ORIGINAL CIVIL.

Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.

BUDHILAL MANJI (APPELLANT AND PLAINTIFF) *v.* MORARJI PREMJI AND OTHERS (RESPONDENTS AND DEFENDANTS).*

1907.
March 22.

Civil Procedure Code (Act XIV of 1882), section 440—Guardian of Minor "appointed by an authority competent in this behalf", meaning of—Powers of a Hindu father to appoint a testamentary guardian to his minor son—Indian Succession Act (X of 1865), section 47, not applicable to the will of a Hindu.

Assuming that a Hindu father has power to appoint a testamentary guardian, it is not by virtue of any statute; for section 47 of the Indian Succession Act does not apply to the will of a Hindu.

If, therefore, the power exists it must be under Hindu Law as distinct from statute. It would not be in accordance with the ordinary use of language to speak of a father, whose power (if any) rests on the General Hindu Law as "an authority competent in that behalf."

It is clear that section 440 of the Civil Procedure Code does not apply to all guardians, for it would be impossible to suggest that it applies to natural guardians.

MANJI JIVRAJ died on 10th March 1903, leaving the plaintiff his minor son. By his will he appointed the first and second defendants two of his executors and directed them to bring up his son in a proper manner. By clause 7 of his will he said "my son Budhilal is to remain under the protection of his maternal grandmother, Bai Panbai, and for (her) taking care of (him) Rs. 10 per month are to be duly paid to her."

This suit was filed by Shamji Mulji, husband of Bai Panbai, as the next friend and on behalf of the minor for an account of the administration of the deceased's estate by the first two defendants.

After the institution of the suit Shamji Mulji disappeared from Bombay, and thereafter a woman named Radhabai applied to the Court for an order under section 447 of the Civil Procedure Code for the appointment of a new next friend. The application was opposed by the first and second defendants, who were two of the executors of the father of the boy, on

* Appeal No. 1437, Suit No. 711 of 1904.

1907.

BUDHILAL v. MORARJI.

the ground that under the father's will Panbai had been appointed guardian of the person of the minor, and that therefore under section 440 of the Civil Procedure Code the suit was a suit which could not be instituted except with the leave of the Court, which had not been obtained. That point was not decided then, but by consent an order was made that Radhabai should be appointed next friend without prejudice to the contention of defendants Nos. 1 and 2 that the suit as originally framed was bad under section 440 of the Code of Civil Procedure. The case was heard by Scott, J., who dismissed the suit with costs on the ground that the words in section 440—"a guardian appointed or declared by an authority competent in this behalf"—applied to a guardian appointed or declared by the will of a Hindu father, and that for that reason the suit was improperly instituted and could not be continued by the present next friend.

Against this decision the plaintiff appealed.

Inverarity for the appellants:—A substantial cause of action is shown in the plaint. Suit originally filed by Lalji Shamji who was the minor's maternal grandfather and husband of Panbai, who was alleged to be the guardian of the minor's person. Shamji and Panbai have both disappeared. Radhabai is proper next friend. The points we rely on are—

(1) Section 440 of the Civil Procedure Code does not include a guardian appointed by a Hindu father on the assumption that a Hindu father had power to appoint.

(2) A Hindu father has no power to appoint the guardian to his minor child.

(3) Panbai has not been appointed guardian.

(4) Either no guardians were appointed or the executors were the guardians.

(5) In any case the order appointing Radhabai next friend has cured all defects.

(6) In any case the Court ought not to dismiss the suit, but stay it until notice is given.

On the first point we say that section 440 was introduced by the Guardian and Wards Act (Act VIII of 1890).

Before that Act you could not file a suit for a minor except by obtaining a certificate of administration.

That section was introduced for the purpose of inducing persons appointed as guardians to come in and be declared as guardians.

See Stokes' Second Supplement to the Anglo-Indian Codes, page 40, note (1).

Scott, J.'s judgment is based on sections 51, 52, 53 of the Guardian and Wards Act.

But there are other authorities other than a Court who can appoint a guardian.

The Collector has power to appoint a guardian of a minor lunatic under section 11 of Act XXXV of 1858. Guardians are appointed by the Court of Wards under section 11 of Act XVII of 1885 (Central Provinces).

The Board of Revenue is a Court of Wards under the North-West Provinces Act XIX of 1873, section 193 and section 3, cl. 11, and section 199.

See also Act XVII of 1876 (Oudh Code).

The words in section 440 "or declared" are unnecessary. They are taken from section 7 of Guardian and Wards Act.

(2) A Hindu father has no power to appoint a guardian by will.

See section 6, Guardian and Wards Act.

The Hindu Wills Act omits section 47 of the Indian Succession Act (X of 1865).

Section 3 of Act XV of 1856 is the only Act which suggests that the power exists.

See *Jussoda Kooer* v. *Lallah Nettya Lall*[1].

He also referred to the following authorities:—Mayne, p. 273 (6th Edn.); West and Bühler, p. 673 (3rd Edn.); Colebrooke, pp. 574, 575 (Vol. II, 3rd Edn.); Strange, Vol. I p. 71; Steele, pp. 189-190. *Soobah Doorgah Lal Jha* v. *Rajah Neelanund*

(1) (1879) 5 Cal. 43.

1907.

BUDHILAL v. MORARJI.

Singh[1]; *Vallabdas Hirachand* v. *Krishnabai*[2]; *In the matter of Srish Chunder Singh*[3].

(3) No power has been exercised in this case even if the power existed.

The Court ought not to dismiss the suit. The defendants cannot argue, after their consent was given to the order of April to cure all defects, that the suit should be dismissed.

Jardine for the respondents supported the judgment.

JENKINS, C.J.—This appeal arises out of a suit instituted in the name of a minor, Budhilal Manji, by his next friend Shamji Mulji.

By an order of the 8th of April 1905 the name of Shamji Mulji was removed and that of Bai Radhabai was substituted as next friend, but this was expressed to be without prejudice to the contention of defendants 1 and 2 that the suit as originally framed was bad under section 440 of the Civil Procedure Code.

This saving clause refers to the last para. of section 440, which provides that:—Every suit by a minor shall be instituted in his name by an adult person, who in such suit shall be called the next friend of the minor, and may be ordered to pay any costs in the suit as if he were the plaintiff.

The defendants' contention is that by the will of Manji Jivraj, the minor's father, Bai Panbai was appointed the minor's guardian, and that as the provisions of the section have not been observed this suit should be dismissed.

Scott, J., accepting this view, has dismissed the suit, and from this decree the present appeal has been preferred.

The points urged before us are (1) that assuming Bai Panbai has been appointed a guardian of the minor, still she was not so appointed "by an authority competent in this behalf"; (2) that a Hindu father has not the power to appoint a testamentary guardian; (3) that if there is such a power, still Bai Panbai has not been appointed; and (4) that any defect has been cured by the order of the 8th April 1905.

(1) (1867) 7 W. R. 74 (Civ. Rul.). (2) (1892) 17 Bom. 566.
(3) (1893) 21 Cal. 206.

If a Hindu father has power to appoint a testamentary guardian, it is not by virtue of any statute, for section 47 of the Indian Succession Act is not made applicable by the Hindu Wills Act to the will of a Hindu.

If, therefore, the power exists, it must be under Hindu Law as distinct from Statute Law. But assuming for the sake of argument that there is such a power, an appointment in exercise of it is not in my opinion an appointment "by an authority competent in this behalf." I do not think it would be in accordance with the ordinary use of language to speak of a father whose power (if any) rests on the general Hindu Law as "an authority competent in that behalf." Scott, J., it is true, held that a Hindu father did come within that description, but he came to this conclusion not because this would be the natural meaning of the words, but from a comparison of this phrase with others used in the Guardian and Wards Act whereby the paragraph under consideration was incorporated in the Civil Procedure Code.

He thought that the phrase "authority competent in this behalf" must mean something wider than a Court of justice, and therefore he held it must include a Hindu father purporting to appoint a testamentary guardian.

But then it was not pointed out to the learned Judge that by certain Acts a power of appointing guardians was vested in what might well be described as an authority competent in that behalf. See Act XXXV of 1858, section 11; Act XVII of 1885 (Central Provinces), sections 11, 13 and 4; Act XIX of 1873 (North West Provinces), sections 199, 193 and 3 (11); and Act XVII of 1876 (Oudh Code), sections 167, 168, 161 and 2, so that the ground of this reasoning is considerably weakened.

It is clear that section 440 does not apply to all guardians, for it would be impossible to suggest that it applies to natural guardians.

And if the respondents' argument is right, a guardian appointed by a Hindu father would be entitled to the benefit of section 440, though the father himself would not.

1907.

BUDHILAL v. MORARJI.

I can see no reason for straining the language of the section to the extent for which the respondent contends.

I have for the sake of argument assumed in the respondent's favour that a Hindu father can appoint a guardian of his minor son by will, but I do not so decide, as in the view I take of the section it is not necessary that I should.

The result is that the decree of the learned Judge must be reversed and the case heard on its merits.

The respondents must pay the appellants' costs of the appeal.

Decree reversed.

Attorneys for the appellant: *Messrs. Dharamsey & Co.*

Attorneys for the respondent: *Messrs. Mulla and Mulla* and *Messrs. Pestonji, Rustim and Kola.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Russell.

1907.
February 12.

NARRONDAS RAMJI AND ANOTHER, PLAINTIFFS, v. NARRONDAS RAMJI AND OTHERS, DEFENDANTS.*

Express Trust—Limitation Act (XV of 1877), section 10—Effect of Limitation in cases where the person liable for payment of a legacy and the person entitled to receive the legacy are the same.

L. K. was a partner in the firm of R. L. As such partner he was entitled to his proportion of certain shares of the Hongkong Mill and of the commission earned by his firm as agents of such mill. On his retirement from the firm in 1900 entries were made in the firm's books from which it appeared that 35 of such shares were appropriated to the said L. K. and that he from the date of the entries ceased to have any interest in the firm of R. L.

Held, that under provisos 2 and 4 of section 92 of the Evidence Act evidence was admissible to show that in fact the arrangement was that L. K. should continue to be entitled to his share in the commission.

The suit was brought by the executors of L. K.'s will against the executors of R. L.'s will. The first plaintiff was an executor of both wills.

* Original suit No. 120 of 1906.