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2nd plaintiff should recover from the defendants' possession of the properties in suit with the exception of Survey No. 11 of Sarve free from the mortgage. With regard to the successful appellant he pays his own costs up to the 13th November 1916 when the Subordinate Judge gave the judgment, and he will get his costs in this Court and in the first appeal Court from the defendants.

Decree modified.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

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January 9.

NARAYAN BALAJI NAGARKAR AND ANOTHER (ORIGINAL DEFENDANTS),
APPELLANTS v. KASHIBAI KESHAV SHANKAR DOND NAIK (ORIGINAL
PLAINTIFF), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sections 34 (A), 35 and 36—Person acting as a guardian—Appointment of guardian who passes a bond—Ward dying leaving minor widow heir—Re-appointment of guardian without bond—Liability to account to minor—Liability of legal representatives of the guardian.

A minor having been left as the sole surviving male member of his family, his estate was for a time managed by his maternal grandfather. The latter was subsequently appointed by the Court as guardian of the property and passed a bond under section 34 (a) of the Guardians and Wards Act, 1890. On the death of the minor, he retained management of the property on behalf of the minor's widow, without re-appointment as guardian. Some months afterwards he was again appointed guardian of the property by the Court, but without a bond. The guardian having died, the minor's widow sued his legal representatives for an account of his management:—

Held, that the suit was maintainable, for neither section 35 nor section 36 of the Guardians and Wards Act, 1890, operated as bar.

Held, also, that the legal representatives of the guardian were liable to account, if it was established that property of the minor did go into the hands of the guardian and thence into the hands of his representatives.

* Appeal from Order No. 9 of 1918.

SECOND appeal from the decision of C. N. Mehta, Joint Judge of Poona, reversing the decree passed by and remanding the suit to R. B. Gupte, additional Subordinate Judge at Poona.

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Suit for account.

On the 1st October 1900, one Keshav, a minor, was, on the death of the last adult male member of a joint family left the sole surviving male member of his family. His maternal grandfather Balaji (father of defendants), thereupon began to manage the minor's property.

Balaji was, on the 17th July 1902, appointed a guardian of the minor's property by the Court; and he duly passed a bond required by section 34 (a) of the Guardians and Wards Act, 1890. He continued to manage the property as such till Keshav's death in September 1906.

After Keshav's death, Balaji continued to manage the estate on behalf of Keshav's widow (plaintiff). He did not, at first seek re-appointment as guardian by the Court; he was eventually appointed guardian of the property by the Court on the 26th June 1907; but he did not execute any bond. In this capacity he continued to manage the estate till his death, which took place on the 11th July 1907.

Before his death, Balaji had filed account of management of the estate in the Court on the 18th January 1907. Nothing, however, seems to have been done with reference to the accounts, and there was no order of discharge under section 41 (4).

The plaintiff filed this suit against the sons of Balaji to take account of the management of the estate by Balaji.

The trial Court was of opinion that the cognizance of the suit by the civil Court was barred by the provisions of section 35 of the Guardians and Wards Act, 1890; and dismissed the suit

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On appeal, the Joint Judge held that neither section 35 nor section 36 of the Guardians and Wards Act, 1890, was a bar to the maintainability of the suit in a civil Court. He, therefore, reversed the decree and remanded the suit to the Court of first instance for trial.

The defendants appealed to the High Court against the order of remand.

J. R. Gharpure, for the appellant:—We say that the present suit is barred by section 35 of the Guardians and Wards Act. The guardian appointed by the Court had given the bond as required by section 34 of the Act and the only way in which the present plaintiff could have proceeded was by following the procedure laid down by section 35. The suit is one for taking accounts generally and those accounts have been submitted already by the guardian appointed, father of the present defendants, and they have been accepted by the District Court and it would be anomalous to have the same question tried by an inferior Court, the Subordinate Judge. We rely on *Manmothnath Bose Mullick v. Basanto Kumar Bose Mullick*⁽¹⁾. The guardian, when discharged under section 41, can only be liable for fraud subsequently discovered: see *Murlidhar v. Vallabhdas*⁽²⁾. At any rate we say that the liability was of the guardian personal, and the defendants, his sons, are not liable for the present claim.

W. B. Pradhan, for the respondent:—We say that section 35 is no bar to the present suit; section 35 speaks of one of the remedies that a ward may have against his guardian; that section makes provision for suits of a particular nature to be brought only during the continuance of the minority of the ward; it is not exhaustive. Section 37 keeps the other remedies open. The relief claimed by the present guardian of

⁽¹⁾ (1900) 22 All. 332.

⁽²⁾ (1909) 33 Bom. 419.

the minor plaintiff is a general relief for accounts and for restoration of property, if any, with the representatives of the deceased guardian; such a suit has been held to be maintainable by the Calcutta High Court: *Maharaj Bahadur Sing v. Basanta Kumar Roy*⁽¹⁾ where the case of *Minmothonath Bose Mullick v. Basanto Kumar Bose Mullick*⁽²⁾ has been dissented from.

If sections 35 and 36 be not strictly construed, then the result will be prejudicial to the safeguarding of the interests of the minor. The right of an incoming guardian to bring a suit against a previous guardian for accounts has been upheld: *Kaniz Fatima v. Sajjad Hosain*⁽³⁾; Trevelyan on Minors, pp. 184, 185. The present plaintiff succeeded to the property of her minor husband and she as heir has a right in her own individual capacity to bring a suit against the defendant, the appointed guardian of her husband under section 88 of the Indian Trusts Act and that right cannot in any way be affected by the provisions of the Guardians and Wards Act.

CRUMP, J.:—The question for determination in this case is whether the present suit is barred by reason of anything contained in sections 35 and 36 of the Guardians and Wards Act (Act VIII of 1890).

On October 1st, 1900, Keshav the deceased husband of the plaintiff was left as the sole surviving male member of his family, and became owner of the family estate. Balaji, father of the defendants, who was Keshav's maternal grandfather, assumed the management, as Keshav was a minor, and on July 7th, 1902, he was appointed guardian of the minor's property under the Guardians and Wards Act by the District Court of Poona. He continued to act as guardian up to the death of Keshav in September 1906. After Keshav's death

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⁽¹⁾ (1913) 17 C. W. N. 695

⁽²⁾ (1900) 22 All. 332.

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Balaji continued to manage the estate on behalf of the minor plaintiff and on June 26th, 1907, he was appointed guardian of the property by the District Court. Balaji died in July 1907.

In this suit the plaintiff prays for an account for the whole period during which Balaji was in charge of the estate, viz., from October 1st, 1900, to the date of his death. That against Balaji she would be entitled to an account is not disputed: the sole question is whether she is bound to proceed under the special Act, or whether she has also a remedy apart from that Act. It is necessary in the first place to distinguish as to the capacity in which Balaji was from time to time managing the property—

1. From October 1st, 1900, to July 17th, 1902, Balaji was not a guardian appointed by the Court.

2. From July 17th, 1902, up to Keshav's death in September 1906, he acted as the guardian of Keshav's property duly appointed by the Court, and it is to be observed that he, on July 21st, 1902, gave a bond as provided by section 34 (a) to duly account.

3. From the date of Keshav's death in September 1906 until his appointment as guardian of the minor plaintiff on June 26th, 1907, Balaji was again in charge, not as a guardian duly appointed by the Court but in his private capacity.

4. From June 26th, 1907, until the death in July 1907, Balaji was in charge of the estate of the minor plaintiff as her guardian appointed by the Court. He gave no bond to account under section 34 (a).

In view of the finding of the lower appellate Court it is unnecessary to consider the period after Balaji's death, for it is found that one Godubai, and not the defendants, was in charge of the estate after that event.

It will be observed that the nature of Balaji's connection with this estate varies from time to time, and his liabilities must depend upon the capacity in which he acted in dealing with the property. That the same individual was in charge throughout is an accidental circumstance which must not be permitted to import confusion. During the first and third periods he was not a guardian appointed under the Act. In the first period there was no appointment and as to the third period his powers as guardian ceased on the death of Keshav. So far as these periods are concerned it cannot be contended that the Guardians and Wards Act is any bar to the suit. As regards the second and fourth periods there is a further distinction. During the second period he was the duly appointed guardian of the estate of Keshav, and had given an administration bond. During the fourth period he was the duly appointed guardian of the estate of the plaintiff and had given no such bond. The plaintiff as regards the fourth period is suing the representatives of her guardian. As regards the second period she is suing the representatives of the guardian of her late husband. Though apart from the special provisions of the Guardians and Wards Act she is entitled to sue for an account the distinction has to be kept in mind in considering how far the provisions of the Act may bar a suit. In the one case section 35 of the Act may be applicable, in the other section 36.

The effect of section 37 of the Act clearly is that a suit will not lie against the guardian or his representatives to enforce any remedy, provided by sections 35 and 36 save as provided in those sections. Section 35 contemplates (i) the assignment of the bond, (ii) a suit on the bond to recover anything due on a breach of the bond. Now the present suit is not based on the bond nor does it seek to enforce the bond, and it is not, therefore, (in my opinion) barred by section 35. Section 36 deals

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with a suit instituted by a third person. For such a suit the leave of the Court is required, the object being undoubtedly to prevent guardians being improperly harassed by third persons. There is nothing in the section itself to bar a suit by the ward after the powers of the guardian have ceased, and a new guardian has been appointed, as is the case here. So far as I understand the object of the Legislature there is no reason for imputing to it any intention to bar a suit by a duly appointed guardian. In my opinion these sections must be construed strictly and should not be held to bar the right to sue unless that conclusion is unavoidable. I do not think that such a conclusion necessarily follows in this case. That a new guardian can maintain a suit against a previous guardian has been held by the Calcutta High Court in *Kaniz Fatima v. Sajjad Hosain*⁽¹⁾ though the arguments urged upon us here were not apparently advanced in that case. For the reasons which I have given those arguments do not appear to me to be valid.

In so far as the suit is against the representatives of the late guardian if it be established that property of the minor did go into the hands of the guardian, and thence into the hands of his representatives, there seems no sound reason why those representatives should not be liable to account. That is the effect of the lower appellate Court's order and that is, I think, a correct view. It is in consonance with the opinion expressed by the Calcutta High Court in *Maharaj Bahadur Singh v. Basanta Kumar Roy*⁽²⁾, which appears to me, speaking with due deference, a correct exposition of the law.

I would, therefore, confirm the order of the lower Court and dismiss this appeal with costs. The cross-objections will also be dismissed with costs.

⁽¹⁾ (1906) 34 Cal. 211.

⁽²⁾ (1913) 17 C. W. N. 695.

SHAH, J.:—I agree. I desire to add that we have considered the decision in *Manmothonath Bose Mullick v. Basanto Kumar Bose Mullick*⁽¹⁾, relied upon by Mr. Gharpure in support of the appeal. It is based upon an earlier decision of that Court under Act XL of 1858, and section 41 of the Guardians and Wards Act of 1890. There is no reference to section 37 of the Guardians and Wards Act in the judgment. With great deference to the learned Judges, I am unable to accept the view taken in that case. Section 37 saves all remedies open to a ward or his representative against his guardian which are not expressly provided in sections 35 and 36. In view of this reservation I do not see how a suit like the present suit can be said to be barred unless it is shown to be a suit contemplated by either of these sections. I do not think that the present suit is one contemplated by section 35 in any sense. As regards section 36, after a careful consideration of the scope and terms of the section, I have come to the conclusion that the section does not apply to a suit filed by a guardian appointed under the Guardians and Wards Act on behalf of his ward against the legal representatives of a deceased guardian of the ward for accounts. As regards section 41, it is true that the summary remedy contemplated by sub-section (3) is open to such a guardian. But I do not see how the existence of that summary remedy can be a ground for excluding the ordinary remedy by way of suit. The Calcutta High Court has taken the same view in *Kaniz Fatima v. Sajjad Hosain*⁽²⁾.

In the present case there is no order under section 41, sub-section (4), declaring the previous guardian to be discharged. Apparently the deceased guardian is said to have filed accounts in January 1907 in the District Court. It does not appear clearly as to what happened

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after the accounts were filed. On the present record nothing is shown to have been done with reference to the accounts said to have been filed by Balaji in January 1907. It is common ground that there is no order of discharge under section 41 (4).

Order confirmed.

R. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Crump.

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January 9.

VAIKUNT SHRIDHAR BHATTA (ORIGINAL PLAINTIFF), APPELLANT v. MANJUNATH MADHAV BHANDARI AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 4), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), Order XXI, Rule 60—Execution of decree—Attachment of property—Claim by a person in possession of maintenance charge on the property—Sale of the property in execution subject to the charge—Suit to recover possession of the property after the death of charge-holder—Parties to appeal—Practice and procedure.

Certain property in which a judgment-debtor was interested as a sharer was attached in execution of a decree against him. His mother applied to raise the attachment on the ground that she was in possession of the property, that she was entitled to retain it during her life-time and that it was subject to a charge for her funeral ceremonies. The property was sold subject to her charge and purchased by the plaintiff at the Court-sale. After the mother's death, the plaintiff sued to recover the judgment-debtor's share in the property by partition, when the judgment-debtor and a brother of his (defendants Nos. 2 and 1, respectively) contended that there was no attachment of the property at the time of sale and that the sale was, therefore, invalid. The trial Court decreed the claim on the ground that the sale was valid even though there was no attachment. Defendant No. 1 alone appealed; and the lower appellate Court held that absence of attachment vitiated the sale and dismissed the suit. The plaintiff having appealed,

Held, that the property was sufficiently attached, that all the subsequent proceedings including the sale of the right, title and interest of the judgment-debtor were in order, and that there was no real basis for the objection that the sale was void in consequence of the absence of attachment.

* Second Appeal No. 892 of 1918.