

(1921) 12 MAD CK 0035
In the Madras High Court

Chunduru Ponniyya and Others

APPELLANT

Vs

Rajam Viranna and Others

RESPONDENT

Date of Decision : 05-12-1921

Acts Referred:

Citation : AIR 1922 Mad 273 : 70 Ind. Cas. 668

Hon'ble Judges : Spencer, J; Ramesam, J

Bench : Division Bench

Judgement

1. In this case the plaintiffs sued to have a final decree in a mortgage suit set aside in spite of their having been represented in the suit, the mortgage-deed (Exhibit X) was executed by their mother representing them as their guardian in 1900, a year after the death of their father, and thereby a tiled house and site were mortgaged for a sum of Rs. 300 to meet domestic expenses and to provide money for their uncle Galib to carry on cloth trade on their behalf. In the suit that followed, they were represented by the Head Clerk of the District Munsif's Court, Guntur, who suffered a mortgage decree to be passed against them ex parte. It is argued that as they did not appeal or apply to have the ex parte decree set aside or file a review petition, the decree had become final and they cannot avoid it without proof of fraud or collusion. Reliance has been placed on an observation of Richards, C.J. in Beni Prasad v. Lajja Ram 35 Ind. Cas. 63 that in a case where a guardian has merely conducted the case of a minor with gross negligence it is Open to a minor to seek relief by way of review of judgment, but that if a decree has been obtained against a minor properly made a party and properly represented, the plaintiff can only succeed in setting aside such a decree in a separate suit upon proof of fraud and collusion. The learned Judges quoted the words of Field, J. in Raghubar Dyal Sahu v. Bhikya Lal Misser 12 C. 69 . But in the Allahabad case it was found as a fact that even negligence had not been established and in the Calcutta case, while recognizing that in England gross laches would give an infant a legal right to re-open an action by a new bill and that the procedure in this country was different, the learned Judge was of opinion that fraud or collusion must be proved and that nothing less would

suffice. From this opinion we must, with due respect, express our dissent. The Bombay and Calcutta High Courts in *Hanmantapa v. Jivubai* 2 Bom. L.R. 478 and *Lalla Sheo Churn Lal v. Ramnandan Dobey* 11 Ind. Dec. 7 have put fraud and negligence of a guardian on the same footing; and this Court in *Gottepati Subbanna v. Gottepati Narasamma* 27 M.L.J. 486 ; *Sankaran Nair, J.* and I held that a minor was not bound by a decree passed against him in a suit where his guardian showed gross negligence as by not setting up a good defence of which he must have been aware, and our decision was followed by *Krishnan, J.* in *Ayya Nadan v. Thanammal* 55 Ind. Cas. 945 . Neglect by a guardian to plead past payment or to object to a personal decree being passed against minors was held in *Grish Chunder Mookerjee v. Miller* 3 C.L.R. 17 to be gross misconduct amounting to fraud. In *Parmeswari Pershad Narayan Singh v. Sheo Dutt Rai* 6 C.L.J. 448 an attempt was made to define the sort of negligence on the part of the next friend of a minor that would enable we minor to impeach a decree to which he was a party. It must be such negligence as leads to the loss of a right which might have been successfully asserted if the suit had been defended with due care. For instance, a mere omission On the part of a guardian to appear at the trial would not amount to gross negligence if there was no good ground of defence to put forward on the minor's behalf, but it would be gross negligence not to defend the suit if there was a valid defence available. If an application for review would be an ineffectual remedy a plaintiff should not be denied the only effectual remedy open to him, namely, a fresh suit see *Dabee Dutt Shahoo v. Subodra Bibee* 25 W.R. 449 and *Trevelyan on Minors* 286 and 287 A minor is entitled to have a next friend who is diligent and will protect his interests Vide *In re Hoghton Hoghton v. Fiddey* (1874) 18 Eq. 573 . In the present case it would be futile to refer the plaintiff to a review application or a petition under Order IX, Rule 13, Civil Procedure Code, as the time for such remedies has expired long ago.

2. We hold then, that the plaintiffs are entitled to maintain this suit if the Court is satisfied that their guardian ad litem seriously neglected their interests. It must have been patent to any intelligent person with an elementary knowledge of Hindu Law that a mortgage of Immovable property for the purpose of lending money to a maternal uncle for a trade that was not ancestral was prima facie not a transaction for the benefit of the minor and that the suit might have been resisted upon that simple ground.

3. The Head Clerk who acted as their guardian has not been examined and asked questions to elicit whether his inaction could from any point of view be justified.

4. His conduct in not defending the suit was, in the absence of any reason to the contrary, grossly negligent.

5. The Subordinate Judge's finding that the mortgage in question does not bind the plaintiffs is correct and the appeal is dismissed with costs.