

(1910) 07 CAL CK 0020
In the Calcutta High Court

Ganga Prasad Bhattacharyya and Others	APPELLANT
Vs	
Hara Kanta Chowdhury and Another	RESPONDENT

Date of Decision : 15-07-1910

Acts Referred:

Guardians and Wards Act, 1890 — Section 17(2)

Citation : 7 Ind. Cas. 234

Hon'ble Judges : Sharf-ud-din, J;Doss, J

Bench : Division Bench

Judgement

Sharf-ud-din, J.—These are two appeals against certain orders passed by the District Judge of Pabna and Bogra in a proceeding under Act VIII of 1890 (the Guardians and Wards Act).

2. The facts of the case are these:--One Brojo Mohan died, leaving a widow named Bidhu Mukhi Debya, a son named Biseshwar Mohan Roy, and two daughters. On the death of the son, the widow, under permission given to her by her deceased husband, adopted a boy, named Monoranjana Chowdhry, the natural son of one Hara Kanta Chowdhry. The adoptive mother is also dead and now the dispute is between Hara Kanta Chowdhry, the natural father of the minor, on the one hand, and the two daughters of Brojo Mohan Roy and the 3 brothers of the widow on the other, as regards the guardianship of the person of the minor.

3. The natural father, Hara Kanta Chowdhry, was the first to apply, under Act VIII of 1890 ; upon which the two daughters of the late Brojo Mohan Roy and his widow's brothers objected. There were thus five objectors altogether ; and all of them objected to the appointment of the natural father as guardian of the person of the minor. It appears from the written objections filed in the case that four of them had no objection to the appointment of Sasi Bhusan Bhattacharya himself, one of the objectors, as guardian of the person and property of the minor. It appears further that Brojo Mohan Roy had left a Will and a codicil and that Sasi Bhusan Bhattacharya was appointed as executor under the terms of that Will. Since the institution of the present proceeding, Sasi Bhusan Bhattacharya has

obtained probate of the Will and codicil; and the probate has been filed with an application before us. On the 20th May 1909, a joint petition was made by Sasi Bhusan Bhattacharya and Hara Kanta Chowdhry, the terms of which were that the matter in dispute had been arranged between them and that it had been agreed that Sasi Bhusan Bhattacharya should be appointed guardian of the property of the minor and Hara Kanta Chowdhry guardian of the person of the minor. The learned District Judge passed an order on the same date in terms of the above petition and further directed that Sasi Bhusan should furnish security to the extent of Rs. 3,000. Sasi Bhusan Bhattacharya appeals against this order of 20th May 1909 and contends that Hara Kanta Chowdhry should not have been appointed guardian of the person of the minor, and that the order for security should not have been made, and that in any case, the amount required as security was excessive. On the 26th May 1909, the learned District Judge passed an order that the head nuzir should check the accounts; and on the 29th of May he passed certain order with regard to the allowance for the maintenance of the minor and sundry other matters for the personal comfort of the minor. Sasi Bhusan appeals against these orders also in his Appeal No. 413 of 1909.

4. In Appeal No. 347 of 1909 the appellants are Ganga Persad Bhattacharya and Mathura Nath Bhattacharya, the maternal uncles of the minor, and Suniti Bala Debi, his sister. Their appeal is against the order of the 20th of May 1909, appointing Hara Kanta Chowdhry guardian of the person of the minor; and they contend that the lower Court was wrong in disposing of the whole case on a petition of compromise filed by Hara Kanta Chowdhry and one of the five objectors.

5. The real dispute appears to be as to whether the natural father, namely, Hara Kanta Chowdhry, is the proper person to be entrusted with the care of the minor. There can be no doubt that by adoption the minor ceased to be a member of his own natural family and there can also be no doubt that; if any of the adoptive parents of the minor were living, that parent would have been, entitled to be the guardian of the person of the minor, unless it was shown that the minor was subjected to ill-treatment. It was so held in the case of *Lakshmi Bai v. Shridhar Takle* 3 B.1. In that case, the respondent's son was adopted by the respondent's paternal aunt; and it was held that the respondent, who was the natural father of the minor, was not, by Hindu Law, a proper guardian while either of the adoptive parents was living, if such adoptive parent was willing to act as guardian. In the present case, the learned District Judge has appointed the natural father as guardian of the person of the minor at a time when none of the adoptive parents was alive. It is contended on behalf of the appellants that u/s 17 of the Guardians and Wards Act (VIII of 1890), the natural father being a stranger to the minor, since his adoption, should not have been appointed guardian at all. Clause 2 of the section, however, runs thus: "In considering what will be the welfare of the minor, the Court shall have regard to the age, sex and religion of the minor, the character and capacity of the proposed guardian and his nearness of kin to the minor, the wishes, if any, of a deceased parent and any existing or

previous relations of the proposed guardian with the minor or his property."

6. There can be no doubt that by adoption the minor ceased to be a member of his natural family so far as inheritance was concerned, and the sacred duty of performing some religious post mortem, ceremonies in relation to the deceased adoptive father devolved upon him. But it is inconceivable that by the mere fact of adoption the natural father should cease to love his son altogether and that all his natural affection should disappear on the performance of the ceremony of adoption. The son, no doubt, becomes a stranger to his natural family; but he cannot marry into his natural family. Hindu Law, therefore, even in such a case, respects the tie of relationship. Besides, under Clause 2 of Section 17 just quoted above, the natural father comes within the expression, "any existing or previous relations of the proposed guardian with the minor or his property." I think, therefore, that there was nothing to prevent the District Judge from appointing Hara Kanta Chowdhury as guardian of the person of the minor, he having no interest adverse to that of the minor.

7. As I have already said above, in Appeal No. 413 Sasi Bhusan Bhattacharyya is the appellant. He has compromised his dispute with Hara Kanta Chowdhury; and it is doubtful if Sasi Bhusan, after having come to a settlement with Hara Kanta, should repudiate his agreement. The other objectors seem to be only aiding and assisting Sasi Bhusan in his attempt to oust Hara Kanta altogether. For the above reasons I am of opinion that the appointment of the natural father, Hara Kanta, as the guardian of the minor's person cannot be disturbed.

8. I must here observe that the order of the District Judge appointing Sasi Bhusan as guardian of the properties of the minor and the order that he should furnish security to the extent of Rs. 3,800 have become infructuous since Sasi Bhusan has obtained probate of the Will. Sasi Bhusan since the probate is vested with, the properties left by the testator, as executor of his Will during the minority of this minor adopted boy. If in this Will, Brojo Mohan Roy had expressed any wish that the executor thus appointed should also act as guardian of the person of the minor, that wish, undoubtedly, would have been entitled to every consideration. The Will has been read in Court, and there is no hint contained in it that Sasi Bhusan, the executor, should also be made to act as guardian of the minor's person during the minority of the latter. I am, therefore, of opinion that the order of the learned District Judge, so far as it appoints Hara Kanta Chowdhury as the guardian of the minor, cannot be disturbed. But, inasmuch as since probate has been obtained, or rather, has been granted to Sasi Bhusan Bhattacharya, as executor of the Will, the order of the learned District Judge, appointing him as guardian of the property of the minor on his furnishing security to the extent of Rs. 3,000 having become infructuous, is set aside.

9. The respondent, Hara Kanta Chowdhury, is entitled to costs in both these appeals.

10. As the result both the appeals are dismissed in the light of the above observations.

11. In Appeal No. 413, the respondent Hara Kanta Chowdhury will receive two gold mohurs as hearing fee, and in Appeal No. 347 he will receive one gold mohur as hearing fee. The other respondents must bear their own costs in both the appeals.

Doss, J.

12. These appeals arise out of three orders, dated the 20th, the 26th May and the 29th June 1909, respectively, passed by the District Judge of Pabna and Bogra, for the appointment of a guardian of the person and property of one Manoranjan Chowdhury, a minor, and for other matters incidental thereto.

13. The facts of the case, shortly, are these. One Brojo Mohan Roy died leaving a widow Bidhu Mukhi Debya, a son, Bisheshur Mohan Roy, and two daughters, Suniti Debi and Sumati Debi, and also leaving a Will whereby he appointed his widow, Bidhu Mukhi Debya, as executrix, and in her default, Sasi Bhusan Bhattacharya, his widow's brother, as executor of the estate; and he gave his widow permission to adopt a son, in the event of the death of Bisheshur. The widow duly took out probate of the Will and, on the death of Bisheshur adopted one Monorajan Roy, the son of j one Hara Kanta Roy Chowdhury, as her son, in accordance with such permission; and changed his name into Biren-dra Mohan Roy. The widow subsequently died; and on her death, Hara Kanta Chowdhry applied on the 9th December 1908 to the District Judge for certificate of guardianship of the person of the minor. The application was opposed by Sasi Bhusan Buttacharya and his two brothers, as also by Suniti Debi, one of the daughters of the testator. On the 20th May 1909, Hara Kanta Chowdhury and Sasi Bhusan Bhuttacharya entered into an amicable settlement, whereby they agreed that Hara Kanta Chowdhury should be appointed guardian of the person and Sasi Bhusan Bhuttacharya guardian of the property of the minor; and they accordingly presented a joint petition to the Court for carrying into effect the terms of the settlement. The other objectors were not parties to this petition. Bat I ought to mention here that Sasi Bhusan and his two brothers in their petition of objection prayed that either Sasi Bhusan alone, or the three brothers jointly be appointed guardian or guardians of the person and property of the minor; and that Suniti, though she presented a separate petition fobjection, appeared through the same pleader who acted for the other objectors. There is, therefore, little room for doubt that they are all acting in concert. On the 20th of May, on this joint petition of compromise being filed, the District Judge made an order in accordance with the terms of the compromise, and appointed Hara Kanta as guardian of the person, and Sasi Bhusan as guardian of the property of the minor. But he proceeded to make a further order that Sasi Bhusan should furnish security to the extent of Rs. 3,000, that the guardian of the property should produce an inventory of the property within six months, and that the nazir of the Court should check the accounts of the estate. In his order of the 28th May

1909, the District Judge repeated his order directing the nazir to go to the house and check the accounts. On the 2nd June 1909, Hara Kanta made an application to the District Judge for an order directing Sasi Bhusan to remove certain inconveniences, in connection with the residence of the minor and to pay the expenses for the maintenance of the minor. This application was opposed by Sasi Bhusan and on the 29th June 1909, the District Judge ordered Sasi Bhusan to pay Hara Kanta Rs. 40 a month, with effect from the 1st June, as maintenance for the minor, and he gave directions for the occupation of a certain portion of the building of the testator by the minor, and for delivery of certain movables for domestic use.

14. From these three orders, Sasi Bhusan preferred an appeal to this Court on the 30th August 1909; and the two brothers of Sasi Bhusan, and Suniti Debi also preferred an appeal against these orders of the 23th of July 1909. During the pendency of these appeals to this Court, Sasi Bhusan obtained probate of the unadministered effects belonging to the estate of Brojo Mohan Roy, apparently u/s 45 of the Probate and Administration Act; and it has under orders been filed this day with an application. The effect of the grant of this probate is that the estate of Brojo Mohan has become vested in Sasi Bhusan as executor, though, under the Will Birendra Mohan is beneficially entitled to the estate. But the estate having thus become vested in the executor, it cannot be considered to be the property of the minor until the office of executor terminates. It follows, therefore, that no guardian of the property of the minor can be appointed so long as the executorship continues. The result, therefore, is that that portion of the orders of the 20th May and the 28th May, whereby Sasi Bhusan was directed to furnish accounts and to file an inventory and also to submit accounts of the estate have ceased to be operative and must, therefore, be declared to have no effect whatever.

15. The principal controversy between the parties in this Court centres round the question as to the appointment of a guardian of the person of the minor. By the terms of the compromise, Sasi Bhusan agreed that Hara Kanta should be appointed guardian of the person of the minor; he cannot be permitted to resile from it. It is true that his two brothers and the testator's daughter, Suniti Debi, were no parties to the compromise. But, as I have already pointed out, they were all acting together in the same interest. But even if we were to consider this question apart from the compromise, it seems to me, in the absence of any special circumstances, and in view of the tender age of the minor, that the natural father is a more fit person to take charge of the person of the minor, than certain distant relations of the adoptive father, or even the daughters of the testator. It appears that both the daughters of the testator have been married away and are living with their respective husbands. Of course, if the adoptive mother had been alive she would have been regarded as the fittest person, and probably this dispute about the guardianship of the person of the minor would not have arisen. It is said that if the minor be kept separate from the testator's family, very little opportunity will be afforded to him for his assimilation into the

adoptive father's family. But what is of prime importance in a matter like this is the welfare of the minor, and not the welfare of the adoptive father's family. The brothers of Bidhu Mukhi Debi are not members of the testator's family, nor are the two daughters of the testators. In fact, there are, at present, no members of the adoptive father's family living. In these circumstances, the natural father and mother of the minor are more fit to be entrusted with the care and custody of the minor than other persons, although those persons may be executors under the Will of the adoptive father.

16. For these reasons, I am of opinion that the order of the learned District Judge appointing Hara Kanta Chowdhury as guardian of the person of the minor should be upheld.

17. The order of the 20th of May 1909 should be varied to the extent I have indicated. The order of the 28th May 1909 is set aside and the order of the 29th June 1909 is upheld, except so far as it directs the executor to file accounts.