

there is no evidence or where, what amounts to the same thing, the evidence is absolutely valueless. There was evidence on both sides and I think the learned Judge was entitled to arrive at the conclusion he did by taking into consideration and weighing that evidence and the probabilities of the case coupled with the fact that the plaintiff originally, or rather his predecessor, was undoubtedly proved to have been in possession of the land. The result is that the appeal is allowed, and the plaintiff's suit is decreed with costs here and in the courts below.

MULLICK, J.—I agree. The only point is whether the findings in this case bring it under the rule propounded in the Full Bench decision of *Raja Shiva Prasad Singh v. Hira Singh* (1). In my opinion the findings are not sufficient to attract the operation of that rule.

Appeal allowed.

APPELLATE CIVIL.

Before Coutts and Das, J.J.

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v.

SAKAL RAI.*

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MATUK
SINGH
v.
TIAN
SAHU.

DAWSON
MILLER,
C. J.

1922.

July, 21.

Guardian ad litem—Appointment of, necessity for consent—Code of Civil Procedure, 1908 (Act V of 1908), Order XXXII, rule 4(3).

Unless the person appointed as guardian *ad litem* consents to act as such the appointment is invalid and an *ex-parte* decree obtained against the minor in such circumstances is inoperative against him.

*Appeal from Appellate Decree No. 578 of 1920, from a decision of Babu Narendra Nath Chakravarti, Officiating, Subordinate Judge of Saran, dated the 29th March, 1920, modifying a decision of Babu Bhuvaneshvar Prashad Pande, Additional Munsif of Chapra, dated the 23rd December, 1918.

(1) (1921) 6 Pat. L. J. 478, F.B.

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Chhatter Singh v. Tej Singh(1), dissented from.

Pundit Mohan Krishna Das v. Chowdhuri Har Pershad(2),
Narendra Chandra Mandul v. Jogendra Narain Rai(3), and
Annada Prasad Ghosh v. Upendra Nath Dey(4), followed.

Appeal by the defendants.

Suit for declaration of title to, and confirmation of possession of 3 *bighas*, 7 *kattahs* and 1 $\frac{2}{3}$ *dhurs*, in *mauza* Datia Parsauli. The trial Court dismissed the suit and the plaintiffs appealed to the District Judge. The appeal was dismissed in so far as the claim of plaintiffs Nos. 1, 2 and 3 were concerned and allowed with respect to the claim of plaintiff No. 4.

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

Baikunta Nath Mitter, for the appellants.

Sambhu Saran, for the respondents.

COURTS, J.—The facts of the case are shortly as follows: Defendants Nos. 1 and 2 are *maliks* of the *patti* in which the land in suit lies. Defendant No. 1 and the mother of defendant No. 2 brought a suit for arrears of rent of this land against defendant No. 5, plaintiff No. 4, and his brother Gajadhar Rai, as *raiyats* of the holding. They obtained a decree and in execution of the decree they purchased the holding, subsequently parting with some of their interest to the other defendants. The plaintiffs Nos. 1 to 3 were not parties to the rent-suit and their case is that they were necessary parties as they were co-sharers in the holding. The case of the plaintiff No. 4 is that although the decree was against him he was a minor at the time of the suit and was not properly represented. The plaintiffs accordingly brought this suit for a declaration that they are entitled to the land in suit. The defendants contended that the plaintiffs Nos. 1 to 3

(1) (1921) 59 Ind. Cas. 671.

(3) (1914-15) 19 Cal. W. N. 537.

(2) (1917) 40 Ind. Cas. 2.

(4) (1921) 34 Cal. L. J. 293.

had no interest in the holding and that the plaintiff No. 4 was properly represented by his mother who had been appointed his guardian *ad litem* by the Court.

The Court of first instance found that the plaintiffs Nos. 1 to 3 had no interest in the holding and that the plaintiff No. 4 was properly represented. The suit was accordingly dismissed. The plaintiffs appealed and on appeal the decision of the Court of first instance has been upheld in so far as the plaintiffs Nos. 1 to 3 are concerned but so far as the plaintiff No. 4 is concerned it has been held that he was not properly represented and that the suit in so far as his half-share in the holding is concerned must succeed. The defendants have appealed to this Court.

The only question in appeal is whether in fact the plaintiff No. 4 was properly represented by his mother in the rent suit. It appears that the Court appointed plaintiff No. 4's mother as his guardian; notices were issued on her, but her consent was not taken and she did not appear in the suit which was decreed *ex-parte* as against the plaintiff No. 4. The learned Subordinate Judge has held on the authority of *Narendra Chandra Mandal v. Jogendra Narain Rai* ⁽¹⁾ that it was not competent to the Court to appoint the mother of plaintiff No. 4 as his guardian without her express consent, that the appointment was without jurisdiction and that the minor was not represented. I am in agreement with this view. It is the view which has been expressed in this Court in the case of *Pundit Mohan Krishna Das v. Chowdhuri Har Pershad* ⁽²⁾; it is the view which has been uniformly adopted in Calcutta [vide *Annada Prasad Ghosh v. Upendra Nath Dey* ⁽³⁾], and it is undoubtedly in my opinion the correct view of the law. We have been referred by the learned Vakil for the appellants to certain decisions of the Privy Council and of this and other High Courts in India in which it has been held

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that although no appointment of a guardian has actually been made by the Court yet if the mother appears and effectively represents her minor son a formal order for her appointment is not necessary. These, however, are entirely different cases. In the present case the minor was not only not effectively represented but was not represented at all. We have also been referred to certain decisions of the Allahabad High Court in which it has been held that where an appointment has been made without consent and where a decree has been passed *ex-parte* unless it has been shown that the minor's interests have been prejudiced by the irregularity the minor has no right to set aside the proceedings [*Chhatter Singh v. Tej Singh* (1)]. With all respect to the learned Judges of the Allahabad High Court who decided this case and other cases relied on in this decision I am unable to accept the view. The provision of Order XXXII, rule 4(3), in respect of consent is mandatory and I can find nothing in the law to suggest that unless the minor is prejudiced he cannot get relief.

This case has, in my opinion, been rightly decided and I would dismiss the appeal with costs.

DAS, J.—I agree.

Appeal dismissed.

PRIVY COUNCIL.

JAI BERHMA

v.

KEDAR NATH MARWARI.*

(and cross appeal).

Restitution—Sale in execution set aside—Repayment of price—Condition to restoration of property—Purchaser paying off charges—Code of Civil Procedure, 1908 (Act V of 1908) section 144.

*Present.—Lord Phillimore, Lord Carson and Sir John Edge.

(1) (1921) 59 Ind. Cas. 671.