1895.

ALI SÁHEB v. SHÁRJI.

removed, [interest would at once begin to run, the debt would increase, and the land in his hands would be liable for the increased debt.

We must, therefore, vary the decree by ordering that on payment of Rs. 300, with Rs. 12 a year for interest from the 5th April, 1880, to date of payment, and costs throughout within six months of this date, plaintiff recover possession of the land mortgaged; and that, in default of such payment, he be foreclosed.

*Decree varied.*

---

## APPELLATE CIVIL.

---

*Before Chief Justice Farran and Mr. Justice Parsons.*

1895. *September* 24.

DATTA'TRAYA KESHAV AND ANOTHER (ORIGINAL DEFENDANTS NOS. 1 AND 2), APPLICANTS, *v.* VA'MAN GOVIND (ORIGINAL PLAINTIFF), OPPONENT.*

*Minor—Suit by minor in Mámlatdár's Court for possession—Mámlatdárs' Act (Bom. Act III of 1876)—Civil Procedure Code (Act XIV of 1882).*

A minor may sue for possession in the Mámlatdár's Court by his next friend, although the Mámlatdárs' Act (Bom. Act III of 1876) makes no provision for such a suit.

APPLICATION under the extraordinary jurisdiction (section 622 of the Civil Procedure Code, Act XIV of 1882) against the decision of Ráo Sáheb S. A. Latkar, Mámlatdár of Wái, in a possessory suit.

Plaintiff Váman Govind, a minor, brought the present suit by his next friend Rámchandra Ganesh to recover possession of a certain house at Wái, alleging that one Gangábái had left it to him by her will with the rest of her estate; that on her death in 1894 it came into his possession, and that on the 12th July, 1894, the defendants took forcible possession of it by breaking open the locks on its doors.

The defendants denied that Gangábái had made any will, and contended that she had adopted defendant No. 1, who was the son of defendant No. 2, and that defendant No. 1 was in possession of the house and the whole estate of Gangábái as her sole heir.

* Application No. 99 of 1895 under the extraordinary jurisdiction.

The Mámlatdár allowed the claim, holding that Gángabái's will was proved and that the plaintiff had been in possession of the house until he was forcibly dispossessed by the defendants.

The defendants applied under the extraordinary jurisdiction of the High Court, urging (*inter alia*) that the Mámlatdár had no jurisdiction to entertain the suit, as it involved complicated questions of title, and that no suit by a next friend could be maintained in the Mámlatdár's Court on behalf of a minor, the provisions of the Code of Civil Procedure (Act XIV of 1882) being inapplicable to the Mámlatdárs' Act (Bom. Act III of 1876).

A *rule nisi* was granted calling on the plaintiff to show cause why the decision of the Mámlatdár should not be set aside.

*Branson* (with *Báláji A. Bhágavat*) appeared for the applicants (defendants) in support of the rule:—A Mámlatdár can only entertain a possessory suit when it is brought by a person who was actually in possession of the property. A minor cannot be said to be in possession of the property on account of his legal incapacity. Even a mortgagor who is not in possession or a landlord whose property is in the possession of his tenant cannot maintain a possessory suit—*Khanderáo* v. *Narsingráo*[1]; *Goma alias Govinda* v. *Narsingráo*[2]. Unless a person is in juridical possession he cannot institute a summary suit either under the Mámlatdárs' Act (Bom. Act III of 1876) or under the Specific Relief Act (I of 1877)—*Nritto Lall Mitter* v. *Rájendro Nárain Deb*[3]; *Amirudin* v. *Mahamad Jamal*[4].

The Mámlatdár has in fact gone into the question of title and has come to the conclusion that the plaintiff is in possession through his next friend. The Mámlatdár had no jurisdiction to do so. Further, the Mámlatdárs' Act has not made any provision for the institution of a suit by the next friend of a minor. That provision is made in the Civil Procedure Code (Act XIV of 1882), but it has been held that the provisions of the Code are not applicable to suits under the Mámlatdárs' Act—*Kásam Saheb* v. *Máruti*[5].

(1) I. L. R., 19 Bom., 289.
(2) P. J., 1895, p. 20; I. L. R., 20 Bom., 260.
(3) I. L. R., 22 Cal., 562.
(4) I. L. R., 15 Bom., 685.
(5) I. L. R., 13 Bom., 552.

1895.

DATTÁTRAYA v. VÁMAN.

*Inverarity* (with *Náráyan G. Chandávarkar*) appeared for the opponent to show cause:—There is no error in the Mámlatdár's judgment. In order to determine whether the defendants were in possession, the Mámlatdár incidentally went into the question of title; but he has not decided the suit on the question of title. A minor can sue in the Mámlatdár's Court by his manager or next friend. The Mámlatdárs' Act does not say that a suit shall be only instituted by a person who has attained majority. The Calcutta case relied on is not applicable, because the plaintiff there said that he was the representative of his uncle and father, who were alive. The cases of a mortgagor out of possession and of a landlord are also not applicable because they cannot be said to be in actual physical possession of the property. In the case of a minor he is in actual possession, but he cannot do certain acts, because the law incapacitates him from doing so.

FARRAN, C. J.:—The Mámlatdárs' Act, it is true, makes no provision for infants suing in the Mámlatdár's Court. But we see no reason why they should not. An infant is as much entitled to have his possession protected as an adult. The Code of Civil Procedure of 1859 made no provision for infants suing, and yet suits were often brought by infants suing by their next friend when that Code was in force. It is an axiom of English law that an infant can sue by his next friend, and we think that we ought not to restrict a Mámlatdár's jurisdiction by holding that an infant cannot sue in his Court in the usual way in which infants sue. Simpson on Infants, page 469, shows that miscellaneous applications made by an infant are always made through their next friend. We discharge the rule with costs.

*Rule discharged.*