

(1886) 08 CAL CK 0001
In the Calcutta High Court

Bhaba Pershad Khan by his Guardians, Ramsakhi Dabi
Chowdhraim and Another

APPELLANT

Vs

The Secretary of State for India in Council and Others

RESPONDENT

Date of Decision : 14-08-1886

Acts Referred:

Citation : (1887) ILR (Cal) 159

Hon'ble Judges : W. Comer Petheram, C.J; Wilson, J; Prinsep, J; O'Kinealy, J; Mitter, J

Bench : Full Bench

Judgement

1. The learned Judges, who heard this case in Special Appeal, have held on the construction of the plaint that the minor was the real plaintiff. They have, however, referred the following question to the Full Bench:

2. Where a suit is brought by a next friend on behalf of a minor and for his benefit, and where the Court of first instance allows it to proceed, whether the objection that the minor was not properly described according to Section 440 of the Civil Procedure Code, or that the next friend was not a certificated guardian under Act XL of 1858, or that no express permission was granted to him by the Court to sue on behalf of the minor, is fatal to the suit.

3. In regard to the first portion of this question, we are of opinion that the fact that the Judge allowed the suit to proceed is evidence that the Court trying the case allowed the institution of the suit, and the referring Judges have found to that effect.

4. In regard to the next part of the question, namely, whether the objection that the minor was not properly described according to Section 440 of the Code of Civil Procedure, is fatal to the suit, we are of opinion that it is not. In all cases the question to be decided is whether on a construction of the plaint and the pleadings the minor is really a party to the suit or not, and if he be, any irregularity in this description is provided for by Section 578 of the Code which

declares : "No decree shall be reversed or substantially varied, nor shall any case be remanded in appeal on account of any error, defect or irregularity, whether in the decision or in any order passed in the suit, or otherwise not affecting the merits of the case or the jurisdiction of the Court."

5. In regard to the third portion of the question, namely, whether the objection that no express permission has been granted by the Court on behalf of the minor, is fatal to the suit; this, if answered in the affirmative, would mean that no evidence, except evidence of express permission, would be admissible to show that the Judge had sanctioned the institution of the suit. We think there is nothing in the nature of the sanction given u/s 3, Act XL of 1858, which takes it out of the general rule of evidence that sanction may be proved by express words or by implication. We are, therefore, unable to hold that the want of express permission is fatal to a suit. At the same time we must say that, according to the practice in the Mofussil Courts, every order is entered in the order-sheet attached to the record, and the proper and regular manner of proving permission would be by the production of the order-sheet or a certified copy thereof.