

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

REV. ROBERT WARD (ORIGINAL OPPONENT), APPELLANT, v.
VELCHAND UMECHAND (APPLICANT), RESPONDENT.*

1909.
August 31.

Guardians and Wards Act (VIII of 1890), section 9—Application for guardianship of minor—Jurisdiction—Domicile—Place where the minor ordinarily resides.

One Panachand, a Jain inhabitant of Kapadwanj in the Ahmedabad District, lived in his house at that place. He died leaving him surviving a widow and two sons, Lallu and Wadilal, the latter a minor, who all lived in the house. Panachand's widow died about a year after him. Thereupon Panachand's house and a shop at Kapadwanj were sold and Lallu with his minor brother Wadilal went to Baroda in May 1906. At Baroda Lallu embraced Christianity and placed his minor brother, who was also baptized, in the American Mission Boarding House at that place. Afterwards Lallu renounced Christianity and in the beginning of February 1909 clandestinely removed his minor brother from the Mission Boarding House at Baroda and placed him in the Jain Boarding House at Ahmedabad. The minor lived at Ahmedabad till the 15th March 1909 and on the next day he was removed from Ahmedabad at the instance of the appellant, a member of the American Mission at that place, and taken to Baroda. On the 29th April 1909 Lallu presented an application to the District Court at Ahmedabad for his appointment as the guardian of the minor's person. The appellant (opponent) at whose instance the minor was taken back to Baroda, contended that inasmuch as the minor lived at Baroda which was beyond the Court's jurisdiction, the Court had no jurisdiction to entertain Lallu's application under section 9 of the Guardians and Wards Act (VIII of 1890). The Court dismissed Lallu's application, he being found unfit for the appointment, but in the same proceeding appointed the respondent, a Jain pleader, on his application, as the guardian of the minor's person and property, on the ground that as the minor lived with his father till the father's death at Kapadwanj which was within the jurisdiction of the Court and as the minor's domicile followed that of his father which was Kapadwanj, the minor's domicile was in British India and he ordinarily resided within the Court's jurisdiction.

Held, on appeal by the opponent, setting aside the order, that the question of domicile was wholly irrelevant to the question of jurisdiction. The minor was living at Baroda and had no other place of residence. He had lived at Baroda for three years with the exception of twenty-eight days. Therefore Baroda was the place where the minor ordinarily resided within the meaning of section 9 of the Guardians and Wards Act (VIII of 1890).

* Appeal No. 94 of 1909.

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APPEAL against the decision of Dayaram Gidumal, District Judge of Ahmedabad, in the matter of an application for the guardianship of a minor under the Guardians and Wards Act (VIII of 1890).

One Panachand professing Jain religion lived in his house at Kapadwanj within the jurisdiction of the District Court at Ahmedabad. He died at that place leaving him surviving a widow and two sons, Lallu and Wadilal, the latter a minor, all of whom lived in the house. Panachand's widow survived him for about a year and after her death Lallu sold away the house at Kapadwanj and a shop and went to Broach with his minor brother, Wadilal. He lived there for a short time and thence went to Baroda with the minor in May 1906. There he embraced Christianity and became a preacher of the American Mission. The minor was also baptized and Lallu placed him in the Mission Boarding House at Baroda. Afterwards Lallu renounced Christianity and reverted to Jainism, the religion of his birth. The minor Wadilal lived at Baroda in the Mission Boarding House at that place from May 1906 till the beginning of February 1909 when Lallu clandestinely removed him to Ahmedabad and on the 15th February placed him in the Jain Boarding House at the place. The minor lived at Ahmedabad till the 15th March 1909 and on the next day he was taken back to Baroda at the instance of Reverend Mr. Ward, a member of the American Mission at Ahmedabad. Thereupon, Lallu, on the 29th April 1909, made an application to the District Court at Ahmedabad for his appointment as the guardian of the person of the minor Wadilal.

The opponent, Reverend Mr. Ward, contended that the Court had no jurisdiction to entertain the application under section 9 of the Guardians and Wards Act (VIII of 1890) inasmuch as the minor's residence was Baroda which was outside the jurisdiction of the Court. He further contended that Lallu was not a fit person for the appointment.

The Judge found that the minor ordinarily resided within the Ahmedabad District, therefore, his Court had jurisdiction to entertain the application. His reason for the finding was that as the minor's father lived and died in his house at Kapadwanj

that place was the father's domicile and as the minor lived with his father till his death, the minor's domicile followed that of his father: Story on Conflict of Laws, section 46. Therefore Kapadwanj being the minor's domicile, his domicile was within British India in the Ahmedabad District.

The Judge further found that Lallu was of fickle mind as shown by the change of religions, therefore, he was not fit to be appointed minor's guardian. He therefore made a suggestion that he would consider an application made by any other proper person and rejected Lallu's application. Thereupon Lallu's pleader, Velchand Umedchand, a Jain by religion, presented an application for his appointment as the guardian. The Judge entertained this application in the proceedings started under Lallu's application and appointed Velchand guardian of the minor's person and also of his property because it was alleged that the minor's right to the family house at Kapadwanj had been wrongfully sold.

Against the said order the opponent appealed.

L. M. Wadia with *G. B. Rele* for the appellant (opponent):—
The case presents three points for consideration. *First*, whether the District Court at Ahmedabad had jurisdiction to entertain Lallu's or Wadilal's application for the guardianship of the minor; *secondly*, whether the minor should be removed from the protection of the Mission at Baroda; and *thirdly*, whether it was not necessary to give us notice of Velchand's application for guardianship.

As to jurisdiction we contend that the District Court at Ahmedabad had no jurisdiction to entertain the application for guardianship. Section 9 of the Guardians and Wards Act lays down that an application for guardianship shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. Baroda has been the ordinary residence of the minor since May 1906 up to this day. No doubt he was at Ahmedabad for a short interval of about four weeks, but such a short stay cannot make Ahmedabad the ordinary residence of the minor. Further, when Lallu applied for guardianship on the 29th April the minor was not living at Ahmedabad. He

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was then living at Baroda. Under section 9 of the Act what is to be considered is the minor's ordinary residence and not his domicile. The Judge was wrong in going into the question of the minor's domicile. Our contention is further strengthened by the expressions used in the previous enactments. Section 4 of the Minors' Act, XX of 1864, refers to the minor's residence. Section 3 of the Indian Majority Act, IX of 1875, refers to the minor's domicile. While the present Act, VIII of 1890, refers to the minor's ordinary residence. If the Legislature contemplated that the minor's domicile should be determined then there was nothing to prevent them from inserting a provision to that effect in the present Act, especially as there was already that provision in the Majority Act. The minor has all along lived at Baroda for three years, therefore, Baroda is his ordinary residence where he is ordinarily to be found, and that being so, the District Court at Ahmedabad had no jurisdiction to entertain the application.

With respect to the second point provision is made in section 17 of the Act. Particular attention is to be directed to the minor's religion and his welfare. We submit that as the minor is a Christian, he should be associated with persons who profess Christianity. He is at present residing with the Missionaries at Baroda and is receiving training in Christian religion. So far as the welfare of the minor is concerned as he has been living in company of the boys in the Mission and has become attached to the Mission, and in fact he says in his affidavit that he is happy in the Mission Boarding House at Baroda and likes to live in it, we submit that he should not be removed from that place. Reverend Mr. Linzell, the Superintendent of the Mission Boarding House, has filed an affidavit in which he says that the minor is properly provided for and educated in the school and he is quite happy there. Under these circumstances it would not be proper to remove the minor from the Mission Boarding School and to hand him over to the applicant Velchand who is not known to him and whom the minor has never seen. Velchand is an utter stranger to him. In this connection the Judge has referred to the head-note of a case given in Mew's Digest, Infant column 1507. The case is *In re Hunt*⁽¹⁾. That case lays down that if a

(1) (1848) 2 Con. and Law., p. 373.

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testamentary guardian, after taking charge of a minor, changes his religion he is liable to be removed from the office of guardian. That case has no bearing at all. It went entirely on its own facts. There are various cases of the High Courts in India and they support our contention. The gist of all those cases is that the welfare of the minor, irrespective of his or her age and irrespective of the parent's right of custody, is the main feature to be considered: *In the matter of Saithri*⁽¹⁾, *In the matter of Joshy Assam*⁽²⁾, *Mokoond Lal Singh v. Nobodip Chunder Singha*⁽³⁾, *Bindo v. Sham Lal*⁽⁴⁾, *Re Gulbai and Libbai*⁽⁵⁾.

Our third contention relates to want of notice of Velchand's application. When the Court made up its mind with respect to Lallu's application, a hint was thrown that it would consider the application of any other fit and proper person for the guardianship of the minor. Thereupon Lallu's pleader Velchand Umedchand presented an application that he should be appointed guardian of the person and property of the minor and his application was granted. Velchand's application was taken by the Court in the proceedings started under Lallu's application. It is headed "In the matter of the application of Lallu Panachand." Velchand's application could not be entertained in the proceedings under Lallu's application because that application was dismissed. Velchand's application should have been given a separate number and a notice of his application should have been given to us under section 11 of the Act. We had no intimation of the application. We had gone to Court in connection with Lallu's application and Velchand's application came upon us as a surprise. The Judge says that no notice of the application was necessary as the appointment of the Názir is often made without notice. We submit that a pleader, though he is an officer of the Court to a certain extent, is not in the position of the Názir. The analogy of Názir is fallacious.

Jinnah with *Motichand* and *Devidas* for the respondent (applicant):—It is not necessary that a minor should reside within

(1) (1891) 16 Bom. 307.

(3) (1898) 25 Cal. 881.

(2) (1895) 23 Cal. 290.

(4) (1906) 29 All. 210.

(5) (1907) 32 Bom. 50.

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the jurisdiction of the Court at the time of the application. The minor in the present case was residing for some time at Ahmedabad, that is, within the jurisdiction of the Court. Further a minor cannot have a domicile of his own, nor can he change his deceased father's domicile which continues in him. It is not contested that Kapadwanj was the domicile of the father.

[SCOTT, C. J.:—The question of domicile is wholly irrelevant. The Act refers to the ordinary residence of the minor.]

We rely on *Sarat Chandra Chakarbatî v. Norman*⁽¹⁾ and *Sheikh Mahomed Hossein v. Akbar Hossein*⁽²⁾.

Further the Mission Boarding School is located in the Cantonment at Baroda which is admittedly within British Jurisdiction. Therefore the minor would be amenable to the jurisdiction of the Courts in British India. The District Court at Broach would have jurisdiction in the matter.

SCOTT, C. J.:—An application was made by one Lallu Panachand to the District Judge of Ahmedabad under the Guardians and Wards Act, VIII of 1890, that the applicant might be appointed the guardian of the person of his minor brother Wadilal.

As to the main facts there is no dispute. The father of the minor died at Kapadwanj leaving two sons and a widow and property consisting of a house and shop. The sons are the applicant Lallu and the minor Wadilal. The widow was the mother of the minor. Within a year of her husband's death the widow died. Lallu thereupon sold the family house and shop and went to Broach and thence to Baroda where he embraced Christianity and became a preacher of the American Mission in that place. He was then sent as a preacher to Dhola in Káthiáwár. He left his minor brother Wadilal in the Mission House. Wadilal remained there from May 1906 until February 1909. In that month he was removed by Lallu without the consent of those in charge of the Mission, Lallu having previously been dismissed from the service of the Mission. Lallu came to Ahmedabad bringing his brother with him and took service in that city. He placed his brother on the 15th of February in a Jain Boarding

(1) (1889) 12 All. 213.

(2) (1872) 17 W. R. 275 (Cir. Cal.).

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House. On the 15th of March by the instrumentality of one Mulji, a preacher of the American Mission, he was removed from the Boarding House to the house of Mr. Ward, a member of the Mission residing in Ahmedabad, and the following day was sent to the Mission at Baroda where he has since remained.

The application of Lallu was made to the District Judge on the 29th of April. At that time the minor had, therefore, been living in Baroda for nearly six weeks. For twenty-eight days prior thereto he had been living in Ahmedabad and for the preceding $2\frac{1}{2}$ years or more had been living at Baroda.

The District Judge holding that he had jurisdiction under the Act on the ground that his Court had jurisdiction in the place where the minor ordinarily resides as provided by section 9, passed an order for the appointment of a Pleader of his Court to be guardian of the person and property of the minor.

An appeal has been preferred from that order, the appellant being the representative of the American Mission in face of whose opposition the order was made.

The first point taken on behalf of the appellant is that the District Judge had no jurisdiction in the matter at all, that he would only have jurisdiction if the minor ordinarily resided within the jurisdiction of his Court. It is contended on behalf of the appellant that the minor ordinarily resides where he is ordinarily to be found and he is ordinarily to be found in Baroda. He had been there for six weeks continuously at the date of the application and with the exception of twenty-eight days he had been there for nearly three years.

The learned District Judge did not found his jurisdiction upon the fact that the minor had resided in Ahmedabad between the 15th of February and the 15th of March of this year, but he held that, because the minor's father had up to the time of his death resided in Kapadwanj the minor's domicile was in British India in the Judicial District of Ahmedabad and that therefore being so domiciled the minor must be taken to ordinarily reside within that district. It is very easy to reduce such an argument as this to an absurdity.

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We think that the question of domicile is wholly irrelevant to the question of jurisdiction in such a case as the present. The words of the Act alone have to be construed, and the words of the Act are "that an application must be made to the District Court having jurisdiction in the place where the minor ordinarily resides".

The minor is living in Baroda and he has no other place of residence, and he has, with the exception of twenty-eight days, lived in Baroda for nearly three years. We, therefore, think that Baroda is the place where the minor ordinarily resides within the meaning of section 9.

It is argued on behalf of the respondent (with what correctness we do not know) that the Mission House in Baroda where the minor is living is in British Cantonnments and is within the jurisdiction of the Judicial District of Broach. It may be so, but even if it is so, that does not give jurisdiction to the District Judge of Ahmedabad.

We set aside the order of the District Judge and allow this appeal with costs.

Order reversed.

G. B. R.

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Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batcher.

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September 15.

PARASHARAM VISHNU DABKE AND OTHERS (ORIGINAL PLAINTIFF AND DEFENDANTS 1—5), APPELLANTS, v. PUTLAJIRAO KAIBARAO AND OTHERS (ORIGINAL DEFENDANTS 6—18).²

Bombay Regulation V of 1897, section XV, clause 3—Usufructuary mortgage of 1869—Agreement to pay the debt after fixed period—Suit by mortgagee after the expiration of the period for the recovery of the debt by sale of mortgaged property.

A usufructuary mortgage executed in the year 1869 contained the following agreement:—

"The amount of Rs. 1,750 is borrowed on the said premises. We three of us shall, after paying off the said amount of debt after fifteen years from this day,

* Second Appeal No. 997 of 1908.