
(1898) 12 CAL CK 0013
In the Calcutta High Court

Fakaruddin Mahomed Chowdhry a Minor Hafiz Aminuddin
Ahmed

APPELLANT

Vs

G.L. Garth and Another

RESPONDENT

Date of Decision : 07-12-1898

Acts Referred:

Guardians and Wards Act, 1890 — Section 14, 17

Citation : (1899) ILR (Cal) 133

Hon'ble Judges : Prinsep, J; Francis W. Maclean, J; Ameer Ali, J

Bench : Full Bench

Judgement

Francis W. Maclean, K.C.I.E., C.J.—Three points have been argued before us upon this appeal. The first is, that the Court below had no jurisdiction to make the order appealed from. The order was made upon the application of the present appellant himself, who is now, for most obvious reasons, saying that the Court had no jurisdiction to make it. In my opinion the Court had ample jurisdiction to make the order.

2. It is clear upon the evidence, the appellant's own evidence, that the minor ordinarily resided in Calcutta, and that being so, u/s 9 of the Guardians and Wards Act VIII of 1890, the Court below had ample jurisdiction to deal with the application.

3. The second point is, that having regard to the provisions of Section 17 of the Guardians and Wards Act, the gentleman appointed as guardian was not a fit and proper person for the purpose. Hardly any argument, or anything worth calling an argument, has been addressed to us upon this point, which is absolutely untenable.

4. The third point is one of more importance. It is urged that the direction given to Mr. Justice Sale by myself, as Chief Justice, to determine the matters in dispute, was unauthorised having regard to the language of Section 14 of the Guardians and Wards Act. The short facts are these: The present appellant

presented a petition on the Original Side of this Court, asking for the removal of the mother of the minor from her position of guardian of his person and property, and for the substitution of himself in her place. A rule was obtained calling upon the mother to show cause, and in the result the mother was removed, and Mr. Justice Sale, who tried the matter, directed an enquiry to be held before the Registrar, to ascertain and report who would be a fit and proper person to be appointed guardian in her place. That enquiry proceeded, and I do not think it is an unfair inference to draw from what appears in the case that the present appellant, finding that he was not likely to be appointed guardian (an office which he obviously desired) instituted fresh proceedings, in the District Court at Backergunge, asking for the same relief, which he had sought by his previous application before Mr. Justice Sale., alleging that the property of the minor was within the jurisdiction of the District Court and not of this Court on its Original Side. This was a most; improper application. The District Judge, purporting to act u/s 14 of the Guardians and Wards Act, reported the matter to this Court on the 12th November 1897, and when the matter was brought before me, I determined that Mr. Justice Sale should deal with it; consequently the reference proceeded, the made his report, and Mr. Justice Sale, upon the matter coming before him on the 7th of January 1898, confirmed that report, and appointed a fit and proper person to be the minor's guardian.

5. It is from that order that the present appeal is preferred; and it is urged before us that Mr. Justice Sale had no jurisdiction to try the case, and that the reference of the case to him by myself was bad, inasmuch as the order of reference ought to have been made by a Division Bench of this Court under Rule 3 of Chapter II of the Rules of the High Court, Appellate Side. I will deal with this objection at once.

6. That rule deals with references, and "references" in the ordinary acceptation of that term. u/s 14, the District Judge has only to report the case, not to refer it, and all the Judge did was to report it. The "references" referred to in Rule 3 are those which are to be heard and determined judicially, and do not apply to such a report as was made by the District Judge in this case.

7. However, as in my opinion Section 14 does not apply to a case such as the present, whether the matter ought to have been dealt with by a Division Bench or by the Chief Justice, is a matter of no real moment. In my opinion when proceedings have been taken on the Original Side of this Court and also in a District Court, the section does not apply.

8. Section 14 says this: "If proceedings for the appointment or declaration of a guardian of a minor are taken in more Courts than one, each of those Courts shall, on being apprised of the proceedings in the other Court or Courts, stay the proceedings before itself." If the section had stopped there it would have been a difficult matter to contend, successfully, that the word "Courts" did not cover every Court, and consequently embraced a High Court in the exercise of its ordinary original civil jurisdiction. But to appreciate what the Legislature intended

we must look at the whole section, and moreover, the whole Act. Sub-section 2 of Section 14 runs as follows: "If the Courts are both or all subordinate to the same High Court, they shall report the case to the High Court, and the High Court shall determine in which of the Courts the proceedings with respect to the appointment or declaration of a guardian shall be had."

9. "The Courts" referred to in this sub-section must mean the Courts referred to in Sub-section 1.

10. Then it is argued for the appellant that looking at the definition of "the Courts" in the definition Clause (clause 4) "the Court" means the "District Court" and the "District Court" includes "a High Court in the exercise of its ordinary original civil jurisdiction." This is ingenious, but it is fallacious. In the first place the definition only applies "unless there is something repugnant in the subject or context, "and in Section 3" nothing in this Act shall be construed to take away any power possessed by any High Court established under the Statute 24 and 25 Vic, c. 104. "It is not disputed that this High Court in the exercise of its ordinary civil jurisdiction, having regard to Section 15 of the Letters Patent of 1865, had power to deal with questions relating to the appointment of guardians of a minor's person and property, and, if so, it could not have been intended that such a Court should be included in Section 14 of the Guardians and Wards Act, so as to make it compulsory on that Court to stay the proceedings before itself. If it were otherwise, we should be construing the Act so as to take away, and in a most direct form, a power, and a most useful and important power, possessed by the High Court, which Section 3 says is not to be done. If, then, this High Court in the exercise of its ordinary original civil jurisdiction is not within Sub-section 1 of Section 14, that Court was not bound to stay the proceedings before itself, and I am not conscious of any power either in a Division Bench of the Appellate Side of the High Court, or in the Chief Justice to stay such proceedings.

11. In this view Mr. Justice Sale was clearly entitled to proceed with "the case, and without any direction from myself.

12. In my opinion the case of two petitions being presented, one in a District Court and one in this Court exercising its ordinary original civil jurisdiction, is one not covered by, and not contemplated by the Legislature u/s 14, and that section was never intended to interfere with the clear right of this Court on its Original Side, to deal with the question of the appointment of guardians to minors. If, then, the case be not within Sub-section 1 of Section 14, as, in my opinion, it clearly is not, Sub-sections 2 and 3 have no application. It is not necessary, in the view I take, to decide it; but had it been necessary, it is at least doubtful whether if "the Court," in Sub-section (2) be read as including a High Court in the exercise of its ordinary original civil jurisdiction, such a reading would not have been repugnant both to the subject and the context of the section.

13. The appellant, therefore, fails on all the above points and the appeal must be dismissed.

14. As regards the question of costs, loth as I am to interfere with the discretion exercised by the learned Judge in the Court below, I can see no good reason why the appellant should have been deprived of his costs up to and including the hearing of the rule. The learned Judge gives no reason for refusing the appellant these costs. He succeeded in his application to have the mother removed, and it must be taken that this, which was done at his instance, was for the minor's benefit.

15. In my opinion he is entitled to have his costs out of the minor's estate up to and including the hearing of the rule, but nothing more. The order must be modified to this extent.

16. As regards the costs of the appeal, there will be no costs: for there is no respondent properly served. We give liberty, however, as Mr. Justice Sale did, to the guardian of the minor to allow the costs of Mr. Garth, who has only been heard as *amicus curia*, and who has assisted the Court, out of the minor's estate which may come to his hands.

Prinsep, J.

17. I desire only to add a few words with reference to Section 14 of the Guardians and Wards Act (VIII of 1890). In all other respects, I agree entirely with the judgment that has been just now delivered by my Lord, the Chief Justice.

18. The present proceedings were commenced by an application made by the present appellant before the Original Side of this Court, under the provisions of the Guardians and Wards Act, for the removal of the guardian previously appointed by a Judge sitting on the Original Side of the High Court, and for the appointment of himself as guardian. After the case had so far proceeded that it had been referred for enquiry to the Registrar as to the appointment of some particular person as a fit guardian of the minor, the petitioner applied to the District Judge of Backergunge under the Act, for the appointment of a guardian, alleging that Court had jurisdiction over the matter. On hearing that proceedings had already been taken on the Original Side of this Court, the District Judge of Backergunge stayed his proceedings u/s 14, Sub-section (1), and reported to this Court under Sub-section (2). There can be no doubt that the application made under such circumstances to the District Judge of Backergunge was not *bond fide*. The petitioner had already complained in his petition to the Original Side of the High Court, of the conduct of the guardian living with the minor in Calcutta, to the detriment of the estate. He, therefore, admitted the jurisdiction of this Court; but it appeared that in the course of the proceedings the mother of the minor removed with the minor to Backergunge. It does not appear whether she removed permanently or temporarily. At all events this Court had ample jurisdiction to try the case when the petition was made.

19. In regard to the application of Section 14 of the Act, that is to say, whether it applies to a matter before the Original Side of this Court, and to the same matter raised in the District Court outside of Calcutta, I should, myself, feel little

difficulty in holding that it did apply, were it not for the terms of the last part of Section 3 of the same Act-that saves the jurisdiction of the High Court established under Statute 24 and 25 Victoria, Chapter 104; and a reference to that Statute shows that the powers previously conferred on and exercised by the Supreme Court, to which the High Court has succeeded, were reserved for the High Court on its Original Side; and even having regard to the terms of Section 3 and the definition of "High Court" given in the General Clauses Act, 1868, I find myself unable to hold that Section 14 has in any way curtailed this jurisdiction of the Original Side of the High Court.

20. I, therefore, agree with the view expressed by my Lord, the Chief Justice, in holding that Section 14 does not apply to any case before the Original Side of this Court, and that the report made by the District Judge of Backergunge was properly dealt with by referring it to the learned Judge before whom proceedings had been taken on the Original Side.

Ameer Ali, J.

21. I agree in holding that Section 14 of Act VIII of 1890 (Guardians and Wards Act) does not apply to the Original Side of this Court. I only wish to add a few words with reference to Mr. Sen Gupta's contention that inasmuch as appeals are allowed from the Original Side of the High Court, it, that is, the Original Side, must, therefore, be regarded as subordinate to the Appellate Side of the same Court. u/s 14 of 24 and 25 Victoria Chapter 104, the Chief Justice of the High Court had power to determine what Judge in each case shall sit alone and what Judges of the Court, whether with or without the Chief Justice, shall constitute the several Division Courts. Ordinarily the Chief Justice determines that two Judges shall sit separately to try the cases arising within the original jurisdiction of the High Court, but two Judges are sometimes appointed to sit together. Section 15 of the Letters Patent, 1865, gives a right of appeal from the judgment of one Judge of the High Court, or from the judgment of two or more Judges wherever such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being, but not from other judgments except to the Privy Council. So that if one Judge of the High Court is appointed to sit alone in the exercise of original jurisdiction his decisions would be appealable to the High Court in its appellate jurisdiction. This would also be the case if two Judges sat together in the exercise of original jurisdiction and disagreed. If two or more Judges forming a Division Bench on the Original Side are agreed, there would be no right of appeal except to the Privy Council. Similarly on the Appellate Side, when two Judges sit together and they disagree, the judgment of the Court below is appealable to the High Court.

22. If the contention put forward with reference to the subordination of the Original Side of the Court, merely because an appeal was given from the decision of a single Judge, were correct it would follow that every Division Bench of this Court would be subordinate to some other Division Bench of the High Court.

Again it must be remembered that rules of procedure either for the Original Side or the Appellate Side, cannot be made expended the whole Court, thus showing that the Original Side of the Court is an interactive part of the High Court. The mere statement of these facts is it seems to me sufficient to show that it could not have been intended that the High Court in the exercise of its ordinary original civil jurisdiction should be treated as subordinate to any other part of the same Court.

23. I, therefore, agree with my Lord in dismissing the appeal.