

(1870) 02 CAL CK 0022

Calcutta High Court

Case No: Miscellaneous Regular Appeal No. 453 of 1869

Mussamat Etwari,
Mother and Guardian of
Dabi Dayal and
Mohadeo Lal, Minors

APPELLANT

Vs

Ram Narayan Ram

RESPONDENT

Date of Decision: Feb. 26, 1870

Judgement

Norman, Officiating C.J.

1. This was an application by Mussamat Etwari, the mother of two infants, named Dabi Dayal and Mohadeo Lal, the elder of whom is five years, and the other two years-and-a-half old, for a certificate under Act XL of 1858, as guardian and manager of the property of the minors, she alleging that the father is wasting the property, and that the appointment of herself as guardian is necessary for the preservation of the rest of the property, and for the purpose of enabling her to institute suits to recover property which has been wasted by the father. The Officiating Judge says simply, that the father's drunken habits are not a sufficient reason for a Court interfering and taking the children from the custody of the natural guardian." Now the 37th section of Act XL of 1858 provides that nothing in that Act shall authorize the appointment of a guardian of the person of " any minor whose father is living, and is not a minor. The words restricting that enactment to a declaration that a guardian of the person of such minor shall not be appointed, gives rise to an inference that it was not intended that the Court should not have power to appoint a guardian of the property of a minor whose father might be living.

2. The 4th section provides that any relative or friend of a minor in respect of whose property such certificate has not been granted, may apply to the Civil Court to appoint a fit person to take charge of the property and person of such minor.

3. The 6th section provides that when an application shall have been made to the Civil Court, either by a person claiming a right to have the charge of the property of a minor, or

by any relative or friend of the minor, the Court shall issue notice of the application, and fix a day for hearing the same. On the day fixed, the Court will enquire summarily into the circumstances, and pass orders in the case.

4. The 7th section is remarkable. It begins by enacting that if it shall appear that any person claiming a right to have charge of the property "of a minor is entitled to such right by virtue of a will or deed, and is willing to undertake the trust, the Court shall grant a certificate of administration to such person." Therefore, if the donor of the property, or the father, shall have exercised his discretion by the appointment of a guardian of the property, the Court is to take such person as having been properly appointed. The section proceeds: If there is no person so appointed (that is appointed either by will or deed) or if such person is unwilling to undertake the trust, and there is any near relative of the "minor who is willing, and fit to be entrusted with the charge of his property, the Court may grant a certificate to such relative." It goes on to say that the Court may also, if it think fit. (unless a guardian have been appointed by the father) appoint such person as aforesaid, or such relative or any other relative or friend of the minor, to be guardian of the person of the minor.

5. Therefore, notwithstanding an appointment of a guardian of the person of the minor by the father, the Court may appoint a person to be a guardian of the property.

6. In the case now before the Court, the Officiating Judge of Gya does not appear to have adverted to the distinction between the appointment of a guardian of the property and the appointment of guardian of the person of the minor. If this is a family governed by the Mitakshara, it is plain that the infants have a right to ask the interference of the Court to restrain their father from dissipating property in which they have by their birth become jointly interested with him; and for that purpose it is clear that the Court must have power to appoint a guardian for the purpose of instituting suits, and protecting the property of the minor; and that such guardian may be a person other than the father; and on a careful consideration of sections 4, 6, and 7, of Act XL of 1858, it appears to me to be plain that a guardian may be appointed under that Act for the purpose of protecting the interest of the minors. The case must go back to the Judge, who will try the question whether the father is wasting the property of these infants, and whether it is necessary for their protection that a person should be appointed as their guardian for the purpose of suing and taking such steps as may be necessary to restrain further waste.