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position as any other person not exempted by the Act. It is his duty to assist the court in every way possible and to disclose to the court all the information in his possession relevant to the matter in issue. I, therefore, had to disallow the plea of the doctors that they were entitled to withhold their evidence in this case.

The petitioner, having proved both cruelty and adultery, is entitled to a decree *nisi* and I so pronounce. She will also have the custody of the three children, to which she is entitled. In this case as the children are of tender years, it is very important that they should be under the control of their mother. Further, the mother is living in Allahabad and facilities for schooling are more easily obtainable here than elsewhere. The husband I understand is coming to reside in Allahabad. The husband and wife have agreed that the wife should give to the husband reasonable access to his children, and I have no doubt that the petitioner will carry out her undertaking. If any dispute arises in future as to the children, I give either party liberty to apply.

[There was then an order as to costs and alimony *pendente lite*.]

REVISIONAL CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Mr. Justice Bajpai

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October, 24

MOTI CHAND (PLAINTIFF) *v.* BALRAM DAS (DEFENDANT)*

Civil Procedure Code, order IX, rule 13; *order XXXII, rule* 11 *—Minor defendant—*Ex parte *decree—Negligence and non-appearance of guardian* ad litem*—Remedy of minor—May apply for setting aside* ex parte *decree and removal of the guardian.*

A minor defendant, against whom an *ex parte* decree has been passed owing to the default and negligence of his guardian *ad litem*, may apply through another guardian or next

*Civil Revision No. 131 of 1932.

friend for setting aside the *ex parte* decree under order IX, rule 13 of the Civil Procedure Code, and is not confined to the remedy of bringing a separate suit. The court can entertain an application on the ground of the negligence of the guardian, and can remove him and appoint another person as guardian *ad litem*.

Messrs. *P. L. Banerji* and *N. Upadhiya*, for the applicant.

Mr. *Shiva Prasad Sinha*, for the opposite party.

SULAIMAN, C. J., and BAJPAI, J. :—The court below has set aside an *ex parte* decree passed against a minor in a partition suit on the ground that the minor's father, who had previously given his consent to a deed of partition by sale in the lifetime of the grandfather, was not a fit and proper person for being appointed a guardian and that he was careless and did not appear on the date of hearing to defend the suit on behalf of the minor. In the connected application filed by the father on the ground that he was ill on the date and could not appear in court it has also set aside the decree as against him, on the main ground that in a partition suit the decree must be set aside against all the defendants. It has also removed the father from the guardianship of the minor, and appointed the minor's mother as his guardian and allowed her to file a written statement on his behalf. We do not think that it can be said in revision that either the court had no jurisdiction to pass the order that it has done, or it has acted with material irregularity in the exercise of its jurisdiction.

The learned advocate for the applicant has relied strongly on the case of *Eda Punnayya* v. *Jangala Kama Kotayya* (1) and urged before us that the only remedy open to a minor who is not properly represented is to bring a separate suit and that he cannot be allowed to be heard in the suit itself because he is not a party. We may point out that the view which has prevailed in this Court has been that a minor against whom a decree has

(1) (1919) 53 Indian Cases, 184.

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been passed without the appointment of a proper guardian has several remedies open to him; he may in that very suit, if the facts justify, appeal against the decree, apply for re-hearing under order IX, rule 13, apply for a review of judgment, or apply for an order under order XXXII, rule 5(2) of the Code, and he has, in addition, the ordinary remedy to bring a separate suit: *Bhagwan Dayal* v. *Param Sukh Das* (1).

In our opinion when a minor is made a defendant in a suit it is the minor who is a party to the suit and not his guardian *ad litem*. The guardian *ad litem's* name appears on the record in order to represent the minor, but not in his capacity as a party to the suit. A suit brought against a minor without a guardian would still be brought in time, and the appointment of a guardian *ad litem* which must be made by the court after the institution of the suit would not be barred by time merely because the guardian is appointed by the court after the expiry of the prescribed period. Although, therefore, when a decree is passed against a minor who has not been properly represented, it is open to him to treat it as if he was not a party to the suit and to avoid the decree, it does not follow that the minor who does appear in court through another guardian or next friend cannot be heard and it must be considered that he has no *locus standi* to appear except through the guardian who has been appointed by the court, however incompetent, negligent and improper he may be. It is the duty of the court to protect the interest of the minor, and we think that it is open to the court to entertain an application on the ground of the negligence of the guardian, and to remove him and appoint another if he was not a proper guardian or was negligent. The summary remedy in the suit itself is very often the least expensive. There seems to be no justification for compelling the minor to file a separate suit and incur heavy expenditure and also run the risk

(1) (1916) I.L.R., 39 All., 8 (10, 11).

of the proceedings being prolonged, and not to allow him to avail himself of the more expeditious summary remedy open to other defendants.

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In this view of the matter we think that the court below did not act without jurisdiction in entertaining the application. We accordingly see no force in this revision and we dismiss it with costs.

APPELLATE CIVIL

Before Sir Lal Gopal Mukerji, Acting Chief Justice, and Mr. Justice Bennet

ZAMIN ALI AND ANOTHER (PLAINTIFFS) *v.* AZIZ-UN-NISSA AND OTHERS (DEFENDANTS)*

1932 *November*, 3

Muhammadan law—Dower—Widow's lien for unpaid dower —Widow "lawfully" obtaining possession—Lien not dependent on consent of heirs to the widow's taking possession—Marriage—Legitimacy—What evidence admissible where direct proof of marriage not available—Evidence Act (I of 1872), *sections* 2, 3, 32(5)*—Practice and pleading—Suit by vendees to recover property from persons in possession—Vendors impleaded, but not raising question of consideration for the sale—Such plea not available to the defendants in possession.*

All that is necessary for a Muhammadan widow to be entitled to retain possession of her husband's estate until her dower debt is paid is that she should have obtained possession peacefully and not by force or fraud. Consent of the other heirs of the deceased husband to her taking possession of the estate is not a necessary condition of her right to retain possession until satisfaction of her dower debt.

Direct proof of the performance of a marriage ceremony, or of the acknowledgment by the father of the legitimacy of the issue, is not the only evidence by which a Muhammadan marriage or legitimacy of the children can be proved. By virtue of sections 2 and 3 of the Evidence Act, any evidence permissible by the Evidence Act, e.g., under section 32(5),

*First Appeal No. 302 of 1928, from a decree of Shah Munir Alam, Subordinate Judge of Gorakhpur, dated the 27th of March, 1928.