Pershád v. *Santo Pershád*(1) and *Prem Sukh* v. *Indro Náth*(2) it was apparently assumed that an appeal would lie against an order made under section 136. We ought, therefore, we think, in this state of the authorities, to hold that an appeal does lie against the order in question, and must discharge the order of that Court, and remand the appeal for decision according to law. Costs to be costs in the cause.

Order discharged.

(1) I. L. R., 10 Calc., 505. (2) I. L. R., 18 Calc., 420.

APPELLATE CIVIL.

FULL BENCH.

Before Mr. Justice Jardine, Mr. Justice Farran and Mr. Justice Ránáde.

VIRUPAKSHA'PPA' (ORIGINAL OPPONENT No. 1), APPELLANT, *v.* NILGANGA'VA' (ORIGINAL APPLICANT), RESPONDENT.*

1894. *April* 5.

Guardian and Wards Act (VIII of 1890)—*Minor—Minor co-parcener in a joint Hindu family governed by the Mitákshará law—Guardianship—Hindu law.*

Under Act VIII of 1890 a guardian cannot be appointed to the property of a minor who is a member of a joint Hindu family governed by the Mitákshará law, and possessed of no separate property. A guardian of the person of such a minor may be appointed under the Act.

APPEAL from the order of Venkatráo R. Inámdár, Assistant Judge of Bijápur, in Application No. 30 of 1891 under Act VIII of 1890.

The petitioner Nilgangava applied under Act VIII of 1890 for a certificate of guardianship to the persons of her minor sons. She also prayed that a certificate of administration, in respect of the minors' property, be issued either to the Collector or to the opponents Virupaksha and Siddáppa, the former of whom was the step-brother and the latter the first cousin of her minor sons. She alleged that the minors were entitled to property worth Rs. 55,000; that the minors and the opponents were members of a joint Hindu family; that the whole of the family property was

* Appeal, No. 145 of 1893.

1894.

VIRUPAK-SHA'PPÁ v. NILGÁNGÁVA.

in the possession of the opponents; and that the opponents were given up to vicious habits and had been wasting and mismanaging the common property.

Opponent No. 1, Virupaksha, contended *(inter alia)* that the minors' property being an undivided share in joint family property, the Court had no power under Act VIII of 1890 to appoint a guardian in respect of such property.

Opponent No. 2, Siddáppa, stated that he was not in possession of the minors' share of the family property.

The Assistant Judge ordered that a certificate of guardianship should be issued to the petitioner with respect to the persons of her minor sons, and to the Collector with respect to all the family property in the possession of opponent No. 1 in which the minors had shares.

Against this order, opponent No. 1 appealed to the High Court.

The appeal was at first heard by a Divisional Bench (Jardine and Ránade, JJ.) and then re-argued before a Full Bench (Jardine, Farran and Ránade, JJ.)

Shámráo Vithal for appellant:—The question in the present case is, whether a guardian can be appointed under Act VIII of 1890 for a minor who is a member of a joint Hindu family and possessed of no separate property. Under the Bombay Act XX of 1864 as well as under the Bengal Act XL of 1858 it was settled law that a guardian could not be appointed to take charge of the minor's undivided share in family property, the reason being that one member of a joint Hindu family has not such an interest in the joint property as is capable of being taken charge of and managed separately —*Shivji Hásam* v. *Datu Mávji*(1); *Gurácháry*a v. *Svámiráyáchárya*(2); *Narsingráv Rámchandra* v. *Venkáji Krishna*(3); *Lakshmibái* v. *Govind*(4); *Sakhárám* v. *Motirám*(5); *Bhágirthibái* v. *Sadáshivráv*(6); *Kálidás* v. *Pránshankar*(7); *Chhagan* v. *Rámchandra*(8); *Rám Chunder Chuckerbutty* v. *Brojonáth*(9); *Sheo Nundun Singh*

(1) 12 Bom. H. C. Rep., 281.
(2) I. L. R., 3 Bom., 431.
(3) I. L. R., 8 Bom., 395.
(4) P. J. for 1874, p. 143.
(5) P. J. for 1881, p. 24.
(6) *Ibid.*, p. 155.
(7) P. J. for 1884, p. 8.
(8) P. J. for 1886, p. 275.
(9) I. L. R., 4 Calc., 929.

v. *Mussamut Ghunsam Koeree*[1]. No doubt the decison of the Privy Council in *Doorga Persád* v. *Kesho Persád Singh*[2] would seem to show that the Court has the power to appoint a guardian for a minor co-parcener. But, as pointed out by this Court in *Narsingráv* v. *Venkáji*[3], the Privy Council did not consider, in *Doorga Persad's* case[2], the general principle of the Act with reference to the estate of an undivided Hindu family, and their observations must be read in connection with the particular case then under consideration. If the Legislature had intended to alter the law as interpreted by our Courts, it would have said so in express terms. On the other hand, the provisions of sections 28, 29 and 34 of Act VIII of 1890 clearly show that the Act does not contemplate the appointment of a guardian in the case of a minor co-parcener governed by the Mitákshará law. See also the report of the Select Committee on the Bill (*Gazette of India*, January to June, 1890, Part V, p. 77). The ruling in *Shám Kuar* v. *Mohanunda Sahoy*[4] completely supports my contention.

N. G. Chandávarkar for respondent:—Under the Hindu law the sovereign as *parens patriæ* is the legitimate and supreme guardian of the property of all minors—1 Strange's Hindu Law, 71; MacNaughten's Principles and Precedents of Hindu Law, p. 104; West and Bühler's Digest, p. 672. The sovereign delegates his authority in this respect to the minor's nearest relatives. No text has been cited showing that the sovereign, or the Court as representing the sovereign, has no jurisdiction to guard the property of a minor who is a member of a joint Hindu family. Very strong authority would be needed to exclude such jurisdiction. The report of the Select Committee regarding the omission of section 17 in the original Bill does not imply that the Legislature meant to deprive the Courts of their jurisdiction in such matters. Specific words are required to exclude their jurisdiction. Section 7 of Act VIII of 1890 is wide enough to cover a case like the present, while section 19 does not exclude it. The cases cited do not show that the Court is not competent to appoint a guardian for a minor member of a joint Hindu family.

(1) 21 Calc. W. R., 143.
(2) L. R., 9 I. A., 27.
(3) I. L. R., 8 Bom., 395.
(4) I. L. R., 19 Calc., 201.

1894.

VIRUPAK-SHÀPPA v. NILGANGÀVA.

They merely show that it is not expedient to appoint a guardian for such a minor. As to the argument that in a joint Hindu family a minor co-sharer has no property to be taken charge of, I submit that he has some interest at least in the family property, and that interest the Court can, and will, protect by appointing a guardian. Take the case of a Hindu family consisting of a father, uncle and a minor son. Suppose the father and uncle collude and dissipate the estate, how is the minor's interest to be protected? The minor cannot enforce a partition against the will of his father and uncle—*Apáji Narhár* v. *Rámchandra*[1], and his interests may be seriously jeopardized if the Courts do not step in and appoint a guardian to protect his share of the joint estate. If the cases cited for the appellant proceed on grounds of expediency, is it not highly expedient, in a case like this, to appoint a guardian? Refers to *Doorga Persád* v. *Kesho Persád*[2]; *Bábáji* v. *Sheshgiri*[3]; *Saroda Soonduree Dossee* v. *Tarinee Churn Chowdhry*[4]; *Shridhar* v. *Hirálal*[5].

The judgment of the Full Bench was delivered by

FARRAN, J.:—We are of opinion that the order of the Assistant Judge, F.P., appointing the Collector guardian of the property of the minors, must be set aside.

The Act, the applicability of which to the case of a minor forming one of the members of an undivided Hindu family governed by the Mitákshará law we have to consider, is a consolidating and amending Act, and in order to understand its scope we ought, we think, to have before us a clear view of the state of the law at the time when it was passed. That law, so far as Bengal was concerned, was contained in Bengal Act XL of 1858, and for the Bombay Presidency in Act XX of 1864. Both Acts have been, in regard to their application to joint Hindu families, the subject of a long series of judicial decisions. The Bengal Act, section 2, was as follows:—"The care of the persons of all minors (not being European British subjects) and the charge of their property shall be subject to the jurisdiction of the Civil

(1) I. L. R., 16 Bom., 29.
(2) L. R., 9 I. A., 27.
(3) I. L. R., 6 Bom., 593.
(4) 6 Cal. W. R., 23, Mis. Rul.
(5) I. L. R., 12 Bom., 480.

Court." The reason of this provision, not at first sight apparent, is explained in *Rám Chunder* v. *Brojonáth*[1] to be that prior to the passing of that Act, by the Regulations then in force, the Courts were restricted from dealing, except by regular suit, with the estates of minors. The Act gave them a general jurisdiction over such estates. The Bombay Act was similar. Section I was this : " The care of the persons of all minors (not being European British subjects) and the charge of their property shall vest in the Civil Courts." Under these Acts, now repealed, no person was entitled to institute or defend a suit connected with a minor's estate of which he claimed charge until he had obtained a certificate of administration, except in the case of very small estates or when there was special cause for allowing it. Any person having the right to have the charge of a minor's estate under a deed or will was entitled to such a certificate, and the nearest relative of the minor had the next claim to it. Failing these, the Court was enjoined (if it thought it necessary for the interest of the minor that provision should be made by the Court for the charge of his property) to grant a certificate of administration to the Public Curator or other public officer, or in the case of land, to direct the Collector to take charge of it. The result of these provisions, therefore, was that it became as a general rule incumbent on the Court on application made to it by any relative or friend of a minor, or, in the case of land, by the Collector, to grant a certificate of administration to the person having a preferential claim to it. The Court had also a discretion, in the absence of a preferential claimant, to entrust the estate of the minor to the care of the Public Curator or of the Collector if it considered it to be for the interest of the minor that such a course should be adopted.

Under section 8 of Act VIII of 1890, the same persons have the right to apply to the Court for the appointment of a guardian to a minor as under the repealed Acts, XL of 1858 and XX of 1864, and by section 7 the Court is directed to appoint or declare a guardian if it is satisfied that it is for the welfare of a minor that such an order should be made, but the appointment of a guardian is not necessary for the purpose of bringing or defending a suit

(1) I. L. R., 4 Calc., 929.

1894.

VIRUPAK-SHA'PPA v. NILGANGÁVA.

(section 53). The Court has now a discretion as to the appointment of a guardian. Under the last mentioned Acts it was in most cases obligatory upon it to appoint one.

It was early held in Bengal, and the ruling has been generally followed there, that one member (although an infant) of an undivided family governed by the Mitákshará law had not such an interest in the joint property as was capable of being taken charge of and managed by the Civil Court or by a guardian appointed under Bengal Act XL of 1858: *Sheo Nundun Singh* v. *Mussamut Ghunsam*(1). The same view of the law was adopted in Bombay. The earliest reported case is to be found in the Printed Judgments for 1874, and the same proposition has been affirmed, but in different and it must be admitted not always quite consistent language, in a long series of decisions ever since. (See *Lakshmibái* v. *Govind*(2), *Shivji Hásam* v. *Datu Mávji*(3), *Govind* v. *Moro Ragunáth*(4), *Náráyan* v. *Balwant*(5), *Gurácharya* v. *Svámiráyacharya*(6), *Sakhárám* v. *Motirám*(7), *Bhágirthibái* v. *Sadáshivráv*(8), *Kálidás* v. *Pránshankar*(9) and *Chhagan* v. *Rámchandra*(10).) It was at one time assumed that a different view of the law on this subject had been taken by the Judicial Committee of the Privy Council in *Doorga Persád* v. *Kesho Persád*(11). See *Bábáji* v. *Sheshgiri*(12); but in a subsequent case, *viz.*, *Narsingráv* v. *Venkáji*(13), it was pointed out that their Lordships of the Privy Council were not considering the question of the applicability of the Act of 1858 to a minor under Mitákshará law; and the Court concluded that their Lordships' remarks must be taken to be confined to the circumstances of the case actually before them which were of a special nature. We are ourselves, after a careful examination of the language of their Lordships' judgment, inclined to adopt the same view.

(1) 21 Calc. W. R., 143.
(2) P. J. for 1874, p. 143.
(3) 12 Bom. H. C. Rep., 281.
(4) Appeal No. 1 of 1875, decided 4th July 1876.
(5) Miscellaneous Appeals 15 and 18 of 1875, decided 28th February 1876.
(6) I. L. R., 3 Bom., 431.
(7) P. J. for 1881, p. 24.
(8) *Ibid.*, 155.
(9) P. J., 1884, p. 8.
(10) P. J., 1886, p. 275.
(11) L. R., 9 I.A., 27.
(12) I. L. R., 6 Bom., 593.
(13) I. L. R., 8 Bom., 395.

It must, we think, be admitted that the difficulties in the way of applying the provisions of the Acts to which we have referred in the case of a minor governed by Mitákshará law owning no property, but having a co-parcener's interest only in undivided family estate, were very great. The Courts had held them to be insuperable. From the report of the Select Committee on the Bill, which eventually became Act VIII of 1890, it is clear that these difficulties, and the current of decisions upon the subject, were present to the minds of the Legislature when they passed the Act (VIII of 1890). The Mitákshará law remains unchanged. The difficulties of placing a minor's interest in family property under the charge of a guardian appointed by the Court continue as great as ever. The Legislature has not made any special provision to meet these difficulties. The question which we have to consider under these circumstances is whether the interest of a minor in such property comes within the scope and intention of the Act as it at present stands worded.

Now a guardian is defined to be a person having the care of * * * the property of a minor: and we think that the Act does not contemplate the appointment of a guardian of the property of a minor unless the minor is possessed of property and of property capable of being taken care of by an appointed guardian. The application for the appointment of a guardian must state the nature, situation and approximate value of the property (if any) of the minor. The words "if any" are necessarily introduced because the application may be for the appointment of a guardian of the person only. The appointed guardian of the property of a minor has certain defined privileges and powers and duties over and in respect of such property granted to him and prescribed by the Act.

1. He is entitled to such an allowance (if any) as the Court thinks fit; or in the case of an officer of Government to fees to be paid to Government out of the property of the ward. There is no provision in the Act for obtaining such allowance or fees from the managing member of the joint family.

2. He is bound to deal with the property as a man of prudence would deal with his own. In the case of a Collector being

1894.

VIRUPAK-SHA'PPA v. NILGANGÁVA.

appointed, he can mortgage or charge it or lease it for a term exceeding five years without the leave of the Court, and in other cases the guardian has the same powers with the leave of the Court. The Court can no doubt define and restrict the powers of an appointed guardian in dealing with property of the minor (section 32), but this only in cases where the Collector is not the guardian.

3. The duties prescribed by section 34, clauses (*a*), (*b*), (*c*) and (*d*), are no doubt rendered optional with the Court to impose, and might be dispensed with in the case of a minor whose only property is an interest in an undivided family estate, but the provisions of clause (*e*) are obligatory, and are wholly inconsistent with the position of a minor in a joint family of the kind we are considering. So, too, are the provisions for the guardian accounting (sections 35 and 36) and delivering up the property of the ward (section 41 (3)). In truth, if any of the powers or duties prescribed by the Act are exercised or performed by the guardian of a minor having only an interest in joint family property of this kind, they would be exercised not over the property of the minor, but over the property of the family in which the minor is an unit. If the Legislature, having their attention called to this subject, had intended to make provision for the case of a guardian who should have power merely to watch over and safeguard the interest of a minor in joint family property, they would, we think, have introduced special provisions on the subject and given him special powers. As a matter of history we know from the report of the Select Committee that they did so in the original Bill, but omitted the clause in deference to the weight of authority.

The conclusion we have arrived at from a consideration of the provisions of the statute would, therefore, seem to be in accordance with the intention of its framers as declared when it was passed. It is true that there is no special exemption in section 19 of the case of a minor having only this species of interest in property from the provisions of the Act relating to appointed and declared guardians; but if the Legislature adopted the view judicially declared by the Courts that an interest of this kind is not property of which a guardian appointed by the Court

can take care, there would, we apprehend, be no need for the expression of such an exemption. There would be nothing on which the Act could operate. We cannot doubt but that they did adopt that view. This decision does not, in any way, prevent the interest of the minor in joint family property being protected, in the only way in which if imperilled by corrupt or bad management, it can be efficiently protected, by separation. See *Mahádev* v. *Lakshman*[1]. The Collector or any one interested in the welfare of the minor can, if the circumstances warrant that step, as next friend of the minor, file a suit on his behalf for partition, and on establishing a case for partition can have himself appointed guardian of the property, which may on partition fall to the infant's share. To appoint a guardian for the purpose of considering whether or not such a suit should be filed, does not, we think, fall within the purview of the Act. It certainly does not fall within its words. We are confirmed in the conclusion at which we have arrived by the judgments in the case of *Shám Kuar* v. *Mohanunda*[2] where the question was fully examined.

The appointment of the minors' mother as guardian of their persons has not been seriously objected to, and under Act VIII of 1890 we see no legal difficulty in making the appointment. Under the repealed Acts the appointment of a guardian of the person seems to have been dependent on, or ancillary to, the appointment of a guardian of the property. Under the present Act this is not the case. That portion of the order appealed against will, therefore, stand affirmed, as the circumstances of the case fully warrant the appointment being made. The parties to pay their own costs throughout.

Order varied.

(1) See *ante*, p. 99. (2) I. L. R., 19 Calc., 301.