APPEAL FROM ORIGINAL CIVIL.

Before Sir Norman Kemp, Kt., Acting Chief Justice, and Mr. Justice Murphy.

1929
September 18.

MANIBAI HEMRAJ (ORIGINAL RESPONDENT), APPELLANT *v.* MAGANLAL VITHALDAS (ORIGINAL PETITIONER), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sections 19 and 25—Custody of minor wife—Husband's application for guardianship—Jurisdiction—Procedure.

Under section 19 (*a*) of the Guardians and Wards Act, 1890, the Court has no jurisdiction to declare the husband, who is not in the opinion of the Court unfit, to be the guardian of the person of his minor wife. If the husband wants the custody of his minor wife, his proper remedy is to apply under section 25 of the Act.

Bai Tara v. *Mohanlal*[1] and *Besant* v. *Narayaniah*,[2] referred to.

APPEAL from the order of Blackwell J.

A petition was made by the respondent Maganlal for being declared a guardian of the person of his minor wife, Prabhavati, under section 19 of the Guardians and Wards Act (VIII of 1890). In the petition Maganlal stated that the minor Prabhavati was born in 1912, that her father died in March 1921, and that he was married to her in July 1922. After her marriage Prabhavati lived with Maganlal and the other members of his family for about ten months. Prabhavati's mother, Manibai, remarried one Liladhar, who, Maganlal alleged, was not a man of good character. On May 26, 1923, Prabhavati went to her mother Manibai to spend a few days but thereafter she did not return. Maganlal requested Manibai to send Prabhavati to his house. She however refused to do so. Maganlal alleged that if the minor was allowed to remain in the custody of Manibai and Liladhar, it would be prejudicial to her interest. Under the circumstances he prayed for an order that he should be declared guardian of the person of his minor wife Prabhavati, and that Manibai should be directed to hand over the minor to his custody.

*O. C. J. Appeal No. 12 of 1928, in the matter of the Guardians and Wards Act.

(1) (1922) 24 Bom. L. R. 779. (2) (1914) L. R. 41 I. A. 314; 38 Mad. 807.

Manibai contended that Prabhavati was ill-treated by Maganlal, that he and his father drove her away from their house, and that Maganlal had married another wife in 1925.

Blackwell J. held that Maganlal was not unfit to be the guardian of his minor wife Prabhavati and declared him as the guardian of her person.

Manibai appealed.

Pandia, for the appellant.

Thanavalla, with *M. P. Amin*, for the respondent.

M. C. Setalvad, for the minor.

MURPHY, J. :—In this matter one Maganlal Hemraj applied to be declared the guardian of his minor wife Bai Prabhavati and for the custody of her person. The application was opposed by the girl's mother and stepfather. The learned trial Judge was of opinion that the allegations of unfitness of the husband for the guardianship of his wife were not made out, and he made a declaration appointing him the guardian of her person, though he also made a special order directing that, for certain reasons, she should, in the first instance, be sent to live for six months at the Vanita Vishram in Bombay, from which place she was subsequently removed to the Seva Sadan in Poona. The appellant is the girl's mother, and the opponent is the girl's husband.

It has been argued in the first instance before us that the order made by the learned Judge is one which was not proper for him to make under section 19 of the Guardians and Wards Act, VIII of 1890. That section provides that—

" Nothing in this Chapter shall authorise the Court to appoint or declare a guardian of the property of a minor whose property is under the superintendence of a Court of Wards, or to appoint and declare a guardian of the person (a) of a minor who is a married female and whose husband is not, in the opinion of the Court, unfit to be guardian of her person. . . . "

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Sub-clause (*b*) in similar terms deals with the case in which the father of a minor is alive and is not in the opinion of the Court unfit to be guardian of his child.

The facts in this case are that the application is to appoint a guardian of the person of a minor who is a married female and it has been found by the learned trial Judge that the husband is not unfit to be her guardian. Primarily, therefore, it would seem that no declaration of guardianship should have been made in this case and the applicant's proper course to obtain what he desired, viz., the custody of his minor wife, was by an application in the terms of section 25 of the Act.

For authority we have been referred to the case of *Bai Tara* v. *Mohanlal*.[1] In that case the application was one made under this Act by the father to be appointed guardian of the person of his minor son who was living with his mother. It was held by Mr. Justice Shah that the application should really have been under section 25, as the case was not covered by section 19 of that Act, and that in the language of Mr. Justice Shah "A Hindu father is not competent to make such an application."

We have also been referred to the case of *Navnitlal Hurgovandas* v. *Purshotam Hurjiwan*.[2] In that proceeding a petition for the appointment of the guardian of a minor wife by the husband had been dismissed by Mr. Justice Taraporewala and the appellate Court reversed the original Court's decree and appointed the husband guardian of the minor wife's person. Though the order allowed the appeal and appointed the petitioner guardian of the person and property of his wife the judgment does not mention the question involved by section 19 of the Act, viz., whether

[1] (1922) 24 Bom. L. R. 779. [2] (1925) 50 Bom. 268.

such an appointment should or should not be made and it really seems to say that the proceedings are under section 25 of the Act and not under section 19, which does not appear to have been considered in connection with the facts of the case.

Lastly, Mr. Setalvad has referred us to the case of *Besant* v. *Narayaniah*.[1] The relevant portion of the head-note is, that no order declaring a guardian could, by reason of section 19 of the Guardians and Wards Act, 1890, be made during the respondent's (i.e., father's) life, unless in the opinion of the Court he was unfit to be the guardian of the minor, and the relevant passage in the judgment is at page 822 and it is as follows :—

"It is to be observed, however, that whatever may have been the jurisdiction of the High Court to declare the infants to be wards of Court, an order declaring a guardian could only be made if their interests required it, and, as appears above, they were not before the Court, nor were their interests adequately considered. And further, no order declaring a guardian could by reason of the 19th section of the Guardians and Wards Act, 1890, be made during the respondent's life unless in the opinion of the Court he was unfit to be their guardian, which was clearly not the case."

It seems clear to us that, even apart from these authorities, in the present case, section 19 (*a*) which is in similar terms to section 19 (*b*) did apply to the declaration made by the learned Judge of the trial Court, and it must under the circumstances of the case be set aside.

The next point we have to consider is the age of the minor girl. Various allegations have been made in correspondence and in the affidavits in the case, but Dr. Nunan, who examined the girl two years ago, was of opinion that she was about fourteen or fifteen years of age at that time. We have seen the girl herself and she says that she has completed eighteen years. Moreover, the girl's mother has produced a certificate from the

[1] (1914) 38 Mad. 807 : L. R. 41 I. A. 314.

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birth register of the Municipality of Junagadh (Kathiawar) to the effect that a daughter was born to Purshotam Kalidas and Bai Manibai, Lohana Hindus, on July 25, 1911, and the entry is No. 2 of July 1911. On the whole, we are satisfied that Bai Prabhavatibai has now completed her eighteenth year and is a major and, therefore, that no guardian of her person should be appointed and any rights and remedies which the husband may have should follow in the course of law.

We have also questioned the girl herself and have satisfied ourselves that she should remain with her mother for the purpose of these proceedings.

The decision of the original Court is reversed, and the petition is dismissed. The appeal is allowed with costs. The original order as to costs of the lower Court should stand.

Attorneys for appellant: Messrs. *Lakhia & Co.*

Attorneys for respondent: Messrs. *Shah & Chinubhai.*

Appeal allowed.

B. K. D.

FULL BENCH.

APPELLATE CIVIL.

Before Mr. Justice Madgavkar, Mr. Justice Patkar and Mr. Justice Murphy.

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February 21.

APPAJI JIJAJI VAIDYA (ORIGINAL DEFENDANT), APPELLANT v. MOHANLAL RAOJI GUJAR AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Hindu Law—Bombay School—Succession—Compact series of heirs—Brother's grandson not included in the series—Daughter-in-law and brother's grandson, contest between—Gotraja sapindas.

Under Hindu law as prevailing in the Bombay Presidency, the compact series of heirs ends with the brother's son, and does not include the brother's grandson.

A daughter-in-law is, therefore, entitled to succeed in preference to the brother's grandson.

Buddha Singh v. *Lallu Singh*,[1] discussed and distinguished.

*Second Appeal No. 251 of 1927 against the decision of A. K. Asundi, Assistant Judge at Poona, in Appeal No. 164 of 1928.

[1] (1915) 37 All. 604; L. R. 42 I. A. 208.