

Bhoocha Vs. Elahi Bux

Bhoocha Vs. Elahi Bux

SooperKanoon Citation : sooperkanoon.com/871531

Court : Kolkata

Decided On : May-21-1885

Reported in : (1885)ILR11Cal574

Judge : Richard Garth, C.J. and ;Macpherson, J.

Appellant : Bhoocha

Respondent : Elahi Bux

Judgement :

Richard Garth, C.J.

1. We are extremely unwilling in this case to interfere with the order of the lower Court. We believe that under the circumstances the uncle of the girl is a far preferable guardian of Inami Begum to the petitioner, the grandmother.

2. But the decision of Mitter and Wilkinson, JJ. in Fuseehun v. Kajo I.L.R. 10 Cal. 15 is directly in favour of the appellant; and we think that we are bound by that decision, unless we are prepared to refer the question to a Full Bench.

3. That also was a case decided under Act IX of 1861. The plaintiff was the maternal grandmother of the minor, a girl aged 12 years, who had attained puberty. The parties who claimed to be guardians were, first, the mother of the minor, who, as in this case, had married again, and was disqualified from being guardian; and, secondly, the paternal uncles of the minor. The Court held that,

though under Mahomedan law the uncles would be the proper guardians, Section 21, Regulation X of 1793 (applicable to minors under the Court of Wards), and Section 27* of Act XL of 1858 (applicable to other minors), read together, prohibited the appointment of anyone but a female to be the guardian of a female. The girl was accordingly made over to the custody of the maternal grandmother and taken away from that of the paternal uncles.

4. In this case the plaintiff is the grandmother of the minor, who, although she has not attained puberty, is found to have been lawfully married. The defendant is the girl's paternal uncle. The mother of the girl, as in the case referred to, has married again, and is consequently disqualified from acting as guardian.

5. The facts of the above case are therefore, so far as the main point in question is concerned, undistinguishable from those of the present, and we consider that we are bound by it. At the same time, we have so much doubt as to whether that case was rightly decided, that we should be disposed to refer the question to a Full Bench if it were not for the fact that the girl in this instance, although married, appears not to have attained the age of puberty.

6. The only ground upon which we doubt the correctness of the above case is this: that the learned Judges seem to consider that Section 27* of Act XL of 1858 obliges the Civil Court to appoint a female as the guardian of the person of a female minor. We think that it may well be doubted whether the Act did not mean to leave the law as it was, in which case we might take as our guide the rule of Mahomedan law.

7. But it would seem from Baillie's Mahomedan Law, second edition, p. 438, that where a girl has not attained the age of puberty, the grandmother is a proper guardian, in preference to her uncle or other male relative, so that even if Act XL left the matter open, the rule of Mahomedan law would seem in favour of the petitioner.

8. We think, therefore, that the judgment of the lower Court should be reversed, and that the girl should be given over to her grandmother as tier guardian. Bach party, under the circumstances, will pay their own costs.

Page No. 576 and 577 Foot Note

* [Act not to authorize the appointment of guardians of certain married women and other persons.

Guardianship during the minority of the father or husband of a minor when to cease.

Section 27: Nothing in this Act shall authorize the appointment of a guardian of the person of a female whose husband is not a minor; or the appointment of a guardian of the person of any minor whose father is living and is not a minor; and nothing in this Act shall authorize the appointment of any person other than a female as the guardian of the person of a female. If a guardian of the person of a minor be appointed during the minority of the father or husband of the minor the guardianship shall cease as soon as the father or husband (as the case may be) shall attain the age of majority.]

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com