Before Mr. Justice Tottenham and Mr. Justice Ghose.

JOGI SINGH (DEFENDANT) *v.* KUNJ BEHARI SINGH AND ANOTHER (PLAINTIFFS.)* 1885 *April* 24.

Act XL of 1858, *s.* 3—*Act VIII of* 1859—*Suit against minor—Permission to next friend to defend—Presumption when no permission recorded by Court—Misdescription of minor—Guardian—Minor—Act XIV of* 1882, *s.* 443.

A suit was brought against a mother "for self and as guardian of *A* and *B*, minor sons of *C*, deceased," at a period when Act VIII of 1859 was in force. The mother had not taken out a certificate under Act XL of 1858, and no permission was recorded by the Court allowing the mother to defend on behalf of the infants under the provisions of s. 3 of that Act. A decree was made in the suit, and in execution thereof certain property belonging to *A* and *B* was sold and purchased by *X*, the decree-holder. Subsequently on *A*'s coming of age, *A* and *B* by *A* as his next friend instituted a suit against *X* and their mother to recover the property so purchased by *X*.

Held, that under the provisions of Act VIII of 1859 it was not necessary to formally record sanction to the mother to defend under s. 3 of Act XL of 1858; and that the fact of sanction having been given might be presumed by the Court, and that on the facts of the case such presumption was warranted.

Held, also, that though *A* and *B* were not properly described in the previous suit, it was a mere defect in form, and did not affect the merits of the case, being in accordance with the prevailing practice at the time when the suit was brought, and that there is no authority for saying that, when minors have been really sued, though in a wrong form, a decree against them would not be valid.

THE facts of this case were as follows: On the 4th August 1871 Mussummat Jhalo Koeri, who was the mother of the plaintiffs, jointly with her deceased husband's brother, Chet Narain Singh, executed a mortgage bond in favor of the defendant Jogi Singh. On the face of the bond it appeared that Mussummat Jhalo Koeri purported to be acting "for herself and as guardian of Kunj Behari Singh and Nanku Singh, (the plaintiffs), minor sons and heirs of Pheku Singh, deceased." She had not, however, taken out a certificate under Act XL of

* Appeal from Appellate Decree No. 354 of 1884, against the decree of W. Verner, Esq., Judge of Bhagulpore, dated the 19th of December 1883, reversing the decree of Hafez Abdul Karim, Khan Bahadur, Subordinate Judge of that district, dated the 10th of June 1882.

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1858. Jogi Singh subsequently brought a suit on the bond, and obtained a decree on the 29th June 1875, in execution of which he brought to sale the property in dispute in this suit, and at the execution sale purchased it himself. In his plaint Jogi Singh made Chet Narain Singh defendant, and also sued Jhalo Koeri "for self and as guardian of Kunj Behari Singh and Nanku Singh, minor sons of Phoku Singh, deceased;" and it appeared that throughout the proceedings in that suit Jhalo Koeri and the minors were described in these terms.

Kunj Behari Singh having now attained majority, instituted this suit along with his brother Nanku Singh who was still an infant, and for whom Kunj Behari Singh acted as next friend, against Jogi Singh, to recover their share of the property so purchased by him, and they made their mother Jhalo Koeri a party defendant. Jhalo Koeri took no part in the suit, and did not appear or defend.

The plaintiffs' case was that their mother Jhalo Koeri executed the bond on her own account, and that as she had not obtained a certificate under Act XL of 1858, she had no authority to deal with their property or bind them; that there was no legal necessity for the loan for which the bond was given; that they were not parties to Jogi Singh's suit, and were not bound by the proceedings therein; and that the decree in that suit was obtained by fraud and collusion. Jogi Singh traversed the whole of the plaintiffs' allegation, and alleged that their mother had been acting as their guardian and manager since the death of their father, and that he had made them parties to his suit, and they were represented therein by her. He further contended that the suit was barred by limitation, inasmuch as it was brought more than one year after an application had been made to the Collector for transfer of names in respect of the share of the property in suit.

Amongst the issues the following were raised:—

(1.) Is the suit barred by one year's limitation?

(2.) Was the decree, under which the property in suit was sold, fraudulently obtained by Jogi Singh?

(3.) Was the bond of the 4th August 1871, on which the decree in question was passed, executed by Jhalo Koeri as guar-

dian of the plaintiffs, and was the suit instituted by Jogi Singh instituted against her in a similar capacity, and was the decree therein passed against her as such?

(4.) Did the plaintiffs' share in the property pass under the sale in execution of the decree?

(5.) Was the loan contracted for legal necessity?

The Subordinate Judge decided all the issues in favor of the defendant Jogi Singh, except that of limitation, and in the findings of fact the lower Appellate Court concurred. Upon the question as to whether the plaintiffs were parties to and properly represented in the suit instituted on the bond by Jogi Singh, the Subordinate Judge, after discussing at some length the following cases which were cited and relied on by the parties—*Sherafutoollah Chowdhry* v. *Sreemutty Abedoonissa Bibee* (1); *Komul Chunder Sen* v. *Surbessur Doss Goopto* (2); *Hunooman Persaud Panday* v. *Mussamut Babooee Munraj Koonweree* (3); *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (4); *Tarinee Churn Gangooly* v. *Watson & Co.* (5); *Modhoo Soodan Singh* v. *Rajah Prithee Bullub Paul* (6); *Junghee Lall* v. *Sham Lall Misser* (7); *Makbul Ali* v. *Srimatti Masnad Bibi* (8); *Buzrung Sahoy Singh* v. *Mussamut Mautora Chowdhran* (9); *Mongula Dossee* v. *Sharoda Dossee* (10); *Mrinamoye Dabia* v. *Jogodishuri Dabia* (11); *Shaikh Abdool Kureem* v. *Syud Jaun Ali* (12); *Noggendro Chundro Mittro* v. *Sreemutty Kishen Sobndory Dassee* (13)—decided the question in favor of the defendant, also finding that no collusion or fraud had been practised, that there was legal necessity for the loan, and that the suit was not barred by limitation, and consequently dismissed the plaintiffs' suit with costs.

The lower Appellate Court agreed with the Court below upon all findings of fact, but considering itself bound by the

(1) 17 W. R., 374.
(2) 21 W. R., 298.
(3) 6 Moo. I. A., 893.
(4) Marsh, p. 614.
(5) 12 W. R., 413.
(6) 16 W. R., 231.
(7) 20 W. R., 120.
(8) 3 B. L. R., 54.
(9) 22 W. R., 119.
(10) 20 W. R., 48.
(11) I. L. R. 5 Calc., 450.
(12) 18 W. R., 56.
(13) 19 W. R., 133.

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decisions in *Sreenarain Mitter* v. *Sreemutty Kishen Soondery Dassee* (1); *Mrinamoye Dabia* v. *Jogodishuri Dabia* (2); and *Durgapersad* v. *Keshopersad Singh* (3), hold, that the minors were not legally represented in Jogi Singh's suit, and were not bound by the decree or proceedings therein. That Court was, however, of opinion that so far as the wording of the plaint in that suit went it was sufficient under Act VIII of 1859 to constitute the minors defendants.

Agreeing with the lower Court, therefore, upon the question of necessity, and the absence of fraud or collusion, the lower Appellate Court reversed the decree, holding that the plaintiffs were entitled to a decree declaring their right to the possession of the property in dispute on their repaying to the defendant Jogi Singh one-half of the consideration-money for the bond, together with interest up to the date when he obtained possession of the property under dispute.

Against that decree the defendant Jogi Singh appealed to the High Court, upon the ground that the decree obtained by him was binding upon the plaintiffs, and that his purchase was valid and could not be set aside; and the plaintiffs filed cross objections, contending that they were entitled to recover the property without repayment of any portion of the bond debt, and that even if liable to pay anything, all they could be legally made to pay was half the purchase-money paid by Jogi Singh, and not half the debt due on the bond as held by the Court below.

Mr. *R. E. Twidale* and Baboo *Annund Gopal Palit* for the appellant.

Baboo *Mohesh Chunder Chowdry* and Baboo *Saligram Singh* for the respondents.

The judgment of the High Court (TOTTENHAM and GHOSE, JJ.) was as follows:—

This was a suit to recover possession of certain properties which were purchased on the 4th April 1876 by the defendant No. 1, Jogi Singh, who is the appellant before us, at a sale in execution of a decree. The plaintiffs are the sons of one Phoku

(1) 11 B. L. R., 171. (2) I. L. R., 5 Calc., 450.
(3) I. L. R., 8 Calc., 656.

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Singh; one of them is a minor, and the other has attained majority. During their minority, Chet Narain Singh, their uncle, as also their mother on her own behalf and on behalf of her sons, executed a mortgage bond for Rs. 1,700. A decree was subsequently obtained upon that document in June 1875, and in execution of that decree the properties in suit were sold and purchased by the defendant. The plaintiffs brought the present suit in January 1882 to recover possession of their share of the properties thus sold to the defendant upon the ground that there was no legal necessity whatever for the loan contracted by the mother; that the decree was a fraudulent one; that in the suit in which the said decree was obtained they were no parties; and that at the sale their interest in the family property did not pass.

The defendant Jogi Singh denied the above allegations, and contended that he had acquired a valid title to the property by the purchase.

There were several issues raised in the Court of first instance, but they were all decided in favour of the defendant. That Court found that there was legal necessity for the loan; that both in the bond and in the suit in which the decree was obtained, the minors were properly described and represented; and that, although no formal order was recorded by the Court giving permission to the mother under s. 3, Act XL of 1858, to act for her minor sons, yet inasmuch as "she was made a defendant in the case as guardian of the minors, and defended the suit as such guardian, and the Court admitted her defence and decided the case accordingly, and the said decision had become final and conclusive, it should be understood that the Court had given the permission in question." The Court of first instance further found that the decree was a *bonâ fide* one, and that the defendant had acquired a good title at the sale.

The Court of Appeal below has concurred with that of first instance in all points, excepting in this, that it holds, following certain precedents quoted in its judgment, that inasmuch as the mother had no certificate under Act XL of 1858, and "it not being apparent" that under s. 3 of that Act she had permisson given to her to defend the suit on behalf of her minor sons, the minors were not represented in the said suit, and

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therefore the decree was not binding upon them. The Judge at the same time observed that he was not prepared to say that, if "unaided by decisions," he should not himself concur in the conclusion of the Sub-Judge, but the "weight of authority" being opposed to that view, he was of opinion that the plaintiffs were entitled to recover, but subject to the payment of a moiety of the money found to be due under the mortgage bond aforesaid, they (the plaintiffs) at the same time getting credit for the sum of Rs. 1,062-6 paid by their mother during their minority.

The defendant has appealed against the said decision upon the ground that the decree in execution of which the property was sold was under the circumstances set out in the judgment of the first Court binding upon the plaintiffs, and that he had acquired a valid title under his purchase. The plaintiffs have filed cross-objections insisting that an unconditional decree should have been given to them.

It will be observed that the decree in execution of which the property was sold was made at a time when the old Procedure Code, Act VIII of 1859, was in force, and which did not contain a chapter like Chapter XXXI which we have in the new Procedure Code, and which provides in s. 443 that "where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, &c., &c." If we had to consider the provisions of the present Procedure Code with reference to what was done in the previous suit in regard to the minors, we should feel grave doubts as to whether there was any appointment of a guardian *ad litem*, and whether the plaintiffs were parties in that case. But as we have already observed, that suit was not governed by the rules laid down in the Code of 1877. What we have to do in the present instance is to consider the provisions of the Procedure Code of 1859, read with s. 3, Act XL of 1858, and determine whether there was such a material defect in the procedure of the previous suit in regard to the minors, as to render it incumbent upon us to say that the minors were not properly represented, and that the decree passed in that suit was not binding upon them. Now s. 3 of Act XL of 1858 provides that no person shall be entitled to institute or defend a

suit connected with a minor's estate, of which he claims charge until he shall have obtained a certificate under the Act; but that when the property is of small value, or for any other sufficient reason, the Court having jurisdiction may allow any relative of the minor to institute or defend a suit on his behalf, notwithstanding no certificate had been granted. The question then arises, whether, in the previous case, the present plaintiff's mother was allowed by the Court in which the suit was instituted to defend it on their behalf. If we were prepared to hold that under the law there must be a *written* permission, we should have felt ourselves bound to hold that such a permission having not been recorded the minors were not represented in that case. But we do not understand the law to be so, and in this view we are supported by a ruling of this Court in *Aukhil Chunder* v. *Tripoora Soondaree* (1). It is indeed true that in one of the cases referred to by the Judge of the Court below a Divisional Bench of this Court in *Mrinamoye Dabia* v. *Jogodishuri Dabia* (2) was of opinion "that the permission must be formally recorded, as it is an act of judicial discretion which is necessarily open to appeal;" but it will be observed in the first place that the suit in that instance was governed by the Procedure Code of 1877 and not that of 1859; and, in the second place, it was not necessary, as we understand the case, for the learned Judges who decided it to come to any decision upon this matter; and, in the third place, the unrecorded order of the Court (supposed to have been made) allowing the mother to appear for the minor was made, in the course of the same proceedings which were the subject-matter of appeal to this Court, and therefore the whole of the proceedings having been before this Court in appeal, the learned Judges were in a position to pronounce, and were authorized to pronounce, judgment upon the question of the regularity or otherwise of the proceedings in connection with the appearance and representation on behalf of the minors. An order like this is not by itself subject to appeal, but if the case in which the order is made is appealed against, its propriety and validity may be determined by the Appellate Court. But, in the present instance, the action of the Court in allowing the mother to defend this

(1) 22 W. R., 525. (2) I. L. R., 5 Calc., 450.

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suit on behalf of her minor sons is not before us in appeal. What we have to determine is, not whether the Court was right in allowing the mother to represent the minors and to defend the suit on their behalf, but whether, as a matter of fact, the Court did allow her to do so. Upon this matter, the Court of first instance, upon a consideration of the whole of the circumstances, came to the conclusion that it was to be presumed that the Court did accord such permission to the mother. The learned Judge of the Appellate Court does not in any way disagree with the first Court in this conclusion, but on the contrary observes: "I am not prepared to say that, if unaided by decisions, I should not myself concur in this finding of the Sub-Judge."

That being so, it really comes to be a question of fact, *viz.*, whether the conclusion arrived at by both the Courts below in this matter, *viz.*, that under the circumstances permission may be presumed to have been given, is erroneous in law. We are of opinion that the grounds upon which the Courts below have proceeded are such as legitimately warrant such a conclusion, and we are unable, nor are we called upon to disturb the same.

Besides the case referred to above, *viz.*, *Mrinamoye Dabia* v. *Jogodishuri Dabia* (1), the learned Judge of the Court below has relied upon two decisions of the Privy Council, *viz.*, *Srinarain Mitter* v. *Sreemutty Kishen Soondery Dassee* (2), and *Durgapershad* v. *Keshopersad Singh* (3).

In the first of these two cases, the suit was for setting aside two deeds for the adoption of a child, and it was brought against Sri Narain Mitter "for himself and guardian of his minor son." The Judicial Committee, being evidently of opinion that the minor was not properly described, held that the child was no party to the suit, and then made the following observations: "If the son had been made co-defendant, it would have been necessary to have a guardian appointed for him. If the child was adopted, his natural father was not his guardian. On a suit by the plaintiff to set aside the deeds upon the ground that there

(1) I. L. R. 5 Calc., 450. (2) 11 B. L. R., 171.
(3) I. L. R. 8 Calc., 656.

had been no adoption, the plaintiff had no more authority to constitute the father the guardian of his son, by suing him as guardian, than the father would have had to constitute the plaintiff the guardian of the child if he had sued her for a declaration that the child had been validly adopted. If the father really refused to give the child in adoption, because he did not desire to have him adopted, he was not a proper person to protect the child's interest, or likely to make the best case in his behalf in a suit to declare the adoption invalid." What the Judicial Committee held, was that in the circumstances of that case the defendant could not be constituted guardian of the minor, and that the minor was not represented by his natural father. That case is therefore really no authority for the question which the learned Judge had to decide in this case, and it will be observed that the remarks of the Judicial Committee were made in appeal against the judgment of the lower Court in the suit in which the minor was said to have been sued against through his guardian. In the present instance, the proceedings of the suit which was instituted against the minors are not before us in appeal.

In the other case, namely, in the case of *Durgapershad* v. *Keshopersad Singh* (1) it appears that the suit in which the previous decree was obtained was brought against the minors under the guardianship of both their uncle and mother. An *ex-parte* decree was in the first instance passed against both the defendants; but subsequently, upon application by the mother, the Court revived the suit, but eventually struck off the name of the mother, and did not allow her to appear as the guardian of the minors. It seems to have been contended that the uncle was the guardian, but the Judicial Committee held that he was not so, he not having obtained a certificate under s. 3, Act XL of 1858. No question seems to have been raised as to whether or not the uncle had been permitted under the proviso to s. 3 to defend the suit on behalf of the minors; and, indeed, in the circumstances of that case, the question could not be raised. The decree was an *ex-parte* one. There was no appearance at all on behalf of the minors, and therefore

(1) I. L. R. 8 Calc., 656.

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the Court was not called upon at any time during the progress of the suit to exercise the discretion vested in it by the proviso to s. 3, Act XL of 1858. That being so, the only question before the Judicial Committee was whether the suit was brought against the minor represented by a legal guardian. In this view of the matter, it appears to us that the decision in that case does not help us in deciding the questions raised on the present occasion.

Being of opinion, as already expressed, that s. 3 of Act XL of 1858 does not require any written order allowing the next friend to sue or defend a suit on behalf of the minor, and that the Courts below have rightly found that such a permission might be presumed in this case, we cannot but hold that the minors were duly represented in the previous suit, and are therefore bound by the result thereof. And we may observe that the view which we take of this matter accords with that expressed by the Allahabad High Court in *Kedar Nath* v. *Debi Din* (1).

There is one other point that we think we ought to notice. It was a point that was raised by the learned vakeel for the respondent, *viz.*, that the minors were not properly described in the previous suit. This is indeed true; but this was merely a defect in form—a defect which does not, in our opinion, affect the true merits of the case. The description that was given of the minors was in accordance with the prevailing practice at the time when that suit was brought; and we agree in the view expressed by a Divisional Bench of this Court in holding "that there is no authority for saying that where the minors have been really sued, though in a wrong form, a decree against them would not be valid"—*Grish Chunder Mookerjee* v. *Miller* (2). See also *Komul Chunder Sen* v. *Surbessur Doss Goopto* (3). The decree against the minors was obtained, and the sale took place in execution in the year 1876, and we think it would not be right after this length of time to unrip all that has taken place, and disturb the title which the defendant acquired so many years ago.

(1) I. L. R., 4 All., 165. (2) 3 C. L. R., 17.

(3) 21 W. R., 298.

Upon all these considerations we are of opinion that the decree of the lower Court should be set aside, and that of the first Court restored, with costs.

Appeal allowed.

Before Mr. Justice McDonell and Mr. Justice Macpherson.

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LAL MAHOMED (DEFENDANT) *v.* KALLANUS (PLAINTIFF).*

Evidence—Estoppel of tenant—Act I of 1872, *s.* 116—*Derivative title.*

A, a ryot, being in possession of a certain holding, executed a *kabuliat* regarding this holding in favor of *B*, (who claimed the land, in which the holding was included, under a derivative title from the last owner), and paid rent to *B* thereunder.

Held, that *A* was not estopped by s. 116 of the Evidence Act from disputing *B*'s title.

The words "at the beginning of the tenancy" in s. 116 of Act I of 1872 only apply to cases in which tenants are put into possession of the tenancy by the person to whom they have attorned, and not to cases in which the tenants have previously been in possession.

THIS was a suit for arrears of rent.

The plaintiff alleged that he had obtained an *ijara pottah* for ten years, from Kartick 1287, of an eight-anna share in a certain mouzah from Mahomed Ismail, Mahomed Eayashin, Shamshenessar Bibi, Azizanessa Bibi and Shaban Bibi. That one Sheikh Lal Mahomed had, subsequently to the execution of the *ijara pottah*, executed in Baishakh 1288 a *kabuliat* for three years on account of a certain *jote* in this mouzah, which *jote* had formerly been held by Sheikh Lal Mahomed under Mahomed Ismail, and that the rent of this *jote* being in arrears, he brought this suit for the purpose above mentioned.

The defendant denied that the persons under whom the plaintiff claimed had had any right in the mouzah, and stated that he had never paid rent to any of them. He further stated that one Ekram Hossain was originally the owner of an eleven-anna share in this mouzah, and that he had paid rent to him for the land for

* Appeal from Appellate Decree No. 2222 of 1883, against the decree of Baboo Parbati Coomar Mitter, First Subordinate Judge of Mymensingh, dated the 18th July 1883, reversing the decree of Baboo Hari Nath Rai, Munsiff of Bazitpore, dated the 14th of February 1883.