Bk. iv, Chs. xiv and xv, pp. 388 and 394; and Shama Churn Sirkar's Lectures on Mahomedan Law, pp. 485—491. Then as to the question of custody, though maintenance is not due from a husband for a wife under the age of puberty, yet there is nothing to show that she may not remain in his custody, or that his custody is necessarily illegal; *ibid.* A marriage is presumed to be legal unless something is proved by the party impugning it to show that it is invalid. It was for the father to show that he was present in Calcutta in order to vitiate the marriage by the mother's consent alone. In the absence of the father, the mother is perfectly competent to contract her infant daughter in marriage; 1 Hedaya, Bk. ii, Ch. ii, pp. 106—108; *Sheikh Kaloo* v. *Sheikh Guriboollah* (1). But in any case marriage

(1) *Before Mr. Justice Kemp and Mr. Justice E. Jackson.*

The 4th June 1868.

SHEIKH KALOO (ONE OF THE DEFENDANTS) *v.* SHEIKH GURIBOOLLAH (PLAINTIFF).*

Mahomedan Law—Marriage of Infant—Consent—Guardian.

Baboo *Debender Narayan Bose* for the appellant.

The respondent did not appear.

THE judgment of the Court was delivered by

KEMP, J.—This was a suit for the dissolution of a marriage as contracted without the consent of the legal guardian of the lady who is a minor. The plaintiff is the brother of the lady's grandfather and he is now in jail under conviction of murder.

The first Court dismissed the suit. In appeal the Principal Sudder Ameen, Moulvi Mussootoollah, has decreed the suit.

The Principal Sudder Ameen held that it was provided by the Mahomedan law that if a minor be married by such a guardian as a mother in the presence of a nearer guardian, such marriage would not be valid unless it receive the sanction of the nearer guardian.

The effect of the Principal Sudder Ameen's decree is that the plaintiff is at liberty to contract a marriage for the lady with somebody else.

The nearest guardian now living of the minor is undoubtedly the plaintiff, but he has never taken any interest in the minor and has hitherto deserted her. Moreover he is in jail, and it is not probable that he will ever come out of jail. The plaintiff being precluded by his absence from acting, the marriage contracted by the mother and grandmother of the minor is lawful—Baillie's Mahomedan Law, 40.

The present marriage is not represented to be an unsuitable one, and we see no good reason for declaring it to be anything but a valid marriage.

We reverse the decision of the Principal Sudder Ameen and restore that of the first Court.

* Special Appeal, No. 2865 of 1867, against the decree of the Officiating Additional Principal Sudder Ameen of Mymensing, dated the 6th August 1867, reversing a decree of the Munsif of Nickly, dated the 2nd February 1866.

1874

IN THE MATTER OF MAHIN BIBI

without the guardian's consent was simply voidable, and not absolutely void. The Mahomedan law requires the consent of the father if he be in a position to give it. In this case the father by his apostasy had ceased to be the child's guardian, and therefore his consent was not required; 1 Hedaya, Bk. ii, Ch- ii, p. 107; Baillie's Mahomedan Law, pp. 47-48; and Shama Churn Sircar's Lectures on Mahomedan Law, pp. 271 and 333.

MACPHERSON, J.—It appears to me that I ought not to make any order in this matter affecting the custody in which the infant now is.

The *habeas corpus* was granted upon an affidavit of Michael Cohen, the father of the infant, who states that the infant is in the custody of Mirza Mahomed Saleh, who claims her as his wife. The chief ground on which the alleged marriage is impeached in the affidavit is that the marriage (if any) took place without the consent of Cohen, the father of the infant, and is therefore necessarily void. The affidavit does not state, as it certainly ought to have done, that the question now before me was raised between the parties interested a fortnight ago in the Police Court. The return to this writ shows that Cohen and his wife the infant's mother having carried her off from Mirza Mahomed Saleh's house, the latter made a complaint against them at the Police Court under s. 31 of Beng. Act IV of 1866, and that the question as to the marriage having been raised, the Magistrate took evidence on the subject, and found as a fact that a marriage had taken place, and that the infant was the wife of Mirza Mahomed Saleh. The Magistrate accordingly ordered the infant to be given up to Mirza Mahomed Saleh, her husband, which was done.

Cohen and his wife have taken no steps to set aside the order of the Magistrate, and when the *habeas corpus* was applied for, I was not informed of the fact of any such order having been made by the Police Magistrate, or of his having found that there was a valid marriage.

The point on which Cohen in his affidavit relies as necessarily invalidating the marriage, is that his consent was not given. I

1874

IN THE MATTER OF MAHIN BIBI.

am clearly of opinion that so far as concerns the marriage of his daughter, a Mahomedan, to Mirza Mahomed Saleh, who is also a Mahomedan, Cohen was not the guardian of the daughter, he being an apostate from the Mahomedan faith. His consent consequently was not necessary. And he being an apostate, the mother's consent, she being a Mahomedan woman (which was in fact given), is sufficient.

Another point has been raised in argument before me, namely, that the mother and not the husband is the proper guardian of the infant, who is about ten years of age and has not reached puberty; and the decision of Norman, J., in the case of *Khatija Bibi* (1) is relied upon by Mr. Branson. I think, however, that case turned on the special circumstances under which the infant wife came into the custody of her mother, and that although the mother's custody of an infant wife who has not attained puberty may be legal, custody by the husband is not necessarily illegal.

On the whole, as the matter stands before me, I cannot find that in the custody of Mirza Mahomed Saleh, her husband, the girl is not in legal custody: therefore the writ will be quashed.

Writ quashed.

Attorney for Cohen: Mr. *Leslie.*

Attorney for Mirza Mahomed Saleh: Mr. *Fink.*

PRIVY COUNCIL.

THAKUR DURRYAO SINGH (PLAINTIFF) *v.* THAKUR DARI SINGH (DEFENDANT).

* P.C. 1873 *Nov.* 4.

[On appeal from the Court of the Financial Commissioner of Oudh.]

Hindu Law—Joint Estate—Impartibility—Partition.

A custom of impartibility must be strictly proved in order to control the operation of the ordinary Hindu law of succession. The fact that an estate has not been partitioned for six or seven generations does not deprive the members of the family to which it jointly belongs of their right to partition.

APPEAL from a decision of the Financial Commissioner of Oudh, dated 27th August 1868, reversing on review his own judgment and the judgments of the two lower Courts.

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, SIR R. P. COLLIER, and SIR L. PEEL.

(1) 5 B. L. R., 557.