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E. C. K.
OLLIVANT
v.
RAHIMTULÁ
NÚR
MAHOMED.

We must hold that the Commissioner was entitled to have the caves of the plaintiffs' buildings removed, and we reverse the decree with costs.

Attorneys for the appellant :—Messrs. *Crawford and Buckland*.
Attorneys for the respondents :—Messrs. *Payne, Gilbert, and Sayani*.

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

1887.

October 4.

SHRIDHAR AND ANOTHER, (ORIGINAL OPPONENTS), APPELLANTS, v. HIRA'-
LA'L VITHAL AND ANOTHER, (ORIGINAL APPLICANTS), RESPONDENTS.*

Hindu law—Marriage—Guardianship—Paternal relatives—Their authority to give a girl in marriage—Civil Court's jurisdiction to interfere with this authority.

The general authority, failing the father, of the paternal relatives to dispose of a girl in marriage is recognized by the Hindu law as a part of the guardianship which is correlative as a right and a duty to her dependence both as a female and as an infant. But those who seek the aid of the Civil Courts, in order to give effect to this authority, may not improperly be put upon terms which may appear necessary in order to prevent the authority from being abused to the injury of the infant. Where a father or mother is the guardian, the intervention of a law Court can seldom be necessary or desirable. In the case of very gross misconduct and disregard of paternal duty, the Court may interfere even in the case of a father.

One Girdhar died, leaving a widow and an infant daughter named Báni. After Girdhar's death, his widow was forced, through the unkindness of her mother-in-law, to seek refuge at her parents' house. There she died about eighteen months after Girdhar's death. The orphan Báni was then brought up by her maternal uncles, Shridhar and Goverdhan.

When Báni became ten or eleven years old, her paternal uncle Hirálál and paternal grandmother Rakhmábái sought, under Act IX of 1861, to take possession of the minor Báni from the custody of her maternal uncles. This application was resisted by Shridhar and Goverdhan, on the ground that the petitioners had no right to give the girl in marriage, and that their object was to marry the girl to an old Bhátíá in Bombay for a large sum of money.

The Court found that several Bhátíá girls of Dharangaon, where the parties resided, had of late been married to old Bhátíás in Bombay, the girls' relatives receiving large sums of money. And as the girl had never lived with the petitioners, the Court ordered that she should, for the present, continue to live with her maternal uncles until the petitioners found a suitable husband for her, to be approved by the Court.

* Appeal, No. 04 of 1886.

Of the persons selected by the petitioners, one was approved by the Court. He was a resident of Vaizápur, a town in the Nizám's dominions. The Court passed an order authorizing the petitioners to give the girl in marriage to this person, and directing the girl to be made over into the petitioners' custody a month before the day fixed for the marriage. Against this order Shridhar and Goverdhan appealed to the High Court.

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Held, that the petitioners, as paternal relatives of the girl, had, under the Hindu law, a preferential right to dispose of the girl in marriage; but as they had never taken care of the girl, it was necessary, in the interests of the minor, to put them upon terms to prevent the possibility of their abusing their authority to the minor's prejudice.

Held, also, that the girl should not be married to a person living in foreign territory, as the effect of marriage with such a person would be to place the minor beyond the protection of the Courts in British India.

Held, also, that the girl ought not to be forced into marrying a person whom she did not like.

APPEAL from the order of G. McCorkell, Acting District Judge of Khándesh, in Miscellaneous Application No. 44 of 1885.

In this case one Hirálál and his mother Rakhmábái sought to obtain possession of the minor Báni, who was the daughter of Hirálál's brother Girdhar.

Girdhar died when Báni was three months old. Owing to the unkindness of her mother-in-law, Báni's mother was driven to seek refuge with her brothers Shridhar and Goverdhan. She died about a year and a half after her husband's death. Báni was thenceforward brought up by her maternal uncles.

When Báni became ten or eleven years of age, Hirálál and his mother Rakhmábái sought, under Act IX of 1861, to take possession of the minor from the custody of her maternal uncles.

Shridhar and Goverdhan opposed this application, on the ground that Hirálál was actuated by selfish and mercenary motives, and intended to sell the girl to an old Bhátíá in Bombay for a large sum of money, without any regard for the girl's interests. They contended that he should not be allowed to have possession of the minor without undertaking to marry her into a respectable family at Dharangaon, which was her native place, and not to an old man or for money.

The Acting District Judge found that several Bhátíá girls of Dharangaon had recently been married to rich old Bhátíás of

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Bombay, the girls' relatives receiving large sums of money. He was of opinion that it was for the interest of the minor Báni that the Court should try to prevent the possibility of her being given in marriage to an unsuitable husband, especially as she never had lived with Hirálál, who was not likely to have so much affection for her as her maternal uncles.

The Court, therefore, passed the following order :—

“The minor Báni is for the present to remain in the custody of her maternal uncles Shridhar and Goverdhan. Petitioners are directed to find a suitable husband for Báni, and to inform opponents, through this Court, of his name and place of residence within six months from this date. Should opponents show no valid reason why the marriage should not be allowed, the Court will order that the custody of the minor be given to petitioners, that they may marry her to the person thus approved.”

One Jivandás Dayál, residing at Vaizápur, in the Nizám's territory, was proposed by Hirálál and approved by the Court as a suitable husband for Báni. Shridhar and Goverdhan objected to the match, but their objections were overruled, and the Court passed an order authorizing Hirálál and Rakhmábái to give the minor in marriage to Jivandás, and to obtain the custody of the minor one month before the date fixed for the marriage ceremony.

Against this order Shridhar and Goverdhan appealed to the High Court.

Ganpat Sadáshiv Ráv for the appellants :—The minor was abandoned by her father's relatives. They have, therefore, lost their right to the custody of the girl. If a father deserts his wife and daughter, he forfeits his right of giving his daughter in marriage—*Modhoosoodun Mookerji v. Jadub Chunder*⁽¹⁾; *The King v. C. Kistnama Náick*⁽²⁾. *A fortiori* a person who has taken no care whatever of his brother's infant daughter forfeits his right, if any, to give her in marriage. Nárada (ch. XII, s. 20, p. 82) says that failing the parents a maternal uncle has a better right to give a girl in marriage than the paternal uncle. See also

⁽¹⁾ 3 Calc. W. R. Civ. Rul., 194.

⁽²⁾ 1 Nort. L. Ca., p. 1.

Yádnavaikya, ch. I, sec. 63; and Stoke's Hindu Law, p. 28. Independently of these texts, it is the duty of the Court to protect the interests of the minor girl. In the present case the uncle has selected a husband who lives in the Nizám's dominions, and over whom, therefore, the Courts in British India will have no control. To marry the girl to such a person would be to place the minor out of the protection of our Courts.

Dáji Abáji Khare for the respondents :—The lower Court has approved the candidate proposed by the uncle. The appellants objected on the ground that the uncle intended to sell the girl for a price. This has not been proved. Under the Hindu law the paternal relatives of a girl have a preferential right to give her in marriage. The Hindu law make a distinction between guardianship for marriage and guardianship for protection of property. The Hindu law gives the sovereign the guardianship of the property of minors, but does not empower him to dispose of a girl in marriage. Maine's text in ch. VIII gives a girl the right to choose a husband for herself, if her parents and relations neglect their duty to find a husband for her. Refers to Colebrooke's Digest, Book V, ch. VIII, 450, 451; Tá Gore's Law Lectures for 1878, p 49; 1 Strange's Hindu law, p. 101; *Kanahi Rám v. Biddya Rám*⁽¹⁾.

WEST, J.:—In this case one Girdhar Vithal died, leaving a widow and an infant daughter, named Báni, who was but a few months old at the time of Girdhar's death. Her mother Mathurábái seems to have been forced by the unkindness of her mother-in-law Rakhmábái to go away from the house of her husband's family and take refuge with her brothers Shridhar and Goverdhan. In their house she died about eighteen months after the death of her husband, and the orphan Báni has, since her mother's death, been brought up by Shridhar and Goverdhan.

It appears that a few years ago the brother of Girdhar Vithal, who is named Hirálál, endeavoured through the Mámlatdár to obtain the custody of Báni's person. He failed in this attempt, and as the Mámlatdár was not the proper authority to apply to, no significance can be attached to the application. Had Hirálál

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seriously desired to insist on his right and to take on himself the burden of the guardianship of the orphan Báni, he would have applied to the Civil Court either under Act XX of 1864 or under Act IX of 1861.

It was under the latter Act that an application was at length made in the present case by Hirálál and Rakhmábái to withdraw Báni, who was then ten years of age, from the care of her uncles into their own custody and guardianship. The declared object was to get the girl married. It appears in evidence that a practice has grown up in the caste, which, though disapproved, prevails more and more, of selling young girls as wives to aged men. Shridhar and Goverdhan, on this ground, opposed the application of Hirálál and Rakhmábái, which, as they alleged, could not, under the circumstances, have been dictated by any affectionate regard for Báni and her interests.

The District Judge would not order a transfer of the custody of Báni's person unconditionally to the applicants Hirálál and Rakhmábái. But recognizing Hirálál's preferable right as Báni's paternal uncle to general guardianship, he allowed him to propose a husband for her in competition with one to be named by Shridhar and Goverdhan. The young man named by the uncle, and preferred by the District Judge, is one Jivandás, and the District Judge has ordered that Báni be handed over to Hirálál one month before a day to be fixed for her marriage to this person.

The general authority, failing the father of the paternal relatives, to dispose of a girl in marriage is recognized by the Hindu law writers as a part of the guardianship which is correlative as a right and a duty to her dependence both as a female and as an infant⁽¹⁾. But those who seek the aid of the Civil Courts, in order to give effect to this authority, may not improperly be put upon such terms as may appear necessary in order to prevent the authority from being abused to the injury of the infant. Where a father or mother is the guardian, the intervention of a law Court can very seldom be necessary or desirable. In the case

(1) See West and Bühler, pp. 232, 673 (3rd ed.); *Nándál v. Tápídás*, 1 Borr. R., at p. 19; *Kumla Buhoo v. Mánishankar*, 2 Borr., 746, 748; 1 Str. H. L., 101; 2 *Ib.*, 204 (ed. of 1825).

of very gross misconduct and disregard of paternal duty, the Court may interfere, even in the case of a father⁽¹⁾, but the distinction between a parent and a more distant relative has been recognized by the English Courts⁽²⁾ and is founded in nature⁽³⁾. Had the uncle of Báni been her father, his conduct towards her would have been wholly unnatural; as it is, his long-continued indifference raises a strong suspicion that his proposal as to her marriage may not have been dictated by a purely disinterested regard for her happiness. The young man Jivandás has no means or business of his own. He holds the somewhat precarious position of assistant in a cloth shop at Vaizápur in the territory of His Highness the Nizám. Without in any way impugning the character of this candidate for Báni's hand, we may say that we have not the same guarantees for it that we should have if he were a resident in British territory. In approving Báni's marriage to him we should virtually remove her, at twelve years of age, beyond the jurisdiction of the Court, which is bound to protect all helpless subjects of the State. The texts relied on by Colebrooke in 2 Strange's Hindu Law, 73, 74, 75 (ed. of 1830) for the doctrine of a general supreme guardianship of the State have in view no doubt—at least primarily—the protection of a minor's estate⁽⁴⁾, and should not be allowed to overrule the specific provisions made by the Hindu law for the disposal of a girl in marriage. But the extended authority ascribed by Colebrooke and Strange to the Sovereign and the State is consistent—an opposite view would indeed be inconsistent—with the range of authority assigned to the Courts by the chief Hindu writers over all matters in litigation of sufficient importance to the community to be worthy of the attention of the king⁽⁵⁾. We may, therefore, in perfect consonance with the precepts of the Hindu lawgivers, impose such terms in the present case as shall seem expedient on the aid we are asked to give to Hirálál in disposing of Báni.

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(1) *The King v. C. Kistnam Náik*, 2 Str. Notes of Cases, 89; 1 Nort. L. Ca., 1.

(2) *Ex parte Hopkins*, 3 P. Wms., 151. (3) *Rouch v. Garvan*, 1 Ves. Sen., 158.

(4) Coleb. Dig., Bk. V, t. 450, 451.

(5) See West and Bühler's Hindu Law, p. 239 (3rd ed.), and the chapter of the *Mitákshara* on Judicature.

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It seems that brides are scarce in the caste. It does not appear that Báni has any liking for Jivandás. Hirálál should find for Báni a husband within British territory and under this Court's jurisdiction. He may be allowed six months for this purpose, and the opponents Shridhar and Goverdhan are to afford every facility for the marriage of Báni to the person proposed and approved by the District Judge. Failing such an arrangement, the local *pancháit* of the caste may, as proposed by Shridhar and Goverdhan, be asked to name a bridegroom to whom Báni may be married when he is approved by the Judge. The Judge will, of course, see that Báni is not in either case forced into a marriage that would be odious to her.

The parties severally to bear their own costs in this Court.

* *Order reversed.*

APPELLATE CIVIL.

Before Mr. Justice West and Mr. Justice Birdwood.

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October 4.

PITÁMBER VAJRSHET, (ORIGINAL DEFENDANT), APPLICANT, v. DHONDU NAVLA'PA', (ORIGINAL PLAINTIFF), OPPONENT.*

Jurisdiction—Appeal—Suit cognizable by a Court of Small Causes—Act XI of 1865, Secs. 2, 6, 12, 21—Act XIV of 1869, Sec. 28—Subordinate Judge invested with small cause powers—Final decision.

The plaintiff sued to recover Rs. 5 as damages for the wrongful removal of a tree. The suit was filed in the Court of a Second Class Subordinate Judge, who was invested, under Act XIV of 1869, sec 28, with the jurisdiction of a Judge of a Court of Small Causes.

The case, which was in itself of the nature of a small cause, was, however, tried as an ordinary suit according to the rules of the Civil Procedure Code. The Subordinate Judge rejected the plaintiff's claim. An appeal was made to the District Court, which reversed the Subordinate Judge's decree, and awarded the claim.

Held, that the suit having really been a small cause, no appeal lay to the District Court, though the Subordinate Judge did not use the procedure of Act XI of 1865. Having the Small Cause Court jurisdiction, the Subordinate Judge must be taken to have dealt with the case under that jurisdiction, even if he was not quite alive to it at the time.

A suit taken cognizance of under sections 2, 6 or 12 of the Mofussil Small Cause Court Act (XI of 1865), does not cease to be a suit tried under the Act, because of

* Application No. 76 of 1887 under extraordinary jurisdiction.