Before Mr. Justice Walsh and Mr. Justice Ryves.

KHUNDI DEVI (DEFENDANT) *v.* CHOTE LAL (PLAINTIFF).* 1922

April, 4, 24.

Act No. VIII of 1890 (Guardians and Wards Act), section 7—Appointment of guardian to a minor—Discretion of Judge—Procedure—Judge not bound to observe the same formality of procedure as in an ordinary civil suit.

In proceedings under the Guardians and Wards Act the District Judge exercises a parental jurisdiction and is not bound to observe that formality and precision of procedure which the Code of Civil Procedure exacts from a Court in the trial of a suit properly so called. The High Court will not upset an order appointing a guardian to a minor, if the order is in itself a reasonable one, merely because the Judge has to some extent failed to observe rules of procedure and evidence.

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

Munshi *Girdhari Lal Agarwala*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

WALSH and RYVES, JJ. :—This is one of those difficult cases in which the mother appeals against an order appointing the father personal guardian of the minor, thereby taking out of the custody of the said mother her infant boy of six. It is needless to dwell on the painful nature of a case of this kind, which is bound to inflict mental suffering upon one or other of the parties, whatever order the court may think it its duty to pass. Unfortunately, the father and mother are living apart and, at present, seem unable to keep a happy home in one another's company. The mother is a *pardanashin* lady who resides with and is doubtless under the influence of her own family, who are said to be well-to-do merchants. To the knowledge of the learned Judge who disposed of the matter, (and in these guardianship cases one has to assume a good deal of knowledge on the part of the court, which is really a court trusted by law to decide them, although the matters may not appear quite strictly on what is called the record), there had been previous unpleasantness between this married couple. The mother had applied for an order against her husband as a lunatic, an application which, judging from the fate it sustained, provided some evidence against herself, which might have justified a similar application against her; and one of the uncles, who is accused of being behind this application, had made what the same Judge described as a most impudent application to be appointed guardian himself, which he did not even attend to support. As long as I sit in this Court, at any rate, I shall turn a deaf ear to all argu-

* First Appeal No. 13 of 1922, from an order of T. K. Johnston, District Judge of Agra, dated the 14th of January, 1922.

1922

KHUNDI DEVI v. CHOTE LAL.

ments based upon proceedings under the Guardians and Wards Act which attack them on the ground of a lack of that formality and precision of procedure which the Code exacts from a court in India in a trial of a suit properly so called. The exercise of a parental jurisdiction in guardianship matters by a District Judge is by no means to be weighed in golden scales like the ordinary trial of a suit between parties for money or land, and under the painful circumstances of this case, and with the previous knowledge that the learned Judge must have had about the family, we think the learned Judge was quite entitled to receive and to weigh a report called for by him from a person in the responsible post of a Tahsildar under the control of the Collector. We are not impressed by Mr. *Agarwala's* contention that he has acted without proper regard to the Act of Parliament, Statute, or the Laws of Evidence, or the procedure laid down by the Civil Procedure Code. On the whole, the order of the learned Judge appears to us to be a reasonable one. Mr. *Agarwala* has succeeded in making one real attack upon it. The learned Judge said he was prepared to reconsider the matter if the mother got an order for separate maintenance from a Civil or Criminal Court. This is perhaps hardly a relevant criterion to test the *bona fides* of an Indian *pardanashin* lady living with her family as this lady is doing. No doubt the Judge wanted to see whether there was a genuine test which could be applied to the reasons which animated the lady in living apart from her husband. We agree with Mr. *Agarwala* that this was putting perhaps too severe a strain upon the lady. We have certain statements before us made on affidavit by the father himself in an *interim* application to this Court, and also made by a *pairokar* of the lady (we should have thought more of the lady and her relations if one of them had had the courage to make an affidavit himself instead of leaving it to a *pairokar*), which the learned Judge had not, and even assuming that the learned Judge had not sufficient reasons for making the order that he did, we are satisfied, on the additional matter before us, that the order which he made was right. Painful though it may be to the mother, we think there is nothing which could justify us in depriving the father of his natural and legal right to the custody of his own child, assuming as we believe him to be an ordinary respectable citizen with the natural feelings of

a father towards his son. We have no evidence which would justify us in treating him as a person who was likely to do any injury either to the person or property of his own child. We should have been better satisfied if he had stated on oath the women folk who assist him in keeping his house and under whose eyes the boy will be when he comes into the house. The father is stated, on the record, to be living alone, and he has not mentioned the matter in his own affidavit, but we are assured that he has in fact a sister living with him who would presumably be responsible and trusted by him to look after the child in the way in which even a loving father is unable to do. We should also have preferred to know exactly what intentions the father has with regard to the immediate education of the child, particularly as we are taking it away from the mother. It is necessary for every court to provide, as far as it possibly can, against the risk of a child being allowed to run wild. But these are matters which must be usually attributed to the good sense and good feelings of a father who wants to look after his own child, and the absence of any explanation with regard to the arrangements does not appear to us sufficient reason for holding our hand with regard to the execution of the order; but we do think there are grounds which we must insist upon as in the nature of a security for the father's proper treatment of the son in the near future.

We confirm the order of the Judge appointing the father guardian of the child and of the property. We remove the stay which has been imposed by previous orders of this Court and direct the mother, in whose custody the child is, to produce the child or to make arrangements for its production in the court of the District Judge next Saturday morning for the purpose of handing it over to the father.

We adjourn the further hearing of the case until Monday, the 24th of April, 1922. In the interval Chotey Lal, the father, must file an affidavit, a copy of which must be supplied to Mr. *Agarwala*, stating the arrangements which he has made or proposes to make, for the female relations who will look after his house and who will look after the boy, and the arrangement which he proposes to make for the boy's education. The nature of his affidavit, and his method of living up to it, will be the test of his *bona fides*. On the other hand, as a *locus pœnitentiæ*, as we recognize that it must be a painful matter

1922

KHUNDI DEVI v. CHOTE LAL.

for the mother, although we do not direct it, we give the mother or any brother of hers, Basdeo for example, whom she may appoint, liberty to appear before us in person on the date fixed to give evidence, if he sees fit or is so advised by Mr. *Agarwala*, on the final disposal of this matter when the affidavit of Chotey Lal is filed.

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In particular and without prejudice to the generality of the foregoing observations, we direct that an order be issued forthwith and communicated to the District Judge at Agra, that Musammat Khundi Devi either produce or make arrangements for producing her infant son before the District Judge next Saturday at 10.30 a.m. for the purpose of handing the boy over to the father, and that Chotey Lal do file an affidavit in this Court in accordance with our directions.

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After hearing the father cross-examined on the additional affidavit which he has filed in accordance with our order, we have no hesitation in confirming the order of the court below and dismissing the appeal.

Appeal dismissed.

1922

April, 26.

Before Mr. Justice Piggott and Mr. Justice Walsh.

GOSWAMI PURAN LALJI (PLAINTIFF) *v.* RAS BIHARI LAL AND ANOTHER (DEFENDANTS).*

Hindu law—Endowment —Failure of nominated manager to act—Settlor's widow competent to assume the management of the endowed property, but not to appoint a new manager by will.

A Hindu, by deed dated the 15th of May, 1871, created an endowment of certain property in favour of an idol, and named a certain person as manager of the endowed property. The manager so nominated never in fact took charge of the property; but after the death of the settlor his widow took possession and managed the property in accordance with the intentions of her husband. The widow, however, proceeded to make a will appointing a new manager in succession to herself, and upon her death, the heir of the settlor sued to have this appointment set aside.

Held that the suit would lie. Although the widow was justified as her husband's representative in assuming charge of the endowed property, and might in her life-time have nominated a manager whose appointment would have enured after her death, she had no power to dispose of the managership by will in the presence of an heir of the settlor.

Gossami Sri Gridhariji v. *Romanlalji Gossami* (1), *Chandranath Chakrabarti* v. *Jadabendra Chakrabarti* (2), *Rajeshwar Mullick* v. *Gopeshwar Mullick* (3), *Sheoratan Kunwari* v. *Ram Pargash* (4), and *Sheo Prasad* v. *Aya Ram* (5), referred to.

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* First Appeal No. 44 of 1920, from a decree of Peare Lal Katara, Subordinate Judge of Muttra, dated the 16th of January, 1920.

(1) (1889) I. L. R., 17 Calc., 3.
(2) (1906) I. L. R., 28 All., 689.
(3) (1907) I. L. R., 35 Calc., 226.
(4) (1896) I. L. R., 18 All., 227.
(5) (1907) I. L. R., 29 All., 662.