

This state of the law, the opinion entertained by my learned brother on the second objection of the decree-holder, and the fact that any decision arrived at by us in these proceedings would apparently not be binding upon the Secretary of State in a suit brought, should occasion arise, to enforce the security, afford additional reasons why I should not, in this matter of discretion, differ from my learned brother. I therefore agree in discharging the rule.

S. C. G.

*Rule discharged*

1911  
 SRINIBASH  
 PRASAD  
 SINGH  
 v.  
 KESHO  
 PRASAD  
 SINGH.  
 TEUNON J.

## APPELLATE CIVIL.

*Before Mr. Justice Chitty and Mr. Justice N. R. Chatterjya.*

JAIWANTI KUMRI

v.

GAJADHAR UPADHYA.\*

1911  
 April 11.

*Guardian—Minor—Guardians and Wards Act (Act VIII of 1890) ss. 8, 13—Applications by mother and grand-mother—Appointment of Nazir as guardian of the property of the minors, by Court—Purdanashin Lady—Recording of Evidence.*

Where a mother and grand-mother of two minors separately applied to be appointed guardian of the persons and property of the minors and during the pendency of their applications it was agreed that a certain person should be appointed guardian of the property, but he refused to take up the appointment, the District Judge without holding an enquiry into the respective merits of the applications made an order appointing the Nazir of the Court to be the guardian of the property of the minors:—

*Held*, that the Court had no power to make an order appointing a guardian except on a substantive application under section 8 of the Guardians and Wards Act (VIII of 1890), and that the appointment of the Nazir was *ultra vires*.

Under section 13 of the Guardians and Wards Act (VIII of 1890) the Court is bound to hear such evidence as may be adduced in support of or in opposition to the application, before passing an order.

The mere fact of the mother being a *purdanashin* lady was no obstacle to her being appointed guardian of the property; the safe custody of the property and its due administration could be sufficiently guaranteed by security being taken from the proposed guardian by the Court.

\* Appeal from Original Order, No. 608 of 1910, against the order of J. C. Twidale, District Judge of Bhagalpore, dated Dec. 6, 1910.

1911

JAIWANTI  
KUMRI  
v.  
GAJADHAR  
UPADHYA.

## APPEAL by Musummat Jaiwanti Kumri.

Musummat Jaiwanti Kumri, the mother of the minors, applied before the District Judge to be appointed guardian of the person and property of the minors. A similar application was made by the grandmother of the minors. On the 22nd of November, 1910, both the mother and the grandmother agreed that Babu Dalip Narain Singh should be appointed guardian of the property of the minors. Babu Dalip Narain Singh, however, refused to take up the appointment. The learned District Judge then, without holding an enquiry into the respective merits of the applications of the mother and the grandmother, made an order appointing the Nazir of his Court to be guardian of the property, and while passing the order of appointment, remarked in his order that both the ladies, being *pardanashin*, were for that reason not very suitable persons to be guardians of a large property like that in question in the case. From this order Musummat Jaiwanti Kumri alone appealed to the High Court.

*Dr. Rash Behary Ghose, Babu Khetra Mohan Sen and Babu Jogendra Nath Dutt*, for the appellant.

*Babu Dwarka Nath Chakravarti and Babu Lal Mohan Ganguli*, for the respondent.

CHITTY AND N. R. CHATTERJEA JJ. This is an appeal by Musummat Jaiwanti Kumri from an order of the learned District Judge of Bhagalpur refusing her application to be appointed guardian of the property of her minor sons, Babu Jagdish Prosad and Babu Jogesser Prosad.

It appears that along with the petition of Musummat Jaiwanti Kumri, the mother of the minors, the District Judge had before him a petition of Musummat Champabati Kumri, the grandmother of the minors, that she should be appointed. On the 22nd of November, 1910, the ladies were agreed that Babu Dalip Narain Singh should be appointed guardian of the property of the minors. That gentleman was asked whether he

would undertake the charge but he declined. The learned District Judge then without holding any enquiry into the respective merits of the applications of the mother and the grandmother, made an order, which is in form a permanent order, but which from his letter would appear to be a temporary order, appointing the Nazir of his Court to be the guardian of the property of the minors. He appointed the mother, Musummat Jaiwanti Kumri, to be the guardian of the person of the minors, and to that no objection is taken. It is conceded by the learned pleaders for both the ladies that the District Judge's order cannot possibly stand. A Court has no power to make an order appointing a guardian of a minor, except on a substantive application (see section 8 of the Guardians and Wards Act, 1890). The appointment, therefore, of the Nazir was *ultra vires*.

With regard to the refusal of Musummat Champabati Kumri's application, she has filed no appeal against the order of the learned District Judge, and there is therefore no application of hers at present before the Court. With regard to the application of Musummat Jaiwanti Kumri, the mother, it is not seriously contended that there ought not to be a proper enquiry into her case. Section 13 distinctly prescribes that "on the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application." The learned District Judge has as yet taken no evidence on either side. In his order of the 22nd of November he remarks that "both the ladies are *pardanashins* and are for that reason not very suitable guardians for a large property like that in question in this case." We ought to point out that the mere fact of the mother being a *pardanashin* lady is no obstacle to her being appointed guardian. It is true that a *pardanashin* lady may not be able to personally supervise the management of the property, but the safe custody of the property and its due administration may be sufficiently guaranteed by security being taken from the proposed guardian by the Court.

1911

JAIWANTI  
KUMRI  
v.  
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UPADHYA.

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 UPADHYA.

The grandmother, Musummat Champabati Kumri, has made very definite allegations against her daughter-in-law in her petition of objection. Those should be enquired into by the District Judge, recording the evidence on both sides.

With these remarks we set aside the order of the learned District Judge and send down the case for him to deal with the application of Musummat Jaiwanti Kumri on the merits.

Each party will bear his or her own costs of this appeal.

We direct that the record be sent down at once.

S. A. A. A.

*Appeal allowed;  
 case remanded.*

## CRIMINAL REVISION.

*Before Mr. Justice Caspersz and Mr. Justice Sharfuddin.*

KANGALI SARDAR

v.

BAMA CHARAN BHATTACHARJEE.\*

1911  
 June 15.

*Jurisdiction of High Court—Power to revise an order of acquittal at the instance of a private party—Decision on a point of local jurisdiction and not on the merits—Criminal Procedure Code (Act V of 1898) ss. 423, 439 (5)—Practice.*

Section 439 (5) of the Criminal Procedure Code does not bar the jurisdiction of the High Court to interfere with an order of acquittal on an application made at the instance of a private party.

Where the Appellate Court set aside a conviction and sentence on the ground that the place of occurrence was outside the local limits of the trying Magistrate's jurisdiction, overlooking the provisions of s. 531 of the Code, the High Court set aside the order of acquittal and directed a re-hearing of the appeal.

What the Appellate Court has to find is whether the offence, of which an accused is convicted, has been made out not with reference to any dispute as to jurisdiction, but on the merits and in accordance with the evidence.

On the 21st August, 1910, the petitioner lodged a complaint, under sections 143 and 379 of the Penal Code, against

\* Criminal Revision, No. 486 of 1911, against the order of W. B. Heycock, District Magistrate of Burdwan, dated Feb. 16, 1911.