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(1963) 12 CAL CK 0001

Calcutta High Court

Case No: None

Nirmal Chandra Ray and Others		APPELLANT
	Vs	
Khandu Ghose and Others		RESPONDENT

Date of Decision: Dec. 16, 1963

Acts Referred:

- Bengal Tenancy Act, 1885 - Section 148(h)

Citation: 68 CWN 333

Hon'ble Judges: D. Basu, J; Banerjee, J

Bench: Division Bench

Advocate: Monmohan Mukherjee and Dhirendra Kumar Das, for the Appellant; Sudhir Kumar Dutta, for the Respondent

Final Decision: Dismissed

Judgement

D. Basu, J.
N.K. Sen, J., sitting singly, referred this Second Appeal to the Division Bench for disposal since, in his Lordships''s opinion, there was a conflict of authorities upon the only question of law which called for his determination in this Appeal.

2. The Second Appeal arises out of a suit brought by the Respondent, who are minors, for a declaration that the ex parte decree for rent obtained by the Appellants against them and their co-sharers, in R.S. No. 2006 of 1944, was not binding upon the Respondents inasmuch as the Respondents were, in that suit, impleaded as represented not by their mother who was their natural guardian, but by their brother, Gobinda alias Gobardhan, who was defendant No. 12 in the suit. It is now established by the findings of the Courts below that there was no adverse interest of defendant No. 12 against the minor defendants, though he did not contest the suit and also that the decree was not tainted by any fraud on the part of the Appellants or of defendant No. 12.

3. The question of law which arises is whether the minors were, in the above circumstances, properly represented by their brother who was not their natural guardian, so as to make the decree in the suit binding upon the minors. The learned Munsif relied upon the doctrine of "effective" or "substantial" representation, answered this question in the affirmative, and dismissed the instant suit for declaration. This decision has been reversed by the lower Appellate Court, holding that there was no representation under the law, by the brother, and in this view, the suit brought by the Respondents has been decreed. The Appellants having come up on second appeal, N. K. Sen, J., thought that there was a difference of judicial opinion on the aforesaid question, and, hence, referred the appeal to the Division Bench for disposal.

4. Upon a careful consideration, we hold that the question must be answered in the negative and the view taken by the learned Subordinate Judge must be upheld.

5. The question, as the learned Subordinate Judge has pointed out, has to be examined from a twofold approach, namely, from the point of view of the CPC and of the Bengal Tenancy Act. The reason is that while the general law relating to the representation of a minor defendant is provided in Order 32 of the Code of Civil Procedure, a special procedure is laid down in Section 148(h) of the Bengal Tenancy Act, which must be complied with by a landlord who, instead of being contended with a money decree for his arrears of rent under the general law, is anxious to have a "rent decree", with all its larger benefits under Ch. XIV of the Bengal Tenancy Act. A "money decree" under the C.P. Code is, however, sufficient to pass to the decree-holder the right, title and interest of the judgment-debtor. If, therefore, in the instant case, there has been a valid decree against the minors in compliance with the requirements of the Code, the instant suit would fail. The Appellants may thus fall back upon the incidents of the decree in question under the C.P. Code in case it is found that the provisions of Section 148(h) of the Bengal Tenancy Act have not been complied with. We must, therefore, examine the records of this case with reference to both the provisions just referred to.

I. It is patent from the records that there was no attempt, in the Rent suit in question, by the landlords, i.e., the Appellants, to comply with the requirements of Section 148(h) of the Bengal Tenancy Act.

6. Order 32, Rule 4(3), of the C.P. Code provides that "no person shall without his consent be appointed guardian for the suit". It means that a guardian-ad-litem cannot be appointed by the Court under this order, for a minor party in a suit, without obtaining the consent of the person who is proposed to be so appointed. Section 148(h) of the Bengal Tenancy Act dispenses with this requirement of obtaining actual consent, provided the procedure laid down therein is followed. That procedure is this: the plaintiff in the Rent suit must serve a notice upon the natural guardian stating that the natural guardian would be treated as a duly appointed guardian-ad-litem, unless he or she does not appear and object to such appointment within the period specified. As has been pointed out in (1) Raghunath v. Bholanath, (1939) 44 CWN 391, "natural guardian" in Section 148(h) of the

Bengal Tenancy Act refers to the person who has the custody of the person of the minor. In the instant case, the minors were in the custody of their mother at the material time. It is not claimed on behalf of the Appellants that any such notice was, in the Rent suit in question, served upon the mother of the Respondents who was their natural guardian.

7. We have, therefore, to see whether the general provisions of the Code were complied with.

II. The relevant provisions of Order 32 of the Code are in Rule 4, sub-rules (1) and (3), which are as follows :

(1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a plaintiff.

(3) No person shall without his consent be appointed guardian for the suit.

8. These provisions deal with the procedure for appointing a guardian-ad-litem for a minor defendant and lay down that even a person other than the natural guardian may be appointed the guardian-ad-litem and a valid decree be passed against the minor as represented by the guardian-ad-litem so appointed by the Court, provided that :-

(a) the interest of such person is not adverse to that of the minor defendant;

(b) the consent of such person is obtained before such appointment.

9. The first of these conditions have, according to the Courts below, been satisfied in the case before us. But, as the lower appellate Court has found, there was not even an application (supported by affidavit) made by the Appellants for appointment of the brother as a guardian-ad-litem in the Rent suit, not to speak of obtaining his consent, by issuing a notice in that behalf. It is thus clear beyond doubt that the brother was not duly appointed a guardian-ad-litem for the Respondents in the Rent suit, according to the provisions of the Code.

10. Nevertheless, it has been argued on behalf of the Appellants that the decree in the Rent suit against the minors must be upheld as a valid decree (under the Code), according to the doctrine a "substantial" or "effective" representation.

11. The broad principle that there cannot be any decree made against persons "not properly represented on the record" was laid down by the Judicial Committee in the case of (2) Khairajmal v. Daim, (1904) 32 IA 23 PC, and it was observed that if any decree were passed against a person not properly represented, the decree became "nullity and

might be disregarded without any proceeding to set them aside." This principle was elaborated as regards a minor defendant, in the later case of (3) Rashidunnissa v. Md. Ismail (1910) 36 IA 168 PC, holding that a decree against a minor would be a nullity where :-

(i) no guardian-ad-litem is appointed at all; or

(ii) no proper person is appointed.

12. To the above proposition, an exception has been engrafted by the doctrine of "substantial" representation propounded by the decision relied upon on behalf of the Appellants.

13. The doctrine appears to have been enunciated by the Privy Council in (4) Musammat Bibi Walian v. Banke Behari, (1903) 30 IA 182 : 30 Cal 1021 (PC), - a case under the Code of 1882, and the other High Court cases relied upon on behalf of the Appellants all rest upon the authority of this Privy Council decision. In that decision, their Lordships pointed out that, u/s 443 of the Code, it was imperative upon the Court to see that a "proper person" was appointed to act on behalf of the minor but that in view of Section 578, no decree should be set aside on the ground of any defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court. It was found in that case that the minors had been represented by their mother with the sanction of the Court, but that there was no formal order appointing her as the guardian-ad-litem. The absence of the formal order, in the circumstances of the case, was held to be an "irregularity" within the meaning of Section 578 of the Code.

14. It is, however, to be noted that the decision of the Privy Council in (4) Musammat Bibi"s case, (1903) 30 IA 182, was given under the Code of 1882, Section 443 of which was as follows :-

443. Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the case.

A guardian for the suit is not a guardian of person or property within the meaning of the Indian Majority Act, 1875, Section 3.

Section 456 of the Code of 1882, further, laid down -

456. An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. Such application must be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in question in the suit adverse to that of the minor, and that he is a fit person to be so appointed.

Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian: provided that he has no interest adverse to that of the minor.

15. Subsequent to the decision of the Privy Council in (4) Musammat Bibi"s case (ibid), the provisions relating to the appointment of a guardian-ad-litem for a minor party have been recast by the Code of 1908 and embodied in Order 32, Rules 3 and 4. Two innovations, thus introduced, are to be noticed in connection with the case before us.

16.It would be useful, in this context, to reproduce the relevant contents of Rule 3 of Order 32 of the Code of 1908 -

3. (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed, or declared by an authority competent in that behalf, or where there is no such guardian, upon notice to the father or other natural guardian of the minor, or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

17. It will be seen that sub-rule (4) of Rule 3 was newly introduced in the Code of 1908, there being nothing corresponding to it in the Code of 1882. What it lays down is that when an application for the appointment of a guardian-ad-litem for a minor defendant is made under sub-rules (2) and (3) of Rule 3, the Court cannot make any order on such application without serving a notice upon the minor as well as his or her natural guardian, and after hearing their objection if any. In short, a guardian-ad-litem may be appointed by the Court only after applying its mind to the question and after considering the interests of the minor, upon notice to the minor and the natural guardian of the minor.

18. In the case before us, there was not even any semblance of compliance with the procedure laid down in Rule 3, as above. As the lower appellate Court finds, there was no application nor affidavit filed on behalf of the landlord-plaintiff in the Rent suit in question no notice was served upon the minors or their mother who was their natural guardian and no order of appointment was made by the Court after such notice, in fact, the Court never applied its mind to the question of appointment of a guardian-ad-litem for the minor defendants. The only thing that the landlords did was to implead defendant 12, the

brother of the minor defendants, as their guardian and there the matter ended and the decree, which was ex parte, was made on this state of the record, against the minor defendants and their brother. It is evident that the decree in the Rent suit in question was obtained in contravention of the requirements, inter alia, of sub-rule (4) of Rule 3 of Order 32 of the Code of 1908, the effects of which could not have been considered by the Judicial Committee in Musammat Bibi''s case (ibid).

19. The second innovation introduced by the Code of 1908 is sub-rule (3) in Rule 4 of Order 32, which lays down, unequivocally, that ''no person shall without his consent be appointed guardian for the suit''; and this impliedly requires a notice to the served upon such person to ascertain his consent, before he is appointed.

20. There was no provision, in the Code of 1882, corresponding to this sub-rule, so that there was no occasion for the Judicial Committee to make any observation as to the effect of non-compliance with the provisions of this sub-rule. [cf. (5) Thakur v. Lakhan, AIR 1923 Pat 231], which has undisputedly been violated in the present case.

21. We have, therefore, to examine the effects of a contravention of Rule 3(4) as well as Rule 4(3) of Order 32 of the present Code.

A. As to the omission to comply with Rule 3(4), had the case before us been one of simple omission to formally record the order of appointment of the guardian-ad-litem, it might have been covered by the decision in (4) Musammat Bibi''s case. But the effect, in the instant case, is something more fundamental. As stated earlier, there was no application and no affidavit by the plaintiff for the appointment of defendant 12 as guardian-ad-litem and no appointment by the Court at all, express or implied.

22. Such a case, in our opinion, was not contemplated by the Judicial Committee in (4) Musammat Bibi''s case. As observed in (6) Baneswar v. Tarapada, (197) 26 CLJ 258, the decision in Musammat Bibi''s case is no authority for the proposition that a valid decree may be made by a Court against a minor without appointing a guardian-ad-litem at all.

23. Since the Privy Council decisions in the cases of (3) Rashidunnissa (36 IA 168) and (2) Khairajmal (32 IA 23), it is indisputable that, even in the absence of fraud or prejudice, a suit lies at the instance of a minor defendant to declare that the decree obtained against him in a suit where he was not properly represented, is not binding on him [cf. (7) Musammat Champi and Another Vs. Lala Tara Chand and Tirloki Nath and Others ; (8) Ramchandar Singh and Another Vs. B. Gopi Krishna Dass and Others, ; (9) Annada v. Upendra, (1921) 26 CWN 781]. The reason is that in the absence of a proper representation, he could not be said to have been a ''party'' to that previous suit, so that the decree passed therein became a nullity so far as the minor defendant was concerned.

24. What we are called upon to decide in the instant case is what would be the consequences of a total non-compliance with the requirements of Rule 3(4) of the Code as is stands to-day. As we have stated earlier, this provision was not in the Code of 1882

under which the decision of the Judicial Committee in (4) Musammat Bibi"s case was made, and the only requirement of that Code was that the person proposed to be appointed as the guardian and so appointed by the Court must be a "proper person". Hence, where the minor sought to impugn the decree obtained against him as represented by any major person as his guardian, under that Code, the only question for the Court"s consideration was whether such person was a "proper person" and, if upon an examination of the facts and circumstances of a particular case, it could be held that the person who represented the minor was a "proper person" in fact, the Court would not interfere on the ground of any irregularity in the matter of appointment of such person as guardian-ad-litem. That is the precise scope of the decision in (4) Musammat Bibi"s case, which, as we have stated, constitutes an exception to the general proposition that a decree obtained against a minor defendant without proper representation is a nullity. So understood, the decision in Musammat Bibi"s case is not inconsistent with the object of Order 32 of the Code, and in this sense it has been applied in cases of this Court, such as (10) Priya Kanta v. Sudhir, (1939) 43 CWN 519 and, in many cases, by the other High Courts.

25. The decision of the Privy Council in Musammat Bibi"s case has no bearing where, as in the case before us, there has been no proposal to the Court to appoint anybody as guardian-ad-litem and the Court has not sanctioned such proposal, formally or informally.

26. The Allahabad decision in (11) Govind Prasad v. Santi Swarup, (1935) 155 IC 1106, relied upon on behalf of the Appellants does not help us because there was, in that case, a formal order of appointment of the father of the minor defendants as guardian-ad-litem but, notwithstanding such appointment by the Court, it was contended that the father was not a "proper person", on the ground that the father being himself one of the executants of the mortgage-deed was not in a position to raise pleas in bar to the claim for foreclosure which might be good defence to the minors. The Court entered into the question whether the minors were in fact prejudiced by the appointment of the father and came to the conclusion that the father did not omit to take any valid plea and add that the minors were not, in fact, prejudiced by such appointment, and so it was upheld. The substance of this decision is that even where the Court has duly appointed a guardian-ad-litem, it is open to the minor to challenge such appointment on the ground that the person appointed was not a "proper person" but in such a case, the minor cannot succeed unless "prejudice", in fact, is established.

27. In the case before us, on the other hand, there has been no representation at all of the minor defendants in the Rent suit in question since the plaintiffs in that suit did not ask the Court to appoint a guardian-ad-litem and the Court did not consider any such proposal. Even in the Allahabad High Court it has been held that in the absence of appointment of a guardian-ad-litem for a minor defendant, the decree obtained against him becomes "void ab initio and a nullity" [(12) Inder Pal Singh Vs. Sarnam Singh, , approved in (13) Mahasai Parbhu Dayal Vs. Man Singh and Another,]. If it be a duty of the Court to decide who would be the proper person to be appointed as guardian-ad-litem

for the minor, it is clear that the Court loses its jurisdiction to pass a decree against the minor where it has not considered that question at all.

28. The question of prejudice may, of course, be relevant where the Court has done its duty by appointing a proper person but there has been some irregularity in making such appointment; e.g., by omitting to make a formal order for appointment, as in (4) Musammat Bibi"s case, or where the properly appointed person has been guilty of fraud, collusion or negligence, thus, failing to protect the interests of the minor, as referred to in cases such as (14) Mt. Siraj Fatima and Others Vs. Mahmood Ali and Others .; (15) Rameswar v. Ramchandra, AIR (1951) All 372; (16) Karuppa Goundan Vs. Komaraswami Gounder and Others, ; (17) Modhusudan v. Jogendra, AIR 1945 Pat 133; (18) Chatrati Sriramamurthi and Another Vs. Official Receiver, Krishna and Others , but not where the Court has not done its duty at all.

29. It also follows that a contravention of such of the requirements of the statutory procedure as results in a non-representation of the minor cannot be held to be a mere irregularity, because, it goes to the root of the jurisdiction of the Court as held by a Division Bench of the Patna High Court in (8) Ramchandar Singh and Another Vs. B. Gopi Krishna Dass and Others, and of this Court in (9) Annada v. Upendra, (1921) 26 CWN 781, to the latter of which we shall advert more fully hereafter. In Ramchandra"s case (ibid), the Patna High Court, on an elaborate review of the case law, held that the provisions of sub-rules (3) and (4) of Rule 3 of Order 32 of the Code were mandatory and that any decree passed in violation of the requirements of these provisions would be a nullity. It is to be noted that even in Musammat Bibi"s case, (30 IA 182 (188), the Privy Council had made the observation that

they desire to impress upon all Courts in India the importance of following strictly the rules laid down in the section (i.e. Section 443) referred to.

30. When, therefore, subsequent to the above observation, a rule has been introduced by the Legislature, requiring notices upon the minor and his natural guardian to be served before appointing some other person, Musammat Bibi"s case itself becomes an authority for the proposition that such rule must be strictly complied with. The finding or assumption upon which the decision in Musammat Bibi"s case was founded is that, in that case, the mother, that is, the natural guardian of the minors, had been properly brought on the record as the guardian-ad-litem of the minors, though there was no formal order of appointment made by the Court. In the case before us, a person other than the natural guardian has been brought on the record, without complying with the mandatory provisions of sub-rule (4) of Rule 3.

31. It should be mentioned in this context that in (19) Ram Sundar and Another Vs. Amrit Pajiyar and Another, , a Division Bench of the Patna High Court had held that the procedural requirement of sub-rule (4) of Rule 3 was not mandatory and that its contravention might be regarded as a mere irregularity. But, as pointed out by the later

Bench in (8) Ramchandar Singh and Another Vs. B. Gopi Krishna Dass and Others, , the earlier Bench in (19) Satdeo''s case founded their decision upon Musammat Bibi''s case, without noticing that there was no provision in the Code corresponding to sub-rule (4) of Rule 3 when the decision of the Privy Council in Musammat Bibi''s case had been pronounced, and without noticing a number of earlier decisions of the Patna High Court to the contrary. We are in complete agreement with the view taken by the Patna High Court in this later decision of 1957, namely, that the provisions of sub-rule (4) of Rule 3 are mandatory, in the same manner as those of sub-rule (3) of Rule 4, as to which we have direct decisions of our own Court, as we shall presently see. We are inclined to prefer this view not merely because of the word shall'' and the negative language used in both these sub-rules, but because the contrary view would defeat the very object of Order 32, namely, that because a minor is incapable of defending a litigation, the Court should appoint a person competent and willing to protect his interests, having regard to the wishes of the minor and of the person who has the custody of his person, and the interests of the minor as such. Without considering all these aspects, neither the plaintiff in the suit nor the Court can be allowed to thrust a so-called guardian-ad-litem upon the minor, simply for the sake of an idle formality. To treat these sub-rules as merely directory would, therefore, defeat their purpose and we cannot make such a construction.

32. When, therefore, there is contravention of such a mandatory provision, it constitutes not merely a violation of a rule of procedure, but of a matter going to the root of the Court''s jurisdiction, because no Court is competent to make a decree against a minor who is not represented according to law, any more than against a dead man [cf. (7) Musammat Champi and Another Vs. Lala Tara Chand and Tirloki Nath and Others].

33. We are also of the opinion that any extension of the principle evolved by the Judicial Committee in Musammat Bibi''s case beyond what was actually decided therein should not be readily made, in disregard of the object and utility of the provisions of Order 32 of the Code as a whole.

34. The position is much more clear as regards the contravention of sub-rule (3) of Rule 4. This sub-rule has been uniformity held to be mandatory, so far as this Court is concerned so that even where there is a formal order of appointment of a guardian-ad-litem by the Court, the order would be invalid if the consent of such person has not been obtained before the appointment [(9) Annada v. Upendra, (1921) 26 CWN 781; (20) Jagadish Chandra De and Others Vs. Harihar De, ; (21) Satish v. Hashem, (1927) 54 Cal 450]. The same view has been taken by the Patna High Court in the case of (8) Ramchandar Singh and Another Vs. B. Gopi Krishna Dass and Others, referred to earlier.

35. In all these cases, the scope of the decision of the Privy Council in Musammat Bibi''s case has been explained and distinguished. In (9) Annada v. Upendra (1921), Mookerjee & Panton JJ., held that sub-rule (3) of Rule 4 controls both sub-rules (1) and (2) and "places a material restriction upon the power which the Court may exercise thereunder".

In the result, an omission to obtain the consent of the person to be appointed guardian-ad-litem constitutes not a mere curable irregularity of procedure but renders the order of the Court "without jurisdiction.

36. We are not unmindful of the fact that in some other High Courts it has been held [e.g., (22) Vasireddi Sriramulu Vs. Putcha Lakshminarayana, ; (23) Raman Gangadharan and Others Vs. Raman Narayanan and Others,] that the consent required by sub-rule (3) of Rule 4 need not be expressed but may be implied from the circumstances of the case. We are, however, unable to subscribe to this view for several reasons:

Firstly, it has been held in several decisions of this Court [vide (6) Baneswar v. Tarapada, (1919) 26 CLJ 258; (24) Radhadhyam v. Rangasundari, (1920) 24 CWN 541; (25) Narendra v. Jogendra, (1913) 19 CWN 537; (9) Annada v. Upendra (1921) 26 CWN 781 (784); (20) Jagadish Chandra De and Others Vs. Harihar De,], that the consent required by this sub-rule must be "express consent". Apart from the fact that these Bench decisions are binding on us, we find no reason to differ from this view particularly because in several other High Courts [e.g., Allahabad, Punjab], it has been considered necessary to amendment Rule 4(3) to the effect that the consent of the proposed guardian shall be presumed, if he does not object after service of the notice containing the proposal, suggesting thereby that prior to such amendment, Rule 4(3) required express consent. On the other hand, it is because this Court interpreted sub-rule (3) as requiring express consent that the Legislature, in 1928, amended Section 148(h) of the Bengal Tenancy Act to provide an exception to the requirement of Order 32, Rule 4(3), namely, that if the procedure laid down therein was followed, the natural guardian, who does not object on service of notice upon him or her, shall be deemed to be the duly appointed guardian of the minor, thus implying his or her consent to act as the guardian-ad-litem. Outside Section 148(h) of the Bengal Tenancy Act, thus, the law under Order 32, Rule 4(3) of the C.P. Code, so far as this Court is concerned, is that nobody can be appointed a guardian-ad-litem for a minor defendant unless he has "signified" his press consent [vide (9) Annada v. Upendra (ibid)].

Secondly, in those cases where consent has been implied there were circumstances in the impugned suit or proceeding itself from which the consent to act as guardian-ad-litem could be inferred, e.g., the omission of the proposed guardian to object after acceptance of notice in that behalf [(e.g. in (23) Raman Gangadharan and Others Vs. Raman Narayanan and Others,]. In the case before us, however, there is no proof of service of any notice upon the brother (defendant 12 in the Rent suit) under Rule 3(4) of Order 32, or in any other manner; proposing to appoint him as guardian-ad-litem. Hence, even factually, there is no material from which it may be implied that the brother consented to act as the guardian-ad-litem for the minor. The learned Munsif, of course placed much importance upon the fact that subsequent to the ex parte decree in the Rent suit, the brother took recourse to proceedings to set aside the sale which took place in execution of the decree. Such conduct subsequent to the impugned decree would, however, be immaterial if, as held in this Court, non-compliance with sub-rule (3) of Rule 4 renders the

decree a nullity on the ground that the Court had no jurisdiction to pass the decree in the absence of the consent of the proposed guardian obtained in the manner laid down in sub-rule (3) of Rule 4 of Order 32 (vide (6) Baneswar v. Tarapada, (1917) 26 CLJ 253; (9) Annada v. Upendra, (1921) 26 CWN 782]. In (9) Annada v. Upendra, ibid., the Division Bench refused to take cognizance of the patent fact that proposed guardian eventually preferred an appeal from the impugned decree itself, on the ground that "he never appeared during the trial of the suit and took no steps to protect the interest of the infant.

Thirdly, as pointed out in (9) Annada v. Upendra, (1921) 26 CWN 781 (785), the doctrine evolved by the Judicial Committee in (4) Musammat Bibi"s case, (1903) 30 IA 182, could not be applied to a case of contravention of the requirement of Rule 4(3) of Order 32, relating to consent, because the Judicial Committee had no such provision before their Lordships in that case and did not consider the effect of appointment of a guardian-ad-litem without his or her consent and also because Section 578 of the Code of 1882 (to which corresponds etc. 99 of the present Code) upon which their Lordships relied could not be extended to a case where the order of the Court is without jurisdiction. This decision in (9) Annada"s case (ibid) has not been dissented from in this Court, ever since.

37. We may conclude by summing up the propositions arrived at by us, upon the foregoing discussion:

(a) Even in the absence of fraud or of prejudice, it is open to a minor to bring a suit for a declaration that a decree passed in a previous suit is not binding on him, on the mere ground that he was not represented, according to law, in the suit in which the decree had been passed.

(b) Where a proper person had been appointed, with the sanction of the Court and in compliance with the mandatory provisions of law, to act as guardian-ad-litem in a suit, the decree passed in such suit cannot be challenged on the ground of a mere irregularity in the matter of appointment of such person as guardian-ad-litem, not causing any prejudice, - such as the absence of a formal order of appointment, - by reason of the doctrine of effective representation.

(c) The foregoing doctrine has no application where the Court has not considered any proposal for the appointment of a guardian-ad-litem.

(d) The provisions of sub-rule (4) of Rule 3 and sub-rule (3) of Rule 4 of Order 32 are mandatory and a decree obtained against a minor in complete disregard of these provisions is without jurisdiction and void ab initio.

(e) The "consent" referred to in sub-rule (3) of Rule 4, as it obtains in West Bengal, means "express consent".

38. We hold that in the Rent suit in question before us, there was no representation of the Respondents, either according to the provisions of the Bengal Tenancy Act or of the Code of Civil Procedure.

39. In the result, this appeal must be dismissed and the decree of the lower Appellate Court affirmed. We do not, however, make any order as to costs in this Court.

40. Bannerjee, J. - I agree with the order passed by my Lord but desire to express myself in a separate judgment.

41. Defendants Nos. 1 to 4 and 26 to 28 are the appellants in this appeal. The appeal is directed against a decree of the Subordinate Judge at Bankura reversing the decree of a learned Munsif.

42. The suit, out of which this appeal arises, was filed in the circumstances hereinafter stated.

43. The plaintiffs, who are certain minors, and defendants Nos.11 to 13 used to hold an agricultural holding, as tenants under defendants Nos.1 to 10, at an annual rent of Rs.25/-. Defendants Nos. 1 to 4, some of the co-sharer landlords, instituted a suit, being R.S. 2006 of 1944, against the tenants abovenamed, for recovery or arrears of rent, obtained a decree and in execution of the decree purchased the holding. Thereafter, the decree-holders landlords settled the holding with defendants Nos. 14 to 26.

44. In the rent suit, the plaintiffs, respondents in this appeal had been impleaded as defendants but were not represented by their mother, who was their natural guardian. Their elder brother, defendant No. 12 was purportedly shown to represent the present plaintiffs, as their guardian-ad-litem, in the rent suit and in the execution proceedings that followed. The plaintiffs respondents alleged that defendants Nos. 11 to 13 were not in good terms with them and used to live separately, while plaintiffs respondents used to live under the guardianship of their mother. As such, they allege, they were not at all represented in the rent suit and in the proceedings that followed and that the decree was not binding upon them. They further allege that the landlords were shrewd litigants and that they instituted the rent suit with an untrue claim, suppressed all processes and succeeded in obtaining a decree without the knowledge of the plaintiffs respondents or their mother. They also allege that the landlords decree-holders themselves induced the defendants Nos. 11 to 13 to file a proceeding for setting aside the rent sale and entered into terms with defendants Nos. 11 to 13. In the said proceeding also, the plaintiffs respondents were not properly represented and as such were not bound by the terms. They lastly allege that new settlement-holders (defendants 14 to 28) from the landlords were trying to enter upon their holding and to dispossess them. On the allegations as stated above, the plaintiffs respondents instituted the suit, out of which this appeal arises, claiming that the decree in Rent Suit 2006 of 1944 be set aside and that the defendants Nos. 14 to 28 be restrained from dispossessing them.

45. The defendants 1 to 4 (decree-holders landlords), defendant No. 11 (a co-sharer of the plaintiffs), defendants 14 to 25 and defendants 26 to 27 (persons who obtained the new settlement from the landlords) filed four sets written statements in the suit. Of them defendant No. 11 supported the plaintiffs'' version in his written statement. Defendants 14 to 25 disowned any interest in the suit land on the plea that they had given up their right under the alleged settlement. The real contest was by defendants Nos. 1 to 4 (the decree-holders landlords) and defendants 26 to 27 (the new settlement holders). Their defence was that the claim in the rent suit was a true claim; that the minor defendants in the rent suit had been properly represented; that defendants Nos. 11 to 13 put forward the minors to institute the suit; that the suit was barred by limitation and the principles of res judicata; and that the rent decree and rent sale were binding on the minors.

46. The trial Court overruled all the pleas of the plaintiffs respondents and held that the minors had been properly represented in the rent suit and that then rent decree and the rent sale were binding upon them. In that view, the trial Court dismissed the suit. The Court of Appeal below, however, found that the minors had not been properly represented and in that view reversed the decree. Hence this Second Appeal at the instance of the decree-holders auction-purchasers and the new settlement-holders.

47. The only point canvassed in this appeal was about the representation of the minors in the rent suit. No other points were canvassed before us.

48. The learned Subordinate Judge found that the mother of the plaintiffs respondents was their natural guardian under the Hindu Law. He further found that the minor plaintiffs, who were some of the defendants in the rent suit, were not represented in the rent suit by their mother guardian but by their elder brother defendant No. 12, who was not their guardian. He did not disturb the finding of the learned Munsif that the defendant No. 12 was joint in property with the minor plaintiffs, looked after their affairs, had no interest adverse to them and was a more suitable person to represent the minors than the natural guardian mother, who displayed ignorance about the affairs of the minor. Nevertheless, he found that the representation of the minors, by a person other than their natural guardian, was not a good representation under the law, in the facts and circumstances of the case. He further found as follows:-

the suit was decreed ex parte and it is not said or suggested that the elder brother of the plaintiffs appeared in Court to give his consent. On the contrary, it is evident that the whole proceeding in the lower Court went on as if the provisions of Section 148(h) applied to the case. It is almost certain that there was no application for appointment of guardian supported by an affidavit as required under Order 32, Rule 4, sub-rule 3 of the C.P. Code. It is also certain that there was no notice upon the defendant 12 enquiring of him as to whether he had any objection. In due course, he was appointed guardian of the minors just like the natural guardian u/s 148(h) of the B. T. Act. Clearly therefore the minors were neither properly represented under the B. T. Act nor under the provisions of the C.P. Code. In the circumstances the decree cannot but be void as against the minor plaintiffs.

49. In coming to the above conclusion, the learned Subordinate Judge placed strong reliance on two decisions of this Court, namely, 44 CWN 391 - per Edgley, J.) and (6) Baneswar Pramanik v. Tarapada Bhattacharjee (26 CLJ 258 - per Mookerjee and Walmsley, JJ.) and distinguished the other decisions cited before him.

50. Mr. Manmohan Mukherjee, learned Advocate for the appellants, argued that the minors were effectively represented in the rent suit and in the proceedings following, by their elder brother, defendant No. 12, who used to look after the joint property in suit, belonging to himself and his co-sharers, including the minors. In my opinion, there is a good deal of infirmity in the argument of Mr. Mukherjee. The doctrine of substantial representation is a matter of substance and not of form. Where a minor was effectively represented in a suit by a guardian, although not formally appointed, and suffered no prejudice on account of the informality, the absence of a formal order of appointment of guardian is not fatal to the suit. In this view I find support from the following observations by Sir Arthur Wilson in (4) Mussammat Bibi Walian v. Banke Behari Pershad Singh, (30 IA 182) :

The present plaintiffs were substantially sued in the former suit and the alleged fraud has been negatived. It appears to their Lordships that they were effectively represented in that suit by their mother and with the sanction of the Court; here is nothing to suggest that their interests were not duly protected. The only defects which can be pointed out are that no formal order appointing the mother of the new plaintiffs to be their guardian is shewn to have been drawn up; and that it is not definitely shewn that any attempt was made to serve the summons in the former suit upon the infants personally, or upon their mother, a purdanashin lady, before serving it upon Gajadhar the only audit male member and Karta of the family. It has not been shewn that the alleged irregularities caused may prejudice to the present plaintiffs. * * * * * Their Lordships are of the opinion that the defects of procedure alleged in the case are at most irregularities, which u/s 570 of the Civil Procedure Code, would not have furnished ground for reversing the proceedings in the former suit, if they had been raised upon appeal in that suit. * * *" And the plaintiffs who have brought a separate suit to set aside the judgment and execution proceedings in the former suit and the title acquired under them can certainly not be in a better position than if they had been appellants in that suit.

51. In the instant case, the learned Subordinate Judge found that the elder brother of the plaintiffs did not himself enter appearance in the rent suit and allowed the rent suit to be decreed ex parte. Therefore, the proposed guardian, namely, the defendant No. 12, took no interest in the suit and cannot be said to have effectively represented the interest of the minors in the suit.

52. If the theory of effective representation of the minors in the suit be out of the way, then the failure to have the minors properly represented in the suit makes the decree, as against the minors, a nullity. If any authority be needed for the proposition, reference may be made to (26) Purna Chandra Kunwar v. Bejoy Chand Mahatap, (17 CWN 549 - per

Jenkins, C.J. & N.R. Chatterjee, J.) and (6) Baneswar Pramanik v. Tarapada Bhattacharjee (26 CLJ 258 - per Mookerjee & Walmsley, JJ.).

53. Then again the rent suit was one brought by some of the co-sharers landlords u/s 148A of the Bengal Tenancy Act. The procedure to be followed in rent suits is to be found in Section 148 of the Bengal Tenancy Act and clause (h) of Section 148 reads as follows :-

Notwithstanding anything contained in Rule 4(3) of Order XXXII in Schedule I to the Code of Civil Procedure, 1908, the Court may serve on the natural guardian of a minor defendant in a suit for arrears of rent a notice informing him that he will be treated as the guardian of such defendant in respect of such suit, unless he appears and objects within such time, not being less than fourteen clear days after the service of the notice, as may be specified in the said notice, and, in default of compliance with such notice, such natural guardian shall, unless the Court otherwise directs, be deemed to be duly appointed guardian of the said minor defendant for all the purposes of such suit.

54. That procedure was not correctly followed in the rent suit, because the notice did not go out to the mother, natural guardian of the minors, even if any notice at all went out. There is also nothing to show that defendant No. 12, consented to act as the guardian of the minors at any stage in the rent suit. In the case of (1) 44 CWN 391 , Edgley, J. very rightly pointed out:

Order 32, Rule 4(3) of the CPC provides that no person shall without his consent be appointed guardian for a suit. Section 148(h) of the Bengal Tenancy Act provides for an exception to the above rule in favour of natural guardian and this section accordingly provides that the Court may serve on the natural guardian of a minor defendant in a suit for arrears of rent a notice informing him that he will be treated as the guardian of such defendant in respect of such suit, unless he appears and objects within the specified time. It is, however, clear that only a natural guardian may be thus appointed without his consent to act as the guardian of the minor. If a person who is not the natural guardian is so appointed without his consent being taken, it necessarily follows that the minor concerned cannot be regarded as being properly represented in that suit.

55. The position in law, therefore, is that if a natural guardian is proposed to represent a minor defendant in a rent suit the procedure as in Section 148(h) of the Bengal Tenancy Act may be followed. But if anybody else is proposed as the guardian of the minor defendants, the procedure as in Order XXXII of the CPC must be followed. In the instant case, Section 148(h) of the Bengal Tenancy Act did not come into play because the guardian proposed was not the natural guardian of the minors. There is also nothing to show that in trying to appoint the defendant No. 12 as the guardian of the minors, the procedure as in Order XXXII was followed. Therefore the minors were not properly represented in the rent suit and the decree as against them was a nullity. That being so, the rent sale did not affect their right, title and interest in the holding. In that view I hold

that the plaintiffs respondents in this appeal are entitled to a decree setting aside the rent sale, in so far as it affected their interest, and injuncting the contesting defendants from interfering with their possession. In the result, this appeal must be dismissed.