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This question the Court below did not try. We accordingly refer the following issues to that Court under the provisions of order 41, rule 25 of the Code of Civil Procedure :—

(1) Was the mortgage in favour of the appellant made by Kishan Lal to raise money for the reconstruction of the *chaupal*.

(2) If so, what powers had Kishan Lal in respect of the *chaupal*, and was he competent to mortgage it for the above purpose?

The Court will take such additional evidence as may be necessary. On receipt of the finding the usual ten days will be allowed for filing objections.

Issues remitted.

PRIVY COUNCIL.

P. C. 1910 *March* 8.

MUNNU LAL AND ANOTHER (DEFENDANTS) v. GHULAM ABBAS AND ANOTHER (PLAINTIFFS.)

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow.]

Minor—Representation of minor—Appointment of guardian ad litem—Absence of affidavit as required by section 456 of the Code of Civil Procedure (1882) *—Suit by minors to set aside proceedings—Civil Procedure Code* (1882), *section 443.*

Where an order was made by the court appointing a person guardian *ad litem* on behalf of certain minors in a suit in which a decree was duly made against them, *Held*, in a suit by the minors on attaining majority to set aside the decree and a sale in execution thereunder, that the absence of an affidavit such as is required by the provisions of section 456 of the Civil Procedure Code (Act XIV of 1882) at the time the application for the appointment of a guardian was made, was not sufficient to render the proceedings illegal and void as against the minors on the ground that they were not properly represented therein.

Walian v. *Banke Behari Pershad Singh* (1) followed.

The order being on the record the presumption was, in the absence of evidence to the contrary, that everything was regularly and properly done.

APPEAL from a decree (20th May 1907) of the Court of the Judicial Commissioner of Oudh, which reversed a decree (30th June 1906) of the Subordinate Judge of Bara Banki.

The principal question for determination in this appeal was whether the respondents, Ghulam Abbas and Ghulam Sarfaraz,

Present :—Lord MACNAGHTEN, Lord COLLINS, Sir ARTHUR WILSON and Mr. AMEER ALI.

(1) (1903) I. L. R., 30 Calc., 1021; L. R., 30 I. A., 182.

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were entitled to set aside a sale made on 20th January 1897 of certain immovable property in execution of a decree passed on 14th November 1894 by the Court of the Subordinate Judge of Bara Banki in favour of the appellant Munnu Lal, against the respondents and the other sons of one Ghulam Hasrat, deceased. Ghulam Hasrat was the owner of an ancestral share of a village called Kola Gahbari. Kasim Ali and Makdum Bakhsh were the owners of another share in the same village, which share, on 22nd April 1875, they mortgaged with possession to one Jaisi Ram. In execution of a decree for other sums of money obtained against them by Jaisi Ram the equity of redemption in their mortgage of 22nd April 1875 was sold and was purchased by one Tika Ram on 17th February 1880; and Tika Ram on 15th September 1880 sold the said equity of redemption to Jaisi Ram. Ghulam Hasrat thereupon claimed the right to pre-empt, and eventually a decree for pre-emption of the equity of redemption was made in his favour on 20th September 1881.

Ghulam Hasrat died in May 1885 leaving as his heirs four sons Ghulam Dastgir, Ghulam Razzak, Ghulam Abbas and Ghulam Sarfaraz, who succeeded to his estate. The three last named sons being minors, Ghulam Dastgir on 15th January 1886 applied to the District Court at Lucknow for a certificate of guardianship under Act XL of 1858, and on 13th March 1886 he was duly appointed guardian of the persons and property of his minor brothers.

On 20th December 1889 Ghulam Dastgir, for himself and as guardian of Ghulam Abbas and Ghulam Sarfaraz, and Ghulam Razzak who had then attained majority, executed a mortgage of both the ancestral share, and the share acquired by pre-emption in favour of the present appellant Munnu Lal, who in 1892 brought a suit on the mortgage and on 14th November 1894, obtained a decree for sale. In execution of that decree both shares were purchased by Munnu Lal and Janki Prasad, the second appellant, subject to existing incumbrances, namely, the mortgage with possession of the 22nd April 1875 as to the acquired share, and a mortgage with possession of the ancestral share dated 26th April 1881 executed by Ghulam Hasrat in favour of one Sanwale Singh.

Ghulam Abbas attained majority on 11th October 1899, and Ghulam Sarfaraz on 29th December 1902; and on 21st December 1905 they instituted the present suit to set aside the sale under the decree of the 14th November 1894, which they contended was not binding on them because in the suit in which that decree was made their brother Ghulam Razzak, who was their guardian *ad litem* in the suit, had not been duly appointed and they had therefore not been properly represented. They also alleged that the mortgage bond of 20th December 1889 was also not binding on them because the money borrowed under it by Ghulam Dastgir was not borrowed for their benefit, nor with the sanction of the court. The plaint prayed for possession of a half share in both the ancestral and acquired property purchased by the defendants (the present appellants).

The defence was that both the decree of 14th November 1894, and the bond of 20th December 1889 were binding on the plaintiffs, who had benefited by the money borrowed and been properly represented in the suit in which the decree was obtained; that the suit was barred by limitation, and that the plaintiffs could in no event recover possession without discharging the debts due by Ghulam Hazrat under the mortgages executed by him on 22nd April 1875, and 26th April 1881, which were held by the defendants.

On these pleadings the first issue (the only one now material) was whether the decree and sale were binding on the plaintiffs.

On this, which was the only issue he dealt with, the Subordinate Judge held that the decree, dated 14th November 1894 was binding on the plaintiffs; that they were properly represented in the suit by Ghulam Razzak, a guardian *ad litem* duly appointed, against whom no fraud, collusion, or gross negligence could be charged; that the money borrowed under the mortgage of 20th December 1889 had been obtained to satisfy decrees made on 14th July 1888 in favour of one Ramdin, and on 20th December 1888 in favour of one Badri Das; that the former of those decrees was admittedly binding on the plaintiffs, and that Ghulam Dastgir was justified in taking the loans he took from Badri Das, for which a decree was subsequently made so as to bind the interests of the plaintiffs in the property in suit.

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The following was the material portion of his judgment on this point:—

"In 1892 Munnu Lal brought a suit against the plaintiffs and their brothers for the recovery of the money due to him under the deed dated 20th December 1889. It appears that the plaintiffs' certificated guardian, Dastgir, did not defend that suit. Plaintiffs' mother and their brother Razzak, who had then attained majority, represented to the court that Dastgir was not a proper person to act as guardian of the minors Abbas and Sarfaraz (the present plaintiffs). The court appointed Razzak to act as guardian *ad litem* of the present plaintiffs. Razzak appointed Munshi Qurban Ahmad, pleader, to defend the suit on behalf of the present plaintiffs. Thus, all proper steps were taken to see that the suit was properly defended on their behalf. It was pleaded on their behalf that the deed in question was not executed for their benefit and was not binding on them, and that it was void, having been executed by their certificated guardian without the permission of the District Judge.

On the 14th November 1894 the court found that the minors were not liable to pay the sum of Rs. 820 (a sum charged as 'commission and compensation for saving the property') and interest thereon, and that they along with their brothers, were liable to pay the rest of the mortgage money amounting to Rs. 7,623. The case went up on appeal to the court of the Judicial Commissioner of Oudh. The present plaintiffs were represented by a pleader in that court also. On 13th July it was decided by the Additional Judicial Commissioner that the sum of Rs. 9,237-9-8 was due to the mortgagee, Munnu Lal. The objectionable item of Rs. 820 was not decreed against the present plaintiffs.

"I am of opinion that the said decree is binding on the plaintiffs.

"We find the following passage in Trevelyan's 'Law relating to minors,' edition of 1897, pages 295, 296.

'If he (the minor) be properly represented by a next friend or guardian for the suit, and there be no fraud or collusion on the part of his next friend or guardian or of the opposite party, and his next friend or guardian be not guilty of gross negligence, a minor is as much bound by a decree made in a suit to which he is a party, whether it be made for his benefit or not, as if he were of full age, and it can be executed against him and his property as the case may be in accordance with law.'

"In the present case there is nothing to show that there was any fraud or collusion on behalf of the plaintiffs' guardian or the opposite party, nor it is made out that their guardian acted with gross negligence. On behalf of the plaintiffs I was referred to the case of *Mata Din* v. *Ali Mirza* (1). In that case the minors were represented in the suit by the guardian who had executed the mortgage and who could not plead the invalidity of his own act.

"In the present case, the certificated guardian, Dastgir, who had executed the deed on behalf of the minors, was not allowed to act as their guardian in the suit. Another person, Razzak, was appointed their guardian *ad litem*, who defended the suit with the help of a pleader and urged all those pleas which were now urged before me. The suit was tried on the merits, and the property

(1) (1902) 5 Oudh Cases, 197.

of the plaintiffs was not charged with the objectionable items of the debts. I therefore find that the decree in favour of Munnu Lal (defendant 1) is binding on the plaintiffs."

The Subordinate Judge therefore dismissed the suit with costs.

On appeal to the court of the Judicial Commissioner, that Court (MR. J. SANDERS, first Assistant Judicial Commissioner, and MR. R. GREEVEN, second Additional Judicial Commissioner), held that in the suit in which the decree of the 14th November 1894 was passed the minors (the present plaintiffs) were not properly represented, and that consequently the decree was not binding upon them. Their ground was that in the appointment of Ghulam Razzak as guardian *ad litem* of the minors the provisions of section 456 of the Civil Procedure Code had not been complied with.

As to this the judgements of the Judicial Commissioners' Court were as follows :—

MR. J. SANDERS (after referring to authorities cited to show that a minor is not properly represented by a guardian not duly certificated) continued :—

"The only ruling to which I have been referred which directly deals with the action of a Court in making the appointment of an unfit person as guardian *ad litem* of minors in a suit brought against them by a person to whom their property has been transferred to enforce the transfer is that to be found in the ruling *Sham Lal* v. *Ghasita* (1). There a mortgagee sued to enforce a simple mortgage of ancestral property executed by the father of a joint Hindu family consisting of himself and two minor sons. The mother of the minors was appointed their guardian *ad litem*. The suit terminated in an *ex parte* decree against the father and the minors. In a suit by the minors for a declaration that the decree for sale did not affect their interests in the joint family property inasmuch as they had not been properly represented in the suit in which it was passed, their mother being as a married woman, incapable in law of acting as their guardian, it was held that the minors on the facts stated above were entitled to the decree asked for.

"There the appointment of the guardian *ad litem* was found to be illegal with reference to section 457, Code of Civil Procedure. I think that this is a good authority for this Court to consider whether the Court which tried the suit of Babu Munnu Lal acted illegally in appointing Ghulam Razzak as guardian *ad litem* of the present plaintiffs. Their learned counsel asks this Court to hold that the appointment was illegal because it was made on the mere application of Ghulam Razzak himself unsupported by the affidavit imperatively

(1) (1901) I. L. R., 23 All., 459.

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required by section 456, Code of Civil Procedure. He asks this Court to consider the irregular or illegal action of the other Court.

"The ruling *Mata Din* v. *Ali Mirza* (1) lays down that the mother of two minors who had herself executed a mortgage of their property having been appointed their guardian *ad litem* in a suit brought by the mortgagee to enforce the mortgage in which he obtained a decree, the decree did not stand in the way of the minors in a suit brought by them to set aside the mortgage-deed. There it was held that such a suit was the only remedy that the minors had against a mortgage executed by the person who was appointed their guardian *ad litem* in the suit brought to enforce the mortgage. It may be implied that the reason for the decision of the learned Additional Judicial Commissioner was that the mother having herself executed the deed was illegally appointed by the Court guardian *ad litem*: in that the Court appointed a person who had an interest in the suit adverse to that of the minors.

"Similarly Ghulam Razzak was one of the executants of the mortgage-deed in favour of Babu Munnu Lal; and this fact should have furnished another reason to the Court for not appointing him guardian *ad litem*. It may be assumed that the Court in appointing him on his mere application and without the affidavit required by section 456, Code of Civil Procedure, acted illegally. I am of opinion therefore that in the former suit the minors were not properly represented and that consequently the decree passed in that suit is not binding on them."

MR. R. GREEVEN said:—

"The point here involved is that two minors, who were represented by a guardian *ad litem* in a suit instituted against them to enforce the mortgage, seek to impeach the decree and the instrument underlying it on the ground that the order of the Court appointing the guardian was wholly illegal because the imperative provisions of section 456 did not receive compliance. I may remark at the outset that I would not give effect to any such contention if the provisions of the section had been disregarded in a matter of office procedure which could not have prejudiced the minors' interests (*Mungniram Marwari* v. *Gursahai Nand* (2), *Walian* v. *Banke Behari Pershad Singh* (3); but in the present instance, it is manifest from the record itself that the provisions of section 443, which are imperative and disregard of which renders the decree a nullity (*Hanuman Prasad* v. *Mohammad Ishak* (4), received no compliance whatever. The Court was bound to see that the application was supported by 'an affidavit verifying the fact that the proposed guardian has no interest in the matters in question in the suit adverse to that of the minor and that he is a fit person to be so appointed.' No affidavit was presented and the Court made no inquiry into the applicant's fitness. I do not think that, by virtue of being an executant of the instrument in suit, he had an interest adverse to that of the minors; but he was hampered in his defence by the difficulty of having either to admit the document to be impeached on their behalf or to challenge it by denying the validity of his own act, as for

(1) (1902) 5 Oudh Cases, 197.

(2) (1889) I. L. R., 17 Calc., 347; L. R., 16 I. A., 195.

(3) (1903) I. L. R., 30 Calc., 1021; L. R., 30 I. A., 182.

(4) (1905) I. L. R., 28 Calc., 137.

example, in this instance, by pleading minority. In a reported decision of this Court (*Mata Din* v. *Ali Mirza*, (1) the inconveniences attending the appointment of such a representative were indicated and the appointment was held not to be such a representation as would preclude the minors from impeaching the decree and the document underlying it. Where there has been no inquiry at all into the fitness of the proposed guardian and the Court has not attempted to form any opinion on the subject, it cannot be argued that the question of fitness is a matter of individual judgement upon which the Court's decision ought to be accepted. I am of opinion that the appointment of an obviously unfit person, who does not present an affidavit, is as much a selection from a class of people expressly prohibited by the Act as the analogous instance of a married woman (*Sham Lal* v. *Ghasita* (2). The duties imposed upon the Civil Courts for the protection of minors have to be positively performed; and such performance cannot be inferentially assumed in the absence of direct evidence (*Manohar Lal* v. *Jadu Nath Singh* (3). On these grounds I would hold that there was no proper representation of the minors by Ghulam Razzak in the suit resulting in the decree given on the 14th November 1894."

The decision of the Subordinate Judge was therefore reversed.

On this appeal.

DeGruyther, K. C. and *B. Dube* for the appellants contended that the respondent had been properly represented in the litigation. The mere fact that an affidavit had not been put in on the application for the appointment by the Court of a guardian *ad litem* on their behalf was not sufficient to vitiate the proceedings in the previous suit. Reference was made to *Walian* v. *Banke Behari Pershad Singh* (4); and sections 443 and 456 of the Code of Civil Procedure (Act XIV of 1882.) The respondents' interests had not been prejudiced in any way, and Ramdin's decree for which some of the money had been borrowed was admittedly a debt for which they were liable with their brothers; while the debts due to Badri Das were contracted under circumstances which created an obligation on the respondents to discharge them. The decree of 14th November 1894 and the sale thereunder, were therefore, it was submitted binding on the respondents. In any event they were not entitled to a decree for possession of the property in suit without redeeming the mortgages in favour of Jaisi Ram and Sanwale Singh.

(1) (1902) 5 Oudh Cases, 197.

(2) (1901) I. L. R., 23 All., 459.

(3) (1906) I. L. R., 28 All., 585; L. R., 33 I. A., 128.

(4) (1903) I. L. R., 30 Calc., 1021; L. R., 30 I. A., 182.

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Ross for the respondent (called on as to whether the respondents had been properly represented) contended that the provisions of section 456 of the Code of Civil Procedure not having been strictly complied with, the guardian *ad litem* must be taken not to have been properly appointed, and the proceedings to have been therefore not binding on the respondents as their interests were not properly represented in the litigation. He referred to a passage from the judgement of the Second Additional Judicial Commissioner in which he said:—"The appointment was made in disregard of two of the safeguards imposed by section 456 of the Code of Civil Procedure. In the first place a mere application, unsupported by the affidavit declared by that section to be essential was accepted without the slightest inquiry. In the second place if he (Ghulam Razzak) had no interest adverse to that of the minors, he was certainly a person unfit to be appointed to represent them. He was one of the executants of the documents in suit; and the only method open to him for escaping from liability was a plea, which involved at least a suspicion of fraud, that he was a minor at the time of the execution. He was, moreover, so illiterate that, as noticed by the Court below, he had been unable even to sign his name in executing the document in suit." It was submitted that the decision of the court of the Judicial Commissioners was correct and should be upheld.

DeGruyther, K. C., in reply.

1910, *March 8th*:—The judgement of their Lordships was delivered by LORD MACNAGHTEN—

Their Lordships are of opinion that the decision of the Subordinate Judge was perfectly right.

The question is whether the respondents, in whose favour a former decree, made when they were infants, has been set aside, were properly represented at the hearing of the suit in which the decree was pronounced.

The objection was that the affidavit required by section 456 of the Code of Civil Procedure is not forthcoming. It does not appear whether in point of fact there was an affidavit or not. But assuming that there was not such an affidavit their Lordships think it impossible now to hold that the infants were not properly represented at the time. The learned Judge appointed

Ghulam Razzak their guardian *ad litem*. The order is on the record and it must be presumed, in the absence of evidence to the contrary, that everything was regularly and properly done.

The case that was referred to of *Walian* v. *Banke Behari Pershad Singh* (1) is really a much stronger case, because there the person who acted as guardian *ad litem* was not formally appointed, but he was recognised as guardian *ad litem* by the Court in the progress of the suit, and it was held by this Board that after that recognition it was too late to dispute his appointment.

Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed. The respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellants:—*Barrow, Rogers & Nevill.*

Solicitors for the respondents:—*T. L. Wilson & Co.*

J. V. W.

BRIJ NARAIN (DECREE-HOLDER) *v.* TEJBAL BIKRAM BAHADUR (JUDGEMENT-DEBTOR.)

P. C. 1910. *March* 2, *April* 19

[On appeal from the High Court of Judicature at Allahabad.]

*Decree—Amendment or alteration of decree—Amendment by Subordinate Judge of his decree after it had been affirmed by High Court on appeal—Future interest struck out of decree not being in accordance with judgement—Amendment limited to one decree-holder of joint decree on appeal to High Court—Civil Procedure Code (*1882*) sections* 206—209.

A joint and several mortgage decree passed by the court of a Subordinate Judge under section 88 of the Transfer of Property Act (IV of 1882), which gave future interest on the amount decreed, was affirmed on appeal by the High Court. Subsequently, on the application of the judgement-debtor (the respondent, who had deposited in the court the whole amount due under the decree, including future interest) the Subordinate Judge, notwithstanding objections by the decree-holders, amended his decree by striking out the future interest on the ground that such interest was not in accordance with the judgement on which the decree was based. The decree-holders (the appellant and another who was a transferee of the original decree-holders) made separate applications to the High Court for revision of the Subordinate Judge's order. On the application of the transferee decree-holder a Bench of the High Court held that the Subordinate Judge had no jurisdiction to amend a decree which had been affirmed by the High Court, and set aside his order, but only so far as it affected the transferee decree-holder. On

Present:—Lord MACNAGHTEN, Lord COLLINS, and Sir ARTHUR WILSON.

(1) (1903) I. L. R., 30 Calc., 1021; L. R., 30 I. A., 182.