1916

JHABBA LAL v. SHIB CHARAN DAS.

and get them decided adversely to the general body of creditors. Decisions in such matters must be passed against some body representing the estate and must be such as will bind the estate in law.

Fortunately no harm can be done by dismissing this appeal upon this purely technical but important point. The applicants have appealed in another appeal against the order on the merits which was passed in their favour. That appeal has been returned to the Insolvency Court for re-hearing and we have pointed out to the Insolvency Court that the receiver is a necessary party to the litigation, which at the re-hearing can be determined on the merits in favour of either one party or the other.

We, therefore, dismiss the appeal with costs.

STUART, J.—I concur.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Stuart.

1916
October, 30.

AMIR KAZIM (APPLICANT) *v.* MUSI IMRAN AND OTHERS (OPPOSITE PARTIES)*.

Act No. IV of 1912 (Indian Lunacy Act), section 72—Lunatic—Appointment of guardian of the person—Wife of lunatic not necessarily excluded by section 72.

Section 72 of the Lunacy Act is a kind of warning that particular care should be exercised by the court where a person is entitled to inherit a part of the property of a lunatic, and is therefore benefited by his death, to see that the appointment of such person as guardian of the person of the lunatic is a beneficial one.

The section, however, does not absolutely preclude such an appointment and in some cases the appointment of, for instance, the wife of the lunatic may be the most suitable, notwithstanding that she is one of the heirs. *Fazal Rab* v. *Khatun Bibi* (1) distinguished.

THIS was an appeal arising out proceedings taken under the Indian Lunacy Act, 1912, for the appointment of a guardian to the person and the property of a certain lunatic. The facts of the case are fully stated in the judgement of the Court.

Mr. *B. E. O'Conor*, for the appellant.

Dr. *S. M. Sulaiman*, for the respondents.

WALSH and STUART, JJ. :—Five connected appeals are brought before us, as to two of which we direct an adjournment, namely,

* First Appeal No. 152 of 1915, from an order of E. C. Allen, Additional Judge of Moradabad, dated the 1st of May, 1915.

(1) (1892) I. L. R., 15 All., 29.

Nos. 145 and 146, and as to the remaining three, decrees must be drawn up in accordance with this judgement. It is not necessary to discriminate between the appeals of the parties thereto. The question raised involves really one simple issue, though it is difficult, no doubt, to determine it. The facts are sufficiently set out in the judgement of the court below. The present position is not satisfactory and the order of the court below must be reversed. The matter relates primarily to the person and also to the property of one Ali Imran, a young man who was brought up at St. George's College, Mussoorie, where he was educated together with his present guardian, and later at Jesus College, Oxford, and who was the son of a wealthy man who appears to have been of somewhat dissolute habits and somewhat of a miser except in respect of his son's education. The young man left his wife in India and the very affectionate correspondence which passed between them shows that in certain matters the father and the wife did not get on, and that the son himself felt this rather keenly. In course of time the son returned to India, and unfortunately, whether from some hereditary cause or vicious habits or the effects of the sun, he became ill at the end of 1913 or early in 1914, and is now what may be regarded as incurably insane and unable to manage his affairs. The property is considerable, and there are other persons, some of them females, and one of them either a minor or until recently a minor, interested in it. He was for some time at Agra in the care of one doctor, and after his father's death, which occurred in August, 1914, he was in the charge of another medical man. Between these two stages of his history, the applications were made out of which the present appeals arise. These were made in September, 1914, and were for the guardianship of the person of the lunatic. Now, as too frequently happens in these cases, various members of the family are desirous of being appointed and have been employed in making charges of one sort and another against each other. The dispute is substantially between the young wife and her father, with whom she is now residing, on the one side, and one Nazar Hasan, on the other. The latter has been appointed guardian of the person. He is in fact managing and controlling the property of the lunatic. Serious allegations are made against him as regards

1916

AMIR KAZIM v. MUSI IMRAN.

his past conduct both with the father and with the lunatic's property, and there is a controversy as to whether or not he is a *persona grata* with the lunatic. On the other hand he makes charges against the lunatic's wife. We do not think it necessary to come to any conclusion about the truth of these accusations, nor to go in any detail into the medical evidence. Substantially the learned Judge has founded himself upon this argument that Nazar Hasan was undoubtedly the confidant and trusted *factotum* of the deceased father; that he helped him to look after his affairs and was trusted by him, and naturally after the father's death slipped into the position which he now occupies, and controlled and managed the property of everybody including that of the lunatic. Now we are not saying for one moment that the learned Judge was wrong in principle in saying that a person indicated by the conduct of a deceased father is a desirable person; but in this particular case there are circumstances which we think outweigh that consideration, and, looking at the matter broadly, we have come to the conclusion that it is far better for the lunatic himself that he should be in the personal custody of his own wife, so long at any rate as she resides with her father. She is the person naturally indicated for the duty, and it is sufficient to say that Nazar Hasan has failed to show anything disentitling her to be trusted with that duty, at any rate so long as she resides with her father, and we therefore take the course which may be unusual but which seems to us within our jurisdiction, of appointing both the wife and her father to exercise the duties jointly of guardian of the person of the lunatic under section 71, so long as they reside together, and the lunatic must be under their custody, not necessarily under their roof, but sufficiently near them to be really under their custody. The Appellate Court, if the materials before it are sufficient, can make any order which the court below might have made. Now we think the learned Judge was possibly misled by the argument addressed to him based upon section 72. Section 72 says that the legal heir of a lunatic shall not be appointed unless the court consider that such an appointment is for the benefit of the lunatic. This section is a little odd. In this case there is no such thing as a legal heir; there are several heirs, and of course the wife is one, but it cannot mean

that in the case of a wife, who under some systems of law may be the sole heir, she is necessarily an undesirable person to be appointed, and indeed we can but endorse the established principle in English Law that a wife has the first claim, and when the section is carefully looked at, it would appear almost tautologous, because no appointment ought to be made by the court which the court does not consider to be for the benefit of the lunatic. We think what the section means is that it is a kind of warning that particular care should be exercised by the court where a person is entitled to inherit a part of the property of the lunatic, and is therefore benefited by his death, to see that his appointment is a beneficial one. The case of *Fuzal Rab* v. *Khatun Bibi* (1) was decided under section 10 of Act No. XXXV of 1858, which left the court no discretion, and it is therefore distinguishable. We are satisfied that this appointment will be for the benefit of the lunatic. The appeal No. 152, which is actually before us, must be allowed in part to the extent which we have already declared, and we make the appointment of the two persons, the father-in-law and the daughter, jointly while they reside together. In the other appeals the decree must be drawn up so as to correspond with that order.

[The rest of the judgement deals with a question as to the Collector taking over charge of the property.]

Order modified.

APPELLATE CRIMINAL.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

EMPEROR *v.* JEOLI.*

1916 *November*, 1.

Act No. XLV of 1860 *(Indian Penal Code), sections* 299 *and* 301—*Murder—Intention to kill one person, but death of another actually caused.*

Where a person intending to kill one person kills another person by mistake, he is as much guilty of murder as if he had killed the person whom he intended to kill. *Public Prosecutor* v. *Mushunooru Suryanarayana Moorty* (2) and *Agnes Gore's Case* (3) referred to.

* Criminal Appeal No. 848 of 1916, from an order of W. D. Burkitt, Sessions Judge of Kumaun, dated the 7th of October, 1916.

(1) (1892) I. L. R., 15 All., 29. (2) (1912) 13 Indian Cases, 833.

(3) 77 English Rep., 853.