

Sami Chetti (Died) and anr. Vs. Adaikkalam Chetti and anr.

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Court : Chennai

Decided On : Nov-29-1923

Reported in : AIR1924Mad484; (1924)46MLJ179

Appellant : Sami Chetti (Died) and anr.

Respondent : Adaikkalam Chetti and anr.

Judgement :

Waller, J.

1. This is an appeal against an order of the District Judge, West Tanjore, appointing one Adaikkalam Chetti as guardian of his minor nephew. Adaikkalam Chetti was the applicant in the guardianship petition, which was opposed by Sami Chetti the minor's paternal uncle. The latter appealed, but died during the pendency of the appeal. His son was brought on record as his legal representative and seeks to prosecute the appeal. Objection is taken that the right to sue does not survive and that the appeal has abated.

2. The objection is based on the decision in Gangabai v. Khashabai I.L.R. 23 B. 719. The facts of that case were, however, very different from those with which we are now concerned. The appellant there relied on a personal appointment as guardian under a will and her brother, after her death applied for leave to prosecute her appeal. It was held that a claim based on a personal trust did not survive. As Parsons C. J. observed ' it cannot be said that the right to sue, which in

this case must be construed to mean the right to make the objection which Ganga Bai made, survived,' Ranade, J. also pointed out that the brother could not succeed as he claimed no right under the will. On the other side has been cited a decision of a single Judge of the Punjab Chief Court who allowed the son of a deceased appellant to prosecute an appeal of this kind [Arjan Singh v. Gujri (1917) 42 I.C. 410]. In that case the appellant had asked to be appointed guardian as a reversioner. In the present case Sami Chetti opposed the application of the minor's maternal uncle on the ground of his own superior claim as the undivided senior paternal uncle. I see no reason why in the language of Parsons, C. J., the right to make that objection should not be held to have survived in favour of his legal representative. A guardianship application is, after all, not a suit inter partes. It is a proceeding designed to satisfy the Court that it is for the welfare of a minor that a guardian should be appointed and as to the most suitable person for appointment. The application may be made by (among others) any relative or friend of the minor and the Judge may issue notice of it not only to certain specified persons, but also to any other persons to whom, in his opinion, special notice should be given. The welfare of the minor is the paramount consideration and it would, I think, be most unfortunate to hold that an appeal against an unsuitable or illegal appointment abated on the death of one of the persons who has received special notice of the application. Here the nearest male relation had filed an appeal objecting to the appointment and I think that the right to make that objection survives to his legal representative. I therefore over-rule the preliminary objection.

3. On the merits it appears that the parties agreed that the selection of the guardian should be left to certain arbitrators who chose Adaikalam Chetty. Their choice seems to have been accepted by the Judge. In Mahadeo Prasad v. Bindeshri Prasad I.L.R. 30 A. 137 it has been held that such a matter, which is not of private interest between parties, cannot be settled by a reference to arbitrators. This ruling I respectfully follow. The law allows a reference to arbitrators where all the parties interested agree that the subject of difference between them shall be so referred. In a guardianship application the party most interested is the minor and he cannot agree to a reference. There is nothing on record to show that the Judge arrived at any independent conclusion as to Adaikalam Chetti's fitness for appointment. Under the circumstances, I think that his order must be set aside and

that he must be directed to dispose of the application afresh. I do this with great reluctance. It is quite likely that Adaikalam Chetti is the proper person to be appointed and this litigation has been going on since March 1920. As appellant agreed to the reference, there will be no order as to costs.

Krishnan, J.

4. I agree.

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