APPELLATE CIVIL.

Before Harrison and Addison JJ.

1932

March 30.

HARI CHAND (PLAINTIFF) Appellant

versus

GHULAM RASUL (DEFENDANT) Respondent.

Civil Appeal No. 534 of 1931.

Guardians and Wards Act, VIII of 1890, section 19: Appointment of guardian other than father—when competent—Change of religion—whether renders father unfit.

Held, that change of religion does not render a father unfit to be guardian of the person and property of his minor son, and, if the father is alive and able to provide for the latter's welfare and it is not shown that he is unfit for some good reason, other than change of religion, no other guardian can be appointed; *vide* section 19 of the Guardians and Wards Act.

Miscellaneous first appeal from the order of Mr. James Read, District Judge, Rawalpindi, dated 19th March 1931, dismissing the application of Hari Chand for appointment as guardian of the person and property of the minor Dina Nath (alias *Ghulam Mustafa*), *son of Ghulam Rasul* Shaikh, *convert Muslim, of Golra, Tahsil Rawalpindi.*

GOBIND RAM KHANNA, for Appellant.

SHUJA-UD-DIN, S. K. AHMAD and MOHAMMAD AMIN, for Respondent.

The judgment of the Court was delivered by :—

HARRISON J.—This case has been referred to a Division Bench to decide whether in the case of a father, who is not unfit, the Court has power to appoint another person as guardian of the minor on the ground of the welfare of the minor.

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All that the counsel has been able to point out to us is that it has been decided that in coming to a decision under section 19 as to the fitness of the father the points detailed in section 17 should be taken into consideration. This merely amounts to emphasizing the necessity of considering the fitness of the father and deciding whether he is able to ensure the welfare of his children.

In this case it has not even been urged that the father is in any way unfit. It has been pointed out that he has changed his religion, and it is conceded by counsel that this in itself does not amount to unfitness. In these circumstances, it has not been shown that there is any reason to suppose that the father is unfit; and, as laid down in section 19, he being alive and able to provide for the welfare of his children, no guardian can be appointed.

The appeal will be dismissed with costs. Pleader's fee Rs. 48. The *ad interim* order of the 16th April, 1931, stands discharged. The order passed by the learned District Judge under section 25 directing that the child be returned to his father will now be carried out.

N. F. E.

Appeal dismissed.

APPELLATE CIVIL.

1932

April 5.

Before Harrison and Addison JJ.

MUSSAMMAT LALITA DEVI (DEFENDANT) Appellant

versus

ISHAR DAS (PLAINTIFF)
RAM LABHAYA AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No 1890 of 1926.

Hindu Law—Mitakshara—*Will by father of undivided coparcenary interest—in favour of his wife—legal effect of.*

According to the *Mitakshara* Law no coparcener, not even a father, can dispose by will of his undivided coparcenary interest, even if the other coparceners consent to the disposition; the reason being that the coparcener has nothing to leave. He can only dispose of what is his at the time of death, the testamentary disposition only operating thereafter. His death and the merging of his interest in the property in his coparceners are contemporaneous.

Thus, the will by the father of an undivided coparcenary interest in favour of his wife was wholly void, in that it purported to dispose of that which had or could have no existence.

Mulla's Hindu Law, page 421 (6th Edition), relied upon.

First Appeal from the decree of Sardar *Sewa Singh, Subordinate Judge, 1st Class, Amritsar, dated the 9th June, 1926, declaring that the suit-property is liable to attachment and sale in the execution of the decree of the plaintiff against defendants Nos. 2 to 4, with costs.*

SHAMAIR CHAND, NAWAL KISHORE and QABUL CHAND, for Appellant.

DEV RAJ SAWHNEY and HAR GOPAL, for Plaintiff-Respondent.

HARRISON J. HARRISON J.—The plaintiff in this case is a decree-holder against one Durga Das and the minor sons of

one Mangtu Mal. The decree is based on *hundis* executed by the firm Durga Das-Banarsi Das, of which the deceased Mangtu Mal was a member. *Mussammat* Lalita Devi, defendant No. 1, the widow of Mangtu Mal, objected to the attachment. Her objection prevailed and the property was released from attachment. The plaintiff now prays for a declaration that the property is liable to attachment and sale in execution of his decree. He is met by a will executed by Mangtu Mal when 23 years of age at a time when he had no son but one daughter. In this will he left the property in dispute to his wife *Mussammat* Lalita Devi. The suit was decreed, the findings of the trial Court being that the property was ancestral property, that the will was made for a specific purpose and in contemplation of the possible death of the testator on a pilgrimage, which he was about to undertake, and that the subsequent birth of sons after his return had the effect of cancelling it. On appeal it is urged that the property is not ancestral, that the will was never revoked and that though it may be voidable at the instance of the interested parties, namely, the sons, the decree-holder has no *locus standi* to impugn it, and that, unless and until the sons take action, it is good against all the world.

The first point as to the ancestral nature of the property is given up and counsel concedes that it is ancestral.

If the will be void and not merely voidable, it is I think clear that the decree-holder has every right to ignore it, and to obtain a declaration that the property is liable and can be proceeded against in execution of his decree. There is only one point to be decided and that is the effect and value of this will. Many rulings

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have been quoted such as *Sitaram* v. *Khandu* (1), *Jhari Koeri* v. *Bijai Singh* (2), *Mst. Saraswati Kaur* v. *Mahabir Prasad* (3), *Mst. Piari* v. *Shri Thakar Kishori Rawanji Maharaj* (4) and *Dhanna Mal* v. *Parmeshari Das* (5). These cases all deal with gifts and there is some conflict as to how far a father can dispose of any ancestral property during his lifetime. The position of a will, however, is very different. As explained in Mulla at page 421, 6th Edition, " according to the *Mitakshara* Law, no coparcener, not even a father, can dispose by will of his undivided coparcenary interest even if the other coparceners consent to the disposition. The reason is that at the moment of death, the right by survivorship of the other coparceners is at conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise." A simpler way, perhaps, of looking at it is that the father has nothing to leave. He can only dispose of what is his at the time of death, the testamentary disposition only operating thereafter. His death and the merging of his interest in the property in the other coparceners are contemporaneous and are merely different aspects of the same fact. It is not so much that the one results from the other as that on his extinction he is automatically replaced—not succeeded but replaced—by the others. There is, strictly speaking, no conflict between the two claimants but rather there can be no contest regarding a right to succeed to what does not exist. As a matter of fact I do not think the view taken by the trial Court is correct as to the cancellation of the will, and the analogy which

(1) (1921) I. L. R. 45 Bom. 105.
(2) (1923) I. L. R. 45 All. 613.
(3) (1928) 109 I. C. 272.
(4) (1931) 32 P. L. R. 100.
(5) 1928 A. I. R. (Lah.) 9.

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he draws between the facts of this case and those of another in which it was stated that the gift was to have effect in the event of the testator dying within a specified time is not sound. This, however, is not very important, for the view I take leads to the same result. This is that the will was wholly void in that it purported to dispose of that which had or could have no existence. The property devised could only come into existence as a separate and heritable entity on an impossible event occurring, namely, on Mangtu Mal dying without that property merging and being absorbed by his survivors, the other members of his joint Hindu family. It was absorbed in accordance with and in obedience to the law of its own being.

I would, therefore, dismiss this appeal with costs.

ADDISON J.—I agree. ADDISON J.

A. N. C.

Appeal dismissed.