

(1912) 07 CAL CK 0049

Calcutta High Court

Case No: None

Sundar Moni Dai

APPELLANT

Vs

Bangsidhar Patnaik and Others

RESPONDENT

Date of Decision: July 3, 1912**Acts Referred:**

- Guardians and Wards Act, 1890 - Section 11, 21, 7, 8

Citation: 16 Ind. Cas. 900**Hon'ble Judges:** Beachcroft, J; Ashutosh Mookerjee, J**Bench:** Division Bench

Judgement

1. This appeal is directed against an order appointing a guardian of the person and property of an infant under the Guardians and Wards Act of 1890. It appears that one Dayanidhi Patnaik died On the 8th August. 1908, leaving properties, moveable and immoveable, of considerable value. During the life-time of his first wife, Dayanidhi adopted a son. The adoption took place in 1899 and the adopted son, by name Bangsidhar Patnaik, is the minor in respect of whose person and property the guardian has been appointed. After the death of his first wife, Dayanidhi took the appellant, Sundarmoni Dei, as his second wife in February 1908. The position of the family at the time of the death of Dayanidhi, therefore, was that he left a widow, a daughter and an adopted son. On the 14th December 1903, the widow applied to be appointed guardian of the person and property of the infant son of her husband. This application was opposed by two relations of her husband, Durga Churn Mohapatra and Sree Krishna Mohapatra, and also by one Lakhidhar Mahanty. The objectors contended that the widow was herself a minor and was not competent as a pardanashin lady to take effective charge of the person and property of the infant. They also urged that the application in substance was not made bona fide in the best interests of the minor concerned. One of the objectors, Sri Krishna, proposed that Baba Gokulanund Chowdhry, a leading Pleader of the Cuttack Bar, who was related both to the widow and to the minor, should be appointed guardian. The

Collector of the District also took action u/s 8 Clause (6) of the Guardians and Wards Act and intimated to the District Judge his opinion that a guardian should be appointed and that the most suitable person available was Durga Churn Mohapatra. The position, therefore, was that the District Judge had before him an application by the widow for appointment of herself as guardian; there was a suggestion by the Collector that Durga Churn should be appointed guardian. There was also a proposal by one of the objectors that Babu Gokulanund Chowdhry should be appointed guardian. The District Judge took evidence and came to the conclusion that the mother should not be appointed, but that Babu Gokulanund Chowdhry was the best person to act as guardian of the infant. The learned Judge accordingly appointed him. Since the order was made, Babu Gokulanund Chowdhry has furnished security and has intimated his willingness to accept the position of a guardian. In the present appeal, which has been filed by the widow, the order of the District Judge has been assailed substantially on two grounds; namely, first, that Babu Gokulanund Chowdhry should not have been appointed guardian as the provisions of Sections 8 and 11 of the Guardians and Wards Act had not been strictly followed, and, secondly, that the application of the widow has been refused on grounds erroneous in fact and insufficient in law.

2. In so far as the first contention is concerned, our attention has been invited to the provisions of the Guardians and Wards Act applicable to the matter. Section 7 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, the Court may make an order accordingly. Section 8 then provides that an order u/s 7 shall not be made except on the application of the person desirous of being, or claiming to be, the guardian of the minor or any relative or friend of the minor or the Collector of the District or other local area within which the minor ordinarily resides or in which he has property, or the Collector having authority with respect to the class to which the minor belongs. Section 10 defines the contents of an application u/s 8 by a person other than the Collector. Section 11 then provides that if the Court is satisfied that there is ground for proceeding on the application, it shall fix a day for hearing thereof and cause notice of the application and of the date fixed for the hearing to be served. On behalf of the appellant, it has been pointed out that the present case does not fall within Clause (a) of Section 8, because there was no application by Babu Gokulanund Chowdhry, nor does Clause (c) of Section 8 cover the case, because there was no application by the Collector such as was entertained by the District Judge in conformity with the provisions of the statute. On behalf of the respondent, reliance has, however, been placed upon the petition of one of the objectors, Sree Krishna Mohapatra, dated the 14th June 1909, in which it was suggested that Babu Gokulanund Chowdhry should be appointed guardian of the person and property of the infant. It has been contended that this petition of objection might be treated in substance as an application by a relative or friend of the minor for the appointment of Babu Gokulanund Chowdhry as guardian. In

answer it has been contended that if the application be treated in this manner, it ought to have been notified as provided in Section 11, and it has been suggested that the failure to comply with the provisions of that section is a fatal defect which invalidates the proceedings of the District Judge. In our opinion, there is no substance in the contention of the appellant. As already stated, there was an application by the widow for the appointment of herself as guardian. There was also an application by a relation for the appointment of Babu Gokulanund Chowdhry as guardian. No doubt, the application was not notified in accordance with Section 11, but that did not constitute a fatal defect. The object of Section 11 is to bring the application to the notice of persons interested in opposing it. There is no room for controversy that all the persons interested in the matter of the appointment of a suitable guardian for the minor, were present before the Court, and the evidence shows that the question of the suitability of Babu Gokulanund Chowdhry as a guardian was fully considered by the Court. The case of *Jaiwanti Kumari v. Gajadhar Upadhyaya* 15 C.W.N. 676 : 14 C.L.J. 226 : 38 C. 783 : 10 Ind. Cas. 334 where it was ruled that a guardian cannot be appointed without an application under the Guardians and Wards Act, has no application to the case before us. In that case, the Court proceeded to appoint the Nazir as guardian though his name had not been suggested by any of the parties to the proceeding. We are-, therefore, of opinion that the order of the District Judge has been made substantially in conformity with the provisions of the Act, and cannot be set aside on any technical ground.

3. In so far as the second contention is concerned, it has been argued that each of the three reasons assigned by the District Judge for the refusal of the application of the widow is unsound. One of the reasons assigned is that the petitioner, as the stepmother, was the next heir and it was consequently undesirable that she should be appointed guardian of the person of the infant. This view, it must be conceded, cannot be supported. As was pointed out by this Court in the cases of *Lala Joti Lal v. Musammat Durani Kower* W.R. (F.B.) 173 : B.L.R. Sup. Vol. 67 and *Tahaldai Kumri v. Gayaprasad Sahu* 37 C. 214 : 5 Ind. Cas. 135 : 14 C.W.N. 443 : 11 C.L.J. 588 and by the Allahabad High Court in the case of *Rama Nand v. Surgiani* 16 A. 221 : A.W.N. (1894) 47 under the Mitakshara School of Hindu Law, the step-mother is not the heir of her step-son. Consequently, the applicant cannot be deemed disqualified on this ground. The second reason assigned is that the petitioner is herself a pardanashin lady and that the estate which is apparently of considerable value cannot possibly be effectively managed by her. No doubt, it cannot be laid down as an inflexible rule of law that a pardanashin lady should not be appointed guardian of the person and property of her infant son. But, in the case before us, the circumstances show that, in so far as the property of the infant is concerned, the petitioner cannot be appointed guardian, with any prospect of advantage to the infant. She is herself a young widow and the estate, if she is appointed guardian, must be managed on her behalf by her father. Her father, it has been pointed out, is in embarrassed circumstances and it would, therefore, be not beneficial to the infant to place his

estate practically in charge of the father of his stepmother. The third ground assigned is that the petitioner herself is an infant, and is, therefore, not competent to be appointed guardian of the person and property of her infant son. The evidence as regards her minority points, we think, to the conclusion that the estimate of the age of the petitioner, as made by the District Judge, is approximately correct. But it has been pointed out that, even in that view, the petitioner has now attained majority, and that whatever disqualification might have existed at the time of the application, there is no disqualification at the present time. Our attention has also been drawn to Section 21 of the Guardians and Wards Act, which provides that a minor is incompetent to act as guardian of any minor except his own wife or child, or, where he is the managing member of an undivided Hindu family, the wife or child of another minor member of that family. This clearly refers to the guardian of the person. In so far, therefore, as the question of the appointment of guardian of the property is concerned, the District Judge was right in the view he took. The conclusion, therefore, follows that the order of the District Judge, in so far as it appoints Babu Gokulanund Chowdhry as guardian of the property of the infant, must be affirmed. In so far, however, as the District Judge has appointed Babu Gokulanund Chowdhry to be the guardian of the person of the infant, the order must be discharged. Section 21, it has been contended, is wide enough to cover the case for an adopted son, and the stepmother, even if a minor, is competent to act as guardian of the person of the infant. There is much force in this contention. See *Rangubai v. Gopal* 5 Bom. L.R. 542; *Lakshmibai v. Shridhar* 3 B. 1 at P. 2. But even if the section was strictly construed, as the applicant has now attained majority, she is entitled to be appointed guardian of the person of the infant. We are further of opinion that, in the circumstances of the case, it is for the benefit of the infant that he should not be separated from his step-mother and his sister, and he has plainly indicated his preference for the family circle, to which fact some weight must be attached. *Ex parte Edwards* 3 Atk. 519. The effect of the appointment of a stranger as the guardian of the person of the minor would be that he would be removed from the family, but it is not desirable that the feeling between the step-mother and the infant son, or between the sister and the brother should be estranged; at the same time, there are advantages in family life which cannot be altogether ignored. The only question is, whether suitable provision can be made for the education of the infant, if the step-mother be appointed guardian of his person. We are of opinion that necessary safeguards may be provided by suitable directions. We accordingly appoint the petitioner as guardian of the person of the infant, as, after all, the Court, in the matter of choosing a guardian of an infant, must be guided entirely by the interest of the ward *Beattie v. Johnstone* 10 Cl. & F. 42 : 7 Jur. 1023 : 59 R.R. 23. We direct, however, that the infant should reside at Cuttack. A house will be taken for him and he will live with his mother and sister. As regards his education, suitable directions will be given by the District Judge. Possibly, the best course will be, as the estate is of considerable value, to appoint for him a tutor, and to place him in one of the schools in the town. It has been apprehended by the

respondent that the infant may be removed from the town, but we are assured by the learned Vakil for the mother that the fears are groundless. At any late, if the mother as guardian does not carry out the directions of the District Judge, she will be guilty of contempt of Court and will be liable to removal from her office of guardian. The result is that this appeal is allowed in part; the order of the District Judge, in so far as the appointment of Babu Gokula nund Chowdhry as guardian of the property is concerned, is affirmed; but in so far as the guardianship of the person is concerned, the order is varied and the mother is appointed such guardian, There will be no order for costs for any party other than Babu Gokulanund and the mother, who as guardians will be entitled to their costs out of the estate of the infant.