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HORMASJI DORÁBJI VÁNIÁ v. BURJORJI JAMSETJI VÁNIÁ.

HÁJI ABDUL RÁHIMAN v. KHOJA KHÁKI ARUTH.

THE LONDON BOMBAY AND MEDITERRANEAN BANK v. PESTONJI DHUNJIBHOY.

charge; (4) that if it is not admitted at all, then the decree is more than twelve years old, and execution cannot issue.

It seems to me the plaintiffs are on the horns of a dilemma. Either the compromise cannot be admitted in evidence at all, or it must be admitted as proof of a complete discharge. Their only remedy is by suit to set aside the discharge, save in so far as it is a part payment.

On these grounds I reject the application for execution, with costs.

Attorneys for the plaintiffs.—Messrs. *Tobin and Roughton* and Messrs. *Tyabji and Dáyábhái.*

Attorneys for the defendants.—Messrs. *Bicknell and Kángá* and Messrs. *Hore, Conroy and Brown.*

NOTE.—See *Jhabar Mahomed* v. *Modan Sonahar*, I. L. R., 11 Calc., 671.

ORIGINAL CIVIL.

Before Mr. Justice Scott.

1886. *February* 13.

WA'GHJI THACKERSEY AND OTHERS, (PLAINTIFFS), *v.* KHATA'O ROWJI AND ANOTHER, (DEFENDANTS).*

Practice—Interrogatories—Discovery—Guardian ad litem—Party for purposes of discovery.

Where a guardian *ad litem* of a lunatic defendant was made a party defendant for purposes of discovery, *held* that the discovery was not intended to include the right to administer interrogatories to him.

SUMMONS in chambers. This was a summons taken out by the plaintiffs on 8th February, 1886, calling upon the defendant, Punjá Wállji, to show cause why he should not answer certain interrogatories.

The suit was filed originally against the first defendant, Khatáo Rowji alone to recover the sum of Rs. 9,442.

The plaintiffs stated that, prior to the year 1879, the plaintiffs had dealings with the defendant, Khatáo Rowji, which resulted in a large balance in favour of the plaintiffs; that in 1878 Khatáo Rowji went away from Bombay on a pilgrimage, leaving his brother-

* Suit 208 of 1885.

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in-law, Punjá Wállji, who was the manager of his firm, to represent him in his absence; that on the 14th November, 1879, during the absence of Khatáo Rowji the accounts between the plaintiffs and Khatáo Rowji were adjusted by Punjá Wállji, who represented himself, as the plaintiffs believed correctly, to be duly entitled to act on behalf of and to bind the said Khatáo Rowji; that on such adjustment a sum of Rs. 16,745 was found to be due to the plaintiffs, and an arrangement was made that this sum was to be paid off by six instalments of Rs. 2,500 each and one of Rs. 1,745, to be paid on certain fixed dates; that while on pilgrimage, Khatáo Rowji became insane, and by an order of Court dated 26th July, 1880, Punjá Wállji was appointed committee of his estate, he being adjudged a lunatic; that, in pursuance of the arrangement of the 14th November, 1879, certain payments were made to the plaintiffs, but at the time of the suit there remained a sum of Rs. 9,442 still due, which the plaintiffs now sought to recover.

The said Punjá Wállji was duly appointed guardian *ad litem* of the defendant, Khatáo Rowji, for the purposes of this suit.

A written statement was filed on behalf of the said Khatáo Rowji which was signed by the said Punjá Wállji. The written statement denied that Punjá Wállji had any authority to adjust accounts, or to enter into agreements on behalf of Khatáo Rowji; and contended that, if any such authority ever existed, it ceased on the defendant's becoming a lunatic. It also set up a plea of limitation as to a large portion of the plaintiffs' claim.

The plaintiffs subsequently took out a summons against Punjá Wállji, who was not then a party to the suit, calling upon him to make an affidavit of documents. This summons was dismissed. The plaintiffs then applied to have Punjá Wállji made a party defendant to the suit; and by an order of Court dated the 29th September, 1885, the plaintiffs were given liberty to make him a party defendant for the purposes of discovery, which was done accordingly.

On the 13th October, 1885, the plaintiffs obtained, *ex parte*, a Judge's order, under section 129 of the Civil Procedure Code (XIV of 1882), requiring the newly made defendant, Punjá Wállji, within ten days to file an affidavit of documents in his possession

relating to the matters in question in this suit, and a further order under section 121 that the plaintiffs should be at liberty "to deliver through this Court the interrogatories in writing for the examination of the defendant, Punjá Wállji, produced by the plaintiffs' attorneys and initialled by me, and that the said defendant do within ten days file in this Court an affidavit replying to the said interrogatories."

On the 20th November, 1885, Punjá Wállji filed an affidavit, in which he set forth that the above order had been obtained *ex parte* by the plaintiffs before he had been served with the summons in the suit as a defendant; and he contended that the plaintiffs were not, in any case, entitled to such order until he had been served with the summons, and had time to file his written statement. He further submitted that the plaintiffs were not entitled to administer interrogatories to him, inasmuch as he had been made a party defendant for the purposes of discovery only, and that he was entitled to object to answer them.

On the 9th January, 1886, Punjá Wállji filed his affidavit of documents.

On the 8th February, 1886, the plaintiffs took out a summons calling on Punjá Wállji to show cause why he should not answer the interrogatories referred to in the order of the 13th October, 1885.

The summons now came on for hearing.

Latham (Advocate General) for the defendant, Punjá Wállji, showed cause. Punjá Wállji was made a defendant to this suit only for the purpose of discovery. No relief is sought against him. He is not a real defendant. No interrogatories can be administered to him. His answers could not be used against his co-defendant. The power to make parties for purpose of discovery is to be rarely exercised. He cited *Heatley* v. *Newton*[1]; *Ingram* v. *Little*[2].

Brown, contra, in support of the summons.—The defendant now really seeks to set aside the Judge's order of 13th October, 1885. That order allowed discovery, not merely of documents,

(1) L. R., 19 Ch. Div., 336.

(2) L. R., 11 Q. B. Div., 251.

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but by way of interrogatories. Punjá Wállji was made defendant for the purpose of discovery. There is nothing to show that such discovery was limited merely to inspection of documents. The old bill of discovery allowed interrogatories. He cited *Weise* v. *Wardle*(1); *Attorney General* v. *Gaskill*(2); *Dyke* v. *Stephens*(3).

SCOTT, J.—In this case the second defendant, Punjá Wallji, was the committee of the first defendant, (a lunatic), and his guardian *ad litem*. The plaintiff obtained an order from Bayley, J., making Punjá party defendant for purposes of discovery. The usual order for an affidavit of documents was then obtained, and after some delay the affidavit was made.

The plaintiff having obtained the discovery of documents, now seeks discovery by interrogatories. The question I have to decide is, whether the order making Punjá a party defendant for purposes of discovery, was intended to cover both kinds of discovery—that is to say, discovery on interrogatories as well as discovery of documents.

I quite agree with the Advocate General that great caution should be exercised in granting orders to make persons party defendants for purposes of discovery. The general rule, no doubt, is that persons against whom there can be no decree ought to be called as witnesses, and should not be made defendants (*per* Lord Eldon in *Fenton* v. *Hughes*(4)). But there are exceptions to this rule, and the great experience of the learned Judge who granted this order makes me feel sure that it comes within one of these exceptions.

Mr. Brown cited *Higginson* v. *Hall*(5) to show that the next friend of a lunatic could be called upon to make an affidavit of documents. Malins, V.C., so decided on the ground that a defendant has a right to know what documents the plaintiff has, and cannot lose that right because the plaintiff happens to be of unsound mind. But in *Dimoline* v. *Ward*(6), Little, V.C., in an unreported case refused to follow this decision; and still more recently Pearson, J., has emphatically dissented from it—*Dyke* v. *Stephens*(7)

(1) L. R. 19 Eq., 171.
(2) L. R., 20 Ch. Div., 519, p. 528-29.
(3) L. R., 30 Ch. Div., 189.
(4) 7 Ves., 287.
(5) L. R 10 Ch. Div., 235.
(6) Referred to in L. R. 30 Ch. Div., at p. 190.
(7) L. R., 30 Ch. Div., 189.

It would seem, therefore, that a guardian *ad litem* cannot be called upon to make an affidavit of documents, unless there are such special circumstances in the case as justify an order making him a party defendant. The true position of a guardian *ad litem* to a lunatic, in the absence of such special order, is that he is not an agent of the lunatic, but an officer appointed by the Court and a party to the suit only for the purpose of protecting the lunatic's interest, with no authority to make admissions. This is clearly laid down in *Ingram* v. *Little*(1), where it was specially decided that guardians *ad litem* are relieved from the duty of answering interrogatories. The Judges in that case also held, generally, that guardians *ad litem* cannot be called upon to make admissions against the interests of those on whose behalf they were appointed. Lord Coleridge, C. J., says (p. 253): "It would seem that he is relieved from all liability as a party to the action where, in acting as such, he would be acting adversely to the interest of the infant or lunatic." Denman, J., says (p. 254): "It seems clear that, before the passing of the Judicature Acts, guardians *ad litem* could not be called upon to make admissions against the interest of those on whose behalf they were appointed. The main object of administering interrogatories is to save expense by obtaining admissions from the opposite party, and I do not think the Legislature intended by the Judicature Acts and rules to give any greater power of obtaining admissions from guardians *ad litem* than existed before the passing of those Acts." Manisty, J., says: "It would, in my view, be a monstrous result if a person, appointed solely to protect the interests of a lunatic, were allowed to make admissions against him."

The principle thus laid down inclines me to think that the order now before me was not intended to include interrogatories; but before finally deciding I will consider the matter from another point of view. Interrogatories are only affidavits obtained in a particular way, and the party wishing to use them must put them in as his evidence. Now, how far would these answers, if I order them to be made, be admissible? They could not be used as admissions against Punjá Wállji, for he is only a defend-

(1) L. R., 11 Q. B. Div., 251

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ant for purposes of discovery, and no decree can be passed against him. They cannot be used as admissions against the lunatic, for the admissions of one defendant are not evidence against another. At the most, the answers would serve the plaintiff by putting him in possession of information which he could use against the first defendant. To admit interrogatories for that purpose would be an infringement of the rule laid down in *Ingram* v. *Little*(1), and it would be tantamount to making a witness a party merely in order to enable the plaintiff to deal better with the other parties upon the record. As the answers themselves could not be used as evidence against any other person in the suit, I think I am justified in disallowing the interrogatories, and in holding that the order in question was intended only to cover discovery of documents.

I may add that this conclusion is amply justified by the affidavit of the plaintiff of the 14th September, 1885, on which the Judge's order making Punjá a party defendant was obtained. The plaintiff there says, that a summons—calling upon the first defendant to show cause why Punjá, "committee and guardian *ad litem*," should not make an affidavit of documents—had been dismissed. The plaintiff then adds: "I have no other means of getting discovery of the said documents, save and except from the said Punjá Wállji, and I am advised that he should be made a party defendant to this suit, and without such discovery I cannot proceed to a hearing." It is quite clear from this affidavit that discovery of documents was alone intended. I may add that the object of the proposed interrogatores is not merely to supplement a deficient affidavit of documents.

My decision may be briefly summed up as follows:—

The main object of administering interrogatories is to save expense by obtaining admissions from the opposite party. But a guardian *ad litem* cannot be called upon to make admissions against the interest of those on whose behalf he is appointed.

In cases, therefore, where he is made defendant for purposes of discovery, the discovery is not intended to include the right to administer interrogatories.

(1) L. R., 11 Q. B. D., 251.

I, therefore, disallow the interrogatories, and the costs must be costs in the cause.

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Attorneys for the plaintiff.—Messrs. *Hore, Conroy and Brown.*

Attorneys for the defendant.—Messrs. *Little, Smith, Frere and Nicholson.*

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, Mr. Justice Nánábhái Haridás, and Mr. Justice Birdwood.

NA'RA'YAN RA'MCHANDRA AND ANOTHER, PLAINTIFFS, *v.* DHONDU RA'GHU AND OTHERS, DEFENDANTS.*

1885. *September* 23.

Stamp Act I of 1879, *Sch.* I, *Art.* 39, *and Sch. II, Art.* 13, *Cl.* (*b*)—*Kabuláyat or lease of immoveable property for any purpose other than that of cultivation—Stamp duty, exemption from, of such lease.*

A *kabuláyat* or lease relating to immoveable property let to a tenant for any purpose other than that of cultivation is not such a lease as is contemplated by article 13, clause (*b*), of Stamp Act I of 1879 so as to be exempt from stamp duty but is chargeable with such duty under Schedule I, art. 39, of that Act.

THIS was a reference by Ráv Sáheb Sakhárám M. Chitale, Second Class Subordinate Judge of Mahád, in the Thána District, under section 49 of Act I of 1879.

The facts of the case were these:—

The plaintiffs in this case sought to recover from the defendants a certain quantity of grain, or to obtain Rs. 27 as the value thereof, on account of rent.

The document upon which the claim, as aforesaid, was based, was a *kabuláyat* of 10th December, 1881, signed by the defendants and engrossed upon plain paper, in which it was stated as follows:—"There is your *dhárá varkas* land out of your *tikán* .....bearing Survey No. 129.....Therein we have built houses. Having agreed to pay *maktá* (fixed rent) thereof in kind....., we have built the houses, and we will be paying *maktá* on account of the same, and will live on that piece of land."

The question referred for the opinion of the High Court was:—"Whether a *kabuláyat*, relating to immoveable property let to

* Civil Reference, No. 27 of 1885.