

ORIGINAL CIVIL.

Before Mr. Justice Leach.

1935

June 6.

K. V. VENKATESWARAN

v.

SARADAMBAL.*

Guardianship—Application to appoint guardian of person of minor—Hindu father—Application by father does not lie—Declaration of guardianship—Guardians and Wards Act (VIII of 1890), ss. 7, 19.

An application by a Hindu father for an order appointing him guardian of the person of his minor son does not lie, because s. 19 of the Guardians and Wards Act prohibits the Court from making such appointment. Moreover an order of appointment is not necessary. A Hindu father is the lawful guardian of his minor children, and a declaration by the Court cannot increase his powers in that respect.

Bai Tara v. Mohanlal, 24 Bom. L.R. 779 ; *Besant v. Narayaniah*, I.L.R. 38 Mad. 807 ; *Sukhdeo Rai v. Ram Chandar Rai*, I.L.R. 46 All. 706—*referred to*.

Kuppachi v. Lakshminah, 48 M.L.J. 179 ; *Srimati Kamini v. Ghose*, 44 C.L.J. 40—*dissented from*.

B. K. B. Naidu for the respondent. An application by a Hindu father to be appointed guardian of his ward is in itself a fallacy. He is the natural guardian already of his minor children, and nothing can take the right away from him. S. 19 of the Guardians and Wards Act governs s. 7 which deals with the appointment of guardians, and under s. 19 no Hindu father can be appointed or declared guardian of his minor son.

Besant v. Narayaniah (1) ; *Sukhdeo v. Ram Chandar* (2).

The present application does not purport to be under s. 25 of the Act, and therefore should be dismissed.

* Civil Miscellaneous No. 17 of 1935.

(1) I.L.R. 38 Mad. 807.

(2) I.L.R. 46 All. 706.

Williams for the applicant. The Privy Council in *Besant's* case did not purport to decide this point, and their Lordships' observations are *obiter*. *Kup-pachi v. Lakshmiah* (1). See also *Kamini v. Ghose* (2). S. 19 applies only when a third party applies to be appointed guardian and not where the father himself is the applicant.

The Court can, however, treat the present application as one under s. 25 and grant the applicant his prayer. In the alternative the applicant should be allowed to withdraw his application with liberty to bring a fresh application under s. 25.

LEACH, J.—This is an application under section 7 of the Guardians and Wards Act, 1890, for an order appointing the petitioner, who is a Hindu, the guardian of the person of his minor son. The respondent, who is also a Hindu, is the wife of the petitioner and the mother of the child. The child was born on the 24th September 1933. A similar application was made by the petitioner in Civil Miscellaneous Case No. 138 of 1934 of this Court, but was dismissed by me on the 22nd November 1934 on the ground that it would not be for the welfare of the minor to remove him from the custody of the mother while he was so young. The petitioner now asks for an order appointing him guardian of the person of the minor on two grounds, namely that he is the father of the minor and that it will be detrimental to the child to allow him to remain in the custody of the respondent.

The learned advocate for the respondent has raised a preliminary objection. He contends that section 19 of the Guardians and Wards Act prohibits

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(1) 48 M.L.J. 179.

(2) 44 C.L.J. 40.

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the Court appointing a Hindu father the guardian of his own child. The contention is well founded and is supported by authority.

Section 7 of the Guardians and Wards Act states that where the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property or both, or, declaring a person to be such a guardian, the Court may make an order accordingly. Section 19 of the Act, however, provides :

“Nothing in this chapter shall authorize the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint or declare a guardian of the person—

- (a) of a minor who is a married female, and whose husband is not, in the opinion of the Court, unfit to be guardian of her person, or,
- (b) subject to the provisions of this Act with respect to European British subjects, of a minor whose father is living, and is not, in the opinion of the Court, unfit to be guardian of the person of the minor, or,
- (c) of a minor whose property is under the superintendence of a Court of Wards competent to appoint a guardian of the person of the minor.”

Shorn of the words which do not apply in this case the section states that nothing shall authorize the Court to appoint and declare a guardian of the person of a minor whose father is living and is not, in the opinion of the Court, unfit to be the guardian of the person of the minor.

In the well-known case of *Besant v. Narayaniah* (1) the Judicial Committee of the Privy Council considered the rights of a Hindu father in the matter of the guardianship of his infant sons and in

delivering the judgment of their Lordships Lord Parker observed :

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“And further, no order declaring a guardian could by reason of the 19th section of the Guardians and Wards Act, 1890, be made during the respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case.”

If further support for this view is sought it is to be found in *Bai Tara v. Mohanlal Lallubhai* (1) and *Sukhdeo Rai v. Ram Chandar Rai* (2). In *Bai Tara v. Mohanlal Lallubhai* (1) Sir Norman Macleod observed :

“The petitioner filed this application under the Guardians and Wards Act to be appointed guardian of the person of his minor son, who was living with his mother opponent No. 4 and his maternal grandfather opponent No. 5. I may point out at once that the application ought to have been dismissed, because such an application by a Hindu father under the Guardians and Wards Act, presumably under s. 19, is not competent, and a considerable amount of confusion has arisen in the course of the argument from neglecting to recognize the fact.”

The learned advocate for the petitioner relies on *Kuppachi Ragavaiya v. Machavolu Lakshmiiah* (3) and *Srimati Kamini Mayi Debi v. Bhusan Chandra Ghose* (4). In the first of these two cases the passage from the judgment of Lord Parker in *Besant's case* (5), which I have just quoted, was disregarded on the ground that it was merely *obiter*. The views of the Privy Council were not discussed in the second case, although reference was made to the judgment of Sir Norman Macleod in *Bai Tara v. Mohanlal Lallubhai* (1). I do not agree that the interpretation

(1) 24 Bom. L.R. 779.

(3) 48 Mad. L.J. 179.

(2) (1929) I.L.R. 46 All. 706.

(4) 44 Cal. L.J. 40.

(5) (1914) I.L.R. 38 Mad. 807.

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of section 19 which the Privy Council gave in *Besant's* case (1) can be disregarded on the ground that it is *obiter*, but in any event it appears to me that a different interpretation would violate the wording of the section. I am, therefore, unable to accept the cases quoted on behalf of the respondent as having been rightly decided so far as the question under discussion is concerned.

It follows that in my view an application by a Hindu father for an order appointing him guardian of the person of his minor son does not lie, because section 19 prohibits the Court making such appointment. Moreover, an order under section 7 is not necessary. A Hindu father is the lawful guardian of his minor children, and a declaration by a Court cannot increase his powers in that respect. The preliminary objection to the application before me, therefore, prevails and the application must be dismissed.

Mr. Williams at the conclusion of his argument suggested that he might be allowed to withdraw the present application with liberty to file another one under section 25 of the Guardians and Wards Act. In my opinion, the proper course is to dismiss the present application, which I have done. The dismissal, however, will not prejudice any application which the petitioner may make under section 25.

The respondent has succeeded on the present application and is entitled to costs which I fix at three gold mohurs.