in that event he will be entitled to realize the amount so paid and amount due on his mortgage by sale of the mortgaged property. In case of his failure to redeem the property as aforesaid his suit for sale will stand dismissed with costs in all courts The defendant appellant is entitled to his costs in all courts.

Appeal decreed.

MISCELLANEOUS CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Sulaiman.

DEBA NAND (PETITIONER) *v.* ANANDMANI (OPPOSITE PARTY)*

1920 *August*, 7.

Hindu Law—Guardian—Will—Father's power to appoint guardian by will.

A Hindu father can by word or writing nominate a guardian for his children, the nomination taking effect after his death. He is unrestricted in the choice of a guardian, and may exclude even the mother from the guardianship. *Soobah Doorgah Lal Jha* v. *Raja Neelanund Singh* (1) and *Albrecht* v. *Bathee Jellamma* (2) referred to.

THE facts of this case sufficiently appear from the order of the Court.

Munshi *Damodar Das*, for the petitioner.

Mr. *M. L. Agarwala*, for the opposite party.

MEARS, C. J., and SULAIMAN, J. :—This is a reference by the Local Government under Rule 17 of the Rules and Orders relating to the Kumaun Division. The facts are clearly set forth in the letter of reference.

The plaintiff Anandmani was the minor son of one Chandramani and formed a joint Hindu family with him. Chandramani by a written will appointed the defendant Deba Nand, his nephew, a guardian of the plaintiff's person and property. On Chandramani's death the testamentary guardian in 1910 took over the management of the estate. In 1918 Musammat Parbati, the widow of Chandramani, acting as the next friend of her minor son Anandmani, brought the suit, out of which this reference has arisen, for rendition of accounts, damages and for the removal of Deba Nand from the managership of the property. The case for the plaintiff was that no valid will had been made by the deceased, nor had he any authority to appoint a guardian of his minor son by will, and that the defendant had been guilty of

* Civil Miscellaneous No. 286 of 1920.

(1) (1867) 7 W. R., C.R., 74. (2) (1911) 22 M.L.J., 247.

1920

SEBA NAND v. NANDMANI.

mismanagement. The defendant pleaded that the will was a valid one and was binding on the plaintiff, and denied the allegations of mismanagement. The court of first instance decreed the suit. On appeal the District Judge found that the will had been validly executed by Chandramani, who had been of sound disposing mind, and that no *mala fides* or lack of prudence, due diligence or care on the part of the defendant had been established. On these findings he set aside the decree of the first court and dismissed the suit. The learned Commissioner in second appeal accepted all the findings of fact, but holding that the plaintiff's father had no power to appoint a guardian of the minor's property by will, restored the decree of the court of first instance decreeing the suit.

The main question for our consideration is whether a Hindu father has under the Hindu law power to appoint by will a guardian of the property of his minor son. The difficulty is caused by the circumstance, as Mr. Mayne says, that "little is to be found on the subject of guardianship in works on Hindu law." There can, however, be no doubt that the father is the natural guardian of his minor son and ordinarily is the best person to judge under whose care and protection his son should be brought up and by whom his property should be managed during his minority. The power to appoint a testamentary guardian would be quite consonant with the parental authority which a Hindu father has a right to exercise over his son. At least there seem to be no provisions of Hindu law opposed to the exercise of such a power. As early as 1866 it was laid down in the case of *Soobah Doorgah Lal Jha* v. *Raja Neelanund Singh* (1) that "No doubt the mother is the natural guardian of her child; and were any person to attempt to deprive her of this right without authority, her right would under ordinary circumstances be supported; but we are not aware of any provisions of the Hindu law, nor have any such been shown us in support of the Principal Sudder Ameen's view, which prohibit a father from appointing, by writing or by word, any other person than the mother to be the guardian of his minor children." The facts of that case are certainly distinguishable from those of the present case, but the statement

(1) (1867) 7 W. R., C. R., 74 (75).

of the law contained therein has not, so far as we are aware, been ever doubted. In fact the case has been accepted by several eminent commentators as an authority for the proposition that a Hindu father can by word or writing nominate a guardian for his children, the nomination taking effect after his death, and that he is unrestricted in the choice of a guardian and may exclude even the mother from the guardianship. *Vide* Trevelyan's Law of Minors, Chapter IX, p. 62, 5th Edition; Ghosh's Hindu law, page 1013, 3rd Edition; and Dr. Gour's Hindu Code, paragraph 59, page 401.

In the case of *Albrecht* v. *Bathee Jellamma* (1) the rule that a Hindu father has power to appoint a testamentary guardian for his minor son, as enunciated in the case of *Soobah Doorgah Lal Jha* v. *Raja Neelanund Singh* (2), was quoted with approval. The learned Judges, however, thought that the wishes of the father were not conclusive and that in a case under the Guardians and Wards Act the paramount consideration would be the welfare of the minor, and that if it would be injurious to the minor to give effect to the father's wishes the Court will interfere even in the father's life-time.

The case before us is not one arising under the Guardians and Wards Act, where the District Judge may have very wide powers of interference. Here the suit in substance is one brought by the mother of the minor as his next friend, and is directed against the defendant who had been duly appointed guardian by the minor's father under a will. No act of misfeasance or bad management has been proved against him. We are of opinion that the mother acting as the next friend of the minor, is not under the circumstances of this case entitled to an order removing the defendant from the guardianship of the property of the minor, as on the authorities the power of a Hindu father to appoint a testamentary guardian of the property of his minor son seems to be well recognized. If the defendant is not a fit and proper person to remain a guardian of the minor's property, it may still be open to persons interested in his welfare to seek redress under the Guardians and Wards Act.

Having regard to the fact that all the allegations as to the invalidity of the will and the bad faith, negligence and bad

(1) (1911) 22 M. L. J., 247. (2) (1867) 7 W. R., C. R., 74.

1920

DEBA NAND v. ANANDMANI.

management of the defendant have been found against the plaintiff, the suit cannot be said to have been for the benefit of the minor. The proper person liable for the costs of the defendant is Musammat Parbati, the next friend herself.

Our answer to the questions referred to us are therefore as follows:—

(1) The learned Commissioner was not right in holding that in this case the deceased father had no power to appoint a guardian to the property by will and in decreeing the suit on this ground.

(2) The costs of litigation including the costs of this reference should be borne by Musammat Parbati, the next friend of the minor.

Reference answered.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Gokul Prasad.

1920
August, 10.

A. CURLENDER AND OTHERS (DEFENDANTS) *v.* ABDUL HAMID AND OTHERS (PLAINTIFFS.)*

Act IX of 1908 (*Indian Limitation Act*), *sections* 19 *and* 20—*Acknowledgment of liability—Part payment of principal.*

It is not necessary that the writing referred to in section 20 of the Indian Limitation Act, 1908, must itself show that the payment made is made as part payment of the principal sum due. It may, for example, be obvious from the fact that no interest was due at the time of making the payment that it could only have been made in part payment of the principal. *In the matter of Ambrose Summers* (1) followed. *Sukharam Manchand* v. *Keval Padamsi* (2) referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *M. L. Agarwala* and Babu *Harendra Krishna Mukerji*, for the appellants.

Mr. *Nihal Chand*, for the respondents.

PIGGOTT and GOKUL PRASAD, J J.:—The circumstances under which the present appeal has arisen are as follows:—

The plaintiff is the proprietor of a firm of bone dealers in Benares, called Abdul Hamid and Sons. The defendants

*Second Appeal No. 1347 of 1917, from a decree of D. Dewar, District Judge of Benares, dated the 16th of July, 1917, reversing a decree of Udit Narain Singh, Subordinate Judge of Benares, dated the 23rd of August, 1916.

(1) (1896) I. L. R., 23 Calc., 592. (2) (1919) I. L. R., 44 Bom., 892.