

the suit must be instituted at Lewe, where the property is situated, but I think that this question is settled by section 20 of the Code. The suit could be instituted at Lewe, where the defendant resides, but under section 20 (c) it may also be instituted where the cause of action arose, and that, I think, was in the Township Court of Yedashe which removed the attachment.

I set aside the judgments and decrees of the Courts below and remand the suit to the Township Court of Yedashe for trial and disposal on its merits. The appellant will be granted a certificate for the refund of the Court-fee paid on this appeal. The other costs in this appeal—advocate's fees three gold mohurs—and the costs in the District Court will be costs in the suit and will follow its result.

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### APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Sen.*

ABDULLA ABDUL GANY

v.

B. K. CHATTERJEE.\*

1931  
 July 7.

*Suit for possession—Receiver of property—Auction-purchaser at court sale  
 —Party entitled to sue for possession.*

When a sale certificate has been issued to the auction-purchaser at a court sale the person entitled to sue for possession of the property is the auction-purchaser, and not a receiver who had been appointed in the suit or execution proceedings.

*Leach and Ganguli for the appellant.*

*Chari for the respondent.*

PAGE, C.J.—This appeal must be allowed.

On the 15th of March 1927 a chettyar firm obtained a mortgage decree against one Po Sin. On

\* Civil Miscellaneous Appeal No. 38 of 1931 from the order of the District Court of Myaungmya in Civil Regular No. 95 of 1930.

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the 8th of April 1927 an application was made for execution of the mortgage decree. On the 14th of May 1927 the judgment-debtor sold part of the property subject to the mortgage to the appellant. On the 19th of July 1928 an *interim* receiver of the mortgaged property was appointed at the instance of the decree-holder, and the *interim* appointment of the receiver was confirmed on the 26th November 1928. The receiver was appointed because the wife of the judgment-debtor had filed a declaratory suit claiming an interest in the mortgaged property, and also had applied for a stay of the sale in execution of the decree, and the learned District Judge was of opinion that the best way of "frustrating the design of the judgment-debtor and his wife" to defeat and obstruct the sale in execution of the decree was to appoint a receiver. The receiver who was appointed was the present respondent. On the 14th of January 1929 the whole of the property subject to the mortgage was sold in execution of the decree, including the property sold on the 14th of May 1927 to the appellant, and the property was purchased by the decree-holder. No objection was raised by the judgment-debtor or anyone else to the sale, and on the 11th of June 1929 the sale was confirmed, and on the 29th of September 1929 a sale certificate was granted. On the 14th of December 1929, as the proceeds of the sale were not sufficient to satisfy the decree, a personal decree for the balance was passed against the judgment-debtor. On the 18th November 1930 the respondent, as receiver, applied for leave to sue the appellant for possession of the property sold to him, upon the ground that he had refused to deliver up possession of the property to the receiver, and on the 3rd December, leave in that behalf having been granted, the present suit was filed. A

preliminary issue as to whether the suit was maintainable was tried and determined by the learned District Judge, who passed a decree in favour of the respondent. The appellant thereupon filed the present appeal.

There is only one point that falls for determination in the appeal, namely, whether in the circumstances obtaining in the present case the receiver was entitled to sue for possession of the property. On behalf of the respondent it is urged that inasmuch as the receiver was granted all the powers that a receiver could be given under Order 40, he was entitled as receiver to sue for possession of the property. On the other hand it is urged on behalf of the appellant that, as a sale certificate was granted by the Court to the chettyar who had bought the property at the auction sale, the only person entitled to recover possession of the property was the auction-purchaser. Now, it is common ground that the effect of the sale certificate was that an absolute title to the property in suit passed to the auction-purchaser, and it is also conceded on behalf of the respondent that the right of the receiver to sue did not depend upon the receiver possessing any title to the property, but upon the authority in that behalf that he had been given under the order of the Court. In my opinion, in so far as the Court granted him authority to sue for possession of this property the authority granted in that behalf must be taken to have been withdrawn when the Court by the certificate of sale granted an absolute title in the property to the auction-purchaser, thereby authorising him to sue for possession thereof. It became obvious that that was the position after the following question had been put to the learned advocate for the respondent: "Assume that the receiver brought a

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suit for possession, and that the auction-purchaser also brought a suit for possession, (it being common ground that they are not entitled to possession in the same right), which suit would succeed, and which suit would fail?" To that question there can be but one answer. I am clearly of opinion that the suit of the auction-purchaser would succeed. In my opinion after the sale certificate had been issued the person who was entitled to sue for possession of the property was the auction-purchaser, and not the receiver. The result is that the suit fails.

It was, however, further urged on behalf of the respondent that this is a case in which the Court ought to exercise the jurisdiction with which it is invested under Order I, Rule 10. In my opinion, in the circumstances obtaining in this case, the Court ought not to accede to that contention. Why the chettyar elected to allow the suit to be filed for possession by the receiver is a matter of conjecture. It may be, as suggested by the learned advocate for the respondent, that he took that course because he thought that a suit brought by an officer of the Court would be more likely to succeed than a suit brought by a chettyar, or, again, it may be that his advisers took the view that if the chettyar himself brought a suit for possession he might find his claim countered by the provisions of section 47 of the Code of Civil Procedure. Be that as it may, it is quite clear that whatever the amount of mesne profits the receiver might be able to claim, all that the auction-purchaser would be entitled to recover would be mesne profits from the date upon which the sale took place. In these circumstances, in our opinion, the Court ought not to apply the provisions of Order I, Rule 10.

The result is that the appeal is allowed, the decree of the District Court set aside, and the suit dismissed. We make no order as to costs.

SEN, J.—I agree.

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## APPELLATE CIVIL.

*Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Sen.*

### SHADEO

v.

### MAHRAJI AND ANOTHER.\*

1931  
 July 13

*Minor—Guardian's remedy for restoration of custody—Suit for custody—Guardians and Wards Act (VIII of 1890), s. 25.*

The remedy of a guardian for restoration of the custody of a minor is by way of application under the Guardians and Wards Act, and not by filing a regular suit.

*Arunachellam Pillay v. Iyama*, 8 B.L.T. 128 ; *Besant v. Narayaniah*, I.L.R. 38 Mad. 807 ; *Sathi v. Ramandi*, I.L.R. 42 Mad. 647 ; *Sham Lal v. Bindo*, I.L.R. 26 All. 594 ; *Utma Kuar v. Bhagwanla Kuar*, I.L.R. 37 All. 515—*followed*.

*Achrallal v. Chimanlal*, I.L.R. 40 Bom. 600 ; *Mathuraban v. Tewary*, 10 B.L.T. 186 ; *Ma Shwe Ge v. Maung Shwe Pan*, 2 L.B.R. 140 ; *Sharifa v. Munckhan*, I.L.R. 25 Bom. 574—*distinguished*.

*Rauf* for the appellant. A Hindu husband is entitled to file a suit to obtain custody of his minor wife from her parents as her natural guardian. The Guardians and Wards Act is not exhaustive, and the right to file a suit which existed before the passing of the Act is not taken away by the Act, either expressly or by implication. See *Sharifa v. Munekhan* (1) ; *Achrallal v. Chimanlal* (2) ; *Ma Shwe Ge v. Mg. Shwe Pan* (3) ; *Mathuraban v. Tewary* (4).

\* Civil First Appeal No. 69 of 1931 from the judgment of this Court on the Original Side in Civil Regular No. 605 of 1930.

(1) (1901) I.L.R. 25 Bom. 574.

(3) (1903) 2 L.B.R. 140.

(2) (1916) I.L.R. 40 Bom. 600.

(4) 10 B.L.T. 186.