

APPELLATE CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

1936
January 13

GANESHJI PANDE AND OTHERS (APPLICANTS) *v.* BHAGIRATHI AND ANOTHER (OPPOSITE PARTIES)*

Guardians and Wards Act (VIII of 1890), section 7—Guardian appointed by will—Probate not obtained—Application for certificate of guardianship—Whether maintainable.

Where a person has been appointed guardian of a minor under a will, it is not necessary for him to take out probate of the will as a condition precedent to the maintainability of an application by him under the Guardians and Wards Act to be appointed guardian of the minor, and the court must consider and decide the application on the merits.

Mr. *A. Sanyal*, for the appellants.

Mr. *B. Malik*, for the respondents.

COLLISTER and BAJPAI, JJ.:—This is an appeal from an order which has been passed by the District Judge of Benares in respect to an application for guardianship.

One Pandit Devi Prasad died on the 25th of June, 1931, leaving a minor son by name Sita Ram. On the 19th of May, 1931, Pandit Devi Prasad had executed a will and it is said that under that will he appointed the four persons hereinafter named as the guardians of Sita Ram: (1) Ganeshji Pande, (2) Devi Pande, (3) Bish Nath and (4) Suraj Prasad Pathak.

Suraj Prasad Pathak is dead: but the other three abovenamed persons applied to the District Judge for their appointment as guardians of Sita Ram on the basis of Pandit Devi Prasad's will dated the 19th of May, 1931. The application was opposed by Mst. Bhagirathi, who was the sister of Sita Ram; and her husband Trilochan put in an application before the court for his own appointment as guardian. Mst. Bhagirathi is now dead and learned counsel for Trilochan informs us that his client has no longer any interest in this matter.

*First Appeal No. 145 of 1934, from an order of L. V. Ardagh, District Judge of Benares, dated the 14th of July, 1934.

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The District Judge did not go into the merits of the application of Ganeshji Pande, Devi Pande and Bish Nath, but has dismissed their application *in limine* on the ground that it could not be entertained unless and until probate of the will was obtained. In *Pathari Alikhan Badlukhan v. Bai Panibai* (1) a Bench of the Bombay High Court held that it is not incumbent on a person who has been appointed guardian of a minor under a will to take out probate as a condition precedent to his obtaining a certificate of guardianship under Act VIII of 1890. That decision was followed by a Bench of the Calcutta High Court in *Sarala Sundari Debi v. Hazari Dasi Debi* (2), where it was held that in an application for the appointment of a guardian of a minor the court is bound to consider a will although probate has not been granted. The judgment contains the following observation: "The fact that there is a contest as to the validity of the will may induce the court to exercise its discretion one way or the other, as for instance it may probably defer deciding on the question of guardianship until the question of probate has been determined. But it is not open to the court to say that it will refuse to take notice of the will." It is not suggested before us that there is any contest as regards the validity of Pandit Devi Prasad's will, and we can find nothing in the Act to justify the view which the learned Judge of the court below has taken. There is no reported authority of this Court on the subject; but we are in full agreement with the view which has been expressed by the Bombay High Court and the Calcutta High Court in the cases above referred to and we accordingly allow this appeal and set aside the order of the court below and we remand the case to that court for inquiry and decision according to law in the light of the observations which we have made above.

(1) (1894) I.L.R., 19 Bom., 832. (2) (1915) I.L.R., 42 Cal., 953.