

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., and Wooltroffe J.

SARALA SUNDARI DEBI

v.

HAZARI DASI DEBI,

AND

GOSSAIN DASI DEBI

v.

HAZARI DASI DEBI.*

1915

Feb 23.

Guardian- Minor—Hindu Widow—Guardians and Wards Act (VIII of 1890), s. 7 sub-s. (3)—Appointment of guardian to a minor widow—Will—Whether before probate taken out, will may be considered in connection with appointment of guardian to a minor.

In an application for the appointment of a guardian of a minor, the Court is bound to consider a will, although probate has not been granted. The fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other, but it is not open to the Court to say it will refuse to take notice of the will.

Sayad Shahu v. Hopija Begam (1), *Chinnasami v. Hariharahadra* (2) and *Pathan Ali Khan Badlukhan v. Bai Panibai* (3) referred to.

APPEALS from an order of Imam J. dated the 18th February 1915 made on an application for the appointment of a guardian of the person of a minor widow, Srimati Akhoy Kumari Debi.

One Atanu Nandan Tagore, who was possessed of considerable property, died in September 1914 leaving him surviving an infant widow, Akhoy Kumari Debi, a girl between 13 and 14 years of age.

There also survived Atanu Nandan Tagore, his

* Appeals from Original Civil, Nos. 9 and 10 of 1915.

(1) (1892) I. L. R. 17 Bom. 560. (2) (1893) I. L. R. 16 Mad. 380.

(3) (1894) I. L. R. 19 Bom. 832.

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step-mother, Gossain Dasi Debi, and his father's sister's daughter, Sarala Sundari Debi.

The infant widow's mother, Hazari Dasi Debi, applied to Imam J. to be appointed guardian of the person of Akhoy Kumari Debi, the infant widow on the ground that as no probate had been obtained of an alleged will by the late Atanu Nandan Tagore, she as mother and natural guardian of the infant widow should be appointed guardian. Her application was opposed by Sarala Sundari Debi, who contended that as she and one Asutosh Bannerji were executors of the will of Atanu Nandan Tagore dated the 25th June 1914, and she had been appointed by the testator the guardian of the infant widow, she should be appointed guardian of the infant widow, although probate of the will had not yet been obtained. Gossain Dasi Debi also applied to be appointed guardian of the infant widow on the ground that as she was infant's mother-in-law, she was a fit and proper person for the guardianship.

Imam J. was of the opinion that he was not bound to consider a will of which probate had not been obtained, and, therefore, appointed Hazari Dasi Debi, the infant's mother, as the guardian of the person of the minor.

Sarala Sundari Debi and Gossain Dasi Debi appealed.

Mr. Eardley Norton (with him *Mr. Hume*), for Sarala Sundari Debi, produced a translation of the alleged will dated the 25th June 1914, and pointed out that by the ninth paragraph of the will Sarala Sundari Debi was by implication appointed guardian of the testator's infant widow, Akhoy Kumari Debi; he further argued that no express words are necessary to appoint a guardian, and referred to *Sayad Shahu v.*

Hapija Begam (1), *Chinnasami v. Hariharabadra* (2) and *Pathanali Khan Badlu Khan v. Bai Panibai* (3).

Mr. Langford James (with him *Mr. S. Ghose*) appeared on behalf of Gossain Dasi Debi.

Sir S. P. Sinha (with him *Mr. B. L. Mitter*), for the respondent, Hazari Dasi Debi, argued that it was useless to consider the directions contained in a will the validity of which was contested. The Court must therefore exercise its discretion in the appointment of a guardian of the person of the infant, and in the circumstances the mother was the natural guardian.

JENKINS C.J. AND WOODROFFE J. These are two appeals from an order appointing a guardian of a Hindu widow, aged 14. There is no power in the Court to appoint a guardian unless the Court is satisfied that it is for the welfare of the minor that the order should be passed. In support of the application there is no affidavit on which the Court can act. More than that it seems to us that, in the circumstances, the case should have waited until the return of Maharaja Tagore the head of the family in order that it might be seen whether he was willing to accede to a course which was apparently acceptable to both parties and would have solved the present difficulty. As it is, we have the curious position that an order appointing a guardian has been made on materials which do not comply with the requirements of the law, and at the same time a Rule has been issued on another application and is pending for the determination of the question whether some one else should not be appointed guardian.

The proper course now to follow is this: We set aside the order of Mr. Justice Imam and send back the

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case in order that it may be re-heard by him if the petitioner thinks fit to put in proper evidence in support of her application. Her application should be heard together with the application of Mr. Langford James' client and also of Mr. Norton's client if she thinks fit to make an application; and in any case nothing should be done until the views of Maharaja Tagore have been ascertained. Finally, we think before making any order the Court must be satisfied that the application is for the welfare of the minor and that the appointment of the guardian will not infringe sub-s. (3) of s. 7 of the Act.

In our opinion the Judge had jurisdiction and was bound to consider that there was a will although probate had not been granted; and that appears to us to be the result of several authorities: *Sayad Shahu v. Hapija Begam* (1), *Chinnasami v. Hariharabadra* (2), and *Pathan Ali Khan Badlukhan v. Bai Pani Bai* (3). The fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other, as for instance, it may possibly defer deciding on the question of guardianship until the question of probate has been determined. But it is not open to the Court to say that it will refuse to take notice of the will.

We allow the appeals. The respondent will pay the costs of the appellant (Mr. Norton's client). We make no order as to the costs of Mr. James' client.

W. M. C.

Case remanded.

Attorney for the appellant, Sarala Sundari Debi:
P. N. Sen.

Attorney for Gossain Dasi Debi: *N. Sen.*

Attorneys for the respondent, Hazari Dasi Debi:
Manuel, Agarwalla & De.

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