TESTAMENTARY JURISDICTION.

Before Mr. Justice Bayley,

GOOLA'M HOOSEIN NOOR MAHOMED AND OTHERS, PLAINTIFFS, *v.* FATMA'BA'I, BY HER GUARDIAN HUSSAN ALOO.*

1884
April 3, 29.

Practice—Guardian ad litem—Costs.

Where a guardian *ad litem* of an infant had been guilty of gross misconduct in putting executors to proof of a will which he wished to upset for his own private purposes, and which, the evidence showed, was to his knowledge duly executed by the testatrix in a sound state of mind,—

Held that he was liable for the costs of the suit.

THE plaintiffs were two of the executors and trustees appointed by the will of Hirbái, the widow of Khojá Nensibhái Gángji. The will was dated the 13th June, 1883, and the testatrix died on the 29th June, 1883. On the 8th October, 1883, the plaintiff applied for probate of the will. Hussan Aloo was the guardian *ad litem* of Fatmábái, one of the minor daughters of the testatrix. On behalf of the minor he filed an affidavit, stating that he "had reason to believe that the will alleged to be made by the said Hirbái was not made by her whilst in a sound and proper state of mind and understanding", and praying that the petitioners should be required to prove it in solemn form.

The case came on before Bayley, J., on the 11th February, 1884, and the hearing lasted for seven days. The learned Judge found in favour of the will, and was of opinion that Hussan Aloo, who had been present when the will was executed by the testatrix, had opposed the granting of probate to the plaintiffs from the indirect and improper motives alleged by the executors. Hussan Aloo called medical evidence to prove that the testatrix was incapable of making a will, and he himself swore that the will was a forgery, and that her mark was put to it by a third person while the testatrix was insensible. Hussan Aloo also claimed to have been a partner of the testatrix. The executors denied that he was partner, and contended he was manager only. The will contained clauses inconsistent with his being a partner. It was argued on behalf of the executors that Hussan Aloo had filed the caveat merely for the purpose of putting off accounting as manager of

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the business of the testatrix and, if possible, of getting rid of a will which gave the lie to his allegation that he was a partner. Judgment having been given for the plaintiffs, the case stood over for argument as to whether Hussan Aloo could be made personally liable for costs.

Inverarity for plaintiffs.—The Court has power to order Hussan Aloo to pay the costs. First, independently of his being guardian *ad litem*, on the ground that he is really the party interested in this case; that he has taken proceedings in the name of the infant to serve his own purposes, and that the circumstances under which he has done so, amount to an abuse of the process of the Court. In the case of *Kálidás Shámji*(1) Green, J., ordered a person, not a party to the record, to pay costs where he had instigated the proceedings; and in *Sreemutty Bammasundry Dossee* v. *Anundolal Doss*(2), Phear, J., at Calcutta ordered the "real plaintiff" to pay the costs, and his order was approved, in appeal, by Peacock, C. J., and Macpherson, J. That case is also referred to in *Rám Coomár Coondoo* v. *Chander Canto Mookerjee*(3) heard before the Privy Council. Hussan Aloo was present at the execution of this will, and knew the facts; but he has used the minor's name to obstruct the grant of probate.

Next, as guardian the Court has power to mulct him in costs on the ground that he, as such, has misconducted himself—Daniell's Chancery Practice, 148; *Komul Chunder Sen* v. *Surbessur Doss Goopto*(4); *Omrao Singh* v. *Prem Náráin Singh*(5); *Green* v. *Procter*(6). See also Brown on Probate, p. 441.

Farran, contra.—A next friend may, no doubt, be ordered to pay costs; but a guardian of an infant cannot, except perhaps where he is guilty of gross misconduct in the actual conduct of suit: *e. g.*, putting in a scandalous or impertinent answer or the like—*Morgan* v. *Morgan*(7). In the case of *Green* v. *Procter*(6) the point was not argued. The cases which have been cited, were before the Legislature when they passed the Civil Procedure Codes

(1) Unreported.
(2) Bourke's Rep. O. J. 44, S. C. on appeal; *ibid.* Part II, 96.
(3) L. R., 2 Ap. Ca. at p. 212.
(4) 21 Cal. W. R., 298.
(5) 24 Cal. W. R., 264.
(6) 1 Hagg. Eccl. Rep., 337, at p. 340.
(7) 11 Jur. N. S., 233.

(X of 1877 and XIV of 1882). By section 440 the next friend of a plaintiff may be liable for costs, but there is no similar provision with respect to a guardian. It appears to be the duty of the Court to appoint a guardian *ad litem*. No one would consent to act as such if any liability were incurred.

[BAYLEY, J., referred to section 458.]

No doubt there may be circumstances under which a guardian may be punished by being held liable for costs, but not simply because he has put in a defence which has been overruled by the Court.

29*th April*. BAYLEY, J.—Having considered the authorities that have been cited to me I am of opinion that the guardian *ad litem* can, and in this case ought to be ordered to pay the costs of the litigation for which he is responsible.

As to the power of this Court to make this order, I think there can be little doubt. Section 220 of the Civil Procedure Code (Act XIV of 1882) gives the Court large powers in the matter of costs, and there are reported cases which, I think, justify me in exercising those powers in the present case by ordering the guardian *ad litem* to pay the costs. In *Green* v. *Procter*[1] the will of a testatrix was propounded by the executors, and was opposed in the name of Elizabeth Green, a minor, by her step-father Joseph Green as her guardian, on the ground of incapacity and undue influence. The opposition failed on all the grounds put forward, there being not merely failure of proof, but complete disproof of the incapacity and undue influence. In his judgment Sir John Nichol said that the guardian had set up "a most ungrounded case in point of fact. There is nothing that justifies him in this opposition. I hardly recollect a case so vexatiously and falsely offered to the consideration of the Court. The party setting it up would be liable to the full costs if they had been pressed for." The learned Judge there made the guardian pay some of the costs, and only abstained from ordering him to pay the whole, from a consideration of some of the special circumstances of the case. That is an authority directly in point in the present case. In the Calcutta case of *Sreemutty Bammasundry Dossee* v. *Anundolal*

(1) 1 Hagg. Eccl. Rep., 337.

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Doss[1] Phear, J., held that certain persons who had improperly set the Court in motion, might be ordered to pay costs, although they were not parties to the suit. This decision was affirmed, on appeal, by Sir Barnes Peacock, C. J., and was referred to by the Judicial Committee of the Privy Council in *Rám Coomar Coondoo* v. *Chander Canto Mookerjee*[2]. In the High Court of Bombay, in the case of the alleged will of *Kálidás Shámjí*[3], Green, J., on the 26th September, 1873, ordered that one Nágjee Jaitha should be personally liable for the costs of the caveatrix. Nágjee Jaitha was not a party to the matter; but the Court, being of opinion that he was the person really moving the applicant, made him bear the costs, and that decision was affirmed by the Court of appeal.

In England the practice has been to make the guardian of an infant defendant pay the costs where he has been guilty of gross misconduct in the case. I am of opinion that in this case Hussan Aloo has been guilty of gross misconduct. I consider that his opposition to the issue of probate was not *bonâ fide*; that it was commenced and carried on by him simply with a view of setting aside a will which he thought to be injurious to his interests. He claimed to be a partner of the deceased, and this will contained a statement by the deceased which was wholly inconsistent with, and opposed to his case, and he, therefore, sought to get rid of it. He was present when the will was executed: he was living in the house with the testatrix. He knew her mental condition, and yet he never objected to her signing the will, or made any suggestion of her incompetency, until he instituted the proceedings in this case. He has put the parties to great expense in carrying on a case the hearing of which lasted seven days. Having regard to all the circumstances I think he has been guilty of such misconduct as brings this case within the authority of *Morgan* v. *Morgan*[4], and I order that the costs of the applicants and of Sárábái be recovered from Hussan Aloo, such costs to be taxed as between party and party.

Attorneys for the plaintiffs.—Messrs. *Jefferson, Bháishankar and Dinshá.*

Attorney for defendant.—Mr. *R. M. Sayáni.*

(1) Bourke's Rep. O. J., 44, and on appeal *ibid.* Part II, p. 96.
(2) L. R. 2 App. Ca., p. 212. (3) Unreported. (4) 11 Jur. N. S., 233.