

**(1936) 12 BOM CK 0019**

**Bombay High Court**

**Case No:** First Appeal No. 295 of 1931

Kisandas Laxmandas Gujar

APPELLANT

Vs

Godavaribai Govinddas Gujar

RESPONDENT

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**Date of Decision:** Dec. 2, 1936

**Acts Referred:**

- Guardians and Wards Act, 1890 - Section 34(a), 37
- Limitation Act, 1908 - Section 10

**Citation:** (1937) 39 BOMLR 351

**Hon'ble Judges:** Divatia, J; Barlee, J

**Bench:** Division Bench

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### **Judgement**

Barlee, J.

One Kisandas died leaving a widow, a son Ganpatdas, and some minor daughters. The widow and Ganpatdas died and the estate came to the minor daughters, who are the plaintiffs in this case. In 1900 the District Court appointed two persons, Ganpatdas Hirachand and Laxmandas Narottamdas, to be guardians of the minors' property, and each of them entered into a bond u/s 34(a) of the Guardians and Wards Act making himself liable to the extent of Rs. 6,000 if he failed duly to account for what he might receive in respect of the property of the wards. The plaintiffs came before in the years 1914 and 1915 and in 1919 Ganpatdas exhibited his accounts, paid what was due from him to the minors and obtained from them a receipt Godavari and later got a discharge from the Court. The other guardian Laxmandas did not render an account and the plaintiffs applied to the District Court for an assignment of the bond to enable them to file a suit against him. In the course of those proceedings he died, the bond was assigned, on July 19, 1922, and the ladies filed suit No. 700 of 1923 against the legal representatives of Laxmandas. That suit, they said, was for accounts under the bond, and they prayed for a decree for any balance which might be found due from the legal representatives of Laxmandas deceased on an account being taken. Their suit was dismissed on the

ground of limitation. On an appeal being made to the District Court, the District Judge held that it was not time-barred inasmuch as they were entitled to the benefit of Section 10 of the Indian Limitation Act, since he held that the certificated guardian was an express trustee. Thereafter the suit was decided on its merits by Mr. Limaye, the First Class Subordinate Judge, and he made a decree for Rs. 6,000. After taking accounts he found that a larger sum was due, but having regard to the fact that the plaintiffs were suing as assignees of the bond, he considered that the maximum amount which he could allow them in that suit was Rs. 6,000. Thereafter the ladies filed the present suit, No. 695 of 1930, the cause of action being their right to call on their guardian for an account inasmuch as that right is preserved to them by Section 37 of the Guardians and Wards Act. The learned Subordinate Judge has given them a decree for Rs. 2,333 and odd, and the legal representatives of the deceased Laxmandas have appealed.

2. Mr. Gajendragadkar on behalf of the appellants has based his case on two grounds, that this suit is *res judicata* and that it is barred by limitation. The first ground I shall deal with very shortly. The learned advocate concedes that the plaintiffs had two causes of action, but his contention is that in fact they joined both their causes of action in their last suit. But we do not find that this is correct. As I have said, Mr. Limaye, who decided the last suit, was of opinion that it was based on a single cause of action under the bond, and after reading the pleadings in the plaint in that suit we think that he was right. The plaint is recorded in exhibit 47, which is a copy of the decree in that suit, and paragraph 4 makes it sufficiently clear that the plaintiffs were asking for accounts under the bond.

3. A more serious argument is that the suit is barred by limitation. It is conceded that it was filed more than three years after the ladies came of age, In fact they did not start any litigation for seven years after they came of age. The learned Judge has considered this point and has decided that the plaintiffs were entitled to the benefit of Section 10 of the Indian Limitation Act on the ground that their late guardian Laxmandas was an express trustee within the meaning of that section. The actual wording of the section is :◆

Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns...shall be barred by any length of time.

4. We are unable to agree with the learned Subordinate Judge that the guardians were express trustees. A trust, according to the definition in Section 3 of the Indian Trusts Act, 1882, is an obligation annexed to ownership, and what the plaintiffs had to show was that the effect of the appointment of the guardians was to vest the plaintiffs' property in them as owners. But we have not been able to discover any vesting section in the Guardians and Wards Act. Mr. Abhyankar, who has argued the case on behalf of the plaintiffs, now respondents, has had to admit that there is no such Section. The Guardians and Wards Act gives the guardians certain rights and

certain duties of management, and certain liabilities, but it does not make them owners. Their position is fiduciary u/s 20, and is analogous to the position of a trustee, but there is nothing in the whole Act to show that a guardian is a trustee.

5. There is no express authority on this particular point, but in the case of *Ma Thein May v. U Po Kin* ILR (1925) Ran. 206, it was decided that a natural guardian is not a trustee, and at p. 210 I find the following passage :◆

Reference may also be made to the definition of a trust in Section 3 of the Indian Trusts Act, II of 1882. " A "trust" is an obligation annexed to the ownership of property,..." From this it is clear that in all trusts the trustee is the legal owner.

6. As far as we can see, there is no difference between the estates of a private and a certificated trustee, and therefore this decision is an authority for the view which we have taken.

7. Mr. Abhyankar has contended that this question is *res judicata*. As I have said, in the former suit No. 700 of 1923, the claim of the plaintiffs was dismissed in the trial Court on the ground of limitation, and on appeal the learned District Judge decided that the plaintiffs were entitled to the benefit of Section 10 of the Indian Limitation Act on the ground that the guardians were express trustees. That suit was between the same parties, and it appears to us that the Judge who tried that suit, Mr. Mehendale, First Class Subordinate Judge of Satara, was competent to try the subsequent suit. But the parties were not litigating under the same title. In the first suit the present plaintiffs sued as assignees on an assignment by the District Judge, and in the present suit they are suing for themselves. It appears to us, therefore, that the decision in that suit cannot be *res judicata* in this suit.

8. For these reasons we must hold that the present suit was time-barred, and therefore, we must set aside the decree of the lower Court and dismiss the plaintiffs' claim with costs throughout. The cross-objections too are dismissed with costs.

Divatia J

9. I concur. The point of limitation in this case, though not covered by any express authority, seems to be clear on the sections of the Guardians and Wards Act as well as the Indian Trusts Act. The point shortly stated is whether a Court guardian is a trustee in whom property is vested for a specific purpose and as such comes u/s 10 of the Indian Limitation Act. The lower Court has held that he does. But in order that he may come under that section, it is clear that some property must vest in him for a specific purpose. There is, however, no vesting section in the Guardians and Wards Act. Section 27 requires a guardian to deal with the minor's property as carefully as if it were his own. In Section 20 a fiduciary relationship is created between the minor and his guardian and u/s 39 he has to perform the duties of his trust. But these provisions do not amount to vesting the property in the guardian as a trustee for a

specific purpose. The scheme of the Act shows that a guardian is regarded as an agent acting on behalf of the minor with a liability analogous to that of a trustee. That, however, does not make him an express trustee. In the Indian Trusts Act also the only reference to a guardian is in ill. (h) to Section 88 which comes under the chapter "Of certain obligations in the nature of trusts." This would mean that the relation between a guardian and minor is fiduciary, and his obligations are based on a constructive as opposed to an express trust.

10. With regard to the respondents' argument that the point of limitation is concluded by res judicata, I think he cannot be allowed to urge it in appeal because it would be inconsistent with his own pleading in the plaint where he has urged that the capacities of the plaintiffs in the two suits are different.

11. I, therefore, agree that the decree of the lower Court should be reversed on the ground that the suit is barred by limitation.