

## APPELLATE CIVIL.

1901  
July 1.*Before Mr. Justice Banerji and Mr. Justice Aikman.*SHAM LAL AND OTHERS (DEFENDANTS) *v.* GHASITA AND ANOTHER  
(PLAINTIFFS).\* \**Hindu law—Joint Hindu family—Suit by sons to obtain exemption of their shares from sale under a decree on a mortgage—Plaintiffs parties to the suit in which the decree was passed, but minors, and not properly represented—Guardian and minor—Res judicata—Civil Procedure Code, section 457.*

A suit was brought by the mortgagee to enforce a simple mortgage of ancestral property executed by the father of a joint Hindu family consisting of himself and two sons. At the time of the suit the sons were minors and the father was first named as their guardian *ad litem*, but he refused to act, and thereupon the mother of the minors was appointed their guardian *ad litem*. The suit terminated in an *ex parte* decree for sale against all the defendants. The minors thereupon sued to obtain a declaration that the decree for sale did not affect their interests in the joint family property, inasmuch as they had not been properly represented in the suit in which it was passed, their mother being, as a married woman, incapable in law of acting as their guardian. No question of fraud was shown to arise in the case. *Held* that the minors, on the facts stated above, were entitled to the decree asked for. *Durga Persad v. Kesho Persad Singh* (1), *Mungniram Marwari v. Mohant Gursahai Nund* (2), *Vishnu Keshav v. Ramchandra Bhaskar* (3), *Daji Himat v. Dhirajram Sadaram* (4), *Nawab Mahomed Nooroolah Khan v. Harcharan Rai* (5), *Dawlat Singh v. Raghbir Singh* (6) and *Raghubar Dyal Sahu v. Bhikya Lal Misser* (7) referred to.

THE facts of this case are sufficiently stated in the judgment of the Court.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*) for the appellants.

Pandit *Sundar Lal* for the respondents.

BANERJI and AIKMAN, JJ.—The plaintiffs in this case claim a declaration that their two-thirds share in certain zamindari property is not liable to sale in execution of a decree for sale obtained under section 88 of the Transfer of Property Act, and that they are not bound by the decree or by any proceedings in execution which may be taken hereafter. The suit for sale

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\* Second Appeal No. 636 of 1898 from a decree of Maulvi Muhammad Ismail, Subordinate Judge of Meerut, dated the 3rd September 1898, confirming a decree of Pandit Alopi Prasad, Munsif of Ghazibad, dated the 8th February 1898.

(1) (1882) I. L. R., 8 Cal., 656.

(4) (1887) I. L. R., 12 Bom., 18.

(2) (1889) L. R., 16 I. A., 195.

(5) (1874) G.N.-W. P. H. C. Rep., 98.

(3) (1886) I. L. R., 11 Bom., 130.

(6) Weekly Notes, 1894, p. 141.

(7) (1885) I. L. R., 12 Cal., 69.

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was brought to enforce a simple mortgage of ancestral property executed by Kure, the father of the present plaintiffs, with whom they formed a joint Hindu family. The defendants to that suit were Kure and the present plaintiffs. The present plaintiffs were then minors, and the father was first named as their guardian *ad litem*, but he refused to act. Thereupon the plaintiffs' mother, Musammat Durga, was appointed their guardian *ad litem*. The suit ended in an *ex parte* decree for sale against all the defendants. No order absolute for sale has yet been passed under section 89 of the Act, or anything else done towards the execution of the decree. In this suit the plaintiffs sue virtually to set aside the decree, so far as it affects their rights, on the ground that their mother, Musammat Durga, being a married woman, her appointment as guardian *ad litem* was illegal with reference to section 457 of the Code of Civil Procedure, and that therefore they were not properly represented in the suit for sale, and are not bound by the decree passed in that suit. It has been found, and is not disputed, that Musammat Durga was a married woman, and therefore could not legally be appointed a guardian *ad litem* of the minors in the suit for sale. It has not been found that there was any fraud connected with her appointment, or with the conduct of the suit, or the passing of the decree. Both the Courts below have decreed the claim on the ground that the plaintiffs not having been properly represented in the suit for sale, the decree passed in that suit is not binding on them. It is urged in the appeal before us that the plaintiffs' suit is barred by the rule of *res judicata*. There can be no doubt that if the decree passed in the suit for sale is binding upon the plaintiffs, the present suit is barred by the rule of *res judicata*, no matter whether the decree was rightly or wrongly passed. The question is whether the decree is binding upon the plaintiffs. This question is by no means free from difficulty; but after giving the matter our best consideration, we think that it is concluded by the ruling of their Lordships of the Privy Council in *Durga Persad v. Kesho Persad Singh* (1) and inferentially by the ruling of their Lordships in *Mungniram Marwari v. Mohunt Gursahai Nund* (2). In the former case the minors sued for

(1) (1882) I. L. R., 8 Cal., 656.

(2) (1889) L. R., 16 I. A., 195.

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a declaration that a certain decreè, which the appellants had obtained against their uncle Sheonandan Singh and another on his own behalf, and as guardian of those minors, ought not to be executed against them, on the ground that the debt contracted by the ancestor, for which the decree was obtained, had not been contracted for legal necessity and was not binding on them, that the uncle was not a properly constituted guardian, and that in the suit in which the decree was so obtained against them they were not properly represented. The Privy Council held that the decree in the suit was not binding upon the infants, as Sheonandan, who was named as their guardian, was not the legal guardian, and had no right to defend the suit in their name. In the latter of the two cases referred to above the suit was of a nature similar to the present. The plaintiff sued for a declaration that the decree and auction sale under which the defendant became purchaser of the property in suit were not binding upon him as he was a minor, and was not properly represented in the suit in which the decree was obtained. Their Lordships disposed of the suit on the ground that the plaintiff was properly represented in the previous suit against him, but they did not dismiss the suit on the ground that such a suit would not lie. It was suggested in the course of the argument in that case that the plaintiff's remedy was by way of an appeal, or an application to have the first decree set aside. But their Lordships did not decide the case on that ground, as they could easily have done. On the contrary, the judgment implies that a separate suit would lie. The right of a minor to sue to set aside a decree on the ground that he was not properly represented in the previous suit was recognised in *Vishnu Keshav v. Ramchandra Bhaskar* (1) and in *Daji Himat v. Dhirajram Sadaram* (2). We may also refer to the case of *Nawab Mahomed Nooroollah Khan v. Harcharan Rai* (3), upon which the lower appellate Court relies. The learned vakil for the appellants has relied upon the case of *Daulat Singh v. Raghubir Singh* (4). In our opinion the judgment in that case, so far from supporting the appellants' contention, is against them. In that case it was

(1) (1886) I. L. R., 11 Bom., 130.

(3) (1874) 6 N.-W.-P. H. C. Rep., 98.

(2) (1887) I. L. R., 12 Bom., 18.

(4) Weekly Notes, 1894, p. 141.

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found that the guardian was properly appointed, and was a person who could legally act as guardian, and it was held that the minor having been represented by a lawfully-constituted guardian, was as much bound by the decree in that suit as if he had been *sui juris* at the time and had represented himself. From this it may be inferred that if the minor had not been represented by a lawfully-appointed guardian the decision would have been different. The ruling in *Raghubar Dyal Sahu v. Bhikaya Lal Misser* (1) to which reference was made on behalf of the appellants, does not, in our opinion, help the appellants. In that case Field, J., observed:—"If it be a suit to set aside the decree obtained against an infant properly made a party and properly represented in the case, and if it be sought to do this by a separate suit, I apprehend that the plaintiff in such a suit can succeed only upon proof of fraud or collusion." This remark of the learned Judge, in our opinion, implied that he would not have held that the suit was not maintainable otherwise than on the ground of fraud or collusion, if the minor had not been properly represented in the suit in which the decree was passed. The result is, that this appeal fails and is dismissed with costs. We may mention that this case was heard by the late learned Chief Justice of this Court and one of us, and that the view which he took was the same as that now adopted by us.

*Appeal dismissed.*

1901  
July 2.

*Before Mr. Justice Banerji and Mr. Justice Aikman.*

SITARA BEGAM (PLAINTIFF) v. TULSHI SINGH AND OTHERS.

(DEFENDANTS).\*

*Civil Procedure Code, section 158—Procedure—Order for plaintiff to pay the cost of preparation of a map—Non-compliance of plaintiff with order—Dismissal of suit.*

A Court has no power to dismiss summarily a plaintiff's suit merely because the plaintiff has omitted to comply with an order of the Court directing him, within a certain time, to pay in a sum of money as the cost of preparing a map considered by the Court to be necessary to the decision of the suit. If an order of this kind is not complied with, it is the duty of the Court to go on and decide the suit on such materials as it has before it.

\* Second Appeal No. 913 of 1899 from a decree of R. Greoven, Esq., District Judge of Benares, dated the 11th September 1899, confirming a decree of Babu Srish Chander Bose, Munsif of Benares, dated the 23rd June 1899.

(1) (1885) I. L. R., 12 Calc., 69.