

section 312, if no such application as is mentioned in section 311 is made, there is only one duty left to the Court, namely, to pass an order confirming the sale as regards the parties to the suit and the purchaser. The Subordinate Judge refused to do that, and set aside the sale, and directed the purchase money to be refunded on certain terms. In so doing he declined to exercise a jurisdiction which he had, and exercised one which did not belong to him, and consequently his judgment was liable to be reviewed by the High Court under the 622nd section of the Code of Civil Procedure.

It does not, however, follow that the appellant is without remedy, but he must select the appropriate remedy. Not having a remedy under the Code, which provides only for the particular cases named therein, he still has the right to have the sale set aside, if it be true that he has been induced by fraud to pay a larger sum for the property purchased than he would have had to pay if he had not been so deceived.

For these reasons their Lordships will humbly advise Her Majesty that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors for the appellant: Messrs. *T. L. Wilson & Co.*

C. B.

## APPELLATE CIVIL.

*Before Mr. Justice Pigot and Mr. Justice Beverley.*

KEDAR \*PROSUNNO LAHIRI (DEFENDANT) *v.* PROTAP CHUN-  
DER TALUKDAR, MINOR, BY HIS MOTHER AND NEXT FRIEND  
RAJMONI DABI AND ANOTHER (PLAINTIFFS).\*

1891  
*April 23.*

*Minor—Suit in substance against minor—Sale certificate, irregular description in—Decree against widow representing her minor son—Decree, sale of infant's share under—Representation of minor in suit.*

A sale certificate expressed a rent decree to have been made against R, the widow and heiress of K, and the mother of a minor son, name unknown.

\* Appeal from appellate decree No. 1280 of 1890, against the decree of J. F. Bradbury, Esq., Judge of Pubna and Bogra, dated the 14th July 1890, reversing the decree of Babu Ashootosh Sarkar, 2nd Munsif of Pubna, dated the 1st July 1889.

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BIBI  
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*Held* that this description, though irregular, showed that in substance the suit was against the infant, and that the infant's share was sold under the decree.

*Hari Saran Moitra v. Bhubaneswari Debi* (1) and *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb* (2) followed.

THE plaintiffs sued to recover a 1 anna 15 gundas share in a certain patn italuk held by them under Mohini Nath Bishi and others, alleging that originally they were the owners of a 3 annas 10 gundas share of the taluk, but that a moiety was sold in satisfaction of a decree for rent obtained by the landlords, and was purchased by the original defendant Grish Chunder Lahiri, since deceased, in the name of his mukhtar Bhugwan Das. The plaintiffs further stated that they had held possession of the 3 annas 10 gundas share jointly with the defendant, but were dispossessed of the share in suit by the defendant in the month of February 1879.

Grish Chunder Lahiri in his written statement alleged that the minor plaintiff's interest in the taluk was sold in execution, and acquired by him in the name of his servant Digamber Nag on the 2nd May 1874, that he and the father of the major plaintiff then held the taluk as co-tenants, and that he subsequently purchased the entire 3 annas 10 gundas share in the name of Bhugwan Das on the 28th October 1876 at an execution sale, and had ever since held exclusive possession. On the death of Grish Chunder, his son Kedar Prosunno Lahiri was made a party defendant to the suit in his stead, and he denied that either the minor plaintiff or the father of the major plaintiff had any interest in the patni at the time of the execution sale.

The Court of first instance held that the plaintiffs had failed to prove possession within twelve years of the institution of the suit, and that whatever right, title, or interest the plaintiffs might have possessed passed from them by the execution sale. The suit was therefore dismissed.

Upon appeal the claim of the major plaintiff was abandoned, the sale certificate, exhibit A, showing that the interest of his father was acquired by Bhugwan Das at the sale of the 28th October 1876. It was contended, however, on behalf of the

(1) I. L. R., 16 Calc., 40; L. B., 15 I. A., 195.

(2) I. L. R., 14 Calc., 204.

minor plaintiff, that he was no party to the rent suit, as his name did not occur in exhibit B, the sale certificate of the 6th July 1874. With reference to exhibit B, the lower Appellate Court observed as follows:—

“That document expresses the rent decree to have been pronounced against Rajmoni Dabi, the widow and heiress of Kristo Sunder Talukdar, and the mother of a minor son, name unknown (*sic*), and against Jadub Chunder Talukdar.

“Kristo Sunder and Jadub Talukdar were the sons of Ram Kristo Talukdar, who, though long since deceased, continues the sole registered tenant of the taluk; and the decree of exhibit B was for a fraction of the arrears of the rent of the patni, that is, for arrears of the fraction payable to some of the co-proprietors. The tenure was not and could not be sold, but merely the right, title, and interest of the debtors. So much exhibit B expresses. Who then were the debtors, or to put the question in another form, was the minor plaintiff a party to the rent suit? Indisputably he is the only son of Rajmoni and Kristo Sunder Talukdar and the boy alluded to in exhibit B. He and not his mother inherited Kristo Sunder’s moiety of the patni. Admittedly he was not properly described as a party to the suit. His mother was not represented to be his guardian. Of her appointment to be his guardian for the purposes of that rent suit there is neither averment nor proof. She acted and was treated apparently as if she and not her son had inherited and represented the estate of her husband. Was that sufficient to bind the minor? The case of *Ganga Prosad Chowdhry v. Umbica Churn Coondoo* (1) is undistinguishable from this case, and on its authority I must hold that the minor plaintiff was no party to the rent suit; that his mother Rajmoni was erroneously impleaded in his place; that she has not and never had any interest in the patni; and that the sale evidenced by exhibit B did not operate to pass the minor plaintiff’s moiety thereof. He is entitled consequently to recover such moiety.”

From this decision the defendant appealed to the High Court.

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(1) I. L. R., 14 Calc., 754.

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Mr. *H. Bell* and Baboo *Bhoobun Mohun Das* appeared for the appellant.

Mr. *A. Chowdhry* and Baboo *Sarut Chunder Roy* appeared for the respondents.

The judgment of the High Court (PIGOT and BEVERLEY, JJ.) was as follows :—

We think, after having heard this matter debated with great care by the learned counsel on both sides, that the view taken by the learned District Judge was erroneous as to the effect of the irregularity in the description of the infant in the sale certificate, exhibit B, of the 6th of July 1874. It is not necessary to enter upon a minute examination of the authorities which relate to the subject. It is enough to say that the effect of them, and notably of the Privy Council case *Hari Saran Moitra v. Bhubaneswari Debi* (1) and the Full Bench case *Suresh Chunder Wum Chowdhry v. Jugut Chunder Deb* (2) must at least be this, that if we are of opinion that substantially the infant was sued, and that substantially execution was against the infant's share, the proceedings were binding against that share, and having regard to the terms of exhibit B and to the description under which he appears and his mother appears in that document, we think it impossible to doubt that substantially the suit was brought against the infant as co-defendant through his mother and natural guardian (supposing, as is probable, that she had not then been appointed under Act XL of 1858), and that the sale was of the infant's share in pursuance of the decree. We think that the mode of description of Rajmoni as heiress (which she<sup>n</sup> was not, as her son was alive) must be taken to show that she was in a representative capacity when placed on the record. She is there described as mother of her infant son, name unknown, as well as widow and heiress of her deceased husband, and we think that, highly inaccurate and irregular as that description was, upon the old authorities as to the Code of Procedure of 1859 it must be taken that that was sufficient to bind the estate of the infant, and that we are not entitled on the ground of technical irregularities

(1) I. L. R., 16 Calc., 40; L. R., 15 I. A., 195.

(2) I. L. R., 14 Calc., 204.

of this description to release his estate. In substance the suit was brought against the infant, the infant's share was sold under the decree, and we think, therefore, that the decision of the District Judge was, on this point, erroneous, and that it must be set aside and the decree of the lower Court restored. The appeal will be allowed with costs throughout.

1891  


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*Appeal decreed.*

A. A. C.

*Before Mr. Justice Pigot and Mr. Justice Banerjee.*

TIN COURI DASSEE, (DEPENDANT), v. KRISHNA BHABINI  
 (PLAINTIFF).\*

1891  


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 July 14.

*Will—Duress—Forfeiture—Condition of residence.*

A testator by his will directed that if any of the female members of his family, either from misunderstanding or from any other cause, should live in any other than a holy place for more than three months, except for the cause of pilgrimage, they should forfeit their rights under the will. The plaintiff, a widowed daughter-in-law of the testator, and a minor, was removed from his house by her maternal relations and brother with the aid of the police, and resided for more than three months with her mother:—*Held*, that under the circumstances the plaintiff's absence did not work a forfeiture. *Clavering v. Ellison* (1) referred to.

THE plaintiff, the widowed daughter-in-law of one Sookhmoy Dass, and a minor, sued by her mother and next friend to have the will of Sookhmoy Das, her father-in-law, construed and her rights declared. She alleged that the defendant, the widow and executrix of Sookhmoy, compelled her by ill-treatment to leave the family dwelling-house, and that under the circumstances she had not forfeited her rights under the will.

The will provided that if any of the female members of the family, either from misunderstanding or from any other cause,

\* Appeal from Appellate decree No. 708 of 1890, against the decree of H. Beveridge, Esq., District Judge of 24-Parganas, dated the 12th of May 1890, reversing the decree of Babu Koylash Chunder Mookerjee, Subordinate Judge of that district, dated the 16th of January 1890.