proved that the defendants could have obtained cheaper rates for the work to be done considering all the circumstances of the case and especially the time of year.

As the defendants have paid into Court more than sufficient to meet the balance for expenses that can be set off against the freight which is repayable, there will be a decree for plaintiffs for the amount of the freight paid with interest at 6 per cent, from 15th June 1915, till judgment with costs and interest on judgment at 6 per cent.

Solicitors for plaintiffs : Messrs. *Crawford, Brown & Co.*

Solicitors for defendants : Messrs. *Little & Co.*

Suit decreed.

G. G. N.

APPELLATE CIVIL.

Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice Heaton.

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February 28.

SAYAD AMIR SAHEB VALAD SAYAD SAIDUMIA KADRI AND OTHERS (ORIGINAL PLAINTIFFS), APPELLANTS *v.* SHEKH MASLEUDIN VALAD GULAM MOHIUDIN, BY HIS GUARDIAN *ad litem* THE TALUKDARI SETTLEMENT OFFICER OF GUJARAT AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Civil Procedure Code (Act V of 1908), section 92—Suit for administration of religious wakf property—Court of Wards Act (Bom. Act I of 1905), sections 31 and 32—Court of Wards added as guardian ad litem *in appeal—Omission to name such a guardian from the commencement not fatal to the suit—Suit not bad for want of notice under section 31 of the Court of Wards Act—Cross-objections—Stamps.*

The plaintiffs instituted a suit under section 92 of the Civil Procedure Code, 1908, for the administration and management of a religious wakf property against the trustees of the institution. Out of the four trustees the District Judge found defendants Nos. 1 to 3 to be defaulting trustees and ordered defendant No. 1 to refund Rs. 6,000 to the institution. In providing for the appointment of new trustees, however, the Judge included defendant No. 4 as one of the

* First Appeal No. 50 of 1915.

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trustees though he was found liable in respect of costs. Aggrieved by this the plaintiff appealed to the High Court where pending the appeal, the Court of Wards as the guardian *ad litem* of 1st defendant was added as a party respondent and cross-objections were filed on its behalf to the effect that the suit was bad under section 32 of the Court of Wards Act, 1905, and that no notice having been given to the Court of Wards as required by section 31 of the Act, the decree was not binding on defendant No. 1. The plaintiffs-appellants contended that the cross-objections were not properly stamped.

Held, that the cross-objections must be stamped as on an appeal relating to the sum of Rs. 6,000 decreed against 1st defendant.

Held, also, that the suit was not bad on the ground that the statutory notice provided for by section 31 had not been given since it was a suit relating to the property of a religious institution and not to the property of the 1st defendant.

Held, further, that the suit was not bad under section 32 of the Court of Wards Act as the section did not say that if the Court of Wards was not named as guardian from the commencement the suit was bad. The omission might under the circumstances be treated as a mere defect or irregularity in procedure not affecting the merits of the case or the jurisdiction of the Court and be corrected under section 152 of the Civil Procedure Code, 1908.

Rup Chand v. *Dasodha*[1] and *Mussammat Bibi Walian* v. *Banke Behari Pershad Singh*,[2] followed.

FIRST appeal against the decision of B. C. Kennedy, District Judge of Ahmedabad.

Suit for administration.

The plaintiffs sued under section 92 of the Civil Procedure Code, 1908, to formulate a scheme for the administration and management of plaint religious wakf property.

The District Judge found that out of the four trustees who were managing the institution, the defendants Nos. 1 to 3 were responsible for the loss caused to the institution as a result of bad management and ordered defendant No. 1 to refund Rs. 6,515 to the institution and on his failing to do so the sum was to be recovered from defendants No. 2 and 3. Defendant No. 4 was

(1) (1907) 30 All. 55. (2) (1903) L. R. 30 I. A. 182.

found liable only in respect of certain costs but he was not found to be a defaulting trustee. In providing for the appointment of new trustees the District Judge, however, included defendant No. 4 as one of the trustees.

The plaintiffs being aggrieved by the latter order of the District Judge appealed to the High Court where pending the appeal, the Court of Wards was added as the guardian *ad litem* of 1st defendant as a party respondent by an *ex parte* order and the following cross-objections were filed on its behalf by the Talukdari Settlement Officer :—

"(1) The property of defendant No. 1 having been placed under the superintendence of the Court of Wards under Bombay Act I of 1905 since the 9th of December 1909 (Bombay Government Gazette, 9th December 1909, Part I, page 2451) and the Court of Wards not having been appointed as guardian *ad litem* to represent him (defendant No. 1) in the suit which was filed subsequently, the decree of the lower Court is a nullity at least so far as he is concerned.

"(2) No notice having been given to the Court of Wards as required by section 31 of Bombay Act I of 1905, the decree passed by the lower Court is a nullity as against defendant No. 1."

N. K. Mehta in support of cross-objections on behalf of the Court of Wards as guardian *ad litem* of respondent No. 1 :—We say that the decree is bad at least so far as defendant No. 1 is concerned (1) because he has been a "Government Ward" within the meaning of section 2 (*a*) of the Court of Wards Act (Bom. Act I of 1905), and the Court of Wards having had the superintendence of his property under the Act *before* the institution of the suit, notice as to the institution of the suit as required

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by section 31 of the Act was necessary to the Court of Wards; and (2) because the suit was brought directly against defendant, and the Court of Wards was not named as his guardian *ad litem* as required by section 32 of the Act.

The words "relating to person or property" in section 31 of the Act mean relating to personal or real rights; and so in every suit against a Government Ward, the section requires notice to be given in writing to the Court of Wards: see *Venkatachelapathy* v. *Sri Rajah B. S. V. Siva Row Naidu Bahadur* [1] which was decided under a corresponding provision under Madras Act I of 1902, section 40. As for point (2), we say that the Court of Wards ought to have been named in the suit as guardian *ad litem* of defendant No. 1 under section 32 and that not having been done the decree against him is bad. There has been no decision of our High Court under the Act on this point. But under the corresponding section of an analogous Act (section 205 of Act XIX of 1873 N. W. Provinces Act) it has been held that a decree passed in similar circumstances is bad against the ward: see *Sheo Dial Chaubey* v. *The Collector of Gorakhpur*;[2] *Muazzam Ali Shah* v. *Chunni Lal* [3] and section 49 of Act VII of 1899, U. P. Code.

Further, it has been held that the provisions of Order 32, rule 3 of Civil Procedure Code, 1908, as to the appointment of a guardian *ad litem* are imperative and where these provisions are not substantially complied with, the minor is not properly represented and any decree passed against him is a nullity: *Hanuman Prasad* v. *Muhammad Ishaq* [4].

As to the inadequacy of Court fees paid no objections were raised by the Taxing Officer and therefore the

(1) (1912) 37 Mad. 283.
(2) (1883) 5 All. 264.
(3) (1911) 33 All. 791.
(4) (1905) 28 All. 137.

other side cannot raise the point: Court-Fees Act, section 5; *Ranga Pai* v. *Baba*[1] and *Kasturi Chetti* v. *Deputy Collector, Bellary*.[2]

G. N. Thakor, for the appellant:—The Talukdari Settlement Officer as Court of Wards has no *locus standi* in appeal. The only person who can file cross-objections is a person who was a party to the suit.

This is not a suit relating to the person or property of the ward. Defendant No. 1 is sued in the capacity of a trustee not in respect of his property but in respect of the trust property of the institution under section 92 of the Civil Procedure Code, 1908. The defendant had mixed up the funds belonging to the Trust with that of his own. They do not thereby cease to be the property of the institution.

The mere fact that the decree may eventually be executed against the person of a party would not make the suit as one relating to his person. Suits relating to persons are suits relating to marriage, adoption, custody, &c., of the ward: *Sharifa* v. *Munekhan*[3]; *Venkatachelapathy* v. *Sri Rajah B. S. V. Siva Row Naidu Bahadur*[4]; Bengal Code (Act IX of 1879); N. W. P. Act (XIX of 1873), section 205, referred to.

As regards section 32 of the Act, it does not lay down any consequences of the provision not having been strictly followed and it does not follow that the decree is a nullity. Even in the case of a minor such defects have been treated as mere irregularities: *Mussammat Bibi Walian* v. *Banke Behari Pershad Singh*[5]; *Hari Saran Moitra* v. *Bhubaneswari Debi*[6] and *Natesayyan* v. *Narasimmayyar*.[7]

(1) (1897) 20 Mad. 398.
(2) (1898) 21 Mad. 269.
(3) (1901) 25 Bom. 574
(4) (1912) 37 Mad. 283.
(5) (1903) L. R. 30 I. A. 182.
(6) (1888) L. R. 15 I. A. 195
(7) (1890) 13 Mad. 480.

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N. K. Mehta, in reply.

G. K. Parekh, for respondent No. 2, supported Mr. Thakor.

SCOTT, C. J. :—The plaintiffs who are the present appellants instituted a suit under section 92 of the Code of Civil Procedure for the administration and management of certain religious wakf property. The learned District Judge after an investigation found certain of the trustees liable for certain sums. The fourth trustee was found liable only in respect of certain costs, but he was not found to be a defaulting trustee. In providing for the appointment of new trustees, the learned District Judge has included the fourth defendant as one of the trustees. That is substantially the ground of the plaintiffs' appeal to this Court, but it does not appear to us that there is any such blame attaching to the fourth defendant upon the finding of the lower Court as should induce us to hold that he is not a fit and proper person to be a trustee under the new scheme. The appeal, therefore, must be dismissed.

That, however, is not the only question which we have to determine now for it appears upon certain information brought to our notice by Mr. Mehta, who appears under instructions from the Talukdari Settlement Officer as the Court of Wards in charge of the superintendence of the property of the first defendant, that that defendant has now, and since 1909, been a Government ward under the Court of Wards, and was so at the date of the institution of this suit on the 20th of December 1910, and although there was a full hearing of charges against the 1st defendant as a defaulting trustee in the Court of the District Judge, the Government Officer acting as the Court of Wards wishes to establish that by reason of defects in procedure provided by the Court of Wards Act I of 1905, the whole proceedings so far as the first defendant is concerned are a

nullity, including the decree for restoration of Rs. 6,000 found to be in his possession as a trustee liable to refund. The point has been brought to the notice of the Court in the form of cross-objections, as the Court of Wards was added as a party respondent by *ex parte* order. It has been contended on behalf of the appellants that the cross-objections are not properly stamped. We think that this contention is well-founded.

They must be stamped upon the footing of an appeal relating to the sum of Rs. 6,000 decreed against the first defendant. We have no information as to the manner in which the first defendant became a Government ward under the Court of Wards Act; whether he is a person declared by the District Court after application and inquiry to be incapable of managing, or unfitted to manage his own property, on account of physical or mental defect or infirmity, or such habits as cause, or are likely to cause injury to his property or to the well-being of inferior holders under section 5 of the Act; or whether he is a land-holder who has applied in writing to the Governor in Council under section 9 of the Act, to have the property placed under the superintendence of the Court of Wards. In the absence of any evidence of a declaration by the District Court under section 5, it would probably be safe to assume that he has made the application under section 9. The point, however, is not very material. The first defendant was sued with the other trustees of a Mahomedan religious institution, and has been found to have been in possession of the trust funds for a long series of years. Being found to be responsible for a sum of upwards of Rs. 6,000 which has come to his hands a decree has been passed against him. That decree was passed in a suit under section 92 of the Civil Procedure Code properly instituted in relation to a public charitable or religious trust.

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It is argued, however, on behalf of the Court of Wards that the suit is, within the meaning of section 31 of the Court of Wards Act, a suit "relating to the person or property of a Government ward," and therefore, is one which cannot be brought in any Civil Court until the expiration of two months after the statutory notice in writing prescribed by the section, which notice has not been given.

Now this suit as instituted is merely a suit relating to the property of a religious institution, and not to the property of the first defendant, and the argument of the Court of Wards could only be sustainable, if it is permissible to regard the possible consequences of a suit in deciding the nature of the suit. The consequence of any suit against any defendant may be that there will be a decree against him, if not for money, at all events for costs, and as a consequence of such a decree, an application may be made for the arrest of the defendant in execution, and therefore, it may in that manner affect his person. Similarly an application may be made to satisfy the decretal costs by issuing execution against his property, and in that manner any decree may affect his property. But the words of the section are not "affecting the person or property of the Government Ward," but "relating to the person or property." Those words appear to us to bring within the scope of that section a designedly limited class of suits. It would have been easier for the Legislature, if the contention of the Court of Wards was correct, to say "no suit shall be brought." That, however, is not the expression adopted. It must be not even any suit which may affect the person or property of the Ward, but a suit relating to the person or property of the Ward, and *prima facie* it must be a suit of which the nature is apparent as soon as the suit is framed, a suit to be judged by its intention and not by its possible

consequences. It is easy to satisfy the words of the section without holding that they embrace any suit of any kind whatever. A suit relating to the person of a Government ward might be a suit such as is referred to in *Sharifa* v. *Munekhan*[1] for the custody of the person of the ward, or a suit relating to the marriage of the ward, or even a suit relating to the adoption of the ward. Similarly a suit relating to the property of the ward may reasonably be held to be a suit relating to property which is really the property of the ward, and not the property of some other institution.

Not only is this suit, however, a suit relating to the property of an institution in which the ward is concerned only as a trustee, but the decree itself when properly regarded is a decree for restoration of the property of that institution to the persons responsible for its management under the new scheme. The defaulting trustee is assumed to have the property which was placed in his charge still in his possession. It is on that footing that he is held liable for it. It is not, therefore, a decree directly affecting at all events the property of the ward. For these reasons we think that the suit is not bad on the ground that the statutory notice provided for by section 31 has not been given.

Then it is argued that it is bad at all events under section 32 which provides that subject to the second paragraph of section 440 of the Civil Procedure Code, which is not material for this judgment, in every suit brought by or against a Government ward, the manager of the Government ward's property, or, where there is no manager, the Court of Wards having the superintendence of the Government ward's property, shall be named as the next friend or guardian for the suit, as the case may be. But the section does not say that if

[1] (1901) 25 Bom. 574.

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the Court of Wards is not named as guardian from the commencement of a suit, the suit is bad. If it is not in every case a fatal objection to a suit against a minor that a guardian has not been named as provided by statute, then it is obvious that in certain circumstances the omission to name such a guardian during some part of the proceedings may be only a defect or irregularity in proceedings not affecting the merits of the case or the jurisdiction of the Court such as is contemplated by section 152 of the Civil Procedure Code. In that case there would be no reason to reverse or substantially vary the decree or remand the case. In our judgment the omission in the present case in no way affects the merits of the case, and it is not suggested that the Court of Wards has any objection on the merits to the decree which has been passed. The conclusion that the omission such as we have in this case may be treated as a mere defect or irregularity in procedure is supported by a reference to the judgments in two cases mentioned in argument, one *Rup Chand* v. *Dasodha*[1] and the other *Mussammat Bibi Walian* v. *Banke Behari Pershad Singh*,[2] a decision of the Privy Council. In both those cases the provisions of section 443 of the Civil Procedure Code had not been complied with, as they should have been, but under the circumstances it was held that the non-compliance did not vitiate the proceedings. Every case, therefore, may be judged upon its own facts to see whether the omission has affected the merits or not. In the present case we think that the provisions of the section will be sufficiently complied with for the purposes of justice if notice is given to the Court of Wards that it will be added to the record as guardian *ad litem* of the first defendant as from the date of this judgment, and the proceedings will be amended accordingly. Any further notices which have

(1) (1907) 30 All. 55.

(2) (1903) L. R. 30 I. A. 182.

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to be given will be given in the first instance to the Court of Wards as the guardian of the first defendant. We do not think that the plaintiffs should be punished in this case by an award against them of costs, and under the circumstances we will allow them their costs. Respondents Nos. 1 and 2 must pay their own costs, and respondent No. 1 must pay full Court-fee on the ground that he is seeking to set aside the decree for Rs. 6,000.

Cross-objections allowed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Batchelor and Mr. Justice Shah.

1916.

March 28.

JIVAPPA TIMMAPPA BIJAPUR (ORIGINAL JUDGMENT-DEBTOR), APPLICANT v. JEERGI MURGEAPPA VIRBHADRAPPA AND ANOTHER (ORIGINAL JUDGMENT-CREDITORS), OPPONENTS. *

Foreign decree—Execution by British Court—The British Court can inquire if the decree was passed with jurisdiction—EX PARTE *decree—Absent defendant not submitting to jurisdiction—Decree, a nullity—Civil Procedure Code (Act V of 1908), section 44, Order XXI, Rule 7—Act XIV of 1882, section 229B.*

It is open to a British Court executing a foreign decree to enquire whether the foreign Court had jurisdiction to pass the decree.

A decree pronounced by a Court of a foreign state in a personal action *in absentem*, the absent party not having submitted himself to its authority, is a nullity.

THIS was an application from an order passed by F. J. Varley, District Judge of Bijapur, confirming an order passed by J. A. Saldanha, Subordinate Judge at Bagalkot.

Execution proceedings.

* Civil Extraordinary Application No. 331 of 1915.