

1908
August 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji,
SRIDHAR RAO (PLAINTIFF) v. RAM LAL (DEFENDANT).*
*Civil Procedure Code, section 440—Minor suing through next friend other than
 certificated guardian—Permission of Court presumed—Procedure.*

A minor who had a certificated guardian living instituted a suit through a next friend other than the guardian. On the application of the next friend notice was sent to the certificated guardian, but he showed no cause, and the suit continued. *Held* that under the circumstances, although no formal order had been recorded permitting the next friend to act on the minor's behalf, it must be presumed that the intention of the Court had been to grant such permission, and the suit ought not to be defeated solely upon the ground that no formal permission had been recorded.

IN this case a suit was instituted by a minor through one Sada Sheo Rao as his next friend. At the time of the institution of the suit there was in existence a certificated guardian of the minor appointed under Act No. VIII of 1890, one Madho Rao. On the application of the next friend the Court (Subordinate Judge of Jhansi) issued notice to the certificated guardian to show cause why the person nominated as next friend of the minor should not be permitted to carry on the suit in that capacity. The suit was one in which the minor sought to set aside the sale of a mortgage deed standing in the minor's name by his certificated guardian to one Ram Lal and a subsequent decree obtained by Ram Lal on the mortgage. No cause was shown by the certificated guardian in answer to the notice served upon him, and the suit proceeded with Sada Sheo Rao as next friend although no formal order was made by the Court permitting him to act as such. The suit was transferred to the Court of the District Judge, where, after all the evidence had been recorded, the defendant took an objection that the suit must fail for want of compliance with the provisions of section 440 of the Code of Civil Procedure. The District Judge sustained this objection and dismissed the suit. The plaintiff thereupon appealed to the High Court.

Babu Jogindro Nath Chaudhri and Babu Harendra Krishna Mukerji, for the appellant.

The Hon'ble Pandit Sundar Lal and Dr. Satish Chandra Banerji, for the respondent.

STANLEY, C.J., and BANERJI, J.—The suit which has given rise to this appeal was brought on behalf of a minor for the

* First Appeal No. 28 of 1907 from a decree of H. E. Holme, District Judge of Jhansi, dated the 7th of January 1907.

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avoidance of a sale-deed executed by his certificated guardian. The plaint in the suit was filed by a person who described himself as the next friend of the plaintiff. As he was not the certificated guardian, the Court ordered notice to issue to the certificated guardian as required by section 440. This order was passed on an application made by the next friend who instituted the suit on behalf of the minor. Notice was served on the certificated guardian, but he showed no cause. The Court then proceeded to settle issues, and recorded some evidence, but no formal order was recorded granting leave to the new next friend to institute the suit. The case was transferred to the Court of the learned District Judge, and before him an objection was taken to the effect that as no leave had been granted under section 440, the suit was not maintainable. This objection prevailed in the Court below, and the suit has been dismissed. The learned Judge was of opinion that leave to institute the suit ought to have been formally granted and recorded. Section 440 requires that if a minor has a guardian appointed or declared by an authority competent in this behalf, a suit shall not be instituted on behalf of the minor by any person other than such guardian, except with the leave of the Court granted after notice to such guardian. As we have said above, notice was issued to the certificated guardian as required by the section; it was served on him, but he did not appear and show cause. It is true that no formal order granting leave was recorded by the Court, but, as the Court framed issues and examined witnesses, it must be presumed that the Court did grant leave to the person who presented the plaint, after being satisfied that it was for the welfare of the minor that that person should be permitted to institute the suit on the minor's behalf. The Court below was therefore wrong in dismissing the suit. As the suit was dismissed upon a preliminary ground, and in our opinion that ground cannot be supported, we set aside the decree of the Court below, and remand the case to that Court under section 562 of the Code of Civil Procedure, with directions to re-admit it under its original number in the register, and dispose of it on the merits. The appellant will have the costs of this appeal. Other costs will abide the event.

Appeal decreed and cause remanded.