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do not pronounce on any other cause of action that the plaintiff may have against this defendant. The Second Appeal is dismissed with costs of respondents Nos. 1 to 10.

K.R.

SPENCER, J.

APPELLATE CIVIL.

Before Mr. Justice Sadasiva Ayyar and Mr. Justice Spencer.

1920, March 15.

PUJARI BHIMAJI, MINOR BY NEXT FRIEND PUJARI NAGAPPA, PLAINTIFF (APPELLANT),

v.

RAJABHAI HUSSAIN SAHEB AND ANOTHER, DEFENDANTS (RESPONDENTS).*

Civil Procedure Code (V of 1908), Order XXXII, rule 4 (2)—Existence of a guardian appointed for a minor by a competent authority—Suit and decree against such minor represented by another guardian, validity of.

If a minor has a guardian appointed for him by a competent authority he alone can represent the minor in any litigation; hence a decree obtained against such a minor represented not by such guardian, but by another, though the Court acted in ignorance of the existence of such appointed guardian is not binding on the minor.

Rashid-un-nisa v. *Muhammad Ismail Khan*, (1909) I.L.R., 31 All., 572 (P.C.), followed; *Dammar Singh* v. *Pirbhu Singh*, (1907) I.L.R., 29 All., 290, not followed.

SECOND APPEAL from the decree of A. J. CURGENVEN, Temporary Subordinate Judge of Bellary, in Appeal No. 136 of 1918, filed against the decree of P. NARAYANA MENON, District Munsif of Hospet, in Original Suit No. 484 of 1917.

The facts are given in the Judgment of SADASIVA AYYAR, J.

P. R. Ganapati Ayyar for appellant.

K. Rajah Ayyar for first respondent.

SADASIVA AYYAR, J.

SADASIVA AYYAR, J.—The plaintiff represented by his certificated guardian (appointed by the District Court) is the

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* Second Appeal No. 967 of 1919.

appellant before us. He sued to set aside the decree passed against him in a suit brought by the present first defendant as plaintiff, on a mortgage bond executed by the plaintiff's mother. The short question for decision is whether the plaintiff was properly and legally represented in that suit. An officer of the Court was appointed in that suit at the instance of the then plaintiff (present first defendant) as guardian (for the suit) of the minor defendant (present plaintiff). If there was no proper representation, if the representation by that officer was not merely irregular but also illegal, there can be no doubt that this suit to set aside the decree and the other proceedings in the former suit is sustainable. The lower Courts held that because the Court and the present first defendant (the then plaintiff) were not aware that a guardian had been appointed by the District Court for the minor, the appointment of an officer of the Court as the guardian for the former suit was neither illegal nor irregular and therefore the decree in the former suit should not be set aside. I am unable to agree with the conclusions of the lower Courts. Order XXXII, rule 4 (2), so far as it relates to a minor defendant, is as follows :—

"Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall be appointed his guardian *for the suit*"

(that is, in the case where a minor is a defendant)

"unless the Court considers for reasons to be recorded that it is for the minor's welfare that another person be appointed."

The old section 457, Civil Procedure Code, prohibited a married woman being appointed as guardian for the suit for a minor defendant and thus created a legal disability in her to act as such. Now Order XXXII, rule 4 (2), in the case where a minor is a defendant, similarly prohibits any person other than the guardian appointed or declared by competent authority to act as guardian for the suit of a minor defendant. The legislature clearly made this provision because it was strongly of opinion that it was not for the minor's welfare that anybody else except such certificated guardian, where one exists should act for a minor defendant. Where there is such a clear prohibition by the legislature, the Court's ignorance of the existence of a certificated guardian cannot be taken into consideration in deciding the question whether there has been a proper

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representation of a minor in the suit, any more than the ignorance of a Court under the old provision that a woman appointed by it as a guardian was a married woman could affect the decision of the question whether the minor was properly represented by such a woman. I think the decision in *Hanuman Prasad* v. *Muhammad Ishaq*(1), confirmed in *Rashid un-nissa* v. *Muhammad Ismail Khan*(2), is almost conclusive on this point. On behalf of the respondent, we have been referred to *Dammar Singh* v. *Pirbhu Singh*(3), in which the question is very meagrely discussed, and it was decided before the Privy Council decision above referred to. The *obiter dicta* in *Jogeswar Narain* v. *Lala Mooralidhar*(4), and *Midnapore Zemindari Co., Ltd.* v. *Gobinda Mahto*(5), approving *Dammar Singh* v. *Pirbhu Singh*(3), do not carry us much further. *Mathuramalai* v. *Palani*(6) was not a case decided on the rule which we are now considering, but the decision turned upon the question whether failure to give notice to a person alleged to be then in charge of the minor wholly vitiated the appointment of a third person by the Court as the minor's guardian, that is whether non-compliance with the provisions of Order XXXII, rules 3 and 4, made the appointment wholly illegal, or whether it was only an irregularity. I do not think that a prohibition to anybody else to act, enacted in Order XXXII, rule 4 (2), can be put on the same footing as the direction to give notice to the person in whose care the minor is before making the appointment of a proper guardian. On the whole, I think that there was no legal representation of the minor plaintiff in the former suit. I hope that plaintiffs will hereafter take care, when they implead a minor as a party defendant and when they apply to the Court for appointing a guardian for the suit, to inquire whether a certificated guardian has been already appointed for the minor defendant. I would also add that there are observations in *Narsingh Narain* v. *Sheikh Jahi Mistry*(7), which doubt the soundness of *Dammar Singh* v. *Pirbhu Singh*(3). I would decree the suit, setting aside the decree of the lower Courts. As allegations of fraud and collusion made in paragraphs 8 (*b*)

(1) (1906) I.L.R., 28 All., 137.
(2) (1909) I.L.R., 31 All., 572 (P.C.).
(3) (1907) I.L.R., 29 All., 290.
(4) (1908) 7 C.L.J., 270.
(5) (1908) 8 C.L.J., 31.
(6) (1914) I.L.R., 37 Mad., 535.
(7) (1912) 15 C.L.J., 3.

and 8 (*c*) of the plaint were not proved according to the findings of both Courts, and as the illegality of the appointment of the Court officer under the provisions of the Code was not expressly set up in the plaint, I would direct the next friend to bear personally the costs of this litigation incurred on the plaintiff's behalf. The defendants will of course bear their own costs.

SPENCER, J.—I agree. I think that when there is a definite prohibition of law in such words as those in Order XXXII, rule 4, Civil Procedure Code, "no person other than such guardian shall act as the next friend of the minor, or be appointed guardian for the suit unless, etc.", that a decree obtained against a minor represented by some other person is an illegal decree void as against the minor and not a decree obtained by a mere irregularity. I would follow in this matter, the Privy Council decision, *Rashid-un-nissa* v. *Muhammad Ismail Khan*(1), and another case of the Privy Council, *Khiarajmal* v. *Daim*(2), where it was held that a decree obtained against a person who was not properly represented on the record was void and without jurisdiction against such person. I agree with my learned brother that *Dammar Singh* v. *Pirbhu Singh*(3), is not a case which we can follow without hesitation. There was another case, *Ram Barechha Ram* v. *Tarak Tewari*(4), quoted by the respondent's pleader. In that case, the minors belonged to an undivided Hindu family and the manager of that family was a party and fully contested the suit. There was, therefore, no necessity to appoint a guardian at all, and a decree obtained against the minors, on whose behalf a guardian not properly representative of their interests was appointed, was not on that account an invalid decree. The appeal will have to be allowed, the directions as to costs being as mentioned in my learned brother's order.

N.R.

(1) (1909) I.L.R., 31 All., 572 (P.C.). (2) (1905) I.L.R., 32 Calc., 296 (P.C.).
(3) (1907) I.L.R., 29 All., 290. (4) (1916) 14 A.L.J., 589.