

(1879) 04 CAL CK 0028
In the Calcutta High Court

Brojonath Mozumdar

APPELLANT

Vs

Ram Chunder Chuckerbutty and Others

RESPONDENT

Date of Decision : 17-04-1879

Acts Referred:

Citation : (1879) ILR (Cal) 929

Hon'ble Judges : Romesh Chunder Mitter, J; Richard Garth, J; Pontifex, J; Jackson, J; Birch, J

Bench : Full Bench

Judgement

Jackson, J.—In order to come to a clear and correct understanding of what the legislature intended in passing Act XL of 1858, it is necessary to refer to previous legislation on the subject.

2. By Reg. X of 1793, which contained a body of rules for the guidance of the Board of Revenue as a Court of Wards, provision was made for the appointment, or confirmation, as the case might be (Section 21), of the guardians to landholders disqualified by minority or otherwise. The office of guardian was to be distinct from that of manager, but both offices might be united in the same person (Section 6).

3. Reg. V of 1799, dealing with the case of persons subject to the jurisdiction of the Zilla Courts, who died leaving heirs under age or incompetent, but not under the superintendence of the Court of Wards, declared that the guardian or nearest-of-kin, designated either by special appointment or by the law of the country as authorized to act for such heir, should not be obliged to apply to the Courts of Justice for permission to take charge of the estate; and (Section 3) also, prohibited or restricted the Courts from interference in such cases, except upon regular complaint (i.e., by suit under Reg. IV of 1793, Sections 1 and 2).

4. Next in order, Reg. I of 1800, reciting the two enactments already mentioned, and the omission in the first of them to provide for the nomination of a guardian, where no person had been appointed by the parents, and also the necessity of

preventing the next-of-kin, in certain cases from exercising the authority given by the other of the two enactments, gave (Section 1) power to the Judge on receipt of a report from the Collector, or other person interested, to appoint some other person in lieu of such next-of kin, reporting, however, in every instance to the Court of Sudder Dewany Adawlut, which Court was also empowered to decide finally on the representation of any person aggrieved by an act of a Zilla Judge in the exercise of this authority.

5. This, accordingly, was the state of the law (Reg. XVII of 1805 not being material to our purpose) in 1855, when the measure was introduced into the Legislative Council, which after various modifications became the Act XL of 1858.

6. The first section of this Act repealed (together with the entire Reg. I of 1800), so much of Reg. V of 1799, Sections 2 and 3, as restricted the interference of the Civil Courts in cases of inheritance of minors, i.e., prohibited them from dealing with the subject otherwise than on a regular complaint or suit. This being done, it was open to the legislature to make such further provision as it thought necessary.

7. The course it took was to affirm, the proposition of which the repealed enactments had contained a negation: and the declaration which immediately preceded the repealed provision, namely, that a "guardian or nearest-of-kin who by special appointment or by the law and usage of the country may be authorized to act, is not required to apply to the Courts of Justice for permission to take possession of the estate of the deceased", is not repealed.

8. This limited repeal is extremely significant.

9. The jurisdiction of the Civil Court is the general proposition affirmed; and the provisions which follow define the extent to which, and the manner in which, that intention is to be carried out.

10. Accordingly by Section 3 every person who shall claim a right to have charge of property in trust for a minor under a will or deed, or by reason of nearness of kin, or otherwise, may apply for a certificate, and if he has occasion to institute or defend any suit connected with the estate, he must ordinarily obtain one, for he will not be entitled to appear until he shall have obtained a certificate.

11. But if the property be small, or for any other sufficient reason, any Court having jurisdiction may allow a relative to institute or defend without a certificate. It is material to observe that the discretion is here given not to the "Civil Court", as defined in Section 29, but to the Court in which the suit is properly brought or to be brought.

12. The succeeding Sections 4 to 9 prescribe the course to be taken by the Court on the application which may, under certain circumstances, be made to it.

13. It is to be observed that the application may be made (Section 4) either by a person claiming the right to have charge of the property, or by any relative or

friend who considers that an application should be made, or where the minor is a landowner, by the Collector.

14. Thereupon after summary enquiry (Section 6), if there be a person entitled under a will or deed and willing, the Court (Section 7) shall grant a certificate to such person. Otherwise, and if there be any near relative willing and fit, the Court may grant a certificate to such relative and may also appoint a guardian after calling for a report, if it thinks fit (Section 8); and if there be no one entitled, and no near relative willing and fit, and the Court shall think it to be necessary for the interests of the minor that provision should be made by the Court for the charge of his property and person, the Court may proceed to make such provision in the manner provided in the Act.

15. Thus by the Act itself, according to the ordinary construction of language although the restriction previously imposed on the jurisdiction of the Civil Court. is legislatively taken away, and the subject-matter is expressly declared to be subject to that jurisdiction, in cases whyet resort to the Court is not made obligatory, except ere a necessity arises for commencing or defending a suit. And even then, for any sufficient reason, the Court having jurisdiction may dispense with the certificate; and further, when the question of appointing some one to the charge of a minor's property has been strictly brought before the Civil Courts. if there be no person entitled, and no near relative qualified and willing to act. it is entirely in the discretion of the Court to proceed or not under the succeeding Sections 10-12.

16. All the sections of the Act from the 18th onwards, respecting powers, duties and responsibilities relate not to guardians generally, but to persons appointed, or to whom certificates have been granted, under the provisions of the Act.

17. It is clear, however, that as some persons could take charge of the estates of minors, and maintain or defend suits connected therewith, without having received certificates, the rules in question apply only to certificated managers and to guardians appointed under the Act. An example of this occurs unmistakably in the words of Sections 25 and 27. By the former section, every guardian appointed by the Civil Court or by the Collector under the Act is bound to provide for the suitable education of a male minor; but Section 27 forbids the appointment of a guardian to any minor whose father is living and not a minor. Consequently this Act does not oblige the father as guardian of a male minor to educate his. son. Section 18 applies in terms to a manager acting under a certificate, and to such manager only; it confers on him generally the powers of the owner, but in regard to acts of alienation beyond certain limits, it requires that his acts, in order to be valid, should have the previous sanction of the Court--a. provision obviously expedient and proper in the case of a manager deriving his. powers from the Court, and also accountable to the Court, but not suitable in the case of a manager altogether unconnected with the Court. In truth, it seems impossible to support the view that no manager can deal with a minor's property at all, unless a certificate has been granted to him. But Section

3 shows that for any sufficient reason, not merely by reason of the small value of the property, a Court may allow a relative to defend a suit for a minor without a certificate: and in that way he might by compromise and with the sanction of the Court in which the suit happened to be pending, give up a most valuable estate.

18. But it is inconceivable that if the legislature had meant by the provisions of this Act to curtail the powers of all guardians (of minors other than European British subjects), it should not have done so by express words, instead of referring only to managers and guardians appointed under the Act, or to whom a certificate has been granted, and thus leaving a loophole for escape from the necessity of obtaining a certificate at all.

19. In fact, there is no indication, whatever part of the Act be examined, of any intention to alter or affect any provisions of Hindu or Mahomedan Law as to guardians who do not avail themselves of the Act. The scope of the enactment is merely to remove legislative prohibitions, to confer expressly a certain jurisdiction, and to define exactly the position of those who avail themselves of, or are brought under, the Act, leaving persons to whom any existing rules of law apply, unaffected.

20. It is obvious that to bring all minors' estates without exception under the operation of the Act, would be most oppressive in many cases, for not only would many guardians be unwilling to act under a certificate with the resulting obligations, but, in many instances, the estate would be nearly or quite absorbed in the costs.

21. The only indication of an intention to compel persons generally to come under the Act in the management of minor's property, is the prohibition (unless with the leave of a Court) from instituting or defending suits on behalf of the minor, unless they shall have obtained a certificate of administration.

22. But that provision seems to act directly in favour of the interpretation, which appears to us to be the correct one, for it recognizes the fact that a person may be in charge of a minor's property under a claim of right to have the charge which it does not forbid, and only makes it obligatory on him, if he desires to come before the Court as a litigant in respect of such property to obtain a certificate, unless the Court should think fit to dispense with it. Why the legislature should have had recourse to such a circumlocution if it meant simply to say that no one could be lawfully in charge of a minor's property except the Court of Wards, or a person holding a certificate from the Civil Courts, it is difficult to understand. It has been suggested that Sections 3 and 4 do indeed allow the exercise of a discretion, but that such discretion is to be exercised by the Court, and not by the volunteer guardian, and the inference intended would seem to be, that every person claiming a right to the charge of a minor's estate is bound to come to the Civil Court, and ask for a decision whether the Court will grant a certificate, or dispense with one. And it is also a view put before us, that the whole law as to minors is now comprehended in the Acts regulating the Court

of Wards, and that no third kind of guardian is permissible.

23. But if so, what becomes of those cases in which the Court u/s 9 does not think it necessary for the interests of the minor that provision should be made for the charge of his property and person?

24. And is the guardian of a minor with a small estate to put his ward to the expense of making an application to the Court, of which the result may very probably be, that the Court will think it unnecessary to make any order? It must be observed, moreover, that the Act contains no provision enabling the Court to act of its own motion.

25. That the rights and powers of guardians (by deputation from the sovereign in theory) were recognized by the Hindu Law is certain; that the British Government in early days was reluctant to meddle with those rights is clear; and it is equally improbable, inconsistent with its previous policy, and unwarranted by its own language, to suppose that the legislature meant in, 1858 to sweep away all ancient law on the subject, and to subject to one inflexible rule the property of all minors throughout Bengal.

26. We, therefore, answer the question put to us in the affirmative; and this being the only question in the case, the appeal is dismissed with costs.