

(1940) 01 AHC CK 0029
In the Allahabad High Court

L. Ram Charan Das

APPELLANT

Vs

Bhagwat Saran and Others

RESPONDENT

Date of Decision : 10-01-1940

Acts Referred:

Citation : AIR 1940 All 467 : (1940) 10 AWR 623

Hon'ble Judges : Verma, J;Bennet, J

Bench : Full Bench

Judgement

Bennet, J.—This appeal is brought by the decree-holder, Ram Charan Das against certain objectors, Bhagwat Saran, Ved Prakash and Rameshwar Prasad, a receiver. The appeal memorandum simply states that the appeal is against the decree of the Civil Judge of Moradabad dated 4th May 1938, and does not set out what relief is desired. The grounds of appeal deal with the case of Ved Prakash who was an objector and presumably the appeal is intended to be against the decree of the lower Court so far as it concerns Ved Prakash, The decree-holder had made an application for execution of the decree in Original Suit No. 60 of 1929 and F.A. No. 521 of 1930 in the High Court. The objection of Ved Prakash described as the minor son of Bhagwat Saran under the guardianship of one Babu Ram is that the decree was in no case passed against the objector and execution thereof cannot be taken out against him. This objection has been allowed by the Court below which has held that the decree in the suit is not binding on Ved Prakash. The Court also held that the representatives of defendants 2, 12 and 13 were not made a party to the appeal and the case abated as against them and the decree of the Appellate Court is not therefore binding on the heirs of the defendants-respondents aforesaid. In the present appeal there is no mention of a relief against the representatives of defendants 2, 12 and 13. It is true that ground No. 4 does refer to three persons Ram Sarup, Imdad Husain and Mt. Rukman as being merely pro forma defendants-respondents and therefore no substitution was necessary and the decree was capable of execution. The Court below has held that the decree was capable of execution.

2. The Court below held however that the case had abated as against the representatives of defendants 2, 12 and 13. I do not consider it possible to deal with this matter in regard to Ram Sarup, Imdad Husain and Mt. Rukman in the present appeal because their legal representatives have not been made parties to this appeal. If the appellant desires to bring any matter in regard to these persons before this Court he should make them parties to his appeal. Therefore the present order in appeal is confined to the case of the objection of Ved Prakash which is the subject-matter of the other grounds of appeal. In suit No. 60 of 1929 Ram Charan Das, the sole plaintiff, sued his son Bhagwat Saran, defendant 1, and a number of other persons who were tenants, defendants 2 to 16(17). The plaintiff Ram Charan Das then made an application on 15th May 1929 asking that

the names of Prem Prakash alias Ved Prakash aged about 6 years and Om Prakash aged about 4 years, minor sons of Bhagwat Saran under the guardianship of their father Bhagwat Saran may be added to the heading of the plaint as defendants 18 and 19.

3. On 29th May 1929, Bhagwat Saran made an application stating that the plaintiff had applied for his minor sons Prem Prakash and Ved Prakash to be defendants 18 and 19 and that he did not desire to be their guardian, that their mother was present and the minors were living with her, and that the mother Mt. Morni should be guardian. On this the Court wrote the order: "The mother of the two minors may be appointed their guardian. Sd. Makhan Lal, 29th May." It will be noted that the names of the minors were given by the father as Prem Prakaah and Ved Prakash whereas they had been given by the grandfather, the plaintiff, as Prem Prakash alias Ved Prakash and Om Prakash. This is the matter which has given rise to the objections in this case. It is common ground between the parties that Bhagwat Saran had a number of children and that three of these were sons, of whom one was born in 1924 and one was born in 1925. There was a third son born about 1927 who died in that year, and Ex. 26, the entry of his death, is produced showing that this son died on 5th March 1927. The suit was filed on 29th April 1929 and at that period it is common ground between the parties that Bhagwat Saran had only two surviving sons, one born in 1924 and the other one in 1925. The question is solely in regard to the names of these two sons. For the objector Ved Prakash, it is contended that the names of the two sons were Prem Prakash who was born in 1925 and Ved Prakash who was born in 1924. The decree-holder adhered to his original application in the plaint giving the names of his grandsons as Prem Prakash alias Ved Prakash and Om Prakash and he alleged that the minor son who died in 1927 was only called Lala and did not have the name of Om Prakash which was alleged for objector.

4. A good deal of evidence was produced before the Court below by the parties and the Court came to the conclusion that the contention of the decree-holder, the grandfather, was incorrect and that the names of the two surviving sons were Ved Prakaah, the objector, who was born in 1924, and Prem Prakash who was

born in 1925. Some argument has been made before us on this point by learned Counsel for the appellant, but I do not think that there is any sufficient reason to disagree with the finding of fact of the Court below on this point and therefore I hold that at the time of the plaint in 1929 the correct names of the sons of Bhagwat Saran were Prem Prakash and Ved Prakash. The application therefore of the plaint did not give the names of the sons correctly and the application of defendant 1, the father, of 29th May 1929 did give the names of the two sons correctly. The order was written on this application by the Civil Judge and this order of 29th May 1929 does refer to the two sons who were correctly mentioned in the application of the father. This order therefore makes no mistake and the objector cannot contend that this order did not refer to Ved Prakash. But the objection taken to this order is that it was not an order appointing the mother as guardian but that it intended to convey that the plaintiff should make a further application asking that the mother should be appointed as guardian. Now it was extremely important for the objector to show as he alleges that there was a later order appointing the mother as guardian and that the name of Ved Prakash was not given in the order appointing the mother as guardian. It is true that the judgment of the Court below makes the following statement:

The question now remains as to how far Ved Prakash is bound by the decree. The relevancy of this point arises from the fact as noted in the order sheet of 27th June 1929 that Mt. Morni is appointed guardian ad litem of Prem Prakash and Om Prakash. This order was passed under a mistaken belief that the written statement by Mt. Morni was on behalf of Prem Prakash and Om Prakash although it was really on behalf of Ved Prakash and Prem Prakash.

5. It is true that there was an agreement between the parties on 19th March 1938 that the whole record of the Original Suit No. 60 of 1929 should be read in evidence. That original record has not been produced before us. The Court below has referred to the order sheet in one place saying that it is "noted" there and in the other place saying that this was "an order." The actual order sheet has not been produced before us nor has any certified copy of it been produced before us in this appeal. I find it difficult therefore to accept the fact from the judgment of the Court below that there was an order by the Civil Judge to the effect set out by the Court below namely that Mt. Morni was appointed on 27th June 1929 as the guardian-ad-litem of Prem Prakash and Om Prakash. The Civil Judge fails to mention the order dated 29th May 1929 signed by his predecessor. Learned counsel desired to produce a certified copy in this Court of an application by the plaintiff dated 4th June 1929 asking that Mt. Morni should be appointed guardian of the two minors giving the names of the two minors as Prem Prakash and Om Prakash. Even if this be admitted it does not prove that the Court made an order for the appointment of Mt. Morni as guardian of Prem Prakash and Om Prakash.

6. The claim of the objector was that he had not been represented in the suit and in my opinion it was very important for the objector to prove that the Court made a wrong order of appointment in which the name of the objector Ved

Prakash did not appear. I think therefore that there should have been in this Court either a certified copy of the alleged order or the production of record. I find the difficulty in accepting the description of the Court below as an order because in one place the Court refers to it as some thing noted on the order sheet and in the next few lines refers to what is on the order sheet as an order. If it were an order it would be signed and initialled by the Civil Judge and there is nothing in the judgment of the Court below to indicate whether what was entered on 27th June 1929 was or was not signed by the Civil Judge. On the other hand it is quite possible that the entry was made as a note of orders that had been passed, and that the reference was to the order dated 29th May 1929 where the names were correct. On that particular date Mt. Morni filed a written statement which is headed "written statement of Ved Prakash and Prem Prakash minors under the guardianship of their mother Mt. Morni." A translation of this is printed in the paper book of F.A. No. 314 of 1930 on pp. 15 to 18 and at the end Mt. Morni has attested:

I, the guardian for the minors, declare that the contents of this written statement are true to my belief. This was verified at Moradabad on 27th June 1929.

7. The written statement of Mt. Morni was filed on 27th June 1929 and this is the date of the alleged order appointing her guardian, according to Court below. But the written statement had been written on behalf of Mt. Morni as the person already appointed guardian of these minors. Considerable argument has been made in regard to the provisions of Order 32, Civil P.C. It was argued that for each appointment of a guardian there must be a separate application of the plaintiff. Order 32, Rule 3(2) states:

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

8. It appears to me that it was quite open to the Court to make an order appointing Mt. Morni as guardian of her two minor sons on the application from their father stating that he did not desire to be their guardian but he desired that his wife Mt. Morni in whose charge the minors were to be their guardian. It was then argued that no such order could be passed without the consent of the proposed guardian. Order 32, Rule 4A (2) states:

Where there is no such guardian, or where the Court considers that such guardian should not be appointed, it shall appoint as guardian for the suit the natural guardian of the minor, if qualified, or where there is no such guardian the person in whose care the minor is, or any other suitable person who has notified the Court of his willingness to act, or failing any such person, an officer of the Court.

9. In the present case, there was no certified guardian and therefore the Court might appoint "the person in whose care the minor is" It is not provided in this Rule that in the case of the appointment of "the person in whose care the minor is" it would be necessary for that person to notify to the Court his or her

willingness to act. Those words apply only to the case of any other suitable person, the expression being "or any other suitable person who has notified the Court of his willingness to act." In my view, therefore, it was open to Mr. Makhan Lal, the Civil Judge, to make an order on 29th May 1929 appointing Mt. Morni as guardian of the two minors Prem Prakash and Ved Prakash who were her sons in her charge. I consider that the order which he wrote on the application of the father was intended to be an order of appointment of the mother as guardian. No doubt the mother might have objected to act as guardian but in fact she did not object. She made an application on 27th June 1929 asking that she should receive funds from the plaintiff for the conduct of the defence of the minors if she were to be the guardian ad litem for these minors. On this the Court passed an order that the plaintiff should supply funds to Mt. Morni. If the Court had not previously appointed her as guardian, the order would have been written on this application but it is not. No one has shown us whether the plaintiff did supply funds or not but the fact remains that Mt. Morni filed a written statement and did contest the suit on behalf of the minors Prem Prakash and Ved Prakash. This is shown by a vakalatnama which she signed for counsel on behalf of these two minors Prem Prakash and Ved Prakash and the certificate of counsel's fee is also in the names of these two minors and the address slips are also in the names of these two minors.

10. The attitude of the parties in the lower Court was that the plaintiff mistakenly no doubt persisted in keeping the name of Om Prakash in his plaint whereas the defendants minors were appearing under their proper names Ved Prakash and Prem Prakash throughout the proceedings. The judgment of the trial Court set out a pedigree in which the entry appears "Bhagwat Saran (defendant 1), his two sons are defendants 17 and 18". The judgment therefore did not mention the names of these two sons. The decree in the original suit No. 60 of 1929 followed the plaint in giving the incorrect name of Om Prakash and in describing the minors as No. 17 Prem Prakash alias Ved Prakash, aged six years, and Om Prakash aged four years, minors, sons of Bhagwat Saran. It is extraordinary that when a first appeal No. 314 of 1930 was filed by Bhagwat Saran, defendant 1, and his two minor sons, these two minor sons are described in the same way as they were in the plaint and decree, that is, No. 2 Prem Prakash alias Ved Prakash, and No. 3 Om Prakash, minors through Mt. Morni. There was therefore a certain laxity even on behalf of Mt. Morni and her husband Bhagwat Saran in describing the names of their two sons. When the High Court wrote its judgment in F. A. No. 341 of 1930 the judgment began by setting out a pedigree and in this pedigree the two sons of Bhagwat Saran were given as Ved Prakash and Prem Prakash, that is they were given correctly. The judgment states on p. 3: "The principal defendants in this case were defendants 1 and his two minor sons defendants 17 and 18". The appeal No. 341 of 1930 was dismissed. Ram Charan Das filed an appeal also which was disposed of in the same judgment, F.A. No. 521 of 1930. After this an application for leave to appeal to the Privy Council P.C.A. No. 7 of 1935 was filed on behalf of Bhagwat Saran and his two minor

sons and in that the minor sons were described as No. 2 Prem alias Ved Prakash, aged about six years, and No. 3 Om Prakash aged about four years, both under the guardianship of Mt. Morni. Again we find that the parents themselves in describing their sons were not accurate in applying the names.

11. The Court below has considered that the order sheet of 27th June 1929 governs the situation and that because Mt. Morni was according to that order sheet appointed guardian for Prem Prakash and Om Prakash therefore she was not appointed guardian for Prem Prakash and Ved Prakash, and Ved Prakash was not represented or properly represented in the civil suit and in the appeals. Now, even on the finding of the Court below, that there was this error in the order appointing Mt. Morni as guardian I have a difficulty in considering that the conclusion of the Court below was correct. There is a ruling of their Lordships of the Privy Council in *Walin v. Banke Behari*, ('03) 30 Cal 1021. In that case the mother of certain minor defendants appeared throughout the proceedings in a suit as their guardian. The Court admitted the plaint in which she was described as a guardian and in the decree and in execution proceedings the Court so described her. There was however no formal order by the Court appointing her guardian ad litem of the minor defendants. The High Court at Calcutta held that the minors were not properly represented in the proceedings and that the proceedings were not binding on them. On p. 1031 their Lordships of the Privy Council observed:

Their Lordships are unable to concur in the conclusion at which the learned Judges arrived. 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; and for the reasons given by the first Court their Lordships attach no importance to the certificate of Durga Dutt. There 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 now plaintiffs to be their guardian ad litem is shown to have been drawn up; and that it is not definitely shown 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 adult mala member and the karta of the family. It has not been shown that the alleged irregularities caused any prejudice to the present plaintiffs, nor indeed could there well be any, since it has been found that the original debt was one for which the present plaintiffs were liable.

12. It is true that the circumstances of the case before their Lordships were somewhat different. There was no order at all appointing the mother as guardian. In the present case there is an order according to the Court below appointing her as guardian in which the wrong name was used for one of her two minor sons. It does not seem to me that an order appointing her guardian with this defect can be held to be a greater defect than no formal order appointing her as guardian at all. In the present case the mother filed a written statement in

which she gave the names of the two minor sons correctly and she contested the case on their behalf through learned Counsel who was engaged on a vakalatnama to represent their case in which the correct names of the minors were given. The case of the minors is not said to have been inadequately represented to the trial Court or to the High Court in appeal. The case of the two minor sons was identical and nothing could be said on behalf of one minor which could not be said on behalf of both. The mere fact that the plaintiff in his plaint gave a wrong name for one of these minors does not appear to me to be a matter which is of vital importance. There were two minor sons of defendant 1 in existence on the date of suit. Those two minor sons were obviously intended by the plaint and no serious objection was taken in the trial Court or in the High Court that those names did not correctly represent the two minor sons of Bhagwat Saran. No doubt the more correct names were given by Bhagwat Saran in his objection to acting as guardian and in the written statement of Mt. Morni. Where there is no real doubt as to who the persons intended are and where those persons are actually represented by a written statement and where counsel appears on their behalf, I do not think that it is open to one of the persons after the proceedings have terminated in decrees of the trial Court and the Appellate Court to come forward in execution proceedings and claim that he was not really represented in the suit and appeal. I think the present case is governed by the ruling of their Lordships of the Privy Council and that the Court below was incorrect in allowing the objection of Ved Prakash. In my view, Ved Prakash was adequately represented in the trial Court and in the Appellate Court. No real grievance exists on his behalf. There was a written statement in his name, counsel appeared for him and no defect exists in his appearance before the Court. For these reasons, I would allow this appeal so far as the order of the Court below concerns Ved Prakash and I would hold that Ved Prakash was properly represented in the original suit No. 60 of 1929 and in F.A. No. 521 of 1930 in regard to which an execution application has been made by Ram Charan Das.

Verma, J.

13. This is an appeal by the decree-holder. The facts as far as they can be ascertained from the materials on the record, are these. The appellant, Ram Charan Das was married twice. Respondent 1, Bhagwat Saran, is his son by his first wife, and by the second wife the appellant has a son called Jagdish Saran. The relations between the appellant and Bhagwat Saran have been strained for a number of years. On 23rd April 1929 the appellant, Ram Charan Das, filed a suit, being suit No. 60 of 1929, in the Court of the Subordinate Judge of Moradabad. He impleaded his son Bhagwat Saran as defendant 1 to the suit, and sixteen other persons were impleaded as defendants 217 on the allegation that they were tenants of a number of properties which were in dispute and, in collusion with defendant 1, denied the plaintiff's right. The principal reliefs claimed were that:

(a) it may be declared that the plaintiff is, with, out the participation of anyone else, the absolute owner of his entire moveable and immovable property...that defendant 1 does not form a joint family with the plaintiff and that he has nothing to do with the plaintiff's property of every description;

and

(b) the plaintiff may, on dispossession of defendant 1, be put in possession of property No. 1, entered in list (b), specified below, which is made waqf of, as a mutwalli. If in the opinion of the Court it is not proved to be a waqf property, then proprietary possession over it also, along with the other properties Nos. 2 to 6, may be awarded to the plaintiff.

14. On 17th May 1929 the plaintiff presented an application in which one of the prayers was that

the names Prem Prakash alias Ved Prakash, aged about 6 years, and Om Prakash, aged about 4 years, minor sons of Bhagwat Saran, under the guardianship of their father Bhagwat Saran aforesaid

may be added as defendants 18 and 19 and that they be described as "principal" defendants. This prayer was based on the allegation that

in order to avoid future disputes it is necessary to implead Prem Prakash alias "Ved Prakash and Om Prakash, minor sons of Lala Bhagwat Saran also.

15. It was further prayed in this connexion, that in para. 14 of the plaint the words

defendants 18 and 19, the sons of defendant 1, whose family is joint with defendant 1 and so they too are included in the array of principal defendants,

may be added. It may be noted here that the record of the original suit was before the Court below, but neither party has taken any steps to have it made available to us. The result is that we have had to send for the printed paper-book which had been prepared for the purposes of the appeals that had been filed by the parties against the decree which was passed by the trial Court in that case. That paper-book does not contain all the applications, affidavits, and orders which are required to enable us to ascertain the facts as a connected whole. The execution record alone is before us. But the parties, knowing that the Court below had at their request agreed to have the record of the original suit before it and to refer to it, did not file copies of all the necessary papers in the execution case. It may, however, be assumed that when the plaintiff, Ram Charan Das, presented this application, he also presented an application and an affidavit for the appointment of Bhagwat Saran as the guardian of his minor sons in accordance with the provisions of Order 32, Rule 3. It appears that the necessary notices were issued. Ex. A1 is the certified copy of a notice addressed to "Prem Prakash alias Ved Prakash" and Ex. A2 is the certified copy of a notice addressed to Om Prakash. These notices bear date 17th May 1929. They were both served

on Bhagwat Saran who accepted service and wrote and signed the necessary endorsement. On 29th May 1929 Bhagwat Saran presented an application. Ex. 41 is a certified copy of this application. The material portion of this application may be translated thus:

The petitioner has been named as the guardian ad litem of Prem Prakash and Ved Prakash minors, defendants 18 and 19. The petitioner is not willing to be the guardian of the minors afore said. The mother of the minors aforesaid is alive and the minors live with her. It is therefore prayed that the petitioner may be exempted from the guardianship of the minors aforesaid.

16. In the certified copy, Ex. 41, the following words are to be found below the signature of Bhagwat Saran: "Address of Mt. Morni, daughter of Lala Budh Sen, wife of Bhagwat Saran, resident of Moradabad, Mohalla Dindarpur, defendant." It is to be noted however that the only prayer made in this application was that the petitioner (Bhagwat Saran) may be excused from the guardian, ship of the minors mentioned in the petition, in other words, that he may not be appointed their guardian. The other fact which has to be noted is that the names of the minors given by Bhagwat Saran in this application are "Prem Prakash and Ved Prakash," and not Prem Prakash alias Ved Prakash and Om Prakash as stated by the plaintiff Ram Charan Das in his application dated 17th May 1929. The Subordinate Judge wrote an order on this application in these words: "The mother of two minors may be appointed their guardian." There are no papers on this record to show whether any action was taken by the plaintiff in consequence of this application of Bhagwat Saran and the order passed thereon by the Court. We have however on this record the certified copy of an application dated 11th June 1929 presented by Mt. Morni, the wife of Bhagwat Saran. It is Ex. 25. The material portion of this application may be translated thus:

The plaintiff of the suit has filed an application that this petitioner be appointed, the guardian ad litem of Ved Prakash and Prem Prakash, the sons of this petitioner. With regard to this matter the petitioner has to state with great respect that unless a written statement is filed on behalf of the minors, their interest will greatly suffer. In order that the minors may get their just rights in this case it is necessary that the written statement be filed through a senior pleader, and a senior pleader cannot be engaged without the payment of the legal fee. The petitioner is poor and has got no money to spend. The plaintiff may therefore be ordered to pay Rs. 700, as specified below, so that the case may be looked after properly and the minors may obtain their just rights.

17. At the foot of this application the petitioner is thus described: "Mt. Morni, wife of Bhagwat Saran, mother of Ved Parkash and Prem Prakash, minors," and the application purports to have been signed by her in Hindi. From the opening sentence of this application it is clear, to my mind, that as the result of the application filed by Bhagwat Saran on 29th May 1929 declining to act as guardian ad litem and the order passed thereon on that day, the plaintiff had filed an application requesting the Court to appoint Mt. Morni guardian-ad-litem of her

minor sons and that notices had issued on that application. It is again noteworthy that the names of the minor sons of Bhagwat Saran and Mt. Morni are shown in this application to be "Ved Prakash and Prem Prakash." It may also be noted that Mt. Morni does not in terms express in this application her consent to act as the guardian ad litem. At the most, she may be taken by implication to say that she would act as the guardian-ad-litem provided the plaintiff was made to pay the sum of Rs. 700 to her. On the same day, that is 11th June 1929, the Court passed the following order on this application: "Call upon the plaintiff to either pay the amount or show cause against it within a week." Ex. 42 is the certified copy of an application presented by the plaintiff Ram Charan Das on 12th June 1929 objecting to the payment of any money to Mt. Morni, There are again no papers on this record to show what took place immediately following the presentation by the plaintiff of this application Ex. 42. There seems no doubt, however, that the Court appointed Mt. Morni guardian-ad-litem of her minor sons. Apart from the fact that in the plaint which is to be found in the printed paper book mentioned above, defendants 17 and 18 are shown "under the guardianship of their mother Mt. Morni," the certified copy of the decree of the trial Court in the original suit No. 60 of 1929, which has been filed and Ex. A6 on this record, show defendants 17 and 18 as "minor sons of Bhagwat Saran under the guardianship of Mt. Morni, mother."

18. It may be mentioned here that owing to the removal from the record of the name of one of the tenants, impleaded as defendants, namely Suraj Mal who was defendant 5, there was a change in the numbers of the defendants, and one of the minor sons of Bhagwat Saran became defendant 17 instead of 18, and the other became defendant 18 instead of 19. Learned counsel on both sides are agreed that Mt. Morni, acting as the guardian ad-litem of her minor sons, filed on 27th June 1929 a written statement on their behalf, and that in this written statement also Mt. Morni clearly put down the names of her minor sons as "Ved Prakash and Prem Prakash," and that the written statement clearly purported to be on behalf of Ved Prakash and Prem Prakash, minors. The suit proceeded and was decided by the trial Court on 13th May 1930. That Court gave the plaintiff a declaration that he was the sole and separate owner of the entire property entered in schs. A and B of the plaint, with the exception of item 1 entered in sch. B, known as the Baghia, of which he was declared to be a mutawalli. It was further declared that the plaintiff was entitled to eject defendants 1, 17 and 18 from the Baghia. It was also declared that defendants 1, 17 and 18 were not members of a joint Hindu family with the plaintiff. It is a remarkable circumstance that, although Bhagwat Saran and Mt. Morni made it perfectly clear that the names of the two sons that they had were Ved Prakash and Prem Prakash and although the written statement was filed on behalf of Ved Prakash and Prem Prakash, the office of the trial Court put down in the plaint the names of these two boys as "Prem Prakash alias Ved Prakash aged about six years and Om Prakash aged about four years" in accordance with the plaintiff's application of 17th May 1929. Nobody seems to have noticed this mistake and the same

names were copied out in the decree of the trial Court. Both parties appealed to this Court against that decree. The appeal of defendants 1, 17 and 18 was First Appeal No. 314 of 1930 and the appeal of the plaintiff was No. 521 of 1930.

19. It is again remarkable that in the memorandum of appeal filed on behalf of defendants 1, 17 and 18 the clerk of the advocate concerned wrote the names of the appellants 2 and 3 as "Prem Prakash alias Ved Prakash and Om Prakash," respectively, and in the memorandum of appeal filed on behalf of the plaintiff the names of respondents 17 and 18 were similarly written by the clerk of the advocate concerned. It is noteworthy, however, that in the vakalatnama executed by Mt. Morni, along with Bhagwat Saran, for the purpose of filing appeal No. 314 of 1930, the names of the minors were correctly written thus: "Ved Prakash and Prem Prakash, minor sons of Bhagwat Saran aforesaid, under the guardianship of Mt. Morni, their mother." The certified copy of this vakalatnama is Ex. 37 on this record. The appeal of the defendants, viz First Appeal No. 314 of 1930, was dismissed and the appeal of the plaintiff, viz First Appeal No. 521 of 1930, was allowed and the decree of the trial Court was modified in this way that, in addition to the decree granted by the trial Court, a decree was passed in favour of the plaintiff for possession over the properties Nos. 2 to 6 mentioned in list (B) of the plaint. In the decrees drawn up in this Court the names of the minors were written in the manner in which they were written in the memoranda of appeal and in the decree of the trial Court. An application for leave to appeal to His Majesty in Council was filed on behalf of Bhagwat Saran and his sons and in the heading of this application the clerk of the advocate again copied out the names of petitioners 2 and 3 in the mistaken way in which they were entered in the decrees. The mistake which was thus persisted in betrays a negligence on the part of all concerned which is lamentable. There are no papers on this record to show what orders were passed on the application for leave to appeal to His Majesty in Council, but evidently it proved infructuous. The application for execution which has given rise to the appeal before us was filed by the plaintiff decree-holder Ram Charan Das, asking for possession as owner over certain properties and as mutawalli over property 1 of Schedule (B) of the plaint.

20. Two petitions of objection to this application for execution were filed, one by Bhagwat Saran and the other on behalf of Ved Prakash. The points raised were (1) that the decree was a nullity as defendant 18, shown in the plaint as Om Prakash, had died long before the institution of the suit; (2) that Ved Prakash and Prem Prakash are two different persons and it was not correct on the part of the plaintiff to describe one of the minor sons of Bhagwat Saran as "Prem Prakash alias Ved Prakash," that the plaintiff having impleaded as defendant 17 a person whom he described as "Prem Prakash alias Ved Prakash" must be taken to have impleaded Prem Prakash alone and not Ved Prakash; and (3) that in any event the trial Court had appointed Mt. Morni guardian of Prem Prakash and Om Prakash, that consequently, even if Ved Prakash be taken to have been impleaded no guardian ad litem was appointed for him, and therefore the decree is not binding on him. There was also an objection raised to the effect that

defendants 2, 12 and 13 had died during the pendency of the plaintiff's appeal in the High Court and their legal representatives not having been brought on the record, "the decree in the appeal was a nullity." My learned brother has dealt with this last point in his judgment and I do not consider it necessary to say anything further. The decree-holder, Ram Charan Das, in reply to the objections raised by Bhagwat Saran and Ved Prakash, persisted, somewhat naturally, in saying that the name of one of the sons of Bhagwat Saran was Prem Prakash alias Ved Prakash and the name of the other was Om Prakash. It was admitted by him that Bhagwat Saran had another son who had died before the institution of his suit, but it was stated that boy had died before he had been given a name and was known by the pet name of Lalla. His case therefore was that Ved Prakash being merely an alias for Prem Prakash and both being the names of one and the same boy, and the name of the other boy being Om Prakash, the order of the trial Court appointing Mt. Morni guardian ad litem of Prem Prakash and Om Prakash was sufficient and that the boy who now filed the objection as Ved Prakash was therefore fully and properly represent ad in the suit,

21. The Court below has held that the plaintiff decree, holder's case that the name of one of the boys is Prem Prakash alias Ved Prakash and the name of the other boy is Om Prakash is untrue, that the name of the boy who had died before the institution of the suit was Om Prakash and that the names of the two existing boys, who were impleaded as defendants in the suit, are Ved Prakash and Prem Prakash, Ved Prakash being the elder, his age in 1929 having been about six years, and Prem Prakash being the younger, his age in 1929 having been four years. It has further held that the plaintiff did mean to implead, and did implead, the only two sons of Bhagwat Saran who existed in 1929, that he gave their names wrongly owing to his ignorance at their correct names, that it was a bona fide mistake, that the interests of both the minors were identical, and that it cannot be held that the decree was a nullity as Ram Charan Das did not really intend to implead the boy who had died as a party to the suit. The Court below has pointed out that the relations between Ram Charan Das and Bhagwat Saran have been strained for a considerable length of time and has inferred from the circumstances of the case that it was not at all improbable that Ram Charan Das, when he made the application to implead the two sons of Bhagwat Saran, did not know their correct names. It has pointed out that it is common ground than in 1929 Bhagwat Saran had only two sons in existence. Proceeding further, the Court below has referred to an order of the trial Court dated 27th June 1929, which, it states, is to be found on the order sheet of the original suit, by which Mt. Morni was appointed guardian ad litem of "Prem Prakash and Om Prakash," and has held that no guardian ad litem was appointed for Ved Prakash. In the result it has held that the decree is not binding on Ved Prakash. The appeal is directed against this order.

22. We have heard learned Counsel on both sides at length. My conclusion is that the Court below is perfectly right in holding that the decree-holder's case that Prem Prakash and Ved Prakash are the names of one and the same boy, who is

called Prem Prakash alias Ved Prakash, and that the name of the other boy is Om Prakash, is not true. In my opinion, the Court below has correctly held that the name of the boy who had died before the institution of the suit was Om Prakash and that the names of the existing boys are Ved Prakash and Prem Prakash and that it is not correct to say that one of the existing boys has the double name of Prem Prakash alias Ved Prakash. The Court has referred to the evidence produced before it. Some of the witnesses produced by the judgment-debtors are just the persons who could have knowledge of these facts. Learned counsel for the appellant has not been able to say a single word against the evidence relied upon by the Court below. This finding of the Court below must therefore be accepted. The next finding of the Court below, namely that Ram Charan Das meant to implead, and did as a matter of fact implead, the only two sons of Bhagwat Saran that were in existence in 1929, and that he failed to give correct names owing to ignorance and a bona fide mistake and did not intend to implead the boy that had died, is also, in my opinion, perfectly correct. The correctness of this finding has not been challenged by learned Counsel for the respondents.

23. The main controversy between the learned Counsel for the parties has centred round the third finding. As already stated, the Court below has referred to an order of the trial Court dated 27th June 1929, appointing Mt. Morni guardian ad litem of "Prem Prakash and Om Prakash." The Court below has stated that this order is to be found on the order sheet on the record of the original suit which, as stated above, was before the Court below and was referred to by the Court by agreement of the parties. I am unable to accept the contention put forward on behalf of the appellant that the Court below is wrong in treating this as an order of the Court. The Court below which had the order sheet before it describes it as an "order." The correctness of the statement made by the Court below on this point has not been challenged in the grounds of appeal. If it was intended to show that the statement of the Court below was wrong, it was the duty of the appellant to see to it that the record of the original suit, which was before the Court below and was referred to by his consent, was made available to us. I cannot accept the argument that it was for the respondent to "produce" that record before us, or to file a certified copy of the entry made in the order sheet under date 27th June 1929. It is for an appellant to show that the Court below is wrong, and a respondent is entitled to rely on the statements of facts contained in the judgment of the Court below until they are shown by the appellant to be incorrect. I am also unable to attach any significance to the word "noted" used by the Court below, as has been urged by the learned Counsel for the appellant. That portion of the judgment of the Court below reads thus:

The question now remains as to how far Ved Prakash is bound by the decree. The relevancy of this point arises from the fact, as noted in the order sheet of 27th June 1929, that Mt. Morni is appointed guardian ad litem of Prem Prakash and Om Prakash. This order was passed under a mistaken belief that the written statement by Mt. Morni was on behalf of Prem Prakash and Om Prakash although

it was really on behalf of Ved Prakash and Prem Prakash. The above order was therefore manifestly incorrect so far as the appointment of Mt. Morni as guardian of Om Prakash was concerned,

24. On the strength of the word "noted" used in one of the sentences quoted above, it has been urged that the entry in the order sheet under date 27th June 1929 was merely a summary, written by the reader of the Court or some other clerk, of an order passed by the Court in some other part of the record, and that it is for the respondent to show that the entry was signed by the presiding Judge before it can be treated as an order of the Court. As I have already observed, I am unable to place any such interpretation on the word "noted." The Court below has in the two succeeding sentences described the entry in the order sheet as an "order." I am also of the opinion that it is not for the respondent to show that the entry in the order sheet in question was signed by the Judge. The rules with regard to the entries in an order sheet are contained in Chap. 5 of the General Rules (Civil) for Civil Courts subordinate to the High Court, Vol. 1. Rule 2 lays down that an order sheet in Form No. 2 shall be maintained. Rule 3 lays down:

There shall be a separate entry in the order sheet for each distinct order or event. Each separate entry shall bear a serial number and where such entry is a reference to a record appearing elsewhere in the file, its serial number shall be noted on such record. The Judge shall put his initials in the order sheet to signify its accuracy and correctness: (a) where an entry is the only record of an order or important event, after such entry; (b) otherwise, after the last entry of each day.

25. This Rule further lays down:

Routine orders, passed on applications for filing of talbana, addresses, diet money, copies of plaint etc, may be entered directly on the order sheet by the clerk concerned, and no such orders shall be written upon applications or separate papers of the record. A brief memorandum shall be made in vernacular on the back of each application or paper giving a reference to the order recorded in the judge's notes, thus: "Application allowed, see order in English, dated...." The memorandum will be written by the reader and initialled by the Judge.

26. This is the only memorandum or summary authorized by the Rules and it is not to be written on the order sheet. It is further clear that the Judge is bound to initial the entries in the order sheet. In Form No. 2, col. 3 is headed: "Order with initials of presiding judge." There is absolutely no reason to suppose that the Judge in this case failed in his duty and did not initial the entry in the order sheet under date 27th June 1929. Then, again, even if this argument is accepted, it only comes to this that there is an order in some other part of the record of which the entry in the order sheet under date 27th June 1929 is a summary.

27. It is not suggested, and cannot be suggested, that the entry in question is a summary of an order which does not exist. I am therefore not prepared to hold that the Court below is wrong in saying that the trial Court had passed an order

on 27th June 1929 appointing Mt. Morni guardian ad litem of "Prem Prakash and Om Prakash." It is also highly probable that the trial Court did pass such an order. As I have pointed out above, the opening sentence of the application of Mt. Morni dated 11th June 1929, Ex. 25, shows that the plaintiff had made an application praying that Mt. Morni be appointed guardian ad litem of her minor sons. I find it impossible to accept the contention of the learned Counsel for the appellant that the order dated 29th May 1929 on the application of Bhagwat Saran, Ex. 41, should be treated as an order formally appointing Mt. Morni guardian ad litem of her minor sons. I have no doubt whatsoever that as the result of that order the plaintiff did file an application in accordance with Order 32, Rule 3 of the Code and that the Court passed an order on 27th June 1929 formally appointing Mt. Morni guardian ad litem. It has been said that under Order 32, Rule 3 an order for the appointment of a guardian for the suit may be obtained on an application in the name and on behalf of the minor, and that Bhagwat Saran's application dated 29th May 1929, Ex. 41, should be treated as an application in the name and on behalf of his minor sons. As I have pointed out above, it was not an application of this character at all. The only prayer made in it was that the petitioner, Bhagwat Saran, be not appointed guardian ad litem as suggested by the plaintiff. I am therefore satisfied that the Court below is right in saying that the trial Court made on 27th June 1929 an order appointing Mt. Morni guardian ad litem of "Prem Prakash and Om Prakash." The question remains, however, whether in all the circumstances of this case mentioned above the Court below is right in holding that

Ved Prakash being a minor and no guardian having really been appointed on the face of the record for him the decree passed cannot be binding on him.

28. It seems to me that the decision of the Court below is wholly opposed to the principle laid down by their Lordships of the Privy Council in ("03) 30 Cal 1021, which, in my opinion, governs the case before us. The sole ground on which the decision of the Court below rests is that the order passed by the Court in the original suit on 27th June 1929 purported to appoint Mt. Morni guardian ad litem of Prem Prakash and did not, in so many words, purport to appoint her guardian ad litem of her other son, Ved Prakash. As soon as the matter is thus put, it becomes clear, to my mind, that the Court below has arrived at an erroneous conclusion. For, what are the facts? As already stated, it is common ground that at the time of the institution of the suit in 1929, and throughout the material period, Bhagwat Saran had only two sons. It is further clear that the plaintiff was ignorant of their correct names and so made a mistake in the names which he gave in his application dated 17th May 1929. It cannot be denied, however, that he did implead both the sons of Bhagwat Saran who were in existence. In his application dated 29th May 1929, Ex. 41, Bhagwat Saran mentioned the correct names and described his existing sons as Prem Prakash and Ved Prakash. In her application dated 11th June 1929, Ex. 25, Mt. Morni described the minors, whose guardian ad litem she had been proposed to be appointed, as "Ved Prakash and Prem Prakash, the sons of this petitioner", and described herself as "Mt. Morni,

wife of Bhagwat Saran, mother of Ved Prakash and Prem Prakash minors." The written statement filed by her on behalf of her minor sons was stated to be the written statement of Ved Prakash, and Prem Prakash. It can be safely assumed that the vakalatnama executed by her must have been as guardian ad litem of Ved Prakash and Prem Prakash. In the vakalatnama, Ex. 37, executed by her when First Appeal No. 314 of 1930 was filed in this Court, she described the minor appellants as "Ved Prakash and Prem Prakash, minor sons of Bhagwat Saran aforesaid, under the guardianship of Mt. Morni, their mother." The vakalatnama filed on behalf of the minor respondents in the plaintiff's appeal, First Appeal No. 521 of 1930, is not before us, but in my opinion there can be no doubt that Mt. Morni correctly described her sons in that vakalatnama also as Ved Prakash and Prem Prakash, In any event, the two appeals were connected and were heard together, and there can be no question that the same minors who were appellants in First Appeal No. 314 of 1930 were the minor respondents in First Appeal No. 521 of 1930.

29. In these circumstances, the only conclusion that can, in my judgment, be arrived at is, in the language of their Lordships, that both the minor sons of Bhagwat Saran who were in existence at the time were substantially sued and that both of them in substance and in reality were parties to the appeals in this Court. It must further be held, again borrowing the language of their Lordships that both of those minor sons were effectively represented by their mother and with the sanction of the Court. It is further clear that there is nothing to suggest that their interests were not duly protected. The only irregularity pointed out, and which has been founded on by the Court below is that the order appointing Mt. Morni as guardian ad litem contains only the name of Prem Prakash and not of Ved Prakash, in other words, that no formal order appointing the mother to be the guardian ad litem of Ved Prakash was drawn up. It has not been shown that this irregularity caused any prejudice to Ved Prakash. It is clear that the interests of the minors were identical with those of their father, Bhagwat Saran. As has been pointed out by their Lordships, it is one thing to say that it is important that the Courts should follow strictly the rules laid down in the Code with regard to the appointment of a guardian ad litem of a minor defendant, but it is quite another thing to say that a defect in following those rules is necessarily fatal to the proceedings. There are a number of cases in this Court in which the rule laid down by their Lordships in ("03) 30 Cal 1021 has been followed, and some of them have been cited at the bar; but, in view of the fact that the pronouncement of their Lordships in ("03) 30 Cal 1021 is perfectly clear it is not necessary to mention any other cases. My conclusion therefore is that the decision of the Court below on this point cannot be sustained. I concur therefore in the order proposed.