1874.
Rango Vithal v. Rikhivadás bin Ráya chand.

relief becomes legally claimable. In the present case, the right of Rikhivadás was wholly denied and his mortgage pronounced invalid by the order of the Subordinate Judge. His proper remedy was a suit, on the mortgage thus refused recognition, to recover the possession, of which he had been deprived. In seeking this, it was incumbent on him, to prove his mortgage and establish its validity to bring forward his whole right under it, as the right had been altogether contradicted. He failed to do this within a year, and his suit merely to enforce his charge on the property brought after that perid was, we think, barred by the last sentence of Section 269.

We, therefore, reverse the decree of the Assistant Judge with costs, and restore the first decree of the Subordinate Judge.

[APPELLATE CIVIL JURISDICTION.]

Civil Referred Case No. 10 *of* 1874.

September 15

BÁBÁJI BIN KUSAJI.....*Plaintiff and appellant.*

MÁRUTI, minor, by his mother and guardian GAJÁI.....*Defendant and Respondent.*

Certificate of Administration—Act XX of 1864—*Mother of a minor.*

An order for the issue of a certificate of administration to a particular individual ought not to be made until it is ascertained whether the individual is willing to take it.

A certificate of administration ought not to be forced upon the mother of a minor unwilling to take it.

Where an order for the issue of such a certificate to the mother of an infant was made, on the default of the mother to appear and show cause why it should not be issued to her:

Held that such default in appearance ought not to have been accepted as her assent to the issuing of the certificate to her.

Course pointed out where no relative or friend of a minor can be found willing to take such a certificate.

THIS reference was made by R. F. Mactier, District Judge of Satara, for the opinion of the High Court. The facts of the case will fully appear from the following observations submitted by the District Judge :—

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Bábájibin Kushá v. Máruti.

"On the 5th of April 1872, Bábáji bin Kusáji applied to this Court, as he stated, under Act XX. of 18 4 in order that a certificate, as guardian and administratrix of her infant son, Máruti, might be granted to Gajái, widow of Eshvant, deceased, against whom he had a claim, and wished the guardian of the infant to be placed in a position to enable him, Bábaji, to sue her as guardian of the minor heir of the deceased Eshvant. The decision of the High Court in *Dhondiba* v. *Kusa* (*a*), and that in Appeal No. 6 of 1870, under Act XX. of 1864, and other similar decisions, were put forward as authority for this application.

"This application of Bábáji, under the above ruling of the High Court, was entertained, and notice was served on Gajái to appear, to take out the certificate, or show cause for her not doing so. Gajái did not appear, and under the ruling of the High Court, an order was passed that Gajái should receive a certificate as guardian of the infant Máruti.

"On the strength of this order having been given, copy of which he obtained, Bábáji sued Gajái to recover the amount of a debt due by her husband Eshvant, making her a defendant, as guardian and manager of the minor Máruti, son and heir of Eshvant deceased. The case was heard by the Subordinate Judge, First Class, who dismissed the suit on the ground that though an order had been passed on Bábáji's application to give Gajái a certificate, she had not actually taken out the certificate, and was not, therefore, properly made a defendant

"Bábáji has now appealed against the decision of the Subordinate Judge, dismissing his suit, and the case has been partly heard. * * *

"This Court has done all that it could possibly do, in appointing Gajái guardian of her infant son, on the application of a third party, and it appears to have gone somewhat beyond the law in even doing so much, as there seems to be no law to *force* a person to take out a certificate, and none to authorize a third party to get another person to be ap-

(*a*) 6 Bom. H. C. Rep. A. C. J. 219.

1874.

Bábájí in Kushaji v. Máruti.

pointed guardian, who will not apply to be so made of his own accord. * * * This Court has done all that it could do. The question, then, is, should the Subordinate Judge have refused to admit Gajái as a defendant without the actual certificate of guardianship? According to the *strict* reading of Section II. of Act XX of 1864, the Subordinate Judge was right, for Gajái has not actually *obtained* a certificate. But I know of no law to force Gajái to come and obtain a certificate; and as she cannot be so *made* to take a certificate, and as the Subordinate Judge was right, on the other hand, in not admitting her name as a defendant until she *did* hold a certificate, the matter, as it stands, leaves me in doubt as to what is to be done.

If this Court were to appoint the *Nazir* a guardian *ex officio* of a minor under the charge of the Civil Court, this would be attended with great inconvenience. Many such minors as this one have no property whatever which could be made available to pay for taking charge of the estate; and though, in *this* case, there may be some property, there are many in which there is none at all, and yet the *Nazir* would have all the trouble of defending suits against the minor under his charge without any remuneration at all.

"If the *Nazir* were made by this Court trustee of every minor's estate, the 'manager' of which would not take out a certificate, it is probable that this difficulty would be got over, but it would not be without a great deal of unremunerated trouble to the *Nazir* of the District Court, and it might probably also involve him in expense."

The reference was considered by WESTROPP, C.J., and KEMBALL, J., on the 15th of September 1874.

WESTROPP, C.J. :—This Court concurs with the District Judge in thinking that a certificate of administration cannot be forced on the mother of the infant, and is further of opinion that an order for the issue of such a certificate to a particular individual ought not to be made until it is ascertained whether that individual is willing to take it. In the present case, the order for the issue of the certificate ap-

pears to have been made on default of the mother of the infant to appear and show cause why the certificate should not be issued to her. Such default in appearance ought not to be accepted as an assent to the issuing of the certificate to the non-appearing party. If no relative or friend of the minor can be found who is willing to take out a certificate, the District Judge will be under the necessity of naming some officer of his Court or some respectable nominee of the suing creditor of the infant. Difficulty will sometimes arise in such cases, but this Court is inclined to think, and certainly hopes, that the instances will be rare in which a minor whom it is worth the creditor's while to sue, will be so completely destitute of friends and relatives as that none can be found to protect his interests. This Court forwards herewith to the District Judge a copy of a judgment given on the 27th March 1874, in appeal No. 1 of 1874, under Act XX. of 1864, *in re Motiram Rupachand Marwari*, which shows that the suit may be brought before guardian is appointed, but that the suing creditor should make an early application afterwards for the nomination of the guardian (*b*).

(*b*) Reported *Supra*, p. 21.