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public auction, and the remarks of the Judicial Committee in the case which has been cited before us have the same tendency, but I am quite unable to understand how it can be possible for us to refuse to give effect to such plain words as those used here for such a reason. The words used are "no sale, &c., shall be annulled, &c.," and they are as general as it was possible for the Legislature to make them, and I do not think we should be justified in restraining their operation to sales conducted in one way only, when in their ordinary meaning they include all sales made for this purpose, in any way contemplated by law.

This disposes of the second ground on which the suit has been decreed, and on that ground too I think the appellants are entitled to succeed. I agree with Mr. Justice Beverley that the appeal must be allowed, and the suit dismissed with costs in both Courts. *Appeal allowed.*

J. V. W.

Before Mr. Justice Trevelyan and Mr. Justice Ameer Ali.

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May 10.

TAQUI JAN, MINOR, BY HIS MOTHER BANU BEGUM (PLAINTIFF) *v.* OBAIDULLA *alias* NANHE NAWAB (DEFENDANT.)*

Minor—Suit on behalf of a person alleged to be but not in fact a minor—Procedure to be adopted when suit is instituted on behalf of an alleged minor who is not so in fact.

When a suit is instituted by a person alleging himself to be a minor, and the suit is brought through a next friend, and when it is found that the plaintiff *was not at the date of the institution* of the suit *in fact a minor*, the Court should not dismiss the suit, as the defendant can be fully indemnified by the payment of his costs. In such a case the proper remedy is for the defendant to apply to have the plaint taken off the file or amended, and if it be not amended the next friend's name may be treated as mere surplusage and the suit be allowed to proceed.

THE facts of this case were as follows: One Mussamut Zaibunissa, sister of the plaintiff, was married to the defendant on the 30th June 1885. She died on the 5th December 1889, and the plaintiff Taqui Jan instituted this suit as a minor through his mother and guardian Mussamut Banu Begum claiming a one-sixth share of the dower of the deceased, on the ground that he,

* Appeal from Original Decree No. 95 of 1893, against the decree of Babu Jogesh Chunder Mitter, Subordinate Judge of Patna, dated the 19th December 1892.

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Mussamut Banu Begum, and the defendant, the husband of the deceased, were her only heirs. His case was that the amount of dower fixed on the marriage of the defendant with his sister was one lakh of rupees and one gold mohur. The defendant in his written statement alleged that the plaintiff was not a minor at the time the plaint was filed, and denied that he was an heir of the deceased, who, the defendant stated, had left a son who died on the 9th June 1890. The defendant further denied that the amount of dower as alleged in the plaint was correct, and stated that whatever dower was due to the deceased from the defendant was remitted by her during her lifetime.

The suit was instituted on the 11th April 1891 in the third Subordinate Judge's Court at Patna, and was subsequently transferred to the Court of the second Subordinate Judge. Six issues were framed, one of which related to the questions as to whether the plaintiff was or was not a minor at the time the suit was instituted, and, if not a minor, whether the suit as instituted could be maintained. The other issues related to the question of the plaintiff's heirship, the amount of the dower, and whether the sum had been remitted by Zaibunissa as alleged by the defendant.

Evidence was taken at the hearing upon all the issues, but the Subordinate Judge considered it unnecessary to determine any other than that relating to the plaintiff's minority. He came to the conclusion that the plaintiff was proved to have been of full age at the date of the institution of the suit, and held that the suit could not be maintained and accordingly dismissed it with costs.

The plaintiff appealed.

Babu *Saligram Singh* and Babu *Bhoobun Mohan Biswas* for the appellant.

Moulvi *Mahomed Yusoof* and Moulvi *Mahomed Isfak* for the respondent.

The judgment of the High Court (TREVELYAN and AMEER ALI, JJ.) was as follows :—

This suit was brought on behalf of a person who was alleged to be a minor. The defendant in his written statement contended that the plaintiff was not a minor but in reality had attained his full age. The learned Judge in the Court below tried only the issue as to whether the defendant's plea was true, *viz.*, that the

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plaintiff was not a minor ; and on finding against the plaintiff on that issue dismissed the whole suit. We have not gone into the question whether as a matter of fact the plaintiff was a minor, as having regard to the view which we take as to what course the learned Judge ought to have adopted the learned pleader for the appellant has not contested that finding. We think that the proper penalty for this mistake on the part of the plaintiff, if it was a mistake, ought not to be the loss of the whole suit but the payment of such costs as would properly indemnify the other side. The proper course to be pursued, where the opposite party contends that a plaintiff who is alleged to be a minor is really an adult, is that the defendant apply that the plaint be taken off the file or be amended. If it be not amended the next friend's name may be treated as mere surplusage and the suit be allowed to proceed.

We think it quite clear that the learned Judge having found that the plaintiff was not a minor ought to have given him an opportunity of electing whether he should proceed with the suit himself. No such opportunity was given, and the suit was dismissed. If we were to uphold this decision the result would be, the suit being now barred by limitation, that the plaintiff, because of this error, whether intentional or not, would lose the whole of his cause of action. We therefore set aside the decree of the Court below, and we give the plaintiff leave to amend the plaint and to make such alterations in it as are now necessary in consequence of its now being found that he is a major. We think, however, that it is clear that the defendant is entitled to have all the costs he has incurred up to this date. We accordingly leave untouched the decree of the Court below so far as it orders payment of costs to him, and we also direct that the appellant pay to the respondent his costs in this Court; and as the case has not been heard on the merits but disposed of on a preliminary issue we fix the pleader's fee at five gold mohurs. These sums, *viz.*, the costs in the Court below and in this Court, must be paid within one month from the date on which the record shall arrive in the lower Court, and if so paid the suit will then be tried on its merits. If they be not so paid this appeal will stand dismissed with costs. The record will be sent down at once.

H. T. H. *Appeal allowed and case remanded.*