Special Appeal No. 548 *of* 1870.

1871.
March 28.

BA'I KESAR, widow of Nichhá .....*Appellant.*
BA'I GANGA', widow of Raghá, & MAKANJI DULLABH .....*Respondents.*

Minors' Act (Bombay)—Vesting of Minor's Property—Unauthorised Alienation—Guardian of a widowed Daughter-in-law—Repayment of Purchase-money.

A Hindu widow is the proper guardian of her deceased son's widow, in the absence of any person claiming a preferential title to succeed to the estate of the latter.

An alienation by the natural guardian of a ward's immoveable estate made without having obtained a certificate under the Minors' Act is invalid.

The Court, while declaring such an alienation invalid, will, under special circumstances, order the ward to repay the amount of the purchase-money paid to the guardian, before setting aside the sale and directing the alienated property to be made over to the ward.

THIS was a special appeal from the decision of W. H. Newnham, Acting Judge of the District of Súrat, in Appeal Suit No. 82 of 1870, amending the decree of the Munsif of Balsád.

The special appeal was argued before GIBBS and MELVILL, JJ.

Nánábhái Haridás for the special appellant.

Nagindás Tulsidás for the respondent Makanji Dullabh.

There was no appearance for the respondent Bái Gangá.

The facts, in so far as they are material, sufficiently appear from the following judgment:—

GIBBS, J.:—This is an action brought by the guardian of Bái Kesar (and the subsequent proceedings after her coming of age have been carried on by Kesar herself) to have a sale of half a house, and a mortgage of some fields, set aside, and to have the property, *i.e.*, the entire house and fields, made over to her, she alleging that Bái Gangá had no power to alienate or to retain any of the property.

The facts found are these:—Nichhá, when a minor, married Kesar, and died in A.D. 1863, before he came of age, leaving

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his widow childless. It appears that the mother of Nichhá, Bái Gangá, had administered to her minor son's property from the time of her husband's death, and, for what the lower courts have found to be necessary expenses, incurred debts, to meet which she, as manager, mortgaged some fields in 1863, before Nichhá died, and also about October 1864 sold half the family house to Makanji.

Act XX. of 1864 came into force on the 24th of March of that year, and in 1866 Kesar's mother applied for a certificate of administration to Kesar, which was granted, and she then filed this action.

The Subordinate Judge found on re-trial that Kesar was entitled to all Nichhá's estate, except what Gangá had a claim to as maintenance; but he found Gangá had power to make alienations as mother and guardian, and also that she could keep some of the property on account of maintenance.

The District Judge amended the decree of the Subordinate Judge in regard to Gangá's maintenance, but in other respects confirmed it.

Kesar specially appeals, and it is admitted that the mortgage made before Nichhá's death cannot be disputed, and that the only point for us to deal with is whether the sale of the half-house in 1864 by the mother-in-law, after the passing of Act XX. of 1864, and without her holding a certificate under that Act, is good or not.

On this point our attention has been drawn to S. A. No. 391 of 1869—Couch, C. J., and Warden, J.—in which, from a note of their judgment taken by Mr. Dhirajlál, who was engaged in the case, and who obligingly lent it to the Court, it appears they set aside a sale made under circumstances similar to those in the present case, because the manager, the vendor, had no certificate under Act XX. of 1864.

Cases were also cited from 1 Beng. L. Rep., F. B. R., p. 49 (*a*), and 8 Calc. W. Rep., Civ. R. 331 (*b*) : these were decisions on the Bengal Minors' Act (XL. of 1858), but we need

(*a*) *Madhusudan Manji* v. *Debigobinda Newgi.*
(*b*) *Mussamut S. Koer* v. *Boshisht Narain Singh.*

not notice them further, because the wording of that Minors' Act (which, however, formed the model for Act XX. of 1864) differs as regards the 2nd section. In the Bengal Act the property of the minor, it is said, "shall be subject to the jurisdiction of the Civil Courts," while in the Act for Bombay the words are "the property," &c., "shall *vest* in the Civil Courts;" and we think that it was this term "vest," and the analogy to the same term in the Insolvent Debtors' Act regarding the insolvent's property, which, from the time he files his schedule, vests in the Official Assignee, which may have led Sir Richard Couch and Mr. Justice Warden to adopt the view which they did in their judgment.

But before deciding the point there raised, it would be desirable, we think, to ascertain whether Bái Gangá, as the mother-in-law, was her daughter-in-law's natural guardian after her son's death. No authorities at the argument were shown us on this point, but upon searching the standard works on the subject we have no doubt but that, after the death of Nichhá, his mother was the rightful guardian of his minor widow, and, therefore, could act on her behalf.

Grady's Hindú Law, page 65, quoting from Macnaghten's Principles of Hindú Law, 104, says: "When married, the woman becomes a member of her husband's family, and is under their control, her husband being her natural guardian. In his default, his sons, grandsons, and great-grandsons. In their default, the husband's heirs generally, or those who will inherit his property after her death. In default of them, her paternal relations. In their failure, her maternal kindred" will be the widow's guardians.

Strange, Hindú Law, page 244, establishes the widow's dependence for protection, if she have no sons, "on the near kinsmen of her husband."

In the Dáya-Bhág, Ch. XI., Sec. I., cl. 64, we find: "When the husband is deceased, his kin are the guardians of his childless widow."

These authorities tend to show that Gangá, after her son's death, was the proper guardian of his widow, as in the event

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of Kesar's death Gangá would inherit, and, such being the case, her alienation would be good had not the Minors' Act intervened. After the passing of that Act, we think that it was not competent to Gangá to alienate immoveable property without having obtained a certificate, and the permission of the court to such alienation. But, before making an order to set aside the sale, we would refer to a case noted in 4 Bengal Ṣadr Diváṇi Adálat Reports, p. 243, *Hoo* v. *Marquis*, quoted by the present Chief Justice in his decision in *Náoroji Berámji* v. *Rogers* (*a*), which may guide us to a decision. Let us collect the facts found by the lower courts; these are an actual management of the estate by Gangá for some years, from her own husband's death until her son's death, and subsequent to that for at least three years more, without opposition by Kesar or any one on her behalf, the *bona fides* found to exist in all the transactions, and the necessity for the debts incurred. These are all held proved, and we may, therefore, follow the principle laid down by the Ṣadr Court in the case above quoted, and while decreeing that, owing to Gangá not having a certificate under Act XX. of 1864 when she sold it, Kesar may recover the half-house sold to Makanji, we direct that, before she does so, she must, within six months from this date, pay into court the amount of the purchase-money paid by him to Gangá, together with the cost of any improvements or necessary repairs made by him, if there be such, and that should she fail within six months to do so, the sale to stand good. The costs throughout to be borne by Bái Kesar.

(*a*) 4 Bom. H. C. Rep., O. C. J. 78.