

Mahabir Singh could not say who purchased the stamped papers for the mortgage deeds or what was the value of those papers.

All the above facts constitute strong circumstantial evidence to show that the transaction in question was really one of sale disguised in the form of a *shankalap*.

The appeal is therefore dismissed with costs.

*Appeal dismissed.*

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## APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Acting Chief Judge and Mr. Justice Ziaul Hasan*

SHEO DARSHAN SINGH AND OTHERS (PLAINTIFFS-APPELLANTS) v. KUNWAR MAHESHUR DAYAL AND OTHERS (DEFENDANTS-RESPONDENTS)\*

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*Mortgage—Usufructuary mortgage—Profits guaranteed in a usufructuary mortgage—Deficiency in profits—Decree for deficiency, obtained before termination of mortgage, validity of—Transfer of Property Act (IV of 1882), section 99—Sales held before Transfer of Property Act came in force—Section 99, whether applies to such sales—Sales held in contravention of section 99, whether void or voidable—Civil Procedure Code (Act V of 1908), Order XXXIV, rule 14 and Order XXXII, rule 3—No steps taken to get sales set aside within limitation—Sale, if can be set aside afterwards—Minor defendant—Application for appointment of guardian ad litem—No formal order passed—Omission, whether a mere irregularity or fatal to suit—Guardian being an executant of the deed in suit, whether a disqualification—Suit not contested by guardian—Decree, whether invalid.*

Where a usufructuary mortgage guarantees the profits of the mortgaged property and the mortgagee obtains, before the termination of the mortgage, a decree for the deficiency in the profits even if the deficiency is recoverable at the termination of the mortgage it was still a debt payable by the mortgagors and the decree passed in the suit cannot be disregarded as invalid. *Bonthi Damodaram Chetty v. Bansilal Abeerchand* (1), relied on.

\*First Civil Appeal No. 21 of 1932, against the decree of Babu Gauri Shankar Varma, Subordinate Judge of Sitapur, dated the 7th of December, 1931.

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Section 99 of the Transfer of Property Act has no application to a sale held before the Act came into force. Moreover, a sale held in contravention of section 99 of the Transfer of Property Act is not altogether void but only voidable and if no steps have been taken to get it set aside within limitation it cannot be set aside afterwards. *Martand Balkrishna Bhat v. Dhondo Damodar Kulkarni* (1), and *Siddeshwar Martand v. Ganpatrao Bharuao* (2), referred to.

Where the court does not pass a formal order for the appointment of guardian *ad litem* of a minor defendant, that is only an irregularity and not an omission fatal to the suit. *Ram Asray Singh v. Sheonandan Singh* (3), and *Sat Deo v. Jai Nath* (4), relied on. *Ghulam Abbas v. Munna Lal* (5), *Abdul Karim v. Thakurdas Thakur* (6), *Hanuman Prasad v. Muhammad Ishaq* (7), and *Bhura Mal v. Har Kishan Das* (8), referred to.

It cannot be said that a person is not fit to be appointed guardian *ad litem* of a minor because he is one of the executors of the deed on which the suit is brought. *Amir Chand v. Narsingh Narayan Singh* (9), *Madari v. Har Dayal* (10) and *Collector of Meerut v. Umrao Singh* (11), relied on.

The fact that a guardian *ad litem* properly appointed did not contest a suit is no ground for holding that the decree was invalid. *Collector of Meerut v. Umrao Singh* (11), and *Parmeshwari Pershad Narayan Singh v. Sheo Dutt Rai* (12), relied on.

Messrs. *M. Wasim, K. N. Tandon, Giria Shankar* and *Ishwari Prasad*, for the appellants.

Messrs. *Hyder Husain* and *C. N. Harkauli*, for the respondents.

SRIVASTAVA, A. C. J. and ZIAUL HASAN, J. :—This first appeal arises out of a suit brought by the plaintiffs-appellants against the defendants-respondents in the Court of the Subordinate Judge of Sitapur for redemption of a twelve annas share in village Ramnagra and a nine annas share in village Bilwaiya. The mortgage deed in question (exhibit 6 at page 98 of the typed record) was executed by Fateh Singh and Arjun Singh

(1) (1897) I.L.R., 22 Bom., 624.

(3) (1916) 35 I.C., 868.

(5) (1907) 10 O.C., 321.

(7) (1905) I.L.R., 28 All., 137.

(9) (1908) 11 O.C., 319.

(11) (1915) 13 A.L.J., 437.

(2) (1925) I.L.R., 50 Bom., 331.

(4) (1922) 9 O.L.J., 141.

(6) (1928) I.L.R., 45 Cal., 1241.

(8) (1902) I.L.R., 24 All., 383.

(10) (1910) 13 O.C., 158.

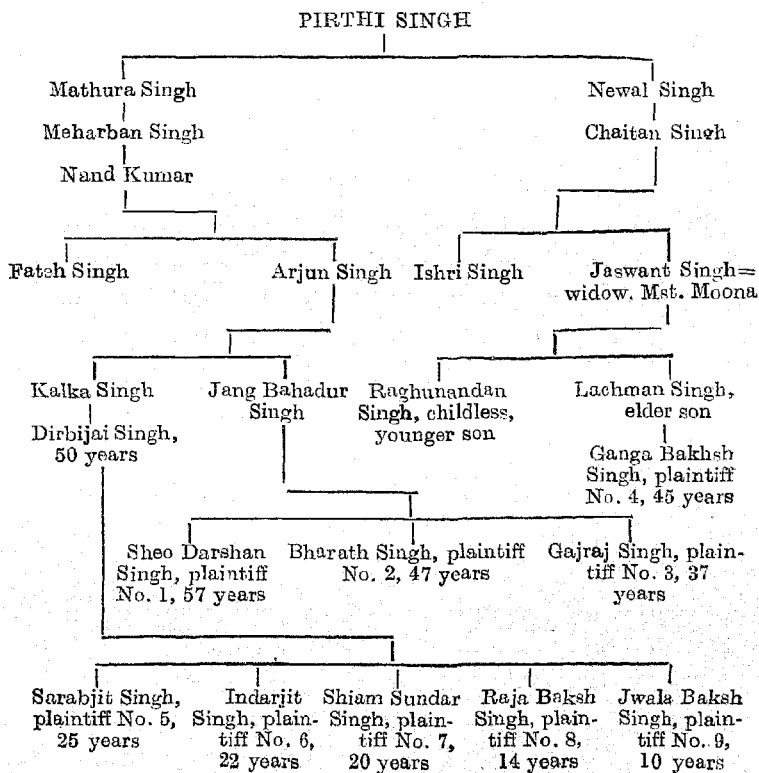
(12) 6 C.L.J., 448.

on the 5th of March, 1872 in favour of Seth Raghubar Dayal, predecessor-in-interest of the defendants-respondents, for a sum of Rs.5,800 and related to the entire village of Ramnagra. This village as well as some others were under a prior mortgage to one Raja Farzand Ali Khan by a deed (exhibit A<sub>1</sub>, page 200) executed by a certain Dalthamman Singh on Sawan Badi 12, 1262 Fasli corresponding to 9th August, 1855 and a sum of Rs.5,857 was to be paid by Fateh Singh to redeem Farzand Ali Khan's mortgage (vide exhibits A<sub>3</sub>, page 206, A<sub>5</sub>, page 209, A<sub>6</sub>, page 221, A<sub>8</sub>, page 228 and A<sub>9</sub> page 230). It was for the purpose of redeeming Farzand Ali Khan's mortgage that the mortgage of the 5th of March, 1872, was made by Fateh Singh and Arjun Singh. The following pedigree will show the relationship of the plaintiffs-appellants with Fateh Singh and Arjun Singh :

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It will be seen that while plaintiffs Nos. 1, 2, 3, 5, 6, 7, 8 and 9 have descended from Arjun Singh, plaintiff No. 4 is a grandson of Jaswant Singh an uncle of Fateh Singh and Arjun Singh. It is admitted by parties that though the mortgage in question was made only by Fateh Singh and Arjun Singh, it was subsequently accepted by their uncles, Jaswant Singh and Ishuri Singh by an agreement dated the 4th of August, 1872 (exhibit 8, page 104). The mortgage was in respect of the Ramnagra property only and provided that the mortgagee would be put in possession of the mortgaged property but that so long as he was not put in possession of the property, he would be entitled to get interest at the rate of Rs.1-8 per cent. per mensem and that after his being put in possession, the entire usufruct of the property would be enjoyed by him in lieu of interest. On the 6th of March, 1872, that is, on the very next day after the execution of the mortgage-deed, the mortgagors executed an agreement guaranteeing that the mortgagee would get profits amounting to Rs.1,530 annually from the mortgaged property but that if the profits should fall short of this amount, the mortgagee would be entitled to obtain possession of so much of village Bilwaiya as would make up the deficiency in profits. This agreement is exhibit 7 and is typed at page 101 of the record. The mortgagee obtained possession of village Ramnagra in April, 1872, but found that the profits fell far short of the amount guaranteed by the agreement of the 6th of March, 1872, and on the 5th of August, 1872, we find Fateh Singh, Arjun Singh, Jaswant Singh and Ishri Singh admitting that there was a deficiency of Rs.629 in respect of the profits of rabi 1279 Fasli recoverable by the mortgagee and executing a mortgage-deed (exhibit A91, page 347) for Rs.1,000 in favour of Seth Raghubar Dayal hypothecating property in village Kundra, a hamlet of Bilwaiya. The deed shows that the mortgagee relinquished a sum of Rs.229

out of the deficiency due to him and that the mortgagors borrowed another sum of Rs.600 from him on the date of the deed. Exhibit A19, page 236—proceedings of the Court of the Deputy Commissioner of Sitapur, dated the 22nd of September, 1874—further show that on the date of the mortgage-deed, exhibit A91, the mortgagors took a lease of Ramnagra from the mortgagee *benami* in the names of certain Ishri and Birbal for sixteen years—the period for which the mortgage of the 5th of March, 1872, was made—and themselves stood sureties for the lessees. This lease, however, appears to have been given up by the mortgagors and it was cancelled by Court on the 23rd of September, 1873.

After the cancellation of the lease, the mortgagee sued the mortgagors in September, 1874, for possession of village Bilwaiya in terms of the agreement of the 6th of March, 1872, on the ground that the annual profits of Ramnagra amounted only to Rs.225, so that there was a deficiency of Rs.1,305 a year in the profits (vide exhibit 9, the plaint in this suit, page 106). This suit was decreed by the Deputy Commissioner on the 3rd of December, 1874, and the mortgagee was awarded possession over twelve annas of village Bilwaiya (vide exhibit 10, page 108 and exhibits A144 and A23 not typed). It was thus that the mortgagee came into possession of twelve annas of village Bilwaiya out of which the plaintiffs-appellants sued to redeem nine annas, excluding Fateh Singh's share. The latter's share in both the villages was sold by auction in January, 1878, and purchased by one Muhammad Sadiq (vide exhibit A39, page 256) and Muhammad Sadiq sold it to Seth Raghubar Dayal by a sale-deed, dated the 11th of November, 1878 (exhibit A40 page 258). As Seth Raghubar Dayal became owner of the equity of redemption of Fateh Singh's share in Ramnagra also, the plaintiffs have excluded his four annas share from the suit.

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The main defence to the suit was that the plaintiffs were not entitled to redeem as their right of redemption had been extinguished by Seth Raghubar Dayal purchasing the equity of redemption in both the properties. The defendants also set up certain deeds of further charge executed by Arjun Singh, Jaswant Singh and Ishri Singh (exhibits A139 to A143 at pages 451 to 457) and pleaded that in any case the plaintiffs were not entitled to redeem the property in question without paying the amounts due on these deeds.

How the mortgagees-defendants claim to have acquired the equity of redemption in the mortgaged property will be explained by the following facts:

The mortgagee, Seth Raghubar Dayal, brought a suit against Fateh Singh, Arjun Singh, Ishri Singh and Jaswant Singh for recovery of Rs.760-12 in regard to the deficiency of profits of Ramnagra property for the year 1281 Fasli (vide the plaint, dated the 19th August, 1875, exhibit 11, page 113). This suit was decreed on the 26th of January, 1876, for a sum of Rs.645-11 against Arjun Singh, Ishri Singh and Jaswant Singh only as Fateh Singh appears to have paid his share of the liability (vide exhibits A26, page 244 and A12, page 115). On the 29th of August, 1876, Seth Raghubar Dayal applied for execution of his decree against Jaswant Singh and Ishri Singh only as both Arjun Singh and Fateh Singh had paid their shares of the liability by executing bonds and prayed for attachment and sale of Jaswant Singh and Ishri Singh's share in Ramnagra (vide exhibit 13, page 117). The sale of eight annas of Ramnagra belonging to Jaswant Singh and Ishri Singh was thereupon held on the 22nd of December, 1877, and purchased by Seth Raghubar Dayal himself (vide the sale certificate, dated the 22nd of January, 1878, exhibit A33, page 251). It is thus that Seth Raghubar Dayal is said to have acquired the

equity of redemption in eight annas of village Ramnagra.

The remaining four annas of Ramnagra and twelve annas of Bilwaiya are said to have been acquired by Seth Raghubar Dayal in the following manner:

On the 15th of December, 1880, Jaswant Singh Ishri Singh and Arjun Singh executed a mortgage-deed (exhibit 21, page 128) in respect of village Aluiya in favour of one Guman Singh for a sum of Rs.5,000. Two days later, that is, on the 17th of December, 1880, these three persons executed a deed of further charge (exhibit 22, page 134) in favour of Guman Singh for another sum of Rs.5,000. This deed provided that it shall form part of the deed of the 15th of December, 1880, and stated that it was executed separately as a single stamp paper worth Rs.100 could not be had and further provided that the conditions of the mortgage of the 15th of December would apply to this transaction also. On the 27th of October, 1881, Arjun Singh alone executed a mortgage-deed (exhibit 23, page 137) for Rs.2,500 in favour of Guman Singh mortgaging his share in Aluiya and also a four annas share in village Bilwaiya. On the 9th of October, 1882, by which time Jaswant Singh appears to have died, Ishri Singh and Jaswant Singh's widow Musammat Moona, as mother and guardian of her minor sons, Raghunandan Singh and Lachman Singh, executed a mortgage-deed for Rs.2,600 in favour of Guman Singh mortgaging property in villages Aluiya and Bilwaiya (vide exhibit 24, page 140). Again on the 24th August, 1883, Arjun Singh alone executed a deed of further charge (exhibit 25, page 145) in favour of Guman Singh for a sum of Rs.875 that had accrued due on account of interest on the deeds of the 15th of December, 1880, and 27th October, 1881. All these five deeds were sold by Guman Singh to Seth Raghubar Dayal on the 18th of November, 1886, by a sale-deed (exhibit 26, page 196) in lieu of Rs.22,500. As the

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deeds of the 15th of December and 17th December, 1880 (exhibits 21 and 22) executed by Arjun Singh, Ishri Singh and Jaswant Singh provided that the interest due would be paid every year in the month of Jeth and that in case of default, the mortgagee would be entitled to take possession of the mortgaged property and appropriate profits in lieu of interest, Seth Raghubar Dayal brought a suit on the 14th of July, 1887, for possession as mortgagee of twelve annas zemindari share in village Aluiya against Arjun Singh, Ishri Singh, Musammat Moona, widow of Jaswant Singh and Lachman Singh, minor son of Jaswant Singh (Raghunandan Singh the other son of Jaswant Singh having died by this time). The plaint in this suit is exhibit 33 and is typed at page 150 of the record. This suit was decreed by the District Judge of Sitapur on the 31st of January, 1888, and Seth Raghubar Dayal was awarded a decree for possession of the property mentioned in the two mortgage-deeds of 15th and 17th December, 1880, and for Rs. 1,116-8-0 costs (vide exhibit A47, page 265, judgment, and exhibit A48, page 270, decree). In execution of this decree for costs, Seth Raghubar Dayal by his application, datd the 1st March, 1889 (exhibit A52, page 277) prayed for attachment and sale of four annas of Ramnagra and twelve annas of Bilwaiya besides other property. On the 26th of September, 1888, Seth Raghubar Dayal applied for the mortgages held by him over the property sought to be sold, being notified (exhibit A53, page 280). The order of the District Judge of Sitapur, dated the 23rd of June, 1891 (exhibit A67, page 297) shows that twelve annas of Bilwaiya and four annas of Ramnagra were sold by public auction, as prayed by the decree-holder, on the 20th of May, 1891, and that the sale was confirmed on the 23rd of June, 1891. The sale certificate issued to Seth Raghubar Dayal is exhibit A68, page 298 of the record and it is by virtue of this purchase that the



defendants claimed to have acquired the equity of redemption in the remaining four annas of Ramnagra and in twelve annas of Bilwaiya.

The learned counsel for the appellants has raised various pleas with regard to both the sales in question. We take up the sale of eight annas of Ramnagra held on the 22nd December, 1877.

With regard to this sale, several objections were taken. The first was, that the agreement of the 6th March, 1872 (exhibit 7) only provided that if the profits of Ramnagra property fell short of the sum of Rs. 1,530 the mortgagee would be entitled to obtain possession of a portion of village Bilwaiya and not that he would be entitled to recover the deficiency of profits from the mortgagors. This plea has, in our opinion, no force. The very fact that the mortgagors by the agreement of the 6th of March, 1872, guaranteed the realization by the mortgagee of a sum of Rs. 1,530 a year shows that they intended that the mortgagee would be entitled to recover this amount for each of the years during which the mortgage subsisted. Moreover, we have seen that on the 5th August, 1872, the mortgagors executed a mortgage-deed (exhibit A91) in respect of the deficiency of profits for 1279 Fasli and further that Arjun Singh and Fateh Singh paid their shares of the liability under the decree obtained by the mortgagee for deficiency or profits of 1281 Fasli, to the decree-holder-mortgagee out of Court. In these circumstances it cannot, in our opinion, be said that the mortgagors did not bind themselves to pay the deficiency of profits to the mortgagee.

The second plea taken was that the suit brought by Seth Raghubar Dayal to recover the deficiency of profits for 1281 Fasli was premature and that the deficit in the profits could have been claimed only at the time of redemption. This plea is also rebutted by the facts just referred to as well as by the circumstance that no such plea appears to have been advanced by the

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defendants mortgagors in the suit itself. Moreover, even granting that the deficiency in profits was recoverable at the termination of the mortgage it was even then a debt payable by the mortgagors and the decree passed in the suit cannot be disregarded as invalid [vide *Bonthi Damodaram Chetty v. Bansilal Abeerchand* (1)].

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The third plea was that the sale in question was confirmed in spite of the judgment-debtors showing willingness to deposit the decretal amount in Court. No doubt Ishri Singh and Jaswant Singh appear to have applied on the 16th of January, 1878, to Court for permission to deposit the decretal amount (exhibit 18, page 123) and that this offer was rejected by the Court (vide exhibit 20, page 126); but in view of the law as it stood at the time, the Court could not have granted the mortgagors' application. There was no provision for setting aside a sale on deposit of the decretal amount within a month from the date of sale, in the Code of Civil Procedure that was in force in 1877 and it was in 1904 only that such a provision was incorporated in the Code as section 310A of the Code of Civil Procedure, 1882.

Lastly, it was argued that the sale of 22nd December, 1877, was in contravention of the provisions of section 99 of the Transfer of Property Act (now Order XXXIV, rule 14 of the Code of Civil Procedure). The Transfer of Property Act was itself enacted in 1882, that is, several years after the sale in question was held. No doubt in the case of *Martand Balkrishna Bhat v. Dhondo Damodar Kulkarni* (2), section 99 of the Transfer of Property Act was applied to a sale held before the Act came into force but that case was held to be no authority only a few years later, in the case of *Govindrao v. Waman* as was pointed out in the case of *Siddeshwar Martand v. Ganpatrao Bharuao* (3). Moreover, a sale held in contravention of section 99 of the Transfer of

(1) (1926) I.L.R., 51 Mad., 711.

(2) (1897) I.L.R., 22 Bom., 624

(3) (1925) I.L.R., 50 Bom., 431.

Property Act is not altogether void but only voidable and no steps having been taken by the appellants to get it set aside within limitation it cannot be set aside now.

We now come to the sale of four annas of Ramnagra and twelve annas of Bilwaiya held in 1891. It was on this part of his case that the learned counsel for the appellants laid great stress, though he conceded that on the pleas taken by him, only the sale of the share of Lachhman Singh and not the entire sale can be impeached. His main contention was that as Lachhman Singh, who was a minor at the time of the suit of the mortgagee, was not properly represented in that suit, the decree and the consequent sale were nullities. It appears that in the suit (vide plaint exhibit 33, page 150). Seth Raghubar Dayal nominated Ishri Singh, uncle of Lachhman Singh, minor, as his guardian *ad litem*. On the same date he put in an application (exhibit 34, page 153) praying that Ishri Singh be appointed guardian of Lachhman Singh as he "is probably his well-wisher." On this the Court appears to have issued summons to the defendant, Lachhman Singh, through his guardian, Ishri Singh, fixing the 10th of August, 1887 for the defendants' appearance. On that date the defendants appeared and applied for adjournment which was granted and the 27th of August, 1887, was fixed. On that date Ishri Singh made an application (vide exhibit 35, page 154) saying that he did not want to act as guardian of Lachhman Singh, minor, and that Musammat Moona, mother of the minor, might be appointed as guardian for the suit. This application was rejected by the Court by its order of the same date (vide exhibit A44, page 262) on the ground that the application should have been made on the previous date and that it appeared to have been put in to delay the suit. After this no further steps appear to have been taken by Ishri Singh to get himself relieved of the guardianship of Lachhman Singh. On the other hand we find him

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treated as his guardian throughout the case upto the time of the sale in question.

Now, the learned counsel for the appellants argues that as no formal order was made by the Court appointing Ishri Singh guardian *ad litem* of Lachhman Singh, as Ishri Singh had refused to act as guardian, and as Ishri Singh was not a proper person to be appointed as guardian of Lachhman Singh, he being one of the executants of the documents on which the suit was brought, Lachhman Singh was not represented in the suit and that therefore all proceedings against him were void. He has referred us to the cases of *Ghulam Abbas v. Munna Lal* (1), *Shaikh Abdul Karim v. Thakurdas Thakur* (2), *Hanuman Prasad v. Muhammad Ishaq* (3), and *Bhura Mal v. Har Kishan Das* (4). We have considered these cases but in view of the special circumstances of this case, we are not prepared to hold that Lachhman Singh was not properly represented in the suit brought by Seth Raghubar Dayal on the 14th of July, 1887. No doubt the Court does not appear to have passed a formal order on the plaintiff's application for the appointment of Ishri Singh as guardian *ad litem* of Lachhman Singh but that was, in our opinion, only an irregularity and not an omission fatal to the suit. In the case of *Ram Asray Singh v. Sheonandan Singh* (5), a Full Bench of the Patna High Court held that where in a suit an application for appointment of a guardian *ad litem* is made and the guardian nominated in the application is allowed to represent the minor at the trial, the mere omission of a formal order appointing the guardian is not fatal to the suit. A similar view was taken in *Sat Deo v. Jai Nath* (6).

As for Ishri Singh's refusal to act as Lachhman Singh's guardian, we have not been shown any authority for the contention that under the Code of Civil Procedure in

(1) (1907) 10 O.C., 321.

(3) (1905) I.L.R., 28 All., 137.

(5) (1916) 35 I.C., 868.

(2) (1928) I.L.R., 45 Cal., 1241.

(4) (1902) I.L.R., 24 All., 383.

(6) (1922) 9 O.L.J., 141.

force at the time, a guardian once appointed had the option of retiring or that it was incumbent on the Court to accept the resignation of a guardian after he had once been appointed. Moreover, in spite of his application of the 27th of August, 1887, Ishri Singh does appear to have not only been treated as Lachhman Singh's guardian by the Court and parties throughout the suit and the subsequent proceedings but to have so treated himself. Exhibits A46 page 264, A47, page 265 A48, page 270, A49, page 273, A50, page 275, A52, page 277, A132, page 436, A130, page 432, A31, page 434, A133, page 442 and A59, page 292 are all documents in which Ishri Singh was treated as guardian of Lachhman Singh by the Court and parties, while exhibit A60, page 294 is a petition of objection under section 311 of the old Code of Civil Procedure which Arjun Singh and Ishri Singh filed and in which Ishri Singh described himself as guardian of Lachhman Singh, minor.

Then, it was said that being one of the executants of the mortgage-deeds on which the suit was brought, Ishri Singh could not act as guardian *ad litem* of Lachhman Singh. With this too we do not agree. In *Amir Chand v. Narsingh Narayan Singh* (1) it was held that a minor cannot be held to have been not properly represented merely because the Court appointed, as his guardian *ad litem*, a person whose act was called in question in the suit. In *Madari v. Har Dayal* (2) also it was held that a father was not an improper person to be appointed guardian *ad litem* of his son notwithstanding that he had on behalf of the minor son executed the mortgage deed which was the subject of the suit. In the case of the *Collector of Meerut v. Umrao Singh* (3) also where the suit was on mortgage-deeds executed by the mother of the minor and the mother herself was appointed guardian of the minor, it was held that she was a fit and

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(1) (1908) 11 O.C., 319.

(2) (1910) 13 O.C., 158.

(3) (1915) 13 A.L.J., 437.

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proper person to act as guardian of her minor son and that if the decrees were fairly obtained against the minor under her guardianship, they were binding. It cannot therefore be said that Ishri Singh was not a fit person to be appointed guardian *ad litem* of Lachhman Singh.

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Further, it was said that Ishri Singh did not defend the suit on behalf of Lachhman Singh and that thereby the latter was prejudiced; but this in all probability was due to the fact that no real defence could be made to the suit. It was suggested that a defence of want of legal necessity for the mortgages, the subject of suit, could have been taken on behalf of Ishri Singh; but, in the first place, part of the consideration being obviously valid, this plea could hardly be put forward in a suit brought for possession as mortgagee and not for sale or foreclosure of the mortgaged property, and, in the second, in view of the fact that the family was over head and ears in debt (as shown by the recitals of exhibit 21), this plea even if taken had little chance of success. Moreover, the fact that a guardian *ad litem* properly appointed did not contest a suit is no ground for holding that the decree was invalid—*vide* the *Collector of Meerut v. Umrao Singh* (1) and *Parmeshwari Pershad Narayan Singh v. Sheo Dutt Rai* (2). Ishri Singh was as a matter of fact managing his minor nephew's estate. Exhibit A88, page 333, is the plaint of a suit brought by Lachhman Singh in which he himself admitted that Ishri Singh managed his estate. Exhibit A80, page 319 is the plaint of another suit brought by Seth Raghubar Dayal against Lachhman Singh and others and in this also Ishri Singh was nominated as guardian *ad litem* of Lachhman Singh and exhibit 31, page 149 is the order appointing Ishri Singh guardian of Lachhman Singh but in this case Ishri Singh does not appear to have

(1) (1915) 13 A.L.J., 437.

(2) 6 C.L.J., 448.

raised any objection to act as the guardian of Lachhman Singh.

In view of what we have said above, we are clearly of opinion that Lachhman Singh was not at all prejudiced by the appointment of Ishri Singh as his guardian *ad litem* and there are no grounds for holding that the decree obtained by Seth Raghubar Dayal was void as against Lachhman Singh.

As on the findings recorded above, the appeal must fail, we do not consider it necessary to go into the question as to how far the defendants-mortgagees can claim to be in adverse possession of the property in suit though there is ample evidence on the record to show that the plaintiffs-appellants never contested the mortgagees' right to remain in possession of the property in question by virtue of the sales of 1877 and 1891 before the present suit was filed. Similarly it is not necessary to consider the deeds of further charge relied on by the respondents and about which they have filed cross-objections.

The appeal is dismissed with costs and the lower Court's decree confirmed. We make no order as to costs of the cross-objections which we leave undecided.

*Appeal dismissed.*

## APPELLATE CIVIL

*Before Mr. Justice Bisheshwar Nath Srivastava, Acting Chief Judge and Mr. Justice H. G. Smith*

JWALA SAHAI AND SONS, MESSRS. (PLAINTIFF-APPELLANTS)  
v. HARI NANDAN DUTT AND OTHERS (DEFENDANTS-RESPONDENTS)\*

1934  
October, 9

*Contract Act (IX of 1872), sections 60 and 61—Debtor owing several debts to the same creditor—Part payment—No express intimation of circumstances implying that payment was in respect of a particular debt—Creditor, whether has discre-*

\*First Civil No. 16 of 1932, against the decree of Dr. Ch. Abdul Azim Siddiqi, Subordinate Judge of Lucknow, dated the 21st of September, 1931.

1934  
SHEO  
DARSHAN  
SINGH  
v.  
KUNWAR  
MAHESHWAR  
DAYAL

*Srivastava,  
A.C.J., and  
Ziaul Hasan,  
J.*