

paid on the appeal has already been made good, but the deficiency, if any, on the plaint has not been paid. It appears to us that in view of the relief claimed by the plaintiffs in their plaint, the court fees, which have been paid both here and below, are sufficient. Mr. *Sundar Lal*, on behalf of the plaintiffs respondents, expressed his willingness to pay the additional court fee, provided the Court gave his clients the supplemental relief to which the clients would be entitled if the plaint were amended and proper reliefs arising out of the existence of these prior mortgages be granted, but he objects to the payment of any additional court fees unless he gets those additional reliefs. We think his contention is right, and that the decree of the Court below went too far in providing for the redemption of the earlier mortgages, a relief which, we have said before, was not sought. We think that the best course is to modify the decree of the Court below by striking out the portion which deals with the prior mortgages. The directions contained in the decree from the words "if the plaintiffs pay" down to the words "Muhammad Mohsin" should be struck out of the decree. The decree will then be the usual mortgage decree for the sale of the mortgagee's rights in the mortgaged property, without prejudice to the claim of any prior incumbrancers. We direct a decree to be so framed, and we extend the time for payment of the mortgage debt up to the 20th of May 1908. On an application in the proper quarter the appellants may be able to obtain a return of the additional court fees which they have been required to pay.

Decree modified.

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

BANARSI PRASAD (DEFENDANT) v. RAM NARAIN AND OTHERS
(PLAINTIFFS).*

Guardian and minor—Guardian ad litem—Civil Procedure Code, section 447—Necessity of formal discharge from the duties of guardian ad litem—Suit to set aside a decree.

Held that no suit will lie to set aside a decree where fraud is neither alleged nor proved and no specific relief is asked for save and except the setting aside of the decree. *Umrao Singh v. Hardeo* (1) referred to.

* First Appeal No. 18 of 1907, from a decree of Girraj Kishor Das, Subordinate Judge of Bareilly, dated the 30th of November 1906.

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Held also that where the same person is both certificated guardian and guardian *ad litem* to minor plaintiffs, the fact that one of such plaintiffs has come of age and been appointed certificated guardian of the persons and property of the others would not relieve the original guardian of her duties as guardian *ad litem*: to do this requires a special order under section 447 of the Code of Civil Procedure.

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

The Hon'ble Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the appellants.

The Hon'ble Pandit *Madan Mohan Malaviya* and Babu *Sital Prasad Ghose*, for the respondents.

STANLEY, C.J., and BURKITT, J.—This appeal arises out of a suit to set aside a decree passed by the Subordinate Judge of Bareilly on the 15th of May 1905 in a redemption suit. The former suit was instituted so far back as the 6th of April 1905, and was a suit for redemption of mortgage and for accounts. The plaintiff in that suit was Kunwar Hulas Singh, the father of the present plaintiffs respondents. The suit was decreed and redemption allowed. The matter came before the High Court on second appeal when this Court affirmed the decree for redemption and directed accounts to be taken on the basis of the gross rental and not upon the basis of actual profits. An appeal was preferred to His Majesty in Council and a decree was passed by the Privy Council on the 25th of March 1903. The case is reported in the Indian Law Reports, 25 All., 387. Upon the question as to the principle upon which the account should be taken their Lordships of the Privy Council reversed the decision of this Court, holding that the defendant mortgagee was not responsible for the amount of the gross rental as shown in the jamabandi but only for such sums as were actually received by him or on his behalf, and such further sums, if any, as might have been received by him but for his own neglect or fault. Their Lordships accordingly directed that an account should be taken of the defendant's receipts and payments under the mortgage deed and that the ultimate balance due to or from the defendant should be certified. We should mention that prior to the decision of the appeal in this Court the appellant Kunwar Hulas Singh died. His three minor sons were brought upon the record as his representatives, his widow Musammat

Mulo being their next friend. In addition to being next friend of her minor sons in this litigation Musammat Mulo was also on the 30th of April 1900 appointed by the District Judge as guardian of their persons and property under the Guardian and Wards Act. After the decision of their Lordships of the Privy Council, namely on the 20th of July 1903, the High Court transmitted their order to the Court below under section 610 of the Code of Civil Procedure with direction to carry it into execution. In these proceedings a pleader named Lekhraj Singh appeared for the minors filing his *vakalatnama* as pleader for them and for their next friend. He appears to have acted as such up to the 9th of May 1905. On that day, after the accounts had been rendered by both the parties, and it only remained to examine and consider these accounts, Lekhraj Singh informed the Court on the day fixed for the hearing that he had no instructions and could not proceed with the hearing. The Court intimating that the accounts had been filed and all that remained to be done was to examine them, adjourned the hearing, considered the accounts and passed a decree on the 16th of May 1905. Meanwhile Musammat Mulo had made an application to the Court of the District Judge stating that her son Ram Narain had attained his majority and that she was incapable of attending to the affairs of the minors and praying that she might be discharged from the post of guardian of their persons and property and that Ram Narain might be appointed guardian in her place. This application was granted on the 3rd of February 1901. No intimation however was given to the Subordinate Judge of the fact that Ram Narain had been appointed guardian in the place of Musammat Mulo, and no application was made on behalf of the minors for the substitution of his name as next friend in the suit which was then pending. This being so, Musammat Mulo continued to be the next friend for the purposes of the suit. The decree of the 16th of May 1905 did not satisfy the plaintiffs, and an application was made by Ram Narain on behalf of himself and his brothers for a reinstatement of the case and a rehearing after investigation of the accounts, alleging that they were not represented when the accounts were examined by the learned Judge. The Subordinate Judge refused this application for reasons which it is not

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necessary to criticise. No appeal was taken from his order, though it was appealable, and the decree of the 16th of May 1905 has become absolute. The suit out of which the present appeal has arisen was then launched, the sole prayer for specific relief being that the decree of the 16th of May 1905 may be set aside. The learned vakil for the respondents has been unable to refer us to any authority for the bringing of a suit in which the only relief claimed is the setting aside by a Subordinate Judge of a decree passed by his predecessor. It is true that the plaintiff claimed any other relief which might be just; but we do not think that this general prayer would justify the passing of an order which would have the effect of annulling a decree against which no appeal was preferred. Even if fraud on the part of the defendant appellants had been alleged, we do not think that the Court would have any jurisdiction to set aside the decree. If other relief had been prayed for and there were proof of fraud in obtaining the decree, it might be open to the Court to treat the decree as a nullity and to give suitable relief. But in this case fraud is neither alleged nor proved, and no specific relief is asked for, save and except the setting aside of the decree. On this subject we may refer to the ruling of this Court in the case of *Umrao Singh v. Hardeo* (1). The learned Subordinate Judge appears to us to have been under a misconception as to the difference between a next friend acting for minor plaintiffs in a suit, and a guardian appointed over the persons and properties of minor under the Guardians and Wards Act. He says in the course of his judgment that "the guardian's name nominally remained as guardian in suit No. 52 of 1895 after the 3rd of February 1904, when Musammat Mulo was removed from guardianship and Ram Narain, the plaintiff, was declared an adult and was appointed guardian of the other plaintiffs by order of the District Judge of Bareilly." He then held that if the plaintiffs had not been properly represented in the proceedings which resulted in the decree, the present suit was maintainable. He evidently considered that when Musammat Mulo was removed from the guardianship under the Guardians and Wards Act she ceased to act as next friend of the minors in the pending suit.

(1) (1907) I. L. R., 29 All., 418.

Such was not the case. Mr. *Moti Lal* has pointed out the course which should have been adopted by the parties if she had desired to retire from the office of next friend in the pending suit. Section 447 of the Code of Civil Procedure directs that a next friend shall not retire at his own request without first procuring a fit person to be put in his place and without giving security for the costs already incurred. This provision of the Code was absolutely ignored by the parties. The Subordinate Judge seems to have considered that the appointment of Ram Narain by the District Judge as guardian under the Guardians and Wards Act was tantamount to his appointment as next friend for his minor brothers in the suit before the Subordinate Judge. We are not able clearly to understand the order which has been passed by him. Whilst setting aside the decree, which is the only relief which was sought, he has given a direction that the suit No. 52 of 1895, that is, the former suit, is to be restored to its original number on the file and that inquiries be made in accordance with the order of their Lordships of the Privy Council. We think that the suit was misconceived and that this appeal must be allowed. We allow the appeal, set aside the decree of the Court below and dismiss the plaintiffs' suit with costs in both Courts. We extend the time for payment of the amount due by the plaintiffs up to the 3rd January 1908.

Appeal decreed.

REVISIONAL CRIMINAL.

Before Mr. Justice Richards.

RAM DENI *v.* NAND LAL RAI.*

Criminal Procedure Code, section 195—Sanction to prosecute—Jurisdiction to grant or revoke sanction.

Application was made under section 195 of the Code of Criminal Procedure to a Magistrate of the third class, who tried the original case, for sanction to prosecute the complainant. This application was refused. A further application was then made to the District Magistrate, who granted sanction. *Held* that the Sessions Judge had no power to set aside the order of the District Magistrate granting sanction.

IN this case one Ram Deni filed a complaint in the Court of a Magistrate of the third class charging two persons, Nand Lal and

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