1869

KALI PRASAD SING v. JAINARAYAN ROY.

is not included within the plaintiff's darpatni, and that his suit be dismissed. There is no reason why we should disturb the orders of the Courts below as to costs, that is to say, that the original defendants should pay a ten annas share of the costs of the first Court, and the plaintiff the remainder. The plaintiff should, I think, pay the costs of the lower Appellate Court and of this Court, the appeal being dismissed.

JACKSON, J.—I concur generally in this judgment, and I think Mr. Justice Markby has put the right interpretation, on the decision of this Court in the case of *Jai Gobind Dass* v. *Gouri Persad Shaha* (2), for which decision I was responsible. There is, no doubt, a good deal of difficulty in defining the circumstances under which parties are to be brought upon the record, under section 73, Code of Civil Procedure, but I quite agree that the words "likely to be affected by the result," mean something quite different from being "bound by the decision:" because it is clear that no one could be bound by the decision, unless he either was, or in some way represented, a party to the suit. The distinction between the case cited, and the case before us is as clear as possible, and is very wide. There the intervening parties did not assert a common title, with either plaintiff or defendant, but set up a title adverse to both.

Before Mr. Justice L. S. Jackson and Mr. Justice Markby.

SRIMATI LAKHI PRYA DASI, MOTHER OF PRAN GOBIND NAG PETITIONER (APPELLANT), *v.* NOBIN CHANDRA NAG (RESPONDENT).*

Guardian—Act XL. of 1858—*Summary Procedure.*

Act XL. of 1858 does not empower a Judge to remove summarily a guardian not appointed by the Court, but under a will of the minor's grandfather.

THIS was an application by Srimati Lakhi Prya Dasi, under Act XL. of 1858, to be appointed guardian of her minor son,

(2) 7 W. R., 202.

* Miscellaneous Regular Appeal, No. 86 of 1869, against an order of the Judge of Midnapore, dated the 24th of December 1868.

1869!

SRIMATI LAKHI PRYA DASI v. NOBIN CHANDRA NAG.

Pran Govind Nag, stating that Ajodhia Lal Nag died, leaving a will, whereby he bequeathed one moiety of his property to Pran Govind, and the other moiety to Nobin Chandra Nag, the uncle of the minor. That since the death of Ajodhia Lal, the petitioner and her son had been living with Nobin Chandra, but that, on the 20th Kartik 1275 (November 1868,) he had dispossessed the petitioner and her son. That he had maltreated the minor and driven him away from the family house, and that he had been altering the Khatta books, wasting the property, and otherwise disposing of the personal property, in order to defraud the minor. The petitioner prayed that, for the purpose of protecting the person and property of the minor, she might be appointed his guardian, under Act XL. of 1858.

Nobin Chandra Nag put in a written statement, alleging that he had been appointed the guardian of the minor, under the will of Ajodhia, and that the charges contained in the petition of Lakhi Prya were not true.

The following is a translation of the will of Ajodhia.

"After my decease, you being in possession as proprietor, you would live in commensality with Pran Govind and support him and bring him up."

The Judge held, that, as the application was for the removal of a guardian appointed by the minor's grandfather, he had no power to appoint another, and that no waste had been shewn to have been committed by Nobin Chandra. He, accordingly, dismissed the application with costs.

The petitioner appealed to the High Court.

Baboo *Rajendra Missry* for appellant.

Baboo *Anukul Chandra Mookerjee and Ashutos Chatterjee* for respondent.

The judgment of the Court was delivered by

JACKSON, J.—This is an appeal against an order of the Zilla Judge, refusing to grant the petitioner certificate of guardianship under Act XL. of 1858.

1869

SRIMATI LAKHI PRIYA DASI v. NOBIN CHANDRA NAG.

The Judge calls it an application for the removal of Nobin Chandra Nag from the guardianship of the boy, Pran Govind Nag, and it appears very likely that this was the form that the application took before the Judge. He says that the guardian was appointed, as such, by the grandfather of the boy, who made a will, dividing his property between the boy and his uncle, the present guardian. The present guardian, it seems, has not taken out a certificate, and is not appointed by the Court. That being so, it does not appear that the Judge had, under Act XL. of 1858, power summarily to remove such guardian, section 21 only enabling the Civil Court for any sufficient cause to recall a certificate granted under the Act, and also to remove any guardian appointed by the Court. The Judge, therefore, could not summarily remove the guardian, and the guardianship not being vacant, the Judge was not empowered to grant a certificate to the widow, who is the applicant. I observe, however, that the petition presented to the Judge set forth that the opposite party, the minor's uncle and guardian had ill-treated the minor, and had expelled him and his mother, the petitioner, from the family-house, and had deprived them of the minor's share of the property. This was, no doubt, a good cause for commencing a suit against the guardian, and, under such circumstances, I think it very likely that the Court, in which the suit was commenced, would, under the discretion allowed under section 3 of the Act, permit a suit to be instituted without a certificate of administration.

We have been asked to give the petitioner costs out of the estate. But the Court is not administering the estate, and we are not aware what the estate is, out of which the costs are to be given.

I think the application should not be granted, and that she ought not to have her expenses out of the estate.

MARKBY, J.—I am of the same opinion.

JACKSON, J.—The decision will be affirmed with costs.