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Before Sir John Stanley, Knight, Chief Justice and Mr. Justice Sir William Burkitt.

HANUMAN PRASAD (PLAINTIFF) *v.* MUHAMMAD ISHAQ (DEFENDANT).*

Civil Procedure Code, section 443—*Guardian* ad litem—*Procedure—Appointment of guardian* ad litem *invalid—Effect of invalidity on decree passed against minor defendant.*

The provisions of section 443 of the Code of Civil Procedure as to the appointment of a guardian *ad litem* for a minor defendant are imperative, and where those provisions are not substantially complied with, the minor is not properly represented, and any decree which may be passed against him is a nullity. *Khiarajmal* v. *Daim* (1) followed. *Walian* v. *Banke Behari Perchad Singh* (2) distinguished.

THIS was a suit brought by one Hanuman Prasad for a declaration of his title to a certain house, and that an auction sale of the house which took place on the 18th of February 1900 was void as against him. One Munna Das, who was the certificated guardian of the plaintiff, on the 18th of June 1891 purported to mortgage the house in question as his own property to two persons, Ajudhia and Munni Lal. The mortgagees brought a suit for sale on their mortgage, obtained a decree, and brought the property to sale, and it was purchased by Muhammad Ishaq. In the suit of Ajudhia and Munni Lal the mortgagor Munna Das was originally the sole defendant, but on the application of Munna Das as certificated guardian of Hanuman Prasad the latter was made a defendant, Munna Das alleging that the house was in fact not his property but that of his ward. No appointment was, however, made under section 443 of the Code of Civil Procedure of a guardian *ad litem* for the minor defendant. Munna Das professing to act as guardian of Hanuman Prasad, filed a written statment on his behalf, and when the suit was lost, presented an appeal against the decree, but this appeal he allowed to be dismissed for default. In the present suit, brought by Hanuman Prasad after he attained majority, the Court of first instance (1st Additional Munsif of Meerut) decreed the plaintiff's claim. The defendant appealed, and the lower appellate Court (Additional Subordinate Judge of Meerut) reversed

* Second Appeal No. 817 of 1903, from a decree of Munshi Rai Shankar Lal, Additional Subordinate Judge of Meerut, dated the 28th of July 1903, reversing a decree of Bhawani Chandar Chakravati, Munsif of Meerut, dated the 1st of September 1902.

(1) (1904) L. R., 32 I. A., 23. (2) (1903) I. L. R., 30 Calc., 1021.

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the Munsif's decision and dismissed the suit. The plaintiff appealed to the High Court.

Mr. *Karamat Husain*, for the appellant.

Pandit *Baldeo Ram Dave*, for the respondent.

STANLEY C.J. and BURKITT, J.—The plaintiff appellant, Hanuman Prasad, in the suit out of which this appeal has arisen, sued for a declaration that a certain house was his property and was not saleable, and did not pass under a sale which took place on the 18th of February 1900. One Munna Das, who was the certificated guardian of the appellant, on the 18th of June 1891, purported to mortgage the house in question as his own property in favour of two persons, Ajudhia and Munni Lal. The mortgagees brought a suit for enforcement of payment of the mortgage debt by sale of the mortgaged property and obtained a decree for sale on the 18th of September 1897, and the property was sold on the 18th of February 1900 to the defendant respondent, Muhammad Ishaq. In the suit which was instituted by the mortgagees the sole defendant originally was the mortgagor, Munna Das. Munna Das, however, made an application to the Court on behalf of his nephew, the plaintiff appellant Hanuman Prasad, to have the plaintiff appellant impleaded as a defendant to the suit, alleging that the house did not belong to him (Munna Das), but was the property of his nephew. That application was signed by Munna Das, as certificated guardian of the plaintiff appellant. The Court acceded to this application and directed that Hanuman Prasad, the plaintiff appellant, should be made a party defendant to the suit, and directed him to file a written statement. No application whatever was made under the provisions of section 443 of the Code of Civil Procedure for the appointment of a guardian *ad litem* for Hanuman Prasad, who was a minor. The suit proceeded in the absence of a guardian *ad litem*, and the sale of the property was ultimately carried out. Munna Das put in a written statement, professing to act as guardian of his nephew, and filed an appeal against the decree which was passed in the suit, but allowed the appeal to be dismissed for default.

Now, the provisions of section 443 are imperative. They direct that where a defendant is a minor the Court shall appoint

a proper person to be guardian for the suit for such minor to put in a defence and generally to act on his behalf in the conduct of the case. It is abundantly clear in this case that Munna Das was not a proper person whom the Court, if it had been made aware of the facts, would have appointed as guardian. In the first place he was the mortgagor who purported to mortgage as his own the property which he afterwards alleged was the property of his ward. He, therefore, had a conflicting interest, an interest which should have precluded any Court from appointing him as guardian *ad litem* in a suit brought by the mortgagees of Munna Das. It is perfectly clear that the Court had not the facts before it, and it also appears to us to be clear that the Court was never called upon by the plaintiff, whose duty it was to see that a proper person was appointed guardian *ad litem*, to appoint such a guardian. The fact is that Hanuman Prasad was not properly represented as a party to that suit, and, therefore, any decree which was passed against him was a mere nullity. It is said that an innocent purchaser at an auction sale should not suffer under the circumstances, but we may point out that it may be open to him under the provisions of section 315 of the Code of Civil Procedure to recover the purchase-money from any person to whom it has been paid, if it turn out upon an issue which it will be necessary for us to remit to the lower appellate Court that the plaintiff appellant is the true owner of the house in question. That question has not been decided by the lower appellate Court.

It has been strongly contended on behalf of the defendant respondent that the decision of their Lordships of the Privy Council in the case of *Walian* v. *Banke Behari Pershad Singh* (1) entitles him to the judgment of the Court. In that case minors were sued, and their mother apparently was appointed as their guardian *ad litem*, but there was no evidence that *any formal order to that effect* was drawn up. Their Lordships in that case held that, there being nothing to suggest that the interests of the minors were not duly protected, and the defects in procedure not having prejudiced the minors, the absence of a formal order appointing the mother guardian *ad litem* was a

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mere irregularity under section 578 of the Code of Civil Procedure and not an error fatal to the suit. Their Lordships in their judgment say (at p. 1031 of the report) as follows:—

"The present plaintiffs were substantially sued in the former suit and the alleged fraud has been negatived. It appears to their Lordships that they were effectively represented in that suit by their mother and with the sanction of the Court, and for the reasons given by the first Court their Lordships attach no importance to the certificate of Durga Dutt. There is nothing to suggest that their interests were not duly protected. The only defects which can be pointed out are that no formal order appointing the mother of the plaintiffs to be their guardian *ad litem* is shown to have been drawn up; and that it is not definitely shown that any attempt was made to serve the summons in the former suit upon the infants personally or upon their mother, a *parda-nashin* lady, before serving it upon Gajadhar, the only adult male member and the *karta* of the family. It has not been shown that the alleged irregularities caused any prejudice to the present plaintiffs; nor indeed could there well be any, since it has been found that the original debt was one for which the present plaintiffs were liable."

It is clear from this language that what their Lordships held was that where orders were passed appointing a guardian *ad litem*, but such orders were not drawn up, the omission to draw up formal orders was a mere irregularity, and that, it appearing that there had been effective representation of the minors in the suit by their mother, and there being nothing to suggest that their interests were not protected, and in view of the fact that they were liable for the debt sued for, the irregularity would not be fatal to the sale. Now, in the case before us we find that the debt in respect of which the suit was brought was a debt of the uncle, and of the uncle alone.

We find that the uncle did not effectively defend the interests of the plaintiff appellant, but, on the contrary, acted dishonestly and improperly in bringing in his nephew into a suit with which he had originally no concern whatever, and entirely neglected his duty towards his nephew and allowed a decree by default to be passed. We may further point out,

in answer to the contention that has been strenuously urged by Mr. *Baldeo Ram* on behalf of the respondent in regard to the non-observance of the imperative provisions of section 443 of the Code, that there is a recent pronouncement of their Lordships of the Privy Council on the subject in the case of *Khiarajmal* v. *Daim* (1). Lord Davey in delivering the judgment of their Lordships considered the effect of a decree obtained against a party who was not properly represented in a suit. The question in that case was as to the validity of sales had under decrees. His Lordship observed :—"Their Lordships agree that the sales cannot be treated as void or now be voided on the ground of any mere irregularities of procedure in obtaining the decree, or in the execution of them. But, on the other hand, the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings, or properly represented on the record. As against such persons the decrees and sales purporting to be made would be a nullity, and might be disregarded without any proceeding to set them aside." We think, under the circumstances, that the lower appellate Court was wrong in disturbing the finding of the Court of first instance upon the question which has been discussed before us. The learned Munsif found that "the decree under which the house was eventually sold and purchased by the defendant No. 2 is also not binding on the plaintiff, seeing that he was not properly made a party to it, as found by the appellate Court in its judgment of the 12th of April 1902." We fully agree with the learned Munsif as regards this matter. We distinctly find that the plaintiff was not properly represented in the mortgage suit, and, therefore, he was no party to it, and he is not bound by the decree passed therein. The lower appellate Court, however, has not decided the title to the house in question. The defendant respondent contends that it was the property of Munna Das at the date of the mortgage executed by him on the 18th of June 1891. The plaintiff appellant, on the other hand, maintains that the house throughout belonged to him, and this has been repeatedly acknowledged by Munna Das. However, we must have a distinct finding upon this question. We, therefore, under

(1) (1904) L. R., 32 I. A., 23.

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the provisions of section 566 of the Code of Civil Procedure, remit to the lower appellate Court the following issue for determination:—Did the house mentioned in the pleadings belong to Munna Das or to the plaintiff appellant, Hanuman Prasad, on the 18th of June 1891, the date of the mortgage by Munna Das to Ajudhia and Munni Lal?

This issue will be determined upon the evidence already before the Court. On return of the finding the parties will have the usual ten days for filing objections.

Issue referred.

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REVISIONAL CRIMINAL.

Before Mr. Justice Richards.

INAYAT ALI *v.* MOHAR SINGH.*

Criminal Procedure Code, section 195—*Sanction to prosecute—Notice of application for sanction—Practice.*

Where an application is made to a Court under section 195 of the Code of Criminal Procedure for sanction to prosecute, although it is not legally necessary that notice of such application should be given to the opposite party before orders are passed thereon, nevertheless it is highly desirable that such notice should be given. *Pampapati Sastri* v. *Subba Sastri* (1), *In re Bal Gangadhar Tilak* (2), *Mangar Ram* v. *Behari* (3) and *Maula Bakhsh* v. *Niazo* (4) referred to.

THE facts of this case are as follows:—

In certain proceedings taken against one Mohar Singh for an assault one Inayat Ali was examined as a witness for the prosecution. In cross-examination he was asked some questions as to a promissory note which he and others were alleged to have given to Mohar Singh. Amongst other questions it was put to him whether or not he owed to Mohar Singh the money secured by that note. His answer was that he did not owe the money. Mohar Singh was convicted for the assault upon the evidence of this witness and several others. The promissory note had nothing whatever to do with the assault, and the only object and materiality of the question was to lessen the weight

* Criminal Revision No. 329 of 1905.

(1) (1899) I. L. R., 23 Mad., 210.
(2) (1902) 4 Bombay Law Reporter, 750.
(3) (1896) I. L. R., 18 All., 358.
(4) Weekly Notes, 1904, p. 171