APPELLATE CIVIL.

Before Patterson J.

1932

Jan. 7.

ZARINA BIBI

v.

WAZUDDI.*

Minor—Representation—Guardian ad litem *appointed by trial court, whether becomes* functus officio *in appeal arising out of the same suit—Mere non-appearance, if amounts to unwillingness or inability to act as guardian—Code of Civil Procedure (Act V of 1908), O. XXXII, rr. 3, 11.*

A guardian *ad litem* appointed by the trial court to represent a minor before it, who is described by the appellant as guardian of the minor respondent in the proceedings arising out of the suit before the appellate court and is served with the notice of appeal, is competent to represent the minor in the appeal without fresh appointment.

The mere fact that the guardian does not appear and take steps in connection with the appeal on behalf of the minor does not of itself show that he was either unable or unwilling to act or that he was guilty of neglect towards the minor.

SECOND APPEAL by defendant No. 3.

The facts appear sufficiently from the judgment.

Upendrakumar Ray for *Sureshchandra Majumdar* for the appellant.

Jateendranath Sanyal for the respondents.

PATTERSON J. The suit out of which this appeal arises was dismissed by the trial court, but decreed by the lower appellate court. The appellant before this Court is defendant No. 3, who alone contested the suit in the courts below. Defendant No. 3 is the mother of minor defendants Nos. 1 and 2 and it would appear from the pleadings that her interests are adverse to those of the minor defendants.

* *Appeal from Appellate Decree, No. 2862 of 1929, against the decree of Praphullachandra Guha, Addl. Subordinate Judge of Tippera, dated June 29, 1929, reversing the decree of Mazaharuddin Ahmad, Second Munsif of Brahmanberia, dated Sept. 12, 1928.*

1932

Zarina Bibi
v.
Wazuddi.

Patterson J.

The main point urged before this Court is that the appeal to the lower appellate court was incompetent, the minor defendants not having been properly represented in that court. It appears that, in the trial court, a pleader was appointed as guardian of the minors for the purposes of the present suit, but that the pleader guardian did not appear and contest the suit on behalf of the minors. The same pleader, as was appointed as guardian of the minors in the trial court, was described as guardian of the minors in the proceedings before the lower appellate court and was duly served with a notice. He did not, however, enter appearance or take any other steps in the matter on behalf of the minors. It is contended on behalf of the appellant that the failure of the pleader guardian to appear and take steps ought to have been brought to the notice of the lower appellate court by the plaintiff and that the plaintiff ought to have taken steps for the appointment of a fresh guardian for the purposes of the appeal before that court. It appears to me, however, that, as the decree of the trial court had not yet become final, the litigation, for the purposes of which the pleader guardian had been appointed, was still pending and that there was, therefore, no need for the appointment of a fresh guardian for the purposes of the appeal. The mere fact that the guardian did not enter appearance and take steps in connection with the appeal does not of itself show that he was either unable or unwilling to act or that he was guilty of neglect towards the minors. It may well be that he thought that it was in the minors' interests that they should not appear and contest the appeal more specially as they had not appeared and contested the suit in the trial court. I, therefore, hold that the appeal to the lower appellate court was not incompetent and that the minors were duly represented before that court. In this connection it may be observed that the point dealt with above was not raised (as it should have been) before the lower appellate court, and that, although the protection of the minors' interests is one of the main considerations in such matters, there is

1932

Zarina Bibi v. *Wazuddi.*

Patterson J.

no reason to suppose that the appellant's apparent concern on behalf of the minors is at all disinterested.

The only other point urged on behalf of the appellant relates to the finding of the lower appellate court to the effect that the plaintiffs had been in possession of the disputed land within 12 years of the institution of the suit and that the suit was, therefore, not barred by limitation. It has been pointed out that the parties are related to one another and that they are, or have been, occupying the same homestead. It is contended that the question of limitation ought not to have been decided in favour of the plaintiffs in the absence of an express finding to the effect that the plaintiffs had been in exclusive possession of the disputed land within 12 years of the suit, especially as the trial court had expressed itself as not being satisfied that the plaintiffs had been in exclusive possession. I am, however, satisfied from the general trend of the judgment of the lower appellate court that the intention of that court was to find that the plaintiffs had been in exclusive possession of the disputed land within 12 years of the date of the institution of the suit.

Both the points urged on behalf of the appellant having been decided against her, the appeal is dismissed with costs and the judgment and decree of the lower appellate court are affirmed.

Appeal dismissed.

A. A.