H.C.J 187/54

HALIMA SULIMAN BARRIYA

v.

THE KADI[1] OF THE SHARIA MOSLEM COURT, ACRE (SHEIKH MUSSA-T-TABARI) AND ANOTHER

In the Supreme Court sitting as the High Court of Justice.
[July 19, 1955]
Before Olshan P., Goitein J., and Berinson J.

Moslem religious courts - Non-interference by High Court of Justice in procedure of religious courts - Moslem Law - Guardianship of minors - Women's Equal Rights Law, 1951 - Civil and Religious law.

An application was made to a Moslem Religious Court by the aunt of three minor children to be appointed their guardian. The applicant's deceased brother, the father of the children, had directed before his death that the mother of the children should be their guardian. After his death the mother had remarried and the aunt, relying upon Moslem law, had taken the children into her care and had prevented them from remaining with their mother.

In the course of the proceedings before the Moslem Religious Court the mother submitted (inter alia) that she was entitled to the guardianship by virtue of s. 3 of the Women's Equal Rights Law [2]. The Moslem Religious judge (the Kadi) decided to deal with the legal arguments only after hearing and considering the evidence in the case. The mother believing that the Kadi had in effect already decided to apply Moslem

[1] Judge of Moslem Religious Court.
[2] Women's Equal Rights Law, 1951, s. 3:
Equality in respect of guardianship.
3. (a) Both parents are the natural guardians of their children; where one parent dies, the survivor shall be the natural guardian.
(b) The provisions of subsection (a) shall not derogate from the power of a competent court or tribunal to deal with matters of guardianship over the persons or property of children with the interest of the children as the sole consideration.

religious law and to disregard the Women's Equal Rights Law applied for an order staying or setting aside the proceedings in the religious court.

Held per Olshan P. : There was nothing in the record of the proceedings before the religious court to show that that court intended to disregard the civil law and rely only upon the religious law, and the order in which the religious court decided to proceed with the case was a matter of procedure with which the High Court would not interfere.

per Goitein and Berinson JJ. : If in the event it is seen that the religious court confined itself to the Sharia [1)] law and refused to take into account the civil law regarding equal rights for women, then it would be acting without jurisdiction and the High Court would come to the aid of the petitioner. The present petition was premature as there was nothing to show that the Kadi intended to disregard the civil law.

Darweesh and *Angel* for the petitioner.
No appearance for the first respondent.
Hawari for the second respondent.
Bar-Or, Deputy State Attorney, for the Attorney-General.

OLSHAN P. This is the return to an order nisi, dated December 26, 1954, calling upon the first respondent to show cause why he should not be restrained from continuing the proceedings in the claim of the second respondent in File 26/54 of the Sharia Court[2)], or why an order should not be made setting those proceedings aside.

The petitioner is the mother of three minor children, a son and two daughters. Her husband died six or seven years ago. The second respondent is the petitioner's sister-in-law, a sister of her deceased husband, and an aunt of the children. On October 14, 1954, the petitioner married her present husband and thereafter, in the language of the petitioner, "the second respondent took energetic steps to take from her the guardianship of the children" and "she succeeded by intimidation and persuasion in keeping them with her, and in preventing them from remaining with the petitioner".

The second respondent applied to the first respondent to be appointed as guardian of the children alleging, inter alia, that her deceased brother had directed before his death that

[1)] Moslem religious law.
[2)] Moslem Religious Court

she should be the guardian of his children. The second respondent was represented before the Kadi by Mr. Hawari. The petitioner was not represented by counsel, but she was assisted by Mr. Darweesh as amicus curiae.

We have been furnished with a copy of the record of the proceedings before the Kadi, the clarity and arrangement of which are to be commended.

The record shows that:

(a) The second respondent based her claim to be appointed guardian upon the allegation that the petitioner had married a second husband and had left the three children with the second respondent.

(b) The petitioner submitted in support of her claim that she was entitled to the guardianship of her children. relying upon section 3 of the Women's Equal Rights Law, 1951. That section provides that the father and mother are the guardians of their children, and that upon the death of one of them the surviving parent continues as guardian unless the interests of the children require the appointment of some other person. The petitioner submitted that this section binds all religious courts and that the interests of the children required that she should continue to be their guardian.

(c) Counsel for the second respondent submitted that the court should apply the religious law, according to which that person should be nominated who had been appointed as guardian by the father before his death. Counsel requested the first respondent to decide upon the preliminary points before hearing witnesses.

(d) The first respondent decided that the sections of the Sharia Law relied upon by counsel for the second respondent should be considered after the hearing of evidence to determine whether the second respondent had in first been nominated as guardian, and that he would then deal with "the Sharia and legal aspects of the case."

(e) At the second hearing, after the above decision had been given, witnesses were heard and the hearing adjourned for the purpose of examining the evidence taken,

and determining to what extent the various witnesses had been consistent with each other. At that stage the petitioner applied to this court and the order nisi was issued.

Counsel for the petitioner submitted before us that in view of the arguments advanced before the Kadi by counsel for the second respondent the decision referred to above must be regarded as a finding by the first respondent on the point argued before him, that is to say, that it is the religious law which must be considered and even preferred, and that the Women's Equal Rights Law must be disregarded. In view of this finding, he submits, the order nisi should be made absolute.

Counsel for the petitioner also submits that the Sharia Law discriminates against the wife in this case and that the decision of the Kadi, therefore, in so far as it seeks to apply the Sharia Law, is in conflict with section 1 of the Women's Equal Rights Law which provides:

> "A man and a woman shall have equal status with regard to any legal proceeding; any provision of law which discriminates, with regard to any legal act, against women as women, shall be of no effect".

Counsel for the petitioner also submits that the decision referred to is in conflict with section 3 of the same law.

It appears from the record that counsel for the second respondent did submit before the Kadi that the religious law is to be applied in matters of personal status, and pointed out that according to the law, in his opinion, a mother who has married a second husband is not to remain guardian, since the children may not be permitted to live under one roof with the second husband, who is unrelated to them. It follows, although he did not say this expresly, that the first respondent was being asked to disregard the Women's Equal Rights Law.

Relying upon a book of the Sharia Law regarding the question of the guardianship of children, counsel tried to show that that law does not discriminate against the wife in the present case. He also submitted that the decision of the court should not be regarded as a decision that the Women's Equal Rights Law is not to be applied, and that since the first

respondent has not yet given his ruling on the point, the present application is based upon mere apprehension and is accordingly premature.

Mr. Bar-Or did not deal with the question of the remedy that the submission of counsel for the second respondent that the order nisi should be discharged.

Mr. Bar-Or did not deal with the question of the remedy that might be available in the event of a religious court deciding the case without taking into account the provisions of the Women's Equal Rights Law. He confined his submissions to the specific matter before us.

He submitted that the decision referred to is not a ruling on a point of law, as was submitted by counsel for the petitioner. Since the present petition is not one concerning the assumption by a court of the power to deal with a matter beyond its jurisdiction, this court cannot issue an order restraining the continuation of the proceedings.

An additional submission of Mr. Bar-Or was that even if the decision referred to could be regarded as a ruling not to apply the Women's Equal Rights Law, even then this would be a decision on the merits of a case within the jurisdiction of the religious court, and if that decision was based upon an error in the interpretation of the law which governed the matter, the remedy was an appeal to the Religious Court of Appeals.

The matter before the Kadi, Mr. Bar-Or submits, is one relating to the guardianship of children which, in accordance with the Palestine Order in Council, is within the exclusive jurisdiction of the religious court. It is therefore clear that there is here no matter of jurisdiction in respect of which an injunction could be issued. All the more so is this the case when the Kadi has only decided to postpone "the consideration of the Sharia and legal aspects" (and he emphasises the word "legal") until after the hearing of the witnesses. How can counsel for the petitioner know that when the Kadi reaches the stage of considering the "Sharia and legal aspects" of the problem, he will decide not to have regard to the interests of the children, in accordance with the provisions of section 3(b) of the Women's Equal Rights Law? [1)]

[1)] For text of s. 3(b) see supra p. 429.

I agree with the submissions of counsel for the Attorney-General, and those of counsel for the second respondent which he made before us (but not with those advanced by him before the Kadi).

We are not called upon to deal with the problem of whether the Sharia Law discriminates against women in matters of guardianship. In the present case there is no attempt to discriminate between a man and a woman, the matter dealt with in section 1 of the Women's Equal Rights Law, for the question that arises here is which of two women is to be guardian of the children.

As far as section 3 of the statute referred to is concerned there is no doubt that it binds all courts and tribunals, even in cases where the application of the religious law would lead to different results. Section 7 of the statute is quite unequivocal, the only case which forms an exception to the rule and where it is permissible to depart from the provisions of section 3 is where the parties are of the age of eighteen years or more and have voluntarily agreed before the court that the litigation between them shall be conducted in accordance with the laws of the community to which they belong.

I do not accept the interpretation placed by counsel for the petitioner upon the decision of the first respondent. The clear meaning of that decision is that the truth of the contention of the second respondent in regard to her having been selected by her deceased brother as guardian of the children must be investigated first. Should it be proved that this contention is incorrect, there will be no need to consider the legal questions raised by counsel for the second respondent, but if it should appear that there is substance in this contention, then the Kadi will deal with "the Sharia and legal aspects of the case." That is to say, the Kadi will then give his opinion upon the legal submissions of counsel for the second respondent based upon the Sharia Law, and also upon the legal submissions of the applicant based upon the secular law. The question of procedure is one for the religious court, and is not a matter with which this court will interfere.

In my opinion that is the proper interpretation of the decision of the Kadi and if that be so it will be seen that the complaint of the applicant narrows down to this, namely, that the Kadi should first have decided the legal question before him, and if he had reached the

correct conclusion, he would have been relieved of the necessity of hearing witnesses. This is a matter of procedure, and each religious court proceeds according to its own rules. This is not a matter, as I have said, in which we should interfere.

I may add that it was counsel for the second respondent who requested that a decision on the preliminary points be given first and the Kadi did not accede to this request. This shows that the meaning of the decision referred to accords with the interpretation I have just given.

The petition should, therefore, be dismissed, and the order nisi discharged. Should the decision of the religious court conflict with the Women's Equal Rights Law, questions will arise that are not before us in these proceedings.

In regard to costs, I think that the bringing of this petition was caused to some extent by the submissions of counsel for the second respondent before the Kadi, upon which he did not rely before us.

I think it right that each party should pay its own costs.

GOITEIN J. I agree with the President that the order nisi should be discharged and I do so for two reasons. (a) In my opinion the application is premature. At present there is no hint in the record of the religious court that the Kadi intends to disregard the provisions of the Women's Equal Rights Law, 1951. It is true that counsel for one of the parties who appeared before him requested him to disregard this law, but there is no evidence whatever before us to show that the Kadi intends to accede to this request. (b) The Women's Equal Rights Law does not confer upon a mother an unappealable right to the guardianship of her children. Section 3(b) of the Law leaves the matter within the discretion of the competent court or tribunal "with the interests of the children as the sole consideration." It follows that every civil and religious court will regard the mother as the natural guardian of her children until it is proved that the interests of the child demand that the mother should cease to be the guardian.

The above considerations give rise to two problems. (a) Suppose the religious law does not recognise that it is in the interests of the children that the mother should be their

guardian, is the religious court then free to decide that the interests of the children demand that they should not remain under the guardianship of their mother? (b) Assuming the religious law is inconsistent with the Women's Equal Rights Law, yet the religious court decides in accordance with the religious law and its judgment is confirmed by the Religious Court of Appeals, may this court interfere?

The first question was raised in argument before us. Moslem religious law, it would seem, does not regard it as in the interests of the children that their mother should remain their guardian after she has married a second time. May the religious court decide in accordance with the religious law? It seems to me that the answer is to be found in section 3(b) of the Women's Equal Rights Law, which provides:

> "The provisions of sub-section (a) shall not derogate from the power of a competent court or tribunal to deal with matters of guardianship over the persons or property of children with the interests of the children as the sole consideration."

The emphasis is upon the word "sole" - that is to say, the test is objective and judges, when dealing with this subject, are to disregard the theoretical presumptions of the religious law as to what constitutes the interests of the children in a particular situation.

It was not argued before us that if the father take a second wife he ceases, according to Moslem law, to be the natural guardian of his children. If his guardianship continues in such a case, then it seems to me that there is discrimination here against the mother by reason of her being a woman. A religious court, therefore, is not entitled to remove the children from the guardianship of their mother and to hand them to their aunt - as in the case before us - relying upon a law which discriminates against a woman by reason of her being a woman. However, as I have already said, there is no proof before us that the Kadi intends to deal with this problem without regard to the Women's Equal Rights Law.

The second question is more difficult and no clear answer to it is to be found in the law of Israel. It has already been decided on innumerable occasions that this court, when sitting as the High Court of Justice, will not interfere with judgments of the religious courts unless they have acted without jurisdiction, or in cases where there has been a denial of

natural justice, or in exceptional cases which call for our intervention for the administration of justice. It has therefore been held that this court will not turn itself into a court of appeal from judgments of the religious courts. That is to say, if those courts err in their interpretation of the law or disregard a particular statute, this court has no power to correct the mistake. The only remedy is an appeal to the religious court of appeals, and if that court also errs, its judgment stands. What then will be the fate of a judgment of a religious court in which it is clearly stated, or the text of which makes it clear, that the court disregarded the provisions of a particular statute - in this case the Women's Equal Rights Law, 1951? The answer, in my opinion, is to be found in Sections 1 and 7 of that Law. Section 1 provides:

> "A man and a woman shall have equal status with regard to any legal proceeding; any provision of law which discriminates, with regard to any legal act, against women as women, shall be of no effect."

Section 7 provides:

> "All courts shall act in accordance with this Law..."

In the light of these sections, we say that the acts of any court which are contrary to the Law are of no effect, for the Women's Equal Rights Law restricted and confined the power of the religious courts to act in accordance with the religious law, as they had been doing before this statute was passed. The answer, therefore, to the question asked above is that when it appears on the face of a judgment that the court has failed to take notice of a law of the State, and that judgment is presented for execution, execution may be refused upon the ground that the religious court, in deciding as it did, exceeded its powers.

It has been submitted before us that a shrewd judge in a religious court will be able to find a way of concealing the fact that he decided otherwise than in accordance with the laws of the State, and that it will then be impossible to invalidate his judgment in any civil court whatever. In my view there is no serious danger of a complainant being unable to establish upon the basis of which law the court gave its decision. If it emerges from proceedings, or from the record, that the religious court intentionally disregarded the laws of the State then this court as the High Court of Justice will restrain execution of the

judgment. In the present case, as I have already said, there is no reason for us to suspect that the Kadi will not decide in accordance with the law as it stands, and there is therefore no reason for us to interfere.

For these reasons I agree with the learned President that the order nisi should be discharged.

BERINSON J. I also agree that the order nisi be discharged for the reasons given by Mr. Justice Goitein, and I wish only to add a few words to clarify my attitude on one of the grounds advanced by him.

Mr. Justice Goitein asks what would become of a judgment of a religious court when it is clear that that court disregarded the provisions of a particular statute such as, in this case, the Women's Equal Rights Law, 1951. His reply is that when it appears on the face of the judgment that the judges disregarded a law of the State, execution of the judgment may be refused upon the basis that the religious court, in deciding as it did, exceeded its powers. With this I agree, but it seems to me, with all respect, that this answer does not exhaust the matter, for in addition to attacking the judgment before the execution authorities, there are other ways of attacking an invalid judgment, given without proper authority. I assume that my colleague cited this method of setting aside the judgment before the execution authorities only as an example, as one of the ways, and did not intend to exclude others. As far as I am concerned, my view is that the ways of invalidating a judgment - such as the one here discussed - of a religious court, are no different or more restricted that those which are ordinarily open to an interested party for upsetting a judgment given by an inferior tribunal without authority. I will explain myself by reference to the facts of the petition before us. The subject of the dispute between the petitioner and the second respondent is the petitioner's guardianship of the three children who are now living with the second respondent, who is in possession of their property and administers it on their behalf. All that the second respondent seeks to obtain in the Sharia Court is the legal confirmation of this state of affairs. Let us assume that the Sharia Court issues an order of guardianship as applied for by the second respondent, basing itself upon the principles of the religious law, and totally disregards the Women's Equal Rights Law, that is to say, that it issues a judgment in excess of its powers. The second respondent need not present that judgment for execution for it merely confirms an existing state of affairs. Does it follow

from this that every alternative legal method of invalidating this judgment is denied to the petitioner? An application could be made to this court for *certiorari,* contesting the validity of the judgment which was given in excess of authority. Again, an application for a writ of *habeas corpus,* directing the return of the children to her possession as their natural guardian in accordance with the Women's Equal Rights Law, could be lodged. It is beyond all doubt that these ways are not closed to the petitioner. In the result, I am of opinion that the judgment of a religious court given In excess of its powers by reason of its being in conflict with the provisions of a secular law which binds the court, may be invalidated in the same way as any other judgment of an inferior tribunal given in excess of its powers.

Order nisi discharged.

Judgment given on July 19, 1955.