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plaintiff and the defendant in the character of the plaintiff's dewan, only not disturbing any settled account, if such there be. And inasmuch as the defendant has taken the course of denying his receipts, his fiduciary position and his accountability *in toto*, a defence which the High Court say is shown to be false by a mass of evidence adduced by the plaintiff, he should have been ordered to pay the whole costs of the suit up to and including the appeal to the High Court. If he had been truthful and honest, he would have submitted at once to a decree for account, and thus have saved great delay and expense. Their Lordships will ~~now~~ humbly advise Her Majesty to make such a decree, and the defendant will be ordered to pay the costs of this appeal.

Appeal allowed with costs. Suit remanded.

Solicitors for the appellant: Messrs. *Barrow and Rogers.*

C. B.

FULL BENCH.

Before Sir W. Comer Petheram, Knight, Chief Justice, Mr. Justice Mitter, Mr. Justice Prinsep, Mr. Justice Wilson and Mr. Justice O'Kinealy.

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BHABA PERSHAD KHAN, MINOR, BY HIS GUARDIANS RAMSAKHI DABI CHOWDHRAIN AND ANOTHER (PLAINTIFFS) *v.* THE SECRETARY OF STATE FOR INDIA IN COUNCIL AND OTHERS (DEFENDANTS.)*

Minor, Suit on behalf of—Objection to description of minor—Permission to sue, Proof of—Civil Procedure Code, ss. 440, 578—*Act XL of* 1858, *s.* 3.

Although the proper and regular manner of giving permission to sue on behalf of a minor is by an order recorded in the order-sheet, there is, nevertheless, nothing in the nature of the sanction provided by s. 3 of Act XL of 1858 which takes it out of the general rule of evidence, that sanction may be proved by express words or by implication.

Where on a construction of the plaint and the pleadings, it is found that the minor is the real plaintiff, the mere fact of his not having been properly described in accordance with s. 440 of the Civil Procedure Code is no ground for setting aside a decree passed in the suit.

* Appeal from Appellate Decree No. 536 of 1885, against the decree of J. F. Stevens, Esq., District Judge of Mymensingh, dated 19th December 1884, reversing the decree of Baboo Parbati Coomar Mitter, First Subordinate Judge of Mymensingh, dated 30th June 1883.

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THIS case was referred to a Full Bench by WILSON and GHOSE, JJ., on the 6th April 1886, with an opinion, of which the following is the only portion material to this report :—

"The question which we desire to refer to a Full Bench arises in this way.

"The suit purported to be brought by 'Ramsakhi Debi Chowdhrain, of Putia, mother and principal *ussies* (executor) and Boroda Churn Surma Khan, deputy executor of Bhaba Pershad Khan Chowdhry, minor, plaintiffs.' The plaint began by saying that 'we Ramsakhi and Boroda Churn on behalf of the said plaintiff Bhaba Pershad Khan, minor, state as follows.' It alleged the title to the land to be in the minor, and it said : 'we the executors on behalf of the minor, the plaintiff,' pray for a decree 'declaring the right of the minor, and awarding the minor plaintiff possession' with other relief.

"The written statement raised the contention that 'as Bhaba Pershad Khan, the minor, has not been made a plaintiff under the provisions of law, and as the plaintiffs have neither stated what kind of *ussies* (executors) they are, nor filed any document to show the same, the plaint is inadmissible.'

"The Subordinate Judge, who tried the case in the first instance, said as to this : 'Defendant did not deny that plaintiff was the guardian of the minor, and if she had denied the fact, plaintiff might prove it by producing the certificate of guardianship. If she is the constituted guardian of the minor, she need not describe herself as the next friend of the minor, and the suit can proceed at her instance. It appears that defendant does not seriously contend that plaintiff is not the guardian, and raises the plea merely for the sake of doing it : if she had any reasonable doubt as to the representative character of plaintiffs, she would no doubt have applied under s. 442 of the Civil Procedure Code to have the plaint taken off the file, and would never have remained satisfied with making an equivocal statement in the written statement. From the plaint it appears that the suit has been brought for the benefit of the minor, and if plaintiff is not the constituted guardian as stated by her, she can be allowed to proceed with the suit as the next friend of the minor, though she has not described herself as the next friend, inasmuch as it

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is not equitable to throw out the plaint at this stage for a formal defect. For the above reasons I hold that the suit is maintainable at plaintiff's instance.' The District Judge on appeal says as to the point now in question—

"There can, I think, be no doubt that the suit was bad as not being brought in accordance with s. 440 of the Code of Civil Procedure, and I must express my great surprise that when this objection was brought to the notice of the Subordinate Judge, he did not return the plaint for rectification of the error. The objection was raised at the earliest possible stage, and should have been at once disposed of. Further, no certificate under Act XL of 1858 was filed by the plaintiff; nor was permission given to her to sue for the minor under s. 3, Act XL of 1858. All that appears on the record is a vague affidavit by the plaintiff's general agent to the effect that such a certificate was obtained from the Judge of Rajshahye and '*has been filed in some case or other*' so cannot be found. This is not at all sufficient. If there was such a certificate in existence, it should either have been produced, or if it could not be found, a duplicate should have been procured and produced. I would call the Subordinate Judge's attention to the cases of *Mrinamoyi Dabia* v. *Jogodishuri Dabia* (1) ; and *Russick Das Bairagy* v. *Preonath Misree* (2)."

There can be no doubt that the minor was not described in the plaint according to the form indicated in s. 440 of the Civil Procedure Code, but at the same it is clear that the suit was one on behalf of the minor and for his benefit. The Court of first instance apparently regarded it as such, and accordingly allowed the suit to proceed. There is some inconsistency between the cases bearing upon this matter, and which have been noticed by us in our reference in Special Appeal No. 1512 of 1885, and we therefore think it right to refer to a Full Bench the following question:—

"Where a suit is brought by a next friend on behalf of a minor, and for his benefit, and where the Court of first instance allows it to proceed, whether the objection that the minor was not properly described according to s. 440 of the Civil Procedure

(1) I. L. R., 5 Calc., 450. (2) I. L. R., 10 Calc., 102.

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Code, or that the next friend was not a certificated guardian under Act XL of 1858, or that no express permission was granted to him by the Court to sue on behalf of the minor, is fatal to the suit?"

Baboo *Srinath Das* (with him Baboo *Kishori Mohun Roy*) for the appellants.—Reading the whole plaint it is clear that the minor is the real plaintiff in the case, and there is no relief claimed except of the minor. The form of the title of the plaint is not material. A Court may in its discretion authorize a next friend without a certificate of guardianship to institute a suit on behalf of a minor. It is not necessary that the Court should record its permission in a separate proceeding. In this case it is apparent on the face of the proceedings that the Court gave the permission. Permission so appearing is sufficient in law—*Goono Monee Debia* v. *Ram Kumol Sandle* (1); *Komul Chunder Sen* v. *Surbessur Doss* (2); *Aukhil Chunder* v. *Tripoora Soonduri* (3); *Alim Buksh Fakir* v. *Jhalo Bibi* (4); *Kedar Nath* v. *Debi Din* (5); *Jogi Sing* v. *Kunj Behari Sing* (6); *Girish Chunder Mookerjee* v. *Miller* (7).

Baboo *Mohesh Chunder Chowdhry* for the respondent.—In order to make a person a party to a suit one must comply with the form prescribed by the law. Section 440 of the Civil Procedure Code lays down the form of the title in a suit on behalf of a minor. In this case the title of the suit is so framed that the minor does not appear as the real plaintiff. The title of the plaint is equivocal. This suit ought not to have been allowed to proceed, as the real plaintiff was not before the Court. Suppose the suit is dismissed on the merits would not the minor on attaining majority be entitled to say that he was not a party to the suit? Permission of the Court is necessary under s. 3 of Act XL of 1858 to enable a next friend to bring a suit on behalf of a minor. The permission should be formally recorded in a separate proceeding which was not done in this case. The suit is bad.

(1) 17 W. R., 144.
(2) 21 W. R., 298.
(3) 22 W. R., 525.
(4) I. L. R., 12 Calc., 48.
(5) I. L. R., 4 All., 165.
(6) I. L. R., 11 Calc., 509.
(7) 3 C. L. R., 17.

Mrinomoyi Dabia v. *Jogodishuri Dabia* (1); *Russick Das Bairagy* v. *Preonath Misree* (2).

Baboo *Sreenath Das* in reply.—In *Russick Das Bairagy* v. *Preonath Misree* (2) an opinion was expressed against my contention; but the case was decided upon another point.

The following opinion was delivered by the Full Bench :—

The learned Judges, who heard this case in Special Appeal, have held on the construction of the plaint that the minor was the real plaintiff. They have, however, referred the following question to the Full Bench :

Where a suit is brought by a next friend on behalf of a minor and for his benefit, and where the Court of first instance allows it to proceed, whether the objection that the minor was not properly described according to s. 440 of the Civil Procedure Code, or that the next friend was not a certificated guardian under Act XL of 1858, or that no express permission was granted to him by the Court to sue on behalf of the minor, is fatal to the suit.

In regard to the first portion of this question, we are of opinion that the fact that the Judge allowed the suit to proceed is evidence that the Court trying the case allowed the institution of the suit, and the referring Judges have found to that effect.

In regard to the next part of the question, namely, whether the objection that the minor was not properly described according to s. 440 of the Code of Civil Procedure, is fatal to the suit, we are of opinion that it is not. In all cases the question to be decided is whether on a construction of the plaint and the pleadings the minor is really a party to the suit or not, and if he be, any irregularity in this description is provided for by s. 578 of the Code which declares: "No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise not affecting the merits of the case or the jurisdiction of the Court."

In regard to the third portion of the question, namely, whether the objection that no express permission has been granted by the

(1) I. L. R., 5 Calc., 450. (2) I. L. R., 10 Calc., 102.

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Court on behalf of the minor, is fatal to the suit; this, if answered in the affirmative, would mean that no evidence, except evidence of express permission, would be admissible to show that the Judge had sanctioned the institution of the suit. We think there is nothing in the nature of the sanction given under s. 3, Act XL of 1858, which takes it out of the general rule of evidence that sanction may be proved by express words or by implication. We are, therefore, unable to hold that the want of express permission is fatal to a suit. At the same time we must say that, according to the practice in the Mofussil Courts, every order is entered in the order-sheet attached to the record, and the proper and regular manner of proving permission would be by the production of the order-sheet or a certified copy thereof.

J. V. W.

APPELLATE CRIMINAL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Beverley.

JASPATH SINGH *v.* QUEEN EMPRESS.*

1886
December 21.

Charge to jury—Criminal Procedure Code (Act X of 1882), *s.* 298—*Duty of Judge when the jury are uncertain as to the offence committed—Evidence disbelieved in some parts and accepted in others.*

A jury, after retiring, returned to the box, and after unanimously finding both prisoners not guilty of the charges framed against them, stated to the Judge that they thought an offence had been committed by one of the prisoners, but were uncertain as to the section of the Penal Code applicable to his case; the Judge thereupon made over to them a copy of the Penal Code, leaving them to decide under what section the offence fell. *Held*, that he had failed in his duty, and that he should have asked the jury what doubts they had as to the crime which had been committed, and should have explained to them the law and informed them what offence the facts would prove against the prisoner if they believed those facts.

Where the evidence at a trial is in part disbelieved, as to which part it is thought that the witnesses had committed perjury, it is unsafe to accept the evidence of those witnesses in other parts and to convict the prisoner thereunder.

* Criminal Appeal No. 762 of 1886, against the order passed by H. Beveridge, Esq., Sessions Judge of Howrah, dated the 13th of September, 1886.