APPELLATE CIVIL—FULL BENCH.

Before Sir John Wallis, Kt., Chief Justice, Mr. Justice Ayling and Mr. Justice Sadasiva Ayyar.

SATHI AND TWO OTHERS (DEFENDANTS NOS. 1 TO 3), APPELLANTS,

v.

RAMANDI PANDARAM (PLAINTIFF), RESPONDENT.*

1919, February, 3 and 18 and April, 22.

Guardians and Wards Act (VIII of 1890), petition under, whether only remedy for a father seeking custody of his child—Suit by father for custody of his minor child in ordinary Civil Courts of the mufassal, maintainability of.

No Mufassal Court has jurisdiction to entertain a *suit* by a father for the custody of his child.

Besant v. *Narayaniah*, (1915) I.L.R., 38 Mad., 807, at p. 820 (P.C.), relied on. *Achratlal Jekisandas* v. *Chimanlal Parbhudas* (1916) I.L.R., 40 Bom., 600, not followed.

SECOND APPEAL against the decree of M. G. KRISHNA RAO, Subordinate Judge of South Malabar at Calicut, in Appeal No. 22 of 1918, against the decree of B. VENKATA RAO, District Munsif of Alathur, in Original Suit No. 273 of 1916.

This was a suit by the plaintiff for the custody of his minor son, the third defendant, aged 3 years, against his wife, the first defendant, and her father, the second defendant, on the ground that the first defendant in collusion with the second defendant took away the third defendant from his custody and was permanently living in the second defendant's house. The defendants pleaded *inter alia* that the plaintiff ill-treated the first defendant, and had married a second wife, that it was not to the interests of the minor son to live with the plaintiff and that there was no collusion. The District Munsif dismissed the suit holding that it would be to the advantage of the minor to leave him in the custody of the mother. On appeal, the Subordinate Judge, holding that the minor's interests would be better served if he lived with his father, allowed the suit. The defendants preferred this appeal.

This Second Appeal coming on for hearing in the first instance before BAKEWELL and PHILLIPS, JJ., the Court made the following

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ORDER OF REFERENCE TO A FULL BENCH.

The only question for determination is whether a suit by a father to recover possession of his minor child is maintainable in a Civil Court, or whether the sole remedy is by proceedings under the Guardians and Wards Act (VIII of 1890). In the latter case the procedure would be by application to the District Court under section 25 of the Act, and it has been held in *Dayabhai Raghunathdas* v. *Bai Parvati*(1) that this section is applicable to all guardians, and not only to guardians appointed by Court, but the Provincial Small Cause Courts Act distinctly recognizes a right of suit, for suits for the custody of a minor are not cognizable by a Court of Small Causes (article 37). It has been held that such a suit is maintainable both in this Court in *Krishna* v. *Reade*(2) and in Bombay in *Sharifa* v. *Munekhan*(3), but a contrary view has been taken in Allahabad; *Sham Lal* v. *Bindo*(4). It is now argued that the decision of the Privy Council in *Besant* v. *Narayaniah*(5) has overruled the Madras and Bombay decisions, but this proposition has been distinctly negatived in *Achratlal Jekisandas* v. *Chimanlal Parbhudas*(6). The argument is based on the statement of the Privy Council in *Besant* v. *Narayaniah*(5) that the District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890. The previous passage, which we quote below, also supports the contention:—

"The real question was whether he was still entitled to exercise the functions of guardian and resume the custody of his sons and alter the scheme which had been formulated for their education. Again, it was not and could not be disputed that the letter of 6th March 1910 was in the nature of a revocable authority. The real question was whether in the events which had happened the plaintiff was at liberty to revoke it. Both questions fell to be determined having regard to the interests and welfare of the infants, bearing in mind, of course, their parentage and religion, and could only be decided by a Court exercising the jurisdiction of the Crown over infants, and in their presence."

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(1) (1915) I.L.R., 39 Bom., 438.
(2) (1886) I.L.R., 9 Mad., 31.
(3) (1901) I.L.R., 25 Bom., 574.
(4) (1904) I.L.R., 26 All., 594.
(5) (1915) I.L.R., 38 Mad., 807, 820 (P.C.).
(6) (1916) I.L.R., 40 Bom., 600.

From this it would appear that in the opinion of their Lordships, the District Court had only jurisdiction under Act VIII of 1890 so far as the case under reference was concerned, but they do not appear to have specifically decided the question of whether any suit like the present one is maintainable in a Civil Court.

We may point out that the decision in *Krishna* v. *Reade*(1) was under Act IX of 1861, which was held to be an enabling Act only, and that Act VIII of 1890 is a consolidating and amending Act although in other respects the provisions appear to be the same; also that the actual decision in *Achratlal Jekisandas* v. *Chimanlal Purbhudas*(2) was based on the fact that the father never had custody of the child, but it has been held by this Court in *Ibrahim Nachi* v. *Ibrahim Sahib*(3) that this fact does not prevent the application of section 25 of the Act of 1890. Section 25 does not expressly state whether the procedure thereunder should be by plaint or petition when no application has been made for the appointment or declaration of a guardian by the Court.

In view of the apparent conflict between the decision in *Krishna* v. *Reade*(1), and the recent *dictum* of the Privy Council, we think it advisable to refer to a Full Bench the question—

"Whether a Mufassal Court other than a District Court has jurisdiction to entertain a suit by a father for the custody of his child."

ON THIS REFERENCE

P. G. Krishna Ayyar for the appellants.—A *suit* by a father in ordinary Civil Courts for the custody of his minor child does not lie; the only remedy is a petition to the District Court under the Guardians and Wards Act—*Besant* v. *Narayaniah*(4). No such suit lay under the previous Act IX of 1861—*Mussamat Harasundari Baistabi* v. *Jayadurga Baistabi*(5). The decision in *Krishna* v. *Reade*(1), which is against this view, is based upon section 11 of the Civil Procedure Code of 1877, whereas section 9 of the Guardians and Wards Act of 1890 impliedly vests such jurisdiction only in District Courts. This

(1) (1886) I.L.R., 9 Mad., 31. (2) (1916) I.L.R., 40 Bom., 600.
(3) (1916) I.L.R., 39 Mad., 603. (4) (1915) I.L.R., 38 Mad., 807 at p. 820 (P.C.).
(5) (1870) 4 B.L.R., Ap. 36.

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Act of 1890 is a consolidating and complete code. Reference was made to *Ibrahim Nachi* v. *Ibrahim Sahib*(1), *Sham Lal* v. *Bindo*(2), and *Utma Kuar* v. *Bhagwant Kuar*(3).

C. V. Anantakrishna Ayyar for the respondent.—Prior to Act IX of 1861 Civil Courts entertained such suits—*Annie Besant* v. *Narayaniah*(4). The right by way of petition under the Guardians and Wards Act is not an exclusive right. The case of *Besant* v. *Narayaniah*(5) is distinguishable owing to its special facts; viewed as a suit the suit was wrongly brought in a higher Court, viz., the District Court; viewed as a petition under the Guardians and Wards Act, the petition to the District Court was incompetent as the minors were not then living under its jurisdiction but were living in England; and nowhere in that judgment does the Privy Council hold that such a suit in ordinary Civil Courts in the mufassal will not lie. The existence of concurrent jurisdictions will not result in any clash of jurisdictions, as when once an order of guardianship under the Act is made by the District Court, it vacates the guardianship of everybody else; see section 7 (2) and (3). A consolidating Act only collects various existing Acts and does not put an end to any existing right outside the Acts; whereas a codifying Act does; see Wharton's Law Lexicon, page 184. The Act of 1890 is only a consolidating Act; that a right of suit exists is clear from clause 37 of the second schedule of the Provincial Small Cause Courts Act; see also Trevelyan on Minors, page 189. Section 25 of the Guardians and Wards Act does not apply to a father; and even if it does, it does not take away the right of suit or the right to apply for *Habeas Corpus*. In England the common law right of suit for detinue in such cases has not been taken away though the summary remedy by way of petition being cheaper is usually resorted to—*The Queen* v. *Maria Clarke*(6), *Rex* v. *Smike*(7), Simpson on Infants, page 363, *Achratlal Jekisandas* v. *Chimanlal Parbhudas*(8). Section 52 of

(1) (1916) I.L.R., 39 Mad., 608, at pp. 610, 611.
(2) (1904) I.L.R., 26 All., 594. (3) (1915) I.L.R., 37 All., 515.
(4) (1913) 25 M.L.J., 661, at p. 682.
(5) (1915) I.L.R., 38 Mad., 807, at pp. 814 and 816 (P.C.).
(6) (1857) 7 E. & B., 186; s.c. 119, E.R., 1217.
(7) (1857) 2 Strange, 982-93; s.c. E.R., 983.
(8) (1916) I.L.R., 40 Bom., 600, at p. 604.

the Guardians and Wards Act recognizes the right of other Courts to appoint. The present relief, viz., custody of a child of 3 years cannot be obtained by a petition under section 25 of the Act; see section 19. But even if the father is a guardian for the purpose of section 25 and can get relief he is not bound to adopt that summary remedy giving up his right of suit; see *Kanhyal Lal* v. *National Bank of India, Ltd.*(1).

P. G. Krishna Ayyar in reply.—'Any Court of Justice' in section 25 means one having jurisdiction. The word 'Guardian' in the Act includes also uncertificated guardian—*Sitha Boi* v. *Radha Boi*(2). A father is a guardian within section 25. While several other rights are saved a right of suit is not saved by section 3. The reliefs prayed for in this suit are exactly similar to those prayed for in *Besant* v. *Narayaniah*(3).

The Court expressed the following

OPINION.

WALLIS, C.J.—British Courts in India appear from the outset to have considered the right of the father or other persons entitled to the custody of a minor to be a civil right and enforceable as such by suit in a Civil Court. That this was a well-known kind of suit appears from the Guardians and Wards Act IX of 1861, which recited that it was expedient to amend the law for hearing suits relative to the custody and guardianship of minors, and provided that applications might be made by petitions to the principal Civil Court of Original Jurisdiction in the district by which such application if preferred in the form of a regular suit would be cognizable. WALLIS, C.J.

It was first held in Calcutta that the right of civil suit was taken away by this Act—*Mussamat Harasundari Baistabi* v. *Mussamat Jayadurga Baitabi*(4). No reasons were given for the decision, and the case was not followed in *Brohmomoyee* v. *Kashi Chundersen*(5). In *Krishna* v. *Reade*(6), this Court also held that the right of suit was not taken away by the Act of 1861, and this view is supported to some extent by the

(1) (1913) I.L.R., 40 Calc., 598, at p. 610 (P.C.).
(2) (1918) 36 M.L.J., 189.
(3) (1915) I.L.R., 38 Mad., 807 (P.C.).
(4) (1870) 4 B.L.R., Ap. 36. (5) (1882) I.L.R., 8 Calc., 266.
(6) (1886) I.L.R., 9 Mad., 31.

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Provincial Small Cause Courts Acts, 1887, which included in the schedule of suits excluded from the jurisdiction of the Small Cause Court—

"*Article* 37.—A suit for the restitution of conjugal rights, for the recovery of a wife, for the custody of a minor or for a divorce."

Act IX of 1861 and a large number of enactments relating to the guardianship of minor's property were repealed and re-enacted with modifications by the Guardians and Wards Act, 1890. It did not purport to be a codifying but a consolidating Act, which is a very different thing, and did not, as far as I can see, make any very material alterations in the provisions of Act IX of 1861 as to the guardianship of the person. It was held however in *Sham Lal* v. *Bindo*(1) to have been a codifying Act and to have taken away the right of proceeding by regular suit in Civil Courts to recover the custody of minors. A different view was taken in *Sharifa* v. *Munekhan*(2), where however the point was not considered to be free from doubt. Then came the decision of the Privy Council in *Besant* v. *Narayaniah*(3). The plaintiff in that case had filed a suit in the District Court of Chingleput against the defendant, Mrs. Besant, who resided within that jurisdiction, for declarations that he was entitled to the guardianship and custody of his two minor sons, and that the defendant was not entitled and was in any case unfit to have the charge and guardianship of the minors, and for a direction to the defendant to hand them over to him or to such person as the Court might think fit. The minors, one of whom was nearly eighteen, were residing and being educated in England at the date of the suit.

The Privy Council held that the suit, which was a suit to recover the custody of the infants, did not lie in the District Court, and observed :

"The District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890."

The question for decision was whether a civil suit not under the Guardians and Wards Act would lie in the Civil Court. The Privy Council held that it would not, and assigned as the sole

(1) (1904) I.L.R., 26 All., 594. (2) (1901) I.L.R., 25 Bom., 574.
(3) (1915) I.L.R., 38 Mad., 807 (P.C.).

but sufficient reason for so holding the fact that the District Court had no jurisdiction in the case except under the Guardians and Wards Act. This I feel bound to construe as a ruling that the jurisdiction conferred by the Guardians and Wards Act was exclusive, and that the right of proceeding independently by civil suit no longer existed. The suit having been held incompetent, their Lordships proceeded to consider whether the proceedings could be supported if treated as proceedings under the Guardians and Wards Act, and held they could not because the minors were not resident in the district where the proceedings were instituted. If the jurisdiction of the District Court to entertain suits of this character not governed by the Guardians and Wards Act had been recognized as still existing to any extent, it would have been necessary to assign reasons for holding that it was inapplicable in the circumstances of the case. The judgment did not do so, but dismissed the suit simply on the ground that the Court had now no jurisdiction except under the Act. If this is the position of the District Court, the position of the District Munsif's Court must be the same. In *Achratlal Jekisandas* v. *Chimanlal Parbhudas*(1) it was no doubt held that the judgment of the Privy Council has not this effect, but no reasons were given for that decision, and I have been unable to find any which are satisfactory to my mind. I would answer the question in the negative.

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AYLING, J.—I agree. The judgment of the Privy Council in *Besant* v. *Narayaniah*(2) appears to me to be open to no other construction.

AYLING, J.

SADASIVA AYYAR, J.—I agree and for the same reasons.

SADASIVA AYYAR, J.

N.R.

(1) (1916) I.L.R., 40 Bom., 600. (2) (1915) I.L.R., 38 Mad., 807.