

## APPELLATE CIVIL.

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

1905.  
August 31.

GANPAT TATIA MAIMKAR (ORIGINAL APPLICANT), APPELLANT, *v.*  
ANNA BIN ANANDRAO AND OTHERS (ORIGINAL OPPONENTS), RESPONDENTS.\*

*Guardians and Wards Act (VIII of 1890), sections 34, 35, 36 and 37—  
Minor—Guardian—Administration bond passed to Judge—Refusal of the  
Judge to assign—Appeal.*

No appeal lies from an order passed by the District Judge under section 35 of the Guardians and Wards Act (VIII of 1890) declining to assign the bond.

A bond under section 34 of the Guardians and Wards Act (VIII of 1890) is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed engaging duly to account for what the guardian may receive in respect of the property of the ward. There is nothing in the section or in the form, as given in the schedule of the High Court Circular Orders, which suggests that the bond ceases to operate either on the death of the guardian or of the ward or on the cesser or otherwise of the guardianship, so that a right of suit would still continue notwithstanding the happening of these events.

The District Judge can in his discretion under such circumstances assign such a bond to a proper person.

APPEAL converted into an application under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the order of F. X. DeSouza, District Judge of Sholapur, rejecting an application for the assignment of a bond under section 35 of the Guardians and Wards Act (VIII of 1890).

One Apparav Anandrav, a certificated administrator of Bhagirathibai, a minor, passed a bond with two sureties, Baburav Dinkar and Laxuman Narasinh, to the District Judge of Sholapur under section 35 of the Guardians and Wards Act (VIII of 1890). The bond was dated the 4th September 1897 and provided *inter alia* for the rendering of proper accounts of the minor's estate from time to time and in default for a liability to pay a sum of Rs. 15,000. Subsequently Bhagirathibai died in December 1897 and Apparav, the certificated guardian, died in the beginning of January 1898. In the year 1902, one Ganpat Tatia Maimkar,

\* Appeal No. 48 of 1905 converted into an application No. 231 of 1905 under extraordinary jurisdiction.

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claiming himself to be the heir of the deceased Bhagirathibai, brought a suit in the Court of the First Class Subordinate Judge of Belgaum for an account of the estate of the deceased against the heir of the certificated guardian and the two sureties. While the suit was pending, Ganpat Tatia Maimkar applied to the District Judge of Sholapur for the assignment of the bond to him so that he may be in a position to continue the suit. The District Judge rejected the application on the following grounds:—

It appears from the record that Apparav rendered no accounts of the estate of his ward to the District Court as stipulated in the bond. But on a construction of sections 35, 36 and 37 of the Act, I am of opinion that the assignment contemplated by section 35 can only be made during the life-time of the ward and during his minority only. Under section 35, the assignee is entitled to recover on the bond "as trustee for the ward"; his heirs and representatives are not contemplated either expressly or by necessary implication. Under section 36, the appointment of next friend by the Court is provided for only "during the continuance of the minority of the ward." The inference is that the legislature has made provision for this exceptional machinery to safeguard the minor's interest only during the life-time and minority of the ward. This will be apparent from a consideration of the wording of section 37, which after referring to the remedies "expressly provided in sections 35 and 36" enacts a saving clause in favour of the general liabilities of the guardian or his representative, as trustee for the ward or his representative.

In this view of the law, I am of opinion that the present application should be dismissed with costs.

The applicant preferred an appeal.

*G. S. Mulgaumkar* for the appellant (applicant):—The Judge erred in construing sections 35, 36 and 37 of the Guardians and Wards Act. He has put a very narrow construction upon the sections and according to his view the provisions of the Act would become nugatory.

*N. V. Gokhale* for the respondents (opponents):—The Judge can assign the bond only during the life-time of the ward but after the ward's death he cannot do so. He can himself take action on the bond.

Further under section 47 of the Guardians and Wards Act the order of the Judge is not appealable.

[JENKINS, C. J.:—We can convert the appeal into an application under the extraordinary jurisdiction under section 622 of the Civil Procedure Code.]

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*Mulgaumkar*, in reply:—We pray that we may be allowed to convert the appeal into an application as the Judge has by his order denied jurisdiction vested in him under the said sections of the Act.

JENKINS, C. J.—This appeal arises out of an application made by the appellant to the District Judge to have a bond assigned in his name to enable him to continue a suit in the Court of the First Class Subordinate Judge of Sholapur.

The bond is not before us but it is stated by the District Judge that it was passed to the District Judge of Sholapur by Apparao and two sureties.

The application is made under section 35 of the Guardians and Wards Act.

The District Judge has declined to assign the bond, and it is clear that no appeal lies from that determination.

We have, however, allowed the appeal to be converted into an application under section 622 of the Civil Procedure Code, and we think that we can with propriety interfere with the order of the District Judge, because he appears to us to have based his refusal on the ground that it was not possible for him to make the assignment.

We do not agree with that view. A bond under section 34 is to be given to the Judge of the Court to enure for the benefit of the Judge for the time being, with or without sureties, as may be prescribed engaging duly to account for what the guardian may receive in respect of the property of the ward. The form of the bond is given in the schedule to the High Court Civil Circular Orders.

Now there is nothing in the section or in the form which suggests that the bond ceases to operate either on the death of the guardian or of the ward or on the cesser otherwise of the guardianship, so that a right of suit would still continue notwithstanding the happening of these events. Then who is to sue? Unless there is an assignment it must be the District Judge. It appears to us that it would be most undesirable for a District Judge to have to sue though events may compel him to do so, and, it is for this reason that the assignment by the District Judge to a proper person is provided for by the Act.

In our opinion the learned District Judge has placed too narrow a meaning on sections 35, 36 and 37 of the Act, when he spells out of them anything which prevents the District Judge assigning the bond after the happening of the events which have occurred in this case, and we at present think that the District Judge has power to assign the bond, though by so saying we do not intend to prejudice any defence that may be raised in any suit hereafter brought. As to whether he should or should not assign it is a matter for his consideration; all we can do now is to set aside the order passed, and remit the case in order that the District Judge may determine whether in the circumstances he should assign the bond.

No order as to costs.

G. B. R.

## ORIGINAL CIVIL.

*Before Mr. Justice Tyabji.*

MOTILAL PRATABCHAND, PLAINTIFF, *v.* SURAJMAL JOHARMAL  
AND ANOTHER, DEFENDANTS.\*

1904.

September 27.

*Letters Patent, clause 12—Contract Act (IX of 1872), sections 46-49, 94—  
Commission agent—Place of payment of debt—Cause of action—Jurisdiction.*

The plaintiff, a commission agent and merchant carrying on business in Bombay, gave instructions to the defendants, also commission agents and merchants carrying on business at Phulgaon in the Birda Zilla, to enter into certain transactions on behalf of the plaintiff, and the defendants entered into those transactions as commission agents on behalf of the plaintiff. Accounts were sent and advices were transmitted from Phulgaon to the plaintiff in Bombay and from Bombay by the plaintiff to the defendants at Phulgaon. Subsequently the plaintiff having applied for leave under clause 12 of the Letters Patent brought a suit in the High Court at Bombay to recover the amount due from the defendants at the foot of the accounts between himself as principal and the defendants as commission agents at Phulgaon: the defendants pleaded want of jurisdiction.

*Held* that as (1) instructions were sent to the defendants from Bombay, (2) accounts were rendered to the plaintiff (at Bombay) and (3) demand was made from Bombay to the defendants at Phulgaon, the payment of money therefore was clearly to be in Bombay.

\* Original Suit No. 492 of 1904.