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SHEORAM TIWARI v. THAKUR PRASAD.

STANLEY, C.J., and BURKITT, J.—We are of opinion that the proceeding of the Munsif was not vitiated by the fact that it was taken on a Sunday. At the utmost it seems to us that the proceedings may have been irregular, but that any irregularity was cured by the consent of the parties. It is not necessary for us to determine whether the Lord's Day Act applies to this country, but we should be slow to hold that it did, as it would be manifestly inconvenient to do so, the Act being entirely unsuited to the circumstances of the country. We may mention that in the case of *Param Shook Doss* v. *Rasheed Ood Dowlah* (1) it was held that it had no application in this country. We dismiss the appeal with costs.

Appeal dismissed.

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January 28.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

MAHADEO PRASAD (OPPOSITE PARTY) *v.* BINDESHRI PRASAD (APPLICANT). *

Act No. VIII of 1890 (*Guardians and Wards Act*)—*Guardian and minor*—*Arbitration*—*Appointment of guardian not to be settled by arbitration.*

The appointment of a guardian to a minor, not being a matter of private right as between parties, is not a question which can be settled by reference to arbitration.

THE facts of this case are as follows:—One Bindeshri Prasad, the managing member of a joint Hindu family governed by the Mitakshara, applied to the District Judge of Allahabad under section 10 of the Guardians and Wards Act (No. VIII of 1890) to be appointed guardian of the person and property of his minor brother Kedar Nath. The application was opposed by Sukhdeo Ram and Mahadeo Prasad, grandfather and father of Kedar Nath's wife, Musammat Janki.

The District Judge with the consent of the parties referred the matter to the arbitration of a gentleman of high social position, Kunwar Bharat Singh, and the arbitrator by his award dated the 4th March 1907 recommended that Bindeshri Prasad be appointed guardian of the person and property of Kedar Nath. In accordance with this award the District Judge on the 30th of April 1907 appointed Bindeshri to be the guardian of the person and

* First Appeal No. 71 of 1907 from an order of C. Rustomjee, District Judge of Allahabad, dated the 30th of April 1907.

(1) (1874) 7 Mad., H. C., Rep., 285.

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property of the minor. Mahadeo Prasad appealed to the High Court against this order, one of the grounds of appeal being that the District Judge had no power to refer the matter to arbitration and to accept the award.

Babu *Satya Chandra Mukerji* (for whom Lala *Kedar Nath*,) the appellant.

Dr. *Satish Chandra Banerji* (for whom Babu *Lalit Mohan Banerji*), for the respondent.

AIKMAN, J.—This is an appeal from an order of the learned District Judge of Allahabad appointing a guardian of the person and property of a minor named Kedar Nath under the provisions of the Guardians and Wards Act, 1890. The appellant is the father-in-law of the minor. The respondent, who was appointed guardian by the learned Judge, is the minor's elder brother. Each of the parties to this appeal claimed to be appointed guardian. It appears that on the joint application of the parties the question as to who should be appointed guardian was referred to the arbitration of Kunwar Bharat Singh, a gentleman against whom no imputation whatever is made. It appears from the order of the learned Judge that he decided the question as to who should be the guardian solely on the award of the arbitrator. In appeal here it is contended that under Act No. VIII of 1890 the District Judge was not competent to refer to an arbitrator the question as to who should be appointed guardian. In my opinion this contention must prevail. Some special Acts, for instance, the Act dealing with religious endowments, No. XX of 1863, empower a Court to refer matters in difference to arbitration. No such power is given in the Guardians and Wards Act, and it is easy to understand why this should be so. When there are rival claimants to be appointed as guardian these claimants are not in the position of ordinary litigants who can refer any matter in dispute between them to a tribunal selected by themselves. The guiding principle in appointing a guardian is the consideration of what is best for the welfare of the minor. In my opinion the intention of the law is that the question as to who is the best guardian of the minor's interests is one to be decided by the Court, and that a Court cannot delegate its functions to any arbitrator, however competent and above suspicion that arbitrator

may be. If rival claimants to a certificate of guardianship are allowed to refer the dispute between them to an arbitrator, a door would be open to collusion and the interests of minors might suffer. For these reasons I am of opinion that this appeal must be sustained.

KARAMAT HUSEIN, J.—This is an appeal from an order passed by the learned District Judge of Allahabad under the Guardians and Wards Act (No. VIII of 1890). The facts are these:—One Bindeshri Prasad, the managing member of a joint Hindu family governed by the Mitakshara, applied to the District Judge of Allahabad under section 10 of the Guardians and Wards Act (No. VIII of 1890) to be appointed guardian of the person and property of his minor brother Kedar Nath. The application was opposed by Sukhdeo Ram and Mahadeo Prasad, grandfather and father of Kedar Nath's wife, Musammat Janki.

The learned District Judge with the consent of the parties referred the matter to arbitration, and the arbitrator by his award, dated the 4th March 1907 recommended that Bindeshri Prasad be appointed guardian of the person and property of Kedar Nath. In accordance with this award the learned District Judge on the 30th of April 1907 appointed Bindeshri to be the guardian of the person and property of the minor. Mahadeo Prasad appeals to this Court against this order. One of the grounds of appeal is that the learned District Judge had no power to refer the matter to arbitration and to accept the award.

This objection is in my opinion sound. The State is theoretically the guardian of all its minor subjects. As an old writer observes, "the law protects their persons, their rights and estates, excuseth their laches and assists them in their pleadings; the judges are their counsellors, the jury are their servants and the law is their guardian"—(Trevelyan on the law relating to minors, page 15). The State being the guardian of all minor subjects delegates by legislation its guardianship to such of its tribunals as it deems fit. In British India the guardianship of the person and property of minors has been given to District Courts, and they have been authorized to appoint guardians in certain specific ways. The law on the subject is now contained in the Guardians and Wards Act (No. VIII of 1890.) The course to be followed

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by the District Court in appointing or declaring a guardian is prescribed in sections 11 (1), 13, 17 and 46. Under section 13 it shall hear such evidence as may be adduced in support of or in opposition to the application. Under section 17 it shall be guided by what . . . . . appears . . . . . to be for the welfare of the minor. Section 46 allows the District Court to call upon the Collector or upon any Court subordinate to it for a report on any matter arising in any proceeding under the Act and treat the report as evidence.

Such are the powers given by the Act to a District Court for the purpose of appointing or declaring a guardian of the person or the property of a minor. There is nothing in the Act to authorize a District Court to refer the question of the appointment or declaration of a guardian to arbitration. The learned District Judge had, therefore, no power to refer that matter to arbitration.

It might be contended that section 647 of the Code of Civil Procedure empowered the learned District Judge to make such reference, but there is no force in this contention. The section in my opinion deals with procedure, and procedure alone, and does not touch the substantive law of arbitration. The reference by the learned District Judge in the case before me was no doubt made with the consent of the parties, but that would give him no power. Besides, a party is allowed by law to submit any dispute regarding any right of his own to arbitration, but the question of guardianship stands upon a different footing and is not one of the private civil rights of any private person.

For the above reasons I hold that the course adopted by the learned District Judge was contrary to law and I therefore set aside his order and remand the case under section 562 of the Code of Civil Procedure with directions to readmit the application under its original number in the register and proceed to determine it in accordance with law.

BY THE COURT.—The appeal is allowed, the order of the learned District Judge is set aside, and the case is remanded to his Court with directions to readmit the application under its original number in the register and proceed to determine it according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

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January 28.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

MAKUND RAO (OBJECTOR) *v.* JANKI BAI AND ANOTHER (DECREE-HOLDER).*

Act (Local) No. I of 1903 (Bundelkhand Encumbered Estates Act), sections 2 and 12—Joint decree—Execution of decree—Effect of some out of several joint judgment-debtors taking advantage of the Act.

Five out of six joint judgment-debtors took the benefit of the Bundelkhand Encumbered Estates Act, 1903. A notification was issued under the Act, but the decree-holders did not make any claim within the time prescribed. *Held* that the decree-holders could not recover from the judgment-debtor who had not taken advantage of the Act anything more than his proportionate share of the judgment debt.

THE facts of this case are as follows :—

On the 9th of June 1893 Musammat Janki Bai and Musammat Lachmi Bai obtained a decree against six persons, namely, Atma Ram, Sita Ram, Balkishen, Raghunath, Krishan and Madho Rao. The decree was for a sum of Rs. 5,091-9-0 with interest and costs. After this decree was passed, all the judgment-debtors with the exception of Madho Rao took the benefit of the Bundelkhand Encumbered Estates Act, 1903. A notification was issued calling upon creditors to submit their claims. The decree-holders put in their claim against the applicants, but they did not come in within the time required by the Act, and their claim was rejected. The decree-holders then applied for execution of their decree against the son of Madho Rao, and sought to execute the whole decree against him. The judgment-debtor objected that under the circumstances he was only liable for his proportionate share of the decretal amount. This plea was, however, rejected, and the first Court ordered execution to proceed against Makund Rao for the whole amount. Makund Rao thereupon appealed to the High Court.

Babu *Durga Charan Banerji*, for the appellant.

The Hon'ble Pandit *Madan Mohan Malaviya* and Munshi *Iswar Saran*, for the respondents.

AIKMAN and KARAMAT HUSEIN, JJ.—This appeal arises out of an application to execute a decree, dated the 9th of June 1893, which was passed in favour of the respondents Musammat Janki Bai and Musammat Lachmi Bai against six persons, namely, Atma Ram, Sita Ram, Bal Kishen, Raghunath, Krishan and Madho Rao. The appellant here is the son of the last-named

* First Appeal No. 134 of 1906, from a decree of Parmatha Nath Banerji, Subordinate Judge of Jhansi, dated the 17th of February 1906.

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judgment-debtor. The decree was for the sum of Rs. 5,091-9-0 and for costs and interest. It appears that all the judgment-debtors save Madho Rao took the benefit of the Bundelkhand Encumbered Estates Act, 1903. The usual notification was issued calling upon creditors to submit their claims. The respondents decree-holders put in their claim against the applicants, but, unfortunately for themselves, they did not put forward their claim within the time required by the Act, and the Special Judge refused to consider it. Now there is in the Act a very stringent provision to be found in section 12, which runs as follows:—"Every claim against the proprietor in respect of a private debt shall, unless made within the time and in the manner required by this Act, be deemed for all purposes and on all occasions to have been duly discharged." That the judgment debt is a private debt within the definition of section 2 of the Act does not admit of any doubt. It follows from the provisions of section 12 that, so far as the liability of the five judgment-debtors who took advantage of the Act is concerned, the decretal debt must be deemed to have been duly discharged. As the respondents decree-holders could not proceed against the other judgment-debtors, they seek now to recover from the appellant the whole of the judgment-debt. The appellant took objection in the Court below that under the circumstances he was only liable for his proportionate share of the decretal amount. This objection was overruled by the learned Subordinate Judge who held that the decree being a joint one each judgment-debtor is liable for the whole of it. This is no doubt true, but we are of opinion that the learned Subordinate Judge did not give due effect to the terms of section 12 of Local Act No. I of 1903 quoted above. No doubt when a joint decree is passed against several judgment-debtors the decree may be executed against any one of these judgment-debtors, and if one of them satisfies the whole of the decree he would have his remedy by taking proper steps to enforce a right of contribution against his co-judgment-debtors. But even a joint decree can only be executed for such part of the decretal debt as has not been discharged. In our opinion the effect of section 12 of the Encumbered Estates Act is to discharge the decree to the extent of the joint liability of

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the five judgment-debtors who took advantage of the Act. It appears to us that the respondents cannot treat the provisions of this section as a nullity and seek to enforce a judgment debt which has by the provisions of the law been *pro tanto* duly discharged. If the appellant had to satisfy the whole of the debt, we are of opinion he could not enforce any right of contribution against his co-judgment-debtors, as they could rely on the terms of the Act and plead in answer to a suit for contribution that their share of the judgment debt must be deemed for all purposes to have been discharged. This result would be owing, not to any fault on the part of the appellant, but to the laches of the respondents in not having put forward their claim before the Special Judge within the time allowed by law. We think, therefore, that the order of the Court below disallowing the appellant's objection was wrong. We allow the appeal, and, setting aside the order of the Court below, remand the case to that Court with directions to proceed with the execution on the basis that the appellant is not liable for the whole of the judgment-debt but only for his proportionate share thereof. The appellant will recover from the respondent $\frac{11}{12}$ of the costs incurred by him in this Court. The respondents will recover from the appellant $\frac{1}{12}$ of the costs incurred by them in this Court. The costs in the Court below will abide the result.

Appeal decreed.

Before Mr. Justice Aikman and Mr. Justice Karamat Husein.

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January 29.

FIROZI BEGAM (PLAINTIFF) *v.* ABDUL LATIF KHAN AND ANOTHER (DEFENDANT).*

Civil Procedure Code, section 549—Security for costs—Non-compliance with order for security—Appeal rejected—Application to restore appeal—Application refused.

Held that no appeal will lie from an order refusing to readmit an appeal which had been rejected under section 549 of the Code of Civil Procedure on account of non-compliance with an order to furnish security for costs. *Lekha* v. *Bhauna* (1) followed. *Kuar Balwant Singh* v. *Kuar Doulut Singh* (2) distinguished.

IN this case one Musammat Firozi Begam, a lady residing in the Rampur State, instituted a suit in the Court of the

* First Appeal No. 24 of 1907, from an order of D. R. Lyle, District Judge of Moradabad, dated the 16th of February 1907.

(1) (1895) I. L. R., 18 All., 101. (2) (1886) L. R., 13 I. A., 57.