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pay court-fee which they were not liable to pay on the date when the copies were obtained by them.

I understand that there are a number of cases of this nature. They will all be governed by this judgment.

APPELLATE CIVIL.

Before Adami and Das, J.J.

SRI THAKUR RADHA KRISHNA GOPAL LALJI

v.

LAKSHMI NARAYAN.*

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Code of Civil Procedure, 1908 (*Act V of* 1908), *Order* XXXII, *rules* 3(4) *and* 11(2)—*Guardian* ad litem, *appointment of—notice to minor, whether necessary—Natural guardian, right of, to be appointed—wishes of minor, when to be consulted.*

When the court appoints a fresh guardian *ad litem* for a minor defendant under Order XXXII, rule 11(2), of the Code of Civil Procedure, 1908, it is not necessary to give notice to the minor. Rule 3(4) of that Order applies only when an application is made for the appointment of a guardian in the name, or on behalf of a minor, or by the plaintiff.

Rajendra Prasad v. *Probodh Chandra Mitra*(1), distinguished.

Although the mother of a minor, as his natural guardian, is the proper person to be appointed his guardian *ad litem* the mere fact that the court has appointed the minor's brother who was the *karta* of the joint family of which the minor was a member does not render the decree obtained in the suit void.

* Appeal from Original Order No. 225 of 1921, from an order of Mr. M. Zahur, Subordinate Judge of Muzaffarpur, dated the 26th July, 1921.

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Although it is desirable that the Court should consult the wishes of a minor when appointing a guardian *ad litem* there is nothing in the Code which requires that the minor's wishes shall be consulted when the appointment is made under Order XXXII, rule 11.

Appeal by the decree-holders.

Appeal from an order dismissing an application for execution of a decree on the ground that a minor judgment-debtor was not properly represented in the suit.

The facts of the case material to this report are stated in the judgment of Das, J.

Susil Madhab Mullick and *Norendra Nath Sen*, for the decree-holders.

C. C. Das (with him *Bhagwan Prasad* and *Sishir Kumar Mittra*), for the respondent.

DAS, J.—This is an appeal on behalf of the decree-holders against an order of the learned Subordinate Judge of Muzaffarpur, dismissing the execution on the ground that the minor judgment-debtor was not properly represented in the action. The material facts are these.

The plaint was admitted on the 17th November, 1913. On the 9th January, 1914, the plaintiffs applied to the Court for the appointment of Ram Bahadur, the eldest brother of the minor, as the guardian *ad litem* for the minor defendant. It is not disputed that Ram Bahadur and the minor defendant formed a joint family and that Ram Bahadur was the managing member of the family. On the 4th of March, 1914, Ram Bahadur appeared in Court and expressed his disinclination to act as the guardian *ad litem* for the minor defendant. On the 30th April, 1914, the Court appointed one Goodarnath Pandey as the guardian *ad litem*. On the 20th May, 1915, Goodarnath Pandey being absent, the Court appointed one Nirbhay Singh as the guardian *ad litem* for the minor

defendant. The suit was then compromised and a consent decree was passed in the suit.

The grounds upon which the learned Subordinate Judge has proceeded are these. First that there is nothing to show that notice or summons was served on the minor after the appointment of Goodarnath Pandey as the guardian *ad litem*; secondly that the plaintiffs should have proposed the mother of the minor as the guardian *ad litem*; and thirdly, that no notice was served on the minor informing him of the intention of the Court to discharge Goodarnath Pandey as the guardian *ad litem*. On these grounds the learned Subordinate Judge came to the conclusion that the decree against the minor was void *ab initio* and that he could disregard the decree in the execution proceedings.

In my judgment the view taken by the learned Subordinate Judge is erroneous and cannot be supported. In the first place there is no provision in the Civil Procedure Code which requires the Court to give any notice to a minor of the appointment of a guardian *ad litem* after such appointment.

Mr. *Das* contended before us that what the Court intended to find was that the notice was not served on the minor in accordance with the provision of the fourth paragraph of Order XXXII, rule 3; but that is certainly not the finding of the learned Subordinate Judge and on the materials before him he could not have come to the conclusion that notice was not served in accordance with the provision of the Code.

On the second point, I certainly think that the proper person to be appointed as guardian *ad litem* was the mother of the minor, that is to say the natural guardian of the minor; but I am unable to say that the decree is a nullity because the plaintiff instead of nominating the mother, nominated his brother who was undoubtedly the *karta* of the joint family and would represent the minor in all joint family transactions.

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The third point raises a question of some difficulty but I have come to the conclusion that though the Court should in every case consult the wishes of a minor before appointing any person as guardian *ad litem* in the suit, there is nothing in the Code which requires it to do so in a case contemplated by Order XXXII, rule 11. It will be noticed that paragraph 4 of Order XXXII, rule 3, applies only to a case contemplated by rule 3, that is to say to a case where an application is made for the appointment of a guardian in the name or on behalf of a minor or by the plaintiff. Rule 11 gives the Court power to appoint any guardian where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, and there is nothing in the Code which requires the Court to give notice to the minor before making the order under rule 11. The case of *Rajendra Prasad* v. *Probodh Chandra Mitra* (1) is not an authority for the view that an order under rule 11, if made without notice to the minor, is a nullity. In that case the order of the learned Subordinate Judge appointing a person as guardian against the express wishes of the minor was challenged in the same proceedings and the Court had not difficulty in setting aside the order. But it is one thing to say that an order is without jurisdiction within the meaning of the term as used in section 115 of the Code, it is another thing to say that the order is void in the sense that the decree which is ultimately made may be disregarded by the Court executing the decree.

I would allow the appeal, set aside the order passed by the learned Subordinate Judge, and direct that the execution do proceed.

The appellants are entitled to the costs of this appeal.

ADAMI, J.—I agree.

Appeal allowed.

(1) (1921) 6 Pat. L. J. 82.