APPELLATE CIVIL.

Before Mr. Justice Muttusami Ayyar and Mr. Justice Parker.

PAPAMMA (DEFENDANT), PETITIONER,

v.

THE COLLECTOR OF GODÁVARI (PETITIONER), RESPONDENT.*

1889. Feb. 20. March 21.

Civil Procedure Code, s. 622—*Act XIX of* 1841, *ss.* 2, 3, 5, 15—*Regulation V of* 1804 (Madras).

On a petition presented by the Agent of the Court of Wards a District Court made an order which purported to have been made under Act XIX of 1841, s. 5. The conditions prescribed by ss. 3 and 4 were not shown to exist:

Held, the order of the District Court was illegal, and was subject to revision under s. 622 of the Code of Civil Procedure.

PETITION under s. 622 of the Code of Civil Procedure praying the High Court to revise the order of A. L. Lister, District Judge of Godávari, made on civil miscellaneous petition No. 106 of 1888, dated 17th March 1888.

The above petition was presented by the Collector of Godávari and Agent to the Court of Wards, and prayed that the Head Assistant Collector should be appointed Curator under Act XIX of 1841, s. 5, in respect of the property of a deceased zamindar, and the order of the District Judge granted the prayer of the petition.

The present petitioner was the adoptive mother of the late zamindar, and claimed to be rightfully in possession of the property concerned. This petition, which was preferred under s. 622 of the Code of Civil Procedure, proceeded on the grounds that the District Judge had no authority to pass the above order under the Act referred to; that he had acted illegally and with material irregularity in appointing a Curator without proper inquiry and without issuing notice to him, and on other grounds.

The *Acting Advocate-General* (Hon. Mr. *Spring Branson*), *Bhashyam Ayyangar* and *Subba Rau* for petitioner, relied on the provisions of Act XIX of 1841, ss. 1, 2, 3, 5 and 15. The provisions of ss. 5 and 15 are given in the judgment of the Court. Those of ss. 1, 2 and 3 are as follows:—

* Civil Revision Petition No. 95 of 1888.

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1. It is hereby enacted that whenever a person dies leaving property, movable or immovable, it shall be lawful for any person claiming a right by succession thereto, or to any portion thereof, to make application to the Judge of the Court of the district where any part of the property is found or situate for relief, either after actual possession has been taken by another person, or when forcible means of seizing possession are apprehended.

2. It shall be lawful for any agent, relative, or near friend, or for the Court of Wards, in cases within their cognizance, in the event of any minor disqualified or absent person being entitled by succession to such property as aforesaid, to make the like application for relief.

3. The Judge, to whom such application shall be made, shall, in the first place, inquire, by the solemn declaration of the complainant, and by witnesses and documents at his discretion, whether there be strong reasons for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and that the application is made *bonâ fide*.

Mr. *Michell* and *Subramanya Ayyar* for respondent.

The arguments adduced on this petition appear sufficiently for the purpose of this report from the judgment of the Court (Muttusami Ayyar and Parker, JJ.).

JUDGMENT.—This is an application for the revision of an order made by the District Court of Godávari. The order in question was passed under Act XIX of 1841, s. 5, and it purports to appoint the Head Assistant Collector of the Godávari District as Curator to take possession of the property belonging to the Nidadavole, Baharzalli, and Ambarupeta Estates, the records, personal property, accounts, and other documents appertaining thereto and of all the other personal property belonging to the deceased proprietor Venkata Ramaya Appa Rao Bahadur.

The question for decision is whether, in the circumstances under which the order was made, it is bad for want of jurisdiction.

The facts of the case are shortly these. From 1827 to 1864 Narayya Appa Rao had been the proprietor of the estates mentioned above, and upon his death in 1864, they devolved on his

two widows, Sri Raja Papamma Rao the petitioner before us, and Sri Raja Chinnama Rao. The junior widow died since and the petitioner was left in sole possession. On 19th June 1885, Papamma Rao, in the exercise of authority conferred upon her by her husband, adopted Raja Venkata Ramanuja Appa Rao Bahadur, Zamindar of Medur Perganna, and had the estates registered in his name, alleging that the ownership therein vested in him by virtue of the adoption. The adopted son died on 1st January 1888 leaving him surviving an only son named Narayya Appa Rao, an infant aged 10 months, a widow named Sri Raja Venkata Raja Gopala Venkayamma Rao, and his adoptive mother, the petitioner in this Court. On the 1st March 1888 the Government authorized the Court of Wards to assume management of the estates on behalf of the minor under Regulation V of 1804, and when the Collector of the district, as Agent of the Court, proceeded to take possession, the petitioner refused to allow him to do so or to have access to estate records. She contended that she had managed the estates subsequently to the adoption and that she was entitled to be left in possession and management during her life; firstly, because it was subject to that condition she made the adoption in 1885; and secondly, because the deceased proprietor appointed her by his will, dated 1st January 1888, to manage all the affairs, and to keep all the property in her possession until his minor son attained his age. On 17th March 1888, the Collector, as the Agent of the Court of Wards, applied, under Act XIX of 1841, s. 2, to be put in possession of the estates of Nidadavole, Baharzalli, and Ambarupeta, and all the personal property of the deceased proprietor, Venkata Ramaya Appa Rao. The petition prayed also that pending the decision of the summary suit, the Head Assistant Collector of the Godávari District might be appointed Curator under Act XIX of 1841, s. 5. On the same day the District Judge made the order which the petitioner now impeaches for want of jurisdiction. It does not appear that beyond the statements contained in the Collector's petition, there was any other evidence before the District Judge when he made the order. The petition first set forth the adoption of the deceased proprietor, the registry of the estates in his name at the request of Papamma Rao, the subsequent collection of all Government dues from him, and stated that the property therein was vested in him. It next referred to his death, to the minority of

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the son left by him and the decision of the Government that the Court of Wards should assume management under Regulation V of 1804. It went on to state that the petitioner refused to allow the Collector to take possession or to have access to the estate records, and then to ask to be put in possession and for the appointment of the Head Assistant Collector as Curator pending decision of the summary suit. Three objections are in the main taken to this order, viz., (1) that the Act was put into force against the petitioner contrary to the provisions of section 3 and section 5; (2) that the order was made without ascertaining first whether the conditions under which alone it could lawfully be made under section 5 really existed, and (3) that the order could not be extended to the accumulations of income derived whilst petitioner was in possession in her own right prior to the adoption in 1885.

The order of the 17th March only authorizes the Curator to take possession of the property of the deceased proprietor, and it does not relate to any property which may belong to the petitioner in her own right. If any property in her possession is really a saving out of the income derived in her own right, it is a matter which she is at liberty to urge and prove before the Judge, and, until she does so, and the Judge makes an order in regard to it, there is no ground for our interference.

As regards the omission to comply with the procedure prescribed by section 3, it is certainly a material error of procedure having a bearing on the *interim* order which we are asked to revise. It is not denied that the Judge has under the Act general jurisdiction over the property of the deceased proprietor. Nor is there any doubt that sections 3 and 4 impose an obligation on the Judge to satisfy himself by some inquiry, before citing the party complained against, that there are strong reasons for believing that the party in possession has no lawful title and that the party suing is likely to be materially prejudiced if left to a regular suit. The scheme of the Act is that the finding of the Judge on the two points mentioned in section 3 is a condition precedent to the Act being put in force; for, section 4 enacts that in case the Judge is satisfied of the existence of such strong ground of belief, but not otherwise, he shall cite the party complained of. No witnesses were apparently examined nor documents produced in this case before the Judge made his order. Though the application is verified, neither the Collector nor any one acquainted

with material facts was examined. Nor does the application embody any information in regard to the claim set up by the petitioner when she refused to allow the Collector to take possession or in regard to the grounds on which that claim was considered untenable. As the inquiry directed by section 3 ought to be held prior to the citation of the petitioner, the party applying under the Act was bound to show, and, if he did not, it was incumbent on the Judge to call upon him to show, in the language of section 3, strong reasons for the belief that the party in possession had no lawful title and that the minor was likely to be materially prejudiced if the Court of Wards was left to the ordinary remedy of a regular suit. It is no doubt in the Judge's discretion to call for witnesses or documents if the solemn declaration of the complainant affords sufficient information and enables him to form an opinion as directed by section 3. The omission to follow the procedure has in this case deprived the petitioner of the protection to which she was entitled under the Act before she could be cited. In this sense the irregularity was material.

Again section 5 under which the order now before us was made runs as follows :—

"In case it shall further appear upon such application and examination as foresaid that danger is to be apprehended of the misappropriation or waste of the property before the summary suit can be determined and that the delay in obtaining security from the party in possession or the insufficiency thereof is likely to expose the party out of possession to considerable risk, provided that he be the lawful owner, it shall be lawful for the Judge to appoint one or more Curators with the powers hereinafter next mentioned whose authority shall continue according to the terms of his or their respective appointments and in no case beyond the determination of the summary suit and the confirmation or delivery of possession in consequence thereof: provided always that in the case of land the Judge may delegate to the Collector or to his officer the powers of a Curator, and also that every appointment of a Curator in respect of any property be duly published."

It will thus be observed that the conditions subject to which a Curator is to be appointed are (1) that there must be an application and an examination as aforesaid (that is to say as directed in section 3), (2) that the Judge must be in a position to say upon such application and examination that danger is to be apprehended of

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misappropriation or waste of the property before the summary suit can be determined, and (3) that the delay in obtaining security from the party in possession or its insufficiency is likely to expose the party out of possession to considerable risk. On referring to the Collector's application of 17th March 1888 we find no averment showing that any of these conditions existed and when the Judge made his order he had no other evidence before him. We must come to the conclusion that, at the time the order before us was made, the Judge overlooked the conditions subject to which alone he was authorized to appoint a Curator.

As regards the statement that the deceased had given directions by his will for the possession of the estate during the minority of his son and that the Judge had no power to put the Act into force in opposition to such directions, section 15 shows that it is a matter to be established by the petitioner during the trial. Section 15 is in these terms—"And it is hereby enacted that the Act shall not be put in force to contravene any public Act of settlement. Neither in cases in which the deceased proprietor shall have given legal directions for the possession of his property after his decease in the event of minority or otherwise, in opposition to such directions, but in every such case so soon as the Judge having jurisdiction over the property of a deceased person shall be satisfied *of the existence of such directions*, he shall give effect thereto." The proper construction is that, if it is shown that the deceased proprietor had given lawful directions as to the possession of his property after his decease and during the minority of his son, the Judge having jurisdiction is bound to give effect to them and not to put the Act into force so as to contravene them. The section appears to us rather to provide a rule of decision for the guidance of the Judge in dealing with the summary suit on the merits than to interdict the exercise of jurisdiction under the Act.

The order of the 17th March 1888 is therefore open to objection in that the Judge failed to satisfy himself that the special condition prescribed by sections 3 and 4 as necessary to his exercising jurisdiction existed in the case, and he also failed to see that the conditions prescribed by section 5 as necessary to interfering with the party claiming to be in possession by the appointment of a Curator existed. The Judge appears to have considered that an application from the Collector on behalf of the Court of

Wards was all that was needed and overlooked the provisions of the Act, first in regard to the special limitation subject to which the jurisdiction vesting in him under the Act ought to be exercised, and next in regard to the conditions which limit his power to appoint a Curator. These omissions or errors of procedure clearly amount to material irregularity in the investigation of a matter on which his jurisdiction depended within the meaning of s. 622 of the Code of Civil Procedure.

We therefore set aside the order appointing the Head Assistant Collector a Curator under section 5.

The summary suit which has been fixed must be heard and disposed of by the Judge in accordance with the provisions of the Act regard being had to the very special circumstances to which the Act was designed to apply and subject to the limitations to which we have referred above.

We do not think it necessary in this order to refer to the affidavit and other documents which have been filed in this Court as they were not before the Judge at the time of making the order we are asked to revise.

The counter-petitioner (the Collector) must pay the costs in this Court, and the costs in the Court below will abide and follow the result of the summary suit.

APPELLATE CIVIL.

Before Sir Arthur J. H. Collins, Kt., Chief Justice, and Mr. Justice Shephard.

RAMANAMMA (PLAINTIFF), APPELLANT,

v.

SAMBAYYA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1889. March 12.

Maintenance—Limitation—Limitation Act XIV of 1859, *s.* 1, *cl.* 13—*Refusal of persons liable to maintain—Cause of action.*

In a suit for maintenance brought in 1887 by a Hindu widow against the undivided family of her deceased husband who had died about 24 years before suit, it appeared that her maintenance had not been made a charge on specific property:

Held, that time began to run against the plaintiff's claim under the Limitation Act of 1859, only from the date of refusal on the defendants' part to maintain her. *Narayan Rao Ramchandra Pant* v. *Ramabai* (I.L.R., 3 Bom., 415) followed.

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* Second Appeal No. 1170 of 1888.