

1907

KAMTA
SINGH
v.
MUKHTA
PRASAD.

share of your profits ; therefore you should not sue me jointly with the other defendant ; you must sue both separately." That, we think, is not the correct view of the law in view of the joint responsibility of the respondents. This suit has been dismissed in all the lower Courts on the ground that the decision of the Assistant Collector, to which we have just referred, operates as a *res judicata*. In our opinion that conclusion is wrong. We must therefore allow this appeal, set aside the judgment of all the lower Courts as also of the learned Judge of this Court, and as the suit was decided in the Court of first instance on the preliminary point that it was not maintainable against the two defendants, we remand the record through the lower appellate Court to the Court of first instance under section 562 of the Code of Civil Procedure to be replaced on the file of pending cases and tried on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

1907
January 19.

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

DAMMAR SINGH AND ANOTHER (PLAINTIFFS) v. PIRBHU SINGH AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, section 443--Guardian ad litem--Appointment of guardian ad litem other than the certificated guardian.

Held that the appointment, apparently by an oversight, as guardian *ad litem* to a minor defendant of a person other than the certificated guardian amounted to no more than an irregularity and would not of itself vitiate either a decree passed in a suit or a sale consequent upon such decree.

THE facts of this case are as follows. Pirbhu Singh and another sued Dammar Singh and another who were minors, and had their mother Rukhmina Kunwar appointed guardian *ad litem*. This was done apparently in ignorance of the fact that one Jhunni Singh had been appointed certificated guardian of the minor defendants. In the suit so brought the plaintiffs obtained a decree and some property of the minors was brought to sale. The defendants then brought the present suit asking for a declaration that the decree and sale in the former suit were void on the ground that they had not been properly represented. The Court of first

* Second Appeal No. 1214 of 1905 from a decree of Babu Madho Das, Subordinate Judge of Shahjahanpur, dated the 6th of September 1905, confirming a decree of Babu Keshab Das, Munsif of Sahaswan, dated the 29th of April 1905.

instance (Munsif of Shahjahanpur) decreed the suit in part and dismissed it in part. Both sides appealed. On appeal the lower appellate Court (Subordinate Judge of Shahjahanpur) dismissed the plaintiffs' suit altogether. The plaintiffs thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri* for the appellants.

Maulvi *Muhammad Ishaq* for the respondents.

STANLEY, C.J., and BURKITT, J.—We think that the view expressed by the learned Subordinate Judge is correct. There is no doubt that in appointing the mother of the minors as their guardian *ad litem* when there was already a certificated guardian, the Court acted in violation of the provisions of section 443 of the Code of Civil Procedure. That section provides that where an authority competent to appoint a guardian was appointed or declared a guardian or guardians of the person or property or both of the minor, the Court shall appoint him guardian *ad litem*, unless it considers for reasons to be recorded by it that some other person ought to be so appointed. It does not appear in this case that the Court did consider that any person other than the certificated guardian ought to be appointed, for it is admitted that no reasons for the appointment of the mother as guardian were given in the order passed by the Court appointing her. In fact it would seem that the Court was ignorant of the fact that Jhunni Singh had already been appointed a certificated guardian. It is contended before us that the appointment of the mother was illegal, and that in consequence of this illegality the decree passed in the suit and the sale consequent upon the decree are nullities. We are not aware of any authority for such a proposition. We are disposed in the absence of authority to hold that the violation of the provisions of section 443 by the Court is merely an irregularity and, as such, does not of itself vitiate either a decree passed in a suit or a sale consequent upon such decree. For these reasons we concur in the finding of the lower appellate Court and dismiss the appeal with costs.

Appeal dismissed.

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