

1888

APRIL 5.

APPEL-

LATE

CIVIL.]

12 B. 550.

JUDGMENT.

SARGENT, C.J.—The effect of the decree of the 21st April, 1887, was to transfer the *vatan* property from the mortgagee to the third plaintiff, who, according to the Collector's certificate, is not a *vatandar*. But the mortgagee himself was not a *vatandar*, and under such circumstances we do not think that the decree was within the contemplation of s. 10 of (Bombay) Act III of 1874, the object of which was to give practical effect to the prohibition against alienations by *vatandars* as provided by ss. 5 and 7. The Court should, therefore, not act upon the certificate of the Collector, but leave him to take proceedings, if he thinks proper, under s. 6, cl. 1. Under these circumstances it is not necessary to answer the other questions.

12 B. 553=13 Ind. Jur. 109.

[553] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Nanabhai Haridas.

NARAYANDAS RAMDAS (*Plaintiff*) v. SAHEB HUSEIN (*Defendant*).*
[9th April, 1888.]

Practice—Minor, suit against—Nazir appointed guardian *ad litem*—Power of Court to direct fee to be paid by plaintiff for communication with natural guardian—Civil Procedure Code (Act XIV of 1882), s. 458—Procedure.

There is no power in the Court to order a plaintiff to pay a fee for the purpose of enabling the Nazir, who has been appointed guardian *ad litem*, to put himself in communication with the natural guardians and other friends, but the Court may refuse to go on with the suit if it should be of opinion that the Nazir has been unavoidably prevented from making himself acquainted with the case against the minor.

In a suit against a minor residing in a Native State at a distance from the Nazir of the Court, who was appointed guardian *ad litem*, and the Nazir was prevented from conducting the minor's defence without incurring expense which the plaintiff refused to pay.

Held, that the Court, if it chose, might cancel the appointment of the Nazir as guardian *ad litem* under s. 458 of the Civil Procedure Code (Act XIV of 1882).

[R., 28 B. 626 (628) ; 22 M. 314 (316).]

THIS was a reference by Rav Saheb Vyankatray Rukmangad Inamdar, Subordinate Judge of Bijapur, under s. 617 of the Civil Procedure Code (Act XIV of 1882).

The facts of the case were stated as follows :—

“One Narayandas bin Ramdas sued one Gaffur Saheb, a minor, as the son and heir of Saheb Husain, the deceased executant of a bond dated 12th September, 1884, to recover Rs. 20 as principal and Rs. 11-14-0 as interest=Rs. 31-14-0, with costs from the estate of the deceased. The bond sued on was said to have been passed at Bijapur, and the cause of action was said to have accrued within the jurisdiction of the Subordinate Judge's Court at Bijapur. The minor defendant is residing with one Chandabi, his sister, in the Miraj State outside British India, and no other person is said to be living in British India who

* Civil Reference No. 4 of 1888.

is fit and willing to act as his guardian *ad litem* in this suit. His property is presumably worth less than Rs. 250. On the application of [554] the plaintiff's *vakil* supported by an affidavit, the Nazir of the Subordinate Court was, under the circumstances, appointed such guardian under s. 456 of the Code of Civil Procedure, and summons was duly served on him. He said that as the minor resides with his relatives at Miraj he was not able to obtain any instructions from the latter as to the merits of this case, and that, therefore, he was not in a position to make any defence in this suit."

The questions referred by the Subordinate Judge for the High Court's opinion were:—

1. Whether, under the circumstances mentioned above, the Nazir sufficiently represents the minor defendant?
2. If not, what procedure should the Court follow for the purpose of bringing the suit to a trial on the merits?

The Subordinate Judge's opinion on the first point was in the negative. On the second he was of opinion, that a sufficient fee should be levied from the plaintiff, to enable the Nazir to put himself in communication with the natural guardians or other friends of the minor for the purpose of obtaining instructions from them, that the fee so levied should be calculated as costs in the suit, and that the amount of fee to be levied should be determined by the Court.

Vishnu Krishna Bhatvadekar, for the plaintiff:—The Court has no power to demand fees from the plaintiff. As the Nazir has accepted the guardianship, he is bound to obtain all instructions from his ward. He can get the expenses from the minor's estate. The Court may remove the Nazir under s. 458 of the Civil Procedure Code, and appoint another person to defend the suit.

Vasudev Gopal Bhandarkar, for the defendant:—The plaintiff will not be a loser if he pays the expenses, for if he succeeds in the suit he will get them included in the costs. Under the rule of English law, a plaintiff in such a case is called upon by the Court to pay such expenses, and the Court is to make order as to its repayment on decision: see Simpson on Infants, p. 464.

JUDGMENT.

SARGENT, C. J.—There is no power in the Court to order the plaintiff to pay a fee for the purpose of enabling the Nazir, who [555] has been appointed guardian *ad litem*, to put himself in communication with the natural guardians and other friends of the minor, but the Court may well and indeed ought to refuse to go on with the suit if it should be of opinion that the Nazir has been unavoidably prevented from making himself acquainted with the case against the minor. In the present case, the minor is residing in a Native State at a distance from the Nazir, who is thus practically prevented from conducting the minor's defence without incurring expense; the Court might well, under such special circumstances, in the event of the plaintiff refusing to provide the means for enabling the Nazir to obtain the necessary information from the minor's relations, cancel the appointment of the Nazir. (which it is to be remarked is not obligatory on the Court) either in exercise of its inherent power over its own officer or at any rate under s. 458 of the Civil Procedure Code, which applies to other causes for removal as well as misconduct.

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