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introduces an anomaly. It was said that a Court may grant and may be obliged to grant an amendment even after the period of twelve years fixed by section 48 of the Code of Civil Procedure and where an amendment is so granted the order would be rendered futile and barren unless section 48 is understood as permitting the twelve years' period to be calculated from the date of the amendment. This may be an anomaly but the remedy is in the hands of the Legislature. When the language of the statute is clear we cannot refuse to give effect to it on considerations of this kind.

SOMAYYA J.—I agree with my Lord the CHIEF JUSTICE.

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APPELLATE CIVIL—FULL BENCH.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Mockett and Mr. Justice Krishnaswami Ayyangar.

1939, October 2.

KARINAGISETTI CHENNAPPA (PLAINTIFF), APPELLANT,

v.

KARINAGISETTI ONKARAPPA (DEFENDANT), RESPONDENT.*

Limitation Act (IX of 1908), *sec.* 21 (1)—*Hindu law—Minor—Paternal grandmother, nearest living relation—If "lawful guardian" under the section.*

Held by the Full Bench.—The paternal grandmother of a Hindu minor is not, even when she happens to be his nearest living relation, the lawful guardian of the minor, within the meaning of section 21 of the Indian Limitation Act, 1908.

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* Second Appeal No. 318 of 1935.

The father and in his absence the mother of a Hindu minor are his lawful guardians not requiring an appointment by Court for acting as such. Where the father and the mother have died, no relative can become the lawful guardian without an order of the Court.

Surayya v. *Subbamma*(1) overruled.

APPEAL against the decree of the District Court of Bellary in Appeal Suit No. 59 of 1933, preferred against the decree of the Court of the District Munsif of Bellary in Original Suit No. 484 of 1932.

A. Bhujanga Rao (with him *D. R. Krishna Rao*) for appellant.—In this case the paternal grandmother of the minor is the "lawful guardian" as mentioned in section 21 of the Limitation Act. The endorsement made by her on the promissory note saves the period of limitation.

Under the Hindu law the paternal grandmother is the guardian of the minor in the absence of his other near relations. [Sir Thomas Strange's Hindu Law (1864), Fourth Edition, page 72 (*a*), and a passage in Macnaghten's Principles and Precedents of Hindu Law quoted in *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(2) were referred to.]

[Manu (Sacred Books of East Series, Vol. XXV), page 257, verse 27, Gautama (Sacred Books of the East Series, Vol. II), page 229, verse 48, and Vishnu (Sacred Books of the East Series, Vol. VII), page 20, verse 65, were referred to.]

[LEACH C.J.—In all the text books the king is stated to be the protector and guardian of all minors. There is no reference to the father or mother as guardians of minors.]

[KRISHNASWAMI AYYANGAR J.—They came to be recognized by custom and usage.]

In *Thayammal* v. *Kuppanna Koundan*(3) SADASIVA AYYAR J. recognized that the direct male and female ancestors of the minor are entitled to be lawful guardians. That case was followed in *Seetharamanna* v. *Appiah*(4). In that case VISWANATHA SASTRI J. was of opinion that the father and the mother were not the only lawful guardians. In *Surayya* v. *Subbamma*(1) it was held that the paternal

(1) (1927) 53 M.L.J. 677. (2) (1878) 2 C.L.R. 583.
(3) (1914) I.L.R. 38 Mad. 1125. (4) (1925) I.L.R. 49 Mad. 768.

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grandmother is the natural guardian of the grand children in the absence of the father and mother.

[Trevelyan's Hindu Law, Third Edition, page 231, Mayne's Hindu Law, Tenth Edition, page 299 and Mulla's Principles of Hindu Law, Eighth Edition, page 565, were referred to.]

[The following cases were also referred to: *Ranganaiki Ammal* v. *Ramanuja Aiyangar*(1), *Kristo Kisser Neoghy* v. *Kadermoye Dossee*(2), *Musst. Bhikuo Koer* v. *Musst. Chamela Koer*(3), *Mohanund Mondul* v. *Nafur Mondul*(4), *Re Gulbai and Lilbai*(5), *Nagayya* v. *Narasayya*(6), *Ganjayya* v. *Ramaswami*(7) and *Ramaswamy* v. *Kasinatha*(8).]

K. Srinivasa Rao for respondent was not called upon.

JUDGMENT.

LEACH C.J.

LEACH C.J.—This appeal raises the question whether the paternal grandmother of a Hindu minor is his lawful guardian when she happens to be his nearest living relation. From 1917 to 1924 the respondent's father had on various occasions borrowed money from the appellant. On 18th September 1924 an account was taken and it was found that the respondent's father owed the appellant an aggregate sum of Rs. 3,825 for which he executed a promissory note. The instrument was not properly stamped and therefore was not admissible in evidence. Realizing the defect the appellant filed a suit in the Court of the District Munsif of Bellary for relief on the basis of a settled account. The date of the institution of the suit was 16th July 1932 and unless the appellant was entitled to rely on certain endorsements on the promissory note his suit was time-barred. I should mention that the respondent's father had died on 4th October 1924 and the suit was against the respondent as his legal representative. The respondent's

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(1) (1911) I.L.R. 35 Mad. 728.
(2) (1878) 2 C.L.R. 583.
(3) (1897) 2 C.W.N. 191.
(4) (1899) I.L.R. 26 Cal. 820.
(5) (1907) I.L.R. 32 Bom. 50.
(6) I.L.R. [1939] Mad. 65.
(7) (1913) 24 M.L.J. 428.
(8) A.I.R. 1928 Mad. 226.

mother had predeceased his father and on his father's death Neelamma, his paternal grandmother, took charge of his property. On 6th September 1927 she paid to the appellant a sum of Rs. 70 in reduction of the interest due on the loans and made an endorsement to this effect on the promissory note. On 10th November 1927 the District Court of Bellary acting under the provisions of the Guardians and Wards Act appointed one Basappa, the guardian of the minor's property. On 18th February 1928 Basappa paid a sum in reduction of the amount due and made an endorsement on the promissory note recording the fact of payment. On 18th July 1929 Neelamma made another payment in reduction of the debt and this was also followed by an endorsement on the instrument. Basappa was then alive and was still the lawful guardian of the respondent, but he died a month later. The last payment to the appellant was made by Neelamma on 25th August 1929. This was a sum of Rs. 1,000 paid towards the principal. Again she made an endorsement on the promissory note recording the fact of payment. In order to save limitation the appellant has to rely on the endorsements made by Neelamma on 6th September 1927 and on 25th August 1929. The District Munsif and on appeal the District Judge of Bellary held that the suit was time-barred. The appellant then filed this second appeal which has been placed before a Full Bench in view of conflicting decisions of this Court bearing on the question whether Neelamma was under Hindu law the lawful guardian of the minor when she made these particular endorsements.

Section 20 of the Indian Limitation Act states that where interest on a debt is, before the expiration

of the prescribed period, paid by the debtor or his agent duly authorized in this behalf, or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent, a fresh period of limitation shall be computed from the time when the payment was made; provided that, save in the case of a payment of interest made before 1st January 1928, an acknowledgment of the payment appears in the handwriting of, or in a writing signed by the person making the payment. Section 21 (1) states that the expression "agent duly authorized in this behalf" includes the person's lawful guardian. The fact that Neelamma was the *de facto* guardian of the minor would not help the appellant. It was expressly held by a Bench of this Court (MADHAVAN NAIR and ABDUR RAHMAN JJ.) in *Nagayya* v. *Narasayya*(1) that an acknowledgment of a debt made by a *de facto* guardian of a minor does not prevent the debt from being time-barred. This decision followed a previous decision of this Court to the same effect. The wording of section 20 and section 21 of the Limitation Act leaves no room for doubt that this decision is correct. The appellant, however, says that Neelamma was the lawful guardian of the minor, except during the period when Basappa was acting in pursuance of the order passed under the Guardians and Wards Act.

In support of this contention the learned Advocate for the appellant has relied on a passage in the edition of Strange's "Hindu Law" published in 1864, Fourth Edition, and a passage in Macnaghten's "Principles and Precedents of Hindu Law" quoted in *Kristo Kissor*

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(1) I.L.R. [1939] Mad. 65.

Neoghy v. *Kadermoye Dossee*(1). The passage from Strange is at page 72 (*a*) and reads as follows :—

"The natural guardians of a minor are, first his father, then his mother, elder brother, paternal relatives and maternal relatives."

The passage from Macnaghten is in these words :

"A father is recognized as the legal guardian of his children, when he exists ; and when the father is dead the mother may assume the guardianship. In default of her, an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian and failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity ; but the appointment of guardians universally rests with the ruling power."

The learned Advocate would have it that these passages must be accepted as authoritative support for the proposition that the legal guardianship devolves upon the nearest paternal relative and in default of a paternal relative on the nearest maternal kinsman. I am not prepared to accept this argument. I consider that it is contrary to principle and accepted authority.

It is common ground that the ancient texts of Hindu law do not provide for the management of a minor's property beyond stating that the guardianship shall rest with the king. The position of the king is now taken by the Court. Custom has, however, recognized that the father of a Hindu minor, and on his death the minor's mother, is entitled to the guardianship of the minor's estate. This has been accepted from time immemorial so universally that the right of the father or of the mother as the case may be cannot now be disputed, but it appears to be equally clear that custom has not extended the rule beyond the

(1) (1878) 2 C.L.R. 583.

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mother. In the case of *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(1), GARTH C.J. referring to the passage from Macnaghten which I have quoted said:

> "We do not think that this passage means that all the persons therein mentioned have in turn an absolute right to take upon themselves the guardianship of a minor, without any permission or authority from the ruling power. If it did mean this, the authorities cited would not appear to support it."

GARTH C.J. then went on to point out that Jagannatha, one of the authorities cited, after quoting from Manu this passage,

> "The king should guard the property which descends to an infant by inheritance, until he returns from the house of his preceptor, or until he has passed his minority."

and from the Ratnacara this statement,

> "Wealth which descends to an infant by inheritance, and becomes the property of the minor, let the king guard; that is, let him protect it from the other heirs."

had proceeded to add these observations of his own:

> "Consequently, the meaning is, let him (the king) act in such manner that other heirs may not take the whole, defrauding the infant who is incapable for non-age of conducting his own affairs; or the sense may be, let him commit the share of the minor in trust to any one co-heir or other guardian."

There is here authority that no one in the family is entitled as of right to act as the guardian of the minor. The right to act then depended upon the decision of the king. The judgment in *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(1) is of special importance in the present case as it related to a contest between the paternal grandmother and the paternal uncle on the one side and the maternal grandmother on the other for the custody of a minor. The Court held that none of them was entitled to claim custody as the lawful guardian.

(1) (1878) 2 C.L.R. 583.

The judgment in *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(1) was accepted as correctly stating the law in *Musst. Bhikuo Koer* v. *Musst. Chamela Koer*(2) which was also decided by the Calcutta High Court. This was a case under the Guardians and Wards Act and the contesting parties were the maternal grand-mother and step-sister of a minor who were his nearest relatives. TREVELYAN and STEVENS JJ. held that there was not, even before the Guardians and Wards Act was passed, anyone other than the father or the mother who had an absolute right to the custody of a Hindu minor.

Kristo Kissor Neoghy v. *Kadermoye Dossee*(1) has been cited with approval in two decisions of this Court; *Ranganaiki Ammal* v. *Ramanuja Aiyangar*(3) and *Thayammal* v. *Kuppanna Koundan*(4). In the latter case SADASIVA AYYAR J. following *Kristo Kissor Neoghy* v. *Kadermoye Dossee*(1) and *Musst. Bhikuo Koer* v. *Musst. Chamela Koer*(2) held

> "that under Hindu law nobody else than the father and mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor), is entitled as a matter of natural right to be and to act as guardian of a minor's person and properties. Recourse must, he said, be had to the Court (representing the rights of the king which are paramount) to even the rights of the parents, where there is no natural guardian alive".

It was not indicated how exceptions might arise in favour of the elder brother or the direct male and female ancestors of a minor and the decision cannot be taken as going really beyond what was decided in the two Calcutta cases. In *Seetharamanna* v. *Appiah*(5) VISWANATHA SASTRIYAR J. expressed the opinion that there is nothing in Hindu law

(1) (1878) 2 C.L.R. 583.
(2) (1897) 2 C.W.N. 191.
(3) (1911) I.L.R. 35 Mad. 728.
(4) (1914) I.L.R. 38 Mad. 1125.
(5) (1925) I.L.R. 49 Mad. 768.

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"which limits guardianship only to the father, the mother, and failing them, the king."

This statement cannot be accepted as correctly stating the position. As I have already pointed out, Hindu law, in so far as it is to be gathered from the ancient texts only, provides for the king having charge of a minor's property. There is nothing to be found in the ancient writings which can be interpreted as giving the father or the mother any right to guardianship. Their present rights in this respect are based merely on custom.

In *Surayya* v. *Subbamma*(1) DEVADOSS and JACKSON JJ. went very far and it is this decision which has caused this appeal to be placed before a Full Bench. They decided that under the Hindu law, in the absence of the father and the mother, the paternal grandmother is the natural guardian of the grandchildren. They said that there was no direct authority for the contention that the paternal grandmother was not the natural guardian of her grandchildren in the absence of their father and mother, but they did not consider the bearing of the two Calcutta cases to which I have referred. The basis of their decision that the paternal grandmother is the natural guardian of her grandchildren is to be gathered from this statement in the judgment:

"Considering the habits and customs of the people of this part of the country, there is no reason why the paternal grandmother should not be considered as the natural guardian of her grandchildren in the absence of their father and their mother."

The short answer to this statement is that neither by Hindu law nor by custom is the grandmother recognized as the lawful guardian of the minor. No

(1) (1927) 53 M.L.J. 677.

member of the family other than the father or the mother has been recognized as having the right of guardianship and this statement receives full support from Mayne, Tenth Edition, page 299; from Mulla's Principles of Hindu Law, Eighth Edition, page 565; and from Trevelyan's Hindu Law, Third Edition, page 231. The Bombay High Court in effect expressed the same opinion in *Re Gulbai and Lilbai*(1). Of course, all other things being equal the nearest relative of the minor should have the position of guardian but if the father and the mother have died no relative can become the lawful guardian without an order of the Court.

I hold that the Courts below were right in refusing to recognize Neelamma as the guardian in law of the minor and in rejecting the claim that her endorsements bound him. It follows that I consider that *Surayya* v. *Subbamma*(2) was wrongly decided and therefore should not be followed.

I would dismiss the appeal with costs.

MOCKETT J.—I entirely agree and am only adding a few words in view of the fact that we are differing from a Bench of this High Court. After the very full investigation into this subject which has been made to-day—the learned Counsel for the appellant referred to all the relevant decisions—I think it is clear that at least at some period of time which it is difficult to fix, the only guardian of a minor was "the king" as he is so described in the texts. But to-day undoubtedly it cannot be argued that the father and in his absence the mother are not the legal guardians. They have been so recognized by usage and custom. Indeed the position of the father is impliedly recognized by statute under section 19 of the Guardians and Wards Act. How all this came about is attractively put in the

(1) (1907) I.L.R. 32 Bom. 50. (2) (1927) 53 M.L.J. 677.

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Tenth Edition of Mayne's Hindu Law, paragraph 231, at page 299. The learned author envisages the natural delegation to the parents by the king of duties so intimately affecting their son, but that idea, as has been pointed out in the authorities to which my Lord has referred, although now having attained the force of law, has never been extended beyond the parents by the Courts, with the exception of the decision in *Surayya* v. *Subbamma*(1). In the case of persons other than the parents, an express delegation or appointment is required and this has been done and is to-day done through the machinery of the Court of Wards. With all respect, I think the learned Judges who decided *Surayya* v. *Subbamma*(1) confused the two positions, namely, a consideration as to who was the most desirable person to be *appointed* as guardian of a minor with a consideration of whether desirability constituted a person a legal guardian automatically. The difference between the two positions is fully recognized by DEVAR J. in *Re Gulbai and Lilbai*(2) and it seems to me that, if these two distinctions are kept apart, this subject presents very little difficulty. Desirability can only be relevant in an application to remove the father or mother or in an application to appoint some one else. I agree that the decision of my learned brothers, DEVADOSS and JACKSON JJ., in *Surayya* v. *Subbamma*(1) is not in conformity with authority and that this appeal must be dismissed with costs.

KRISHNASWAMI AYYANGAR J.

KRISHNASWAMI AYYANGAR J.—It is scarcely necessary for me to add anything after, if I may say so with the utmost respect, the full and elaborate consideration that the matter has received at the hands of

(1) (1927) 53 M.L.J. 677.

(2) (1907) I.L.R. 32 Bom. 50.

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my Lord. The question in short is whether a paternal grandmother can by reason of her relationship alone be held to be a lawful guardian within the meaning of section 21 of the Indian Limitation Act. She may, in a sense, be regarded as a natural guardian as her relationship to the minor is so close that she may be expected naturally to watch over and guard his interests. It is however better to avoid the use of the expression for the present purpose, as we are not concerned with finding whether in the ordinary course of nature she is or is not a fit and proper person to protect the minors' interests in the absence of a nearer relation. The statute has used the expression lawful guardian and the introduction of the term natural guardian can scarcely elucidate discussion, but on the contrary may divert the attention.

The Act does not define the expression "lawful guardian". But it is obvious that we must resort to the personal law of the minor or to other enactments, if any, to ascertain its meaning. The only enactment having a bearing is the Guardians and Wards Act, 1890, which does no more than define the word guardian simpliciter. We have therefore to fall back on the personal law of the minor, viz., the Hindu law to get at the meaning of the expression with which we are concerned. If a person has been appointed or declared a guardian by Court under the Guardians and Wards Act, he or she is undoubtedly a lawful guardian. The difficulty arises only when no such appointment has been made. A lawful guardian can be no other than a person whom the law invests with the right and duty of protecting the property of the minor. Such a person is generally described as a *de jure* guardian, in contrast to a *de facto* guardian. The law does make a

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real distinction between a *de jure* guardian and a *de facto* guardian. A *de facto* guardian may be a relation or even a mere intermeddling stranger who in fact assumes the management of a minor's property though in law he or she has no authority to do so. It is consequently impossible to regard him as a lawful guardian, notwithstanding the fact that, by reason of the decision of Courts, the acts of a *de facto* guardian bind the estate of the minor, if done under the pressure of necessity or for the clear benefit of his estate.

There is in the texts of Hindu law no warrant for regarding a paternal grandmother or indeed even the parents themselves for that matter, as the lawful guardians of a minor entitled to manage his property as of right. The texts bearing upon the point are few and do not throw any direct light on the point under consideration. They only seem to establish the proposition that it is the king alone who as *parens patriae* is the universal and supreme guardian of all the minors and their estates in the kingdom. He of course has the power to delegate his authority and to appoint guardians, and that power is now vested in the Courts established by law by a process of legislative delegation, if I may so call it. As has been pointed out by my Lord, the parents of a minor have been so long and so consistently regarded as lawful guardians by the Courts no less than by the community that an exception in their favour must be held to have been engrafted on the primeval law of the Hindu text writers. The father and in his absence the mother must accordingly be regarded as lawful guardians, not requiring an appointment for acting as such, and this has now to be treated as an integral rule of the law itself. But such a custom is wholly lacking in the case of other remoter relations not excluding the paternal grandmother

however much they may be interested in the welfare of the minor. In the passages cited from Macnaghten and Strange, there would seem to be at the first look a statement of the order of lawful guardianship which includes other relations besides the father and the mother. It is however clear to my mind that the enumeration was not intended to declare the persons to be recognized as lawful guardians under the Hindu law without reference to an appointment by Court. It seems to me that it will be more in consonance with the spirit of the law to hold that what was intended by the enumeration was but an indication of the order of preference which the Court should bear in mind in making the choice of a guardian among the available relations, the dominant consideration being the welfare of the minor. It follows that neither the paternal grandmother nor any other relations beyond the mother can be regarded as possessing an inherent right to act as lawful guardians for the purposes of section 21 of the Limitation Act. I have the less hesitation in assenting to this view, as I consider that it will tend to the better protection of the minor's properties than if I were to hold that a series of relations commencing from the elder brother and including the paternal and the maternal relations have the inherent right directly and without an appointment by the Court to assume charge of a minor's estate and proceed to keep alive debts on his behalf. Such an expansion of the rule is, it seems to me, fraught with dangerous consequences and, in the absence of binding authority, should not be upheld. I concur in the judgment just now pronounced by my Lord.

V.V.C.