

APPELLATE CIVIL.

fore Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

ANGABAI (ORIGINAL OPPONENT), APPELLANT, v. KHASHABAI AND ANOTHER (NO. 1, ORIGINAL PETITIONER), RESPONDENT.*

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March 29.

Guardian and Wards Act (VIII of 1890), Secs. 7 (3), 8 (a), 13—Claim to guardianship based on a will does not survive to claimant's representative—Appeal—Death of appellant pending appeal—Abatement.

The Khashabai applied to be the guardian of the person and property of her minor son. Her application was opposed by Gangabai, the grandmother of the minor, who alleged that she had been appointed guardian by the will of the minor's father. The Judge found the will not proved, and he appointed Khashabai to be guardian. Gangabai appealed and pending the appeal she died. Madhavrao, Gangabai's brother, thereupon applied for leave to prosecute the appeal as Gangabai's representative.

Held, refusing the application, that the appeal must abate by reason of Gangabai's death. Her appointment alleged to have been made under the will was a matter of personal preference and trust. A claim based on personal trust does not survive to her representative.

The appeal from the decision of J. B. Alcock, District Judge of Poona.

The Khashabai applied to be appointed the guardian of the person and property of her minor son Hanmant. Her application was opposed by Gangabai, the grandmother of the minor, who alleged that she herself had been appointed the guardian under a will executed by the deceased father of the minor. At the inquiry the original will was not produced, and the Judge appointed Khashabai guardian of the person, associating the collector with her as guardian of the property of the minor.

Gangabai thereupon filed the present appeal. Pending the appeal Gangabai died. Her brother Madhavrao now applied to have his name entered on the record as her representative and to be allowed to continue the appeal.

Mr. V. Bhandarkar appeared for the applicant:—The applicant being Gangabai's brother is her heir, and he is entitled to succeed to all the rights which Gangabai had.

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[PARSONS, C. J.:—In the present case Gangabai derived right of guardianship under the alleged will, and that right being personal came to an end when she died.]

The applicant could have presented an application of his own or could have objected to an application presented by another person under the provisions of the Guardian and Wards Act. So long as Hanmant continues a minor, the applicant is entitled to move in the matter.

Bahadurji (with *Darasha Bazonji* and *Finayak V. Ranoo*) appeared for respondent No. 1, *Khashabai*:—Without the will Gangabai had no independent right to the guardianship of the minor. Gangabai being the grandmother of the minor could not be preferred to the respondent, who is his mother. Any right to the guardianship conferred on Gangabai by her son's will came to an end at her death. It was not such a right as surviving her representative. This appeal, therefore, must abate.

PARSONS, C. J. (ACTING):—In this case *Khashabai* had applied to be appointed the guardian of the person and property of the minor son *Hanmant*. Her application was opposed by *Gangabai*, the grandmother of the minor, who claimed the right herself being appointed the guardian under a will said to have been executed by the father of the minor. The District Judge found the will not proved and appointed *Khashabai* guardian of the person, associating the Collector with her as guardian of the property of the minor.

Gangabai preferred this appeal against the order and died on the 1st January last. Her brother *Madhavrao* has now made an application, asking that his name be entered on the record as her representative and that he be allowed to continue the appeal. The question is, whether he has the right to continue the appeal. We answer it in the negative. The objection raised by *Gangabai* to the appointment of *Khashabai* was a purely personal one. It was based upon her own appointment by the will of the minor's father, and it ceased on her death. The applicant as her representative could not continue her contention that, as a guardian had been appointed by will, an order appointing another person to be guardian could not be made under the terms of section 7 (3)

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of the Act. It cannot, therefore, be said that the right to sue, which in this case must be construed to mean the right to make the objection which Gangabai made, survived.

It was argued that as the applicant Madhavrao might himself have made an application under section 8 (a) to be appointed guardian or have opposed the application of Khashabai under section 13, he has the right of continuing the application and the opposition of Gangabai, but this is not a sound argument. He could only continue the action of Gangabai if he occupied her place having succeeded as her representative to her rights. This he does not do, for her rights which were based only upon the will determined with her death, and the action of her brother is based not upon the will or upon any rights derived from her, but upon rights which belonged to, and could have been exercised by him in her lifetime. It seems sufficient to say that as *Held*, applicant has not succeeded to the office of guardian as the representative of Gangabai, and does not base his opposition to her appointment on any grounds based on representation from Gangabai, he cannot continue this appeal, which must be held to have abated on the death of Gangabai. We now order the appeal to abate.

—RANADE, J. :—The question at issue, *viz.*, whether this appeal does not abate by reason of the death of the appellant Gangabai, depends for its decision upon the inquiry whether the right to sue in this case survives to Madhavrao as Gangabai's heir after her death (section 365). Gangabai was opponent in an application made by Khashabai, the respondent, to be appointed guardian and administrator of the minor Hanmantrao. Gangabai chiefly relied upon the will of her deceased son, the minor's father. This will was held not proved, and the District Judge granted the respondent's application so far as the guardianship of the minor's person was concerned, and appointed the Collector and respondent to administer the estate jointly. Gangabai appealed to this Court against this order of the District Judge, and an issue was sent down for inquiry regarding the will. No evidence was given, as Gangabai died in the meanwhile. Her brother now seeks permission to prosecute the appeal as Gangabai's heir. His right to do so must obviously depend upon the right to sue or defend

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surviving to him as Gangabai's heir. Gangabai claimed the right under her son's will. Independently of the will, she had no superior right as against the respondent Khashabai. Madhavrao claims no right under this will. The appointment of Gangabai alleged to have been made in the will was a matter of personal preference and trust. Such a claim based on personal trust cannot survive Gangabai. Mr. Shivram Vithal contended that the right survived because the cause of action, according to him, was the minority of Hanmantrao, and that still continued. This is not a correct view to take. The right to sue or defend in this case rests solely on the personal preference contained in the will. The cause of action means in such cases the right to bring the action, or in this case the right to object to the claim. This does not survive to Madhavrao, who claims to be Gangabai's heir. If he claims under any special appointment made in his favour by Gangabai, he must, it is obvious, apply to the District Court and establish his right first. Such an appointment can confer no right on him to have his name substituted in Gangabai's place as appellant in this case. Mr. Bhandarkar admitted that he was unable to cite a single precedent where applications for guardianship or defences in such proceedings have been permitted to be carried on by the heirs of deceased parties. We must, therefore, hold that this appeal abates by reason of Gangabai's death.

The Collector's objection to be joint manager with the respondent will be separately dealt with by the District Judge. It cannot influence the decision of the present appeal in any way.

Appeal ordered to abate.