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consent to act as guardian or whether the Court did expressly appoint such person as the guardian for the suit, unless it is shown that the defect in following the rules has affected the merit of the case. But where the record, on the face of it, shows, that the minor was not represented by a guardian for the suit, or was represented by a guardian disqualified, under the express provision of the statute, from acting as guardian, the position is the same as if the minor were not a party to the suit, and the judgment rendered by the Court is without jurisdiction and null and void. I think the decisions of the Judicial Committee support the conclusions at which I have arrived.

In the present case, as I have shown, the present plaintiff had no defence to the suit in which he was cited as a defendant. He was represented throughout in the proceedings of the suit by a guardian competent to act as such. That being so, it is impossible to hold that the decree passed against him in the mortgage suit and the sale held in pursuance of that decree are null and void.

I would dismiss this appeal with costs. The cross objection is allowed.

ADAMI, J.—I agree.

Appeal dismissed.

APPELLATE CIVIL.

Before Das and Adami, J.J.

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Jan. 5.

SHEONANDAN CHOWDHURY

v.

DEBI LAL CHOWDHURY.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *section* 141, *Order IX, rule* 4, *Order XXI, rule* 100—*Execution of*

*Appeal from Appellate Order No. 161 of 1922, from an order of Babu Harihar Charan, Subordinate Judge of Muzaffarpur, dated the 16th May, 1922, reversing an order of Babu Debi Prasad, Munsif of Hajipur, dated the 30th June, 1922.

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decree—dispossession of occupier—application by occupier, whether is an application in execution—dismissal of application for default, whether application lies to set aside.

Order IX, rule 4, of the Code of Civil Procedure, 1908, applies to an application under Order XXI, rule 100, which had been dismissed for default.

Bhubaneshwar Prasad Singh v. *Tilakdhari Lal*(1), discussed.

Satya Narain v. *Gobind Sahay*(2) and *Thakur Prashad* v. *Fakirullah*(3), referred to.

An application under Order XXI, rule 100, is not an application in execution of a decree.

Haricharan Ghosh v. *Manmatha Nath Sen*(4), not followed.

Appeal by the defendant.

This appeal arose out of an order passed by the Subordinate Judge of Muzaffarpur, on the 16th of May, 1922. The respondents were the purchasers of the property in dispute at a sale held in execution of their decree. The appellant applied under the provision of Order XXI, rule 100, of the Code, to be put in possession of the disputed property. He contended that he was in possession of the property on his own account and he complained that he was dispossessed of the property by the respondents in execution of a decree which they had obtained against another person. This application was dismissed for default on two different occasions. Ultimately it was restored under the provision of Order IX, rule 4, of the Code: and on the 5th August, 1916, the claim of the appellant was allowed in the absence of the respondents. On the 2nd October, 1920, the suit, out of which this appeal arose, was instituted by the respondents for recovery of possession of the property in dispute. The suit was resisted by the appellant on

(1) (1919) 4 Pat. L. J. 135, F.B. (2) (1918) 3 Pat. L. J. 260.
(3) (1895) I. L. R. 17 All. 106; L. R. 22, I. A. 44.
(4) (1914) I. L. R. 41 Cal. 1.

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two grounds, first, on the ground that it was barred by limitation, and, secondly, on the ground that the suit was not maintainable as a previous suit by the plaintiff was allowed to be improperly withdrawn by the Court. The Court of first instance thought that the suit was well within time, but came to the conclusion that the order allowing the plaintiff to withdraw the suit with liberty to bring a fresh suit was without jurisdiction, and in this view he dismissed the plaintiff's suit. On appeal, the Subordinate Judge agreed with the view of the Court of first instance that the suit was not barred by limitation, but he differed from that Court as to the effect of the order allowing the plaintiff to withdraw the suit with liberty to bring a fresh suit. He thought that, however erroneous that order might have been, it could not be said that the order was without jurisdiction. He accordingly allowed the appeal and remanded the case to the Court of first instance for disposal according to law. The present appeal was against the order of the learned Subordinate Judge remanding the case for trial.

Susil Madhab Mullick and *Sheonandan Ray*, for the appellant.

Saroshi Charan Mitter and *Nawal Kishore*, for the respondents.

DAS, J., after stating the facts of the case as set out above, proceeded as follows :—

The only question which we have to consider is whether the Courts below are right in holding that the suit is not barred by lapse of time. The suit is *prima facie* governed by Article 11A of the Limitation Act and the period of limitation provided in Article 11A is one year from the date of the order. The suit was obviously instituted in order to avoid the effect of the order passed on the 5th August, 1916. The suit itself was instituted on the 2nd October, 1920. *Prima facie* the suit is barred by limitation; but it was argued on behalf of the respondents that the order of the 5th August, 1916, is a nullity and that he is entitled to

disregard that order and bring his suit within twelve years from the date he was dispossessed by the defendants. According to the learned Vakil Order IX, rule 4, is not applicable to a proceeding under Order XXI, rule 100, of the Code. He accordingly argues that the Court had no jurisdiction to restore the application which was presented under Order XXI, rule 100, after it had been dismissed for default. The learned Vakil maintains that, that being so, the order of the 5th August, 1916, allowing the claim of the defendants was without jurisdiction and null and void. The argument advanced on behalf of the respondents is supported by the decision of the Calcutta High Court in the case of *Haricharan Ghosh* v. *Manmatha Nath Sen* (1), but is negatived by the decision of this Court in *Satya Narain* v. *Gobind*(2). The learned Vakil argues before us that the decision in *Satya Narain* v. *Gobind Sahay* (2) has been overruled by the decision of the Special Bench in the case of *Bhubaneshwar Prasad Singh* v. *Tilakdhari Lal* (3). According to the contention of the learned Vakil we are conclusively bound by the decision in the case of *Bhubaneshwar Prasad Singh* v. *Tilakdhari Lal* (3), and that we are bound to hold that Order IX, rule 4, is not applicable to a proceeding under Order XX, rule 100, of the Code.

It is admitted by Mr. *Susil Madhab Mullick* on behalf of the appellant that Order IX, rule 4, of the Code of Civil Procedure does not, of its own force, apply to a proceeding under Order XXI, rule 100; but he contends that he is entitled to apply Order IX, rule 4, to a proceeding under Order XXI, rule 100, by force of section 141 of the Code. Section 141 of the Code runs as follows:

"The procedure provided in this Code in regard to suits shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction."

In the case of *Thakur Prashad* v. *Fakirullah* (4), the Judicial Committee pointed out that the proceedings

(1) (1914) I. L. R. 41 Cal. 1. (2) (1913) 3 Pat. L. J. 260.
(3) (1919) 4 Pat. L. J. 135, F.B.
(4) (1895) I. L. R. 17 All. 106; L. R. 22 I. A. 44.

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spoken of in section 141 of the Code include original matters in the nature of suits such as proceedings in probate, guardianships and so forth and that they do not include executions. It was also pointed out by the Judicial Committee that both from the Code itself and the provisions of the Limitation Act, the legislature contemplated that there might be a succession of applications for execution and that it was unlikely that the legislature should make Order IX, rule 4, applicable to an execution proceeding since it was open to the decree-holder to make a succession of applications for execution. I regard the decision of the Judicial Committee in *Thakur Prashad* v. *Fakirullah* (1) as establishing that section 141 of the Code does not operate so as to make the provision of Order IX, rule 4, and call cognate provisions applicable to execution proceedings.

But this conclusion, in my opinion, does not decide the present case. The question which we have to consider is whether a proceeding under Order XXI, rule 100, is a proceeding in execution. As to this I have expressed my opinion very frequently to the effect that an application under Order XXI, rule 100, cannot be regarded as an application in execution. I have stated the reasons so fully in a recent case which came up before my learned brother and myself that I do not think it necessary to repeat them (2). The case of *Haricharan Ghosh* v. *Manmatha Nath Sen* (3) does indeed support the arguments of the respondents but that case assumed, rather than decided, that an application under Order XXI, rule 100, is an application in an execution proceeding. The case of *Haricharan Ghosh* v. *Manmatha Nath Sen* (3) is confessedly based on the decision of the Judicial Committee in the case to which I have referred; but all that the Judicial Committee decided is that the proceedings spoken of in section 141 of the Code include original matters in the nature of suits and that they

(1) (1895) I. L. R. 17 All. 106; L. R. 22 I. A. 44.

(2) See *Triloke Nath Jha* v. *Banaman Jha*, ante, p. 249, *Ed.*

(3) (1914) I. L. R. 41 Cal. 1.

do not include execution. The other ground upon which *Haricharan Ghosh* v. *Manmatha Nath Sen* (1) is based is that the order in a proceeding under Order XXI, rule 100, is not conclusive, but is subject to the right of the person aggrieved to bring a suit; but it seems to me that the right to apply under Order XXI, rule 100, does not stand on the same footing as a right to maintain a suit, if the application under Order XXI, rule 100, is dismissed. All that the applicant has to establish in a proceeding under Order XXI, rule 100, is that he was possessed of the property on his own account or on account of some other person than the judgment-debtor; but if he is compelled to institute a suit he has to establish the right which he claims to the present possession of the property. The question in my opinion is not solved by a reference to the provision of Order XXI, rule 103, of the Code.

The question came up for decision in our Court in *Satya Narain* v. *Gobind Sahay* (2). Roe, J. in delivering the judgment of the Court very properly pointed out that all that was decided by the Judicial Committee in *Thakur Prashad* v. *Fakirullah* (3) was that Order IX, rule 9, was not applicable to proceedings in execution and the learned Judge thought that the decision of the Judicial Committee did not support the conclusion that Order IX, rule 9, was not applicable to a proceeding under Order XXI, rule 100. The learned Judge pointed out that an application under Order XXI, rule 100, is in the nature of a summary suit and that in that view the provision of Order IX, rule 9, should apply to such an application. In my opinion, the case of *Satya Narain* v. *Gobind Sahay* (2) was correctly decided and is binding on this Court. It was strongly pressed before us that *Satya Narain* v. *Gobind Sahay* (2) has been overruled by the decision of the Special Bench in the case of *Bhubaneshwar Prasad Singh* v. *Tilakdhari Lal* (4); but

(1) (1914) I. L. R. 41 Cal. 1.
(2) (1918) 3 Pat. L. J. 250.
(3) (1895) I. L. R. 17 All. 106; L. R. 22 I. A. 44.
(4) (1919) 4 Pat. L. J. 135, F.B.

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I am unable to take the view that it was within the scope of the decision in the Special Bench case to overrule *Satya Narain* v. *Gobind Sahay* (1). What is actually decided in the Special Bench case is that Order IX, rule 9, does not apply to an application under Order XXI, rule 90, of the Code. No doubt the arguments employed by the learned Judges deciding the case of *Bhubaneshwar Prasad Singh* v. *Tilakdhari Lal* (2) apply with equal force to an application under Order XXI, rule 100; but, though the decision itself is binding on me, I do not think that I ought to be compelled to accept that which logically follows from that decision as equally binding on me, especially as I consider that the decision in *Bhubaneshwar Prasad Singh* v. *Tilakdhari Lal* (2) needs re-examination.

The whole problem is whether Order IX, rule 9, applies by force of section 141 to a proceeding under Order XXI, rule 100. Now an application under Order XXI, rule 100, is not an application in execution proceedings, but is an original matter in the nature of a suit, and in my opinion the decision of the Judicial Committee in the case cited is an authority for the proposition that Order IX, rule 4, would apply by force of section 141 to original matters in the nature of suits.

I am unable to look upon the order of the 5th August, 1916, as a nullity. That being so, the suit, which was instituted on the 2nd October, 1920, was clearly barred by limitation under the provision of Article 11A of the Limitation Act. I would accordingly allow the appeal, set aside the order passed by the learned Judge in the Court below, and restore the decree passed by the Court of first instance. The appellant is entitled to his costs throughout.

ADAMI, J.—I agree.

Appeal allowed.

(1) (1918) 3 Pat. L. J. 250.
(2) (1919) 4 Pat. L. J. 135, F.B.