APPELLATE CIVIL.

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

1899. *March* 13.

GANESH VITHAL JADE (Applicant), Appellant, *v.* KUSABAI (Opponent), Respondent.*

Guardian and Wards Act (VIII of 1890), Secs. 13, 16 and 39—Duty of District Court to hear all evidence—Decision based on evidence taken by a Subordinate Court illegal—Practice—Minor—Guardian.

Section 46 of the Guardian and Wards Act (VIII of 1890) does not control section 13 of the Act, so as to authorize the District Judge to dispense with the hearing of evidence by himself and transfer the whole investigation of material issues of fact to a Subordinate Court. Nor does it empower the District Judge to use the evidence taken by the Subordinate Court.

An application was made for the appointment of a guardian to the person and property of a minor. The District Court sent the application to a Subordinate Judge for inquiry and report, and issued a notice calling upon any who objected to the appointment of the proposed guardian to appear before the Subordinate Judge, who would hear and dispose of the objections. The whole inquiry was held before, and all the evidence was taken by, the Subordinate Judge. Upon the evidence so taken, the District Judge disposed of the application.

Held, that the procedure adopted by the District Judge was illegal, and his decision based upon evidence not taken before him could not be accepted.

Application under the Guardian and Wards Act (VIII of 1890) for the appointment of a guardian to the person and property of a minor.

The applicant alleged that one Sadashiv Narayen Jade died possessed of considerable moveable and immoveable property; that a few hours before his death he adopted the minor Balkrishna, who performed his funeral ceremonies and inherited the whole of his estate; that the minor lived with his adoptive mother Kusabai for a time; that disputes then arose between Kusabai and the minor's natural father, in consequence of which Kusabai turned the minor out of the house, neglected his education, and wasted his property.

The applicant, therefore, prayed that the Názir of the District Court should be appointed as guardian of the minor's person

* Appeal, No. 102 of 1898.

and property. This application was presented to the District Judge of Poona on 11th November, 1896.

On 13th November, 1896, the District Judge sent the application to the Joint Subordinate Judge of Poona for inquiry and report as to whether the allegations made in the application were true, and whether it was necessary to appoint a guardian.

At the same time the District Judge issued a notice calling upon any person who objected to the appointment of a guardian to appear on the 14th December, 1896, before the Joint Subordinate Judge.

In answer to this notice, Kusabai appeared before the Subordinate Judge and objected to the appointment of a guardian on several grounds. She urged (*inter alia*) that the minor was adopted by her after her husband's death under an agreement made with his natural father, which provided that the minor should live with her till he came of age, when, if they disagreed, the whole of her husband's property should be divided half and half between herself and her adopted son.

The Subordinate Judge, without going into the question of the agreement set up by Kusabai, limited the inquiry before him to the question whether it was in the interest of the minor to appoint a guardian of his person or property or both.

On this question the whole of the evidence was recorded by the Subordinate Judge, and a report was submitted by him to the District Judge on the 8th March, 1898, recommending that a guardian should be appointed to the person and property of the minor.

On the 9th June, 1898, the District Judge sent back the case to the Subordinate Judge for further inquiry as to the truth of the conditional adoption alleged by the opponent Kusabai.

The Subordinate Judge took evidence on this question, and sent it to the District Judge, without making any report, or expressing his opinion on the evidence recorded, as the order of the 9th June, 1898, was silent on that point.

On the evidence taken by the Subordinate Judge, the District Judge finally disposed of the application on the 18th November,

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1898. He held that the conditional adoption as alleged by the opponent Kusabai was proved, and that there was no ground for removing her from the guardianship. The application was, therefore, rejected.

Against this order the applicant appealed to the High Court.

Ganpat Sadashiv Rao for applicant:—The procedure in this case was irregular and illegal. The District Judge instead of taking the evidence himself, transferred the whole inquiry to a Subordinate Court and based his decision upon evidence recorded by that Court. Section 13 of Act VIII of 1890 expressly requires the District Judge to hear all the evidence. He cannot delegate this duty to a Subordinate Court.

Under section 46 (1) he may call for a report from a Subordinate Court on any matter relevant to the inquiry before him; but he cannot rest his decision on evidence taken by the Subordinate Court. Here the judgment is founded entirely on evidence recorded by the Subordinate Judge. Moreover, on the merits the decision cannot stand. The opponent admits that she is unable to manage the minor's property, and she sets up an agreement with the minor's natural father under which she claims a moiety of the property left by the minor's adoptive father. Her interests are thus distinctly adverse to those of the minor. And the Judge ought to have removed her from the position of guardian under section 39 (*g*) of the Act.

N. G. Chandavarkar for respondent:—The objection taken here to the lower Court's procedure was never raised in the Court below. The case was pending in the District Court for nearly two years, during which time the appellant never objected to the inquiry being held by the Subordinate Judge. On the contrary he adduced all the evidence he had before the Subordinate Judge without any demur or objection. Nor did he object when the District Judge finally heard the arguments of both parties on the evidence taken by the Subordinate Judge. It is only now, after the case has been decided against him, that he

(1) Section 46 of Act VIII of 1890 provides as follows:—"(1) The Court may call upon the Collector, or upon any Court subordinate to the Court, for a report of any matter arising in any proceeding under this Act and treat the report as evidence."

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raises this technical objection. It is the general practice for the District Court to send such cases for inquiry and report to a Subordinate Court. And if he acts on such report, or bases his decision on evidence taken during the course of such inquiry, I submit he does not act illegally. On the merits, the District Judge finds that there is no sufficient reason for removing the minor from the guardianship of his adoptive mother. It is in the interests of the minor that a stranger should not be appointed as his guardian.

PARSONS, J.:—The procedure in the lower Court has been distinctly illegal. Section 11 of the Guardian and Wards Act, 1890, requires the Court, that is, the District Court, to fix a day for the hearing of the application, and section 13 provides that "on the day fixed for the hearing, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application." In the present case the District Judge neither gave notice of a hearing before himself, nor took any evidence himself. On receipt of the application he sent it to the Joint Subordinate Judge for investigation as to whether the allegations made in it were proper, whether it was necessary that a guardian should be appointed, and whether the minor was attending any, and if so, what school, and he issued a notice calling on any who objected to the appointment of the proposed guardian to appear on the 14th December, 1896, before the Joint Subordinate Judge, who would hear and dispose of the objections. The whole enquiry was held before, and all the evidence was taken by, Subordinate Judges. Section 46 of the Act permits the District Court to call "upon any Court subordinate to itself for a report on any matter arising in any proceeding under this Act, and treat the report as evidence." This clearly does not mean that the whole enquiry should be handed over to a Subordinate Judge, and it does not allow of the use by the District Court of evidence taken by the Subordinate Court. I think that the irregularity is one that vitiates the whole proceedings, and that the conclusion that the District Judge has come to upon evidence not taken before him, cannot be accepted. The parties have the right to require that the District Judge shall take their evidence and pronounce judgment upon it.

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We reverse the order and remand the application for a legal hearing.

Costs to abide the result.

RANADE, J.:—In this case, the appellant, who is a relative of the minor Balkrishna, made an application under sections 10—12 of Act VIII of 1890, praying that a guardian be appointed to the person and property of the minor, as the opponent, the minor's adoptive mother, had turned the minor out of the house, and was wasting his property. In the first application made on 11th November, 1896, the applicant prayed that the Názir of the District Court might be appointed as guardian. In a supplementary application, made on 14th December, 1896, the name of one Govindrao Shete was suggested in place of the Názir. The original petition was sent on 13th November to the Joint Subordinate Judge of Poona, who was asked to report if the allegations made in the petition were true, and also whether it was necessary to make an appointment as prayed for, and whether the minor attended school. The opponent in her reply denied that she had turned out the minor from her house or that she was squandering the property. She further stated that under an agreement made with the minor's father at the time of adoption, she and the minor had equal claim to the property. The Joint Subordinate Judge before whom the inquiry was held, asked the District Judge on 6th July, 1897, whether he should include in his inquiry the disputed question of the adoption and the agreement set up by the opponent, and the District Judge informed him that he should only report on two points: (1) whether it was in the interest of the minor that an appointment of guardian to the person or property or both should be made; and (2) who should be so appointed. Owing to transfers, the evidence in the Subordinate Court was taken before three officers, and finally on 8th March, 1898, a report was submitted recommending that a guardian should be appointed to the person and property of the minor, and that Govindrao and not the Názir should be so appointed.

The District Judge, after hearing arguments, came to the conclusion that the question of the truth and genuineness respectively of the alleged adoption and agreement set up by the oppo-

nent ought to be inquired into before an order could be made for the removal of the opponent from the guardianship which she claimed under the agreement and adoption deed. He, accordingly, on 9th June, 1898, remanded the case for further inquiry. This further inquiry was made by the First Class Subordinate Judge, who sent up, on 24th September, 1898, the evidence taken by him, but expressed no opinion on the same, as the second reference order was silent on that point. Thereupon the District Judge finally disposed of the application on 18th November, 1898, by rejecting it. He held that the first adoption set up by the applicant had not taken place; that the adoption and agreement on which opponent relied were proved; and that there were no grounds for removing the opponent from the guardianship.

The first contention urged by the appellant's pleader before us relates to the procedure followed by the District Judge in conducting the inquiry into this application. It was contended that the District Judge had no power to direct a Subordinate Court to take any part of the evidence without calling for a report from that Court on the evidence so recorded; and, further, the District Judge was in error in acting upon the evidence taken during the course of the second inquiry. On the merits, it was contended that the decision of the District Judge in favour of the adoption set up by respondent, and adverse to the earlier adoption, was against the weight of the evidence, and that under any circumstances the respondent was not a proper and fit person to be recognized as guardian of the minor, as she had misappropriated the minor's property, and her interests were in conflict with those of the minor. These are the only two points which require consideration.

In regard to the first point, I feel satisfied that the objection to the procedure followed by the District Judge must be upheld. Section 13 of the Act, VIII of 1890, expressly lays down that the Court shall hear the evidence adduced in support of or in opposition to the application. It is true that section 46 permits the Court to call upon any Court subordinate to it for a *report* on any matter arising in any proceeding under the Act, and treat such report as evidence. For the purpose of making this report, the Subordinate Court may institute the necessary inquiries. This latter section does not control section 13 so as to enable

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District Judge to dispense with the hearing of evidence by himself, and transfer the whole investigation of material issues of fact to the Subordinate Court. Still less does it empower the District Judge to admit the evidence recorded by the Subordinate Court when unaccompanied by the report, as was done in this case, in respect of the second inquiry. The points first referred to the Subordinate Court, and on which it submitted its report, were distinct from the point in respect of which the second inquiry was directed, and on the results of which the District Judge finally disposed of the dispute. Not one out of the seven witnesses examined on applicant's behalf or the twenty witnesses examined on opponent's behalf was examined by the District Judge. The conditions laid down in section 13 were, therefore, not complied with, and in the absence of the report on the remand inquiry, the provisions of section 46 cannot be said to have been carried out. The decisions in *Buroda Churn Bose* v. *Ajoodhya Ram Khan* [1], *Shadhoo Singh* v. *Ramanoograha Lall* [2], *Iswarchandradas* v. *Jugal Kishor* [3], show that a Court cannot delegate its function of inquiry to an Amin, who in those cases stood in the same position as the Subordinate Court here. The trial of the most important issues of fact cannot be thus delegated. It is true those decisions were passed under the Civil Procedure Code, but section 647 of that Code extends its provisions to all proceedings in any Court of Civil Jurisdiction. They were so made applicable to inquiries under the Dekkhan Agriculturists' Relief Act, to proceedings under Regulation II of 1827, to proceedings under the Land Acquisition and Divorce Acts, and the Registration Act: see *In re Nagappa Hulgappa* [4]; *Heysham* v. *Bholanath Mullick* [5]; *King* v. *King* [6]; *In the matter of the Petition of Hadjee Abdoollah* [7]. The inquiry in this case is, therefore, defective in both the ways objected to. The District Judge heard no evidence whatsoever, and he had not the report of the Subordinate Court on the material issue which was raised after the first inquiry, and on which the Judge finally rested his decision. There was thus no legal investigation made by the Judge in this case, and this defect is one which materially affected the merits of the case,

(1) (1875) 23 Cal. W. R., 287.
(2) (1868) 9 Cal. W. R., 83.
(3) (1870) 4 Ben. L. R., App., 33.
(4) (1868) 5 Bom. H. C. Rep., 215.
(5) (1871) 17 Cal. W. R., 222.
(6) (1882) 6 Bom., 416.
(7) (1876) 2 Cal., 131.

and is, therefore, not cured by the terms of section 578, Civil Procedure Code.

On the merits also it may be noted that, on her own showing, the opponent has interests which must conflict with those of the minor. She claims under the disputed agreement that she has an equal interest with him in the property. The existence of such an interest is a sufficient reason to justify the Judge of his own motion to remove a guardian from his post under section 39 (*g*). This disqualification is not removed by the proviso (*a*), inasmuch as the adverse interest accrued after the death of the opponent's husband. The opponent admitted that she was not in a position to manage the property, and that she was very much in the same condition as the Parda ladies, noticed in *The Collector of Broach* v. *Bai Daviaba*[1], who must rely on karbhâris or confidential agents. That same ruling is an authority for holding a lady so situated disqualified, more especially when she claims a right to a large portion of the property which is *primâ facie* a part of the minor's estate. The lady held disqualified in the case noticed above was a natural mother of the minor. Even a Collector was held in the same case to be disqualified for guardianship when he had adverse interest to the minor. A person claiming an antagonistic interest to the minor cannot be permitted to dispute the right of the minor to have a separate administrator of the property appointed to take care of the minor's interest—*Dinkarrav* v. *Lakshmibai*[2]; *Bai Dolba* v. *Dansing*[3]. If the opponent in this case had not set up, as she does on the findings of the lower Court, an adverse right for herself, she might have well urged her objections to the appointment of a Názir or a stranger, but as it is, it appears to me that the minor has a right to be duly protected by the Court in respect of his property at least—*Parvatibai* v. *Hariboa*[4]; *Lakshmibai* v. *Shridhar*[5]. The lower Court does not appear to have considered this point. For the reasons aforesaid, even if the findings of fact be accepted, I would reverse the order of the lower Court, and direct a rehearing and a fresh decision on the merits.

Order reversed and case remanded.

(1) P. J. for 1892, p. 401.
(2) P. J. for 1886, p. 209.
(3) P. J. for 1886, p. 245.
(4) P. J. for 1888, p. 351.
(5) (1878) 3 Bom., 1.