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for a definite sum and so fell within the ruling of the majority of the Full Bench of the Calcutta High Court in the case of *Kunjo Behary Singh* v. *Madhub Chundra Ghose* [1]." Then again we have Second Appeal No. 736 of 1904 [2] which is to the same effect.

Under these circumstances we do not think it necessary to refer this to a Full Bench. We will follow the Bombay decisions referred to, and hold that the preliminary objection must prevail.

We accordingly reject this appeal with costs.

R. R. *Appeal dismissed.*

(1) (1896) 23 Cal. 884. (2) Unreported.

APPELLATE CIVIL.

Before Sir L. H. Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Aston.

1905.
August 29.

BINDAJI LAXUMAN TRIPUTIKAR (ORIGINAL OPPONENT), APPELLANT, *v.* MATHURABAI (ORIGINAL APPLICANT), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sections 39 and 52—Minors—Guardian of person—Guardian of property—Minor having proprietary interest with adults in joint family—Joint family comprising all minors—Guardianship liable to cease as soon as there is an adult person.

A guardian of the property cannot be appointed for a minor whose only proprietary interest is as co-parcener with adults in a joint family property.

This principle does not apply when all the co-parceners are minors and a guardian of the property is appointed for the whole number, *Lingangowda* v. *Gangabai*[1] followed.

As soon as there is an adult co-parcener, any guardianship of the property previously constituted either ceases or is liable to cease.

An order appointing a guardian of the property of minor co-parceners, who exclusively constitute the joint family, should reserve liberty to any minor on attaining majority to apply for the removal of the guardian of the property or restrictions of his power under section 52 of the Guardians and Wards Act (VIII of 1890).

APPEAL from the decision of W. Baker, Assistant Judge of Poona, appointing a guardian of the person and property of minors.

* Appeal No. 126 of 1904.
(1) (1896) P. J. p. 521.

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The applicant, Mathurabai, widow of Vishnu Mahadeo, applied for a certificate of guardianship of the person and property of three minors, (1) Govind and (2) Gopal Mahadeo and (3) Keshav Sonu, aged respectively fifteen and thirteen years and eight months, alleging that the first two minors were the step-brothers of her deceased husband and the third minor was her grandson, that the minors were members of an undivided Hindu family, which possessed immoveable property worth about Rs. 9,500 at Poona, that the mother of the minors 1 and 2 was dead, that they were living with their maternal uncle in a village in Koregaum Táluka in the Sátára District and that the applicant being the eldest member of the family consisting of herself and the minors, was entitled to the certificate.

Opponent Bindaji Laxuman Triputikar resisted the application on the grounds that he was the maternal uncle of minors 1 and 2 who were living with him, that the property of minor No. 3 was separate from that of minors Nos. 1 and 2, that he was in possession of some of the property belonging to the latter two and that the application was not *boná-fide* inasmuch as the object of the applicant was to get the property of the two minors into hotch-pot as joint property.

The Judge found that the separation alleged by the opponent was not proved and as the applicant was the eldest member of the family she was the natural guardian of the minors. He, therefore, passed an order appointing her guardian of the person and property of the three minors.

The opponent appealed.

V. M. Mone, for the appellant (opponent):—The Judge has not considered all the circumstances which he should have done under section 17 of the Guardians and Wards Act before making the appointment. The appointment need not be based exclusively on the consideration of nearness of relationship. The Court should have regard to the interest of the minors and also to the fitness of the applicant. Proximity of relationship does not give an absolute right to the certificate, *Musst. Bhikuo Koer* v. *Musst. Chamela Koer*[1], *Sohna* v. *Khalak Singh*[2]. The minors being

(1) (1897) 2 C. W. N. 191.

(2) (1889) 13 All. 78.

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old enough to exercise an intelligent preference, their wishes ought to have been consulted. The relationship here is also by half blood. The applicant may be appointed guardian with respect to minor 3 only.

V. V. Ranade, for the respondent (applicant) :—The Judge found that the property was joint and he took into consideration the circumstance that the applicant was the eldest member of the joint family. He, therefore, rightly gave preference to the applicant.

[JENKINS, C. J. :—The family being joint has the Court any power to appoint guardian of the property? See *Virupakshappa* v. *Nilgangava*(1), *Gharib-ul-lah* v. *Khalak Singh*(2), *Lingangowda* v. *Gangabai*(3).]

We submit that those rulings are not applicable. In those cases the family consisted of adults and minors. In the present case all the persons entitled to the family property are minors. This circumstance gives rise to the necessity of representation by a guardian.

Mone in reply :—Referred to section 41, clause 2 (c) of the Guardians and Wards Act.

JENKINS, C. J. :—This is an appeal from an order appointing the respondent the guardian of the person and property of three minors, who are the sole members of a joint Hindu family: and we must first see whether it is within the power of the Court to make the appointment.

The status of the minors places no difficulty in the way of appointing guardians of the person; but different considerations apply to the guardianship of the property.

It must now be taken as established that a guardian of the property cannot be appointed for a minor whose only proprietary interest is as co-parcener with adults in joint family property.

This incompetence rests on the view that the interest of such a co-parcener "is not individual property at all, and that therefore

(1) (1894) 19 Bom. 309. (2) (1903) 30 I. A. 165.
(3) (1896) P. J., p. 521.

a guardian, if appointed, would have nothing to do with the family property." *Gharib-ul-lah* v. *Khalak Singh*[1].

A distinction, however, has been drawn by a decision of this Court, whereby it was determined that the principle does not apply where all the co-parceners are minors and a guardian of the property is appointed for the whole number : *Lingangowda* v. *Gangabai*[2]. The same view is taken in Trevelyan on Minors, page 104, but the author cites no authority. The decision binds us.

The learned Judges by whom it was given were not unconscious of the difficulty that would arise when one of the minors attained majority, and the matter came before them at that stage in *Basalingappa* v. *Nazir* [3], but the case, in the course it took, furnishes us with no guidance of any value as to how this difficulty should be surmounted.

The solution appears to us to lie—assuming, as we must, that the appointment can be made—in section 39 of the Guardian and Wards Act which provides that the Court may remove a guardian by reason of the guardianship of the guardian ceasing, or being liable to cease under the law to which the minor is subject. The reason of the rule that when the joint family originally comprises an adult, a guardian of the property cannot be appointed, (in our opinion) involves the conclusion that as soon as there is an adult co-parcener any guardianship of the property previously constituted either ceases or is liable to cease, for then there is no longer any property in respect of which there can be a guardian.

Therefore, as it seems to us, an order appointing a guardian of the property of minor co-parceners, who exclusively constitute the joint family, should reserve liberty to any minor on attaining majority to apply for the removal of the guardian of the property or restrictions of his powers under section 52.

We hold on the strength of the cited authority that it was within the power of the Court to make the appointment under appeal.

(1) (1903) L. R. 30 I. A. 165 at p. 170. (2) (1896) P. J. p. 521.
(3) (1899) 1 Bom. L. R. 822.

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On the merits, however, we see no reason for appointing the respondent guardian of the person of the minors Govind and Gopal: we think the appellant should be so appointed, and the order appointing the respondent guardian of the person should be varied accordingly. There should also be reserved liberty to any of the wards on attaining majority to apply for the removal of the guardian of the property, or otherwise as he may be advised.

Order varied.

G. B. R.

APPELLATE CIVIL.

Before Mr. Justice Russell and Mr. Justice Batty.

1905.
August 30.

KESHAVRAM DULAVRAM (ORIGINAL PLAINTIFF), APPELLANT, *v.* RANCHHOD FAKIRA AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Mortgage—Two mortgages on the same property executed by the same person—Suit under the second mortgage for sale of the property subject to the first mortgage—Civil Procedure Code (Act XIV of 1882), section 43.

Where a mortgagee holds two mortgages on the same property executed by the same person, he cannot maintain a suit to recover the sum due on the later mortgage only, by sale of the property subject to the prior mortgage.

SECOND appeal from the decision of J. C. Gloster, District Judge of Broach, varying the decree passed by P. J. Talyarkhan, Subordinate Judge of Ankleshwar.

On the 29th September 1895, Mithia mortgaged his house to the plaintiff for Rs. 599. The mortgage was without possession. Vanmali (a brother of Mithia) joined in this mortgage apparently as a surety.

On the 13th June 1898 Mithia alone (Vanmali having died in the meanwhile) executed a second mortgage in favour of the plaintiff in respect of the same house for Rs. 399. The material portions of the deed are set out in the judgment of Russell, J.

Under the second bond the plaintiff received Rs. 130, and to recover the balance Rs. 269, the plaintiff filed on the 27th

* Second appeal No. 214 of 1905.