

**APPELLATE CIVIL.***Before Adams and Sen, J.J.*

MONOMOINI DASI

v.

HARI PRASAD BOSE.\*

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June, 30,  
and  
July, 1, 2, 3.

*Guardian and Wards Act, 1890 (Act VIII of 1890), section 17(2)—Hindu Law—adoption—death of adoptive father—natural father, whether should be appointed guardian of the person of the son.*

A natural father should not, on the death of an adoptive father, be appointed guardian of the person of the son whom he has given away in adoption where there are other suitable members of the adoptive father's family available and where the effect of appointing the natural father would be to frustrate the intention of the adoptive parents.

*Ganga Prasad Bhattacharjee v. Hara Kanta Choudhuri*(1), distinguished.

Appeal by the objectors.

These three appeals were directed against an order of the District Judge of Cuttack, appointing Hari Prasad Bose, the respondent in the appeals, to be the guardian of the person of the minor Krishna Kumar Bose.

Nand Kumar Bose died on the 14th of November, 1902, leaving him surviving his wife Sarojini Dasi, his mother Monomohini Dasi, his mother's brother Sital Prasad, and his wife Mrinalini Dasi, as well as his sister Kherodemani Dasi. By his Will, which was executed the day before he died, he empowered his wife Sarojini to adopt a son in consultation with the executors whom he appointed under his Will.

\* Appeals from Original Decrees nos. 3, 5 and 7 of 1923, from a decision of S. B. Dhavle, Esq., i.c.s., District Judge of Cuttack, dated the 4th June, 1923.

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He directed that the executors should hold and administer all his property and that Sarojini should act as the guardian of the son she adopted, the executors being guardians of the property. In case Sarojini died before making the adoption, he empowered his mother Monomohini Dasi to adopt a son to him: in case his wife or his mother died before making the adoption, or, if no adopted son survived, the executors were empowered to dedicate all his properties:

“ to the *Seba Puja* of his *Istadebata* and family idols, Radha Mohan Thakur and Damodar Chandra Thakur, and spend the profits accruing therefrom in doing acts of piety and hospitality of all sorts by helping the poor and the distressed and helpless guests and strangers by proper arrangement.”

He further directed that the executors should make proper arrangements for the maintenance of his wife and of his widowed sister and mother.

Of the five executors, two only took out probate of the Will and consented to serve as such, namely, Babu Jagat Ballav Ghose, the father of Sarojini, and Babu Benode Lal Bose, a relation of the family. In June 1903 probate was granted to these two.

At the beginning of 1915, Sarojini requested the respondent, Hari Prasad Bose, to allow her to adopt one of his sons who was born on the 14th of September, 1914. Coming to know of this proposal Jagat Ballav Ghose and Benode Lal Bose advised Sarojini not to make the adoption in a hurry but to ensure that there would be safeguards for the payment of the maintenance allowance for herself and her relations. Sarojini, however, was very anxious to make the adoption at once, and, though an *ekrarnamah* was drawn up by Hari Prasad undertaking that the allowance would be paid, it appeared that the terms of the *ekrarnamah* were not altogether satisfactory to the two executors. Jagat Ballav Ghose, however, consented to the adoption, and Benode Lal, though he did not express his consent, did not object to it. Consequently, on the 14th of April, 1915, Sarojini adopted Krishna Kumar

the second son of Hari Prasad, the name of Krishna Kumar being given to him at the time of the adoption, Jagat Ballav played a leading part in the adoption ceremony. Krishna Kumar was about six months old at the time of the adoption.

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It appeared that, from about the year 1913, Sarojini was not satisfied with the manner in which the executors supplied her with money and she seems to have been in correspondence with Hari Prasad, who advised her with regard to her attitude towards her father, Jagat Ballav Ghose.

The tension between Sarojini and the executors became so great that the executors filed a petition asking to be allowed to renounce their office. They, however, withdrew this petition later on and then it was asked by them that Sarojini should be appointed a co-executrix with them. This was disallowed. Sarojini had previously applied to have Letters of Administration issued to her on the ground that the executors had renounced the executorship, and that application was also disallowed. Sometime in 1913, Sarojini had caused a criminal case to be brought against the executors but it failed. In 1916 Hari Prasad filed an application to be made guardian of the person of the minor but this request was refused, and soon after Sarojini made a like application. The executors did not oppose the application, which was granted.

On the 23rd of January, 1922, Sarojini died and the minor boy remained with his grandmother and Mrinalini, Sital Prasad and Kherodemani at Bahukud, a place about ten miles from Cuttack, where Nand Kumar Bose's house was. On the 15th of February, 1922, that is, less than a month after Sarojini's death, Hari Prasad applied to be appointed as guardian of the person and property of the minor. This application was opposed by Monomohini, who applied to be made guardian of the person of the minor, and there were four other applications; one by Jagat Ballav as

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the maternal grandfather, another by the two executors as such, a third by Mrinalini Dasi as maternal aunt of Nand Kumar, and the last by Kali Sankar Roy who married a cousin of Sarojini. This last application was not pressed. The application of Hari Prasad was heard with the four other applications. Hari Prasad did not press his application to be made a guardian of the property knowing that he would have no chance of success since the executors had been appointed as guardians.

After hearing the parties, the learned District Judge granted the application of Hari Prasad and appointed him guardian of the person of the minor; he directed that the executors should be the guardians of the property of Sarojini which amounted to about Rs. 50,000.

Against that order, one of the appeals was by Monomohini, another by Jagat Ballav personally and the third by the two executors jointly as such.

The learned District Judge passed over the applications and objections of Monomohini and Mrinalini very shortly, his reason being that the boy was of age to require education which the ladies could not easily attend to without the help of others; also he held that Monomohini was very old and Mrinalini was not a very close relation of the minor. He thought that the boy would get as much attention in matters other than his education from his natural mother as from these two ladies. He then proceeded to discuss the claims of Hari Prasad, the natural father, on the one hand and the executors on the other. He found that Hari Prasad, being the natural father of the minor, had natural affection in his favour, and also that the executors, being in the position of presumptive heirs, since the Will empowered them, in the event of the minor's death to dedicate the property to certain Deities and confided the administration of the charity to them, would have an interest adverse to the minor's and it would be undesirable to charge them with the

custody of the boy. He relied on the case of *Ganga Prasad Bhattacharjee v. Hara Kanta Choudhuri* (1).

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On the ground that Jagat Ballav Ghose had an interest adverse to the minor, while Hari Prasad was bound to the boy by ties of natural affection, he came to the conclusion that Hari Prasad ought to be appointed. He considered the objections put forward against Hari Prasad's appointment, one of which was that he had borrowed money from Sarojini and not repaid it, and another was that he had little education and was not competent to manage the property. Against Jagat Ballav Ghose it was urged before the District Judge that he was opposed to the adoption of the minor and had wanted his own grandson, Akhoy's son to be adopted by Sarojini. Also it was urged that Jagat Ballav had not properly looked after the boy and was too old and too greedy to look after his interest. The learned District Judge showed how Sarojini had quarrelled with the executors and pointed out that Jagat had been discredited by some letters which were filed in the case. It may be mentioned here that though these letters were not objected to by the opposing party, they appeared to have been of a character which would not entitle them to be admitted as evidence except *Exhibit C* and some letters written by Hari Prasad. The District Judge found that Jagat Ballav was too old and that his conduct, as shown by his evidence and some of the letters, would not entitle him to be given the custody of the boy.

*Susil Madhab Mullick*, for the appellant in First Appeal no. 3 of 1923.

*Siva Narain Bose*, for the appellant in First Appeal no. 5 of 1923.

*Satya N. Sen Gupta*, for the appellant in First Appeal no. 7 of 1923.

*J. N. Bose and Durga Prosanna Das Gupta*, for the respondent.

*Cur. adv. vult.*

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ADAMI, J. (after stating the facts, as set out above, proceeded as follows): Our first consideration must be with regard to the interest and the welfare of the minor, and, after that, we have to see how far the intentions of the adoptive father can be best carried out.

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With regard to the welfare of the minor, it seems to me that there is not much difference between the various applicants if they do their duty. It is important that the boy should be given an education to fit him for his position as a member of the family of Nand Kumar who was a man of some wealth, leaving property valued at five lakhs. It is important then that he should be sent to a good school at Cuttack, and as a matter of fact since his appointment as guardian, Hari Prasad has kept the boy at the Ravenshaw College with a tutor guardian appointed by the District Judge. But Monomohini or Jagat Ballav or the executors would have been able to do, and probably would have done, exactly the same, and as a matter of fact Jagat Ballav lives in Cuttack and has a house where the boy could be kept, while Hari Prasad lives at Bahukud and a house has to be engaged for the minor.

The next question is whether by the appointment of Hari Prasad as guardian of the minor, the full intentions of Nand Kumar are being carried out. The learned District Judge has relied on the case of *Ganga Prasad Bhattacharjee v. Hara Kanta Choudhuri* (1). There one Brojo Mohan Roy died leaving a widow, a minor son and two daughters; the son died and the widow adopted the minor son of Hara Kanta. On the widow's death, Hara Kanta, the natural father, applied to be appointed guardian of the person and property of the minor. An executor appointed under Brojo Mohan Roy's Will opposed the application with regard to the property and two brothers of the

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widow and one of her two daughters opposed the application with regard to the guardianship of the person. It was argued that the natural father of the minor adopted boy was not fit to be appointed as guardian of his person since by adoption the minor was cut off from all relationship with his natural family and by leaving him in the custody of his natural father the ties with his adoptive family would be severed. Sharfuddin, J., in that case held that the natural father was properly appointed guardian of the person of the adopted boy: but that case is distinguishable from the present one, for there the two daughters who applied were both married into other families, while the brothers of the widow were not members of the family of the adoptive father, so that there was no member of the adoptive father's family alive. In the present case the paternal grandmother Monomohini is alive and ordinarily she would be the proper guardian of the boy. It appears too that in that case the learned Judge considered that the words in clause (2) of section 17 of the Guardian and Wards Act, VIII of 1890 :

" Any existing or previous relations of the proposed guardian with the minor or his property."

would cover the case of a natural father with regard to his son who had been adopted. It is clear, I think, that in that clause relation does not mean relationship. It seems that if the adopted boy is again put in charge of his natural father all the objects of the adoption are lost; he will not be likely to keep the traditions of the family of his adoption and he will be brought up in the traditions of his natural father's family and will be likely, when he grows up, to repudiate all relationship with the adoptive father's family. Thus the intention of the adoptive parents would be frustrated.

In Miscellaneous Judicial Case no. 24 of 1924, which came up before Jwala Prasad and Kulwant Sahay, J.J., in connection with the present dispute, subsequent to the order passed by the District Judge

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1924. from which these appeals have been lodged, Jwala

MONOMOINI Prasad, J., said :

DASI " The boy was six months old when he was adopted and had been  
 v. living in the adoptive family up to the death of his adoptive mother in  
 HARI PRASAD the year 1922 for a period of about 8 or 9 years. The boy had developed  
 BOSE. affection for the adoptive grandmother to such an extent that it was  
 difficult for the District Judge to enforce his order to hand over the boy  
 ADAMI, J. to the natural father "....." The object of adoption by Nand  
 Kumar Bose was to affiliate the boy into his family and to disassociate  
 himself completely from his natural father and family. The boy is to  
 become a member of the adoptive family and to own the adoptive father  
 and the adoptive mother as his parents and the relations of the adoptive  
 family as his own relations. All traces of relationship with the natural  
 parents or their relations had to be effaced."

Speaking of the tutor who happened to be appointed,  
 Jwala Prasad, J., said :

" He should have reared up sentiments such as the adoptive father  
 wanted to imbibe him with. The District Judge should not encourage  
 any foreign tendencies being developed in the boy; and when such matters  
 are brought to his notice he should see that such sentiments are soon  
 destroyed and not allowed to grow "....." If the boy is not  
 shaped from now to take his proper position in the adoptive family, after  
 he comes of age he will be totally lost to the family and perhaps he  
 would like to go back to the natural father and that might be the game  
 which the natural father is perhaps now trying to play."

In my opinion, in this case, the intentions of the  
 adoptive father would be frustrated if the boy is  
 allowed to remain in charge of Hari Prasad.

The evidence of the letters on the record show  
 clearly that Hari Prasad had been even before the  
 birth of this boy turning his attention to the property  
 of Nand Kumar. We find that sometime before the  
 birth of the boy, Hari Prasad had procured, through  
 his servant, a copy of Nand Kumar's Will: the date  
 of the delivery of the copy shows this fact. The letters  
 too show that between 1913 and 1917, Hari Prasad was  
 in communication with Sarojini and advising her  
 behind the back of Jagat Ballav Ghose how to deal  
 with her father and to persuade him to do what  
 Sarojini and he himself wished. His application to  
 be made the guardian of the person and property of  
 the minor also points in the same direction. In the  
 letter (*Exhibit C*) it is quite evident that Hari Prasad  
 was trying to get Sarojini to force her father to comply



with her demands by threats; he advised her to tell her father that if he and Benode Lal remained guardians he Hari Babu would get the estate put under the Court of Wards and would have all his accounts examined from the date when the estate came into his hands. The letter shows too that Hari Prasad was trying to put Jagat Ballav on the horns of a dilemma. It is unnecessary to quote from all the letters; many of them especially those from Kali Shankar Roy are quite irrelevant; but they do show that there was a good deal of scheming going on with the object of getting the property out of the hands of the executors. It is true that Hari Prasad has a certain amount of property paying Government revenue of Rs. 1,700 a year, but there is suspicion in my mind that his desire to become guardian of the person of the minor is prompted not so much by natural affection as by a desire to intermeddle with the property and obtain a profit therefrom.

When the executors required an *ekrarnamah* to be executed at the time of the adoption, Hari Prasad appears to have altered or objected to some of the wording, and it is doubtful whether he really had power to execute the *ekrarnamah* on behalf of his minor son. It is useless to speak of natural affection on the part of the father who allows a son to be adopted into another family six months after that son's birth. I am, therefore, of opinion that Hari Prasad was not a proper person to be appointed guardian of the person of the son he had given in adoption to another.

It remains to consider the claims of the three other applicants, namely, Monomohini, Jagat Ballav Ghose and the two executors.

With regard to the application of the two executors jointly, I do not think that it is proper that it should be granted. It is necessary that the person who is appointed guardian of the minor should live with him and look after him and attend to his daily needs. The two executors could not do this properly;

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besides there is the objection, which has been considered by the District Judge and accepted, that the two executors under the Will would have the disposing power over the properties of Nand Kumar on the death of the minor. It seems that these executors, under the terms of the Will, could not be said to be the presumptive heirs. There is no reasonable ground before us for suspicion or fear that men of the age of Jagat Ballav and Benode Lal, who have up to the present managed the property carefully and well, would have any thought of bringing an end to the life of the minor or of doing anything disadvantageous to him. Jagat Ballav Ghose is an old man of about 75 and it is not likely that he would covet in any way the property of the minor.

With regard to the application by Jagat Ballav alone, the remarks I have made with regard to the two executors apply. It may be that there is little likelihood that Jagat Ballav would be moved by any interest adverse to the minor, but he is not a member of Nand Kumar's family though he is the father of the minor's adoptive mother. In my opinion it is preferable that in a case like this the same person should not be guardian both of the property and person of the minor.

We come next to the application of Monomohini and this application, I think, should have been granted by the District Judge. The objections put forward against her are merely to the effect that she is old, somewhat weak-minded, and has lost all interest in worldly affairs. That she has been fond of the minor is not denied, and that he was fond of her. He had lived with her ever since Sarojini's death and had been in the house with her previous to that. The evidence as to the state of Monomohini's mind is very vague; it is merely said that she is crazy; but the chief witness who gives evidence as to this is a Sub-Inspector of Schools who has never been posted in the Bahukud Circle and seems to have had little opportunity of forming an opinion. From the manner in which she

has applied to be made guardian and her subsequent applications to be allowed to see the boy, it would appear that she is by no means of weak intellect. As I have said before, she would ordinarily be the proper person to be appointed guardian of the person of the minor, being the paternal grandmother. Furthermore it is quite evident from the Will by which she was empowered to adopt a son to Nand Kumar on the failure of adoption by Sarojini, that Nand Kumar placed full confidence and trust in her and would have liked her to act as the mother of a boy adopted to him. She will live in Cuttack and be able to look after the boy and will have the advice and help of competent advisers. It is true that she is old but she may have many years to live yet, and I have no doubt as to her competence. In my mind she is the right person to be appointed the guardian of the person of Krishna Kumar Bose, the minor.

To ensure the welfare of the minor and his interest, it will be necessary that the boy be kept at school and be properly educated at the Ravenshaw College or some other good school and that he be put in the care of a tutor-guardian for this purpose. If in the opinion of the District Judge the present tutor-guardian is no longer suitable owing to his want of sympathy with Monomohini Dasi, it will be necessary to dismiss him and appoint another tutor.

I would set aside the order of the learned District Judge and allow the appeal of Monomohini Dasi, and direct that she be appointed the guardian of the person of the boy. The appeals of the other appellants will be dismissed.

The District Judge will call upon Hari Prasad Bose to make over the boy to Srimati Monomohini Dasi.

Srimati Monomohini Dasi will get her costs in both the Courts.

SEN, J.—I agree.

*Appeal no. 3 of 1923 decreed.  
Appeals nos. 5 and 7 of 1923 dismissed.*

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