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JUDGMENT.

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SARGENT, C. J.—The suits, having been transferred from the Court of the Subordinate Judge of Pandharpur to the District Court of Sholapur, were pending in the latter Court when the defendants made their application to have the suits retransferred to Pandharpur. Section 25 only enables a District Court to [656] transfer a suit pending in a Court of first instance subordinate to itself, and not to transfer a suit which is pending in its own Court. The order of retransfer must, therefore, be discharged as having been made without jurisdiction. Rule made absolute with costs.

13 B. 656.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Candy.

TUKARAM ANANT JOSHI, A LUNATIC BY HIS NEXT FRIEND, BHIKAJI RAMCHANDRA NIMKAR (Original Plaintiff), Appellant v. VITHAL JOSHI AND OTHERS (Original Defendants), Respondents.*
[14th January, 1889.]

Right to sue—Suit by a next friend of a lunatic—Code of Civil Procedure (Act XIV of 1882), s. 463—Adjudication of lunacy under Act XXXV of 1858.

A suit for partition was brought by A as next friend of B, a lunatic.

Subsequent to the institution of the suit, B was adjudged to be of unsound mind under Act XXXV of 1858, and A was appointed a manager of the lunatic's estate.

Held, that A had no right to sue, as next friend of the lunatic, under chap. XXXI of the Code of Civil Procedure (Act XIV of 1882). The provisions of this chapter apply only in cases where there has been an adjudication of lunacy under Act XXXV of 1858 previously to the institution of the suit.

Held, also that, independently of the provisions of chap. XXXI of the Code of Civil Procedure, on principles of equity, A had no right to sue in respect of the immoveable property of a lunatic.

Held, further, that the adjudication of lunacy under Act XXXV of 1858 and A's appointment as manager of the lunatic's estate subsequent in the institution of the suit did not cure the original invalidity of his proceedings in the suit.

[N.F., 23 B. 653; Appr., 21 B. 351 (365); R., 20 A. 2 (5); 3 L.B.R. 169 (172); D., U.B.R. (1905); 3 Qr. C. P.C. 463.]

SECOND appeal from the decree of R. Courtenay, Assistant Judge of Ratnagiri, in appeals Nos. 336 and 340 of 1885 of the District File.

This action was instituted by Tukaram Anant Joshi, a lunatic, by his next friend, Bhikaji Ramchandra Nimkar, for a partition of certain ancestral property. The suit was filed on 29th August, 1883.

The defendants pleaded (*inter alia*) that Bhikaji could not sue, as next friend of the lunatic, without a certificate of guardianship or administration.

[657] In January, 1885, when the Subordinate Judge, after having recorded the whole evidence and heard arguments of both sides, was about to pronounce judgment, Bhikaji applied to the District Judge, under Act XXXV of 1858, for an inquiry into the plaintiff's state of mind. On the

* Second Appeal, No. 652 of 1886.

12th March, 1885, the plaintiff was adjudged to be of unsound mind, and Bhikaji was appointed to be a guardian of the person, as well as manager of the estate of the lunatic.

On 27th June, 1885, the Subordinate Judge held that the present suit by a next friend was maintainable under the provisions of chap. XXXI of the Code of Civil Procedure, and passed a decree directing partition of the lands in dispute.

On appeal this decree was reversed by the Assistant Judge, who was of opinion that, at the institution of the suit, Bhikaji had no authority to act for the plaintiff, and that his subsequent appointment, under Act XXXV of 1858, as manager of the lunatic's estate did not cure the original defect. He, therefore, dismissed the suit.

Against this decision a second appeal was preferred to the High Court.

Nagindas Tulsidas, for appellant.

Manekshah Jahangirshah, for respondents.

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The judgment of the Court was delivered by

JARDINE, J.—The suit was for partition of lands, and was filed on the 29th August, 1883, by one Bhikaji Ramchandra, as next friend of Tukaram Anant Joshi, a lunatic. The defendants in their written statement alleged that the next friend of a lunatic cannot bring a suit without having obtained a certificate of guardianship or administration.

The fifth issue framed by the Subordinate Judge was as follows:—“The plaintiff has sued by his next friend. Whether such suit can lie, according to chap. 31 of the Civil Procedure Code?” It is admitted that on the 12th March, 1885, Tukaram was adjudged to be of unsound mind, and Bhikaji was appointed manager of his estate, under s. 9 of Act XXXV of 1858. Section 14 declares that, with certain exceptions, which it is unnecessary to [658] notice here, such a manager “may exercise the same powers in the management of the estate, as might have been exercised by the proprietor, if not a lunatic.”

The Subordinate Judge decided the suit on the 27th June, 1885. The finding on the fifth issue is as follows:—“The plaintiff has been adjudged to be a person of unsound mind under Act XXXV of 1858 (see Ex. 78); so, under s. 463 of the Civil Procedure Code, a next friend can institute a suit by a person of unsound mind. I, therefore, hold that the next friend, who is also the certificated guardian of the plaintiff, (see Ex. 78), can institute the present suit for the insane person.” The document, Ex. 78, appoints Bhikaji to be manager of the estate and guardian of the person of Tukaram under Act XXXV of 1858. The Subordinate Judge also determined the issues on the merits, and passed a decree directing a partition.

The defendants appealed to the District Judge. The sixth ground of appeal is that “a certificate obtained after the institution of the suit did not legalize the previous proceedings.” Mr. Courtenay, the Assistant Judge, who tried the appeal found in the affirmative on the following issue—“Whether the suit should fail on account of plaintiff's next friend not having obtained a certificate until after the institution of the suit?” The Assistant Judge found that Bhikaji did not apply to the District Court, under Act XXXV of 1858, until after the 20th January, 1885, the day on which the Subordinate Judge, after having recorded all the evidence

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and hearing the arguments of pleaders on both sides, was to pronounce judgment. Then the Subordinate Judge raised a new issue as to the state of mind of Tukaram in 1879. The declaration of the District Court was that Tukaram was a lunatic on the 12th March, 1885. The Assistant Judge held that this declaration and appointment by the District Court did not avail to give validity to Bhikaji's earlier proceedings in the suit. We confined the argument to the sixth point of the appeal petition to this Court, which avers that the Assistant Judge has erred in this finding.

Mr. Nagindas has argued for appellant that Bhikaji was competent to file the suit, as next friend of Tukaram, under the provision [659] of s. 463 of the Code of Civil Procedure, which applies ss. 440 to 462 in the case of certain persons of unsound mind. But in an appeal from an order granting a review of judgment at the instance of a next friend—*Ganesh Padmakar Bhat v. Tukaram Anant Joshi* (1)—the High Court held that an application for review could not be made by a next friend, where the alleged lunatic was not of the class specified in s. 463, viz., "adjudged to be so under Act No. XXXV of 1858, or under any other law for the time being in force." We are informed that the judgment of which review was sought was in a former suit for partition of lands brought on behalf of this same lunatic Tukaram by one Krishnaji Vithe as next friend. No other authority has been cited on this point before us. We have thought it right, however, to refer to some of those reported in the Indian and the English books. In *Uma Sundari Dasi v. Ramji Haldar* (2), it was laid down that a man not yet adjudicated a lunatic had not lost his civil rights, and there was no reason why he should not have appeared either by *vakil* or in person *Dennis v. Dennis* (3) *Rock v. Slade* (4) and *Gladdon v. Trebble* (5) are quoted for this ruling; the last two cases being suits for money. In the matter of the petition of *Bhoopendra Narain Roy* (6) it may perhaps be inferred, from the language used by the learned Judges at p. 543 of the Report, that they were of opinion that a suit by an unadjudicated lunatic might be brought by a next friend. But this is only an inference, and the point was not before the learned Judges. *Megan Babuji v. Maldas Purshotum* (7) and *Jonnagadia Subbaya v. Thatiparthi Senadala Buthaya* (8) deal with the case of a defendant lunatic, not adjudged to be of unsound mind; and are in harmony with the view taken by this High Court previously alluded to, that chap. 31 of the Civil Procedure Code is not applicable, where the lunacy has not been adjudicated. The authorities above noticed appear to show clearly that chap. 31 conferred no authority on Bhikaji to file the suit.

[660] Another question remains, which we think we ought to consider, although it was not raised at the hearing of the appeal. Irrespective of chap. XXXI, had Bhikaji a right to file the suit as next friend, assuming, for the purpose of the question, that Tukaram was of unsound mind at the time, although not so adjudicated? The answer depends on the principles of equity as applied in the practice of the tribunals. The nature of the suit in the present matter has to be regarded. The rule is thus stated in Daniell's Chancery Practice, 6th ed. Vol. I, p. 116:—

(1) Printed Judgments for 1885, p. 23.

(2) 2 Williams Notes to Saunders' Rep. p. 329.

(3) 9 C. B., (N.S.) 367.

(4) Printed Judgments for 1881, p. 144.

(5) 7 C. 242.

(6) 7 Dowl. P. C. 22.

(7) 6 C. 539

(8) 6 M. 380.

"If the object of the action is to deal with the real estate of a person of unsound mind (as an action for partition or for sale in lieu thereof), the action cannot be brought by a next friend, although an action may be instituted by a next friend for the protection of a person of unsound mind." For the first part of this rule, the case of *Halfhide v. Robinson* (1), (a suit prior to the Partition Act), is mentioned as an authority. There the point was raised by Lord Justice James, and decided—Lord Justice Mellish concurring—in the following words:—"I wish it to be understood that a bill cannot be filed by a next friend on behalf of a person of unsound mind not so found by inquisition, for dealing with his real estate. The consequences of such a course might be monstrous." This authority may be accepted as a clear indication of the view in which Courts of Equity in England regard suits like the present. Other cases—e.g., trusts and partnerships—stand on other grounds. People of unsound mind stand in frequent need of protection. The reasons why the next friend may sue in the Court of Chancery on behalf of a lunatic, not so adjudged, are pointed out in *Rock v. Slade* (2), *Gleddon v. Trebble* (3), *Beall v. Smith* (4) and *Jones v. Lloyd* (5).

A further point arises which has been argued, and which it is necessary for us to decide,—that is, whether the adjudication by the District Court on 12th March, 1885, that Tukaram was then of unsound mind, and the appointment of Bhikaji as manager on that day, cure the original invalidity of his proceedings in the suit [661] prior to that date. No authority has been cited to us bearing on the point, except *Mahammad Azmat v. Lalli* (6), which bears on it only slightly and by analogy. The ruling of their Lordships of the Judicial Committee of the Privy Council on the effect of production, after filing of suit, of a certificate required under the Pensions Act, XXIII of 1871, is to be found at p. 434 of the Report. Their Lordships took notice of the words of the Act requiring the Court to take cognizance "upon receiving a certificate" from the Collector. The reason being thus special, we cannot apply it generally.

In the absence of any legislative provision on the point, we think we should refer to the practice of the Courts of Equity and the reasons on which it is based. An action brought in the Court of Chancery by a next friend for a lunatic not so found by inquisition was held to be at once paralysed upon this state of things ceasing, either by recovery—*Palmer v. Walesby* (7), or declaration of lunacy—*Beall v. Smith* (4). The present case would present no difficulty in the application of this principle but for the peculiarity that Bhikaji, the next friend, got himself appointed manager at the adjudication: otherwise we might hold that all proceedings in the suit after the adjudication are irregular and void. Ought we to treat the case as an exception to the rule? That depends on the reasons by which the rule is supported. They are stated in the judgment of Lord Justice James in *Beall v. Smith* (4). "It was quite clear that if the lunatic recovered he could act for himself; it was also clear that if he did not within a few months recover, it would be necessary to obtain for him the legitimate protection of the Court in Lunacy." Again, "the bill purports to be the bill of a person of unsound mind, not found so by inquisition, suing by his next friend. It is essential to any such suit that the plaintiff should be of unsound mind, and that he should not have been found so by inquisition. What is the effect of that state of things ceasing to be? I am of opinion

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(1) L. R. 9 Ch. 373, (375).

(2) 7 Dowel. P. C. 22.

(3) 9 C.B. (N.S.) 367.

(4) L. R. 9 Ch. 85 (93).

(5) L. R. 18 Eq. 265.

(6) 8 C. 422.

(7) L.R. 3 Ch. 732.

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on principle, and there is no authority to the contrary, that the suit is absolutely paralysed thereby. If he becomes of sound mind, the next [662] friend can have no pretext for continuing his intervention; if he is found lunatic by inquisition, so as to be under the control and protection of the Crown and of the Court in Lunacy, there is equally no pretext for continuing the officious protection of a self-constituted guardian or committee when there is a legitimate protection in the proper tribunal. We were referred to some decisions or *dicta* to the effect that a suit becomes abated by the appointment of a committee, and it was contended from this that there was no abatement until such appointment. But there is no decision that it can go on in the interval between the inquisition and the appointment, and Vice Chancellor Shadwell expressed a clear opinion that going on even after the commencement of proceedings in Lunacy would be a fraud on the jurisdiction. It is not suggested that such a bill could be filed in the interval between the inquisition and the final appointment of a committee, or in the interval between the death of one committee and the appointment of another. The committee is only an officer of the Court, the Court itself being only the delegate of the Crown's prerogative. It is not because a committee has been appointed, but because the Crown, by its proper tribunal, has the lunatic and all his affairs under its exclusive care and protection, that the power of any person to commence or to prosecute any proceedings for his protection is taken away. There is no inconvenience or injustice in this. Application can at all times be made to the Court for any thing that may require or may be just to be done, and no doubt if any person who has interfered for the protection of a lunatic can satisfy the Court that he has acted *bona fide*, and for the benefit of the lunatic, the Court will reimburse him, as it would recompense any other person who had rendered services to the lunatic. I am satisfied, therefore, that every proceeding, and every order, taken or made in the suit after the inquisition, was irregular and void, as much so as if it had been taken or made after the lunatic's death. Moreover, any such attempt to deal with a lunatic's property after the inquisition amounts to a gross contempt of the Court in Lunacy (1)."

Now it is to be remarked that most of Lord Justice James' observations on the care and protection afforded by the Court to [663] the lunatic and all his affairs apply equally to the District Court acting under Act XXXV of 1858. The manager has to get the sanction of the District Court for sales and mortgages and for leases exceeding five years. Inventories and accounts have to be rendered: and the Court may, for sufficient cause, remove the manager and the guardian of the lunatic's person. It is obvious that if we were to hold that a person, who, after he has brought a suit for partition on behalf of an alleged lunatic, obtains a tardy adjudication and appointment under Act XXXV of 1858, could ratify his previous proceedings in the suit, the paramount object of the Act, "to make better provision for the care of the estates of lunatics," would be in danger of frustration. The power of the Court to protect the estate might be seriously hampered in the interval: and there would be encouragement to strangers to bring suits, without any feeling of responsibility to the tribunal.

For these reasons we are of opinion that, in the absence of any authority to that effect, the present case should not be treated as exceptional.

Cases as to minors—*Vijkor v. Jijibhai* (1) and *In re Motiram Rupachand* (2) and *Babaji v. Maruti* (3)—have been cited by the pleader for appellant. But we fail to see that the reasoning applies to this case: and, with references to those judgments, we notice that Act XXXV of 1858 contains no provision by which suits can be brought on behalf of a lunatic by a next friend, similar to the proviso about suits for small amounts in s. 2 of Act XX of 1864, or the provision of a summary jurisdiction in like cases, without inquisition, in 25 and 26 Vic., cap. 86, ss. 12 to 15. The Legislature has not made the provision. See *Ex parte Cohen* (4), where it was held that a liquidation petition cannot be signed by a next friend on behalf of a "lunatic not so found by inquisition."

It is also well known that while the fact of minority is often patent, the question of unsoundness of mind is often complex, as shown in *the matter of Cowasji Beramji* (5) and the cases there [664] mentioned. Moreover, the adjudication of the District Court deals with the state of mind at the time, and does not relate to times past. Thus as the circumstances vary, so do the principles which the Courts apply to infants and to lunatics: the restrictions in s. 463 of the Civil Procedure Code we find to be in accordance with the practice of the Courts in England, and so are the interpretations of that section by the High Courts in India.

For the reasons we have given we are of opinion that the Assistant Judge was right in dismissing the suit brought by Bhikaji.

The present appeal was filed by Bhikaji. After his death Ganu bin Raghaji Savant got his name inserted on the record, by order of this Court, as new next friend of Tukaram in place of Bhikaji. Ganu has not obtained any appointment under Act XXXV of 1858. The reasons on which we have found that Bhikaji had no right to file the suit apply to Ganu's authority to appear as appellant, and we hold that he has none, and that a future appointment to be manager of the estate under Act XXXV of 1858 will not cure the want of *locus standi*. We, therefore, confirm the decree of the Assistant Judge, and direct the appellant Ganu personally to pay the costs of this appeal.

Decree confirmed.

13 B. 664.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Candy.

NARAYAN GANESH (*Original Plaintiff*), Appellant v.
HARI GANESH (*Original Defendant*), Respondent.*
[21st January, 1889.]

Issues—Civil Procedure Code (Act XIV of 1882) s. 149—Court's authority to frame new issues—Amendment of plaint.

A Court is not authorized by s. 149 of the Code of Civil Procedure (Act XIV of 1882) to frame new issues which have the effect of altering the nature of the suit.

A Court's power of raising additional issues is co-extensive with its power of amending plaints, and is subject to the same restrictions.

* Second Appeal, No. 657 of 1885.

(1) 9 B.H.C.R., 310.

(2) 11 B.H.C.R. 21.

(3) 11 B.H.C.R. 182.

(4) L.R. 10 Cn. D. 183.

(5) 7 B. 15.