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occurred to the referring authority, *viz.*, whether the lease does not fall under the exemption from Article 35 being a lease executed in the case of a cultivator for the purposes of cultivation, the average annual rent reserved not exceeding Rs. 100.

Answer accordingly.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Heaton and Mr. Justice Shah.

1915. *March* 9.

DAYABHAI RAGHUNATHDAS (ORIGINAL APPLICANT), APPELLANT, *v.* BAI PARVATI AND ANOTHER (ORIGINAL OPPONENTS), RESPONDENTS.*

Guardians and Wards Act (VIII of 1890), section 25—Custody of minor—Application by guardian—Guardian need not be a certificated guardian.

An application under section 25 of the Guardians and Wards Act (VIII of 1890) for the custody of a minor can be made by a guardian, who need not be a certificated guardian.

APPEAL from the decision of M. S. Advani, District Judge of Surat.

This was an application under the Guardians and Wards Act (VIII of 1890).

The applicant applied under section 25 of the Act to the District Judge at Surat to recover the custody of his minor daughter Bai Mani.

The District Judge was of opinion that the applicant, not being a certificated guardian of the minor, could not maintain application. The learned Judge dismissed it on the following grounds :—

It is contended by the learned Vakil that as the applicant is the natural guardian of the minor under the Hindu Law you could seek assistance of the Court under section 25 of the Act to have the custody of the minor. He has quoted no direct authority in support of his contention. He

* First Appeal No. 240 of 1914.

has drawn my attention to a case reported in I. L. R. 26 All, 594. There it was laid down that no suit would lie in a Court for recovery of the person of a minor but that a proper remedy would be an application under the Guardians and Wards Act, as that Act was intended to be a complete Code defining the rights and remedies of wards and guardians. If this ruling is carefully considered it will show that a person should, in the first instance, make an application under the Act to have himself appointed or declared guardian of the minor and then seek other reliefs.

The next case relied upon by the learned pleader is the one reported in I. L. R. 25 Bom. 574. There it was pointed out that there were three courses open to a person whose ward had been removed from his custody. Firstly, he could proceed in a criminal Court. This remedy has been taken adavantage of by the applicant and his complaint has been rejected by the learned City Magistrate. Secondly, he can proceed under the Guardians and Wards Act. This remedy has been dropped after making an application to this Court. Thirdly, the guardian can file a suit.

Next case relied upon is the one reported in 16 Bom. L. R. 625. This case does not help the applicant. When looked through properly this authority is against the applicant, for it expressly lays down that "a District Court is not a Court exercising the jurisdiction of the Crown over infants and has no jurisdiction over infants except such jurisdiction as is conferred by the Guardians and Wards Act."

Chapter II of the Act deals with appointment and declaration of guardians. Then comes Chapter III which deals with duties, rights and liabilities of guardians.

It is in this chapter section 25 comes. Having regard to the position of section 25 in the Act it seems to me that the Legislature contemplated the appointment under the Act and it is only after the appointment had been made the guardian could seek the assistance of the Court to have the ward restored to him which had been removed from his custody. Here the applicant in paragraph 4 of the application definitely states that he does not want to be appointed or declared guardian of Bai Mani. Such being the case I am of opinion that I cannot grant his prayer. His proper course will be first to get himself appointed or declared guardian of Bai Mani under the Act and then move the Court for assistance under section 25 of the Act.

The applicant appealed to the High Court.

T. R. Desai, B. G. Rao and *M. D. Daru,* for the appellant.

G. N. Thakor, for the respondents.

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SHAH, J. :—This is an appeal under the Guardians and Wards Act. It arises out of an application made by the appellant to the District Court of Surat under section 25 of the Act for the custody of his minor daughter Bai Mani.

The lower Court has rejected this application on the ground that unless the appellant takes steps to be appointed a guardian of the minor, no application under section 25 could be entertained by that Court.

The correctness of this view has been questioned before us in this appeal. A 'guardian', as defined by the Act, means a person having the care of the person of a minor or of his property or of both his person and property. The appellant is the father of the minor and claims to be her natural guardian. Section 25 refers to the custody of a guardian and not of a guardian appointed under the Act. This distinction between a guardian and a guardian appointed under the Act is to be noticed throughout the Act. As an illustration we may refer to section 26 of the Act where provision is made with reference to a guardian of the person appointed or declared by the Court.

It seems that it is open to an aggrieved party to make an application to the Court under section 25 where the ward leaves or is removed from the custody of a guardian of his person. It is not essential that there should be a certificated guardian before an application under section 25 could be entertained by the Court. We do not see anything either in the scheme of the Act or in the position of section 25 in Chapter III which relates to duties, rights and liabilities of a guardian, which can be said to be in conflict with this view; on the contrary it appears that the scheme of the Act supports it.

We say nothing as to the merits of the application. It was suggested on behalf of the respondents that

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the application may be disposed of on the merits here. But the lower Court has decided the application on a preliminary ground and it would not be right to say anything as to the merits at this stage. This appeal is decided only on the allegations made in the petition, which contains an averment that the applicant is a guardian of the minor as defined by the Act and that the ward is removed from his custody.

It follows, therefore, that the order of the lower Court must be set aside and the application sent back to that Court for disposal according to law.

Costs to be costs in the application.

Order set aside.

R. R.

PRIVY COUNCIL.*

BAL GANGADHAR TILAK AND OTHERS, PLAINTIFFS, *v.* SHRINIVAS PANDIT AND OTHERS, DEFENDANTS.

P. C.*
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January 21, 22, 25, 26, 27, 28, 29.
March 26.

[On appeal from the High Court of Judicature at Bombay.]

Hindu law—Adoption—Validity of adoption—Non-performance of ceremony of datta homam*—Will giving power to widow to adopt with consent of trustees where one declines to act—Omission to follow provisions of section 145 of Evidence Act as to using documents to contradict witnesses—Inferences drawn from documents so used, and basing decision on them to prejudice of witnesses—General allegations of undue influence and fraud without specific issues or pleas.*

On this appeal, their Lordships of the Judicial Committee, in a suit to establish the validity of an adoption, *Held* (reversing the decision of the High Court) that on the evidence and under the circumstances of the case the adoption was valid.

Where the boy to be adopted is of the same *gotra* as the adoptive father the performance of the ceremony of *datta homam* is not essential to the validity of the adoption among Maratha Brahmins in Bombay.

* *Present* :—Lord Shaw, Sir George Farwell, Sir John Edge and Mr. Ameer Ali.