

Courts will hold it to be a proof of laches, and disallow such applications. There seems to be no sufficient reason for holding that an application under section 89 is not an application for, or a step in aid of execution, and, as such, it must be treated as an application to which article 179 applies. In the present case this second question does not properly arise, as the application of September, 1897, was admittedly made within three years from the date of the decree, and it prevents the bar of limitation. It was indeed contended that as that application did not expressly pray for an order absolute, but was made under section 235, Civil Procedure Code, it was an order which had no legal effect, and did not save limitation. This contention seems too technical to be entitled to any support. The judgment-creditor's present application of October 1898, is obviously within time by reason of the proceedings he took in September, 1897.

The third question has been answered above.

The fourth question is apparently of a speculative character, and does not arise from the facts of the case. It, therefore, calls for no answer. It may, however, be suggested that there is nothing to prevent applications for an order absolute and for the execution of the *darkhast* from being made together or at short interval.

Order accordingly.

APPELLATE CIVIL.

Before Mr. Justice Parsons, Acting Chief Justice, and Mr. Justice Ranade.

PRANSUKHRAM DINANATH, A LUNATIC, BY HIS NEXT FRIEND HIS WIFE BAI FULKOR (ORIGINAL PLAINTIFF), APPELLANT, v. BAI LADKOR AND ANOTHER (ORIGINAL DEFENDANTS), RESPONDENTS.*

1899.

March 1.

Lunatic—Suit by wife as next friend, alleging husband to be a lunatic—Husband not an adjudged lunatic—Civil Procedure Code (Act XIV of 1882), Sec. 462—Act XXXV of 1858—Practice—Procedure.

Where a wife, alleging her husband to be of unsound mind, brought a suit as next friend, the Court ordered an inquiry (1) as to whether the husband was of unsound mind and (2) as to whether the suit was for his benefit.

* Second Appeal, No. 529 of 1898.

1899.

SECOND appeal from the decision of R. J. C. Lord, Assistant Judge with full powers at Broach, confirming the decree of RAO SÁHEB G. R. GOKHALE, Subordinate Judge of VÁGRA.

The plaintiff, who was alleged to be of unsound mind, brought this suit by his next friend, his wife Bai Fulkor, to recover possession of certain property.

The defendants contended (*inter alia*) that the next friend had no right to bring the suit under section 463 of the Civil Procedure Code (Act XIV of 1882), that the plaintiff had not been adjudged a lunatic; and that no certificate of guardianship had been obtained under Act XXXV of 1858.

The Subordinate Judge dismissed the suit, holding that the next friend was not entitled to maintain it, as there had been no valid adjudication of lunacy and she had not obtained a certificate under Act XXXV of 1858.

- The Judge having confirmed the decree in appeal, the plaintiff preferred a second appeal.

Gokuldas K. Parekh for the appellant (plaintiff):— There is nothing in Act XXXV of 1858 to prevent a suit being brought by a wife as next friend of her lunatic husband. The husband's property is to be protected, and the suit is for his benefit. It is true that no declaration with respect to the plaintiff's lunacy has been made, but such a declaration can be made at any time. Section 463 of the Civil Procedure Code is not exhaustive. It is just and equitable that such a suit should be allowed—*Nabhu Khan v. Sita*⁽¹⁾; *Porter v. Porter*⁽²⁾; *Venkatramana v. Timappa*⁽³⁾.

Kalubhai Lallubhai for the respondents (defendants):— A suit at the instance of a next friend can lie only when a person is adjudged to be a lunatic under Act XXXV of 1858—*Tukaram v. Vitthal*⁽⁴⁾. We do not admit that the plaintiff is a lunatic. There has been no adjudication upon that point—*Beall v. Smith*⁽⁵⁾.

(1) (1897) 20 All., 2.

(3) (1891) 16 Bom., 132.

(2) (1888) 37 Ch. Div., 420.

(4) (1889) 13 Bom., 656.

(5) (1873) L. R. 9 Ch., 85.

1899.

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PARSONS, C. J. (ACTING):—The question raised in this appeal is whether Bai Fulkor had a right to file the suit as the next friend of her husband, who was alleged to be of unsound mind, but had not been adjudged to be so under Act XXXV of 1858 or under any other law for the time being in force. In *Tukaram v. Vithal*⁽¹⁾, a Bench of this Court expressed an opinion to the contrary on the strength of the rule stated in Daniell's Chancery Practice, 6th Edition, Vol. I, p. 116. In a more recent case, a Bench of the Allahabad High Court decided the point in the affirmative—*Nabhu Khan v. Sita*⁽²⁾. Their decision is based on the case of *Porter v. Porter*⁽³⁾, and they point out that the rule on the subject in England is no longer the rule stated in Daniell's Chancery Practice. We see no reason why the principles of equity as applied in the practice of the Courts of England should not be observed in the Courts of this country in cases in which there is no law existent which lays down a different procedure. The Code of Civil Procedure is silent upon the point at issue here, and we must, therefore, act upon general principles and in conformity with the practice of the Court of Chancery (see *Venkatramana v. Timappa*⁽⁴⁾). The practice of that Court is clearly set out in the case of *Porter v. Porter* and in the other cases there cited. In it Cotton, L. J., says: "What is the principle on which the Court allows a person of unsound mind to sue by a next friend? Where the person is incapable of acting for himself, the Court allows any one of the Queen's subjects to take proceedings on his behalf as regards that which is *primâ facie* for his benefit." Bowen, L. J., says: "It seems to me to be this that when there is a person of unsound mind, who, although not found to be of unsound mind by inquisition, nevertheless stands in need of the protection or the intervention of the Court as regards his property, real or personal, or as regards any portion of his property, then, supposing he would, if sane, be entitled to the intervention of the Court, a third person, a stranger, may come forward and do that which is clearly for the benefit of the person of weak mind;" and in applying the principle he says: "The Court ought to be satisfied, so to speak, of the

(1) (1889) 13 Bom., 656.

(3) (1888) 37 Ch. Div., 420.

(2) (1897) 20 All., 2.

(4) (1891) 16 Bom., 132.

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title of the next friend to intervene, and it ought to be satisfied that the person is of unsound mind and that he stands in need of protection as regards his property, and it ought to be shown that it would be for his true interest that the Court should exercise its jurisdiction."

In the present case, the suit has been summarily dismissed, so that we do not know whether Pransukhram, on whose behalf the suit has been brought, is a person of unsound mind or not. That point will, therefore, have to be enquired into. The suit is brought to set aside certain deeds said to have been executed by him when of unsound mind, and under undue influence; it is, therefore, *prima facie* founded on a good and beneficial cause of action. In *Beall v. Smith*⁽¹⁾ it is said that the more common case of the Court's interference is where the incompetent person by his next friend seeks to set aside instruments or other gifts obtained by persons taking fraudulent advantage of his mental weakness. The point is one on which we must order enquiry in the circumstances of the present case, and we think, in the words of Cotton, L.J., in the above cited case, that the *onus* must be placed on those who suggest that the action is not duly constituted to show that it cannot be really for the benefit of the person of unsound mind. We, therefore, frame these issues, namely:—Is Pransukhram a person of unsound mind? Do the defendants prove that the suit instituted by his wife as his next friend is not for his benefit? and ask the Judge of the lower appellate Court to take evidence and find on them, and certify his findings to this Court within two months.

Issues sent down.

(1) (1873) L. R. 9 Ch., 85.