1894.

PATEL KILÁBHÁI LALLUBHA'I v. HARGOVAN MANSUKH.

SARGENT, C. J.:—The Mámlatdár has found that the defendants are not "in possession under a right derived from the plaintiff," because he considers the lease to be a nominal one. He has come to that conclusion, because he is of opinion, on the evidence, that the property belonged to the defendants when it was passed by them. But the defendants, having passed the *kabuláyat* to the plaintiff, could not be heard to deny the latter's title as a ground for refusing to give up possession, and the Mámlatdár himself, therefore, could not go into the question. The decision in *Parbhudás* v. *Fulba*[1] referred to did not turn upon a conflict of title between the parties, but upon whether the lease was intended to be acted on.

We ought, therefore, under these circumstances, to exercise our extraordinary jurisdiction and make absolute the rule, and reverse the order of the Mámlatdár, and direct possession to be given to the plaintiff. Applicant to have his costs.

Rule made absolute.

(1) See *supra*, p. 133, note 1.

APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Candy.

1894. *January* 18.

KIRPA'RA'M JHUMEKRA'M MODIA, INSANE, BY HIS GUARDIAN HIS WIFE BA'I NA'THI (ORIGINAL PLAINTIFF No. 2), APPELLANT, *v.* MODIA DAYA'LJI JHUMEKRA'M AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Practice—Procedure—Lunatic—Limitation—Striking out lunatic plaintiff's name—Restoration of name—Suit by person not adjudged to be of unsound mind under Act XXXV of 1858.

A plaint as originally framed contained the name of Kirpárám, stated to be of unsound mind, as first plaintiff and of his wife Náthi as his guardian and second plaintiff. When the plaint was actually filed, Kirpárám's name was struck out by the pleader and Náthi. Subsequently his name was restored on his own application, but the period of limitation prescribed for the suit had then elapsed. The first Court held that under section 7 of the Limitation Act the plaintiff's claim was not barred. On appeal, the Judge dismissed the suit, holding that the order of the first Court restoring Kirpárám's name was bad, and that the suit was time-barred at the date of that order. On second appeal,

Held, reversing the decree, that the pleader and Náthi acted beyond their authority in striking out Kirpárám's name, and that, therefore, the restoration of his name must relate back to the filing of the suit, which was, therefore, not barred.

* Second Appeal, No. 564 of 1892.

1894.

KIRPÁRÁM JHUMEKRÁM MODIA v. MODIA DAVÁLJI JHUMEKRÁM.

Quœrs—Whether a person of unsound mind, but not adjudged to be so under Act XXXV of 1858, can in this country sue by his next friend.

SECOND appeal from the decision of Gilmour McCorkell, District Judge of Ahmedabad.

This was an action filed in the year 1890 for the recovery of Rs. 825 under two bonds dated the 6th June, 1886, and payable on the 25th April, 1887. The plaint as originally framed contained the names of Kirpárám Jhumekrám, insane, by his guardian his wife Bái Náthi as first plaintiff, and Bái Náthi herself as plaintiff No. 2. The plaint was verified by Kirpárám himself, and the *vakalatnáma* (pleader's warrant) was signed by both Kirpárám and Bái Náthi. Subsequently, when the plaint was actually filed in Court, Bái Náthi and the plaintiff's pleader struck out Kirpárám's name from the title without making any other alteration in the body of the plaint. The suit was proceeded with at the instance of Bái Náthi alone. The defendants *(inter alia)* denied Bái Náthi's right to maintain the suit. On the 19th March, 1891, Kirpárám presented an application to the Court asking to have his name restored to the plaint, and the application having been granted, the defendants contended that his claim was barred by limitation.

The Subordinate Judge found *(inter alia)* that the claim was proved, and that the plaintiff Kirpárám being of unsound mind the suit was not time-barred under section 7 of the Limitation Act (XV of 1877). He, therefore, allowed the claim.

On appeal by the defendants the Judge reversed the decree. The following is an extract from his judgment:—

"Assuming for the moment that Kirpárám was of unsound mind at the moment of the institution of the suit, it is clear that he could neither institute it himself, nor could his wife, without a certificate under Act XXXV of 1858, do so on his behalf—*Tukárám Anant Joshi, by his next friend Bhikáji Rámchandra Nimkar* v. *Vithal Joshi*, I. L. R., 13 Bom., 656 *et seq.* Nor can the want of certificate be now cured. If Kirpárám was not of unsound mind at the date of the institution of the suit, then his wife had even less reason to appear as his guardian. However, the name of Kirpárám disappeared from the record in the first instance; he made no complaint in that respect in Exhibit 18 on 19th March, 1891, when he asked to have his name restored to the plaint. The erasure appears to have been made with the cognizance of the pleader, as he has initialled it. The order of the Subordinate Judge restoring Kirpárám's name appears to me bad. By withdrawing his name from the plaint, Kirpárám, if sane, must be held as withdrawing from the suit, and on the 19th March, 1891, the

claim had become time-barred * * * Whether Kirpárám is of sound or unsound mind, the suit in the present form is not maintainable."

Bái Náthi as the guardian of her husband preferred a second appeal.

Govardhanrám M. Tripáthi for the appellant (plaintiff):—It was not necessary to mention Bái Náthi as plaintiff in the plaint. The plaint as it was originally framed with her name as the guardian of her husband was sufficient for our purpose.

[SARGENT, C. J.:—But, if Kirpárám is of unsound mind, how could his wife bring a suit without a certificate under Act XXXV of 1858?]

A lunatic may sue either by himself or through a next friend —*Venkatrámána Rámbhat* v. *Timáppa Deváppa*[1].

[SARGENT C. J.:—That decision appplies to a defendant.]

We submit that the same principle applies to a plaintiff. The practice in the Courts of Chancery is also to the same effect—*Jones* v. *Lloyd*[2].

There was no appearance for the respondents (defendants).

SARGENT, C. J.:—The plaint was originally framed with Kirpárám himself as first plaintiff and his wife as his guardian as the second plaintiff; and the plaint was verified by Kirpárám himself. When the plaint was actually filed, Kirpárám's name had been struck out from the heading of the suit, as the Subordinate Judge says, by the pleader and second plaintiff. This was clearly beyond their authority, and, therefore, when the name was restored on Kirpárám's application in person on 19th March, 1891, the restoration must relate back to the filing of the suit; in which case the suit would be in time and maintainable in plaintiff's name, whether of sound or unsound mind, and it is, therefore, unnecessary to determine whether, as has been contended before us, there may be cases in which a person of unsound mind, not adjudged to be so under Act XXXV of 1858, can sue by his next friend, as it would appear may be done in England under certain circumstances—*Jones* v. *Lloyd*[2].

We must, therefore, reverse the decree, and send back the case for a decision on the merits. Costs to abide the result.

Decree reversed and case sent back.

(1) I. L. R., 16 Bom., 132. (2) L. R., 18 Eq., 265.