

ORIGINAL CIVIL.

Before Mr. Justice Davar.

1907. *RE GULBAI AND LILBAI, MINORS. DHAKLIBAI, WIDOW, PETITIONER.*

July 25. *Guardians and Wards Act (VIII of 1890), section 17—Appointment of Guardian of person of Minors—Hindu Law.*

According to Hindu Law in the case of minors who have lost both parents the nearest male kinsman should be appointed their guardian, the paternal kinsmen having the preference over the maternal.

The interest, well being, and happiness of the minors ought to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor.

THIS was an application for the appointment of a guardian of the person and property of minors under the Guardians and Wards Act.

The facts relating to the petition appear sufficiently from the judgment.

Raikes (Acting Advocate General), for the applicant.

Jinnah, for the opponents.

DAVAR, J.—The petitioner Dhaklibai, the maternal grandmother of two orphan girls named Gulbai and Lilbai of the respective ages of 12 and 8, prays that she or some other fit and proper person may be appointed guardian of the person and property of the minors. The minors' mother, Muktabai, daughter of the petitioner, died six years ago. Their father Ganpatrao died in the year 1905. During his life-time Ganpatrao lived with his wife and children in the house of his father Nanabhai Raghunath. Nanabhai's daughter Shantibai became a widow five years ago and came and lived with her father from the time she became a widow. The minors have an elder sister named Zalbai. She is now married but till she was married she lived with her sisters in her grandfather Nanabhai's house. Nanabhai got her married at an expense of about Rs. 2,000. Nanabhai died on the 14th of May 1907. Till the 14th of June 1907 the minors were living with their paternal aunt Shantibai. On that day

the elder minor Gulbai was taken away from Shantibai's custody by the petitioner. The reason given for such forcible removal was that Gulbai was going to be clandestinely married to a man named Keshrinath, who, the petitioner says, was "a person given to vices." Shantibai applied to the High Court for a Rule in the nature of a Habeas Corpus and after a very full hearing Mr. Justice Macleod ordered that Gulbai should be restored to the custody of her paternal aunt Shantibai. I understand from counsel who argued this petition that the learned Judge left the question as to who was entitled to the custody of the minors open to be decided on this petition. The minors have hitherto never lived with the petitioner. The petitioner's son Jaywant, the maternal uncle of the minors, is an Assistant Accountant General at Lahore at present. This petition was presented while the Habeas Corpus proceedings were pending. So far there is no contest between the petitioner and the opponents Shantibai and the minors' father Ganpatrao's paternal uncle Vinayak who oppose the petition and ask that they should be appointed guardians of the minors' persons. The property of the minors appears to be very small and before me both parties were quite indifferent as to who was appointed a guardian of the property and it was suggested that an officer of the Court may be appointed such guardian. The struggle before me was as to the custody of the persons of the minors. The Advocate General contended that his client the petitioner was a woman of means—that her son occupied a good position in life and that the minors would be better cared for and be much happier with his client than with Shantibai and Vinayak—the first of whom he said was without any means and the second had been insolvent. Another objection which the Advocate General urged was that Shantibai had a daughter of her own about the same age as Gulbai and that that was an element which would lead to discord. He urged that the minors would have the undivided affection of their grandmother who had no children in the house to compete with the minors in the affection of the petitioner. The learned counsel offered to maintain the minors and get them married at his client's own costs. On the other side it was urged that the petition was only a count r-blast to f

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Habeas Corpus proceedings—that the application was not *bona fide*—that the petitioner had no love or affection for the minors—that she had never so much as looked at them ever since their mother's death and that she herself was a woman without any means whatever. Mr. Jinnah like the Advocate General made an offer that his clients were prepared to maintain and ~~get the~~ minors married at their own costs.

When listening to these warm and fervid protestations of affection for the minors and the intense anxiety displayed by both parties for their welfare I thought it was a good opportunity to secure some benefit for them before the warmth of the parties cooled down and I asked both counsel if their clients pledged themselves to the condition that whoever was appointed guardian of the persons of the minors would bring into Court and pay to the guardian of the property of the minors whom I may appoint Rs. 4,000 for the marriages of the two girls. I suggested four thousand as I find that their sister Zalbai was got married by her grandfather Nanabhai at the costs of a little over Rs. 2,000.

Both sides have through their counsel pledged themselves to pay to the guardian of the minors' property Rs. 4,000 to defray their marriage expenses on being appointed guardian or guardians of the persons of the minors and have agreed that the appointment should be conditional on the payment of this sum. This at all events is a most satisfactory result of the petition.

I have now therefore to consider whom I should appoint as the guardian or guardians of the persons and property of the minors. As there is a dispute between the parties as to what exactly is the property of the minors I think it is lesirable to appoint an officer of the Court to receive and ecover the property of the minors and deal with it in the manner I will direct hereafter.

The question as to who amongst the contending parties should e appointed guardian of the persons of the minors presents a difficulty whatever to my mind. After I had the affidavit ad before me on Saturday last the 20th instant and heard nsel's argument I directed that both the minors should be

brought before me on Tuesday morning and they were on that day both examined by me and their statements in answer to my questions are taken down in short hand, the transcript of which will remain with these proceedings.

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In appointing a guardian I am, under the provisions of section 17 of the Guardians and Wards Act of 1890, to take into consideration various things. First of all I must consider who in law is entitled to be appointed a guardian. The minors are Hindus and according to Hindu Law in the case of minors who have lost both parents "the nearest male kinsmen should be appointed, the paternal kinsmen having the preference over the maternal". See Mayne's Hindu Law, 7th Edition, page 273, section 211. The petitioner is a maternal grandmother and her son is a maternal uncle. The opponents are a paternal aunt and a paternal great-uncle, *i. e.* the minors' father's paternal uncle, their grandfather's brother. Strictly speaking then if I was merely to be guided by consideration as to who is in law entitled to be appointed guardian I should have to say the right belongs to the paternal great-uncle Vinayak Raghunath.

Under the section I have also to take into consideration "any existing or previous relations of the proposed guardian with the minor or his property." Now so far as Dhaklibai and Jaywant are concerned there have been no previous relations at all and there are no existing relations with the minors. The girls never knew their grandmother or maternal uncle—they have never lived with them and during the enforced residence of Gulbai at her grandmother's house the impression produced on her mind is most unfavourable. Dhaklibai did not succeed in inspiring any feelings of affection or reverence towards her in the mind of Gulbai. On the other hand the previous and existing relations of Shantibai and Vinayak with the minors are of the most affectionate kind. Not only did the elder minor speak of her paternal aunt Shantibai and her great-uncle Vinayak with affection but even the child Lilbai showed unmistakable signs of attachment to Shantibai. This again points most clearly to the Court who should be the guardian of the girls.

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Next I have to take into consideration the preference of the minors if they are old enough to form an intelligent preference. The little girl Lilbai told me in very clear terms that she was very happy with Aku and Tatyā meaning Shantibai and Vinayak. She had never seen her maternal grandmother and uncle and evidently was not ever aware of their existence. The elder minor, who appears to be older than she is said to be, impressed me as a very intelligent girl and very sensible for her age. As I said before she spoke affectionately and reverently of Aku and Tatyā and resented very angrily my suggestion that she should go and live with her grandmother. She very firmly told me that she would not go and live with her and seemed surprised that I should suggest such a thing. This consideration again works in favour of the opponents.

But the mere legal right to be appointed a guardian, the preference of the minors, and the existing or previous relations are very minor considerations as compared with the main question—what order would be for the welfare of the minor? In making orders appointing guardians for the persons of minors the most paramount consideration for the Judge ought to be—what order under the circumstances of the case would be best for securing the welfare and happiness of the minors? With whom will they be happy? Who is most likely to contribute to their well being and look after their health and comfort? Who is likely to bring up and educate the minors in the manner in which they would have been brought up by the parents if they had been alive? In fact the main question for the Court to consider in the case of the unfortunate minors who have lost their natural guardian is—who amongst the relations or for the matter of that, friends of the minors can you select who will supply as nearly as possible the place of their lost parent or parents? The interest, well being and happiness of the minors ought as I said before to be the main and paramount consideration for the Court in selecting the guardian of the person of a minor. This is the view taken by the Allahabad High Court in *Bindo v. Sham Lal*⁽¹⁾ wherein a Division Bench of the High Court reversing the order of the lower Court appointed the

(1) (1906) 29 All. 210.

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maternal grandmother of the minor—guardian of the minor's person in preference to the minor's own natural father. There was nothing against the father. The only thing urged was that he had married a second wife. The High Court felt that the child during its minority would be happier with the maternal grandmother and gave her the custody of the child in preference to the child's own father. This case is very instructive as showing that all other considerations gave way to the main and paramount consideration—the interest and welfare of the minor.

Let us now turn to the facts of the case and see where lies the happiness of these children. I find on the evidence before me that Dhaklibai has been estranged from the children of her daughter ever since her death. She says the estrangement was due to her refusal to give her other daughter in marriage to Ganpatrao. This is stoutly denied on the other side. It is not necessary for me to ascertain what was the cause of the estrangement. It is sufficient for the present purposes to find as a matter of fact that Dhaklibai is a stranger to her grandchildren. They have no affection for her. The enforced taking away of the elder girl and her detention in her house has created feelings of resentment in the mind of the elder girl. That the estrangement was more than merely accidental and that there must have been serious differences between Dhaklibai and the family of the minor's father appears to be very clear from the fact that for six years the children have never visited their grandmother. Dhaklibai and the members of her family did not attend Zalbai's wedding. She says they were not invited. The other side contradict this. Be that as it may she did not go and see the minors nor pay to her son-in-law's family a single condolence visit when Ganpatrao, the father of the children, died. Did that require invitation? Zalbai gave birth to a child after her marriage. Dhaklibai never went and saw her and it is said never made any inquiries after her health. Now did that again require an invitation? The conviction forced upon my mind is that Dhaklibai has been on most unfriendly terms with the family of her deceased son-in-law. I am far from saying that this is due to any fault on her part. I merely find this as a matter of fact and it is unnecessary to go

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further and find out the cause of this unfriendliness. It is more than likely that Dhaklibai bears feelings of affection towards her dead daughter's children and it is more than probable that in taking Gulbai away and detaining her she was actuated by an honest desire to save the girl from what she considered or was led to believe was a step which would make her grandchild unhappy for life. I do not think she has presented this petition from improper motives either. She has shown a genuine desire to do all that is in her power for the welfare of her minor children. Her action in taking away Gulbai and detaining her was in the highest degree hasty and injudicious. It may be her misfortune that she should be estranged from her grandchildren, but the fact remains that they bear her no love or affection and they would be most unhappy if they were forced to go and live with her.

The appointment of Jaywant is quite out of the question and it is not worth while discussing the desirability of his appointment. It was suggested that he may be appointed jointly with his mother Dhaklibai. If I was inclined to appoint Dhaklibai I might have considered the suggestion though I hardly think his offer to join Dhaklibai as guardian would in any way have strengthened her claims. He is at Lahore now. He is liable to be transferred from one place to another and situated as he is he would be of no use to the minors.

Let me now turn from Dhaklibai and Jaywant and consider the claims of Shantibai and Vinayakrao. They are paternal relatives and if I was merely deciding the question before me according to the strict legal rights of the parties I should have to give preference to Vinayakrao, at all events as against Dhaklibai. She is the maternal grandmother. He is the paternal grandfather's brother. The letters annexed to his affidavit prove conclusively that he was on intimate and affectionate terms with his brother—the grandfather of the minors. He appears to have always taken interest in the minors and although he was not living with his brother and the minors he often saw him and them. His insolvency seven or eight years ago may have been due to misfortunes. His present pecuniary position is one of ease. He is earning Rs. 120 a month

and has nobody to maintain therefrom except himself and his wife. Out of his earnings he can easily maintain the minors in comfort. In addition to his earnings Shantibai has a small competence of her own. They offer to provide for the marriage expenses of both the girls and it must be remembered that the elder girl will, in the ordinary course, soon be married. The children are attached to Shantibai. They have lived with her for five years and they say they have been quite happy. The presence of Shantibai's daughter far from being a drawback is to my mind an additional reason for keeping the minors where they are. They have the society of some one of the same age as the elder minor. The minor's sister strongly urges that they should be allowed to remain with Shantibai and her wishes carry weight with me.

Amongst the many and multifarious duties that a Judge in Chambers performs by far the most onerous duties are those cast upon him by the Guardians and Wards Act. I have devoted my most anxious consideration to the question now before me and have come to a very definite and unhesitating conclusion that the interests and welfare of the minors will be best secured by my appointing Shantibai and Vinayakrao Raghunath joint guardians of the persons of the minor Gulbai and Lilbai, and accordingly I appoint them such guardians. This appointment is conditional on their paying to the guardian of the property of the minors, whom I am presently going to appoint, Rs. 4,000 for the marriage expenses of the two minor girls within one month from this day. Should either or both the minors die before her or their marriage this sum or a moiety thereof as the case may be is to be returned to the guardians of the persons now appointed by me. I direct Shantibai and Vinayak to allow Dhaklibai and Jaywant to have access to the minors at all reasonable times and to send the minors to Dhaklibai if she invites them on holidays or ceremonial occasions or at reasonable intervals if she desires to have the minors at her house.

I must here express my regret that the proposed marriage of Gulbai to Keshrinath has fallen through. I am by no

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means satisfied that the proposed bridegroom was undesirable. Dhaklibai's allegation against him is extremely vague and I could hardly believe that the allegation is made from personal knowledge. I wholly distrust the statements made by Lotleker in his affidavit. I do not believe that Shantibai and Vinayakrao would have knowingly agreed to give Gulbai in marriage to a bad man. I do not believe that the marriage was intended to be clandestinely performed. If that was so, Dhaklibai would not have come to know of it six days before the date of the intended marriage. I am far from committing myself to saying that the proposed bridegroom was a desirable match. All I say is that on the materials now before me I am not at all satisfied that he was not an eligible and proper person to be married to Gulbai. When I questioned Gulbai she said she had been consulted about the marriage and she was willing to marry him. She is a very intelligent girl and she told me that she is still willing to marry him. It seems to me to be a great pity that an attack should have been made on the man in such a manner that it has made him withdraw from the contemplated alliance. To avoid any possible mischief in the future I direct that Shantibai and Vinayakrao are not to give the minors in marriage without first obtaining the sanction of the sitting Judge in chambers and I further direct that notice of any such application for sanction to their marriage should be given to Dhaklibai and Jaywant. If Keshrinath should change his mind and still desire to marry Gulbai I will be prepared to consider the matter in chambers.

I appoint Mr. R. D. Sethna guardian of the property of the minors. Having regard to the smallness of the property and to the fact that he will not have very much to do, he has been good enough to agree to act without remuneration. He will receive Rs. 4,000 mentioned above, and recover the property of the minors, convert the same into cash, and hand the cash over to the Accountant General. The Accountant General is to open an account in the joint name of the minors, invest the amount that may be handed over to him in Government paper, and pay interest on Government paper of the nominal value of Rs. 4,000 to Shantibai to be expended by her towards

the maintenance of the minors. The Accountant General will hold the said funds so invested till the further order of this Court.

Under all the circumstances of the case and having regard to my findings I must order Dhaklibai, the petitioner, to pay the costs of Shantibai and Vinayak. I certify for counsel.

Attorneys for the petitioner: Messrs. *Chitnis and Motilal*.

Attorneys for the opponent: Messrs. *Khanderao, Laud and Mehta* and Messrs. *Chitnis and Motilal*.

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APPELLATE CIVIL.

Before Mr. Justice Russell, Chief Justice (acting), and Mr. Justice Heaton.

PANDHARINATH VISHVANATHI (ORIGINAL DEFENDANT 4), APPELLANT,
v. GOVIND SHIVRAM (ORIGINAL PLAINTIFF), RESPONDENT.*

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August 27.

*Hindu Law—Mitakshara—Widow—Moveables inherited from husband—
Gift invalid.*

A Hindu widow is not competent under the Mitakshara to make a gift of moveables inherited by her from her husband who died childless and intestate.

SECOND appeal from the decision of F. X. DeSouza, District Judge of Sholapur, confirming the decree of G. R. Gokhale, Joint Subordinate Judge of Sholapur.

One Shivram left him surviving three sons, namely, Govind, Manohar and Gopal, who were undivided in interest. They got their shares divided by an award of arbitrators, and on the 25th September 1897 a decree was passed in the terms of the award. Gopal, being of unsound mind, was represented by his eldest brother Govind in the arbitration proceedings. Under the decree, Gopal was given a specific share of the family property, some ornaments for his wife Gitabai and Rs. 4,350 in cash. Gopal's share was made over to his wife on the 1st December 1898. Gopal died in September 1902 and on the 22nd December

*Second Appeal No. 297 of 1904.