APPELLATE CIVIL.

Before Mr. Justice Broomfield and Mr. Justice Wassoodew.

1936
November 2

CHIMANLAL GANPAT AND ANOTHER (ORIGINAL OPPONENTS), APPELLANTS *v.* RAJARAM MAGANCHAND OSWAL (ORIGINAL PETITIONER), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), section 25—Application for custody of minor—Appointment of a person as guardian who is not residing within the jurisdiction of the Court—Court's jurisdiction to appoint such person as guardian.

Under the Guardians and Wards Act, 1890, there is no legal prohibition against the appointment of a person as guardian who is not residing within the jurisdiction of the Court, though the Court as an ordinary rule would be reluctant to make such an order and the same applies to orders made under section 25 of the Act.

Subbarathnammal v. *Seshachalam Naidu*,[1] *Asghar Ali* v. *Amina Begam*,[2] and *Beni Prasad* v. *Mt. Parwati*,[3] referred to.

In order to give the Court jurisdiction the minor must be " ordinarily resident " within the local limits of the jurisdiction of the Court for the purpose of an appointment of a guardian and for the purpose of an order under section 25 of the Act.

APPEAL under the Letters Patent against the decision of Divatia J. confirming the order passed by D. D. Nanavati, District Judge at Poona.

The application under section 25 of the Guardians and Wards Act, 1890.

The applicant Rajaram and his brother Dattatraya lived in Top, a village in Kolhapur State as members of a joint Hindu family. Dattatraya died in the year 1925 leaving a widow Jasudbai and a daughter Lilavati. Lilavati and her mother lived with Rajaram at Top, and Lilavati occasionally visited her other relations in Poona.

In 1934 Chimanlal (opponent No. 1) the maternal uncle of Lilavati and Gulabchand (opponent No. 2), the former's brother-in-law, took Lilavati to their place in the Poona District. While she was staying with them in August

*Appeal under the Letters Patent No. 8 of 1936.

(1) (1931) 54 Mad. 758. (2) (1914) 36 All. 280.
(3) [1933] A. I. R. All. 780.

1934 arrangements were made for her marriage by Rajaram with one Manekchand. The relatives of the girl approved of this marriage but the opponents objected to a term of the agreement by which the girl's guardian Rajaram was to receive a sum of Rs. 2,000 from the father of the bridegroom. The opponents tried to prevent the payment of money to Rajaram and declined to allow Lilavati to return to him when he wanted her back.

In January 1925, Rajaram made an application for the custody of the minor Lilavati under section 25 of the Guardians and Wards Act, 1890.

The District Judge held that the applicant was the *de facto* guardian of the minor who had been taken out of his possession on false excuses. He also held that the arrangement regarding the marriage of the minor was *bona fide* and the acceptance of the sum of Rs. 2,000 by the applicant from the bridegroom's father was according to the custom of the community. The learned Judge, therefore, ordered that the applicant be appointed guardian of the person of the minor and that the custody of the minor should be handed over to him on his furnishing security in the sum of Rs. 1,000 with one surety for that amount resident in the Poona District.

The opponents appealed to the High Court. The appeal was heard by Divatia J. who confirmed the order of the District Judge. His Lordship delivered the following judgment on February 28, 1936.

DIVATIA J. This appeal arises under the Guardians and Wards Act and is preferred by the original opponents. The applicant is the paternal uncle of the minor and the first opponent is the maternal uncle. The paternal uncle applied under section 25 of the Guardians and Wards Act for obtaining the custody of the minor girl, on the ground that she was living with the petitioner in a village in Kolhapur State and that opponent No. 1 and opponent

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No. 2 under false pretexts removed her from the custody of the petitioner and did not restore the minor to them. The defence of opponent No. 1 was that the minor was living with him and that the petitioner was never the minor's guardian, that the minor's mother was also living with opponent No. 1, and that the application was not *bona fide*. The lower Court has held on the evidence that the petitioner was the *de facto* guardian of the minor, that the application was made *bona fide*, and on the other hand it was opponent No. 1 who removed the minor stealthily and by means of a pretence from the custody of the petitioner, and that it was for the welfare of the minor that his custody should be restored to the petitioner. The petitioner has settled the betrothal of the minor and both sides are agreed as to the fitness of the bridegroom, but the contention of opponent No. 1 is that the petitioner wants to get his own son married and for that purpose he has accepted the amount of Rs. 2,000 from the bridegroom's father in exchange for giving the girl in marriage to the bridegroom. The lower Court has come to the conclusion that this is a *bona fide* arrangement, because such arrangement prevails in this particular community, and but for the arrangement the minor girl could not be married at all.

The question as to whether the appointment of this guardian is for the welfare of the minor or not is really one of discretion, and ordinarily this Court would not interfere with the discretion exercised by the trial Court. I am quite satisfied that on the evidence before it the lower Court has rightly exercised its discretion.

There is however one point urged on behalf of the appellant which requires to be considered, and that is that the petitioner is a resident of Kolhapur State, that the minor was at the date of the application in British India, and therefore this application by the petitioner is not competent, and secondly, in any case the lower Court erred in appointing the petitioner as a guardian under the

Guardians and Wards Act because such appointment is prohibited under the Act, and reliance is placed for this purpose upon section 39, clause (*h*), which says that "the Court may on the application remove the guardian appointed on the ground that the guardian has ceased to reside within the local limits of the jurisdiction of the Court". Reliance has also been placed on section 26 which says:

"A guardian of the person appointed or declared by the Court, unless he is the Collector, or is a guardian appointed by will or other instrument, shall not, without the leave of the Court by which he was appointed or declared, remove the ward from the limits of its jurisdiction, except for such purposes as may be prescribed."

It is urged that the combined effect of the two sections is that it is not competent to the Court to appoint one who is living outside British India as a guardian of the minor who is residing within the jurisdiction of the Court, and the learned advocate on behalf of the appellant has also relied upon the ruling in *Subbarathnammal* v. *Seshachalam Naidu*,[1] in which it is held that "a person who is living outside the jurisdiction of the Court should not be appointed as a guardian". Now it may be noted in the first place that the application of the petitioner in the lower Court was not an application originally under section 7 of the Guardians and Wards Act, nor under section 17 of that Act, but under section 25, on the ground that he was the guardian of the minor, that the minor was living with him but that he was deprived of her custody and therefore it should be restored to him. It may be that in making the appointment of the guardian under section 7 the Court may take into consideration as to whether the guardian is living within the jurisdiction of the Court, and it is laid down in section 17 that the Court while making an appointment of the guardian is to take into consideration, among other things, the capacity of the proposed guardian. It is nowhere enacted specifically in the Act that no person shall be appointed as a guardian who does not reside within the jurisdiction of the Court.

[1] (1931) 54 Mad. 758.

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Section 39, clause (*h*), refers to the removal of a guardian for ceasing to reside within the local limits of the jurisdiction of the Court, and that too the Court may do on the application by any person or of its own motion. That section does not say that the moment the guardian ceases to reside within the local jurisdiction of the Court he must be removed as a matter of course. The only thing that the Court has to see is the welfare of the minor, and it would therefore follow that if the welfare of the minor requires, the Court may appoint a person who is residing even outside the jurisdiction of the Court subject to certain safeguards. It is no doubt held in *Subbarathnammal* v. *Seshachalam Naidu*,[1] that the Court should not appoint a person who is living outside the jurisdiction of the Court as a guardian. But it is on the other hand held by the Allahabad High Court in *Beni Prasad* v. *Mt. Parwati*,[2] that:

"There is nothing in the Guardians and Wards Act which debars a Court from appointing a guardian who is not residing within the jurisdiction of the Court to which an application is made. Under section 7 a Court will appoint a guardian whenever it is satisfied, that it is for the welfare of the minor that an order should be made. Section 39, clause (*h*), does not imply that a person applying for appointment must be residing within the jurisdiction of the Court to which the application is made. What clause (*h*) means is that in certain cases, ceasing to live within the jurisdiction of the Court which made the order of appointment may be a ground for the removal of the guardian from his office and no more. The only duty cast on the Court under the Act is to appoint the best person to act as guardian regardless of his place of residence . . .'

In my opinion the view taken in this case is correct. It is observed in that case that if the law were that only a person living within the jurisdiction of the Court could be appointed a guardian, then in some cases the consequences may be disastrous, as it may permit an unscrupulous person to prevent the well-wishers of the minor from being appointed guardian, by inducing the minor to remove himself and his property from the district in which his friends and relatives, most competent to act as his guardian, reside.

[1] (1931) 54 Mad. 758. [2] [1933] A. I. R. All. 780.

This is exactly what has happened in the present case. The minor has been removed from the Kolhapur State with the object of keeping her out of the custody of the petitioner, and if the Court is powerless to make any order in such cases, it means that any person can take away the minor from the guardian's custody from one district and remove him to another, and the Court would have no power to restore him to the guardian. It has been contended on behalf of the opponent that the proper remedy is to file a suit and such a suit is not prohibited under the Guardians and Wards Act. I quite concede that it may be open to the petitioner, in view of a decision of our High Court, to file a suit and obtain the custody of the minor. After the decision of the Privy Council in *Besant* v. *Narayaniah*[1] it has been held by the Madras High Court that if a person wants the restoration of the custody of the minor, and that person is a *de facto* guardian, his only remedy is to apply under the Guardians and Wards Act and not to file a regular suit: *Sathi* v. *Ramandi Pandaram.*[2] Our High Court had, however, held in *Sharifa* v. *Munekhan*[3] that a suit of this nature is not barred by the provisions of the Guardians and Wards Act, and even though subsequent to the Privy Council ruling, a case came up to this Court, viz., *Achratlal Jekisondas* v. *Chimanlal Parbhudas*,[4] this Court observed (p. 604):

"We are not prepared to hold that the dictum....in *Annie Besant* v. *Narayaniah*,[1] to the effect that a suit *inter parties* is not the proper proceeding, was intended to be of such general application as virtually to overrule the decision of this Court in *Sharifa* v. *Munekhan*.[3]

That means a suit can be filed, but it does not mean that that is the only remedy, because it has been expressly said in *Sharifa* v. *Munekhan*[3] that there is a concurrent remedy, and that a remedy was open to the plaintiff by way of application under the Guardians and Wards Act. Therefore it cannot be said that the only remedy for the plaintiff was to file a suit. The plaintiff can proceed under the Guardians

[1] (1914) 38 Mad. 807, P. C.
[2] (1919) 42 Mad. 647, F. B.
[3] (1901) 25 Bom. 574.
[4] (1916) 40 Bom. 600.

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and Wards Act, and it has been held that a *de facto* guardian can also apply under section 25 of the Act. It has been held on the evidence in this case that the petitioner was a *de facto* guardian, and that the minor was under his care and custody. It is clear, therefore, that the petitioner was entitled to apply under section 25 of the Act, and even though the petitioner was a resident of the Kolhapur State, that does not prevent the Court from handing over the custody of the minor to him.

The lower Court thought that in order to safeguard the interest of the parties, security should be demanded from the petitioner as he was residing outside British India, and the petitioner has furnished such security. It was thought that in order that the petitioner might observe the terms of the security he should be formally appointed a guardian. But the order would remain valid even though a formal appointment has been made.

For these reasons the order of the lower Court is confirmed and the appeal is dismissed with costs.

THE opponents appealed under the Letters Patent.

A. G. Desai, with *S. G. Chitale*, for the appellants.

S. G. Patwardhan, for the respondent.

BROOMFIELD J. This is an appeal under the Letters Patent from a judgment of Mr. Justice Divatia confirming an order of the District Judge of Poona by which the respondent was appointed guardian of his minor niece Lilavati and it was directed under section 25 of the Guardians and Wards Act that she should be restored to his custody from that of the opponents. The respondent who made the application to the District Court is the paternal uncle of the minor girl. The appellants are the persons who opposed that application. Opponent No. 1 is the maternal uncle of the girl and opponent No. 2 is his brother-in-law. According to the findings of the lower Courts, which have not been seriously disputed, the respondent, i.e., the paternal uncle, who is

a resident of Kolhapur State, brought up the minor and maintained both her and her mother from the time of her father's death. It appears that the girl now and again visited her other relations who resided in Poona, but for the greater part of the time she was with the respondent in Kolhapur. It is not disputed that he was and is her guardian.

In April, 1934, she was taken away by the opponents to the Poona District. While she was staying with them in August 1934, arrangements were made for her marriage to a young man who resides at Supa, also in the Poona District. The relations of the girl all approve of this marriage but the maternal uncle and also opponent No. 2 object to a term of the agreement by which the girl's guardian, the paternal uncle, is to receive a sum of Rs. 2,000 from the father of the bridegroom. The learned District Judge has found that this is in accordance with the custom of the community to which the parties belong, that there is nothing unusual or objectionable in it and that the opponents are not actuated by any concern for the welfare of the minor but are simply trying to maintain their personal views about the marriage which they have supported by perverting the facts. They have apparently tried to prevent the payment of the money to the paternal uncle and declined to allow the girl to return to him when he wanted her back. Accordingly, in January 1935, he made the application under section 25 of the Guardians and Wards Act which has given rise to this appeal.

The District Judge was of opinion that it was for the welfare of the minor that she should be restored to the custody of her guardian. Mr. Justice Divatia evidently agreed with him and on that matter of discretion we see no reason whatever to interfere with the view taken by the lower Courts.

The only point of substance in the appeal is whether the District Judge, Poona, had jurisdiction to appoint the respondent guardian of this minor girl and to make the order under section 25 in his favour. The question arises by reason of the fact that he does not reside within the

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jurisdiction of the District Court but in the State of Kolhapur. Mr. A. G. Desai who appears for the appellants contends that the Court had no jurisdiction. He relies on the following provisions of the Guardians and Wards Act. Under section 1 (*2*) the Act extends to the whole of *British* India. In section 9 (*1*) it is provided that applications with respect to the guardianship of the person of a minor are to be made to the District Court having jurisdiction in the place where the minor ordinarily resides. In section 26 it is laid down that a guardian of the person appointed or declared by the Court shall not without the leave of the Court remove the ward from the limits of its jurisdiction. Section 39 provides for the removal of a guardian on certain grounds. One of the grounds on which he may be removed is for ceasing to reside within the local limits of the jurisdiction of the Court. Lastly section 44 provides that a guardian may be punished by fine or imprisonment if he removes the ward from the limits of the jurisdiction of the Court in contravention of the provisions of section 26.

Mr. Desai's argument is that it is against the spirit, if not actually against the letter, of the Act to appoint a person as guardian who is resident outside the jurisdiction or to make an order under section 25 in favour of such a person. In support of this proposition he relies on *Subbarathnammal* v. *Seshachalam Naidu*[1] and *Asghar Ali* v. *Amina Begam*.[2] In the former case it was held that it is clearly against the intention of the Guardians and Wards Act that anyone residing outside British India should be appointed guardian of a minor's person, as over such a guardian the Court could not exercise its proper control. There is no discussion of the provisions of the Act in the judgment. It may be mentioned also that in the present case the District Judge has required security to be furnished with a surety resident in the Poona District and thereby the carrying out of any orders that the Court might think fit to make have been

[1] (1931) 54 Mad. 758. [2] (1914) 36 All. 280.

ensured. In *Asghar Ali* v. *Amina Begam*[1] it was held that the Guardian and Wards Act contemplates that an applicant should reside within the jurisdiction of the Court to which he makes the application. Here also no detailed reasons are given. The case has been referred to and distinguished in a later case of the same High Court, *Beni Prasad* v. *Mt. Parwati*,[2] where it has been held that the remarks in this connection in the earlier case were *obiter dicta* and not intended to lay down any universal rule, and that there is nothing illegal in appointing a person resident outside the jurisdiction as guardian in a proper case.

This is the view of the law which has been accepted by Mr. Justice Divatia. He points out that it is nowhere enacted specifically in the Act that no person shall be appointed as a guardian who does not reside within the jurisdiction of the Court. Section 39 (*h*) empowers the Court to remove a guardian for ceasing to reside within the jurisdiction but does not say that he must be removed as a matter of course. In all proceedings under the Act the paramount consideration is the welfare of the minor, and if it were to be held that in no circumstances could a person residing outside the jurisdiction be appointed guardian, the Court might be prevented from making the appointment which most conduced to the minor's welfare. Mr. Justice Divatia says in this connection :—

> "If the law were that only a person living within the jurisdiction of the Court could be appointed a guardian, then in some cases the consequences may be disastrous, as it may permit an unscrupulous person to prevent the well-wishers of the minor from being appointed guardian, by inducing the minor to remove himself and his property from the District in which his friends and relatives, most competent to act as his guardian, reside."

That, according to the learned Judge, is precisely what has happened in the present case.

We agree with the learned Judges below in holding that there is no legal prohibition against the appointment of a person as guardian who is not residing within the

(1) (1914) 36 All. 280. (2) [1933] A. I. R. All. 780.

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jurisdiction of the Court, though naturally the Courts would as an ordinary rule be reluctant to make such an order. The same applies to orders under section 25. Here we think the special circumstances of the case justify the orders made by the District Judge.

It is to be noted of course that in order to give the Court jurisdiction the minor must be " ordinarily resident " within the local limits of the jurisdiction. That is provided, so far as the appointment of a guardian is concerned, by section 9 (*1*), and as regards section 25 the word " Court " is mentioned there and " Court " is defined in section 4 (*5*) as the District Court having jurisdiction in the place where the ward for the time being ordinarily resides. In view of the fact already mentioned that the minor has spent the greater part of her short life with the respondent in Kolhapur, there might have been some difficulty in this connection, but since April, 1934, she has admittedly been residing with the opponents in the Poona District. At the time the application was made in January 1935, she had already been residing with them for eight months. The husband with whom her engagement has been made is a resident of Poona. If the application under section 25 had not been made at all she would doubtless have continued to reside in Poona. Under these circumstances we think that it can be said that she was ordinarily residing within the jurisdiction of the District Court of Poona at the material time both for the purpose of appointment of a guardian and for the purpose of an order under section 25. I may say that there appears to have been no dispute on this point either in the District Court or before Mr. Justice Divatia, it being common ground apparently that the minor must be taken to be ordinarily resident in Poona. We hold, therefore, that the appeal fails and must be dismissed with costs.

Appeal dismissed.

J. G. R.