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the plaint himself, and, this being so, in our opinion, it is right and proper that he should subscribe and verify. We refrain from making any further observations, feeling sure that this intimation from us will be acceded to at once and without delay by the plaintiff. Let the plaint be signed and verified by the plaintiff within fourteen days from the date of the receipt of this order of ours by the lower Court.

Appeal dismissed.

1887
March 15.

Before Mr. Justice Brodhurst and Mr. Justice Mahmood.

PARMESHAR DAS AND OTHERS (DEFENDANTS) *v.* BELA AND ANOTHER (PLAINTIFFS).*

Act XL of 1858, (*Bengal Minors Act*) *s.* 3—*Suit on behalf of minor—Permission to relative to sue, proof of—Civil Procedure Code, ss.* 440, 578.

In a suit conducted on behalf of a minor by a relative, the absence of the certificate of guardianship required by s. 3 of the Bengal Minors Act (XL of 1858), is not a fatal defect; and the fact of the Court allowing such a suit to proceed must be taken as implying that the necessary permission has been given. Even if such permission has not in fact been given, the irregularity is covered by s. 578 of the Civil Procedure Code. *Bhaba Pershad Khan* v. *The Secretary of State for India in Council* (1) followed.

The facts of this case are sufficiently stated in the judgment of Mahmood, J.

Mr. *J. E. Howard*, for the appellants.

Mr. *W. S. Howell*, for the respondents.

MAHMOOD, J.—This is a suit by one Ram Ghulam, under the guardianship of his mother Bela, for the recovery of possession of certain property, which admittedly belonged to one Indar Sen. Indar Sen is said to have died, by one party, in 1273 fasli, corresponding to 1866 of the Christian era, and it is found by the Court of first instance that he died in 1275 fasli, which would be about 1868 *A.D.* The plaintiff's suit was resisted by the defendants on the allegation that they were the real heirs of Indar Sen, but that the plaintiff was born of Bela, after the death of Indar Sen, by another husband; that the plaintiff therefore had no right of inheritance

* Second appeal No. 345 of 1886, from a decree of R. G. Leeds, Esq., District Judge of Gorakhpur, dated the 28th November, 1885, confirming a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Gorakhpur, dated the 11th June, 1885.

(1) I. L. R., 14 Calc. 159.

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in respect of the property of Indar Sen; that the defendants had been in adverse possession for more than twelve years, and therefore the suit was barred by limitation. The Court of first instance decreed the claim upon findings which are not necessary to be set down here.

Upon appeal, amongst many of the grounds urged by the defendants, one was that Musammat Bela, who called herself the next friend and guardian of Ram Ghulam, had not obtained the certificate of guardianship from the Civil Court, as is required by s. 3 of Act XL of 1858, and therefore she could not maintain the suit. The learned Judge of the lower appellate Court overruled this point. But in dealing with the merits of the case, he has written a few lines, which do not convey to my mind any information that he had present to his mind all the essential points of this case. It seems to me that it may be presumed that the learned Judge did not dispose of the case upon a preliminary point, and that he did make some sort of endeavour to deal with the case upon the merits. But the judgment recorded by him is very unsatisfactory, and it is not such as is required by s. 574 of the Civil Procedure Code. I have had doubts whether the judgment should not be set aside altogether, and the case remanded under s. 562, Civil Procedure Code, for proper decision according to law. But considering the exigencies of this particular case, I think it will be sufficient for the ends of justice to indicate what the issues were upon which the learned Judge ought to have concentrated his mind and arrived at a final decision. I say this, as I have often said it before, that it is the bounden duty of the Judges in appeals from original decrees to indicate clearly the reasons of their conclusions, and properly weigh the evidence in the case. It is not our duty, sitting as a Court of second appeal, to weigh the evidence.

Before, however, indicating those issues, it is necessary to dispose of the question of law insisted upon by Mr. *Howard*, namely, whether the plaintiff was properly represented in this litigation by his mother, who never obtained a certificate of guardianship. With regard to this, I am of opinion that the Full Bench ruling in the case of *Bhaba Pershad Khan* v. *The Secretary of State for India in Council* (1) decides the point. All that has been argued before

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us was argued there, and it was held that the absence of a certificate of guardianship was not a fatal matter, and that the very fact of the Court allowing a suit to proceed must be taken to imply that the necessary permission was given. Moreover, upon this point, I have very definite views of my own, and even if no such permission was given, the irregularity was such as was covered by s. 578 of the Code; that is to say, it did not affect the merits of the case or the jurisdiction of the Court. I therefore disallow this objection.

As to the other grounds of appeal, there are only these points, which form the main issues in the case:—When did Indar Sen die, and when was Ram Ghulam born? The learned Judge below must find on these, and decide whether Ram Ghulam is the legitimate son of Indar Sen or not.

Then as to adverse possession, which has been made the subject of the fourth ground of appeal, I think, the plaintiff being a minor, no plea of that character can arise. But there are other circumstances which the learned Judge should bear in mind in deciding the case. Among them it is alleged by one side that upon the death of Indar Sen, the property was entered in the Government revenue records in the name of Musammat Bela and not in the name of Ram Ghulam, who, if the son of Indar Sen, would be the rightful heir. There are also other minor circumstances in the case to be borne in mind; for instance, the allegation that after the mutation of names had already been made, Musammat Bela had, by an application subsequently presented to the revenue authorities, asked for her name to be expunged, and the names of the defendants recorded, because she had contracted a second marriage. These are questions which bear upon the main issues. I would therefore remand the case under s. 566 for decision upon those points. On the return of the findings, ten days will be allowed for objections.

BRODHURST, J.—I concur in the remand order proposed by my learned colleague (1).

Issues remitted.

(1) See also *Janki* v. *Dharam Chand* (I. L. R., 4 All. 177). *Contra*, see *Pirthi Singh* v. *Lobhan Singh* (I. L. R., 4 All. 1).

1887
March 23.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

JASODA (*Objector*) *v.* MATHURA DAS AND OTHERS (AUCTION-PURCHASERS).*

Execution of decree—Civil Procedure Code, s. 311—*Material irregularity in publishing or conducting sale—Substantial injury—Notification omitting to state place of sale—Sale held after date advertized—Civil Procedure Code*, ss. 287, 290.

Where a proclamation of sale of immoveable property in execution of a decree omitted to state the place of sale, and where the sale took place on a date other than that notified in the proclamation, and before the expiration of the thirty days required by s. 290 of the Civil Procedure Code,—*held* that the non-compliance with the provisions of ss. 287 and 290 of the Code was more than mere irregularity, that it must have caused substantial injury, and that the order confirming the sale must be set aside. *Bakhshi Nand Kishore* v. *Malak Chand* (1) referred to.

Per MAHMOOD, J., *quaere*, whether material irregularities such as the above were not in themselves sufficient, within the meaning of the first paragraph of s. 311 of the Code, to justify a Court in setting aside a sale, without inquiring whether such irregularities had resulted in substantial injury within the meaning of the second paragraph.

THE facts of this case are stated in the judgment of Edge, C. J.

Lala *Juala Prasad*, for the appellant.

Munshi *Sukh Ram*, Pandit *Sundar Lal*, and Maulvi *Mehdi Hasan*, for the respondents.

EDGE, C. J.—This is an appeal from an order of the Munsif of Gorakhpur, confirming a sale of immoveable property. The notification of sale was put up in the Court-house on the 30th June, 1886. That notification did not state the place of sale; it stated that the sale would take place on the 27th July, but it took place on the 29th July, and before the expiration of the thirty days required by s. 290 of the Code of Civil Procedure. It is contended that no substantial damage resulted from these irregularities. I cannot believe that injury was not done by omitting from the notification the name of the place of sale and by holding the sale on a date subsequent to the date advertized. The non-compliance with the provisions of ss. 287 and 290 of the Code of Civil Procedure was more than an irregularity. I am of opinion that the Munsif ought not to have confirmed the sale. I am of opinion

* First Appeal No. 21 of 1887 from an order of Babu Ram Dhun Mukerji, Munsif of Gorakhpur, dated the 13th November, 1886.

(1) I. L. R., 7 All. 289.

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that this appeal must be allowed and the order set aside. I thoroughly agree with the judgment reported in the case of *Bakhshi Nand Kishore* v. *Malik Chand* (1).

MAHMOOD, J.—I agree with the learned Chief Justice, but as I was a party to the judgment which has been referred to by him, I wish to add that this is not the first occasion upon which I have entertained serious doubts as to the question whether *material* irregularities, such as those found in this case, are not in themselves sufficient, within the meaning of the first paragraph of s. 311 of the Code of Civil Procedure, to justify a Court in setting aside a sale without inquiring whether such "*material* irregularity" had resulted in substantial injury within the meaning of the second paragraph of the section. I am inclined to hold that the presence of "*material*" before the word "irregularity" in the former paragraph of the section, and the absence of that word in the latter paragraph of the section, would so far sustain the view I have indicated, especially because the second paragraph of the section does not appear in the Code in the form of a proviso governing the earlier paragraph, but as a separate clause beginning with a disjunctive word. The rule of construction under such circumstances would render the two clauses independent of each other for the decision of the point now before us, and I think an argument might well be addressed in support of a contention that "*material* irregularity" is, *ipso facto*, fatal to a sale. I only wish to add on this point, with reference to the judgment of Mr. Justice Oldfield in the case above referred to, that I concurred without expressing any definite opinion whether a sale that infringes the rule of thirty days provided by s. 290 would not in itself be a sale subject to such a *material* irregularity as the earlier part of s. 311 contemplated. I have considered it necessary to say this with reference to the argument insisted upon before us on behalf of the respondent. The question in this form does not really arise because, as the learned Chief Justice has said, it is impossible for us as a Court of first appeal, dealing with facts as well as law, to hold, as a question of fact, that a sale held under such conditions as the sale in this case, ever resulted otherwise than in a substantial injury to the

(1) I. L. R., 7 All. 289.

judgment-debtor within the meaning of the last part of s. 311 of the Code of Civil Procedure. I concur with the learned Chief Justice.

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Appeal allowed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Mahmood.

1887 *March* 28.

RAM PRASAD, (PLAINTIFF) *v.* ABDUL KARIM, (DEFENDANT.)*

Pre-emption—Wajib-ul-arz—Custom—Muhammadan Law—Immediate and confirmatory demands—Practice—Remand.

The *wajib-ul-arz* of a village gave a right of pre-emption *shufaa* "according to the usage of the country." In a suit for pre emption there was no evidence to show what, in fact, was the usage prevailing in the district, in regard to pre-emption. There was no evidence that the plaintiff had satisfied the requirements of the Muhammadan Law as to immediate and confirmatory demands, or that there was any custom which absolved him from compliance with those requirements, or that he was at any time willing to pay the actual contract price.

Held that in the absence of evidence of any special custom different from or not co-extensive with the Muhammadan Law of pre-emption, that law must be applied to the case, and that, under the circumstances above stated, the suit failed and must be dismissed. *Fakir Rawot* v. *Sheikh Emambaksh* (1), *Chowdhry Brij Lall* v. *Rajah Goor Sahai* (2) and *Jai Kuar* v. *Heera Lal* (3), referred to.

A case ought not, as a rule, to be remanded upon a point which has been framed as an issue by the Court below and brought to the attention of the parties, and where they have failed at the trial to give any evidence upon it.

The facts of this case are stated in the judgment of Edge, C. J.

Mr. *W. M. Colvin* and Pandit *Nand Lal*, for the appellant.

The Hon. *T. Conlan* and Shah *Asad Ali*, for the respondent.

EDGE, *C. J.*—In this action the plaintiff claimed a decree for pre-emption in respect of 5 biswas of land which had been sold by a co-sharer in the mauza to a stranger. The right of preemption was alleged to have arisen by reason of the *wajib-ul-arz*. The *wajib-ul-arz* in question contained the following paragraph :—"The custom of pre-emption prevails according to the usage of the country." That I understand to mean a declaration by the parties to that *wajib-ul-arz* that pre-emption, according to the usage of the country, should be the rule amongst them. The plaintiff in his

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* First appeal No. 53 of 1886, from a decree of Maulvi Muhammad Abdul Qayum Khan, Subordinate Judge of Bareilly, dated the 23rd February, 1886.

(1) B. L. R, Sup Vol. p. 35. (2) N.-W. P. Full Bench Rulings, July-December, 1867, p. 128.

(3) N.-W. P. H. C. Rep, 1875, p. 1.