

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

1894.

September 26.

PATHA'N ALIKHA'N BADLUKHA'N (ORIGINAL APPLICANT), APPELLANT,
v. BA'I PANIBA'I (ORIGINAL OPPONENT), RESPONDENT.*

Guardian and Wards' Act (VIII of 1890)—Certificate of guardianship—Guardian appointed under a will—Necessity of probate.

It is not incumbent on a person, who has been appointed guardian of a minor under a will, to take out probate as a condition precedent to his obtaining a certificate of guardianship under Act VIII of 1890.

APPEAL from the decision of Gilmour McCorkell, District Judge of Ahmedabad, in Miscellaneous Application No. 124 of 1893, under Act VIII of 1890.

The applicant prayed for a certificate of guardianship under Act VIII of 1890, alleging that he had been appointed a guardian of the person as well as of the property of the minors under the will of their deceased step-mother.

The District Judge rejected this application, holding that as there had been a special appointment of a guardian under a will, the applicant was bound to take out probate of the will, without which the certificate of guardianship could not be granted.

The applicant thereupon appealed to the High Court, contending that it was not incumbent on him to apply for probate.

Goverdhan M. Tripáthi for appellant.

Ganpat Sadáshiv Ráo for respondent.

The following authorities were cited in argument:—*Lakshman v. Jamálbibi*⁽¹⁾, *Lakshman v. Abdul*⁽²⁾, *Párvatibái v. Hariboa*⁽³⁾, *Bhagvánsang v. Bechardás*⁽⁴⁾ and *Shaik Moosa v. Shaik Essa*⁽⁵⁾.

JARDINE, J.:—The District Judge refused to give the appellant a certificate of guardianship, under Act VIII of 1890, holding that as he pleaded an appointment as guardian under the will of the deceased step-mother of the minors, and as he had not taken out probate, the relief should be refused.

* Appeal, No. 66 of 1894.

(1) P. J. for 1875, p. 150.

(3) P. J. for 1888, p. 351.

(2) P. J. for 1875, p. 151.

(4) I. L. R., 6 Bom., 73.

(5) I. L. R., 8 Bom., 241 at pp. 254, 255.

No words of Act VIII of 1890 lay down such a rule: and we do not think the Legislature intended to alter the earlier law in this matter. See Act XX of 1864, as interpreted in *Lakshman v. Jamál-bibi*⁽¹⁾, *Lakshman v. Abdul*⁽²⁾, *Parvatibá'i v. Hariboa*⁽³⁾. See also *Bhagvánsang v. Bechardás*⁽⁴⁾ and *Shaik Moosa v. Shaik Essa*⁽⁵⁾. We are, therefore, of opinion that it was not a condition precedent of relief that the appellant should take out probate.

On this point no contention has been raised by Mr. Ganpatrav, who appears for the respondents and supports the decree on another ground, appertaining to the merits, which have not been inquired into.

The Court reverses the order of the District Judge and remands the cause for inquiry and decision according to law. Costs on the respondents.

Order reversed.

(1) P. J. for 1875, p. 150.

(3) P. J. for 1888, p. 351.

(2) P. J. for 1875, p. 151.

(4) I. L. R., 6 Bom., 73.

(5) I. L. R. 8 Bom., 241 at pp. 254, 255.

1894.

PATHA'N
ALIKHA'
BADLUKHA'
v.
BA'I
PANIBA'I