

APPELLATE CIVIL.

Before Mr. Justice Norris and Mr. Justice Ghose.

NEWAJ (DEFENDANT) v. MAKSUD ALI AND OTHERS (PLAINTIFFS).*

Minor, Suit by—Next friend—Certificate under Act XL of 1858, s. 3—Civil Procedure Code (Act XIV of 1882), s. 440.

1885
August 10.

Section 440 of the Civil Procedure Code, read with s. 3 of Act XL of 1858, does not make the receipt from the Court of a written permission to sue compulsory upon the next friend of an infant plaintiff.

THIS was a suit for the recovery of land. Zaminoodi (plaintiff No. 1) and Maksud Ali (No. 2) were the nephews, and Manik Jan (No. 3, a minor, represented in this suit by plaintiff No. 2) was the daughter of one Moonshi deceased, as whose heirs they allege that they hold possession of the said land from the time of his death, but were dispossessed by the defendants in the year 1287 (1881). The first, and, for the purposes of this report, the only material issue raised, was whether plaintiff No. 2 could legitimately act as next friend of the minor. On this point the Munsiff said: "Maksud Ali is the son of the uterine brother of the infant's father. This being so, the institution of this suit by him, as next friend of the infant, has not been wrong. Besides he has been acting for the benefit of the minor. It has not, therefore, been improper for him to act as the next friend of the minor. On the merits the plaintiffs' suit was decreed. On appeal the Subordinate Judge of Tipperah upheld the Munsiff's decision, though of opinion that he would have done better to have given a written permission. Defendant then appealed to the High Court.

Baboo *Hari Mohun Chakibati* for the appellant.

Munshi *Serajul Islam* for the respondents.

The judgment of the Court (NORRIS and GHOSE, JJ.) was delivered by

GHOSE, J.—We see no ground to interfere in this case. The suit was instituted by the plaintiffs Nos. 1 and 2 and a

* Appeal from Appellate Decree No. 2325 of 1884, against the decree of Baboo Dwarka Nath Bhattacharji, Rai Bahadur, Additional Subordinate Judge of Tipperah, dated the 30th. of August 1884, affirming the decree of Baboo Kristo Prosad Chowdhuri, Rai Bahadur, First Munsiff of Muradnagore, dated the 8th of August 1883.

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third plaintiff, the minor daughter of one Moonshi, who was represented by her next friend the plaintiff No. 2; and the object of the suit was to recover possession of the lands in suit upon the ground that they belonged to the said Moonshi; and that upon Moonshi's death they had devolved upon the plaintiffs.

The defendant in the Court of first instance, amongst other things, pleaded that the plaintiff No. 2 was not the proper person to represent the interests of the minor plaintiff; but the Court of first instance overruled that objection; and upon the question of title, it held that the property belonged to Moonshi and was in Moonshi's possession up to his death.

The lower Appellate Court has substantially confirmed the findings of the first Court.

The learned vakil for the defendant-appellant contends before us in the first place, that, inasmuch as no written permission was granted to the plaintiff No. 2 to represent the minor, the suit ought to have been dismissed.

We are of opinion that this ground cannot be sustained. Section 440 of the Code of Civil Procedure, read in connection with section 3 of Act XL of 1858, does not, as contended for by the vakil, enjoin such a written permission being granted by the Court to the next friend of a minor, when the latter is a plaintiff. The suit in the present case, as already stated, was instituted in the name of the minor by her next friend the plaintiff No. 2; the plaint was duly received by the Court, and the suit was allowed to proceed. It is, therefore, to be presumed that the Court accepted the plaintiff No. 2 as a fit person to represent the interests of the minor. But more than this we find that the Court of first instance dealt with the question, whether the plaintiff No. 2 was a proper guardian of the minor, and whether he should be allowed to prosecute the suit on her behalf, and decided both questions in the affirmative. In this state of things, we are of opinion that this ground cannot be maintained.

The learned vakil for the appellant next contends that the lower Appellate Court has decided the case upon an altogether different issue from that upon which the first Court decided it.

We are of opinion that this ground also cannot be main-

tained. Both the lower Courts have substantially found that the property belonged to Moonshi, and that upon his death it devolved upon the plaintiffs. Whether, upon Moonshi's death, the property devolved upon all the three plaintiffs, or to the minor plaintiff alone, is a question which has not been, and which need not have been, gone into in the present case. That is a question which may hereafter be raised, if occasion should arise, as between the plaintiff No. 3, the minor daughter, and the plaintiffs Nos. 1 and 2, the nephews of Moonshi. We are, therefore, of opinion that the appeal should be dismissed with costs.

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Appeal dismissed.

CRIMINAL REVISION.

Before Mr. Justice Wilson and Mr. Justice Ghose.

IN THE MATTER OF THE PETITION OF DINONATH MULLICK.

DINONATH MULLICK v. GIRIJA PROSONNO MOOKERJEE.*

1885

August 24.

Recognizance to keep the peace—Criminal Procedure Code (Act X of 1882), s. 107—Power of District Magistrate to call on person residing in another district for security.

A Magistrate has no jurisdiction to take proceedings under s. 107 of the Criminal Procedure Code, against a person not personally within his jurisdiction. *In the matter of the petition of Jai Prokash Lal (1), and in the matter of the petition of Rajendro Chunder Roy Chowdhry (2) followed.*

Even assuming there was jurisdiction, it was not a case where the Magistrate should have called upon the petitioner to appear personally, he residing at a distance, there being no special circumstance making his personal attendance necessary, and the Magistrate having power under s. 116 to allow him to appear by a pleader.

THE petitioner Dinonath Mullick, through an agent, made an application to the Deputy Magistrate of Bongong to the effect, that, as a breach of peace was apprehended on the part of Girija Prosonno Mookerjee and his servants, on their attempt to put up by force a bund on the *khul* belonging to the petitioner, they

* Criminal Revision No. 333 of 1885, against the order of Baboo Troinkya Nath Sen, Deputy Magistrate of Bongong, dated the 3rd August 1885.

(1) I. L. R., 6 All., 26.

(2) I. L. R., 11 Cal., 737.