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in other words, it justifies the transaction on the ground of legal necessity. It cannot, we think, be said that the consent of the beneficiary himself is such a consent as would give rise to any such presumption. In either of these views it appears to us that the appellant here is not entitled to rely upon this document as being a transfer in his favour and to claim that the estate of the deceased Lalji has vested in him. We are of opinion that the plaintiffs were entitled to the declaration sought, and we, therefore, dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

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June, 20.

Before Mr. Justice Walsh and Mr. Justice Sundar Lal.

BHAGWAN DAYAL AND ANOTHER (PETITIONERS) *v.* PARAM SUKH DAS (OPPOSITE PARTY).*

Civil Procedure Code, 1908, *section* 151; *order IX, rule* 13—*Procedure—Minor—Decree against minor set aside on ground of want of proper appointment of guardian* ad litem—*Remedies open to plaintiff.*

Under the Code of Civil Procedure a suit may be instituted against a minor by name. It is the duty of the court to appoint a proper guardian *ad litem*. The institution of the suit is complete and saves limitation, but its further progress depends upon the appointment of a suitable guardian *ad litem*.

Where proceedings taken to appoint a guardian *ad litem* for a minor in a suit have been declared to be invalid, and a decree passed against a minor has been set aside because the minor was not properly represented in the suit, the court whose duty it ultimately is to appoint a guardian has inherent power under section 151 of the Code of Civil Procedure to revive the suit under order IX, rule 13, of the Code. *Raj Kumar Roy* v. *Hara Krishna Chakarvarti* (1), referred to.

THE facts of this case were as follows:—

In 1911 Param Sukh Das instituted a suit against Parbhu Lal and Bhagwan Dayal, minors and their uncle Raghubar Sahai on a mortgage, dated the 17th of September, 1904, for sale of property. Raghubar Sahai, the uncle, was named by him as a fit and proper person to be appointed as guardian of his minor nephews. Raghubar Sahai refused to act as guardian and in doing so he informed the court that the minors were living with their mother,

* Civil Revision No. 6 of 1916.

(1) (1911) 10 Indian Cases, 855.

and not with him. The court thereupon appointed the amin of the court as the guardian *ad litem* of the said minors and made an *ex parte* decree for sale on the 30th of August, 1911. An application was made on behalf of the plaintiff for setting aside the *ex parte* decree on the 8th of June, 1912. The court, however, rejected the application. The plaintiff then brought a suit to set aside the *ex parte* decree.

The suit was dismissed by the two courts below, but was decreed by the High Court, which set aside the decree on the sole ground that the minors were not properly represented in the suit. The plaintiff thereafter applied to have the suit restored to the file and proceeded with after appointment of a fit and proper person as guardian of the minor defendants. The court made an order as prayed, and against this order the defendants applied in revision to the High Court.

Pandit *Uma Shankar Bajpai*, for the appellants.

Munshi *Panna Lal*, for the opposite party.

SUNDAR LAL, J.—In 1911 Param Sukh Das instituted a suit against Parbhu Lal and Bhagwan Dayal, minors, and their uncle Raghubar Sahai on a mortgage dated the 17th of September, 1904, for sale of property. Raghubar Sahai, the uncle, was named by him as a fit and proper person to be appointed as guardian of his minor nephews. Raghubar Sahai refused to act as guardian and in doing so he informed the court that the minors were living with their mother, and not with him. The court thereupon appointed the amin of the court as the guardian *ad litem* of the said minors and made an *ex parte* decree for sale on the 30th of August, 1911. An application was made on behalf of the plaintiff for setting aside the *ex parte* decree on the 8th of June, 1912. The court, however, rejected the application. The plaintiff then brought a suit to set aside the *ex parte* decree on the ground that "the appointment of the plaintiff's guardian as made was improper and contrary to law and the plaintiffs had no knowledge of the suit aforesaid, and on account of this they were deprived of their right to set up a lawful defence."

The suit was dismissed by the two courts below, but on the 19th of January, 1915, a Division Bench of this Court presided over by the Hon'ble the CHIEF JUSTICE and Mr. Justice BANERJI

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decreed plaintiff's suit. The judgement of this Court is reported in I. L. R., 37 All., 179. It may be noted that the only ground upon which the suit was based was that the order appointing the amin as guardian of the plaintiff was bad for the many reasons set forth in the plaint, and upon that ground the proceedings taken in the suit after the date of the said order were invalid and bad in law. This Court set aside the decree in the suit on that ground alone. The only point in controversy between the parties in that suit was whether the appointment of the amin as guardian *ad litem* of the minors was proper and whether by reason of the defect in his appointment, the proceedings in the suit which followed and led up to the decree were invalid and void in law. No issue was framed in that suit as to whether the mortgage debt in suit was a good and valid debt binding upon the minors, and whether the mortgage-deed in suit was duly executed and capable of enforcement as against them. The decree in that suit was set aside on grounds other than those which were concerned with the merits of the claims as urged in that suit. The decree for sale in the suit on the mortgage having been set aside by this Court, on the ground mentioned above, the plaintiff, applied on the 26th of March, 1915, to the court below to restore the suit to the file of pending cases and to proceed to hear and dispose of the same according to law, after appointing a fit and proper person to act as guardian *ad litem* of the minor defendants. By its order, dated the 15th of May, 1915, the court below has admitted the suit to the file of pending cases so far as the minor defendants are concerned, and directed the plaintiff to take proper steps to appoint a guardian *ad litem* for the said minors, to enable it to proceed with the further hearing of the case. Mr. *Uma Shankar Bajpai* has applied for the revision of the said order and has asked us to set aside the said order on the ground that "the court below had no jurisdiction to revise the proceedings of the original suit against the applicants."

A minor against whom a decree has been made without the appointment of a proper guardian for him has several remedies open to him. He may, if the facts of the case justify, in that very suit—

(*a*) appeal against the decree,

(*b*) apply for re-hearing under order IX, rule 13,

(*c*) apply for a review of judgement, or

(*d*) apply for an order under rule 5(2) of order XXXII of the Code,

according as the circumstances of the case may permit. He has of course to initiate suitable proceedings for being duly represented by a guardian or next friend in these proceedings. He has, in addition to these four remedies, according to the cases, another, viz., a suit on the lines indicated in the case of *Sham Lal* v. *Ghasita* (1) In this case the petitioners sought their remedy by suit and obtained a decree from this Court on the 19th of January, 1915 (*vide* I. L. R., 37 All., 179). The question now is what is the remedy of the plaintiff mortgagee, who is respondent in this case. His case on the mortgage on the basis of which he had brought his suit has not been tried by this Court. All that has been done by this Court is to set aside or discharge the decree which the plaintiff had obtained on the 30th of August, 1911, without going into the question of the execution or the validity of the mortgage in suit. The plaintiff respondent was entitled to have his claim on the mortgage adjudicated upon either in the suit brought by him, or in the suit brought by the minors, which resulted in the decree of the 19th of January, 1915. The courts in India have adopted one course or the other according as the exigencies of the case demanded. Where, for example, a sale in execution of the decree has taken place and the rights of third parties as purchasers have come into existence which could not be properly adjudicated upon in the suit on the mortgage, the courts have sometimes gone into the merits of the claim on the mortgage as well, and passed a decree such as the circumstances of the case required. As an illustration of a case of this class I may refer to the case of *Durgapersad* v. *Keshopershad Singh* (2). On the other hand, in some cases, the courts have merely discharged the decree obtained against the minors; *Kundan Lal* v. *Gajadhar Lal* (3). Another instance of a suit to set aside a decree obtained against a minor on foot of a compromise to enter into which no leave had been obtained by her guardian

(1) (1901) I. L. R., 23 All., 459. (2) (1882) I. L. R., 8 Calc., 656.
(3) (1907) I. L. R., 29 All., 728.

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in the case of *Manohar Lal* v. *Jadunath Singh* (1). The decree passed in that suit by the Judicial Commissioner of Oudh set aside the decree in its entirety and went on to declare that the suit would "have to be decided afresh." Their Lordships of the Privy Council, however, modified the decree and held "that it will be quite sufficient if there is a declaration that the compromises and decrees are not binding upon the minor, and that he is restored to his original rights." In a later case, *Partab Singh* v. *Bhabuti Singh* (2), their Lordships passed a decree on similar lines. The minor is restored to the same position in which he was on the date on which the suit was filed against him. Under the Code of Civil Procedure a suit may be instituted against a minor by name. It is the duty of the court to appoint a proper guardian *ad litem*. The institution of the suit is complete, and saves limitation, but its further progress depends upon the appointment of a suitable guardian *ad litem*. In this case proceedings taken to appoint such guardian *ad litem* have been pronounced to be invalid, and the suit cannot proceed unless such proceedings are properly initiated and completed. The court whose duty it is ultimately to see that a proper guardian *ad litem* is appointed has jurisdiction to revive the suit. If any authority is required for this proposition, it is to be found in section 151 of the present Code, under which the courts are declared to possess inherent powers to make such orders as may be necessary for the ends of justice. The authority cited in the order of the court below is in point [*Raj Kumar Roy* v. *Hara Krishna Chakravarti* (3)], and is in accordance with what has been done in some cases in this Court. I would, therefore, dismiss the application for revision with costs.

WALSH, J.—I agree. *Application dismissed.*

(1) (1906) I. L. R., 28 All., 585.
(2) (1913) I. L. R., 35 All., 487.
(3) (1911) 10 Indian Cases, 355.