

1892

17 B. 560.

AUG. 31.

[560] APPELLATE CIVIL.

APPEL-
LATE
CIVIL.*Before Mr. Justice Bayley, Chief Justice (Acting), and Mr. Justice Candy.*

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SAYAD SHAHU (*Original Opponent*), *Appellant v. HAPIJA
BEGAM (Original Applicant), Respondent.** [31st August, 1892.]*Minor—Guardian—Appointment of guardian by will—Application for certificate of
guardianship—Practice—Procedure—Guardians and Wards Act (VIII of 1890), ss. 7,
(Cl. 3), 13 and 48 (1).*

When a person alleges that he has been appointed guardian of a minor under a will, no one else can be appointed guardian under s. 7 (3) of Act VIII of 1890 until it is found after due investigation that there is no valid will.

The procedure under Act VIII of 1890 is not intended to be summary.

[R., 15 C.W.N. 457=7 Ind. Cas. 702 (703).]

THIS was a first appeal from an order passed by C. G. W. Macpherson, District Judge of Belgaum.

The facts of the case were as follows:—

One Hapija Begam, widow of Gouskhan Desai, applied under Act VIII of 1890 for a certificate of guardianship to the persons of her minor sons and grandsons, and asked the Court to appoint a manager of the property of her deceased husband.

[561] The opponent, Sayad Shahu *alias* Mahomed Saheb, objected on the ground that he had been appointed guardian of the minors and of their property under a will made by the deceased Gouskhan on the 15th June, 1890.

The District Judge after recording some evidence declined to take further evidence, on the ground that the proceedings were summary, and that it was open to the opponent to establish his position in a regular suit. He accordingly granted to the applicant the certificate of guardianship of the minor children, and requested the Collector to nominate a manager of the property.

The opponent appealed.

Phirozshah M. Mehta (with *Mahadeo Bhaskar Chaubal*), for the appellant.—The Judge has disposed of this matter summarily according to the procedure under Act XX of 1864; but that Act has been repealed

* Appeal No. 2 of 1892.

(1) Sections 7, 13, and 48 of Act VIII of 1890 are as follows:—

Section 7.—(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made—

(a) appointing a guardian of his person, or property, or both; or

(b) declaring a person to be such a guardian.
the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) 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.

Section 13.—On the day fixed for the hearing of the application, or as soon after as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application.

Section 48.—Save as provided by the last foregoing section and by s. 622 of the Code of Civil Procedure, an order made under this Act shall be final, and shall not be liable to be construed by suit or otherwise.

by Act VIII of 1890, which contemplates full inquiry into the allegations of the contending parties—ss. 13 and 48.

Section 7 (3) of the Act lays down that when a person is appointed guardian under a will or other instrument, no other person shall be appointed as guardian until the powers of the appointed guardian have ceased.

Jardine (with *Ghanasham N. Nadkarni*), for the respondent.—The case of a guardian appointed under a will is governed by s. 5 of Act VIII of 1890, and that section applies only to European British subjects.

Section 6 relates to the appointment of a guardian generally. But when a guardian is appointed under a will, s. 5 only is applicable.

[CANDY, J., referred to s. 7.]

We do not contend that the Act does not apply to persons other than European British subjects. We say that it applies to all persons, but what we contend is that when a guardian is appointed under a will, there is special provision made by s. 5 which relates only to European British subjects. The other sections of the Act do relate to the appointment of a guardian, but they do not relate to the appointment of a guardian under a will or other instrument.

[562] Next, the Judge was not satisfied as to the genuineness of the will and therefore he was right in not appointing the appellant. The Judge was also justified in rejecting the appellant's application for producing evidence, because the application was made only the day before the final order was passed.

The respondent is the grandmother of the minors, and therefore she is the proper person to be their guardian.

JUDGMENT.

CANDY, J.—The District Judge was apparently misled by his recollection of the old Act (XX of 1864), which directed that the proceedings under that Act should be summary. Sections 13 and 48 of Act VIII of 1890 show that the procedure under the later Act is not intended to be summary.

Opponent opposed the application on the ground that he had been appointed by will. We think that under s. 7 (3), the District Judge could not appoint any one else as guardian until he found, after due investigation, that there was no valid will as alleged by opponent. The District Judge declined to hear the evidence referred to in the application of opponent, dated 26th October 1891, not because the evidence was adduced too late, but because "the proceedings are summary, and the Courts are open for a regular trial." Under these circumstances, we must reverse the order of the District Judge, and remand the case to him for investigation according to law. All costs to be dealt with in the Court below.

Order reversed.

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