(1919) 03 CAL CK 0036

Calcutta High Court

Case No: None

Sachindra Narain Sah		APPELLANT
	Vs	
Hironmoyee Dasi		RESPONDENT

Date of Decision: March 17, 1919

Citation: 59 Ind. Cas. 435

Hon'ble Judges: Newbould, J; Greaves, J

Bench: Division Bench

Judgement

1. This is, an appeal from the decision of the District Judge of Dacca, dated the 8th of August 1917.

2. The real paint at issue is, whether the citation served upon a minor in an uncontested Probate proceeding by serving it upon her husband after the husband has been appointed her guardian in the proceeding is bad because the husband was appointed guardian without his consent.

3. The facts are shortly as follows:On the 10th August 1914 one Mohendra Narain Saha died leaving a Will, dated the 14th Sravan 1321 B.S., corresponding to 30th July 1914. He left him surviving a widow, Mrinalini Dabya, and a daughter, Hironmoyee Dasi. On the 11th November 1914 Mrinalini applied for Probate of the Will, The petition states that the testator had two near relatives, namely, Hironmoyee Dasi, minor wife of Susan Bahari Ray, residing at 13, Nather Bagan Street, Calcutta, represented by her husband Susen Behary Ray, residing at the same place, and also a sister''s son named Jotindra Nath Saha. Upon the same day that the petition was presented a petition was also presented on behalf of the petitioner for the appointment of guardians of the two minors. The petition states that Hironmoyee is under the guardianship of her husband Susen Behary Ray, and that he has no interest adverse to the minor and that he was a fit and proper person to be her guardian. It appears from the order sheet that, on the 14th November 1914, Susen Behary Ray was appointed guardian ad litem of Hironmoyee Dasi. We have an affidavit, dated 23rd January 1915, of the bailiff of the Small Cause Court of Calcutta

stating that, according to the identification of Debandra Chandra Dutt, he affixed a copy of the notice with regard to guardian ship on the outer door of 13, Nattier Bagan Street. The first opposite party, that is, Hironmoyee, being a Hindu pardanashin lady and Susen Ray not being present the bailiff states that Hironmoyee''s father-in-law, Gosto Bahary Roy, was present and that he refused to accept service and sign the original. There is an affidavit also on the record of Dabandra Chandra Datt stating that he accompanied Gosto Behary Gupta bailiff to serve notices on the two minors and he states that the bailiff served a copy of the notice by affixing it on the outer door of the dwelling house of the first opposite party, that is, Hironmoyee at 13, Nather Bagan Street. Upon the widow''s application the grant of Probate was issued to her and no body appeared on behalf of Hironmoyee to contest the application for the grant. Upon the death of Mrinalini the present application was made on behalf of Hironmoyee Dasi by her husband and guardian, Susen Roy, asking for revocation of the grant of Probate upon certain grounds stated in the petition, one of them being that the Will was a forgery and that it was never signed by the testator, suit another being that no notice of the proceeding was served upon Hironmoyes Dasi or upon her guardian, and also alleging that she wag never represented in the Probate proceeding and was not bound by the same.

4. We have been referred to Section 83 of the Probate and Administration Act which provides that, in any case before the District Judge in which there is contention the proceeding shall take as nearly as may be the form of a suit, and if is suggested that the proceeding for Probate by Mrinalini had not become contentious and that, therefore, the provision of the Civil Procedure Code, that is to say, Order XXXII, Rule 4, which provides that no person shall, without his consent, be appointed guardian of a minor for the purpose of the suit had no application, and that, consequently, the application for revocation of the grant u/s 50 of the Probate and Administration Act was not well founded as there had been no real defeat in substance.

5. It is urged on behalf of the appellant that the learned District Judge who, upon the fact baling brought to his notice that Hironmoyee Dasi''s husband never assented to his appointment as guardian, revoked the grant, acted prematurely and that he should not have so acted unless he were satisfied by evidence that Susen Ray, the husband, was not a fit and proper person to be Hironmoyee''s guardian, or that in fast Hironmoyee through her guardian had no notice of the proceeding, and it is pointed out with some force that Susen Ray must have been the proper person to be appointed as guardian and that it is not likely that his interest was in any way adverse to the minor, as we find that in the present proceeding he is her guardian for the purpose of these proceedings.

6. This is the only question that arise, and the point seems to be uncovered by any actual authority. We were referred to Section 69 of the Probate Act which provides that in all cases it shall be lawful for the District Judge, if he thinks fit, to issue

citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of Probate or Letters of Administration, and we were referred to the case of Nistariny Dabya v. Brahmomoyi 18 C. 45 : 9 Ind. Dec. (N.S.) 31 as an authority for the proposition that the mere non-issue of citations was not a defect in substance within the meaning of Section 50 of the Probate and Administration Act and that the mere non-service of citation was not sufficient to invalidate the proceeding provided that the person to whom the citation should have issued had notice of the proceeding. We were also referred to Tristram and Coote''s Probate Practice, page 305, which deals with the question of service on minors and from which it is stated that it appears that service on a minor is to be effected in the presence of the person who is the natural guardian of the minor, but that no provision is made for the assent of the guardian. We were also referred to Mortimer on Probate Practice, Edition 1911, at page 530, on the same point. So far as the case in Nistariny Dabya v. Brahmomoyi Dabya 18 C. 45 : 9 Ind. Dec. (N.S.) 31 is concerned, this does not seem to have any application, for in that case the minor had been represented in the Probate proceeding by a guardian whose right to appear as guardian was disputed, But in those proceedings there had been contest as to the Will and Probate had only been granted after the contest had taken place. I am prepared to accept the contention of the learned Vakil who appeared for the appellant that Order XXXII, Rule 4, does not apply as the proceedings had not arrived at the contentious stage, but, even so, I think that it was for the person who got the guardian appointed to show the Court that that person assented to the guardianship and took upon himself the burden thereof. It seems to me that it is a necessary protection in the interest of an infant that not only should the Court be satisfied that a guardian has been appointed, but that a guardian has been appointed who had consented to accept the appointment and take upon himself the onus that by virtue of the appointment falls upon him on behalf of the infant. We think, therefore, that the learned District Judge was right in the decision at which he has arrived, namely, in revoking the grant and directing the Will to be proved in solemn form in the absence of any evidence that Hironmoyee''s husband assented to his appointment as guardian. We do not think that it was necessary for the Judge to await proof either as to the unsuitability of Hironmoyee''s husband for the position of guardian or that the service had not been properly effected.

7. Under these circumstances, the appeal fails and must be dismissed with costs. We assess the hearing fee at two gold mohurs.

Newbould, J.

8. I agree.