

(1936) 03 MAD CK 0012
In the Madras High Court

Krishnaswami Goundan

APPELLANT

Vs

Palani Ammal

RESPONDENT

Date of Decision : 27-03-1936

Acts Referred:

Guardians and Wards Act, 1890 — Section 43

Citation : AIR 1936 Mad 843 : (1936) 71 MLJ 417

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—The father of the minors in question made a will describing the appellant before us as his executor. The minors"

mother presented a petition in the lower Court under the Guardian and Wards Act, contending that the appellant was not merely the executor but

also the minors" testamentary guardian, and prayed for his removal as such guardian and for appointment of herself in his stead. The lower Court

made an order imposing certain conditions on the appellant in regard to the discharge of his duties as guardian and directing him to furnish security

for an amount which has been specified. The correctness of this order has been impeached before us.

2. Though the learned Judge does not say under what provision of law he has acted, the respondent"s Counsel seeks to justify the order by

reference to Section 43 of the Guardian and Wards Act. But that section enables a Court to regulate by its order the conduct of guardians either

appointed or declared by the Court. That leads us to the question, can the appellant be declared under the provisions of the Act, the testamentary

guardian of the minors? Their mother, as already stated, contends that on a proper construction of the will, the appellant is their testamentary

guardian. But this position is controverted by the appellant, who maintains that under the will, he is merely an executor and not the minors"

guardian. Granting that the mother's contention is right, namely, that the appellant is the minors' testamentary guardian, she cannot invoke in her

favour Section 43 unless the Court can make a declaration to that effect under the Act. Section 17(5) provides very clearly that the Court shall not

declare any person to be a guardian against his will. It therefore follows that, even should the mother's contention be right, we cannot against the

will of the appellant make a declaration that he is the minors' testamentary guardian. The application of Section 43 is thus excluded, and the lower

Court's order, for which support can be sought, if at all, in Section 43, must be held to be wrong. In the circumstances stated, it is unnecessary to

express any opinion on the question, whether the appellant on a true construction of the will, is or is not the minors' testamentary guardian.

3. We may observe that Section 39, which refers to the removal of guardians, is wider in its scope than Section 43. Under the former section, the

Court may remove a guardian appointed or declared by the Court or a guardian appointed by a will or other instrument. But the prayer for

removal was abandoned in the lower Court and this section therefore cannot be relied on by the respondent.

4. Finally, we must point out, that in any view of the matter, the lower Court's order cannot be supported. The Judge observes that no evidence

has been adduced by the petitioner in support of the allegations in her affidavit. That being so, we fail to see, even granting for a moment that

Section 43 applies, how the lower Court's order can be justified.

5. The appeal is allowed with costs less the Advocate's fee to be paid by the respondent.