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VENKATRAMAN MUKUND v. JANARDHAN BABURAO

not desire to pronounce a separate judgment beyond expressing my concurrence.

Appeal allowed.

J. G. R.

APPELLATE CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Crump

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August 12

NATHABHAI DEVIDAS AND OTHERS (ORIGINAL OPPONENTS), PETITIONERS *v.* WAGHJIBHAI JAVERBHAI AND OTHERS (ORIGINAL PETITIONER AND OTHERS), OPPONENTS.*

Indian Trusts Act (II of 1882), sections 73 and 74—Disqualification of trustees—Application to remove trustees made by uncle of minor beneficiary—Jurisdiction of Court to grant relief—Guardian—Mother appointed guardian of person—Competency of order—Guardians and Wards Act (VIII of 1890), section 7.

A petition was presented by the uncle of a minor beneficiary to remove from their office the trustees appointed by the will of the father of the minor, on the ground that the trustees had become unfit to act in the trust as they had committed a breach of trust. The trial Judge removed the trustees under section 73 of the Indian Trusts Act, 1882, appointing the Deputy Nazir the sole trustee, and by a separate order under section 7 of the Guardians and Wards Act appointed the Deputy Nazir guardian of the property of the minor, and the minor's mother guardian of the person. Against the orders an application under revisional jurisdiction and an appeal being preferred to the High Court;

Held, that, the application not having been made by the beneficiary but by his uncle on his own account (although he was not even mentioned in the will), the Court had no jurisdiction under section 74 of the Indian Trusts Act to grant the relief asked for on the petition.

Held further, that, inasmuch as the order of removing the trustees from their office could not be upheld, the grounds on which the guardian of the property had been appointed by the lower Court had disappeared, and there was in fact no adequate reason for the appointment.

Held further, that, in the circumstances no order should be made appointing a guardian of the person.

Per MARTEN, C. J.:—"Speaking generally, applications for the removal of a trustee should undoubtedly be brought by a suit; and where, as here, it is alleged that the trustees have committed a breach of trust, that suit should ask for the delinquent trustees to make good the breach of trust. Further the suit should normally ask for the administration of the trust estate by the Court."

APPLICATION praying for reversal of the order passed by M. I. Kadri, District Judge of Kaira, in miscellaneous application No. 25 of 1926

and

FIRST APPEAL against the order passed in miscellaneous application No. 7 of 1926 under section 7 of Act VIII of 1890.

* Civil Revision Application No. 293 of 1926 (with F. A. 311 of 1926).

One Gordhan Hirabhai died on September 29, 1918. By his will executed on the same day, Gordhan appointed opponents Nos. 1 to 6 as trustees to look after his property and his minor children. The trustees continued managing the property till 1926 when an application was made under the Indian Trusts Act by one Waghjibhai, paternal uncle of Gordhan, to have the trustees removed on the ground (*a*) that they had acted prejudicially to the interests of the minors, in that they had effected settlements of outstandings due to the estate of the deceased for much smaller amounts than were actually due; (*b*) that they had alienated a large portion of the trust estate without any necessity, at prices far below market value, and made profits for themselves by the transactions.

Waghjibhai also presented another petition under section 7 of the Guardians and Wards Act, 1890, to have himself appointed guardian of the person of the minors. The minors' mother Bai Hira was added as a party opponent No. 7 to both the applications.

The opponents trustees opposed the application.

The mother of the minors opposed the guardianship application.

The District Judge held that under section 73 of the Indian Trusts Act, the trustees had proved themselves unfit to act in the trust and directed that they be removed from their office and appointed the Deputy Nazir as official trustee in their place. On the guardianship application, the learned Judge ordered that Bai Hira be appointed guardian of her minor children and Deputy Nazir guardian of the property.

The trustees applied to the High Court under its revisional jurisdiction against the order removing them from the trusteeship and preferred an appeal against the order appointing the mother as guardian of the person of the minors.

G. N. Thakor with *U. L. Shah*, for the applicants.

No appearance for the opponents.

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MARTEN, C. J. :—In this matter the learned District Judge on a petition under the Indian Trusts Act, 1882, has purported to remove from their office the trustees appointed by the will of the father of the minor. This he has done on a petition presented not by the next friend of the minor but by his uncle Waghjibhai. As the learned Judge in his judgment puts it, although the application refers to other sections of the Trusts Act, viz., 72 and 74, yet it is really founded on section 73 on the ground that the trustees have become unfit to act in the trust.

The view generally adopted in the English Courts is that those words imply something in the nature of personal incapacity like, for instance, paralysis, or personal unfitness which in many cases has been held to apply to insolvency. In this particular section insolvency has been provided for. But whatever the true construction of the words "unfit or personally incapable" in section 73 may be, one has also to see who are the persons to appoint new trustees. This section provides that the appointment may be made (*a*) by the person nominated for that purpose by the trust instrument. There is no such person in the present case. Then (*b*) if there be no such person, the author of the trust, if alive, may appoint. But the author of this trust is dead. Then we come to the "surviving or continuing trustees for the time being." But the present appointment has not been made by them. So, stopping there, section 73 could not apply. The old trustees obviously have not removed themselves.

Next if one turns to section 74, "Whenever any such vacancy or disqualification occurs and it is found impracticable to appoint a new trustee under section 73, the beneficiary may, without instituting a suit, apply by petition." But the present petition is not by any beneficiary, but by the uncle Waghjibhai on his own account. He is not, however, even mentioned in the will of the minor's father. Under these circumstances the Court had no jurisdiction to grant

the relief asked for on the petition of the present petitioner. And so on that ground alone this order of the learned Judge must be set aside.

But I wish to put the matter on rather broader grounds by way of warning. Speaking generally, applications for the removal of a trustee should undoubtedly be brought by a suit. And where, as here, it is alleged that the trustees have committed a breach of trust, that suit should ask for the delinquent trustees to make good the breach of trust. Further, the suit should normally ask for the administration of the trust estate by the Court. Nothing of that has been done here. All that has been done is to appoint the Deputy Nazir the sole trustee, because the Court finds that the petitioner himself is not to be trusted as he is a man who has his own axe to grind, so the Court says.

I may refer to Lewin on Trusts, 9th Edn., p. 1166: "If there be ground for removing a trustee for misconduct or other cause, the application to the Court should be by suit." Similarly if one looks at Seton, Vol. II, 6th Edn., p. 1224, it is stated: "There is no jurisdiction under the Trustee Acts to remove a trustee for misconduct." Reference is there made to certain authorities.

If, on the other hand, a suit was brought here to remove the trustees, that could be brought by the uncle acting as the next friend of the infant. And if it was alleged that specific breaches of trust had been committed, then those could be inquired into in the ordinary way on oral evidence and not on affidavit evidence without any cross-examination —the course that has been adopted by the learned Judge in the present case.

Next turning to first Appeal No. 311 of 1926, the learned Judge there has, under the Guardians and Wards Act, appointed the mother to be the guardian of the person, and the Deputy Nazir to be the guardian of the property of the infant. Now section 7 is the ordinary section giving the

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Court power to make an order as to the appointment of a guardian of the person or property of a minor, if it is satisfied that it is for the welfare of the minor that an order should be made. But sub-section (3) provides :—

"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."

Then if one turns to section 39 or section 41, the Court has power on the application of any person interested, or of its own motion, to remove a guardian.

Here the guardianship must not be muddled up with the trust. Under the will the trustees were given definite powers of management, and to apply the property for the education, amongst other things, of the minor, and to hand it over to him when he attained his majority. Therefore, in one sense if the trustees are not removed from their office, there is little for the guardian of the property to do and no adequate reason for his appointment. Technically the guardian of the property on being appointed could only receive such income as the trustees under the will allotted for the education and maintenance of the minor, and could then personally apply it for such purposes.

But the ground on which the learned Judge has made his order is that he has removed the trustees from their office as trustees under the other application. We have already pointed out that that order cannot be upheld. Consequently the grounds on which the learned Judge appointed a guardian of the property cannot be supported. The mother opposes the present application, and under the circumstances and on the materials at present before us we do not think an order should be made either appointing a guardian of the person or a guardian of the property.

This of course will not prevent a guardianship order being made on some other application at some future date on proper materials before the Court. We only determine

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the present matter on the present materials. In our opinion this order of the learned Judge must be discharged.

As regards costs, we think the uncle must bear the costs throughout of both applications. The learned Judge in the Court below seems to have doubted his *bona fides*, and under these circumstances we see no reason why the infant should be saddled with the costs of these irregular applications.

Therefore in Civil Revision Application No. 293 of 1926, the rule is to be absolute. Order discharged. Waghjibhai to pay the costs throughout. In First Appeal No. 311 of 1926 appeal allowed. Order of the lower Court discharged. Waghjibhai to pay the costs throughout. In Stay Application No. 748 of 1926 rule made absolute. Order discharged.

Rule made absolute.
Appeal allowed.

J. G. R.

APPELLATE CIVIL

Before Sir Amberson Marten, Kt., Chief Justice, and Mr. Justice Blackwell

1927
August 15

THE BOMBAY STEAM NAVIGATION COMPANY LIMITED (ORIGINAL DEFENDANTS), APPLICANTS *v.* VASUDEV BABURAO KAMAT (ORIGINAL PLAINTIFF), OPPONENT.*

Bills of Lading Act (IX of 1856), section 1—Conditions in bill of lading—Consignee bound—Liability of shipping agent for negligence of servants—Indian Contract Act (IX of 1872), section 151—High Court—Revisional jurisdiction—Civil Procedure Code (Act V of 1908), section 115—Bombay Regulation II of 1827, c. I. s. 5 (2)—Act XII of 1873—Government of India Act (5 & 6 Geo. V., c. 61), sections 106 and 130.

The plaintiff's agent at Bombay shipped some packages to the plaintiff at Honawar by a vessel belonging to the defendant company. One of the conditions of the bill of lading, which the plaintiff's agent had not in fact been authorised by the plaintiff to accept, was that the defendant company was not liable for loss from the negligence of its servants. Whilst the shipment was being unloaded in the Honawar harbour, one of the packages got loose from a sling, fell into the sea and was lost. The plaintiff having sued to recover the value of the lost package;

Held, that it was competent to the defendant company to protect itself against liability for loss arising from negligence of its servants, by a condition in the bill of lading, notwithstanding section 151 of the Indian Contract Act, 1872.

Sheik Mahamad Ravuther v. *The British India Steam Navigation Co. Ltd.*,[1] followed.

* Civil Revisional Application No. 310 of 1926.

[1] (1908) 32 Mad. 95.