1916.

EMPEROR v. A DEAF AND DUMB ACCUSED.

in finding that the accused understood the nature of the act which he was committing when he committed this theft.

We, therefore, confirm the conviction and sentence the accused to one month's rigorous imprisonment.

Conviction and sentence confirmed.

R. R.

APPELLATE CIVIL.

1916.

April 14.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

ACHRATLAL JEKISANDAS (ORIGINAL OPPONENT), APPELLANT *v.* CHIMANLAL PARBHUDAS (ORIGINAL PETITIONER), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sections 12, 13, 17, 19, 24 and 25—Minor never in the custody of his father—Application by father for custody of his son under Guardians and Wards Act—Refusal of the District Court to make an order on the application—Remedy by way of suit—Jurisdiction of District Court.

One C, the maternal uncle of B, a minor, applied to the District Court at Ahmedabad for the appointment of himself as guardian of the person and property of the minor in preference to A, the father of the minor. The Court made no order as to the guardianship of the minor's person by reason of section 19 of the Guardians and Wards Act, 1890, but appointed the Deputy Nazir as the guardian of the minor's property. Subsequently the father who never had the custody of his minor son applied under the Guardians and Wards Act, 1890, for the custody of the boy. The Joint Judge refused to make an order on the application and referred the father to a regular suit. On appeal to the High Court,

Held, that the only remedy of the father was to file a suit for the custody f his son.

Sharifa v. *Munekhan*,[1] followed.

Held further, that the jurisdiction of the District Court was defined by the Guardians and Wards Act and that it had no inherent powers to make orders with reference to minors which were not expressly conferred upon it by that Act.

* First Appeal No. 63 of 1916.

(1901) 25 Bom. 574.

Annie Besant v. *Narayaniah*, [1] followed.

FIRST appeal against the decision of R. S. Broomfield, Joint Judge of Ahmedabad, in Miscellaneous Application No. 41 of 1913.

The petitioner Chimanlal Parbhudas, maternal uncle of the minor, prayed to be appointed guardian of the person and property of the minor Bhalia who was the son of the opponent Acharatlal Jekisandas, in the place of his father Parbhudas Ghelabhai. Parbhudas was appointed the guardian of the minor's person and property by the District Court in 1910. He having died on the 18th May 1912, the present application was made by the petitioner.

The father of the minor opposed the claim on the ground that he was better qualified than the petitioner to be the minor's guardian.

The District Court appointed the Deputy Nazir as the guardian of the property of the minor but passed no order as to the guardianship of the person of the minor in view of the provisions of section 19 of the Guardians and Wards Act, 1890.

Subsequently the father made an application under the Guardians and Wards Act for the custody of his minor son.

The Joint Judge dismissed the application holding that the father had only two courses open to him; viz., to file a regular suit for the custody of his boy, or to apply to the High Court for an order in the nature of Habeas Corpus under section 491 of the Criminal Procedure Code.

The father appealed to the High Court.

G. N. Thakor, for the appellant :—We say the Joint Judge is in error in holding that he had no jurisdiction

[1] (1914) 38 Mad. 807.

1916.

ACHRATLAL JEKISANDAS v. CHIMANLAL PARBHUDAS.

to make the order asked for. On the merits the learned Judge is entirely with us but he thinks our remedy is under section 491, Criminal Procedure Code (Act V of 1898), or by a regular suit. Assuming that remedy is open it does not preclude the father from applying under the Guardians and Wards Act, 1890.

The term "Guardian" is defined in the Act and is not confined to a guardian appointed by the Court: section 4 (2) of Guardians and Wards Act, 1890. It has been held by this Court that a father has a right to apply under section 25 of the Act, although he may not have been appointed a guardian by the Court: see *Dayabhai Raghunathdas* v. *Bai Parvati*.[1]

A guardian is charged with the custody of the ward under section 24. If it imposes on a guardian this duty there is a correlative right to have the assistance of the Court under the Act.

Section 25 will apply in terms. The appellant had through the boy's mother the custody of the boy originally. Again after the grandfather's death the appellant had in law the custody of the minor. The respondent had, therefore, to apply to be appointed a guardian. He failed. The Court said "the minor must go to his father and the father is at liberty to exercise his own right of possession and care of the minor." We contend we can apply to the Court to enforce its own order.

As to the right of suit the Privy Council decision of *Annie Besant* v. *Narayaniah*[2] makes it doubtful whether a suit can be filed. The Allahabad High Court has ruled that no suit can be filed: see *Sham Lal* v. *Bindo*[3] and *Utma Kuar* v. *Bhagwanta Kuar*.[4] The

(1) (1915) 39 Bom. 438.
(2) (1914) 38 Mad. 807.
(3) (1904) 26 All. 594.
(4) (1915) 37 All. 515.

Bombay High Court is no doubt inclined to the other view : see *Sharifa* v. *Munekhan*.[1]

Kanga with *Amin and Desai* and *M. H. Vakil*, for the respondent :—We say section 25 of Guardians and Wards Act, 1890, does not apply. The father never had the custody of the minor. The custody of the mother was never the custody of the father. In *Dayabhai Raghunathdas* v. *Bai Parvati*[2] the girl was removed from or had left the custody of the father.

Section 24 has nothing to do with the present facts. It does not speak of giving custody. It does not provide for the way in which custody is to be secured.

Section 12 provides for the temporary custody of the minor. It will apply, if at all, during the pendency of the application for guardianship but not after it has been disposed of. The father has his remedy by a suit : see *Annie Besant* v. *Narayaniah*[3] and *Sharifa* v. *Munekhan*.[1]

The case of *Utma Kuar* v. *Bhagwanta Kuar*[4] is not good law. There the mother was appointed guardian by the Court.

Thakor, in reply.

SCOTT, C. J.:—The question in this appeal is whether the father who has never had the care or custody of his infant child can successfully call upon the Court by an application under the Guardians and Wards Act for an order upon the person in whose custody the infant is to hand him over. The learned Joint Judge holds that the father has two courses only open to him, viz., to file a regular suit for the custody of his boy, or apply to the High Court for an order in the nature of Habeas Corpus under section 491 of the Criminal Procedure

(1) (1901) 25 Bom. 574.
(2) (1915) 39 Bom. 438.
(3) (1914) 38 Mad. 807.
(4) (1915) 37 All. 515.

1916.

ACHRATLAL JEKISANDAS v. CHIMANLAL PARBHUDAS.

Code. In regard to the Criminal Procedure Code, section 491, the learned Judge is in error, for such an application could only be made in a case falling within the limits of the ordinary civil jurisdiction of the High Court, whereas this is an Ahmedabad case. That a suit can be filed for the custody of the boy may be conceded on the authority of two decisions in this Court, one being *Sharifa* v. *Munekhan*[1] and the other being referred to in the report in that case. We are not prepared to hold that the dictum of the Privy Council in *Annie Besant* v. *Narayaniah*[2] to the effect that a suit *inter partes* is not the proper proceeding was intended to be of such general application as virtually to overrule the decision of this Court in *Sharifa* v. *Munekhan*.[1]

The only question remaining then is whether the learned Judge was right in refusing to make an order on the application under the Guardians and Wards Act. It may be taken on the authority of the Privy Council in *Annie Besant* v. *Narayaniah*,[2] that the jurisdiction of the District Court is defined by the Guardians and Wards Act, and that it has no inherent powers to make orders with reference to minors which are not expressly conferred upon it by that Act. The chapter of the Act relating to the appointment and declaration of guardians is chapter II. Section 12 provides for the summoning before the Court of the minor for whom an application has been made for the appointment of a guardian, and for the interim custody of the minor pending the hearing of the application under section 13. Then section 17 lays down matters to be considered by the Court in appointing a guardian, and clause 4 of that section lays down the respective rights of parents claiming guardianship where those parents are

(1) (1901) 25 Bom. 574. (2) (1914) 38 Mad. 807.

European British subjects. In such cases the Court will appoint one or other of them a guardian, and the minor will then be given to such parent as is appointed guardian. But where the parents are not European British subjects, section 19 lays down that nothing in the chapter shall authorize the Court to appoint or declare a guardian of the person of a minor whose father is living, and is not, in the opinion of the Court, unfit to be guardian of the person of the minor. Now if a father has had the care and custody of his infant child, he may be within the definition of the Act a "guardian," and the provisions of sections 24 and 25 may then apply to him. But that is not the case where he has not had the custody of his infant child. Section 25 cannot apply to this case for the ward has never left or been removed from the custody of his guardian ; nor again can the provisions of section 24 be invoked, which were held on a liberal interpretation by the Allahabad High Court in *Utma Kuar* v. *Bhagwanta Kuar*[1] to justify the Court in obtaining and delivering over the custody of a minor to a Mahomedan mother who had been appointed guardian by the Court. It appears to us that on the peculiar facts of this case the learned Joint Judge is right, and the only remedy of the father is to file a suit. We think that under the circumstances of the case we should make no order as to costs.

Decree confirmed.

J. G. R.

[1] (1915) 37 All. 515.