APPELLATE CIVIL.

I L R 19 Calc. 301.

Before Mr. Justice Kemball and Mr. Justice Birdwood.

NARSINGRA'V RA'MCHANDRA AND OTHERS, APPLICANTS, *v.* VENKA'JI KRISHNA, OPPONENT.*

1884 *April* 28.

Act XX of 1864, *Sec.* 2—*Hindu law—Joint family—Unseparated minor—Certificate of administration of minor's share when necessary—Manager.*

Three brothers belonging to a joint Hindu family instituted a suit in the Court of a Subordinate Judge in their own names and on behalf of their minor brother to set aside an alienation of the family property made by their deceased father. The Subordinate Judge ruled that one of the plaintiffs must procure a certificate of administration under Act XX of 1864, sec. 2, before the suit could proceed.

Held that no certificate was necessary. The manager of the family should be allowed to proceed with the suit as next friend of the minor, with permission, if necessary, to amend the plaint accordingly.

Durga Persád v. *Kesho Persád Singh* (1) distinguished.

Kálidás Ravidat v. *Pránshankar Jibhái* (2) concurred in.

THIS was an application for the exercise of the Court's extraordinary jurisdiction under section 622 of the Civil Procedure Code (XIV of 1882).

Ghanashám Nilkanth Nádkarni for the applicant.

No one appeared on behalf of the opponent.

The material facts are stated in the following judgment delivered by

KEMBALL, J.—This is an application under section 622 of the Civil Procedure Code. A rule calling on the defendant to show cause why the suit filed against him by the applicants should not proceed without the applicants being required to produce a certificate of administration, was obtained on the 24th January last, and notice was duly served upon the defendant; but no cause having been shown against the rule, we are now asked to make it absolute.

The circumstances under which the application was made are these. The three petitioners, brothers, instituted a suit in the Court of the First Class Subordinate Judge of Dhárwár in their own names and on behalf of their minor brother (all being

*Extraordinary Civil Application, No. 2 of 1884.

(1) L. R., 9 I. A., 27. (2) Printed Judgments for 1884, p. 8.

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members of a Hindu joint family) to set aside an alienation of the family property made by their deceased father. A question, however, having arisen as to the power of the brothers to institute a suit on behalf of the minor without producing a certificate of administration under Act XX of 1864, it was contended for the petitioners on the authority of decisions of this Court in *Shivji Hasam* v. *Datu Mavji Khojá*[1] and *Gurácháryá* v. *Swámiráyáchárya*[2] that an administrator cannot legally be appointed to have charge of the undivided share of a minor in the family property, for the reason that one member of an undivided family has not such an interest in the joint property (enjoyed in its entirety by the whole family) as is capable of being taken charge of and managed separately, and that, therefore, a certificate of administration cannot in such a case be granted; but the Subordinate Judge held that these decisions have been "superseded" by the judgment of the Judicial Committee of the Privy Council in *Durga Persád* v. *Kesho Persád Singh*[3], and accordingly required the production of a certificate before the suit could be proceeded with.

Admitting, however, the necessity of a minor being represented by a legal guardian in any suit instituted either on his behalf or against him in order to make the decree passed therein binding upon him, we are unable to concur in the view of the Subordinate Judge as to the effect of the Privy Council decision upon the principle laid down and acted on for a series of years by this Court. The circumstances of the case before the Judicial Committee were of a peculiar nature. A member of a joint family, who was neither the guardian of certain minors nor the manager of the family estate, had affected to deal with the interests of the minors by executing a money bond in the names of himself and them, and a decree had been obtained by the obligee against the real manager personally and as guardian of the minors in virtue of his being the co-proprietor and manager of the estate; and the object of the suit, by the quondam minors, was to prevent the obligee from executing his decree against them. Their Lordships held that "the manager, although he may have the power to manage the estate, is not the guardian of infant co-proprietors

(1) 12 Bom. H. C. Rep., 281. (2) I. L. R., 3 Bom., 431.

(3) L. R., 9 I. A., 27.

of that estate for the purpose of binding them by a bond * * * or for the purpose of defending suits in respect of money advanced with reference to the estate"; and they proceeded to consider the provisions of the Bengal Minors' Act, XL of 1858, which corresponds in most particulars with the Bombay Minors' Act, XX of 1864. No doubt, it would seem, from their Lordships' remarks on the Act, that an application for the appointment of an administrator of the interest of minors in a joint family estate is contemplated, but it is obvious that their Lordships were not considering the general principle of the Act with reference to the estate of an undivided Hindu family, and we think their observations must be read strictly with reference to the particular case then under consideration. Though one member of a joint family has not ordinarily such an interest in the family estate as is capable of being taken charge of and separately managed, the case is necessarily altered where a right is claimed to deal with the interests of a minor co-proprietor as a separate estate. We fully concur in the following remarks of West and Nánábhái, JJ., in *Kálidás Ravidat* v. *Pránshankar Jibhái*[1]: "We think it highly undesirable that a right to separate administration for an unseparated minor should be recognized, so as to impose on a brother the necessity of keeping accounts and all the inconveniences, without the advantages of separation. The principle applies to a father equally with a brother, and it would obviously be fatal to the peace and welfare of most Hindu families if, whenever a son was born, any mischievous busybody could come in as his next friend and obtain a separate administration of the infant's share as against his father. There is, according to a previous case—*Appovier alias Seetaramier* v. *Rámá Subba Aiyan*[2]—no distinct share to administer."

In the case before us we are strongly of opinion that Náráyanráv (the name of Bháskerráv having been apparently used by the Subordinate Judge by mistake,) ought to have been allowed as next friend to carry on the suit in the minor's interest. As eldest brother and manager of the family he was the minor's natural guardian according to Hindu law, and, as was held in *Jádav Mulji* v. *Chhagan Raichand*[3], "section 2 of Act XX of 1864 has

(1) Printed Judgments for 1884, p. 8. (2) 11 Moore's I. A., 75.

(3) I. L. R., 5 Bom., 306.

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not any bearing on the case of a next friend or guardian *ad litem* not claiming charge of the estate of the minor."

The order of the Subordinate Judge, directing Bháskerráv, or whoever may be manager, to procure a certificate of administration under section 2 of Act XX of 1864, must be set aside. The manager to be allowed to proceed with the suit as next friend of the minor, with permission, if necessary, to amend the plaint accordingly. The costs of this application to be costs in the cause.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Kemball and Mr. Justice Birdwood.

April 28. GOSVA'MI SHRI PURUSHOTAMJI MA'HA'RA'J, BY HIS AGENT JUGALDA'S (ORIGINAL PLAINTIFF), APPELLANT, *v.* B. ROBB, MANAGER OF THE MOFUSSIL COMPANY, LIMITED (ORIGINAL DEFENDANT), RESPONDENT.*

Suit to levy a tax on cotton and cotton seeds purchased in, and exported from Broach—Act XIX of 1844*—Cess illegal—Agency—Trust—Agreements to defeat the object of an Act—Contract Act IX of* 1872, *Sec.* 23.

The plaintiff, manager and part proprietor of a Vallabhácháryá temple at Broach, sued the defendant to establish the right of the temple to levy a cess on cotton and cotton seeds purchased in Broach, and exported from it.

The defendant denied the plaintiff's right, and contended *(inter alia)* that, even if the right existed until 1844, it was then abolished by Act XIX of that year, which "enacted that, from the first day of October, 1844, all town duties, kusub viras, mohtarphás, baluti taxes, and cesses of every kind on trades and professions, under whatsoever name levied within the Presidency of Bombay, and not forming a part of the land revenue, shall be abolished."

Held, that Act XIX of 1844 applied to the cess claimed by the plaintiff. The expression "cesses of every kind" included the cess on cotton and cotton seeds, and absolutely put an end to the right, if any existed, of the Government or of any private individual of levying the same.

Held, also, the suit could not be regarded as a suit for money had and received by the defendant to the plaintiff's use, or as one to recover money received by the defendant as trustee or agent.

Held, also, an agreement to pay a tax prohibited by an Act of the Legislature would defeat the object of the Act, and was, consequently, void, and could not be enforced—Indian Contract Act IX of 1872, sec. 23.

* Second Appeal, No. 68 of 1883.