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CLARK
v.
ALEXANDER.

to have been realized in all the suits, and the principle of rateable distribution between all the creditors should be applied.

For these reasons I prefer to adopt the practice of this Court, supported as it seems to me to be by the authority of the cases decided in this Court which I have cited. I therefore hold that the money realized in this case should be rateably distributed between all the attaching creditors, and that their costs of appearing before me should be added to their claims respectively.

Attorney for applicant : Mr. *E. J. Fink*.

Attorneys for the Small Cause Court creditors : Messrs. *Dignam, Robinson and Sparkes*.

T. A. P.

Before Mr. Justice Sale.

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Sept. 11.

IN THE MATTER OF SRISH CHUNDER SINGH & OTHERS.*

Guardian—Appointment of Guardian—Infant residing out of the jurisdiction of the Court—Letters Patent, High Court, clause 17—Guardian and Wards Act (VIII of 1890), ss. 4, 7, 9—Testamentary guardians—Jurisdiction of High Court.

Case in which the Court refused, on a summary proceeding under clause 17 of the Charter, to appoint a guardian of the person and property of an infant who was not a European British subject, and who was living outside the limits of the ordinary Original Civil Jurisdiction of the Court, there being testamentary guardians in existence, and no application or suit filed to remove them.

On these two last grounds the Court also refused to appoint a guardian of the infant's property under Act VIII of 1890.

THIS was an application made under clause 17 of the Charter of the High Court, and section 17 of the Guardian and Wards Act (VIII of 1890), by one Dabendrobala Dabee for her appointment as guardian of the person and property of her adoptive son Srish Chunder Singh, then an infant of 12 years of age.

It appeared that in October 1887 one Grish Chunder Singh died, leaving a widow, Dabendrobala Dabee, and three brothers, Poorno Chunder Singh, Kanti Chunder Singh, and Sarut Chunder Singh, and also a son of his father's brother, Indra Chunder

* Original Civil Suit.

Singh. By his will he appointed the four persons last mentioned his executors, and, after providing for certain legacies, gave all the residue of his estate to the son who should be adopted by his widow under a power given to her for that purpose. The will further contained the following clause which bore reference to the power of adoption, *vis.*:—"If the party who is entitled to the property be under age, then the whole of my property will pass into the hands of my executors, and until the person so entitled as aforesaid shall attain the full age of 21 years, they shall manage all the property, and the duties and management and education of the said son shall be conducted under the supervision of my wife."

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At the time of the death of the testator the estate, which was known as the Paikpara estate, was joint, and was in the hands of the Court of Wards. In 1879 the Board of Revenue made over the joint estate to Poorno Chunder Singh, Indra Chunder Singh, and Sarut Chunder Singh in their character as executors. Probate of the will of the testator was obtained by Poorno Chunder Singh and Kanti Chunder Singh on the 19th September 1878; and in July 1879 and March 1882 by the two remaining executors respectively.

On the 25th July 1881, Dabendrobala Dabee, in pursuance of the power given to her for that purpose, adopted one Srish Chunder Singh, one of the sons of Poorno Chunder Singh, as a son to Grish Chunder Singh.

In 1889 Sarut Chunder Singh filed a suit for partition of the joint estate; and in such suit a Receiver of the whole of the joint estate was appointed; and the Commissioner of partition therein appointed duly made his award, which at the time of the present application had not however been confirmed, owing to the award having been remitted to the Commissioner for alteration in minor details concerning certain properties situate outside the jurisdiction of the Original side of the Court. Under this award the whole of the property allotted to the minor was situate outside the jurisdiction of the High Court.

In 1889 another suit was brought by Srish Chunder Singh through his adoptive mother as next friend, against the other members of the family, which, amongst other matters, asked for an injunction restraining Sarut Chunder Singh from further

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acting as executor to the estate of Grish Chunder Singh, on the ground that he had improperly dealt with large sums of money belonging to the estate. In 1891 a decree in this suit was made directing Sarut Chunder Singh and Indra Chundra Singh to file their accounts. In February 1892 Sarut Chunder Singh filed his account, which was objected to on the grounds of insufficiency and incompleteness, and on the further ground that the estate of Srish Chunder Singh had been improperly debited with large sums which ought not to have been paid therefrom. No account was filed by Indra Chunder Singh.

It further appeared that Srish Chunder Singh was, at the time of the application and had been previous thereto, living with his adoptive mother outside the Original jurisdiction of the High Court; and it was alleged that the infant had no near relations except the applicant and her paternal grandmother, a lady over 60 years of age, living in Calcutta, and his uncles Sarut Chunder Singh and Indra Chunder Singh, who were alleged to be on bad terms with each other, and could not therefore properly act together as managers of the minor's property; and that the applicant was apprehensive that the award would shortly be confirmed by the Court, and that therefore the Receiver would be discharged, and the estate pass to the hands of the executors.

The application was opposed on the grounds

- (1) that the Court had no jurisdiction inasmuch as the infant did not reside within the local limits of the Original side of the Court, and did not possess any property within such limits;
- (2) that the suit for accounts of the estate of Grish Chunder Singh was still pending and the executors had not been discharged, and no application could, therefore, be entertained under the Guardian and Wards Act;
- (3) that the grandmother of the infant and Sarut Chunder Singh, his paternal uncle, were willing to act as guardians, and had a preferential right to the applicant, and that testamentary guardians had already been appointed and had not been removed;
- (4) that the applicant was not a fit and proper person to be appointed.

Mr. Pugh, Mr. Garth and Mr. Chackravarti, for the applicant.

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Mr. Jackson (with him Mr. Acworth) for Sarut Chunder, referred to Simpson on the Law of Infants, 2nd Ed. 454-455; Trevelyan on Infants, p. 194; *In re McCullochs* (1), and *Ingham v. Bickerdike* (2).

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Mr. Sinha for Indra Chunder Singh.

Mr. O'Kinealy for the Receiver.

SALÉ, J.—This is an application for the appointment of the adoptive mother of the infant Srish Chunder Singh as guardian of his person and property made under clause 17 of the Charter, and also under section 7 of the Guardians and Wards Act. The circumstances under which it is made may be shortly stated as follows:—Srish Chunder Singh was taken in adoption by the widow of Grish Chunder Singh, as a son to Grish Chunder Singh. Grish Chunder Singh, who was entitled to a share of very large properties, called the Paikpara Raj Estate, which originally belonged to two brothers, Issur Chunder Singh and Pertap Chunder Singh, died in 1877, leaving a will by which he appointed his uterine brothers Poorna Chunder Singh, Kanti Chunder Singh, and Sarut Chunder Singh, and his paternal uncle's son Indra Chunder Singh, his executors. The terms of the appointment will be more particularly referred to presently.

At that time the family was joint, and the joint Paikpara estate was in charge of the Court of Wards and remained in charge of the Court of Wards till 1879. It was then, including the share of Grish Chunder Singh, made over to Poorna Chunder Singh, Indra Chunder Singh, and Sarut Chunder Singh, the share of Grish Chunder Singh being managed by them as his executors.

In 1889 a suit (No. 41 of 1889) was brought by Sarut Chunder Singh, one of the sons of Pertap Chunder Singh, for partition of the joint estate. In the same year, a suit No. 235 of 1889 was brought by Srish Chunder Singh, the adopted son of the petitioner, through the petitioner as his next friend, against the other members of the joint family, for the removal of Sarut Chunder Singh from acting further as executor to the estate of Grish Chunder Singh, and for an injunction and other relief. The case alleged against Sarut Chunder Singh was that

(1) 6 Ir. Eq., 393.

(2) 6 Madd., 275.

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he had improperly dealt with large sums of money belonging to the estate. In 1891 a decree was made in the last mentioned suit, directing an account as against Sarut Chunder Singh and Indra Chunder Singh, as the surviving executors to the estate of Grish Chunder Singh.

On the 2nd February 1892 Sarut Chunder Singh filed his account. In the objections taken to this account it is alleged that the account is to a great extent unintelligible; that it is incomplete and insufficient; that it does not give credit for the whole income derived from Grish Chunder Singh's share in the joint estate, and that the disbursements charged in the account are not all properly chargeable against the share of Grish Chunder Singh. Indra Chunder Singh, though directed to file his account, has not done so.

It is an important fact that in the partition suit a Receiver was appointed of the whole Paikpara Raj estate. Thereupon the Receiver took charge and has ever since remained in charge of the estate.

The statements upon which the petitioner relies are, that by an award made by the arbitrator appointed in the partition suit to decide all matters in dispute between the parties, and to carry out the partition of the joint estate, the zemindaries belonging to the estate have been partitioned; that on the award being confirmed the receiver will be discharged as to such zemindaries; that the share allotted to Srish Chunder will then pass into the hands of the executors, who are unfit to take charge of it; that this should be prevented by the appointment of the petitioner as guardian.

It should, however, be stated that pending this application the award was remitted to the arbitrator for amendment and for reconsideration as to certain properties left unpartitioned. The result apprehended by the petitioner has thus been postponed.

The petitioner claims to be entitled to the order sought in the present application, both under the power which this Court has under its Charter, and also under the terms of the Guardians and Wards Act. The infant, it is admitted, resides outside the Original Civil jurisdiction of this Court, and the difficulty I have in proceeding under the jurisdiction given by the Charter is this:—

In the first place I am not aware of any instance in which this Court has exercised that jurisdiction in the case of an infant residing outside the ordinary Original Civil jurisdiction of this Court, who is other than a European British subject. And, further, it does not appear to be the practice of this Court, or of the English Courts, to act in a summary way without suit in the appointment of a guardian, except where no difficulty arises in the administration of an estate. Here there is an important question arising as to whether there are not now in existence persons in the position of testamentary guardians of the infant; at all events a claim is made on behalf of Sarut Chunder and Indra Chunder that they are in that position, and I do not think I should be justified in a summary proceeding, under the jurisdiction conferred by the charter, to appoint a guardian as against those persons. I may also say, having regard to the terms of the "Guardians and Wards Act," that even if the Court were now to act under the powers conferred by the Charter, still, in exercising those powers, it would not disregard, but as far as possible follow, the principles and procedure laid down in the Guardian and Wards Act. Coming to the terms of the Act, we find the definition of the word "Guardian" in the 4th section of the Act as follows:—"Guardian means a person having the care of the person of a minor, or of his property, or of both his person and property."

Now the question is whether, under the terms of the will appointing the executors and defining their powers, guardians of property within the meaning of the Act have in fact been appointed. By the second clause of the will the testator appoints his uterine brothers, Poorna Chunder Singh and Kanti Chunder Singh, executors, and directs that his youngest brother Sarut Chunder Singh, and his paternal uncle's son Indra Chunder Singh, who were then under age, should on attaining their majority also become executors.

Their powers in connection with the estate of the testator are thus defined in the 10th clause of the will: "If the party who is entitled to the property be under age, then the whole of my property will pass to my executors, and until the person so entitled reaches the full age of 21 years, they shall manage all the property and the duties of the

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management and education of the said son shall be conducted under the supervision of my wife."

Now that, I take it, gives to the persons who are appointed executors the care and management of the property until the infant attains the full age of 21 years, and I therefore think this appointment did constitute the executors guardians within the meaning of the Guardians and Wards Act.

The 7th section of the Act provides that "where the Court is satisfied that it is for the welfare of a minor that an order should be made appointing a guardian of his person or property, or both, or declaring a person to be such a guardian, the Court may make an order accordingly;" and the second clause of the section says that "an order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument, or appointed or declared by the Court." This is controlled by sub-section 3. "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."

The present application is not one for the removal of Sarut Chunder Singh and Indra Chunder Singh: indeed, what has been contended is that these persons are not testamentary guardians of the infant. It may be that it is undesirable that the infant's estate should, under present circumstances, and until the charges made against Sarut Chunder Singh have been determined, revert to the care of Sarut Chunder Singh or Indra Chunder Singh, but that is a matter not before me at the present time, and the arguments addressed to me, though they might perhaps be of considerable weight in opposition to an application for the discharge of the Receiver, or in support of an application to continue the Receiver, so far as the estate of the infant is concerned, and so to prevent the property coming into the charge of either of the executors, do not assist the petitioner on the present application. I therefore think, having regard to section 7, that I am at present precluded from making any appointment of guardians of the property of the infant. As regards the application for the appointment

of a guardian of the person of the minor, the Act provides that the application should be made to the Court in whose jurisdiction the minor resides.

Therefore, I think I have no power to make the order asked for. The application must be dismissed and the costs of Sarut Chunder Singh must be paid by the applicant. The Receiver, being in possession of the property, was right in appearing, and he will be at liberty to pay his own costs out of the estate, which will be debited to the share of the infant in the general estate. The Receiver will also be at liberty to pay the costs of Sarut Chunder Singh out of the infant's share in the general estate.

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Application refused.

Attorneys for applicant: Messrs. *Hensley and Rose.*

Attorneys for *Indra Chunder Singh*: Messrs. *Morgan & Co.*

Attorney for *Sarut Chunder Singh*: *Baboo G. C. Chunder.*

Attorney for the Receiver: *Baboo Kally Nath Mitter.*

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FULL BENCH REFERENCE.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Prinsep, Mr. Justice Pigot, Mr. Justice Macpherson, and Mr. Justice Ghose.

SURJAN RAOT (PLAINTIFF) v. BHIKARI RAOT AND OTHERS
 (DEFENDANTS).*

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June 16.

Arbitration—Private arbitration—Application to file private award—Objection to award, effect of—Power of Court—Civil Procedure Code, ss. 520, 521, 525, 526.

Held by the Full Bench (FERREBRAM, C.J., and PRINSEP, PIGOT, MACPHERSON and GHOSE, J.J.):—

Where an application is made to a Court for filing a private award, and objections are raised in a verified written statement, and the objections are such as fall within section 521 of the Code of Civil Procedure, the Court is not bound to hold its hand and reject the application, but it is

* Full Bench reference in Rule No. 1470 of 1892, in the matter of suit 21 of 1892 in the Court of the Second Subordinate Judge of Shahabad.