APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BAI DIWALI (ORIGINAL APPLICANT), APPELLANT, *v.* MOTI KARSON (ORIGINAL OPPONENT), RESPONDENT.*

1896. *October* 5.

Hindu law—Marriage—Marriage of a minor in disobedience of Court's order—Doctrine of factum valet—Presumption—Presumption as to completion of marriage ceremonies—Guardian and Wards Act (VIII of 1890), *Sec.* 24—*Court's power to make order as to marriage of minor.*

If there is sufficient evidence to prove the performance of some of the ceremonies usually observed on the occasion of a marriage, a presumption is always to be drawn that they were duly completed until the contrary is shown.

A Hindu widow, who was appointed guardian of the person of her minor daughter eight or nine years old, married the minor in disobedience of the order of a civil Court directing her to make over the minor to her paternal uncle for the purpose of getting her married.

Held, that the principle of *factum valet* applied. Neither the disobedience of the Court's order, nor the disregard of the preferable claims of the male relations, would invalidate the marriage.

Quære—Whether the marriage of a minor eight or nine years old can be regarded as falling within the scope of section 24 of Act VIII of 1890, especially when the marriage of a minor female terminates the power of the guardian of the person!

APPEAL from the order of G. McCorkell, District Judge of Ahmedabad.

This was an application under Act IX of 1861 (the Minors Act) for the custody of Rakhi, a girl aged eight or nine years.

The girl was living with her mother Bai Diwáli, who had been appointed guardian of her person under Act VIII of 1890.

The applicant was Rakhi's paternal uncle, and he sought to take her from her mother for the purpose of getting her married.

On the 2nd January, 1896, the District Judge of Ahmedabad passed an order declaring the right of the paternal uncle to dispose of the girl in marriage in preference to the mother, and directing Bai Diwali to give her up to him four days before the date fixed for the marriage.

On the 9th January, 1896, Bai Diwali married Rakhi to one Govind in defiance of the order of the District Judge.

* Appeal, No. 65 of 1896.

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On the 17th January, 1896, the paternal uncle made the present application, alleging that he had already betrothed the girl to a suitable husband, and praying that she should be handed over to him for the purpose of completing the marriage.

Bai Diwali replied that she had already given Rakhi away in marriage.

The District Judge found on the evidence that the alleged marriage was not proved. He, therefore, passed an order, directing Bai Diwali to make over the girl to the custody of her paternal uncle for the purpose of marriage.

Against this order Bai Diwali appealed to the High Court.

C. H. Setalvad for the appellant:—The marriage of the girl is proved. That being so, the uncle has no right to the custody of the girl, who is living with her mother, her lawful guardian.

G. M. Tripati for respondent:—The mother has contracted a *Natra* marriage. She has gone into a different family. She has ceased to act as Rakhi's guardian. The alleged marriage is found by the lower Court to be a fiction, got up for the purpose of preventing the paternal uncle from completing the marriage of the girl, whom he had already betrothed to a suitable husband. The witnesses who speak to the marriage speak as the true witnesses. There is no evidence that the *saptápadi*, which is the essential part of the marriage ceremony, was performed. The marriage is, therefore, not proved.

But assuming that it is proved, it is invalid. The mother was not competent to give away the girl in marriage. Under the Hindu law the paternal uncle is her legal guardian for the purpose of marriage. He has a preferential right to dispose of the girl in marriage—*Shridhar* v. *Hiralal* (1). His right was declared by the District Court in this case, and the mother was ordered to give the minor to him for the purpose of marriage. In defiance of this order, the mother pretends she has given her away in marriage. The alleged marriage is, therefore, invalid.

Setalvad in reply:—The doctrine of *factum valet* applies in this case. Neither disobedience of the Court's order, nor dis-

(1) I. L. R., 12 Bom., 480.

regard of the paternal uncle's rights, would invalidate a marriage duly solemnised—*Bace Rulyat* v. *Jeychund Kewul*(1); *Khushalchund* v. *Bai Mani*(2); *Namasevayam Pillay* v. *Annammai Ummal*(3). It is contended that the essential ceremonies which constitute a valid marriage were not performed. But the evidence of the officiating priest shows that the usual ceremonies were performed, and the presumption is that the marriage ceremony was duly completed—*Brindabun Chundra* v. *Chundra Kurmokar*(4). Section 24 of the Guardians and Wards Act (VIII of 1896) does not authorize the Court to pass any order relating to the marriage of a minor.

RANADE, J.:—It is admitted in this case that the appellant Bai Diwali is not only the natural mother of the minor, but was also appointed guardian of the minor's person, and this appointment continues still to be in force, though Bai Diwali has contracted *Natra* marriage with a second husband. The respondent, who is uncle of the minor child, claiming to have a preferable right as against Bai Diwali to dispose of the minor in marriage, applied to the District Court and obtained from that Court an order on 2nd January, 1896, directing Bai Diwali to make over the minor into respondent's charge four days previous to the date fixed for marriage,—20th January, 1896. Bai Diwali did not obey this order, and, therefore, respondent applied to the District Judge on 17th January, 1896, for a fresh order directing Bai Diwali to make over the minor into his charge at once. Bai Diwali in her answer to this fresh application replied that she had given away the minor in marriage to Govind, and that the minor was in the charge of her husband. The District Judge thereupon made Govind a party to the proceeding, and held, on the evidence adduced before him, that the alleged marriage did not take place, and Bai Diwali was again ordered to hand over the minor to the custody of the respondent.

In the appeal before us exception is taken to the correctness of the District Judge's finding on the question of fact, namely, that the alleged marriage had not taken place. The District Judge

(1) Bellasis Rep. (1840—48), 13.
(2) I. L. R., 11 Bom., 247.
(3) 4 Mad. H. C. R., 339.
I. L. R., 12 Cal., 140

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appears to have taken no notice of Govind's sworn statement, that his marriage with the minor took place on 9th January, 1896. Of the other four witnesses examined, one is a Pátidár, another is a Bráhmin priest, the third is a carpenter, which is the caste of the parties, and the fourth is a Bania vendor of opium. They are all residents of the place where the marriage is alleged to have been celebrated. None of them are related to the parties. The District Judge disbelieved the evidence of Somaram Pitambar, though that witness admittedly gave clear evidence about the marriage, chiefly because he stated in cross-examination that no male person was present with Bai Diwáli to give away the girl. There was obviously some mistake here, because the witness had stated that Bai Diwáli's son gave away the girl, his sister, in marriage. The Bráhmin priest was disbelieved, because he professed not to recognize the bride or know her name. It is quite possible that this ignorance was feigned. It at least rebuts the suggestion that the witnesses were tutored to give their evidence. While the husband and four independent witnesses gave evidence on Bai Diwali's behalf, there was no rebutting evidence on the other side, although the names of several persons were mentioned as being present on the occasion.

On the whole, we feel satisfied that the marriage of the minor did take place as stated by these witnesses. If the evidence was sufficient to prove the performance of some ceremonies usually observed on such occasions, a presumption is always to be drawn that they were duly completed, until the contrary was shown —*Brindabun Chandra* v. *Chundra Kurmokar*[1] and *Inderun* v. *Ramasawmy*[2]. Bai Diwali was, no doubt, guilty of disobeying the order of the District Judge; but neither that circumstance by itself, nor the disregard of the preferable claim of the male relations would invalidate the marriage. Even where the dispute was between husband and wife, the doctrine of *factum valet* was allowed to prevail—*Bace Rulyat* v. *Jeychund Kewul*[3]; *Modhoosoodun* v. *Jadub Chunder*[4]; *Khushalchand* v. *Bai Mani*[5]; *Namasevayam Pillay* v. *Annammai Ummal*[6].

(1) I. L. R., 12 Cal., p. 140.
(2) 13 M. I. A., p. 141.
(3) Bellasis Rep., p. 43.
(4) 3 Cal. W. R., p. 194.
(5) I. L. R., 11 Bom., 247.
(6) 4 Mad. H. C. Rep., 339.

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In the view we have taken of the facts it is unnecessary to consider the question how far the District Judge's order in this case fell within the scope of the provisions of the Guardians and Wards Act, VIII of 1890. Mr. Goverdhanram referred to section 43 as authorizing the orders of the District Judge, but that section, which provides for orders regulating the conduct or proceedings of a guardian, must necessarily be read along with and in relation to the sections in which are laid down the duties of a guardian of the person of a minor—sections 24 to 26. These provide only for the support, health and education and advancement of a minor. It is true that besides the specific objects above named there is a general reference to "all such matters as the law to which the minor is subject requires." Whether the marriage of a minor child at or before nine years can be regarded as falling within the scope of these general words, especially when the marriage of a minor female terminates the powers of the guardian of the person (section 41), is, we think, doubtful. It is, however, unnecessary to consider further this view of the question. For the reasons stated above, we reverse the order of the District Judge, and dismiss the application. Respondent to bear all costs.

Order reversed.

APPELLATE CIVIL.

Before Sir C. Farran, Kt., Chief Justice, and Mr. Justice Hosking.

SHANKAR, PLAINTIFF, *v.* MUKTA, DEFENDANT.*

1896. *October* 6.

Account stated or adjusted (ruzukhata)—Cause of action—Such account only evidence of the existing debt, not itself a fresh contract on which a suit may be brought—Interest—Dámdupat—Practice—Procedure.

In June, 1883, the plaintiff's father advanced a loan to the defendant at compound interest. The account of this debt with interest was adjusted and signed from time to time. In June, 1893, it was adjusted and signed, the amount found due being Rs. 28-8-0. In February, 1896, the plaintiff sued to recover this amount.

Held, that the account (*ruzukhata*) was merely an acknowledgment of the debt and of the correctness of the calculation of interest upon it.

* Civil Reference, No. 7 of 1896.