

PER CURIAM.

The provisions of Act XX of 1864 are in many respects obscure and apparently contradictory. We do not think that the word "may" in s. 11 should be construed as equivalent to "shall." The manner in which the words "may" and "shall" are used in contradistinction to one another in other parts of the Act (e.g. in s. 6) seems to show that this is not the case. Again, s. 3 shows that the Collector may, when the minor's property consists of land, apply to the Court to appoint "a fit person" to take charge of the property; and this indicates that fit person, other than the Collector, may be appointed. Finally, if a certificate of administration must necessarily be granted to the Collector under s. 11, it is not easy to see how the provisions of s. 10, which are in terms retrospective, could be applied, and the result would be that the Act would contain no provision for the appointment of guardian in such cases. It is true that s. 9 does not, in terms, apply to cases in which the property of the minor consists of land other than gardens and the like; but we must suppose that, although no distinct provision is made by the Act, the Court in which the charge of the property vests has an inherent power of appointing an administrator; and we think that, although s. 11 permits the appointment of the Collector, yet the other considerations, to which we have referred, show that it is not obligatory upon the Court to do so. It appears that the administration of the minor Mir Zulfiar Ali's property has been for seventeen years in the hands of Mr. Hope and Mr. Crawley-Boevey, neither of whom was Collector of the district of Broach; and it is admitted that Mr. Crawley-Boevey's successor in the office of talukdari settlement officer is the person by whom the administration can be most fitly and conveniently carried on. On these grounds we reverse the District Judge's order, and direct that Mr. Lely be appointed administrator of the estate. Costs of this application to come out of the estate.

Order accordingly.

4 B. 638.

[638] APPELLATE CIVIL.

*Before Sir Michael Roberts Westropp, Kt., Chief Justice, and
Mr. Justice F. D. Melvill.*

MOHAN ISHWAR (*Plaintiff*) v. HAKU RUPA AND MAN RUPA,
DECEASED, BY HIS SONS AND HEIRS, MOTI AND BEHECHAR,
BOTH MINORS BY THE ADMINISTRATOR OF THEIR ESTATES,
NATHUBHAI GOPALJI, NAZIR OF THE SUBORDINATE COURT,
DHOLKA, (*Defendant*).^{*} [13th July, 1880.]

Minors Act—Act XX of 1864—Guardians—Collector—Public curator—Nazir—Bombay Civil Courts Act (XIV of 1869), s. 32—Act X of 1876, s. 15—Civil Procedure Code (Act X) of 1877, s. 456—Officer of Government—Execution—Jurisdiction—Want of jurisdiction apparent on face of record.

The nazir of a Civil Court, who is appointed guardian of the estate of a minor under Act XX of 1864, is not an officer of Government within the meaning of s. 32 of Act XIV of 1869 as amended by s. 15 of Act X of 1876.

An officer of Government, in order to come within those enactments, must be a party to a suit in his official capacity.

^{*} Civil Reference No. 6 of 1880.

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The only officers of Government, whom Act XX of 1864 contemplates as guardians of the estate of a minor in their official capacity, are the Collector of the district, and the public curator, appointed, as such, under Act XIX of 1841.

Vasudev Vishnu Dikshit v. Narayan Jagannath Dikshit (1) referred to and dissented from.

A Subordinate Judge who, under s. 456 of the Civil Procedure Code (Act X) of 1877, as amended by s. 73 of Act XII of 1879, appoints the nazir or any other officer of his Court to act as guardian of a minor plaintiff or defendant in a suit in his Court, has no jurisdiction to hear it, and pass a decree against that officer as guardian *ad litem* of the minor.

Trimbak Nimbaji v. Shivram and others (2) explained and approved.

Quere—Whether, upon an application for execution of a decree, an objection apparent on the face of the record, to the jurisdiction of the Court which made the decree, can be entertained.

[R., 5 B. 306 (310); 14 C.P.L.R. 92 (93).]

THIS case was referred for the opinion of the High Court by Khan Sahab M. N. Nanavati, Subordinate Judge (Second Class) of Dholka, in the district of Ahmedabad, under s. 617 of the Civil Procedure Code (Act X) of 1877. He stated the case as follows:—

“Contingent on the opinion of the High Court on the point referred as to whether a Court can or cannot take the point of want of jurisdiction in execution appearing on the face of the record which has not been taken at the hearing of the suit, I dismiss this [639] application. In this case the decree was passed by the Dholka Subordinate Court in a suit wherein the nazir of the Court was a defendant as administrator of the estate of a minor. I cannot, therefore, have any doubt on the point, that such a suit is not cognizable by a Subordinate Court. The Subordinate Court having no jurisdiction to try such a suit in the first instance, can it execute a decree of a Court which has no jurisdiction to pass it? This is the point. And the applicant's pleader answers it in the affirmative. He cites the case of *Ex parte Manohar Bhivrav* (3). It will be seen that it does not appear in that case whether the point of the want of jurisdiction appeared on the face of the record. The point of want of jurisdiction appears on the case of the record in this case, the application for execution itself saying by whom the decree was passed and against whom it was passed. It is a well-established point of law that even consent cannot give jurisdiction. And this is recognized in the case of *The Government of Bombay v. Ranmalingji Amarsingji* (4). If consent cannot give jurisdiction, much less can the point of want of jurisdiction be waived. And it has been held that the objection of jurisdiction cannot be waived (*Lalmonsee Dosee v. Judoonath* (5)). And there are innumerable cases showing that the point of want of jurisdiction may be taken at any time, even in special appeal. *Vide* the cases of *Matilal Ramdas v. Jamnadas Javerdas* (6), *Bhai Trimbakji v. Tomu* (7), and those cited by Mr. Nanabhai Haridas in the case of *Bapuji Auditram v. Umedbhai Hathesing* (8). From the judgment in that case it would seem that, had the objection of want of jurisdiction appeared, as in this case, on the face of the record itself, the High Court would have entertained it. In the case of *Ex parte Manohar Bhivrav* (3) it could well have been said that, as want of jurisdiction did not appear on the face

(1) See Note 1 *infra*, 4 B. 642.
 (3) 2 B.H.C.R. A.C.J. 374.
 (5) 1 Ind. Jur. N.S. 319.
 (7) 2 B.H.C.R. A.C.J. 192.

(2) See Note 3 *infra*, 4 B. 643.
 (4) 9 B. H.C.R. 242.
 (6) 2 B.H.C.R.A.C.J. 40.
 (8) 8 B.H.C.R. 245.

of the record, it could not be presumed that the decree was passed without jurisdiction. But where the point of want of jurisdiction does appear on the face of the record, the Court cannot shut its eyes to it. It cannot be broadly laid down that the point of want of jurisdiction cannot be taken in execution [640] of a decree; for *vide* the case of *Khushaldas v. Sakharam Ramchandra* (1).

The parties did not appear in the High Court, either in person or by pleaders:

The following is the judgment of the Court:—

JUDGMENT.

WESTROPP, C.J.—In this reference the Subordinate Judge submits, for the decision of this Court, the question whether, upon an application for execution of a decree, an objection, apparent on face of the record, to the jurisdiction of the Court which made the decree, can be entertained.

It appears, however, to us that the question proposed by the Subordinate Judge does not arise in the present case, inasmuch as we are clearly of opinion that the objection, taken by him to the jurisdiction of the Subordinate Judge's Court at Dholka, is unsound.

That objection is, that the nazir of the Court, who was, under Act XX of 1864, appointed guardian of the estate of the infant defendants, being an officer of Government, the Subordinate Judge was by s. 32 of the Bombay Civil Courts Act (XIV of 1869), as amended by s. 15 of Act X of 1876, precluded from taking cognizance of the suit. In order, however, to bring the case within those enactments, the officer of Government must be a party to the suit "in his official capacity." The only officers of Government whom Act XX of 1864 contemplates as guardians of the estate of a minor *in their official capacity* are the Collector of the district (ss. 11, 12, 15, and 21) and the public curator (ss. 9, 12, 21), appointed as such public curator under Act XIX of 1841. This Court has, accordingly, held that a Collector, appointed *as such* to take charge of the estate of a minor under Act XX of 1864, is an officer of Government within the meaning of s. 32 of Act XIV of 1869 (Bombay Civil Courts Act): *Narsingrav v. Laccumanrav* (2) and *Bhaskarrav v. Guropa* (3). In *Vasudev Vishnu Dikshit Patankar v. Narayan Jagannath Dikshit* (4) a Division Bench, purporting to follow the above-mentioned [641] case of *Bhaskarrav v. Guropa*, held that the Subordinate Judge had not jurisdiction to entertain the suit. But it does not appear to us that *Bhaskarrav v. Guropa*, which was the case of a Collector appointed administrator under Act XX of 1864, was any authority in the case of nazir appointed administrator under the same Act. The Division Bench, which decided *Bhaskarrav v. Guropa*, expressly rested its ruling upon *Narsingrav v. Laccumanrav*, the decision in which was founded on ss. 11 and 15 of Act XX of 1864, the Court there saying: "For the appellant it is contended that the Collector is acting as the officer of the Court which appoints him administrator of the estate of the infant, and not as an officer of Government. But we think that ss. 11 and 15 of Act XX of 1864, taken together, show that the Collector, when appointed to take charge of the estate of a minor, is so in his capacity as Collector, and, therefore, as an officer of Government." No authority or reason, other than the decision in

(1) 12 B. H.C.R. 212.

(2) See Note 1, *infra*, 4 B. 642.

(3) 1 B. 318.

(4) See Note 2, *infra*, 4 B. 642.

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Bhaskarrav v. Guropa (a Collector's case), was given for the decision in *Vasudev Vishnu Dikshit v. Narayan Jagannath Dikshit*, the nazir's case. But the nazir is not anywhere mentioned in Act XX of 1864 as a person who may, in his official capacity, be appointed the administrator of the estate of a minor under that Act. If he be a relative or friend of the minor (s. 3), or entitled by virtue of a will or deed (s. 6), or a fit person (ss. 3 and 9), he may, in any of these capacities, be appointed administrator of the minor's estate, but he would be so appointed simply in his private and not in his official capacity. The Court could not, under Act XX of 1864, appoint him simply because he is nazir; for it is possible that the nazir might not be either a friend or relative of the minor, or a fit person to be appointed administrator, or a person authorized by virtue of a deed or will. For these reasons we find ourselves unable to follow the decision in *Vasudev Vishnu Dikshit v. Narayan Jagannath Dikshit*, the nazir's case. The only other case, of which we are aware, to which it is necessary that we should refer, is *Trimbak Nimbaji Bhase v. Shivram* (1). The note, however, to that case, as well as the papers in it, show that the nazir, who there represented a minor defendant, had, in his official capacity, been appointed that defendant's guardian *ad litem* under the provisions of s. 456 of Act X of 1877, as amended by s. 73 of Act XII of 1879, [642] and not under Act XX of 1864. Section 456 of Act X of 1877 and s. 73 of Act XII of 1879 expressly authorize the appointment of officers of the Court as guardians *ad litem*—a circumstance which fully supports the decision in *Trimbak Narayan Bhase v. Shivram and others*, and which does not exist where a nazir is appointed guardian of a minor's estate under Act XX of 1864.

Our reply to the Subordinate Judge's reference in the present case must be that the fact that the nazir was appointed, under Act XX of 1864, administrator of the estate of the infant defendants in this suit, does not deprive the Subordinate Judge's Court of jurisdiction to entertain the suit or to execute its decree.

4 B. 642-N.

NOTE 1.—In *Bhaskarrav v. Guropa* (S.A. No. 33 of 1877) the special appellant *Bhaskarrav* (original defendant) was a minor, and represented in the Courts below and in the High Court by the Collector of Dharwar as guardian of the minor appointed under Act XX of 1864. The suit (No. 94 of 1871) was filed in the Court of the First Class Subordinate Judge at Dharwar, who allowed the plaintiff's claim with costs. His decision was affirmed, in appeal, by the Assistant Judge of Dharwar. No objection was taken to the jurisdiction of the Subordinate Judge's Court in the Courts below. But in the High Court it was contended, in special appeal, that the Subordinate Judge had no jurisdiction to try the suit, and that all the proceedings in both the lower Courts were null and void, and that as the suit was against the Collector in his official capacity as an administrator, it should have been brought in the District Court. The appeal was heard by M. Melvill and Kemball, JJ. The following is the judgment of the Court:—

M. MELVILL, J.—The Subordinate Judge had no jurisdiction—the Collector, as administrator of the minor's estate, being an officer of Government within the meaning of Act XIV of 1869, s. 32 (*Narsingrav Ramchandra v. Lakshmanrav*, I. L. R., 1 Bom. 318). We, accordingly, annul the decrees and all the proceedings in the Courts below, and direct that the plaint be returned to the plaintiff for presentation in the District Court of Dharwar. Each party to bear his own costs hitherto incurred. [This case is also followed in 4 B, 638 (640).]

4 B. 642-N.

NOTE 2.—In *Vasudev Vishnu Dikshit v. Narayan Jagannath Dikshit* (Appeal No. 12 of 1878), above referred to, the appellant *Vasudev* (original defendant) was a minor, and represented by the nazir of the District Court of Khandesh,

(1) See Note 3, *infra*, 4 B. 643.

as administrator of the minor's estate appointed under Act X of 1864. The suit (No. 391 of 1876) was brought in the Court of the First Class Subordinate Judge at Dhulia, who allowed part of the plaintiff's claim. An appeal was thereupon preferred in the High Court by the nazir as the minor's administrator. The objection to the jurisdiction of the Subordinate Judge's Court was not taken either in the Court below or in the memorandum of appeal filed in the High Court. It appears to [643] have been taken at the hearing of the appeal which was heard by West and Pinhey, JJ., who gave the following decision:—

WEST, J.—Following the ruling in the case of *Bhaskar v. Guropa* (1) we must hold that the Subordinate Judge had not jurisdiction to entertain this suit. We, therefore, annul his proceedings, and direct that the plaint be returned to the plaintiff for presentation in the District Court.

Costs in the Court of first instance to be borne by the respondent. Each party to bear his own costs of appeal. [This case is also referred to in 4 B. 638 (640).]

4 B. 643-N.

NOTE 3.—*Trimbak Nimbaji Bhave v. Shivram and others* (Small Cause Court Reference No. 5 of 1879), above referred to, was a suit filed in the Court of the Subordinate Judge of Sinnar, in the district of Ahmednagar, invested with the power of a Small Cause Court Judge. One of the defendants being a minor, the Subordinate Judge appointed the nazir of this Court as guardian of the minor in the suit, under s. 456 of Act X of 1877 as amended by s. 73 of Act XII of 1879. He then referred, for the opinion of the High Court, the following question, *viz.*, whether a Subordinate Judge, who has under the provisions of s. 456 of Act X of 1877 as amended by s. 73 of Act XII of 1879, appointed the nazir or any other officer of his Court to act as guardian for the suit of a minor defendant, has jurisdiction to hear the suit and pass a decree against that officer as guardian *ad litem* of the minor defendant.

The reference was considered by Pinhey and F. D. Melvill, JJ.

PINHEY, J.—The Court is of opinion that the question put by the Subordinate Court at Sinnar must be answered in the negative.

The Subordinate Court has no jurisdiction in the suit described. [This case is also referred to in 4 B. 638.]

4 B. 643.

APPELLATE CIVIL.

Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

DESAI HIMATSINGJI JORAVARSINGJI (Original Defendant),
Appellant v. BHAVABHAI KAYABHAI, & Co., (Respondents).*

[14th July, 1880.]

Government grant subject to existing rights—Local cess—Bombay Act III of 1869, s. 8—Superior holder—Landlord and tenant—Wanted land—The Indian Contract Act (IX of 1872), ss. 69 and 70.

The grant of a village by Government, whether native or British, is subject to all existing rights against Government, whether or not the deed of grant contains an exception or reservation of such rights. Government cannot, by alienating its own rights in a village, albeit that the *sanad* purports to grant the village as a whole, extinguish or affect any substantive right therein appertaining to third persons, or convey to the grantee any larger or better estate or interest than was vested in Government.

The plaintiffs sued to recover back from the defendant the amount levied by him as local cess on certain *wanted* lands belonging to the plaintiffs, the [644] defendant claiming to be the superior holder of the village in which the lands were situated. The amount was levied by the defendant through the assistance of the mamlatdar under Bombay Act III of 1869, s. 8. The defendant contended that, in consequence of a demand from Government, he had paid

* Appeal No. 24 of 1879.

(1) Printed Judgments of 1877, p. 84.

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