APPEAL FROM ORIGINAL CIVIL.

Before Sanderson C. J. and Mookerjee J.

1920

Nov. 19.

LALIT KUMAR MUKERJEE

v.

DASARATHI SINGHA.*

Minor—Appointment of guardian—Jurisdiction—"Property"—Guardians and Wards Act (VIII of 1890) s. 9 (2).

A guardian can be validly appointed of the property of a minor, in the hands of the administratrix to his father's estate.

Brajanath Dey Sirkar v. *Anandamayi Dasi* (1) relied on.

APPEAL from an order of Rankin J.

The appellant, Lalit Kumar Mukerjee, obtained an *ex parte* decree against the respondent, Dasarathi Singha for Rs. 19,246-9-6 due on six promissory notes, alleged to have been executed between the 28th July and the 3rd September 1919. After the writ of attachment was issued in execution of the said decree, the respondent Dasarathi Singha, through his certificated guardian and next friend, applied for setting aside the *ex parte* decree, on the grounds that summons was not served on him, the promissory notes were not executed by him and at the time of the alleged execution of the promissory notes he was a minor under the age of twenty-one years, being born on the 27th March 1901, and a guardian of his person and property being appointed by the Hughli Court on the 30th July 1917. On that the issue "Whether Dasarathi was an infant

* Appeal from Original Civil No. 89 of 1920 in Suit No. 2483 of 1919.

(1) (1871) 8 B. L. R. 208.

at the date of the alleged service of summons on him and at the date of the decree" was tried on examination of witnesses and on that Mr. Justice Rankin found that Dasarathi was an infant on account of the appointment of a guardian of his property by the Hughli Court, although the appointment of guardian of his person was not validly made as Dasarathi lived outside the jurisdiction of the Hughli Court.

Dasarathi appealed from that order.

Mr. S. K. Chakravarti (with him *Mr. B. C. Ghose*), for the appellant. The appellant was neither a resident nor had any property within the jurisdiction of Hughli Court, so that Court had no jurisdiction to appoint a guardian and that order was a nullity. The appellant had no property inasmuch as the property left by his father was vested in the administratrix. The appellant attained majority at the age of eighteen years, *i.e.* on the 27th May 1919.

Mr. B. L. Mitter (with him *Mr. H. C. Majumdar*), for the respondents. The beneficial interest in the property was in the minor. He alone could deal with it for personal benefit. The administratrix held the property "as such"; the property was vested in her for a limited purpose.

SANDERSON C. J. This is an appeal from the judgment of my learned brother, Mr. Justice Rankin.

On the 27th of November 1919, a suit was brought by the plaintiff against Dasarathi Singha, based upon promissory notes alleged to have been executed by the defendant, the dates of which extended from the 28th of July to the 3rd of September 1919. The defendant was sued as a person who was *sui juris*. On the 17th of December 1919, an *ex parte* decree was made. Thereafter, there was an attachment of certain

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properties, and, in consequence thereof, on the 16th of February 1920, an application was made by Subashini Dasi, who was alleged to be the certificated guardian of the defendant, that the decree should be set aside. It was alleged that at the time of the abovementioned suit and decree the defendant, Dasarathi Singha, was a minor. On the 15th of June 1920, the learned Judge delivered judgment after an issue or issues had been tried, and, the following order was made: "This Court doth declare that the defendant is a "minor under the age of twenty-one years and it is "ordered that all proceedings in this suit except the "said plaint be, and the same are hereby, set aside. "And it is further ordered that the defendant be at "liberty to appear in and defend this suit upon a proper "guardian being appointed in this suit. And it is "further ordered that the said plaint and the register "of this suit be amended by describing the defendant "in the cause title thereof as a minor under the age "of twenty-one years."

The main ground on which this appeal was argued by the learned counsel for the appellant was that the order appointing the guardian, who was the sister of the defendant, was a nullity, and that the defendant had in fact attained his majority in May 1919.

The material dates are as follows. In December 1900, the father of the defendant died; on the 31st of May 1901 the defendant was born; on the 30th of August 1901 Letters of Administration were granted to the defendant's mother in respect of the father's estate. It was on the 30th of July 1917 that Subashini Dasi, the applicant in this matter, was appointed guardian of the person and the property of the defendant, Dasarathi Singha. At that time the defendant was under the age of seventeen years. By reason of the provisions of the Indian Majority Act, the effect of

that order, if valid, was to extend the minority of the defendant until he attained the age of twenty-one. Therefore, if the order was valid, the defendant was still a minor in 1919, when the promissory notes were executed by him and when the decree in the suit was made.

Learned counsel has argued that the order of guardianship made by the District Judge was without jurisdiction and that consequently it should be treated as a nullity, and that if it were so treated the defendant was not a minor in November or December 1919, when the suit was instituted and the decree made, inasmuch as he attained the age of eighteen in 1919.

The District Judge of the Hughli Court by his order appointed the sister guardian of both the person and the property of the defendant. My learned brother, Mr. Justice Rankin, found that the residence of the defendant was not within the jurisdiction of the Hughli Court and that consequently the appointment of the guardian so far as it concerned the person of the defendant was not valid. But the learned Judge further found that certain of the properties left by the minor's father were within the jurisdiction of the Hughli Court and that consequently the order was not invalid so far as the property was concerned.

It was, however, urged that the mother of the defendant had been appointed administratrix of the father's estate and of the abovementioned properties and that consequently the said properties vested in her and, therefore, they were not the properties of the defendant. It was urged, therefore, that the Hughli Court had no jurisdiction to make the order appointing the sister guardian of the property, and therefore it must be treated as a nullity. By

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section 4 of the Probate and Administration Act (V of 1881) it is provided as follows:

"The executor or administrator, as the case "may be, of a deceased person, is his legal represen- "tative for all purposes, and all the property of the "deceased person vests in him as such. [But "nothing herein contained shall vest in an executor "or administrator any property of a deceased person "which would otherwise have passed by survivorship "to some other person]."

Therefore, the property of the defendant's father would vest in the defendant's mother as administratrix on her appointment as such administratrix, and for the purposes of administration. The defendant, however, was admittedly his father's heir, and he had a beneficial interest in the property, and I am not prepared to hold that the mere fact of the appointment of the mother as administratrix would have the effect that the defendant had no property within the jurisdiction of the Court within the meaning of section 9(*2*) of the Guardian and Wards Act (VIII of 1890).

In my judgment, therefore, the Hughli Court had jurisdiction to make the order as to the guardianship of the property, and, although there may not have been any necessity to appoint the guardian in respect of the property—as to which I express no opinion—I cannot hold that the order was a nullity. The order of the Hughli Court, therefore, extended the minority of the defendant until he was twenty-one years old. Consequently, he was a minor at the date of the suit and the decree, and he should not have been sued as if he were a person *sui juris*.

The result, in my judgment, therefore, is that I agree with my learned brother, Mr. Justice Rankin, in the order which he has made, and, in my judgment this appeal should be dismissed with costs.

MOOKERJEE J. I agree that the order made by Mr. Justice Rankin must be affirmed and this appeal dismissed with costs.

The facts material for the determination of the question in controversy are not in dispute at this stage, and may be briefly outlined. On the 27th November 1919, the appellant instituted a suit against the respondent on several negotiable instruments under Order XXXVII of the Civil Procedure Code. The claim was not contested, and was decreed *ex parte* on the 17th December, 1919. On the 12th February, 1920, the sister of the respondent initiated the proceedings which have culminated in this appeal. She made an application under rule 4 of Order XXXVII of the Code of Civil Procedure, to set aside the *ex parte* decree on the allegations that the respondent was at the date of the institution of the suit an infant, that she had been appointed guardian of his person and property, that the suit instituted against him, described as *sui juris*, was not properly constituted, and that, consequently, the *ex parte* decree should be vacated and the suit restored to be re-tried in accordance with law. It was asserted that the respondent was the posthumous son of his father and was born on the 31st May 1901. Her sister was appointed guardian of his person and property by the District Judge of Hughli on the 30th July, 1917, with the result that the period of minority, which would otherwise have terminated on the 31st May 1919, was extended up to the 31st May 1922. Consequently, on the 27th November, 1919, when the suit against the respondent was instituted he was still an infant. The appellant contended that the order for the appointment of the sister as guardian was inoperative, *first*, because it had been made without jurisdiction; and, *secondly*, because it had been irregularly made without service of the

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requisite notices. Mr. Justice Rankin overruled these contentions and granted the application.

On the present appeal, the grounds urged before Mr. Justice Rankin have been reiterated and it has been urged by Mr. Chakravarti that the order was made without jurisdiction and that in any event it was irregularly made.

It may be stated at once that the second ground assigned cannot be entertained in the present proceedings. If the order was irregularly made, the proper course to follow was to have it vacated by the Court which passed it, as pointed out by Mr. Justice Davar in the case of *Nagardas Vachraj* v. *Anandrao Bhai* (1) We are, consequently, called upon to consider only one question, namely, whether the order for appointment of guardian was made without jurisdiction. Section 9 of the Guardians and Wards Act (1890) provides that if the application is with respect to the guardianship of the person of the minor, it may be made to the District Court having jurisdiction in the place where the minor ordinarily resides, or to a District Court having jurisdiction in a place where he has property. In so far as the order appointed the sister to be guardian of the person of the minor, it has been found that at the date of the application the minor did not ordinarily reside within the jurisdiction of the District Court at Hughli. Consequently, we may take it that the order in that respect was made without jurisdiction. But this is not sufficient for the purposes of the appellant, because under section 3 of the Indian Majority Act (1875) the period of minority is extended from eighteen years to twenty-one years, if a guardian has been appointed either of the person or of the property of the infant. Consequently, the appellant has to establish that the

(1) (1907) I. L. R. 31 Bom. 590.

order for the appointment of the sister as guardian of the property of the minor was also made without jurisdiction.

On this part of the case, the contention is that the minor had no property within the jurisdiction of the District Court at Hughli. It is conceded, however, that the father of the minor left property within the jurisdiction of that Court. The respondent on his birth took this property by right of inheritance, because it is well established that an unborn child is treated as in actual existence whenever it is to his benefit so to treat him. As was pointed out in *Beroja* v. *Nubokissen* (1) and *Keshab* v. *Bishnu Prosad* (2), this is a principle recognised by Hindu Law. The rule was subsequently affirmed by a Full Bench of this Court in *Kalidas* v. *Krishan Chandra Das* (3) and was recognised by the Judicial Committee in the case of *Tagore* v. *Tagore* (4). We then start with the position that the respondent took by right of inheritance the estate left by his father, subject no doubt to the liability to discharge such debts, if any, as were legitimately payable out of the assets left by him. It is then contended, that as on the 30th August, 1901, the mother of the infant was appointed administratrix to the estate left by her deceased husband, the properties ceased to be the properties of the infant within the meaning of section 3 of the Indian Majority Act. In support of this proposition reliance is placed upon section 4 of the Probate and Administration Act, which is in these terms: "The executor or adminis-"trator, as the case may be, of a deceased person, is "his legal representative for all purposes, and all

(1) (1863) 2 Sevestre 238
(2) (1860) 2 Sevestre 240.
(3) (1869) 2 B L. R. (F. B.) 103, 121.
(4) (1872) L. R. I. A. Sup. Vol. 47, 67.

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"the property of the deceased person vests in him as "such." This section corresponds to section 179 of the Indian Succession Act (1865), which was considered by this Court in the case of *Brajanath Dey Sirkar* v. *Anandamayi Dasi* (1). Mr. Justice Phear pointed out in that case that the executor or administrator holds the estate of the deceased only in a representatative character, and takes no beneficial interest therein. This view was affirmed in *Rajnarain* v. *Universal Life Assurance Company* (2) and was subsequently adopted by the Bombay High Court in *Lallubhai and others* v. *Mankuvarbai* (3), and by the Madras High Court in *Ramanuja Ammal* v. *Sawmi Pillai* (4). The case last mentioned pointed out that the decisions in *Bhatji Bhumji* v. *Administrator-General of Bombay* (5) and *Srirangammal* v. *Sandammal* (6) were in reality not opposed to this principle. In those cases, the question substantially in controversy was as to the right of possession of the administrator as against the person entitled to succeed to the estate either under a testamentary instrument, or in the ordinary course of inheritance when the original owner died intestate.

I am, therefore, unable to hold that the result of the appointment of the mother of the respondent as administratrix on the 30th August 1901 was to deprive him of his interest in the estate of his father, which he had acquired on his birth on the 31st May 1901. Consequently, the order for appointment of his sister as guardian was made with jurisdiction and had the effect of extending the period of his minority up to the 31st May 1922. The suit instituted against him

(1) (1871) 8 B. L. R. 208.
(2) (1881) I. L. R. 7 Calc. 594.
(3) (1876) I. L. R. 2 Bom. 388.
(4) (1911) 22 M. L. J. 228.
(5) (1898) I. L. R. 23 Bom. 428.
(6) (1899) I. L. R 23 Mad. 216.

as *sui juris* on the 27th November 1919 was thus improperly constituted and the *ex parte* decree made therein has been rightly vacated.

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Attorney for the appellant: *K. N. Chatterjee.*

Attorney for the respondent: *M. N. Sen.*

PRIVY COUNCIL.

LAKSHMIDAR MAHANTI

v.

RATNAKAR MAHAPATRA AND OTHERS.

P.C.*
1921
March 3.

[ON APPEAL FROM THE HIGH COJRT AT CALCUTTA.]

Sale—Bengal Tenancy Act (VIII of 1885), s. 174—Orissa—Sale for arrears of rent—Sale under Ben. Act VIII of 1865—Deposit in Court—Setting aside sale.

In Orissa, since the extension thereto of Ch. XIV of the Bengal Tenancy Act (VIII of 1885), a sale under Ben. Act VIII of 1865 is liable to be set aside under s. 174 of the Bengal Tenancy Act, 1885, upon the judgment-debtor depositing in Court within 30 days of the sale the amount recoverable under the decree.

Judgment of the High Court affirmed.

APPEAL (No. 130 of 1916) from a judgment and decree of the High Court (February 7, 1913) reversing a decree of the Subordinate Judge of zilla Cuttack.

On January 12, 1907, a decree was obtained against the respondents Nos. 1 to 13, and others, for arrears of rent in respect of a saleable under-tenure in Orissa. Part of the decretal amount was paid, and upon an

* *Present*: LORD DUNEDIN, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.