
(1927) 08 BOM CK 0010

In the Bombay High Court

Case No : Civil Revisional Application No. 293 of 1926

Nathabhai Devidas

APPELLANT

Vs

Vaghjibhai Jhaverbhai

RESPONDENT

Date of Decision : 12-08-1927

Acts Referred:

Guardians and Wards Act, 1890 — Section 39
Trusts Act, 1882 — Section 73, 74

Citation : AIR 1928 Bom 20 : (1927) 29 BOMLR 1577 : (1928) ILR (Bom) 32

Hon'ble Judges : Crump, J; Amberson Marten, J

Bench : Division Bench

Judgement

Amberson Marten, Kt., C.J.—In this matter the learned District Judge on a petition under the Indian Trusts Act, 1882, has purported to remove from their office the trustees appointed by the will of the father of the minor. This he has done on a petition presented not by the next friend of the minor but by his uncle Vaghjibhai. As the learned Judge in his judgment puts it, although the application refers to other sections of the Indian Trusts Act, viz., 72 and 74, yet it is really founded on Section 73 on the ground that the trustees have become unfit to act in the trust.

2. The view generally adopted in the English Courts is that those words imply something in the nature of personal incapacity like, for instance, paralysis or personal unfitness which in many cases has been held to apply to insolvency. In this particular section insolvency has been provided for. But whatever the true construction of the words "unfit or personally incapable" in Section 73 may be, one has also to see who are the new trustees to be appointed by. This section provides that the appointment may be made (a) by the person nominated for that purpose by the trust instrument. There is no such person in the present case, Then (b) if there be no such person, the author of the trust, if alive, may appoint. But the author of this trust is dead. Then we come; to the "surviving or continuing trustees for the time being." But the present appointment has not been made by them. So stopping there Section 73 could not apply. The old

trustees obviously have not removed themselves.

3. Next if one turns to Section 74: "Whenever any such vacancy or disqualification occurs and it is found impracticable to appoint a new trustee u/s 73, the beneficiary may, without instituting a suit, apply by petition," But the present petition is not by any beneficiary, but by the uncle Vaghjibhai on his own account, He is not, however, even mentioned in the will of the minor's father. Under these circumstances the Court had no jurisdiction to grant the relief asked for on the petition of the 2 present petitioner. And so on that ground alone this order of the learned Judge must be set aside.

4. But I wish to put the matter on rather broader grounds by way of warning. Speaking generally, applications for the removal of a trustee should undoubtedly be brought by a suit. And where, as here, it is alleged that the trustees have committed a breach of trust, that suit should ask for the delinquent trustees to make good the breach of trust. Further, the suit should normally ask for the administration of the trust estate by the Court. Nothing of that has been done here. All that has been done is to appoint the Deputy Nazir the sole trustee, because the Court finds that the petitioner himself is not to be trusted as he is a man who has his own axe to grind, so the Court says.

5. I may refer to Lewin on Trusts, 9th Edn. p. 1166: "If there be ground for removing a trustee for misconduct or other cause, the application to the Court should be by suit." Similarly if one looks at Seton, Vol. II, 6th Edn., p. 1224, it is stated : "There is no jurisdiction under the Trustee Acts to remove a trustee for misconduct." Reference is there made to certain authorities.

6. If, on the other hand, a suit was brought here to remove the trustees, that could be brought by the uncle acting as the next friend of the infant. And if it was alleged that specific breaches of trust had been committed, then those could be inquired into in the ordinary way on oral evidence and not on affidavit evidence without any cross-examination-the course that has been adopted by the learned Judge in the present case.

7. Next turning to F.A. 311 of 1926, the learned Judge there has, under the Guardians and Wards Act, appointed the mother to be the guardian of the person, and the Deputy Nazir to be the guardian of the property of the infant. Now Section 7 is the ordinary section giving the Court power to make an order as to the appointment of a guardian of the person or property of a minor, if it is satisfied that it is for the welfare of the minor that an order should be made. But Sub-section (3) provides: "where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act." Then if one turns to Section 39 or Section 41, the Court has power on the application of any person interested, or of its own motion, to remove a guardian.

8. Here the guardianship must not be muddled up with the trust. Under the will the trustees were given definite powers of management, and to apply the property for the education, amongst other things, of the minor, and to hand it over to him when he attained his majority. Therefore, in one sense if the trustees are not removed from their office, there is little for the guardian of the property to do and no adequate reason for his appointment. Technically the guardian of the property on being appointed could only receive such income as the trustees under the will allotted for the education and maintenance of the minor, and could then personally apply it for such purposes.

9. But the ground on which the learned Judge has made his order is that he has removed the trustees from their office as trustees under the other application. We have already pointed out that that order cannot be upheld. Consequently the grounds on which the learned Judge appointed a guardian of the property cannot be supported. The mother opposes the present application, and under the circumstances and on the materials at present before us we do not think an order should be made either appointing a guardian of the person or a guardian of the property.

10. This of course will not prevent a guardianship order being made on some other application at some future date on proper materials before the Court. We only determine the present matter on the present materials. In our opinion this order of the learned Judge must be discharged.

11. As regards costs, we think the uncle must bear the costs throughout of both applications. The learned Judge in the Court below seems to have doubted his bona fides, and under these circumstances we see no reason why the infant should be saddled with the costs of these irregular applications,

12. Therefore in Civil Revision Application No. 293 of 1928, the rule is to be absolute. Order discharged. Vaghjibhai to pay the costs throughout. In F.A. 311 of 1926 appeal allowed. Order of the lower Court discharged. Vaghjibhai to pay the costs throughout. In Stay Application No. 748 of 1915 rule made absolute. Order discharged.