

ORIGINAL CIVIL.

Before Sir L. H. Jenkins, Chief Justice, Mr. Justice Tyabji and
Mr. Justice Russell.

RE MANILAL HURGOVAN, A MINOR, HURGOVAN MANCHAND,
APPLICANT.

1900.

December 21.

Minor—Guardian appointed of property of a minor who was a member of a joint Hindu family and the property was joint property—Sanction given for sale of family property in which minor had a share—Jurisdiction of High Court.

Under its general jurisdiction and apart from the Guardian and Wards' Act (VIII of 1890), the High Court has power to appoint a guardian of the property of a minor who is a member of a joint Hindu family and where the minor's property is an undivided share in the family property.

The applicant in this case who sought to be appointed guardian also sought the sanction of the Court for a sale of the family property in which the minor was interested,

Held, under the special circumstances of the case, that the sanction should be given.

APPLICATION to be appointed guardian of the property of a minor who was a member of a joint family, and for leave to sell the minor's interest in certain immoveable property.

The applicant Hurgovan Manchand in his affidavit stated that he was the father of the minor, a child eight years old, who was living with him and was his only son. A certain house situate at Mumbádevi in Bombay had been purchased by the applicant's father in 1862 for Rs. 15,000, and, on partition of the family property in 1873, had fallen to the applicant's share. He had recently been involved in litigation with his brothers in which he had been successful, but they had not been able to pay his costs and he was therefore obliged to borrow money to pay his attorneys. In order to raise money to pay off this debt, he had agreed to sell the above-mentioned house for Rs. 40,000. The house was in need of repairs, but he had no means to defray the cost necessary for effecting the repairs, and, if the repairs were not made, the property would suffer and its value be greatly diminished. The present offer he regarded as a very favourable one, but the proposed purchaser having regard to the fact that

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the applicant's minor son was interested in the said house, which was joint family property, insisted that the applicant should obtain an order of Court authorizing him to execute the conveyance in respect of the right and interest of the said minor in the house. The following paragraphs of his affidavit are material:—

"12. I submit that the agreement for sale of the house which I have made for Rs. 40,000 is a very profitable bargain, and there is no probability of my realising anything like the said price if the present agreement goes off, and it is to the interest of me, this deponent, and my said son, that the said contract for sale should be carried out."

"13. I say I am willing that a moiety of the said sum of Rs. 40,000, after deducting all costs of and incidental to the sale, should be invested in Government paper and held by the Accountant of this Honourable Court for the benefit of the said minor."

"14. Under the above circumstances I pray that this Honourable Court will be pleased to make an order appointing me guardian of the property of the said minor and authorising me to convey the right, title and interest of my said son in the said property as such guardian as aforesaid on such terms and conditions as this Honourable Court may think proper to safeguard the interests of my said minor son."

Inverarity for petitioner.

The applicant asks to be appointed guardian of his minor son and that the Court will sanction the sale of the house in which the minor has a share. The question is whether the Court has jurisdiction to appoint a guardian of property of a minor, when that minor is a member of an undivided Hindu family and his property consists of an undivided share of the family property. In two cases under Act VIII of 1890, *Sham Kuar v. Mohanund*⁽¹⁾ and *Virupakshappa v. Nilgangava*⁽²⁾ it has been held that in such cases a guardian of the property cannot be appointed. I submit that these decisions do not apply to such a case as the present. Here it is the manager of the family who applies to be guardian. These decisions are based on the fact that a guardian cannot get possession of the minor's undivided share and that to give authority over such property to a person who is a stranger to the family would create dissension between him and the legal manager of the family. That reason however does not

(1) (1891) 19 Cal. 301.

(2) (1894) 19 Bom. 309.

apply here where it is the manager himself who applies to be made guardian.

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[JENKINS, C.J.:—Why does he want to be guardian? As manager of the family he has a right to deal with the family property.]

Yes, but the person who desires to purchase rightly thinks he would get a better title if a guardian of the minor's share were appointed and the Court's sanction given to the sale. The minor could not hereafter question the sale as he might do if it were made by the manager in that capacity alone.

[JENKINS, C.J.:—That is the difficulty in the way of granting the application. We would take away the minor's right hereafter to question the sale if he thinks proper to do so.]

That is a right that need not be considered in this case. We are willing to protect his rights in every way. As the family is constituted at present he has a right to a half-share of this property; the other half is ours. We are willing if allowed to sell to pay over half the amount to the Accountant General in the minor's name and for the minor's benefit. We can now get Rs. 40,000 for the property. The minor will get Rs. 20,000.

I say then that, even under the Guardian and Wards Act (VIII of 1890), the Court has power to grant this application, and that the cases I have referred to are not authorities against me, inasmuch as they are not cases in which the manager of a family sought to be guardian.

But this is not an application under that Act, and I say that independently of that Act this Court has power to make the order we ask. *Re Jairam Luxmon*⁽¹⁾; *Re Jagannath*.⁽²⁾ I have here a list of nineteen cases (not, I believe, exhaustive), extending over a period of fifteen years, in which this Court has made similar orders. If the Court now holds that it has no jurisdiction to make such an order it will destroy the title to all the properties which have been dealt with on the strength of these orders.

Assuming then that this Court can appoint a guardian, the next question is, will it sanction a sale of the minor's property.

(1) (1892) 16 Bom. 634.

(2) (1893) 19 Bom. 96.

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In England, no doubt, the Court would not sanction a sale of realty. (See Simpson on Infants, 2nd. edition, chap. XX.) The sale converts realty into personalty. That is one reason which influences the Court there. But in India there is no distinction between realty and personalty. Here it really amounts merely to changing the investment of the minor's property, and the Court's power to do that is recognised in section 29 of Act VIII of 1890.

In this case if the Court can do so it ought to order a sale. The house is in bad repair. We have no money to repair it. It will be pulled down by the Municipality if not repaired and everybody will be the loser. We can get Rs. 40,000 now for it. My client is interested to the extent of one-half, so that is some guarantee that the price is the best obtainable. It was bought in 1862 for Rs. 15,000.

[JENKINS, C.J.:—Why does the manager want to sell it?]

He owes a debt of Rs. 1,500 and wants to pay off that debt, and besides he has no money to keep up the house. The debt no doubt is so small that by itself it would not justify a sale. But it is to be remembered that as manager the applicant can sell this house without coming to Court at all. The only result will be that, so selling it, he will get a much smaller price and every one will be the loser. Also, if he sells in that way he will get all the purchase-money into his hands, and he may (I do not say he will) squander it all away. The minor will have no redress. He cannot follow the money. It is therefore clearly to the minor's advantage that we should be allowed to sell for Rs. 40,000 and that Rs. 20,000 should be secured to him. On these grounds the Court should sanction the sale.

JENKINS, C.J.:—(Tyabji and Russell, JJ., concurring). The question here is whether under our general jurisdiction and apart from the Guardian and Wards Act (VIII of 1890), this Court can appoint a guardian of the property of an infant who is a member of a joint Hindu family and when that property is an undivided share in the family property. Having regard to the long line of decisions of this Court, to which our attention has been called, I think we ought not now to repudiate this jurisdiction,

and thus imperil the title to property which has been dealt with in reliance upon these decisions. We hold therefore that this Court has power in such cases as this to appoint a guardian of the property of a minor.

But in coming to this conclusion we desire to add that it is a power to be exercised with the greatest caution. We make appointment in this case because the person applying to be appointed the guardian is also the manager of the family to which the minor belongs, and thus we do not introduce into the family any element of possible disturbance. I can hardly imagine a case in which it would be right to grant such an appointment unless the applicant were the manager, and it is expressly upon this ground that we make the appointment in this case.

The next point is whether we ought to sanction the proposed sale of property. It is immoveable property. The Court of Chancery in England will not sanction the sale of real property in these cases, but they are influenced by considerations which have no place here. In England the Court's refusal is based upon the doctrine of conversion which affects the power of the minor to dispose of the property by will and also alters the line of succession. It is for these reasons that the Court refuses to sanction a sale of real property, and it is plain that these reasons do not apply in India where no difference is made between what in England is known as real and personal estate. Immoveable property is no doubt more durable than moveable property, and if that were the only point to be considered we would hesitate about altering the nature of property in which an infant has an interest. But in Bombay one member of an undivided family can dispose of his share in the family property. The result is that, if we withhold our sanction to this sale, it will be open to the applicant, who is the father and legal manager of the family, to dispose if not of the whole, at all events of a moiety of the family property. It seems therefore that the best we can do for the minor is to see that at any rate a moiety is secured for him. To that the father assents and, in view of the fact that, with our sanction, a considerably larger price will be obtained for the property than could be obtained by a sale without it, I think we ought to sanction the sale. It appears

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that it was bought between thirty and forty years ago for Rs 15,000. The applicant says he can now get Rs. 40,000 for it, and he has an obvious interest in getting the highest possible price for it. I do not think it necessary to refer the question of value to an expert.

We therefore hold that we have jurisdiction to appoint the applicant guardian of the minor and we sanction the sale of this property.

Attorneys for the petitioner:—*Messrs. Bhaishankar and Kanga.*

APPELLATE CIVIL.

Before Mr. Justice Ranade and Mr. Justice Crowe.

1900.

November 26.

MAHADEO (ORIGINAL DEFENDANT 3), APPELLANT, v. PARASHRAM BHAWANCHAND AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Limitation—Limitation Act (XV of 1877), schedule II, article 144—Symbolical possession—Effect of symbolical possession as between judgment-creditor or his assigns and judgment-debtor or his heirs—Suit by purchaser from judgment-creditor to recover possession from heir of judgment-debtor.

As between the judgment-creditor or his assigns on one side, and the judgment-debtor or his heirs on the other, symbolical possession is as good as actual possession to give the (judgment-creditor's) purchaser or his assigns the right to bring a suit for possession within twelve years from the date of such symbolical possession.

SECOND appeal from R. Knight, District Judge of Sátára.

Suit to recover possession of land. The land originally belonged to the defendant's father, against whom in 1882 a decree was obtained by one Bhawanchand under which Bhawanchand became entitled to it. Bhawanchand died and left a son Parashram (the plaintiff), who was then a minor and was represented by his guardian, Gangabai. In 1886 Gangabai sold the decree against defendant's father to Dalasukha and Ambaram and afterwards applied for execution of the decree and obtained

* Second Appeal No. 420 of 1900.