REVISIONAL CIVIL

Before Mr. Justice Collister and Mr. Justice Bajpai

1935
November, 29

MISRA RANGNATH (APPLICANT) *v.* MISRA MURARI LAL (OPPOSITE-PARTY)*

Guardians and Wards Act (VIII of 1890), section 41(3) and (4)—Powers of court in respect of accounts delivered by ex-guardian—Detailed inquiry or investigation not contemplated—Remedy of ex-minor by suit—Order for payment of a sum found due after investigation ultra vires*—Revision—Jurisdiction—Discharge to ex-guardian—Effect of discharge—Guardians and Wards Act, sections 34(c), (d) and 34A.*

The correct interpretation of section 41(3) of the Guardians and Wards Act is that the Act does not contemplate a detailed inquiry by the court into the matter of accounts delivered by the ex-guardian of a ward who has attained majority, but only a summary investigation. After the cessation of minority the ex-ward has of course the right to bring a suit against the ex-guardian for rendition of accounts; and it is clear therefore that no duty has been cast nor power conferred on the court to make detailed inquiry or investigation into the accounts delivered by the ex-guardian under section 41(3). If the court makes a detailed investigation and as a result thereof arrives at a certain sum as being due from the ex-guardian and orders him to pay it, the order is without jurisdiction and a revision lies, the order not being appealable under section 47.

A consideration of section 34(*c*) and (*d*) of the Act points to the same conclusion as to the intention of the Act regarding the scrutiny of the guardian's accounts. Accounts are exhibited under section 34 while the ward is a minor and the powers of the guardian have not ceased; and many legal difficulties which would otherwise arise are avoided, and there is no real difficulty, if all that the court does is to look into the accounts in a summary manner and see that the guardian has not incurred any expenditure which was prohibited by the court and has generally acted according to the directions given by the court. The auditor appointed under section 34A will be of some assistance to the court in order to check the accounts in the above light. If the accounts are unsatisfactory or if the guardian disobeys any directions given under section 34(*d*) the court has ample powers under sections 35 and 36 to sanction a suit by a proper

*Civil Revision No. 184 of 1934.

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person and relief can be given to the minor, and under section 37 the general liability of the guardian as trustee is preserved.

Held, further, without deciding the question whether a discharge given to the ex-guardian under section 41(4) would or would not have the effect of preventing a suit against him by the ex-minor, that the proper thing for the court, upon an application for discharge, is to give notice to the ex-minor, and if any objections are raised by him which *prima facie* appear to the court to be of some substance, to refuse the discharge and direct the ex-minor to obtain redress by a suit.

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

Mr. *Ram Nama Prasad,* for the opposite party.

COLLISTER and BAJPAI, JJ.:—An important question of law is raised in this revision, but before we discuss the same it might be of some advantage if the facts are stated in some detail. On the 30th of June, 1923, Misra Rangnath, the applicant before us, applied to be appointed a guardian of Misra Murari Lal, the opposite party. The certificate was granted on the 1st of August, 1923. The minor was a resident of Muttra and he had some property of his own and further he was a trustee of an endowment along with certain other persons, but in the application for guardianship only the private property of the minor was disclosed and no mention was made of the property of which the minor happened to be a trustee. On the 7th of August, 1930, the minor attained majority and on the 7th of February, 1931, he applied that the guardian be directed to render accounts. Mr. Allen, the then District Judge, was of the opinion that either the guardian should file an account or the minor may file a suit. This opinion was expressed on the 14th of April, 1931, and on the 16th of May, 1931, the guardian filed accounts for the period 1927 to 1930, accounts of previous years having already been filed. On the 15th of August, 1931, Murari Lal filed objections to the accounts and he alleged that a large sum was due to him and that the guardian had not disclosed the income that accrued from the endowed property. The reply of the guardian was that accounts could not be

gone into in the miscellaneous proceedings and that as a matter of fact a small sum was due to the guardian. Mr. Mushran, the District Judge, appointed Babu Mukat Behari as auditor under section 34A of the Guardians and Wards Act to audit the accounts. The auditor submitted his report on the 17th of December, 1931, stating that no definite conclusions were possible, because the accounts of the guardian were not reliable, and expressed an opinion that as Murari Lal contemplated a suit no further inquiry was desirable. On the 26th of February, 1932, Mr. Smith, the District Judge, held that he had jurisdiction to go into the matter of accounts and that the auditor be asked if he was prepared to give a definite report. On the 12th of October, 1932, the auditor submitted a second report which took the shape of notes criticising the accounts, but even in this report it was not shown as to what sum was due from the guardian in the result. Several objections were taken to this report by the guardian and all of them were sent down to the auditor by the learned District Judge. On the 23rd of September, 1933, the auditor submitted a third report and the District Judge transferred the case on the 21st of November, 1933, to the Additional Subordinate Judge who took up the case on the 25th of November, 1933, and he held that the guardian should not be given any further time for objections and that his previous objections had already been dealt with in the auditor's report. He, therefore, directed the office to make a calculation on the basis of the report of the auditor and ordered that the guardian should pay what was found to be due by the office. The office made a calculation and on the 13th of February, 1934, the Additional Subordinate Judge passed a formal order on the basis of the office report to the effect that a sum of Rs.1,757-1-10 should be paid by the guardian to Murari Lal.

The guardian has filed the present application in revision against the said order and contends firstly that

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the entire proceedings in the court below are without jurisdiction, in the sense that the Act does not contemplate a detailed inquiry into the matter of accounts but only a summary investigation, and secondly that in any event they are wholly irregular inasmuch as the court has relied entirely on the auditor's report and has not adjudicated upon the objections of the guardian judicially and that proper opportunities were not given to the guardian to object to the auditor's report.

The first question is a question of some importance and we propose to discuss it at some length. While it is contended on behalf of the guardian that on an application of the present kind filed by the minor who has attained majority, which must be deemed to be an application under section 41(3) of the Act, the only direction which the District Judge can give is to order the guardian to deliver any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward and that in this connection the property or accounts which can be delivered are those which are admitted by the guardian, the contention of the opposite party is that on the accounts furnished by the guardian the court ought to institute a detailed inquiry and give proper directions to the guardian on the basis of such an inquiry.

Authorities on this point are by no means agreed. On the one hand it is said that proceedings under the Guardians and Wards Act are more or less summary and do not contemplate a detailed inquiry. It is further said that if the District Judge were to embark upon an elaborate inquiry on an application under section 41(3) and come to the conclusion that a certain sum is due from the guardian to the minor, all that he can do is to direct the guardian to pay the said sum to the ward, but if the guardian refuses to do so, the order cannot be executed except that certain disciplinary action can be taken under section 45(*c*) and the guardian can be

fined in a sum not exceeding Rs.100 and in case of recusancy in another sum, the aggregate not exceeding Rs.500, and he can be detained in the civil jail until the order is obeyed. The liability of the guardian might be fixed under the inquiry in a very large sum and all that the Judge can do is to fine the guardian in a sum not exceeding Rs 500 (it is doubtful if this can be awarded as compensation to the minor) and to detain the guardian in the civil jail and this will be but poor consolation to the minor. The order of payment is not appealable under section 47 except by straining the language of section 43 and saying that such an order regulates the conduct of a guardian. The order will not ordinarily be open to revision under section 115 of the Civil Procedure Code and under section 48 of the Act it will be final and not be liable to be contested by suit or otherwise. If a suit is brought by the minor after attaining majority against the guardian for rendition of accounts and for payment of the money found due, the order of the District Judge on such rendition in the summary inquiry under section 41(3) might or might not be held to be *res judicata*. If it is held to be *res judicata*, it would work very harshly, because after all it is a decision under an Act where the proceedings are more or less summary and the order could not be tested by way of appeal, and if it is not held to be *res judicata* the elaborate inquiry conducted by the District Judge would be wasted. These are the difficulties which surround the view that is contended on behalf of the opposite party in the present case.

On the other hand it is contended on behalf of the minor that if all that the District Judge can do is to direct the guardian to deliver such property belonging to the ward or such accounts relating to any past or present property of the ward as are admitted by the guardian to be in his possession, the necessity of directing the guardian to file accounts is reduced to a farce and the guardian might very well cook accounts and the court is

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powerless in the matter. It is also said that although the present application by the minor was under section 41(3) after the attainment of majority, section 34(*c*) and (*d*), which comes into play when the minor is still a minor, should also be considered, and it is contended that in the interest of consistency there should be no difference in interpreting the two provisions. It is said that the accounts exhibited by the guardian under section 34(*c*) in the court ought to be true and genuine accounts and the balance due from the guardian, which has got to be paid by him on those accounts under section 34(*d*), should be the balance discovered not on the basis of the arbitrary accounts submitted by the guardian, but which will be found due after scrutiny. In this connection reliance is placed on section 34A which was added by the Amending Act XVII of 1929, and the argument is that if the court has the power to appoint an auditor it is obvious that a thorough checking of the accounts was contemplated. Another contention is that under section 41(4) when the guardian has delivered the property or accounts which are admitted by him to be in his possession, the court will declare him to be discharged from his liabilities and the minor will have then no remedy by way of a suit, which could hardly be the intention of the legislature.

We have given anxious consideration to the difficulties that have been pointed out to us in connection with the two contending views, and we have come to the conclusion that the better view and the view attended with least difficulty is the one which is advanced by the guardian. Accounts are exhibited under section 34 when the minor is still a minor and the powers of the guardian have not ceased. There is no real difficulty if all that the court did were to look into the accounts in a summary manner and see that the guardian has not incurred any expenditure which was positively prohibited by the court and has generally acted according to the directions given by the Judge. The auditor appointed under section 34A

will be of some assistance to the court in order to check the accounts in the above light. If the accounts are unsatisfactory or if the guardian disobeys any direction given under section 34(*d*) the court has ample powers under sections 35 and 36 to sanction a suit by a proper person and relief can be given to the minor, and under section 37 the general liability of the guardian as trustee is preserved. The guardian can also be removed by the court. After the cessation of minority the ward who has attained majority has of course the right to bring a suit against the guardian for rendition of accounts and the mere fact that the guardian has delivered such property and accounts of the minor as are admitted by him to be in his possession will not absolve him from liability unless he has obtained a discharge, and the proper thing for a court, when the guardian applies for a discharge, is to issue a notice to the minor. If the minor has no objection, the discharge may be given and then there is no hardship if the minor is precluded from instituting a suit later on. He is of full age, able to look after his affairs and he alone is to blame if he, after understanding the accounts and receiving such property as the guardian delivers, chooses to give an acquittance to the guardian. If, however, he has any objections, he will naturally, in pursuance to the notice issued by the Judge, make an attempt to substantiate his objections, and the court again in a summary manner may look into the objections and if it is satisfied *prima facie* that there is some force in the objections it will refuse to declare the guardian discharged from his liabilities under clause (4) and direct the minor to obtain redress by means of a suit. The guardian can have no reasonable grievance, for after all the suit must be instituted within three years of attaining majority and the discharge will be given on the basis of the decision of the regular suit and the guardian cannot say that the discharge has been unnecessarily delayed. It was also contended on behalf of the guardian that a discharge under clause (4) of

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section 41 is a discharge only for the purposes of the Act and does not prevent a suit by the minor, but in the view which we have taken of the matter it is not necessary for us to consider this argument. It is significant that the words used in section 41(3) are "to deliver . . . any accounts in his possession" and we doubt whether the legislature would have employed such language if the intention had been that the ex-guardian should render an account of his stewardship. Further, we find it difficult to believe that if the legislature had contemplated that the District Judge should have power to fasten liability up to any amount upon the late guardian, it would have expressly provided that there should be no appeal against such order. On the whole, apart from authority, we are of the opinion that the contention advanced on behalf of the guardian on the interpretation of sections 41(3) and 34(*c*) and (*d*) is correct.

We now propose to consider the cases that were cited before us at the bar. In the case of *Nabu Bepari* v. *Sheikh Mahomed* (1) it was held by a Full Bench that an order for the payment of a sum found to be due *on an investigation* under section 41(3) was objectionable and without jurisdiction. It was further held that although the court has certain summary powers under section 34 of the Guardians and Wards Act, yet even such summary powers cease after the termination of guardianship. In the case of *Jagannath Panja* v. *Mahesh Chandra Pal* (2) where section 34 was being interpreted, it was held that the only order which a court could pass under section 34(*d*) was for the payment of the balance on the accounts exhibited by the guardian and not on the basis of accounts as may be discovered after an elaborate investigation. In *Subbarami Reddi* v. *Pattabhirami Reddi* (3) it was held that the property to be delivered under section 41(3) is the property which is actually in the possession of the guardian and not what he should have with him according to the

(1) (1900) 5 C.W.N., 207. (2) (1916) 21 C.W.N., 688.
(3) (1926) I.L.R., 50 Mad., 80.

opinion of the court and so also the accounts to be delivered are those which have been actually kept by him and not those which according to the court are the correct accounts. In this view the learned Judges followed certain earlier decisions of their own court and the case of *Hari Krishna Chettiar* v. *Govindarajulu Naicker* (1) may be particularly mentioned, because there also a similar view was taken, but in that case it was further held that an order against a guardian regarding liability not admitted by him may be treated as one under section 43 and treated as appealable. But we, with great respect, as pointed out before, are of the opinion that this will amount to some strain on the language, and the learned Judges of the Madras High Court also conceded that it may not be quite the right thing to say that an order under section 34(*d*) is "an order regulating the conduct or proceedings" of a guardian. In the case of *Motilal Kalyandas* v. *Bai Ichha* (2) it was held that section 41(3) of the Guardians and Wards Act provides for a very summary procedure which can only be applied without hardship in cases where there is no room for reasonable doubt as to the guardian being in possession of certain property of the ward. The clause refers to the property in the actual possession or control of the guardian and does not include all property for which he may, by the application of the law of principal and agent, be made legally responsible. In *Muhammad Khadim Husain* v. *Ahmad Hasan* (3) a Bench of this Court held that "A District Judge who has appointed a guardian of a minor and directed him to file accounts should look into those accounts from time to time during the minority, but there is no obligation on him after the minor has attained majority to review the accounts or to direct the guardian to render accounts afresh. He has, however, express power to direct the ex-guardian to hand over the posses-

(1) A.I.R., 1926 Mad., 478. (2) (1908) 11 Bom., L.R., 90.
(3) (1917) 39 Indian Cases, 175.

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sion of all papers and accounts which are in the guardian's possession to the ex-minor, who can then consider the accounts and take such steps as he may be advised in respect thereto." In *Sadhu Singh* v. *Mehar Singh* (1) it was held that under section 41(3) a court cannot compel the guardian of a minor to pay to the minor any sum found due from the guardian after an inquiry into the accounts. The guardian is only liable to deliver any property in his possession or control belonging to the ward or any accounts in his possession or control relating to any past or present property of the ward. It was pointed out that the words "or his representative" in section 41(3) lend support to the above view and the learned Judge observed: "Surely it cannot be supposed that if the deceased guardian's accounts were wrong the court could compel the representative of the guardian to pay into court any sum found due after an investigation." In *Hoondomal Chhabaldas* v. *Nazir, Judicial Commissioner's Court* (2) the learned Judicial Commissioners held after reviewing several authorities that the legislature has neither expressly nor impliedly given power to the court to record a definite finding as to the exact amount due by the guardian as a result of an inquiry binding upon the guardian and to compel its payment; and if there is a definite finding by the court as to the amount which the ex-guardian has to pay as a result of the inquiry, to that extent the finding is not warranted by the provisions of the Act and is without jurisdiction. They also pointed out that the very fact that this provision applies not only to the ex-guardian but to the legal representative of a deceased guardian makes it clear that the only obligation imposed on a guardian or the legal representative of a deceased guardian, as the case may be, is to hand over any such property as is in his possession or control and not such property as has disappeared or has passed out of his possession or control and likewise to hand over such

(1) A.I.R., 1931 Lah., 68. (2) A.I.R., 1930 Sind, 43.

accounts as are in his possession irrespective of such accounts being correct or not. They said that there was nothing in section 34 also to warrant the suggestion that the expression "balance due from him on those accounts" is necessarily intended to empower the court to compel the guardian to pay into the court not the sum which he admits to be due at the foot of the account exhibited by him but the sum which the court finds on an inquiry held by it to be due. The position, therefore, is that the High Courts of Calcutta, Madras, Bombay and Lahore, the Court of the Judicial Commissioner of Sind and in one case this Court have taken the view at which we ourselves have arrived independently.

It remains now to consider the cases that support the contrary view. In *Sita Ram* v. *Mst. Govindi* (1) WALSH, A.C.J., was of the opinion that the power of a court in dealing with accounts exhibited by a guardian was not limited by such balance as the guardian chooses to show therein nor is the disciplinary jurisdiction of the court limited to directing repayment of sums actually in the hands of the guardian. If, therefore, the guardian filed an account which was not a just and true account, and was surcharged by the court in any amount, the court could procure the repayment of the amount surcharged by means of the procedure prescribed by section 45 of the Guardians and Wards Act. The learned Judge cited certain illustrative cases to show that the opposite view would be obviously unfair; for instance it was pointed out that if the guardian in the account said: "As to a sum of Rs.2,000 I yesterday paid this away to an insistent creditor of mine to prevent my arrest, and I am therefore unable to produce this sum of money and the balance due from me is eight annas." Another illustration of a contumacious guardian deliberately throwing

(1) (1924) I.L.R., 46 All., 458.

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away a box of rupees amounting to half a lakh belonging to the minor into the Ganges was also mentioned in the judgment. These are extreme cases and it might be possible to hold that the Rs.2,000 paid by the guardian to an insistent creditor of his and a box containing half a lakh of rupees thrown into the Ganges is admitted by the guardian to be in his possession, but the other difficulties pointed out by us were not taken into consideration. The difficulty of the order being unappealable was mentioned and not answered. In *Saiyid Muhammad Fariduddin* v. *Saiyid Ahmad Abdul Wahab* (1) it was held that the court had jurisdiction to investigate the accounts exhibited by a guardian under section 34(*c*), to amend them by striking out objectionable items, and to direct the guardian to pay the balance due on a true and just account, and on his failure to pay the balance as found by the court under section 34(*d*) the court had jurisdiction to impose a fine on the guardian under section 45. The learned Judges followed the case in *Sita Ram* v. *Mst. Govindi* (2) mentioned just now, but for the reasons given by us in an earlier portion of our judgment and by other learned Judges of other High Courts, with great respect, we find ourselves unable to agree with that view.

Two other points were raised by learned counsel for the opposite party and we might dispose of them at this stage. It is said that on the 26th of January, 1932, Mr. Smith, the then District Judge, held that he had jurisdiction to go into the accounts in a detailed manner and that that decision operated as *res judicata* and prevents the guardian from agitating the same point now. We are of the opinion that there is no force in this contention. The order of the learned District Judge was an interlocutory order and could neither be appealed against under section 47 nor could a revision be filed under section 48 read with section 115 of the

(1) (1927) I.L.R., 7 Pat., 144. (2) (1924) I.L.R., 46 All., 458.

Civil Procedure Code. The matter had not been finally decided by the court and the guardian is not prevented from raising the point now when a final order directing the payment of a definite sum has been passed. The next point that was urged was that the order, dated the 25th of November, 1933, against which the present revision has been filed is also an interlocutory order and as such we should not interfere. There is no force in this contention as well, because although it is quite true that the judgment that has been filed along with the application in revision is the judgment, dated the 25th of November, 1933, which might be said to contain an interlocutory order only, yet the applicant has filed with that judgment a copy of the formal order, dated the 13th of February, 1934, by which the learned Subordinate Judge directs Rangnath Misra to pay the sum of Rs.1,757-1-10 to Murari Lal Misra. It does not appear that the learned Judge after calling for a calculation from the office on the basis of the auditor's report passed any judgment excepting the formal order, dated the 13th of February, 1934, directing the payment of the sum mentioned above, and both the judgment, dated the 25th of November, 1933, and the formal order, dated the 13th of February, 1934, have been filed along with this application in revision which could under the circumstances be deemed to be an application against the final order of the 13th of February, 1934. We, therefore, overrule the two preliminary objections advanced on behalf of the opposite party. We have not thought it necessary to consider the question as to how far the order of the court below is vitiated by material irregularity, in the sense that it has not arrived at any independent decision of its own on the objections of the guardian but has thought fit to rely on the report of the auditor alone, nor have we found it necessary to consider whether in the accounts the profit arising out of the endowed property which was not mentioned in the application for guardianship could be taken into

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consideration, as indeed it has been, under the auditor's report and the order of the learned Judge.

For the reasons given above, we allow this application, set aside the orders of the court below, dated the 25th of November, 1933, and the 13th of February, 1934, and direct the court below to pass appropriate orders in the case in view of the observations made in our judgment, and if any property or accounts belonging to the ward was admittedly in the possession of the guardian he should be ordered to deliver the same to the ex-minor and if the guardian applies for a discharge the court should refuse to give such a discharge as it is obvious that the minor objects to, and the court is not satisfied with, the accounts submitted by the guardian, unless a suit by the minor for rendition of accounts is barred by time now. The minor should try and obtain redress by means of a regular suit and the question of discharge will naturally abide the result in such a suit. The guardian, we understand, claims a certain sum from the ex-minor, and he can also, if so advised, institute a suit for the recovery of the same. Under the circumstances of the case we direct the parties to bear their own costs in the court below and in this Court.

APPELLATE CIVIL

Before Mr. Justice Harries and Mr. Justice Rachhpal Singh

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December, 2

ANTU RAI AND OTHERS (DEFENDANTS) *v.* RAM KINKAR RAI AND ANOTHER (PLAINTIFFS)*

Civil Procedure Code, order XXII, rule 5—Dispute among several persons as to who is the legal representative of a deceased appellant—Order deciding one of them to be the legal representative—Subsequent suit between same persons regarding succession to the deceased person—Res judicata.

A decision under order XXII, rule 5 of the Civil Procedure Code of a dispute as to which of several persons is the heir and legal representative of a deceased appellant is a decision in a

*First Appeal No. 42 of 1932, from a decree of Krishna Das, Subordinate Judge of Ghazipur, dated the 9th of January, 1932.