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the re-entry of the landlord on default of payment of theka jama.

It follows that the landlord appellant, having no proviso for re-entry in his favour, is not entitled to any decrees for ejectment. The appeals thus fail.

Appeals dismissed.

S. A. K.

DHAVLE, J.

APPELLATE CIVIL.

Before Khaja Mohamad Noor and Rowland, JJ.

1939.

April, 18, 19.

RATAN PRASAD MARWARI

v.

BRIDHI CHAND SHOROFF.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXII, rule 3(5)—minor defendant attaining majority during pendency of suit—no steps taken to proceed against the defendant as major—decree, whether is a nullity.

There is no provision in law which makes it incumbent upon a plaintiff to keep himself informed as to the date when a minor defendant, who was sued as such, became a major and then to apply to have the guardian discharged and to proceed with the suit against the defendant as a major.

A minor defendant who comes of age may, if he thinks fit, come on the record and conduct the defence himself. If, however, he does not do so and allows the case to proceed as though he was still a minor without bringing to the notice of the Court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the time.

Therefore, a decree by a competent Court against a minor, who had during the pendency of the suit attained

* Appeal from Original Order no. 138 of 1938, from an order of Rai Sahib Bansidhar, Subordinate Judge of Deoghar, dated the 16th May, 1938.

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majority but who continued to be shown on the records as a minor represented by a guardian, is not a nullity.

Lanka Sanyasi v. *Lanka Yerran Naidu*(1) and *Drupad Chandra Naskar* v. *Binduvoyi Dasi*(2), followed.

Daulat Singh v. *Maharaj Raja Ramji*(3), distinguished.

Appeal by one of the judgment-debtors.

The facts of the case material to this report are set out in the judgment of Khaja Mohamad Noor, J.

J. P. Upadhaya and *Choudhury Mathura Prasad*, for the appellant.

S. C. Chakravarty, for the respondent.

KHAJA MOHAMAD NOOR, J.—This miscellaneous appeal arises out of a proceeding for execution of a mortgage decree for sale obtained by the respondent Bridhi Chand Shoroff against Baijnath Marwari and his two sons, one of them being the appellant Ratan Prasad Marwari, who was admittedly a minor when the suit was instituted and attained majority after the passing of the preliminary decree but before the date of the final decree. He was represented in the suit by his guardian ad litem Babu Baidyanath Banerji who continued to act as such till the final decree was passed, though, as I have said, the appellant was a major then. The decree-holder took out execution describing the appellant as minor. The execution record is not before us, but from the fact that the notice under Order XXI, rule 22, for the appellant was served on Babu Baidyanath Banerji it is clear that the appellant was proceeded against under the guardianship of that gentleman. It appears that later on Babu Rati Nath, a pleader, was appointed guardian ad litem. As the whole record is not before us, it is not clear how the guardian was changed; but it must have been done because Babu

(1) (1928) A. I. R. (Mad.) 294.
(2) (1926) A. I. R. (Cal.) 1053.
(3) (1926) I. L. R. 48 All. 362.

Baidyanath Banerji did not enter appearance and perhaps the decree-holder or the Court thought it desirable to discharge him and appoint a new guardian. The execution proceeded against all the judgment-debtors, the appellant being represented through Babu Rati Nath, pleader. Later on the appellant appeared and filed objection under section 47 of the Civil Procedure Code in which he questioned the validity of the final decree and of the execution proceeding. He urged that the final decree was a nullity inasmuch as at the time when it was passed the appellant had already attained majority and, therefore, could not be represented at that stage through a guardian at litem. On the same ground he questioned the validity of the execution proceeding, that is to say, he urged that as he was a major, the execution proceeding in which he had been described as a minor was ineffective and the properties could not be sold in such a proceeding. The objection was disallowed and he has preferred this appeal.

It appears that after the institution of the appeal the appellant applied for an order staying the sale of the mortgaged properties. That application was rejected and we are informed that the properties have been sold and purchased by the decree-holder.

The objection raised by the appellant before the learned Subordinate Judge has been repeated before us in appeal. The first contention of the learned advocate for the appellant has been that the final decree was a nullity on account of the mis-description of the appellant. No authority has been placed before us in support of this contention. The learned advocate referred us to the case of *Daulat Singh* v. *Maharaj Raja Ramji*(1). That case has absolutely no application to the present one. There a defendant, who was a minor, was described as a major, and the case proceeded against him without the appointment

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of a guardian ad litem. It was held that the decree passed under such circumstances was a nullity. But here when the suit was instituted the appellant was admittedly a minor and was properly represented through a guardian and this state of affairs continued up to the time of the passing of the preliminary decree. The question is whether the final decree, which was passed without the removal of the guardian ad litem and without describing the appellant as major, is a nullity. Now, there is no provision in law which makes it incumbent upon a plaintiff to keep himself informed as to the date when a minor defendant, who was sued as such, became a major and then to apply to have the guardian discharged and to proceed with the suit against the defendant as a major. Sub-rule (5) of Order XXXII, rule 3, as amended by this Court, runs as follows:—

"(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceedings in the execution of a decree."

The effect of this rule is that a guardian ad litem does not cease to function automatically on a minor defendant attaining his majority. He is to be discharged, and as the minor who has attained majority is the best person to know the date of his attaining majority, it is, I think, for him to come to Court and apply for the discharge of the guardian and to take up defence of the suit personally. I am supported in this view by the authority of two decisions which have been relied upon by the learned Subordinate Judge. The first is *Lanka Sanyasi* v. *Lanka Yerran Naidu*(1) where it was laid down that no provisions have been made in the Civil Procedure Code, in respect of a minor defendant attaining majority. Therefore, the minor defendant who comes of age may, if he thinks fit, come on the record and conduct the defence himself. If, however, he does not do so and allows the

(1) (1928) A. I. R. (Mad.) 294.

case to proceed as though he was still a minor without bringing to the notice of the Court, the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the time. A similar view has been taken by the Calcutta High Court in the case of *Drupad Chandra Naskar* v. *Bindumoyi Dasi*(1). Therefore, I am clearly of opinion that the final decree for sale was a perfectly good decree.

Coming to the validity of the execution proceeding, the same considerations arise. As I have stated before, under the amended rule 3 of Order XXXII the guardian ad litem appointed in the suit continues even in the execution proceeding. Therefore, the execution was rightly taken out against the appellant through the guardian who was appointed in the suit and notice was properly served upon him. Then, I presume that on the guardian not appearing in the execution for some reason which is not clear from the record, a fresh guardian was appointed. Then apart from all the considerations the appellant himself appeared in the execution proceeding and beyond questioning the validity of the execution he raised no objections about the merits of the execution itself. Had he any objection to raise about the merits of the case it was open to him to assert it. He could have taken up the conduct of the case in his own hands and could have raised any objections which he wanted to raise. He did not do so, and, as I have said, the only thing he did was to raise some technical objection about the execution. The debt for which the decree was passed was incurred by the appellant's father, and though he was made a defendant in the suit, the only defence that he could raise in the suit was that the debt was incurred for illegal or immoral purposes or that the mortgage was not executed for legal necessity. No such defence seems to have been raised

(1) (1926) A. I. R. (Cal.) 1053.

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in this case. In my opinion the objection was taken simply with a view to gain time and put off the satisfaction of the decree. There is no merit in it. I may also mention that the decree-holder who has purchased the mortgaged property is willing to give up his rights under the sale if the decretal amount be paid to him within a short time. To this the learned advocate for the appellant did not seem to agree.

I would dismiss this appeal with costs.

ROWLAND, J.—I agree.

Appeal dismissed.

S. A. K.

APPELLATE CRIMINAL.

1939.

January, 3, 4, 5, 6, 12, 13, 16, 26, 27, 30, 31. *February*, 3, 6, 7, 8, 9, 10. *April*, 25.

Before Khaja Mohamad Noor and Dhavle, JJ.

AMBICA THAKUR

v.

KING-EMPEROR.*

Code of Criminal Procedure, 1898 (*Act V of* 1898), *sections* 145, 423 *and* 439—*order under section* 145, *effect of*—*forcible or surreptitious possession by unsuccessful party, whether amounts to dispossession of successful party*—*party restrained, whether can be allowed to assert possession unlawfully retained or obtained*—*High Court, power of, to convert an order of acquittal into one of conviction.*

Where a person, against whom an order under section 145, Code of Criminal Procedure, 1898, is passed, is able on some occasions either surreptitiously or forcibly to cultivate the lands, the subject-matter of the proceeding, these could be no more than isolated acts of trespass (and offences punishable under section 188 of the Penal Code, 1860) but not acts amounting to a dispossession of the party in whose favour the order is made.

The possession of the party which succeeds in a proceeding under section 145 cannot be put an end to by the unsuccessful party by mere violence or surreptitious invasion.

*Criminal Appeal no. 172 of 1938 (with Criminal Revision no. 110 of 1939), against a decision of Rai Sahib Nidheshwar Chandra Chandra, Additional Sessions Judge of Shahabad, dated the 26th July, 1938.