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ABDULLA ABDUL GANY v. B. K. CHATTERJEE.

The result is that the appeal is allowed, the decree of the District Court set aside, and the suit dismissed. We make no order as to costs.

SEN, J.—I agree.

PAGE, C.J.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Sen.

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July 13

SHADEO v. MAHRAJI AND ANOTHER.*

Minor—Guardian's remedy for restoration of custody—Suit for custody—Guardians and Wards Act (VIII *of* 1890), *s.* 25.

The remedy of a guardian for restoration of the custody of a minor is by way of application under the Guardians and Wards Act, and not by filing a regular suit.

Arunachellam Pillay v. *Iyama*, 8 B.L.T. 128 ; *Besant* v. *Narayaniah*, I.L.R. 38 Mad. 807 ; *Sathi* v. *Ramandi*, I.L.R. 42 Mad. 647 ; *Sham Lal* v. *Bindo*, I.L.R. 26 All. 594 ; *Uma Kuar* v. *Bhagwanla Kuar*, I.L.R. 37 All. 515—*followed.*

Achratlal v. *Chimanlal*, I.L.R. 40 Bom. 600 ; *Mathuraban* v. *Tewary*, 10 B.L.T. 186 ; *Ma Shwe Ge* v. *Maung Shwe Pan*, 2 L.B.R. 140 ; *Sharifa* v. *Munckhan*, I.L.R. 25 Bom. 574—*distinguished.*

Rauf for the appellant. A Hindu husband is entitled to file a suit to obtain custody of his minor wife from her parents as her natural guardian. The Guardians and Wards Act is not exhaustive, and the right to file a suit which existed before the passing of the Act is not taken away by the Act, either expressly or by implication. See *Sharifa* v. *Munekhan* (1) ; *Achratlal* v. *Chimanlal* (2) ; *Ma Shwe Ge* v. *Mg. Shwe Pan* (3) ; *Mathuraban* v. *Tewary* (4).

* Civil First Appeal No. 69 of 1931 from the judgment of this Court on the Original Side in Civil Regular No. 605 of 1930.

(1) (1901) I.L.R. 25 Bom. 574.
(2) (1916) I.L.R. 40 Bom. 600.
(3) (1903) 2 L.B.R. 140.
(4) 10 B.L.T. 186.

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The decision in *Besant* v. *Narayaniah* (1) is distinguishable. *Sathi* v. *Ramandi* (2) goes too far. The High Court has wider jurisdiction than a District Court, and can entertain all civil suits unless explicitly barred. If it is denied that the appellant has custody of his wife, then he will have no remedy under s. 25 of the Guardians and Wards Act.

Miss Dantra for the respondents. The only course open to a husband in order to obtain the custody of his minor wife is to apply under the Guardians and Wards Act. The Court must then consider whether it is for the benefit of the minor to hand her over to the husband. The Privy Council has so held in *Besant's* case (1). Prior to that case the Allahabad High Court took the same view in *Sham Lal* v. *Bindo* (3) and in *Utma Kuar* v. *Bhagwanta Kuar* (4). A Full Bench of the Madras High Court in *Sathi* v. *Ramandi* (2), has followed the Privy Council case.

PAGE, C.J.—This is a suit by a Hindu husband for an order that his minor wife should be restored to his custody as her guardian. The judgment of the lower court and of this court proceeds upon the footing (i) that the suit was brought by the plaintiff as the guardian of his wife and not otherwise; and (ii) that the plaintiff claimed that the custody of his wife should be restored to him as she had been removed from his custody by her parents. That this is the plaintiff's cause of action is clear from paragraph 3 of the plaint, and paragraph 7 of the written statement.

The learned trial Judge held (i) that the plaintiff was a major at the time when he filed his suit; and

(1) (1915) I.L.R. 38 Mad. 807.
(2) (1919) I.L.R. 42 Mad. 647.
(3) (1904) I.L.R. 26 All 594.
(4) (1915) I.L.R. 37 All. 575.

(ii) that, having regard to the provisions of the Guardians and Wards Act (VIII of 1890), the remedy of the plaintiff lay in an application under section 25 of the Guardians and Wards Act, and not by filing a regular suit. The suit was dismissed.

At the hearing of the appeal it was urged by the learned advocate for the appellant that, although the appellant was entitled to apply that the custody of his wife should be restored to him under the Guardians and Wards Act, he had an alternative right to file a regular suit in that behalf.

Now, it is common ground that before the passing of the Guardians and Wards Act the plaintiff would have been entitled to file a regular suit for the restoration of the custody of his minor wife, and it is urged on behalf of the appellant that the right which he possessed before the passing of the Act was not taken away by express terms or necessary implication by the Guardians and Wards Act. The Guardians and Wards Act does not purport to be exhaustive of all questions that arise with respect to the custody of a minor, but, in my opinion, in cases to which section 25 applies it is incumbent upon the guardian to proceed by way of application under the Guardians and Wards Act, and not by a regular suit. The case is concluded, in my opinion, against the appellant both on principle and by authority. As was pointed out in *Ma Shwe Ge* v. *Maung Shwe Pan* (1) and *Sham Lal* v. *Bindo* (2) to hold that there were concurrent or alternative remedies open to a guardian who sought the restoration of the custody of a minor would lead to great inconvenience, for it might be that there would be subsisting at the same time an order made in a suit by one person claiming to be the guardian of a minor for restoration of the

(1) (1903) 2 L.B.R. 140. (2) (1904) I.L.R. 26 All. 594.

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minor to his custody, and also an order made on an application under the Guardians and Wards Act by another person claiming to be the guardian of the minor for an order that the custody of the minor should be restored to him. In my opinion the object of the Legislature in enacting s. 25 of the Guardians and Wards Act was that in cases to which that section applied the guardian should be bound to seek redress as provided in the Act, and not otherwise. I am of opinion that the case is also concluded against the appellant by authority. In *Besant* v. *Narayaniah* (1) Lord Parker, in delivering the judgment of the Privy Council, laid down that "the District Court in which the suit was instituted had no jurisdiction over the infants except such jurisdiction as was conferred by the Guardians and Wards Act, 1890." That was a case in which a natural guardian sought to recover the custody of his minor sons. Prior to *Besant's* case the same view had been expressed by the Allahabad High Court in *Sham Lal* v. *Bindo* (2) and in *Utma Kuar* v. *Bhagwanta Kuar* (3); and after the decision of the Privy Council in *Besant* v. *Narayaniah* (1), the Chief Court of Lower Burma in *Arunachellam Pillay* v. *Iyama* (4) held that the effect of the ruling of the Privy Council in that case was that proceedings by a guardian for restoration of the custody of a minor must be taken under the Guardians and Wards Act, and not by way of a separate suit. In *Sathi* v. *Ramandi Pandaram* (5) Wallis, C.J., when considering the effect of *Besant* v. *Narayaniah* (1), observed that:

> The question for decision was whether a civil suit not under the Guardians and Wards Act, would lie in the Civil Court. The

(1) (1915) I.L.R. 38 Mad. 807.
(2) (1904) I.L.R. 26 All. 594.
(3) (1915) I.L.R. 37 All. 515.
(4) 8 B.L.T. 128.
(5) (1919) I.L.R., 42 Mad. 647 at p. 652.

Privy Council held that it would not, and assigned as the sole but sufficient reason for so holding the fact that the District Court had no jurisdiction in the case except under the Guardians and Wards Act. This I feel bound to construe as a ruling that the jurisdiction conferred by the Guardians and Wards Act was exclusive, and that the right of proceeding independently by civil suit no longer existed."

On the other hand the learned advocate on behalf of the appellant referred to *Sharifa* v. *Munekhan* (1) in which case the Bombay High Court held that the remedy by way of a regular suit in a proceeding in which an application might have been made under the Guardians and Wards Act, was not ousted by that Act ; but Jenkins, C.J., in the course of his judgment, observed that in so holding the Bombay Court was concluded by an earlier decision of that Court, and his Lordship added :

" It appears to me under the circumstances profitless to enter on any discussion of the question ; for even if we disagreed with that decision we could only refer the matter to a Full Bench. When, however, the Legislature comes to amend Act VIII of 1890 (which I trust may be at no distant date), it will, I think, be worthy of consideration whether the procedure under the Act should not be explicitly substituted for an ordinary suit, and the position of a father at the same time made clear."

Jenkins, C.J., therefore, did not purport to express any opinion of his own as to whether, if the matter were open, he would have decided the question one way or the other. Reference was also made to *Ma Shwe Ge* v. *Maung Shwe Pan* (2) in which a Full Bench of the Chief Court came to the conclusion that in the circumstances of that case inasmuch as "the person who claims to be the natural guardian has never had the custody of the minor" it could not be held that a regular suit was

(1) (1901) I.L.R., 25 Bom. 574. (2) (1903) 2 L.B.R. 140.

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barred. In *Achratlal Jekisandas* v. *Chimanlal Parbhudas* (1) the Bombay High Court was "not prepared to hold that the dictum of the Privy Council in *Annie Besant* v. *Narayaniah* to the effect that a suit *inter partes* is not the proper proceeding was intended to be of such general application as virtually to overrule the decision of this Court in *Sharifa* v. *Munekhan*;" and Scott, C.J., added that "section 25 cannot apply to this case for the ward has never left or been removed from the custody of his guardian." In *Mathuraban* v. *D. Tewary* (2), Robinson, J., dissented from *Arunachellam Pillai* v. *Iyama* (3) and followed *Ma Shwe Ge* v. *Maung Shwe Pan* (4) but in *Mathuraban* v. *D. Tewary* (2) as in *Ma Shwe Ge* v. *Maung Shwe Pan* (4) section 25 had no application, for the plaintiff had never had the custody of the minor. For these reasons, in my opinion, the law as laid down by the Full Bench of the Madras High Court in *Sathi* v. *Ramandi Pandaram* (5) was correct, and this appeal must be dismissed with costs.

SEN, J.—I agree.

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(1) (1916) I.L.R. 40 Bom. 600.
(2) 10 B.L.T. 186.
(3) 8 B.L.T. 128.
(4) (1903) 2 L.B.R. 140.
(5) (1919) I.L.R. 42 Mad. 647.