

way illegal or invalid. We have already expressed our view that it is legal. That being so it seems to us that the plaintiff was not entitled to bring a suit for dissolution. If there were any disputes that she desired to be settled, she ought to have resorted to arbitration as laid down in the deed of agreement. This is clearly not a case in which the plaintiff needed any protection of the court; and further it is not a case in which the appropriate protection was a decree for dissolution. In view of the circumstances of this case we have come to the conclusion that the plaintiff's suit is not a *bona fide* one. In our opinion the court below exercised a sound discretion in dismissing the plaintiff's suit and there are no grounds whatsoever which can justify an interference with that discretion.

For the reasons given above we dismiss this appeal with costs.

## REVISIONAL CIVIL

Before Mr. Justice Mulla

CHHITTAR (APPLICANT) *v.* JAI SINGH AND OTHERS (OPPOSITE PARTIES)\*

1939  
March, 9

*U. P. Encumbered Estates Act (Local Act XXV of 1934), section 9—Notice to creditors upon landlord's application under the Act—Minor creditor—Duty of court to appoint guardian—Civil Procedure Code, section 141; order XXXII, rule 3—U. P. Encumbered Estates Act, rule 6—Guardian not appointed by court—Proceedings void as against minor—Extension of time to the minor to file statement of claim.*

A proceeding under the U. P. Encumbered Estates Act is a proceeding in the nature of a suit, to which the provisions of order XXXII, rule 3 of the Civil Procedure Code are applicable by virtue of rule 6 of the Rules framed under that Act and of section 141 of the Civil Procedure Code. The failure to follow the mandatory provisions of order XXXII, rule 3 necessarily vitiates the whole proceeding so far as the minor is concerned and such proceeding cannot affect the minor's rights in any way.

The presumption, that when a thing is published in the Government Gazette every one concerned in the matter has

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knowledge of it, which forms the basis of the period of limitation prescribed in section 9(3) of the U. P. Encumbered Estates Act, cannot possibly be drawn against a minor.

So, where a creditor named by the landlord applying under section 4 of the U. P. Encumbered Estates Act was a minor but no guardian was appointed for him by the Special Judge, and notice was published in the Gazette under section 9(1) of the Act and also sent by registered post under section 9(2) to the address of a person wrongly named as the supposed guardian of the minor, and it was only after about fifteen months that the minor first had knowledge of the proceeding and he then applied to put in a written statement of his claim and prayed for condonation of the delay, it was *held* that as no guardian had been appointed by the court for the minor the proceedings under section 9 were of no effect as against him, that no presumption of knowledge of the publication in the Gazette could be drawn against a minor, that the court should now proceed to appoint a guardian of the minor and to admit his claim notwithstanding that the maximum period mentioned in section 9(3) had long expired.

Mr. S. B. L. Gaur, for the applicant.

Mr. Damodar Das, for the opposite parties

MULLA, J.:—This is an application in revision under section 115 of the Civil Procedure Code. It arises out of a proceeding under the Encumbered Estates Act. The applicant Chhitar who is a minor brought a suit on the basis of a mortgage against the opposite party Jai Singh and obtained a preliminary decree on the 29th of January, 1935, which was eventually made final on the 30th of November, 1935. His mother Mst. Bhudei acted as his guardian for that suit. Some time after the passing of the preliminary decree but before the preparation of the final decree the opposite party Jai Singh along with some other members of his family made an application under section 4 of the Encumbered Estates Act on the 10th of September, 1935. It is noticeable that this fact was not brought to the notice of the court which had passed the preliminary decree and was proceeding to prepare the final decree. It appears that the opposite party Jai Singh did not put in his appearance

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in the course of the proceeding for the preparation of the final decree. That absence may well have been intentional, for if he had appeared in the course of that proceeding and brought it to the notice of the court that he had made an application under section 4 of the Encumbered Estates Act which had been sent by the Collector in due course to a Special Judge the proceeding would have been stayed at once under section 7 of the Encumbered Estates Act and the applicant would have had notice of the application made by the opposite party under the Encumbered Estates Act and would have consequently been vigilant to prefer his claim before the Special Judge. It has been suggested on behalf of the applicant—and I think not without some force—that the opposite party Jai Singh made his application under section 4 of the Encumbered Estates Act quietly with the deliberate intention of keeping that fact from the knowledge of the present applicant and later on got a notice of his application published in the Government Gazette in the name of Mst. Bhagwan Dei and not of Mst. Bhudei, the name clearly mentioned in the preliminary and the final decrees referred to above. It must also be mentioned in this connection as a very significant fact that the present applicant was the only creditor mentioned in the application under section 4 of the Encumbered Estates Act. The Special Judge ordered a notice to be published in due course in the Government Gazette in the name of Mst Bhagwan Dei in accordance with the particulars supplied by the opposite party Jai Singh. That notice was published on the 22nd of February, 1936. It appears that in accordance with section 9(2) of the Encumbered Estates Act the Special Judge also sent a copy of the notice by registered post to Mst. Bhagwan Dei. On behalf of the applicant it is alleged that no such notice was actually tendered to Mst. Bhudei the mother of the applicant who had acted as his guardian in the mortgage suit. Both the courts below have, however, found that Mst. Bhudei

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refused to accept delivery of the registered notice presumably on the ground that the person to whom the notice was addressed was Mst. Bhagwan Dei. The result of this proceeding was that no written statement was filed on behalf of the applicant before the Special Judge within three months from the date of the publication of the notice in the Government Gazette as required by section 9(1), and as the applicant was the only creditor the proceeding came to an end and his debt was taken under section 13 of the Act to have been duly discharged. Now the applicant's case is that he had no knowledge of all this and when his uncle Shadi Ram made a demand on the 2nd of May, 1937, from the opposite party Jai Singh for payment of the decretal amount he was told that the debt had been discharged in consequence of an application having been made under section 4 of the Encumbered Estates Act and no written statement of the claim having been filed within the time allowed by law. Thereupon the applicant under the guardianship of his uncle Shadi Ram put in a petition on the 3rd of May, 1937, along with a written statement of his claim based upon the final decree, asking the Special Judge to condone the delay and to permit him to put in his claim. It was definitely alleged in that petition that the opposite party had been guilty of fraud and the applicant had been prevented by that fraud from having any knowledge of the proceeding under the Encumbered Estates Act. The Special Judge rejected the petition holding that he had no power to extend the limitation beyond the period of five months provided for in sub-section (3) of section 9 of the Encumbered Estates Act. That view has been upheld by the learned District Judge of Bulandshahr in appeal, hence the present application in revision.

The argument on behalf of the applicant is that the whole proceeding before the Special Judge subsequent to the opposite party's application under section 4 of the Encumbered Estates Act was void because no step

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was taken by the court to appoint a proper guardian to represent the present applicant who is admittedly a minor. It is pointed out that rule 6 of the Rules made under the Encumbered Estates Act provides that proceedings under this Act shall be governed by the provisions of the Code of Civil Procedure of 1908 for the time being in force so far as they are applicable and not inconsistent with the provisions of the Act and of these rules. It is further urged that section 141 of the Civil Procedure Code makes the procedure provided in the Code in regard to suits applicable to all proceedings in any court of civil jurisdiction. It is urged upon these grounds that it was incumbent upon the Special Judge to appoint a guardian of the present applicant for the purposes of the proceeding before ordering the publication of a notice in the Government Gazette under sub-section (1) of section 9 of the Encumbered Estates Act. It appears from the judgment of the learned District Judge that the same argument was pressed before him and he was inclined to hold that it was the duty of the Special Judge to proceed under order XXXII, rule 3 of the Civil Procedure Code to appoint a guardian of the present applicant; but for reasons which I am entirely unable to appreciate he finally arrived at the conclusion that the omission on the part of the Special Judge to follow that procedure did not justify any condonation of the delay in filing the written statement on behalf of the applicant. The relevant portion of the judgment of the learned District Judge runs as follows:—

“It was the court’s obvious duty to have appointed a guardian for the purpose of these proceedings. But, because the court failed in its duty the parties cannot be made to suffer. The minor had obtained both a preliminary and a final decree in respect of his claim under the guardianship of his mother Mst. Bhudei. A notice of these proceedings had actually been sent to this lady. She refused to accept this notice on a pretext which is sufficient to alienate whatever sympathies a court of law might have had for her. The

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notice was presented to the lady on some date in February, 1936. Her guardianship was not impugned till more than a year afterwards. The minor also could have come forward with an application for the appointment of a proper guardian within a reasonable interval. Had some action been taken by or on behalf of the minor in order to have his status defined, there would have been some meaning in all these technicalities which have today been raised. But nothing was done and fifteen months after the notice had been issued a written statement was attempted to be filed for the registration of a claim. I do not think these facts would justify a condonation of the delay."

Most of the observations made by the learned District Judge seem to me to be entirely beside the point. The simple question for consideration before him was: What was the effect of the omission on the part of the Special Judge to follow the procedure laid down by order XXXII, rule 3, with regard to the applicant? According to the learned District Judge himself the parties could not be made to suffer for the failure in its duty on the part of the court, but that is exactly what has happened in the present case, for the present applicant who is admittedly a minor and was not represented at all in the proceeding before the Special Judge has been deprived of the fruits of his decree. I have no hesitation in holding that a proceeding under the Encumbered Estates Act is a proceeding in the nature of a suit to which the provisions of order XXXII, rule 3 of the Civil Procedure Code are applicable by virtue of rule 6 of the Rules framed under the Encumbered Estates Act and section 141 of the Civil Procedure Code. The failure to follow the mandatory provisions of order XXXII, rule 3 necessarily vitiates the whole proceedings so far as the present applicant is concerned. No notice was ever sent to the applicant as required by sub-section (2) of section 9 of the Encumbered Estates Act and he was not a party to the proceeding at all. No argument is needed in these circumstances to justify the conclusion that the proceeding in question cannot affect his right in any way. It was argued on behalf of the

opposite party that the application of order XXXII, rule 3 of the Civil Procedure Code was subject to the limitation provided in rule 6 of the Rules framed under the Encumbered Estates Act in the following terms, "so far as they are applicable and not inconsistent with the provisions of the Act and of these rules". It was also urged that a similar limitation is contained in section 141 of the Civil Procedure Code in the words, "as far as it can be made applicable". I do not find any force in this argument, for I see no inconsistency of any kind between the provisions of order XXXII, rule 3 and the provisions of the Encumbered Estates Act or of the rules framed thereunder. The whole basis of the period of limitation prescribed in sub-section (3) of section 9 of the Encumbered Estates Act is the presumption that when a thing is published in the Government Gazette every one concerned in the matter has knowledge of it. It is obvious that such a presumption cannot possibly be drawn against a minor. I do not find the slightest justification for holding that the Encumbered Estates Act contemplates that a proceeding can be instituted against a minor creditor without any step being taken either by the applicant or by the court to appoint a proper guardian of the minor.

The result therefore is that I allow this application and setting aside the orders passed by the courts below direct that the case shall be sent back to the Special Judge who shall proceed to appoint a guardian of the applicant in accordance with the law and to admit and decide the claim made on his behalf. The applicant shall have his costs from the opposite parties.

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