APPELLATE CIVIL.

Before Sir Lionel Leach, Chief Justice, and Mr. Justice Lakshmana Rao.

AMIRTHAVALLIAMMAL (MINOR) BY HER NEXT FRIEND T. A. ARUMUGAHAM PILLAI AND TWO OTHERS (NIL AND RESPONDENTS 2 AND 3), APPELLANTS,

1938, January .

v.

SIRONMANI AMMAL AND THREE OTHERS (PETITIONER—FIRST RESPONDENT AND NIL), RESPONDENTS.*

Guardians and Wards Act (VIII of 1890), sec. 7—Minor—Existence of testamentary guardian—Appointment of guardian under section—Absence of power of Court—Sec. 12—Temporary custody of minor under—Power of Court—Principles governing the exercise of—Indian Succession Act (XXXIX of 1925), sec. 213 (1)—Relevancy of, to proceedings for appointment of guardian—Will unprobated—Procedure to be adopted.

In a case where a Hindu father had appointed testamentary guardian for his minor sons and died, his widow (the mother of the minor) filed a petition under the Guardians and Wards Act praying that she be declared the natural guardian of the minor. Probate proceedings were also pending.

Held: When there is a testamentary guardian the Court has no power under section 7 of the Guardians and Wards Act to appoint another person to be the guardian or give another person the custody of the minor (unless it be temporary custody under section 12 of the Act) until the testamentary guardian has been removed from his office. If the Court feels any doubt as to the validity of the will, the proper course for the Court seized of the guardianship proceedings would be to give some person temporary custody of the minor, if it considers it necessary in the interests of the minor so to do, until probate proceedings are terminated.

* Original Side Appeal No. 39 of 1937.

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APPEAL against the order of GENTLE J. dated 29th April 1937 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Original Petition No. 53 of 1937.

K. Krishnaswami Ayyangar for *V. S. Rangachari* for first appellant.

N. K. Mohanarangam Pillai for first respondent.

V. Radhakrishnayya and *C. Madhavaroya Mudaliar* for third and fourth respondents (transposed as second and third appellants).

Second respondent was unrepresented.

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The JUDGMENT of the Court was delivered by LEACH C.J.—This appeal arises out of an application filed under the Guardians and Wards Act by the first respondent on the Original Side of this Court. The first respondent is the mother of the first appellant who was born on 30th October 1922. The first appellant's father was one C. Manicka Mudaliar. He died on 19th January 1936, having left a will dated 22nd January 1935, under which he appointed the second and third appellants guardians of the first appellant. The second respondent in the appeal is the senior widow of the testator. The testator, his wives and his children all lived together in the family house, 2/49, Acharappan Street, George Town, Madras. The second and third appellants who are his nephews also lived in the same house with their families. After the death of the testator it would appear that the two widows did not get on well together and the first respondent left the family house in August 1936. She filed the petition out of which this appeal arises on 23rd February 1937. In it the first respondent asked

that she be declared the natural guardian of the first appellant and her two minor sons, Govindarajulu and Madhava Rao, born respectively on 22nd October 1925 and 29th January 1929. When the first respondent left the house the first appellant remained with her step-mother. The first respondent took her sons away when she left the family house. The petition is really concerned with the guardianship of the first appellant. The first respondent alleges in paragraph 18 of her petition that the second and third appellants are not fit and proper persons to be in charge of a minor unmarried girl and in paragraph 22 she alleges that the girl is living in an atmosphere not conducive to her moral welfare. There is no evidence tendered in support of these allegations. It is not suggested in what way the second and third appellants are unfit to be guardians and it was not stated why the atmosphere of the family house where she lived for fifteen years is not conducive to her moral welfare. The first respondent did not ask for the removal of the second and third appellants from their positions as testamentary guardians. She merely wishes the Court to declare that she is entitled to the custody of the girl and asks the Court to give her custody.

On 29th April 1937 GENTLE J. who heard the application passed an order declaring that the first respondent was entitled to the custody of her three minor children. He added that this order was to be without prejudice to the rights of the second and third appellants under the will of the deceased father. The appeal is against this order. The appeal was filed by the first appellant alone, but subsequently an application was made by the

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second and third appellants, who were then respondents, to be transposed as appellants, and this application was ordered by us.

Section 7 (1) of the Guardians and Wards Act provides that where the Court is satisfied that it is for the welfare of a minor that an order should be made (*a*) appointing a guardian of his person or property, or both, or (*b*) declaring a person to be such a guardian, the Court may make an order accordingly. Sub-section 2 says that an order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court. Sub-section 3 then provides that, where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian so appointed or declared have ceased under the provisions of this Act. Therefore, where there is a testamentary guardian the Court has no power to appoint another person to be the guardian or give another person the custody of the minor (unless it be temporary custody under section 12 of the Act) until the testamentary guardian has been removed from his office. In passing the order which he did the learned Judge overlooked the provisions of this section. It is common ground that a Hindu father has the absolute right of appointing by will the guardian of his minor child and the will, so far as the appointment of the guardian is concerned, speaks from the date of death. It is true that under section 213 (1) of the Indian Succession Act no right as executor or legatee can be established in any Court of Justice,

unless a Court of competent jurisdiction has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of an authenticated copy of the will annexed. The exception which is contained in sub-section 2 does not apply to wills of Hindus resident in Presidency-towns.

In *Sayad Shahu* v. *Hapija Begam*(1) a Bench of the Bombay High Court held that, where a person claims that he has been appointed guardian of a minor under a will, the Court has no power to appoint any one else guardian under section 7 of the Guardians and Wards Act until it has been ascertained that there is in fact no valid will. In *Sarala Sundari Debi* v. *Hazari Dasi Debi*(2) a Bench of the Calcutta High Court, consisting of JENKINS C.J. and WOODROFFE J., held that the fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other, but the Court cannot say that it will refuse to take notice of the will. In the course of the judgment the Court observed:

"In our opinion the Judge had jurisdiction and was bound to consider that there was a will although probate had not been granted; and that appears to us to be the result of several authorities: *Sayad Shahu* v. *Hapija Begam*(1), *Chinnasami* v. *Hariharabadra*(3) and *Pathan Alikhan Badlukhan* v. *Bai Panibai*(4). The fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other, as for instance, it may possibly defer deciding on the question of guardianship until the question of probate has been determined. But it is not open to the Court to say that it will refuse to take notice of the will."

In the case before us an application had been filed on the Original Side of this Court for the

(1) (1892) I.L.R. 17 Bom. 560.
(2) (1915) I.L.R. 42 Cal. 953.
(3) (1893) I.L.R. 16 Mad. 380.
(4) (1894) I.L.R. 19 Bom. 832.

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grant of probate of the will of the testator and was then pending. If the learned Judge had felt any doubt as to the validity of the will, the proper course would have been to have given some person, the mother or the step-mother or the testamentary guardians, temporary custody of the minor, if he considered it was necessary in the interests of the minor so to do, and postpone the hearing of the application until probate had been granted. We consider that in declaring the mother to be entitled to the custody of the minor the learned Judge erred and his order must be set aside.

The second and third appellants as testamentary guardians of the minor will have custody of the first appellant and will be entitled to remain in custody until the minor becomes of age, unless the Court removes them in the meantime. The minor has appeared before us and we have questioned her. She appears to be very intelligent and expressed her desire to remain with her step-mother and the second and third appellants.

The appeal will accordingly be allowed. The appellants will be entitled to one set of costs which will come out of the estate.

G.R.