APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

1892.
August 31.

SAYAD SHAHU (ORIGINAL OPPONENT), APPELLANT, *v.* HAPIJA BEGAM, (ORIGINAL APPLICANT), RESPONDENT.*

Minor—Guardian—Appointment of guardian by will—Application for certificate of guardianship—Practice—Procedure—Guardian and Wards Act VIII of 1890, *Secs.* 7 (*Cl.* 3), 13 *and* 48.(1)

When a person alleges that he has been appointed guardian of a minor under a will, no one else can be appointed guardian under section 7 (3) of Act VIII of 1890 until it is found after due investigation that there is no valid will.

The procedure under Act VIII of 1890 is not intended to be summary.

THIS was a first appeal from an order passed by C. G. W. Macpherson, District Judge of Belgaum.

The facts of the case were as follows :—

One Hapija Begam, widow of Gouskhán Desái, applied under Act VIII of 1890 for a certificate of guardianship to the persons of her minor sons and grandsons, and asked the Court to appoint a manager of the property of her deceased husband.

* Appeal No. 2 of 1892.

(1) Sections 7, 13 and 48 of Act VIII of 1890 are as follows :—

Section 7.—(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(*a*) appointing a guardian of his person, or property, or both, or

(*b*) declaring a person to be such a guardian,

the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

Section 13.—On the day fixed for the hearing of the application, or as soon after as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application.

Section 48.—Save as provided by the last foregoing section and by section 622 of the Code of Civil Procedure, an order made under this Act shall be final, and shall not be liable to be construed by suit or otherwise.

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The opponent, Sayad Shahu *alias* Mahomed Sáheb, objected on the ground that he had been appointed guardian of the minors and of their property under a will made by the deceased Gouskhán on the 15th June, 1890.

The District Judge after recording some evidence declined to take further evidence, on the ground that the proceedings were summary, and that it was open to the opponent to establish his position in a regular suit. He accordingly granted to the applicant the certificate of guardianship of the minor children, and requested the Collector to nominate a manager of the property.

The opponent appealed.

Phirozsháh M. Mehta (with *Mahádeo Bháskar Chaubal*) for the appellant:—The Judge has disposed of this matter summarily according to the procedure under Act XX of 1864; but that Act has been repealed by Act VIII of 1890, which contemplates full inquiry into the allegations of the contending parties—sections 13 and 48.

Section 7 (3) of the Act lays down that when a person is appointed guardian under a will or other instrument, no other person shall be appointed as guardian until the powers of the appointed guardian have ceased.

Jardine (with *Ghanasham N. Nádkarni*) for the respondent:—The case of a guardian appointed under a will is governed by section 5 of Act VIII of 1890, and that section applies only to European British subjects.

Section 6 relates to the appointment of a guardian generally. But when a guardian is appointed under a will, section 5 only is applicable.

[CANDY, J., referred to section 7.]

We do not contend that the Act does not apply to persons other than European British subjects. We say that it applies to all persons, but what we contend is that when a guardian is appointed under a will, there is special provision made by section 5 which relates only to European British subjects. The other sections of the Act do relate to the appointment of a guardian, but they do not relate to the appointment of a guardian under a will or other instrument.

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Next, the Judge was not satisfied as to the genuineness of the will, and, therefore, he was right in not appointing the appellant. The Judge was also justified in rejecting the appellant's application for producing evidence, because the application was made only the day before the final order was passed.

The respondent is the grandmother of the minors, and, therefore, she is the proper person to be their guardian.

CANDY, J. :—The District Judge was apparently misled by his recollection of the old Act (XX of 1864), which directed that the proceedings under that Act should be summary. Sections 13 and 48 of Act VIII of 1890 show that the procedure under the later Act is not intended to be summary.

Opponent opposed the application on the ground that he had been appointed by will. We think that under section 7 (3), the District Judge could not appoint any one else as guardian until he found, after due investigation, that there was no valid will as alleged by opponent. The District Judge declined to hear the evidence referred to in the application of opponent, dated 26th October, 1891, not because the evidence was adduced too late, but because "the proceedings are summary, and the Courts are open for a regular trial." Under these circumstances, we must reverse the order of the District Judge, and remand the case to him for investigation according to law. All costs to be dealt with in the Court below.

Order reversed.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.

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BHUKHANDÁS VIJBHUKANDA'S (ORIGINAL PLAINTIFF), APPELLANT, *v.* LALLUBHAI KA'SHIDA'S AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

Res judicata—Suit on a mortgage against several defendants—Dismissal of suit as against some of the defendants for want of jurisdiction—Subsequent suit on the mortgage against same defendants in another Court—Civil Procedure Code (XIV of 1882), Secs. 42, 43.

The plaintiff brought a suit in the High Court of Bombay (No. 169 of 1887) against three defendants on a mortgage executed at Surat of certain property

*Second Appeal, No. 12 of 1891.

situated there. The covenant for repayment was joint and several. The second and third defendants in that suit (the defendants in the present suit), who were inhabitants of Surat, pleaded that as against them the Court had no jurisdiction. The suit was accordingly dismissed as against them for want of jurisdiction, but as against the first defendant, who resided in Bombay, the Court passed a decree for the plaintiff. The plaintiff then brought the present suit against the defendants in the Surat Court to enforce their liability under the mortgage. The defendants pleaded that the claim against them was barred by the dismissal of the former suit.

Held, that the suit was not barred. In the former suit there had been, as against these defendants, no decision on the merits, and the proceedings against them were a nullity.

SECOND appeal from the decision of C. G. W. Macpherson, District Judge of Surat.

In this suit the plaintiff sought to recover Rs. 4,165 alleged to be due on a mortgage executed in his favour by the defendants and one Jekisondás Purshotamdás.

The plaint stated that the plaintiff had already brought a suit (No. 169 of 1887) on the mortgage against all the mortgagors on the original side of the High Court. In that suit the defendants pleaded that the Court had no jurisdiction, in as much as the mortgaged property was situated at Surat, where they resided and where the mortgage was executed. The High Court thereupon dismissed the suit as against them for want of jurisdiction, but passed a decree against their co-defendant, Jekisondas Purshotamdás, who resided in Bombay.

The defendants now pleaded that this suit against them was barred by the dismissal of Suit No. 169 of 1887.

The First Class Subordinate Judge passed a decree for the plaintiff.

On appeal by the defendants the District Judge reversed the decree. In his judgment, after referring to sections 42, 43, 16 and 17 of the Civil Procedure Code (Act XIV of 1882), he said :—

"Now it seems to me that all these provisions are aimed against a plaintiff bringing two or more suits where the matter in litigation can be disposed of in one, and against defendants being troubled unnecessarily, and they point at a suit being as a rule brought in the Court within the local limits of whose jurisdiction the property in dispute is situate or the cause of action

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arose; it can be brought in a Court within whose local limits the defendant or one of the defendants resides, but only under certain conditions.

"In the present case a bond executed in Surat by Jekisondás and the present defendants mortgaged to plaintiff a house situate in Surat. Plaintiff, however, elected to sue the mortgagors in Bombay, and obtained in the High Court a decree for the full amount of the bond against Jekisondás, who resides in Bombay, while his claim as against the present defendants was rejected for want of jurisdiction. The plaintiff then brought a second suit against them in the Court of the First Class Subordinate Judge of Surat, and has obtained a second decree for the full amount of his bond, and the question is, whether this second decree can be confirmed. I think it cannot. * *

"In the words of section 42 of the Civil Procedure Code, it was practicable by bringing the suit in Surat to obtain a final decision against all the mortgagors, and thus to prevent further litigation, and I am of opinion that when plaintiff elected to bring his suit in a Court which had jurisdiction in respect only of one defendant, he, in effect, waived his claim against the others. No doubt, if he had different causes of action against the different defendants, he might bring different suits, but I think when a house is mortgaged for a lump sum of money by its co-owners, the mortgagee has only one cause of action. He may sue one or two or more or all of them, but he can't bring more than one suit, and I do not think that a clause in the bond making the mortgagors jointly and severally liable (as in this case) over-rides the provisions of the law against a multiplicity of suits when, as a matter of fact, the whole of the property is mortgaged by all its owners."

The plaintiff preferred a second appeal.

Lang, Acting Advocate General, for the appellant:—The liability here was a joint and several liability. The dismissal of the former suit against the defendants for want of jurisdiction without any decision on the merits cannot operate as *res judicata* in a subsequent proceeding against them. If the liability under the bond had been joint, and not several, then the dismissal of the

suit might have operated as *res judicata*—*Kendall* v. *Hamilton*[1]; *Hemendro Coomar* v. *Rajendrolall*[2]; *King* v. *Hoare*[3]; *Dhunput Sing* v. *Sham Soonder Mitter*[4].

Jardine (with *Mánekshák J. Taleyárkhán*) for the respondents:—The plaint in the former suit in the High Court alleged that the money was to be paid by the respondents at Bombay, and hence the cause of action was alleged to have arisen in Bombay. Under these circumstances the appellant ought to have appealed against the order of the High Court dismissing the suit for want of jurisdiction, and that order ought to have been set aside. Not having been set aside, it operates as a bar to the present suit.

Lang in reply:—The respondents themselves had raised the plea of want of jurisdiction in the High Court. Therefore it cannot now be open to them to urge that the order of dismissal ought to have been set aside in appeal. The mortgage-bond does not say that the money was to be paid at Bombay. The bond having been executed at Surat, the presumption would be that the money was to be paid at Surat, unless there was a special provision to the contrary.

BAYLEY, C. J. (Acting):—We are of opinion that the decision of the District Judge cannot be sustained. He has evidently not appreciated the difference between a joint liability and a joint and several liability. Defendants 2 and 3 in the Suit No. 169 of 1887 on the Original Side of the High Court pleaded in their written statement that as against them the Court had no jurisdiction. That Court so decided and dismissed the suit against them. There was no decision on the merits, and the proceedings against them in that Court were a nullity. The case of *King* v. *Hoare*[3], which was treated as a binding authority in the case in the House of Lords of *Kendall* v. *Hamilton*[1], does not appear to have been cited, or to have been present to the mind of the District Judge when he was preparing his judgment,

(1) 4 Ap. Ca., 504.
(2) I. L. R., 3 Calc., 353.
(3) 13 M. and W., 494.
(4) I. L. R., 5 Calc., 291.

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The sections of the Civil Procedure Code quoted by the District Judge have, in our opinion, no application.

We, therefore, reverse the decree of the District Judge and restore that of the Subordinate Judge. All costs on defendants.

Decree reversed.

APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Telang.

1892.
September 27.

VALLABDA'S HIRA'CHAND (ORIGINAL OPPONENT), APPLICANT, *v.* KRISHNA'BA'I, (ORIGINAL APPLICANT), OPPONENT.*

Guardian and Wards Act (VIII of 1890), *Sec.* 41, *Cl.* 3, *and Sec.* 51—*Its applicability to guardians who had ceased to be such before the Act came into force—Guardian and ward.*

The Guardians and Wards Act (VIII of 1890) does not apply to guardians whose powers had ceased by reason of their wards having attained majority, or otherwise, prior to the passing of the Act.

The word 'guardian' in section 51 of the Act means a guardian who was such at the time the Act came into force.

A was appointed a guardian of *B*'s property under the Bombay Minors Act, XX of 1864. *B* attained majority in 1886. In 1892 *B* applied to the District Judge for an order directing *A* to deliver to *B* his property together with the accounts relating thereto. The District Judge made the order, as asked for, under section 41, clause 3 of Act VIII of 1890.

Held, that the District Judge had no jurisdiction under Act VIII of 1890 to make the order in question, as *A* had ceased to be a guardian before the Act came into force.

THIS was an application under section 622 of the Code of Civil Procedure (Act XIV of 1882).

On the 30th January, 1879, the applicant was appointed administrator of the estate of the opponent Krishnábái, then a minor, under section 6 of the Bombay Minors Act, XX of 1864.

Krishnábái attained majority in 1886.

Krishnábái adopted a son, and an arrangement was made between her and the administrator of the estate, under which she was to be paid Rs. 50,000 in cash, and the rest of her estate was to be held by the administrator in trust for the benefit of the adopted son.

* Application No. 108 of 1892 under Extraordinary Jurisdiction.