Before Sir Francis W. Maclean, K.C.I.E., Chief Justice, and Mr. Justice Holmwood.

1907
May 30.

SURENDRA NATH SARKAR
v.
ATUL CHANDRA ROY.*

Guardian and Ward—Minor—Account, suit for—Guardian's power to bind minor—Advances made to guardian for minor's benefit—Principal and Agent—Advances made by Agent to guardian of Principal.

A guardian cannot bind his minor ward by a personal covenant.

But where a minor comes to Court to have an account taken as between himself and his agent, and it is found on taking the account that the agent has made advances to the guardian and the advances have been applied for the benefit of the minor, the agent ought to be allowed those advances in taking the accounts.

Waghela Rajsanji v. *Shekh Masludin*(1) distinguished.

SECOND APPEAL by the plaintiff, Surendra Nath Sarkar.

The suit out of which this appeal arose was brought by the plaintiff against the principal defendant, Atul Chandra Roy, for accounts and for recovery of whatever might be found due to the plaintiff from the defendant upon the taking of such accounts. The allegations in the plaint material to the purposes of this report were as follows :—That the plaintiff was a minor and that he and his brother, the *pro formâ* defendant Narendra Nath Sarkar, owned considerable properties and that the principal defendant acted in various capacities as manager under the plaintiff's guardians from time to time; that during the time when he acted as such manager, he had, by various acts of fraud, dishonesty and wilful negligence, procured considerable benefits to himself at the expense of the plaintiff's estate, and had caused great loss and injury to that estate; that the defendant No. 1 was finally dismissed from his office in Assar 1308, but that he had neither rendered any accounts nor made over charge of the *tehbil*. The

* Appeal from Appellate Decree, No. 1557 of 1905, from the decree of R. R. Pope, District Judge of 24-Perganas, dated May 22, 1905, modifying the decree of Bhagabati Charan Mitter, Subordinate Judge of Alipur, dated Aug. 16, 1904.

(1) (1887) I. L. R. 11 Bom. 551.

suit was instituted by the plaintiff through his mother as next friend; during the course of the suit he attained his majority and elected to proceed with the suit.

The defence of the defendant No. 1 was that he had rendered accounts in respect of the period during which he had acted as manager of the plaintiff's estate, and he claimed that a large sum of money was due to him from the plaintiff for the period of his service. He denied all charges of fraud, negligence and improper conduct.

The Subordinate Judge who tried the suit passed a preliminary decree for accounts on the 29th of March, 1904, but he rejected the defendant's prayer for set-off.

The matter then ultimately went before a Commissioner nominated by both parties; the accounts were taken and the Commissioner reported that a sum of Rs. 4,581-1 was due from the plaintiff to the defendant No. 1. The Subordinate Judge accepted the report and made a decree in favour of the defendant No. 1 for the amount.

On appeal by the plaintiff, the District Judge found that the defendant No. 1 had made the advances, in respect of which he had obtained the decree, to the plaintiff's guardian in her capacity as guardian and for the benefit of the minor and of his brother who was also a minor at the time. He accordingly affirmed the decision of the Subordinate Judge but allowed the defendant No. 1 costs throughout which the Subordinate Judge had refused.

The plaintiff appealed to the High Court.

Dr. Rashbehary Ghose (*Babu Mahendra Nath Roy* and *Babu Hari Charan Sarkhel* with him), for the appellant. Assuming that under the Code of Civil Procedure a decree may be made in favour of the defendant in an action for accounts, the Court below was not right in making the plaintiff, who was a minor at the time, liable for advances made to his guardian even if they were for his benefit. It is not a case of advances for necessaries. A guardian's authority extends merely to creating a charge on the minor's estate; he cannot bind the minor by a personal covenant. The defendant No. 1 could not have sued the plaintiff for these

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advances made to the guardian. The Guardian and Wards Act under which the guardian was appointed gives a guardian no power to bind the ward by a personal covenant: *Waghela Rajsanji* v. *Shekh Masludin*(1); *Maharana Shri Ranmalsingji* v. *Vadilal Vakhat Chand*(2); *Abhassi Begum* v. *Moharanee Rajroop Koonwar*(3).

[MACLEAN C. J. But this is not a suit against the minor on the covenant; here you claim accounts, and in a Court of Equity the whole account must be taken.]

I ought not to be made liable for the whole of the advances, as a portion was spent for the benefit of my brother; it would be driving me to a suit for contribution against my brother, which is not right.

Babu Lal Mohan Das (*Babu Jnanendra Nath Bose* and *Babu Biraj Mohan Majumdar* with him), for the respondent (who was called upon only on the last question raised by the appellant), contended that as the two brothers held their properties jointly and the advances were made to meet demands, such as Government revenue, in respect of the joint estate they were as much for the benefit of the plaintiff as for the benefit of the brother.

MACLEAN C. J. This is a suit for an account by a principal against his agent. When the suit was instituted the principal was a minor and the suit was by his mother as his next friend. He subsequently attained majority and elected to go on with the suit, and is the present appellant. A preliminary decree for accounts was passed and accounts were taken by a commissioner. The matter then came before the Subordinate Judge; and he in effect affirmed the view of the commissioner and found that a sum of Rs. 4,581-1 anna was due from the plaintiff to the defendant instead of anything from the defendant to the plaintiff. The plaintiff then appealed to the District Judge, and his appeal was dismissed with costs. Hence the present appeal.

The first question that arises in the circumstances is whether certain advances made by the agent to the guardian of the minor

(1) (1887) I. L. R. 11 Bom. 551. (2) (1894) I. L. R. 20 Bom. 61, 69.
(3) (1878) I. L. R. 4 Calc. 33.

which were found by both Courts to be expended for the benefit of the minor, can, in taking the accounts as between the plaintiff and his agent, be properly allowed to the agent. It is urged by the appellant that they cannot. As I have said, both Courts have found that these advances were made for the benefit of the minor. It is said that a guardian cannot bind his minor ward by a personal covenant: and, reference is made to the case of *Waghela Rajsanji* v. *Shekh Masludin*(1) decided by the Privy Council. Nobody disputes that. But the question here is a very different one. The question here is, where a minor comes to this Court to have an account taken as between himself and his agent, and it is found on taking that account that the agent has made certain advances to the guardian—the only person to whom he could make advances as representing the minor—and those have been applied for the benefit of the minor, whether the agent ought not to be allowed those advances, in taking the accounts. I think he ought. Here the plaintiff seeks relief from a Court administering equity, and he must do equity himself. I think it is most equitable, when it is found that the minor has had the benefit of these advances, that they should be allowed to the agent, on taking the accounts. I have, therefore, very little hesitation in saying, in the circumstances of this case, that the view taken by both the lower Courts as to the allowance of these sums was correct.

Then the second question is whether the Judge erred on the ground that all these advances were not made for the benefit of the minor plaintiff. I thought at first there was something in that point; but when one looks at the judgment of the Subordinate Judge, which has been accepted on this point by the District Judge, it is clear that all these sums were really advanced for the benefit of the minor. Had we thought otherwise, it might have been necessary to remand the case. Now that our attention is called to the finding of the Subordinate Judge, affirmed as it is by the District Judge, I do not think any remand is necessary.

The third point is whether a decree can be made in a suit for account, in favour of the defendant. I should have thought that

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it could. But this point has not been raised until the present moment; it was not raised in either of the Courts below nor is it made a ground of appeal, and I think it is too late to raise it now.

The only other question is as to costs. The Court below has exercised its discretion as to costs: and, upon the facts found as to the manner in which the defendant has been treated by the plaintiff, I think the conclusion at which the Court below has arrived is right.

The result, therefore, is that the appeal fails and must be dismissed with costs.

HOLMWOOD J. I agree.

Appeal dismissed.

S. CH. B.