APPELLATE CIVIL.

Before Mr. Justice Curgenven and Mr. Justice Bardswell.

1934, May 1.

KRISHNA AYYAR (PETITIONER, FIRST RESPONDENT), APPELLANT,

v.

SUBBALAKSHMI AMMAL (RESPONDENT, PETITIONER), RESPONDENT.*

Indian Lunacy Act (IV of 1912), Chap. V—Custody of lunatic—Power of Court to give to guardian appointed—Sec. 83—Appeal—Order dismissing guardian's application for custody—Whether appealable.

Although Chapter V of the Lunacy Act (IV of 1912) makes no express provision for giving custody of the person of a lunatic to the guardian appointed, the Court which passed the order appointing the guardian has power to give custody of the lunatic to the guardian so appointed. This power lies by implication in that part of the Act which confers the primary power of appointing the guardian, viz., Chapter V. And section 83 of the Act which allows an appeal from all orders passed under that chapter, makes an order dismissing the guardian's application for custody appealable.

APPEAL against the order of the District Court of Trichinopoly, dated 16th February, 1934, and made in Interlocutory Application No. 479 of 1933 in Original Petition No. 38 of 1933.

T. R. Ramachandra Ayyar and *L. A. Gopalakrishna Ayyar* for appellant.

T. R. Venkatarama Sastri and *K. V. Sesha Ayyangar* for respondent.

The JUDGMENT of the Court was delivered by

CURGENVEN J.

CURGENVEN J.—This is an appeal against an order of the District Judge of Trichinopoly dismissing

* Appeal against Order No. 152 of 1934.

an application by the appellant for the custody of a lunatic, who is his natural son. The proceedings arose in a petition by the lunatic's wife to have him declared a lunatic and herself appointed guardian of the person and property. This application was closed by an order passed by agreement between the parties according to which the wife was to be the guardian of the property and the father, the present appellant, guardian of the person. It appears that a difficulty arose in carrying out the terms of this order, so that the appellant had to institute this application for getting custody of the lunatic.

The first question that has been raised before us is whether the order dismissing his application for custody is an appealable order. Orders passed by a Court in lunacy outside the Presidency-towns are provided for by Chapter V of the Lunacy Act, and section 83, the last section in that chapter, provides that an appeal shall lie to the High Court from any order made by any District Court under the chapter. Section 71 empowers the District Court to appoint a guardian of the person of a lunatic, and that is the section under which the original order in this case, appointing the appellant guardian of the person of his lunatic son, was passed. There is no express provision in the chapter for giving custody of the person of the lunatic to the guardian thus appointed, but it is not questioned before us that such power must reside in the Court which passed the order appointing a guardian. This is a well known principle of the interpretation of statutes; we need only refer to Craies on Statute Law, 3rd edition, page 227, and the English case,

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Scott v. *Legg*(1). We do not think we need discuss that point further, as it is not disputed. Assuming then that the Court has power to pass an order for the custody of a lunatic, the only question is whence that power is derived. It seems clear from the authorities which we have cited that it lies by implication within the four corners of the Act which grants the primary power and, extending the same principle, it can scarcely be questioned that it lies in that part of the Act which confers that power, and in the present case within Chapter V of the Lunacy Act. If this reasoning be correct, section 83, which allows an appeal from all orders passed under that chapter, will make this particular order appealable.

Coming to the merits of the case, the first order of the District Judge appointed the appellant guardian of the person of the lunatic, and, unless anything exceptional appears to the contrary, it appears to us that the right so conferred upon the appellant implies the right to the custody of the lunatic's person. The learned Judge in the order now under appeal considers that it does not necessarily permit him to have "exclusive" or "separate" custody of the lunatic. He scarcely conceals his disagreement with the order of his predecessor and we think that, in the observations which he has made on it, it was incumbent upon him to say—what he has omitted to say—that the order was passed by consent of the parties. The main ground upon which he appears to have proceeded is that it is not possible to separate the lunatic from his wife. The position apparently is

(1) (1876) 2 Ex. D. 39, 42; 10 Q.B.D. 236.

that all the parties lived together in the house occupied by the lunatic and his wife from 1929, when the lunatic's adopted mother died, until 1933, when there was a quarrel over some question relating to the estate. It was said that the father (appellant) had mismanaged the property. It became then impossible for the appellant and his wife to remain in the house and he withdrew to his own village of Allur, which is only two miles away from Kambarasanpettai, where the lunatic at present resides. The argument that the husband cannot be separated from his wife appears to us to be somewhat of an inversion of the normal state of affairs which requires that the wife should follow the fortunes or misfortunes of her husband rather than *vice versa*. We have no ground at present to suppose that giving the custody of the lunatic to the appellant will necessarily involve separation between husband and wife, but at any rate that in itself cannot on general grounds be made a reason for not implementing the order appointing the appellant as guardian. Virtually what the order of the Court below seems to us to say is : " You have, it is true, been appointed guardian of the person but you shall not have any custody or control of it." It seems quite clear that unless an order for custody is made, the virtual guardian of the lunatic will be the wife herself who will have no compunction, it appears, in shutting the door in the face of the natural father. In these circumstances we think that the only course compatible with enforcing the order of appointment is to pass an order giving the appellant custody of the lunatic and, allowing the appeal, we pass such an order.

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There is a further application for a monthly allowance for the maintenance of the lunatic. We are not in a position to deal with that finally now and we direct the learned District Judge to dispose of it. The appellant will get his costs throughout, including the cost of privately printing the records, from the estate, and the respondent will bear her own costs.

K.W.R.

APPELLATE CRIMINAL.

Before Mr. Justice Pakenham Walsh.

1934, August 28.

NARAYANASWAMI VANNIAR (FIRST ACCUSED), PETITIONER,

v.

KARUMBAYIRAM PERIYARI (COMPLAINANT), RESPONDENT.*

Criminal Procedure Code (Act V of 1898), *sec.* 403—*Re-trial on same charge after acquittal owing to want of jurisdiction in trying Magistrate—Previous trial no bar to re-trial—Madras Village Courts Act (I of* 1889), *sec.* 76 (8).

When the conviction and sentence passed upon an accused are set aside on the ground that the trying Magistrate had no jurisdiction, the order of the appellate Court setting aside the conviction is no obstacle to the accused being re-tried on the same charge.

The petitioner and others were accused before a Village Panchayat Court and convicted of an offence. A revision petition was filed under section 76 (8) of the Madras Village Courts Act (I of 1889), and the conviction and sentence were set aside on the ground that the Bench had no legal existence at the time, and hence no jurisdiction. Subsequently an identical complaint on the same facts was filed before the same

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* Criminal Revision Case No. 97 of 1934.