

APPELLATE CIVIL.

Before Skemp J.

MUSSAMMAT NAZIR BEGUM—Appellant

versus

GHULAM QADIR KHAN AND OTHERS—

Respondents.

Civil First Appeal No. 255 of 1936.

Guardians and Wards Act (VIII of 1890), section 9 (1) — ' Ordinarily residing ' — meaning of — Muhammadan minor girl — Mother — whether competent to present application for guardianship — though living in another District — and whether the best guardian of the minor's person.

Held, that where the minor girl was born, as in the present case, in August 1933 in her father's house at Multan and lived there until her father died at Multan in March 1935, and was then sent to Bahawalpur, early in April 1935, with a lady, a nominee of her step brothers, living outside British India, and the mother applied on 14th May, 1935, to be appointed guardian, the minor must be held to have ordinarily resided in Multan within the meaning of section 9 (1) of the Guardians and Wards Act and the Multan Court was, therefore, competent to hear the application for guardianship.

Mubarik Shah Khan v. Mst. Wajeh-ul-Nissa (1), and *Jakshman Moreshet v. Gangaram Narayan* (2), relied upon.

Held also, that the fact that the applicant was not living in the Multan district, but in her father's house at Lahore, did not render her incompetent to make the application.

Beni Prasad v. Mst. Parwati (3), relied upon.

And further, that in the present case the mother was the best guardian of her female child until she attained the age of puberty.

First appeal from the order of Sheikh Mohammad Zafar Qureshi, Subordinate Judge, 1st Class, Multan, dated 24th August, 1936, returning the application by Mst. Nazir Begum for appointment as the guardian

(1) 53 P. L. R. 1902.

(2) 1932 A. I. R. (Bom.) 592.

(3) 1933 A. I. R. (All.) 780.

1937

Jan. 7.

of the person of *Fahmida Khanam*, her minor daughter, for presentation to a Court of competent jurisdiction.

1937

MUSSAMMAT
NAZIR BEGUM

v.

MOHAMMAD AMIN, for MALIK MOHAMMAD HUSSAIN, GHULAM QADIR
for Appellant, KHAN.

MELA RAM, for Respondent.

SKEMP J.—This is an appeal against an order of the learned Subordinate Judge, 1st Class, Multan, rejecting the application of *Mussammat Nazir Begum* to be appointed guardian of her minor daughter *Fahmida Khanam*.

SKEMP J.

The minor was born on the 30th of August, 1933, in her father's house at Multan. The learned trial Judge states that the family is the premier family of Multan. Her father *Nawab Abdul Karim* died at Multan on the 7th of March, 1935, and his *Chehlum* ceremony was celebrated on the 7th of April. The minor was sent to Bahawalpur State in the custody of *Mussammat Mehan Bibi* a few days later, it is said with her mother's consent. *Mussammat Nazir Begum's* application to be appointed guardian was drafted on the 13th May, 1935, and presented in Court on the 14th May, 1935.

The learned Subordinate Judge rejected the application on the following grounds:—

(1) that he had no jurisdiction, because the minor ordinarily resided in Bahawalpur State;

(2) that the mother had consented to her being sent to Bahawalpur; and

(3) that, although by the personal law of the parties the mother was the guardian until the age of puberty, it was in the circumstances for the welfare of the minor that she should not be appointed guardian.

1937

MUSSAMMAT
NAZIR BEGUM
v.
GHULAM QADIR
KHAN.
SKEMP J.

In my judgment the conclusions of the learned Subordinate Judge are wrong and the appeal must be accepted. Section 9 (1) of the Guardians and Wards Act requires that an application for guardianship of the person of the minor should be made to the District Court having jurisdiction in the place where the minor ordinarily resides. In *Mubarik Shah Khan v. Mst. Wajeh-ul-Nissa* (1), the minor's father had lived both in Delhi and Khan Khoda in the Rohtak District, dying in the latter place. The child was born at Khan Khoda, but brought to Delhi by her mother who died a few weeks later in the house of a relative in Delhi. Robertson J. held that the minor ordinarily resided in Khan Khoda. To much the same effect is a Division Bench ruling of the Bombay High Court, reported as *Lakshman Moreshet v. Gangaram Narayan* (2). I hold that the minor, who had lived all her life in the Multan District until a few weeks before the application, ordinarily resided in the Multan District.

Before me it was also urged that the law requires that the applicant should live in the District in which the application is made. Admittedly at the time of the application the applicant was living in the house of her father, a *rais* of Lahore and she is still living there. Reliance was placed on *Asghar Ali v. Amina Begam* (3), which contains an *obiter dictum* to this effect reproduced in the head note. This *obiter dictum* was also followed in a Single Bench judgment of this Court reported as *Mussammat Lachmi v. Nanak Chand* (4), where it was quite unnecessary for the decision of the case. The Allahabad ruling has been dissented from by a later Bench of the Allahabad High Court in *Beni Prasad v. Mst. Parwati* (5).

(1) 53 P. L. R. 1902.

(3) I. L. R. (1914) 36 All. 280.

(2) 1932 A. I. R. (Bom.) 592.

(4) 1928 A. I. R. (Lah.) 716.

(5) 1933 A. I. R. (All.) 780.

Rachhpal Singh J. said " It is nowhere laid down that a person not residing within the jurisdiction of the Court to which the application is made will be incompetent to make the same. The District Judge relies on Clause (b), section 39 of the Act."

The learned Judge then explained that this section merely means that " in certain cases ceasing to live within the jurisdiction of the Court, which made the order of appointment, may be a ground for the removal of the guardian from his office and no more." He then distinguished *Asghar Ali v. Amina Begam* (1) and pointed out that the remark was only an *obiter dictum*.

It is quite clear in view of the foregoing that the *dictum* in *Asghar Ali v. Amina Begam* (1) can no longer be regarded as good law. In cases like the present it would lead to the consequence that a mother cannot be appointed guardian of her own child, because she has gone to live in her father's house in another District.

As to the merits, the Muhammadan Law lays down that a mother is the proper guardian of a female child until the child attains the age of puberty. The learned trial Judge, however, persuaded himself that it was for the welfare of the child that another person should be appointed. He was quite right that the welfare of the child should take precedence even of the personal law of the parties, but it passes my comprehension how it is for the welfare of the child to be under the care of a nominee of her step-brothers living outside British India and not with her own mother. He said that the mother had agreed to the child being taken away to Bahawalpur. Even if she

1937

MUSSAMMAF
NAZIR BEGUM
v.
GHULAM QADIR
KHAN.

SKEMP J.

1937

MUSSAMMAT
NAZIR BEGUM

v.

GHULAM QADIR

KHAN.

SKEMP J.

did so in order that she might leave Multan and return to her father's house in Lahore, it is no bar to this application.

I accept this appeal and direct that the applicant *Mussammat Nazir Begum* be appointed guardian of the person of her minor daughter *Mussammat Fahmida Khanam*. The respondents are to pay the appellant's costs throughout.

A. N. C.

Appeal accepted.

REVISIONAL CIVIL.

Before Skemp J.

GHULAM ALI AND ANOTHER (PLAINTIFFS)

Petitioners

versus

NIAZ ALI AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 470 of 1936.

Civil Procedure Code (Act V of 1908), s. 115, and Punjab Courts Act (IX of 1919), section 44: Order directing the plaintiff to make up a deficiency in Court-fees — whether an interlocutory order — Revision to High Court — whether competent.

Held, that an order directing the plaintiff to make up a deficiency in Court-fees is an interlocutory order and is not open to revision by the High Court.

Lal Chand-Mangal Sen v. Behari Lal - Mehr Chand (1), and *Navab v. Duni Chand* (2), relied upon.

Lakshmi Narain v. Dip Narain (3), *Adeshwar Prasad v. Mst. Badami Devi* (4), *Karuppana Tevar v. Angammal* (5), *Ramrup Das v. Shiyaram Das* (6), and *Dodda Sannekappa v. Sakravva* (7), not followed.

(1) I. L. R. (1924) 5 Lah. 288 (F. B.). (4) 1934 A. I. R. (Oudh.) 212 (2).

(2) 69 P. R. 1912.

(5) 1926 A. I. R. (Mad.) 678.

(3) 1933 A. I. R. (All.) 350.

(6) (1910) 14 Cal. W. N. 932.

(7) (1916) 36 I. C. 831.