

1878 held that the plaintiff was entitled to recover so much of the mortgage-debt as he had paid in excess of his share. The plaintiff asks that that should be calculated in proportion to the respective value of the properties held by the parties. It is not denied here that that is a correct principle. If the parties cannot agree as to what the amount to be recovered by the plaintiff would be, the case will be remanded to the lower Appellate Court to try the third issue.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Ainslie and Mr. Justice Broughton.

LAL DAS *v.* NEKUNJO BHAISHIANI.*

1878
Dec. 4.

Maintenance ordered by Magistrate—Criminal Procedure Code (Act X of 1872), Chap. xli—Custody of Illegitimate Child.

In determining questions under chap. xli of Act X of 1872, as to the maintenance of wives and families in certain cases, a Magistrate has no power to enter into any question as to the lawful guardianship of a child.

There is nothing in the Code which would warrant a Magistrate in ordering a mother to surrender her illegitimate child to its father, although such child be of the age of maturity. A refusal by the mother to make over the custody of the child in such a case would be no ground for stopping an allowance previously ordered.

THE facts of this reference were, that a Hindu, the father of an illegitimate son, had been sued by the boy's mother for maintenance, and ordered by the Magistrate to pay a certain sum to the mother monthly.

In January 1878 the father applied to the Magistrate for the custody of the child, who was then eight years old. The Magistrate declared that he was entitled to the custody of the child; the mother, however, did not surrender the child, but applied to

* Criminal Reference, No. Z-1110 of 1878, from an order made by A. J. R. Bainbridge, Esq., Sessions Judge of Moorshedabad, dated the 25th of November 1878.

the successor of the Magistrate who had passed the last order to enforce arrears of maintenance since accrued. On the 4th November 1878 the Magistrate made an order in favor of the mother, overruling the father's objection that he was not bound to pay maintenance until the order giving him the custody of the child had been complied with.

1878
 LAL DAS
 v.
 NERUNJO
 BHAIHIANI.

On the case coming up before the Sessions Judge of Moorshedabad in November 1878, he considered that the order of the Magistrate, dated the 4th November 1878, was wrong, inasmuch as the father was the rightful guardian of the child, and because the Magistrate had no power to set aside the order passed by his predecessor; he therefore sent a report of the proceedings for the orders of the High Court under s. 296 of the Code of Criminal Procedure.

No one appeared at the reference, and the order of the Court was delivered by—

AINSLIE, J.—We decline to interfere with the order of the Magistrate. It is not for a Magistrate to determine the question who is the lawful guardian of a child. The provisions of chap. xli of the Criminal Procedure Code only enable him to make an order for the maintenance of his wife or child on its appearing to the satisfaction of the Court that he has neglected or refused to do so, although in the possession of sufficient means.

The child in this case is an illegitimate one in the custody of its mother, and there is nothing in the Code which warrants the Magistrate making an order for her surrendering it to the father. Her refusal to surrender it is no ground for stopping the allowance previously ordered. The father's right to the custody of the child, if any, must be determined elsewhere, and not in the Magistrate's Court.

Order upheld.