1903
MARCH 31.

ORIGINAL CIVIL.

30 C. 609=7 C. W. N. 517.

The next point is whether this application is barred by Article 178 of the Limitation Act, 1877, that is, whether three years have elapsed since the right to apply accrued. As I have already said, I consider that the present application might have been made at the death of the son, which was admittedly more than three years ago, and the question argued before me is, did the right to apply accrue at that time within the meaning of the Act? Reliance has been placed on the decision of Wilson, J. in *Kedarnath Dutt* v. *Harra Chand Dutt* (1),followed by Sale, J. in *Ram Nath Bhuttacharjee* v. *Uma Charan Sircar* (2), in which it was decided that a right to make a similar application, being one in a pending suit, the right to apply was a right which accrued from day to day, and therefore it was not barred by lapse of time.

In both these cases the application was made after a partition had been decreed and before it had been carried out, and it is suggested that for that reason they cannot be held to apply to the present case. This, no doubt, creates a difference between those cases and the present one; since a right to partition, if it accrues at all, accrues from day to day, and a right to account does not.

It is not, however, on this characteristic of the case before him that the judgment of Wilson, J. is founded, but on the fact that a suit was pending—a characteristic common both to that case and this. It is further urged that if that principle is applied to this case, there can be no limitation to an application under section 372. I am not concerned to say that this is the proper construction to be put on Mr. Justice Wilson's language, but if it is, I do not think the argument is conclusive. I consider therefore that the present case is governed by the two cases I have quoted, and that the petitioner's right to make this application accrues from day to day, and is therefore not barred by limitation. The petition is therefore granted in terms of the prayer.

Attorney for the petitioner: *Jnanendra Nath Dutt.*

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30 C. 613 (=7 C. W. N. 419.)

[613] APPELLATE CIVIL.

RAKHAL MONI DASSI *v.* ADWYTA PROSAD ROY.* [6th March, 1903.]

Compromise—Minor—Guardian of Minor—Proper course to set aside a compromise—decree—Appeal—Adoption, suit to set aside—Guardians and Wards Act (VIII of 1890), ss. 47, 48—Civil Procedure Code (Act XIV of 1882), ss. 443, 622.

When a compromise, and a decree based upon it are sought to be set aside on the ground that the compromise was entered into by the guardian of a minor defendant without the leave of the Court having been granted after a judicial determination that it was for the minors's benefit:

Held, that the proper course to set aside such a decree would be by way of an application for review in the first Court or by a separate suit, but not by an appeal from the compromise decree.

Biraj Mohini Dasi v. *Chinta Moni Dasi* (3) followed.

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* Appeal from Appellate Decree No. 588 of 1900, against the decree of W. B. Brown, District Judge of Cuttack, dated Jan. 17, 1900, reversing the decree of Behari Lal Mullick, Subordinate Judge of that district, dated Aug. 22, 1899.

(1) (1882) I. L. R. 8 Cal. 420.
(2) (1899) 3 C. W. N. 756.
(3) (1901) 5 C. W. N. 877.

Section 48 of the Guardians and Wards Act does not prevent a widow, who has been appointed by the District Judge, under that Act, guardian of a minor as her husband's adopted son, from maintaining a suit for a declaration that the minor was not the adopted son of her husband.

[Ref. 16 I. C. 543.]

1903 MARCH 6.

APPELLATE CIVIL.

30 C. 613=7 C. W. N. 419.

SECOND APPEAL by the plaintiff, Rakhal Moni Dassi.

The suit was brought by the plaintiff for a declaration that the minor defendant No. 1, Adwyta Prosad Roy, was not the adopted son of her deceased husband. The plaintiff alleged that she was a minor at the time of her husband's death, which took place in 1892, and that the defendant No. 2, Hari Prosad Roy, the father of the defendant No. 1 and her husband's uncle, was entrusted with the management of her affairs; that while he was so employed, he got a false vakalutnama filed in her name in the Court of the District Judge and took out on her behalf a certificate of guardianship of the said minor defendant, Adwyta Prosad, on [614] the false allegation that her husband had adopted him as his son before his death; and that all this was done fraudulently and without her knowledge. In the suit the defendant No. 1 was represented by his guardian, the defendant No. 2, and in a joint written statement they denied the allegations in the plaint and maintained that the defendant No. 1 was validly adopted.

A petition of compromise dated the 21st August 1899 was, however, filed in Court by both the parties, praying that the adoption be cancelled; that a six-anna share of the properties, excepting the homestead lands and buildings, of the deceased husband of the plaintiff, be declared to belong to the defendant No. 1, and that the remaining ten-anna share of the properties, together with the homestead lands and buildings be declared to belong to the plaintiff and her husband's heirs. The Subordinate Judge made a decree in the terms of the petition of compromise.

The defendant No. 1, now represented by his next friend, one Gonesh Prosad Roy, a distant cousin, appealed from the said decree to the District Judge, who held that the plaintiff was not competent to bring this suit in its present form so long as she remained guardian of the person and property of the defendant No. 1, and that her proper course was to apply to the District Court to be relieved of her guardianship. He further held that the compromise was illegal, as well as the decree founded upon it, which travelled beyond the boundaries of the original suit, invalidated the order of guardianship passed by the District Judge, and prejudiced the rights of the plaintiff's reversioners. He held that an appeal lay to him and dismissed the suit.

Dr. *Ashutosh Mukerjee* and Babu *Biraj Mohan Mazumdar* for the appellant.

Babu *Jagat Chunder Banerjee* for the respondents.

BANERJEE AND HENDERSON, JJ. This appeal arises out of a suit brought by the plaintiff-appellant to obtain a declaration that the defendant No. 1, a minor, was not the adopted son of her husband, and for such other relief as the plaintiff may be deemed to be entitled to. The plaint contains an allegation that the plaintiff has learnt on enquiry that the defendant No. 2, the natural father of the minor defendant No. 1, fraudulently [615] and without knowledge of the plaintiff had obtained by an application which was filed under a false vakalutnamah, purporting to be executed by the plaintiff, a certificate appointing the plaintiff as guardian of the defendant No. 1, as her husband's adopted son. The defence

1903
MARCH 6.

APPELLATE CIVIL.

30 C. 613=7 C. W. N. 419.

was a denial of the allegations in the plaint. Then it appears that the parties came to terms, and a *sulenama* or compromise was effected, and with the leave of the first Court, as the order-sheet shows, the natural father of the minor was allowed to enter into the compromise, and a decree was made in accordance with the terms thereof. Against that decree an appeal was preferred on behalf of the minor, represented not by his natural father by whom he was represented in the first Court, but by a distant cousin ; and upon that appeal the learned District Judge has set aside the compromise and dismissed the plaintiff's suit upon the ground, as far as we can gather from his judgment, that an appeal lay because the compromise was unlawful, and that it was incompetent to the plaintiff to maintain the suit so long as the order of the District Judge appointing her as guardian of the minor defendant remained in force.

From that decision this appeal has been preferred ; and it is contended on behalf of the plaintiff-appellant that the learned District Judge was wrong in holding that an appeal lay, and, in dealing with the case upon that appeal, the compromise was wrongly set aside.

In our opinion the contention of the learned vakil for the appellant is well founded. If the defendant No. 1 is entitled to have this *sulenama* set aside, he may have other remedy by way of an application for review in the first Court or by a separate suit ; but an appeal was certainly not the proper remedy, especially having regard to the facts of this case. If the ground upon which the *sulenama* is to be pronounced unlawful, is, that it was entered into without the leave of the Court having been granted after that Court had judicially determined that the compromise was for the minor's benefit, it was not by way of appeal that that point could be made out, but the proper method was to apply to the Court which granted the leave to determine the point. An Appellate Court can determine the appeal only upon the materials **[616]** before it on the record. Then, as for the ground taken by the learned District Judge, that it was not competent to the plaintiff to maintain the suit so long as the order appointing her guardian of defendant No. 1 stood, we are of opinion that that is an erroneous ground. Section 48 of the Guardians and Wards Act of 1890 has been relied upon in support of the learned Judge's view. That section says that, except as provided by section 47 of that Act and by section 622 of the Code of Civil Procedure, an order made under that Act shall be final and shall not be liable to be contested by suit or otherwise. That no doubt is so. The appointment of the plaintiff as guardian as being the proper person to have the custody of the person and property, or both, of the minor is a thing which it was for the District Judge, acting under the provisions of the Guardians and Wards Act, to determine so long as certain preliminary conditions remain fulfilled. But a party who had been appointed guardian, even admitting that she was appointed guardian by her own consent, might say : 'I then believed that the minor, whose guardian I was appointed, was the lawfully adopted son of my late husband ; now I have taken advice, and I am told that the adoption is invalid in law. I want to have that adoption set aside.' She could not ask the District Judge under the Guardians and Wards Act to enter into an adjudication as to the validity or invalidity of the adoption and to revoke the order appointing her as guardian. Her only course would be to bring a suit to set aside the adoption, care being taken of course that the minor was properly represented by some other person whose interest

1903 MARCH 6. APPELLATE CIVIL.

30 C. 613=7 C. W. N. 419.

was not adverse to that of the minor. Such a case as this is clearly contemplated by the second paragraph of section 443 of the Code of Civil Procedure. That being so, the decision of the Lower Appellate Court was clearly based upon an erroneous ground. The view we take that an appeal was not the proper mode of having a *sulenama* such as has been entered into in this case set aside, is in accordance with that taken by this Court in the case of *Biraj Mohini Dasi* v. *Chinta Moni Dasi* (1).

The decree of the Lower Appellate Court must therefore be reversed, and it would be left open to the respondent, if he wishes [617] to have the compromise set aside, to proceed either by review or by a separate suit. The appellant is entitled to her costs in this Court as well as in the Lower Appellate Court.

Appeal allowed.

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30 C. 617.

APPELLATE CIVIL.

GANGA PROSAD *v.* RAJ COOMAR SINGH.* [23rd. February, 1903].

Appeal—Order—Civil Procedure Code (XIVof 1882), ss. 244, 287 (e)—Value specified in Sale Proclamation.

An order passed by a Court disallowing the objection of a judgment-debtor, that the value of the property specified in the sale proclamation under s. 287, cl. (e) of the Code of Civil Procedure, was grossly inadequate, comes under s. 244 of the Code, and is therefore appealable.

[Diss. 27 M. 259, F. B.=14 M. L. J. 57. Fol. 22 I. C. 780. **Ref.** 2. Pat. L. J. 13 ; 6 M. L. T. 252 ; 3 I C. 342 ; 10 I. C. 371=14. C. L. J. 35=16 C. W. N. 124 ; **Dist.** 5 Pat. L. J. 270=1920 Pat 227=56 I. C. 452.]

SECOND APPEAL by the judgment-debtor, Ganga Prosad.

A property belonging to the judgment-debtor was ordered to be sold by public auction in execution of a decree. After the Munsif had caused a proclamation of the intended sale to be made under s. 287 of the Civil Procedure Code, the judgment-debtor put in a petition of objection stating that the value of the property specified in the sale proclamation was grossly inadequate. The Court disallowed the objection on the ground that if the property were sold at an inadequate price, the judgment-debtor might then apply to set aside the sale. The execution case was struck off, the attachment standing over.

On appeal by the judgment-debtor, the Subordinate Judge held that, although the Munsif had discretion to take evidence for the purpose of ascertaining the value of the property advertised for sale and ought to have exercised that discretion, as the [618] order of the Munsif was passed under s. 287 of the Civil Procedure Code, no appeal lay to him from that order. The appeal was accordingly dismissed.

Babu *Raghu Nandan Prosad* for the appellant.

No one appeared for the respondent.

GHOSE AND PRATT, JJ. The application which the judgment-debtor made to the Munsif, upon which his order of the 14th April, 1902 was made, related to a matter contemplated by section 287, clause (e), Code

* Appeal from order No. 230 of 1902, against the order of Tej Chunder Mookerjee, Subordinate Judge of Chapra, dated July 25, 1902, affirming the order of Umesh Chunder Sen, Munsif, Chapra, dated April 14, 1902.

(1) (1901) 5 C. W. N. 877.