APPELLATE CIVIL

Before Mr. Justice Dixit

RAKHMABAI KACHU GHADGE (ORIGINAL OPPONENT NO. 1), APPELLANT *v.* SITABAI KACHU GHADGE AND ANOTHER (ORIGINAL APPLICANT AND OPPONENT NO. 2), RESPONDENTS.*

1951

June 28

Hindu law—Guardianship—Joint family consisting of minor son and widows of last holder—Hindu Women's Rights to Property Act (XVIII of 1937), s. 3 (2)—Widows having interest in family property under the Act—Power of Court to appoint guardian of minor's property.

Where a joint Hindu family consists of a minor son and two widows of the last holder, the mere circumstance that the widows have an interest in the joint family property by virtue of s. 3 (2) of the Hindu Women's Rights to Property Act, 1937, does not prevent the Court from appointing an officer of the Court as guardian of the property of the minor.

Seetha v. *Narasimha*,[1] followed.

Virupakshappa v. *Nilgangava*,[2] *Bindaji* v. *Mathurabai*,[3] and *Nagappa Narayan* v. *Mukambe*,[4] referred to.

FIRST APPEAL from the decision of G. N. Katre, Esquire, District Judge at Nasik in Miscellaneous Application No. 90 of 1949.

Application under the Guardians and Wards Act, 1890.

One Kachu Ganpat died on April 15, 1945, possessed of considerable moveable and immoveable property. He left behind him two widows, Rakhma (opponent No. 1) and Sita (applicant), a daughter Bhagu (opponent No. 2) by Rakhma, and a son called Khanderao and a daughter called Kamal by Sita.

On December 19, 1949, the applicant made an application to the District Judge at Nasik for her own appointment as the guardian of the persons of her minor children Khanderao and Kamal and for the appointment of the Deputy Nazir as guardian of the property of the minors. She alleged that the opponent No. 1 being the senior widow had entered into possession of all the estate of Kachu Ganpat, and as her management was detrimental to the interest of her minor son she had filed the petition.

The opponent No. 1 opposed the application *inter alia* on the ground that under the Hindu Women's Rights to Property Act,

---

* First Appeal No. 497 of 1950.

[1] (1945) Mad. 568.
[2] (1894) 19 Bom. 309.
[3] (1905) 30 Bom. 152.
[4] (1950) 53 Bom. L. R. 177.

1951

RAKHMABAI KACHU v. SITABAI KACHU

Dixit J.

1937, she had got an undivided one-third share in the estate and hence the petition was not maintainable.

The learned District Judge granted the application by observing as follows:—

"Prior to the Act (i. e. the Hindu Women's Right to Property Act, 1937) the property of a joint family vested absolutely in the sole surviving co-parcener. If such a co-parcener was a minor, the Court had the power to appoint a guardian to his property and I am of the opinion that this power is not taken away merely because the opponent has now acquired a better right to demand a certain share in the property and enjoy it seperately."

The opponent No. 1 appealed to the High Court.

M. G. Chitale, for appellant.

V. S. Desai, for respondent No. 1.

DIXIT J. This is an appeal from an order made by the District Judge, Nasik, appointing the Deputy Nazir as guardian of the property of a minor by name Khanderao. The facts leading up to the application are these.

One Kachu died on April 15, 1945, leaving him surviving two widows, Rakhama and Sita, a son by Sita called Khanderao, a daughter by Sita called Kamal and a married daughter by name Bhagu by Rakhma. Rakhma is the senior widow, while Sita, the mother of Khanderao, is the junior widow. It appears that Kachu left at his death a house and lands both Bagayat and Jirayat. He had a grape garden and also a guava garden. The evidence shows that the net income of the property left by Kachu is between Rs. 3,000 and Rs. 4,000. Khanderao was just an infant, being about 5 years of age, when the application was made on December 19, 1949, for the appointment of the guardian of the person of Khanderao and Kamal and for the appointment of the guardian of the property of Khanderao. It was alleged in the application that his step-mother, i. e., Rakhma, was in possession of the estate of Kachu, and that the management was detrimental to the interest of the minor son. Besides the property which I have mentioned above, the application mentions considerable moveable property in schedule B consisting of outstandings. In the application, the total value of the property is stated to be Rs. 65,065.

Rakhmabai opposed the application. Her contentions were that the application was not maintainable in view of s. 9 of the Guardians and Wards Act, that her management was efficient, that she had an undivided one-third share in the estate

1951

RAKHMABA KACHU v. SITABAI KACHU

Dixit J.

of Kachu, and that if the property was given in the management of the Deputy Nazir, the same would be neglected and that the application was made at the instigation of persons hostile to opponent Rakhma.

Upon the evidence adduced before him, the learned Judge accepted the application and made an order appointing Sitabai as the guardian of the person of the minors Kamal and Khanderao and appointing the Deputy Nazir as the guardian of the property of the minor. He also made consequential orders in order to give effect to the main order. Opponent Rakhmabai has appealed.

Upon this appeal the first contention taken on behalf of the appellant is that this was not a case in which it was necessary to make an appointment of the guardian of the property of the minor. I was referred to the evidence of Sitabai and the evidence of Rakhmabai. While Sitabai stated that it was necessary to make the appointment of the guardian of the property of the minor, Rakhmabai stated that the minor's estate would suffer if the Deputy Nazir was appointed guardian of the estate. It will be seen from the evidence of Sitabai that the property left by Kachu was considerable. Rakhmabai who is in possession is a step-mother of the minor Khanderao. It appears from the evidence of Sitabai that Rakhmabai was not conducting the management in consultation with Sitabai, and that Rakhmabai asked Sitabai to leave the family. The family consists of the two widows, the minor Khanderao aged 5 and an unmarried daughter Kamal aged 9. When it is remembered that the step-mother is in possession of the property and the relations between the two being strained and the property left by Kachu considerable, which, on Rakhmabai's own showing, is not managed without the assistance of her servants, it seems to me that the lower Court was right in appointing the Deputy Nazir as the guardian of the property of the minor. According to s. 7, in making the appointment of a guardian of the property of a minor, the Court must be satisfied that it is for the welfare of a minor that an order should be made, and having regard to the aforesaid considerations, it seems to me that the learned District Judge was right in making the appointment of the Deputy Nazir as the guardian of the property of the minor Khanderao.

But Mr. Chitale's contention is that in this case the Deputy Nazir cannot be appointed as guardian of the property, because Rakhmabai has an interest in the property and she is in

1951

RAKHMABAI KACHU v. SITABAI KACHU

Dixit J.

management of the property. Reliance was placed upon s. 3, sub s. (2) of the Hindu Women's Rights to Property Act, 1937. So far as material, the section is as follows:—

"When a Hindu governed by any school of Hindu law other than the Dayabhag school or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-s. (3), have in the property the same interest as he himself had."

It is urged that Rakhamabai has a share in the family property, and since she was managing the property, the appointment of the Deputy Nazir cannot be made. In determining this question it is necessary to appreciate the true position of a lady like Rakhmabai in the family. Rakhmabai is one of the two widows of deceased Kachu. Prior to the passing of the Hindu Women's Right to Property Act, 1937, all that she was entitled to was maintenance, and a provision for residence. The Act conferred upon her better rights and under s. 3 (2) she got an interest in the joint family property which her husband had in it at the time of his death. It is to be noticed that s. 3, sub-s. (2), does not give her a share in the joint family property. According to s. 3, sub-s. (3), the interest which devolved upon her is the interest known as a Hindu woman's estate, and she is given the right to claim partition as a male owner. A widow like Rakhmabai is not a coparcener. She does not get an interest in the joint family property either by survivorship or by inheritance. She gets a special kind of property under the Hindu Women's Rights to Property Act, 1937. Although she is not a coparcener, she is a member of a joint Hindu family. Now, in a joint Hindu family it is the eldest male member who is entitled to act as the manager of the family. Mr. Chitale at one stage contended that she was a coparcener. But I think the contention is fantastic. The test to determine the question whether a widow in the position of Rakhma is a coparcener or not is to see whether she gets an interest in the property by birth and whether she gets property by survivorship. These two attributes of the conception of coparcenary can hardly apply to a widow, and, in my opinion, it is idle to contend that she is a coparcener in the family. But Mr. Chitale contends that there is nothing in law to prevent her from acting as a manager of the family. I am unable to accept this contention. In the joint Hindu family it is the eldest male member who acts as the manager and leader of the family and I am not prepared to accept the position that merely because

1951

RAKHMABAI KACHU v. SITABAI KACHU

Dixit J.

a widow gets an interest in the joint family property, that would invest her with the right of a manager of the family and this is settled by authority.

Where a family consists of adults and minors, the appointment of a guardian of the property of a minor cannot be made under the Guardians and Wards Act, 1890. This principle is laid down in *Virupakhappa* v. *Nilgangava*[1]. This proceeds upon the view that where you have an adult who is the manager of the family, an appointment of a guardian of the property of a minor under the Guardians and Wards Act will interfere with the management of the manager who has a right under the law to manage the property. *Virupakshappa's* case,[1] therefore, does not assist Mr. Chitale. The case of *Bindaji* v. *Mathurbai*[2] was a case of a family consisting of minors, and it was held that where all the coparceners are minors, a guardian of the property of the whole number can be made. But Mr. Chitale contends that in this case the family consists of a minor and two widows and so the appointment of a guardian under the Guardians and Wards Act cannot be made. The nature and the extent of the rights given to a widow under s. 3 of the Hindu Women's Rights to Property Act were considered in *Nagappa Narayan* v. *Mukambe*.[3] It is there pointed out that the interest which a widow gets by virtue of s. 3, sub-s. (2), is not by right of survivourship or by right of inheritance, but the Act gives the widow a special kind of property. It is to be noticed that s. 3 sub-s. (2), uses the expression "interest" and does not use the expression "share". In this connection s. 3 (1) and s. 3 (2) may be contrasted. The position, therefore, of Rakhamabai in the family is that while she is a member of a joint Hindu family, she is not entitled to be the manager of the family, and all that she is entitled to is to claim an interest in the joint family property by partition if she is so minded. If she cannot be the manager of the family, then there is nothing to prevent the Court from appointing an officer of the Court as guardian of the property of the minor, and the mere circumstance that she has an interest in the joint family property gives her no right to say that in such a case a guardian cannot be appointed of the property of the minor. As I said, where the family consists of adults and minors, the position is a simple one. In such a

[1] (1894) 19 Bom. 309.

[2] (1905) 30 Bom. 152, s. c. 7 Bom. L. R. 809.

[3] (1950) 53 Bom. L. R. 177.

1951

RAKHMABAI KACHU v. SITABAI KACHU

Dixit J.

case, no guardian can be appointed. In a case where the coparcenary consists of minors only, a guardian of the property of the minors under the Guardians and Wards Act can be made and the question which falls to be determined in this case is whether in a case where the family consists of two widows and a minor son, a guardian can be appointed of the property of the minor. While it is noticeable that she gets an interest in the family property which her husband had at the time of his death, the property continues to be the joint family property, and all that the widow is entitled to is to claim by partition an interest in the property which her husband had at the time of his death. If she is not the manager of the family, then some one must step in in a suitable case in order to protect the interest of the minor, and I do not see why in such a case the Court would have no power to appoint an officer of the Court as guardian of the property of the minor. In this particular case, the minor, on attaining the age of majority, will be entitled to manage the property. If Mr. Chitale's argument is right, in such a case the minor, on attaining majority, will not be entitled to be the manager of the property, because Rakhmabai would, according to him, be the manager of the family. Such a result will, in my opinion, be startling. I am not, therefore, satisfied that the contention urged in support of the appeal is correct. Besides, the view which I take is in accordance with the decision of the Madras High Court reported in the case of *Seetha* v. *Narasimha*[1]. For all these reasons the lower Court was, I think, right in appointing the Deputy Nazir as the guardian of the property of the minor.

The last contention taken on behalf of the appellant is that in any case Rakhmabai should not be deprived of the possession of the property in her possession and that time should be given to her in order to enable her to file a suit for partition. This argument is, I think, less impressive than the one which I have dealt with already. Section 3, sub-s. (3), of the Act, gives her a right to demand partition. Section 3, sub-s. (2), gives her an interest in the joint family property, and it was open to her, if she was so minded, to claim partition at any time she liked. But she cannot resist the present application by contending that no appointment could be made and yet continue the *status quo* by not filing a suit for partition. As regards a suitable provision to be made for Rakhamabai, the

[1] [1945] Mad. 568.

lower Court has made an order in that sense, and I do not think that any further order is necessary.

For the above reasons, therefore, I think the decision of the lower Court is correct. This appeal fails and the same will be dismissed with costs.

Appeal dismissed.

M. W. P.

1951

RAKHMABAI KACHU *v.* SITABAI KACHU

Dixit J.

APPELLATE CIVIL

Before Mr. Justice Bhagwati and Mr. Justice Vyas.

VISHWAMBHAR HARIHAR PANDIT, AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* PARASU KUSHAPPA DAREKAR, AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1951

July 20

Bombay Land Revenue Code (Act V of 1879), s. 83—Permanent tenancy—Whether commencement within a limited period of years can rebut presumption of antiquity of tenancy— Rent not remaining constant and execution of leases by tenants occasionally—Whether sufficient to rebut presumption of permanent tenancy.

Under Sec. 83 of the Bombay Land Revenue Code, 1879, when a tenant has established the antiquity of his tenancy, the presumption arising out of the principle of *presumitur retro* comes into operation and the presumption is not rebutted by the landlord showing that the origin of tenancy can be traced to some year within a margin of four to five years.

Shankarrao Dagadujirao v. *Shambhu Nathu Patil*[1] and *Nagappa Balappa* v. *Ramchandra*,[2] followed.

The mere fact that rent did not remain constant and that as many as four leases were executed by the tenants in favour of the landlords showing that they would remain in possession for definite durations of time are not sufficient to rebut the presumption arising under s. 83 of the Bombay Land Revenue Code, 1879 when the tenancy is antiquated and no evidence regarding the commencement of the tenancy in any particular year is forthcoming.

Rama v. *Abdul Rahim*,[3] *Dhondu* v. *Damodar*,[4] *Juvansingji* v. *Dola Chhala*,[5] followed.

Ejectment suit.

FIRST APPEAL from the decision of S. D. Phansalkar, First Class Sub-Judge, Kolhapur.

* First Appeal No. 220 of 1949 with First Appeal No. 219 of 1949.

(1) (1940) 43 Bom. L. R. 1, P. C.
(2) (1945) 48 Bom. L. R. 225.
(3) (1920) 22 Bom. L. R. 1214.
(4) (1934) 37 Bom. L. R. 209.
(5) (1924) 27 Bom. L. R. 890.