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whole of the purchase-money to the defendant purchasers. But the learned vakeel who appeared for them informed us that his clients were unwilling to take a decree upon this condition.

We are, therefore, of opinion that the plaintiffs' suit should be dismissed. Although we do not agree with the lower Court in the reasons given in the judgment, we think that upon the ground mentioned above the suit was rightly dismissed.

The appeal is dismissed with costs.

*Appeal dismissed.*

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*Before Mr. Justice Pigot and Mr. Justice O'Kinealy:*

1885 *March* 19.

GURU CHURN CHUCKERBUTTY AND OTHERS (DEFENDANTS) *v.* KALI KISSEN TAGORE (PLAINTIFF.)*

*Guardian ad-litem, Appointment of—Act XIV of* 1882, *ss.* 443, 464—*Act XL of* 1858, *s.* 3—*Minors, Suit against, improperly framed.*

In a suit intended to be brought against some minors, the defendants were set out in the heading of the plaint as "Sharoda Sunderi Debya, widow of Chundra Kanta Chuckerbutty, deceased, mother and guardian of the minors" (setting out their names). At the filing of the plaint, the plaintiff applied for and obtained an order, making Sharoda guardian of the minors for the purposes of the suit. She was not, however, guardian of the property and persons of the minors under Act XL of 1858.

*Held*, that the minors were not parties to the suit; that the order making Sharoda guardian *ad-litem* was not made in a suit in which the minors were defendants; and that the suit must be dismissed as against the minors.

*Held* also, that neither the Code of Civil Procedure nor the proviso of s. 3 of Act XL of 1858, give a plaintiff any power to institute a suit against a person named by himself as guardian *ad-litem* on behalf of a minor, nor do they give to the Court the power of transferring by a mere order made *ex-parte*, an irregular proceeding such as the one above-mentioned into a suit against the minor.

THIS was a suit brought by a zomindar against the holders of a certain *howlah* which had been granted in 1268 to two brothers, Anund Chunder Rai and Poorna Chunder Rai, and had been sold by them to the defendants. The object of the suit was to obtain *khas* possession of certain land which had accreted to a certain *chur*, as being in excess of the land originally leased.

* Appeal from Original Decree No. 192 of 1883, against the decree of Baboo Jagat Durlav Mazumdar, Rai Bahadur, Subordinate Judge of Furridpore, dated the 16th of June 1883.

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The *pottah* and *kabuliat* interchanged on the creation of the *howlah*, amongst other things, stipulated that upon new land accreting to the *chur*, mouzah Halai Puttee, the lessor should be entitled to measure the whole *chur* by the standard pole of the pergunnah in the month of Kartic of the year following the accretion, and upon the area being found to be greater than the quantity leased, the lessor should have the right to take *khas* possession of the excess.

The plaint, as framed, was headed "Kali Krishna Tagore, plaintiff *v.* (1) Guru Churn Chuckerbutty, (2) Sharoda Sunderi Debya, widow of Chunder Kanta Chuckerbutty, deceased, mother and guardian of Probol Chunder Chuckerbutty, Aukhil Chunder Chuckerbutty, Anamto Coomar Chuckerbutty, minors, and Nishi Kanta Chuckerbutty, &c., defendants;" and on the filing of the plaint, the plaintiffs applied for and obtained an order making Sharoda Sunderi Debya the guardian of the infants. It did not, however, anywhere appear that Sharoda had ever been appointed guardian of the infants under Act XL of 1858; and no relief was asked for personally as against her. The defendants put in a written statement setting out various defences which are immaterial for the purposes of this report; they however took no exception to the form of the suit, although an issue was raised to the following effect (which may or may not have been intended to raise the question) *viz.*, "whether or "not the plaint is obscure and incomplete, and the subject-matter "of dispute uncertain. If so, then is the suit unmaintainable by "reason thereof."

The Subordinate Judge found that the plaintiff was entitled to recover possession of a certain quantity of land proved to be, after measurement, in excess of the quantity originally leased, and gave him a decree for possession thereof against all the defendants; he, however, as regards the issue set out above, merely stated that it was not argued, and that he decided it in favor of the plaintiff.

The defendants appealed to the High Court. In the heading of the grounds of appeal the appellants were set out as being (1) Guru Churn Chuckerbutty, (2) Probol Chunder Chuckerbutty, Aukhil Chunder Chuckerbutty, and Nishi Kanta Chuckerbutty,

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minors, by their mother and next friend Sharoda Sunderi Dabya; and amongst the grounds taken was the following: "For that "the minor defendants Probol Chunder, Aukhil Chunder, Ananto "Coomar and Nishi Kanta Chuckerbutty not having been properly "represented and described in the plaint, the Court below should "have dismissed the suit as against them."

Baboo *Srinath Doss*, Baboo *Kashi Kant Sen*, and Baboo *Grish Chunder Chowdhry* for the appellants.

Baboo *Kali Mohun Doss*, Baboo *Durga Mohun Doss*, and Baboo *Ram Sokha Ghose* for the respondents.

The Court (PIGOT and O'KINEALY, JJ.) after setting out the facts, found that the defendant was holding certain lands in excess of the quantity leased, and that the plaintiff was entitled to obtain possession of such lands, and gave him a decree against Guru Churn Chuckerbutty, but dismissed the suit as against the minors, inasmuch as the suit had not been properly framed as against them. The portion of the Court's judgment relating to the frame of the suit was as follows:—

Another question still remains for our decision, namely, whether the plaintiff has in this case properly sued the minor sons of Chandra Kanta Chuckerbutty. They are described in the plaint in the following words: "No. 2, Sharoda Sunderi Debya, widow "of Chundra Kant Chuckerbutty, deceased, mother and guardian "of Probol Chunder Chuckerbutty, Aukhil Chunder Chuckerbutty, "Ananto Coomar Chuckerbutty, and Nishi Kanta Chuckerbutty, "minors, inhabitants of Rudrakar, pergunnah Idilpore, station "Palung, zillah Furridpore."

In the case of *Sreenarain Mitter* v. *Sreemuti Kishen Soondery Dassee* (1), their Lordships of the Privy Council declared that a suit against a father in his own right, and as guardian of his minor son was not a suit against the minor.

So far back as 1873, in the case of *Mongala Dossee* v. *Sharoda Dossee* (2), a similar decision was arrived at in this Court.

In this case the suit was originally framed as it now stands, the defendants being described as No. 1, Guru Churn Chucker-

(1) 11 B. L. R., 171 (190 & 191).
(2) 20 W. R., 48.

butty, son of Tiluk Chunder Chuckerbutty, deceased; No. 2, Sharoda Sunderi Debya, widow and mother and guardian of the minors, setting out their names.

The plaint is dated June 30th. On that day the plaintiff applied to have the mother Sharoda made guardian, and an order appointing her was made on July 30th, on which day the suit was instituted and summons in the suit issued.

We think that under these circumstances the minors are not parties to this suit. Sharoda was not, and is not, so far as appears from the record, guardian of the person and property of the minors under Act XL of 1858. The provisions of Chapter 31 of the Civil Procedure Code, therefore, apply to this case (section 464). The order making Sharoda guardian *ad-litem* was not made in a suit in which the minors were defendants: it was made *ex-parte* in a proceeding to which they were strangers, no suit being at the time in existence.

Section 443 of the Code directs the Court to appoint a guardian *ad-litem* when the defendant to a suit is a minor.

We think that before it is competent for the Court under this section to appoint a guardian *ad-litem*, there must be a suit in which the minor is a defendant in existence. This is not a mere matter of form. It involves the necessity of service of the summons in the suit, so that the minor, or those in whose charge he is, may come in, and so have an opportunity of defending his interests in the matter of the selection of a guardian *ad-litem*.

Neither the Code nor, as we construe it, the proviso of s. 3 of Act XL of 1858 give to a plaintiff the power of instituting a suit against a person named by himself as guardian *ad-litem* on behalf of the minor: nor do they give to the Court the power of transforming an irregular proceeding of this sort into a suit against the minor by its mere order made *ex-parte*.

Probably, in the present case, the mother of the minors has no interest adverse to them, and is the person who would have been properly made their guardian *ad-litem*. Probably, the case has been conducted with as much regard to their interests, as it would have been had it been regularly constituted.

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But, however, this may be, we are not able on this ground to hold that they are parties to the suit.

Section 464 of the Code makes the provisions of section 442 to 462 not applicable, where a guardian of person or property has been appointed under a local law: the local law in this case is, of course, Act XL of 1858. The proviso of s. 3 of that Act does not relate to a case where a guardian of person or property has been appointed; and if it be not repealed by the Code, it must, at any rate, be read with it. We think that this section also contemplates that a suit shall be instituted before a guardian *ad-litem* is appointed; and that the summary appointment of such a guardian which, in the special circumstances, contemplated by the section, the Court is empowered to make, should be made in that suit. We do not here deal with a case in which a properly appointed guardian is alone placed upon the record as guardian of the minor defendants. That form of suit is highly incorrect, and should not be adopted. The proper form, where a minor having a guardian is to be sued is, to sue the minor (naming him) by A B his guardian.

This Court has, however, in more than one case overlooked the defects of form when satisfied, or holding itself justified in inferring that the minor defendant was substantially represented by a properly appointed guardian.

Such a course was taken by the Court in *Komul Chunder Sen* v. *Surbessur Doss Goopto* (1), in *Grish Chunder Mookerjee* v. *Miller* (2), and by the Allahabad High Court in *Janki* v. *Dharam Chand* (3).

In this case, however, we can make no such inference: we have the facts relating to the institution of the suit distinctly before us, and we hold upon them that the minors never have been represented in this suit, and are not bound by any proceedings taken in it. We think, therefore, that this objection is one that must be allowed, and that the suit, so far as the defendant No. 2, namely, Sharoda Sunderi Debya, who was not sued in her personal capacity, and the minors mentioned in that paragraph are concerned, must be dismissed.

*Appeal allowed in part.*

(1) 21 W. R., 298. (2) 3 C. L. R., 19. (3) 1 L. R., 4 All., 170.