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COUTTS TROTTER, J.

both vested in the same person. I am, therefore, of opinion that the Act does not apply to these lands and that the ordinary Courts of Law have jurisdiction over the suit.

The appeal must be allowed and the decree of the District Munsif restored with costs here and below.

S.V.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Moore.

1916. February, 28 and 29.

K. P. ALAGAPPA AYYANGAR (PETITIONER), APPELLANT,

v.

MANGATHAI AMMANGAR AND ELEVEN OTHERS (RESPONDENTS), RESPONDENTS.*

Guardians and Wards Act (VIII of 1890), ss. 39 and 7—Appointment by a Hindu father of a guardian for the person and property of his undivided minor son—Validity of appointment of guardian of property—Will written under instructions of testator partly on blank sheets previously signed, validity of.

A Hindu father is entitled to appoint by will, a guardian of the person of his minor son, but not of the properties in which his minor son will have a right by birth. A will appointing a guardian of such properties being invalid, need not be set aside and cannot be set aside in an application made on behalf of the minor son under section 39 of the Guardians and Wards Act for removal of the guardian.

Dr. Albrecht v. *Bathee Jellamma* (1912) 22 M.L.J., 247 and *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* (1913) 21 I.C., 848, followed.

The appointment of a guardian of the properties being invalid, the mother as natural guardian becomes the guardian of the properties and if she be competent, there is no necessity for the Court to appoint her as such.

Properties attached to *Tirumaligais* (houses of religious preceptors) are private and not trust properties.

A will signed by the testator after completion on the sixth and seventh sheets is not invalid, because he signed some of the earlier sheets before the will was written on them.

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* Appeal Against Order No. 363 of 1914.

Namberumal Chetty v. *Pasumarthy Kannia Chetty* (1915) 28 I.C., 959, followed.

APPEAL against the Order of F. G. RICHARDS, the Acting District Judge of Tinnevelly in Original Petition No. 513 of 1913.

One Athan Sadagopachariar, a religious preceptor and *guru* of some disciples of Vaishnava sect in Alwartirunagiri in Tinnevelly district, died on 13th December 1911, leaving behind him, his widow, an undivided minor son and a daughter and bequeathing by means of a will, said to have been executed on 11th December 1911, his properties to all these persons and appointing by the will, four persons (*viz.*, his widow the first respondent and respondents Nos. 6, 7 and 8) as guardians of the minor's person and property. The petitioner in this case who was the widow's brother, filed this petition under sections 39, 10 and 7 of the Guardians and Wards Act (VIII of 1890) for removing respondents Nos. 6, 7 and 8 from the guardianship and for the appointment of either himself or the widow as the guardian of the person and property of the minor. The petitioner attacked the will as not genuine. He also charged the respondents Nos. 6, 7 and 8 with mismanagement of the estate. Respondents Nos. 6, 7 and 8 contended that the will was genuine, that their appointment by the testator as guardian was proper and beneficial to the minor, that their administration of the estate was proper and that the appointment either of the petitioner or of the widow as guardian was prejudicial to the minor. The first respondent, *viz.*, the widow, supported the petitioner. The District Judge found the will to be genuine and as the charges advanced against the management of the estate by respondents Nos. 6, 7 and 8 were withdrawn by the petitioner, he dismissed the petition. Thereupon the petitioner preferred this appeal to the High Court.

T. Rangachariar for the appellant.

Hon. Mr. *S. Srinivasa Ayyangar acting Advocate-General* and *N. S. Rangaswami Ayyangar* for the respondents Nos. 6, 7 and 8.

The others were not represented.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—This appeal has arisen out of an application filed in the District Court of Tinnevelly under sections 39,

ALAGAPPA AYYANGAR v. MANGATHAI AMMANGAR. — SADASIVA AYYAR, J.

10 and 7 of the Guardians and Wards Act of 1890. The petitioner in the District Court is the appellant before us. The prayers in the petition are:—(*a*) that the first respondent, namely, the mother of the minor boy, may be declared the sole guardian of the minor and his estate, removing respondents Nos. 6, 7 and 8 if they should be deemed to have been appointed by the minor's father; (*b*) that if necessary, the petitioner or the fourth respondent or any other fit and proper person may be appointed by the Court as guardian solely or with the first respondent for the minor's estate for both his person and estate, and (*c*) that other fit and necessary orders be made.

Now the minor's father died on the 13th December 1911 and the respondents Nos. 6, 7 and 8 set up that themselves and the first respondent have been appointed by a will executed by the minor's father on the 11th December 1911, as the guardians of the person and properties of the minor. That will is Exhibit I in the case. As section 7, clause (3), of the Guardians and Wards Act enacts that where a guardian has been appointed by will, an order under that section declaring another person to be guardian in his stead, shall not be made until the powers of the guardian appointed and declared by the will have ceased under the provisions of the Act, the learned District Judge first considered the question of fact whether the will was genuine or not. I think that on that question, the District Judge came to a correct conclusion, though I do not agree with some of his observations which seem to imply that the burden of proving that the will was not genuine lay in the first instance on the petitioner-appellant. Whoever puts forward a will as genuine and as supporting his contentions ought to prove it and cannot throw the burden of proving the negative on the opposite party: see *Krishnamachariar* v. *Krishnamachariar*(1). On the evidence, however, as I said, I agree with the learned District Judge that the will is genuine. It is attested (among several others) by the testator's sister's husband and his son-in-law. It was produced by the widow (first respondent), for registration to the Sub-Registrar and till the 28th June 1913 (see Exhibit VII),

(1) (1915) I.L.R., 38 Mad., 166.

she admitted that it was a genuine and valid will. The evidence of the contesting respondents' witnesses Nos. 1 to 4, satisfactorily establishes the genuineness of the will and that it was read out to the testator while he was of sound mind before he signed it. From the papers, Exhibits F series, it, no doubt, appears that the testator signed some blank papers with a view to having his testamentary intentions written over those signatures. But it is proved that a draft will had already been prepared under the instructions of the testator and even if the first five sheets of the will, Exhibit I, had been signed in blank by the testator for the purpose of the fair will being written above those signatures and (if necessary) above the signatures in the Exhibits F series sheets, I am clearly satisfied that the will as a whole after it had been fair copied was submitted to the testator and was signed by him in at least the sixth and seventh sheets, after it had been completed and that is sufficient to make the will legally valid : see *Namberumal Chetty* v. *Pasumarthy Kannia Chetty*(1). The evidence of the petitioner's witnesses that the testator was too ill on the date of the will to understand its contents is absolutely worthless. The reason why the widow (first respondent) and the petitioner (who had himself admitted the validity of the will by his attestation of Exhibits VIII and IX and under whose advice Exhibits VIII and IX were presented to the police according to the evidence of the first respondent) now deny the validity of the will is clear from the statements in paragraphs Nos. 5 to 8 of Exhibit VII. The way in which the petitioner's first witness (a petty clerk of the testator and his widow) contradicted his own statements in Exhibits X and XI is also significant. I do not think it necessary to go into further details in respect of the evidence with regard to the genuineness of Exhibit I. The explanation for not having it registered during the testator's lifetime seems to me to be not at all unreasonable or suspicious and might be accepted under the circumstances.

The next question is whether Exhibit I is a will that has to be set aside under section 39 of the Guardians and Wards Act. It need not and could not be set aside if the testator had no legal power to appoint a guardian for the boy by will. Before going

(1) (1915) 28 I.C., 959.

ALAGAPPA AYYANGAR v. MANGATHAI AMMANGAR. —— SADASIVA AYYAR, J.

into that question there is a preliminary point for decision namely, whether the will did appoint guardians (*a*) for the minor's person and (*b*) for the minor's properties. After some hesitation, I have come to the conclusion that it does appoint the widow and the respondents Nos. 6, 7 and 8 as guardians for both the person and property of the minor. The testator calls them "guardians" in the will and as he directs them to maintain the boy, perform his *upanayanam* to instal him in the *acharya's* throne and so on, I do not think he meant to make any distinction between the guardians of the person and the guardians of the property by the terms of his will. Then comes the question as to whether the appointment is valid, first as regards the person and then as regards the properties. I think I ought to follow *Dr. Albrecht* v. *Bathee Jellamma*(1), where it was decided that a Hindu father has got the power to appoint by will a guardian for the person of his minor child. Next as regards the properties, there are two branches of the question to be considered. The first branch relates to the case where the properties disposed of by the will, are alleged to be the ordinary private ancestral properties of a Hindu father; and the second branch relates to the case where (as is alleged in the present will) the properties belong to a *mutt* or a religious institution. On the first branch of the question, there is a decision of this Court *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar*(2), which clearly lays down that as regards properties which survive to the minor son of a Hindu Testator as ancestral family property on the death of the father, the father has no power to appoint a guardian. That case has been followed by a single Judge of this Court in *Krishna Aiyar* v. *Chakrapani*(3) though *Soobah Doorgah Lal Jhah* v. *Rajah Neelanund Singh*(4) which was followed in *Dr. Albrecht* v. *Bathee Jellamma*(1), seems to hold a different view. The actual decision in *Dr. Albrecht* v. *Bathee Jellamma*(1) established the validity of the appointment by the father of the guardian only of the person of his minor child. One of the learned Judges who was a party to the decision in *Dr. Albrecht* v. *Bathee Jellamma*(1), was also one of the Judges

(1) (1912) 22 M.L.J., 247.
(2) (1913) 21 I.C., 848.
(3) (1915) 29 I.C., 475.
(4) (1866) 7 W.R., 74.

who remanded *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar*(1) for a finding to the lower Court on the issue as to self-acquisition, which finding would be required only on the view that as regards joint family properties, a Hindu father has no right to appoint a person by will to be the guardian of such properties on behalf of the minor son. I would therefore follow the decision in *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar*(1) and hold that if these properties were the ancestral private properties of the testator, the appointment by will of a guardian of such properties was invalid. If they were, however, properties dedicated to a religious trust, then no question of guardianship at all arises and no question therefore of removing a testamentary guardian. I might however state that I am strongly of opinion that the properties belonging to this *tirumaligai* and the similar three other *athan tirumaligais* are private properties and not trust properties and I prefer to follow the decision of Sir SUBRAHMANYA AYYAR and DAVIES, JJ., in *Sadagopachariar* v. *Kuppar Aiyangar*(2) (filed as Exhibit I in this case) in preference to the decision (filed as Exhibit XVIII) in *Annaviengar* v. *Puckle*(3).

Finally, there is the question "whether it is for the welfare of the minor" (see section 7 of the Act) that a guardian of his person or property or both should be appointed; and whether the guardian of the person appointed by the will (if such appointment is held valid) should be removed for the purpose of the appointment by the Court of a guardian according to section 7 of the Act. If the appointment of the guardian of the property by the will is invalid as I have held, the mother becomes the guardian of the properties and I see no necessity why the mother should be appointed again by the Court. The petitioner is clearly not a person fit to be the guardian both by reason of his character as appears from his evidence and by reason of his position in life as mentioned by the District Judge. Similar remarks apply to the suggested appointment of the fourth respondent. As the boy, I believe, is almost sure to become an *acharya* (preceptor) as soon as he gets his *upanayanam* performed, I do not think it necessary in his interests to appoint a guardian for his person or property so as to advance the age of majority

(1) (1913) 21 I.C., 848. (2) Appeal No. 12 of 1903.
(3) Appeal No. 101 of 1873.

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of the boy from 18 to 21. I would, in the result, dismiss the appeal with costs of the respondents Nos. 6, 7 and 8, the charges advanced against whose management of the estate were withdrawn in the lower Court.

MOORE, J.—I agree.

N.R.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Moore.

1916. February 24 and 29.

SESHAPPIER (PETITIONER, THIRD DEFENDANT), APPELLANT,

v.

SUBRAMANIA CHETTIAR AND TWO OTHERS (RESPONDENTS—PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Limitation Act (IX of 1908), arts. 48 and 49—Suit for goods misappropriated—Contract Act (IX of 1872), ss. 108 and 178.

A commission agent employed to sell a jewel belonging to the plaintiff wrongfully pledged it in 1907 for Rs. 175 to the defendant who lent the amount *bona fide* without any knowledge of the plaintiff's ownership. Plaintiff coming to know of the wrongful pledge in 1909, sued in 1911 for the recovery of the jewel or its value.

Held:

(1) that the suit was in time and article 48 and not article 49 of the Limitation Act was applicable and time began to run from 1909 when the plaintiff came to know in whose possession the jewel was, and

(2) that as the defendant was a pawnee in good faith from one who had juridical possession of the jewel, the plaintiff was not entitled to recover the jewel without paying the defendant the amount due to him on the pledge.

"Possession" in section 178 of the Contract Act (IX of 1872) means juridical possession and not custody.

Rameshar Chanbey v. *Mata Bhikh* (1883) I.L.R., 5 All. 341, *Ram Lal* v. *Ghulam Hussain* (1907) I.L.R., 29 All., 579 and the observations of BATCHELOR, J., in *Nandlal Thakersey* v. *The Bank of Bombay* (1910) 12 Bom. L.R., 316 at p. 335, followed.

APPEAL under clause 15 of the Letters Patent against the judgment of SESHAGIRI AYYAR, J., in *Seshappier* v. *Subramania Chettiar*(1).

The facts of the case are stated in the judgment.

K. S. Jayarama Ayyar for *R. Kuppuswami Ayyar* for the appellant.

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* Letters Patent Appeal No. 217 of 1914.

(1) (1915) I.L.R., 38 Mad., 783.