

(1915) 09 MAD CK 0041
In the Madras High Court

Davuluru Vijaya Ramayya

APPELLANT

Vs

Davuluru Venkatasubba Rao and Others

RESPONDENT

Date of Decision : 16-09-1915

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 7

Citation : (1916) ILR (Mad) 853 : (1916) 30 MLJ 465

Hon'ble Judges : Tyabji, J;Ayling, J

Bench : Full Bench

Judgement

Tyabji, J.—The present plaintiffs who are minors were parties to Original Suit No. 416 of 1905 which had been instituted by the present 1st

defendant for partition. That suit was in the First Court referred to arbitration (by orders in November 1906 and March 1907). The award was

dated 9th April 1907 and a decree passed in accordance with it. The present plaintiffs' father appealed from the decree passed on the award

(A.S. No. 504 of 1907). The appeal was compromised and a decree was purported to be passed therein by the consent of the parties. The

present suit is to have it declared that the consent decree does not bind the plaintiffs, to have it set aside, to obtain possession of the properties

mentioned in the plaint, and other reliefs.

2. It is admitted that, neither the reference to arbitration nor the consent decree was with leave of the court under Order 32, Rule 7 (Section 462 of

the Civil Procedure Code, 1882). I shall in the rest of my judgment refer only to the Code of 1908 though most of the decided cases are of course

on the Code of 1882. At an earlier hearing it was held by this Court that the compromise was on this ground voidable by the plaintiffs, and findings

were called for. The finding on the 4th issue is (admitted to be one of fact which we cannot question in second appeal. The other findings are contested.

3. It is contended for the appellant that as the consent decree in appeal is inoperative, the decree passed in the original court must revive, and that, as that decree was passed on an award, it cannot now be set aside, but has become final.

4. The respondent in answer contends in the first place that the decree on the award was finally and effectively set aside by the appellate consent decree, notwithstanding that the plaintiffs elect to avoid the latter. But the plaintiffs having elected to avoid the consent decree must do so in toto so far as they are concerned, and cannot, after avoiding it, rely upon it for the purpose of rescinding the decree which it purported to supersede, and which it would have superseded only if it had been of any legal effect.

5. The real point on which the parties" are at issue is, the appellate consent decree being out of the way, to what extent is the decree on the award

binding on the minors? The "appellant"s argument is based on two cases decided by the Allahabad High Court which are directly in point : Hardeo

Sahai v. Gauri Shankar ILR (1905) A. 35, and Lutawan v. Lachya ILR (1913) A. 69. The grounds on which the first of these decisions proceeds

are:

(a) that Schedule II to the Civil Procedure Code, 1908, relating to arbitration proceedings, contains special proceedings which are not subject to

Order 32 Rule 7

(b) that there is nothing in Schedule II requiring the Court to give leave to the parties to make the application for a reference to arbitrations where

minors are concerned ;

(c) that an application made under Schedule II paragraph 1 is very different from an agreement or compromise contemplated by Order 32, Rule 7;

and

(d) that assuming that Order 32, Rule 7 applies, and has been violated, once a decree is passed in accordance with the terms of an award, it can

only be impeached on one of the grounds mentioned in Schedule, II, paragraph 16, that is only if, and in so far as, (i) the decree is in excess of or

(ii) not in accordance with the award.

6. In the second case above alluded to, *Lutawan v. Lachya* ILR (1913) A. 69 Richards, C.J., and Ryves, J, approve of the decision in *Hardeo*

Sahai v. Gaiiri Shanhar ILR (1906) A. 35; Banerji J. proceeds on a different basis.

7. I shall deal for the present only with the first three reasons above stated which are cognate to each other.

8. With all deference I cannot agree that arbitration proceedings can be considered to be special, in the sense that acts of the guardian ad litem or

next friend of a minor. - I shall include both in the term guardian ad litem - "in regard to those proceedings, are unaffected by Order 32 Rule 7,

which defines the powers of guardians, The first step in arbitrations is that the parties should agree to refer; it is also contemplated that they agree

upon the arbitrator. (Schedule II, paragraphs 1, 2, 7, 17). See *Ghulam Khan v. Muhammad Hassan* ILR (1902) C. 167, and *Luxmi Bai v. Hajee*

Widina Cassum ILR (1899) B. p. 629. Where the parties are before the Court as plaintiffs and defendants in a suit, and any of them is a minor,

such agreements on behalf of the minor can be entered into only at the instance of the guardian ad litem "Order, 32 Rule 5. It would be

supererogation to expect that whenever any enactment contemplates the doing of any act by the guardian ad litem (e. g., entering into an agreement on

behalf of the minor) the provisions contained in Order 32 Rules 6, 7, which define the powers of a guardian ad litem should be repeated in that

enactment. To say that those provisions are not to be given effect to unless they are repeated in every other Act is to make them a dead letter

where they stand. If the provisions contained in the CPC are not to govern arbitration proceedings as laid down in a schedule to the same Act

what force can they have in regard to any independent enactment? See *Mahadeo Balhrishna v. Krishnabai* (1896) B.H.C. 609 referred to in

Vithaldas v. Dattaram ILR (1901) B. 298 during arguments.

9. Here I may refer to an argument of Richards, C.J. and Ryves, J. in *Lutawan v. Lachya* (1913) 36 A. 69, viz., that in Schedule II paragraph 1

the expression agree is to have no different force from the term desire, the latter word being what was contained in Section 506 of the Code of

1882. But where a particular word is altered in a provision which is in other respects re-enacted, it is hardly permissible to interpret the latter

provision on the basis that in spite of the alteration, the enactment will have the same force as if the original word had been retained. It seems to me

that the legislature substituted for the vague expression desire the more definite expression agree, which is legislatively defined, and frequently

interpreted judicially. But in the present case reading the word ""desire"" for ""agree"" cannot support the argument based upon it. For the desire of a

minor to refer to arbitration must in the first instance be communicated to the other parties concerned and then to the Court through an application

made by his guardian ad litem, and as the order granting the application can be made only by the consent of the parties, it must be sanctioned by

the Court on behalf of the minor ; Ghulam Khan v. Muhammad Hassan ILR (1902) C. 167, Luxmibai v. Haji Widina Cassum ILR (1899) B. 304.

10. The learned Subordinate Judge followed Lalshmana Ghetti v. Chinnathambi Chetti ILR (1900) M. 326 considering it to be directly opposed

to the Allahabad decisions above mentioned. It is there decided that as the award therein was not made after a reference by the Court, it could

only be taken cognizance of (if at all) as an adjustment of the suit (Order 23, Rule 3), The Court assumed, without deciding, the correctness of the

view expressed by Starling, J, in Samibai v. Premji Pragji ILR (1895) B. 304 that ""an agreement to refer coupled with the award resulting from the

reference may be treated as an adjustment. T. Venkatachalla Reddi Vs. T. Rangiah Reddi and Others, . The grounds for making this assumption

have become stronger since Lakshmana Ghetti v. Ghinnathambi Chetti ILR (1900) M. 326 was decided as a similar decision is given by Jsnkim,

C.J. and Starling, J. in Pragdas v. Girdhardas ILR (1901) B. 76 and it is not rejected in Tincowry Dey v. Fakir Chand Dey ILR (1902) C. 218

and T. Venkatachalla Reddi Vs. T. Rangiah Reddi and Others, .

11. The result of Lakshmana Chetty v. Chinnathambi Chetty ILR (1900) M. 326 in the light of the later cases may be taken to be that (1) where

there is an agreement to refer to arbitration, followed (without the intervention of the Court) by an award, the two together may form "" such an

agreement, compromise or satisfaction "" as has to be recorded by the Court under Order 23, Rule 3 and in accordance with which a decree has to

be passed : and (2) that in such a case it is necessary if any minors are concerned that leave of the Court should be obtained under Order 32, Rule

7 either before the submission to arbitration or after the award, otherwise the award cannot take effect as such agreement, compromise or

satisfaction. Hence unless leave has been obtained, the minor is not bound by it the Court must proceed with the suit so far as he is concerned, and

cannot merely pass a decree in accordance with the award.

12. In the present case we have a reference through the Court, and the gist of this part of the appellant's argument is that such a reference is not an

agreement or compromise within Order 32, Rule 7. The decision of this question depends in the first instance upon the provisions of the law relating

to references through the intervention of the Court, to which I shall presently refer more fully.

13. It seems to me, however, a legitimate argument on the side of the respondents to rely upon the following words in Lakshmana Chetty's case

ILR (1900) M. 326 : The effect of the submission was to take away from the Court the power of adjudicating upon the rights of the minors, and to

leave such adjudication to a private tribunal. Such an agreement seems to us to be clearly one falling within Section 462 (Order 32, Rule 7) of the

Civil Procedure Code." Thus a submission to arbitration without an order of the Court pending a suit, was considered by the Court to be an

agreement of the nature referred in Order 32, Rule 7. The opinion so expressed is opposed to the view taken in Hardeo Sahai v. Gauri Shankar

ILR (1906) A. 35, unless it can be shown that there is nothing common between such a submission and a submission through the Court. But the

preliminary agreement to refer (on which an application to the Court under Schedule II paragraph 1 is subsequently based) must be exactly of the

same nature as that which the Court was considering in Lakshmana Chetti v. Chinnathambi Chetti ILR (1900) M. 326. This preliminary agreement

must always be entered into out of Court. It is only after such an agreement has already been arrived at that the parties may follow or make a

departure from the provisions of Schedule II; (1) they may apply to the Court for an order of reference, or (2) proceed with the arbitration without

such an order. If they choose to apply to the Court, does their agreement to submit to arbitration become (at the hearing of the application)

something other than an agreement, merely by reason of their application? It may be argued that after the Court makes an order upon the

agreement, its original character merges in the order of the Court. The answer is that by reason of Schedule II paragraphs 2 and 3, the order of the

Court is entirely based on the agreement. The Court does not in referring the matter to the arbitrator exercise any judicial discretion, and the

passing of such an order on the agreement is hardly more than a ministerial act. The analogy between an order passed on an agreement to refer to

arbitration, and a decree passed on compromise falling under Order 23, Rule 3 is complete. Where a compromise on behalf of a minor has not

been sanctioned by the Court under Order 32, Rule 7, it acquires no validity by reason of a decree having been passed on it : *Ganesha Bow v.*

Tuljaram Row ILR (1913) M. 295. Equally it seems to me that where an order is passed on an agreement to refer, the order has no more validity

in regard to the sanction of the Court, than the agreement itself.

14. As against these considerations the decision in *Ghulam Khan v. Muhammad Hassan* ILR (1902) C. 167 was relied upon by the appellant.

Lord Macnaughten there said : "" In cases falling under Head I the agreement to refer and the application to the Court founded upon it must have

the concurrence of all parties concerned and the actual reference is the order of the Court. So that no question can arise as to the regularity of the

proceedings up to that point."" In the sentences immediately following he describes an application under paragraph 17 or 20 as a ""litigious

proceeding,"" in the sense that "" Cause may be shown against the application."" Reading the whole of the paragraph together it seems to me that

nothing more is meant than that when the parties have agreed to a proceeding they cannot object to it. The words ""no question can arise as to the

regularity of the proceedings up to that point"" cannot imply that the validity of "" the agreement to refer "" (which, as Lord Macnaughten expressly

says, ""must be the agreement of all the parties to the suit"" (p. 182) and ""must have the concurrence of all parties concerned"" (p. 183) can never be

questioned, or that if questioned before a Court competent to decide upon it, then the provisions of the CPC are not to be considered for

determining whether the guardian was entitled to bind the minor--this question being involved in the question whether the agreement to refer had

the concurrence of all the parties concerned.

15. His Lordship however also stated that ""there did not appear to have been

any substance in any of"" the objections raised against the award -

the first of these being that the defendant's guardian had agreed without leave of the Court to refer the case to arbitration. It was argued that this

expression of opinion must be taken to mean that leave is unnecessary.

16. But this does not seem to be so. The allegation that at the time of the reference leave of the Court had not been obtained, was apparently

brought to the notice of the Subordinate Judge (see *Ghulam Khan v. Muhammad Hassan* ILR (1902) C. p. 167, and he nevertheless pronounced

judgment in accordance with the award. As implied in *Laltihmana Chetti v. Chinnathambi Chetti* ILR (1900) M. 326, the leave may be obtained

either at the time of agreeing to refer or after the award. Their Lordships of the Privy Council in *Ghulam Khan v. Muhammad Hassan* ILR (1902)

C p. 167, point out that the award was a fair and reasonable settlement. Therefore the objection was characterised as one in which there was no

substance. It is also noticeable that their Lordships refer (p. 184) to the objection that the award was bad because the Court had no jurisdiction

and dispose of this objection by saying that the Court will not sit as a Court of Appeal on awards in respect of matters of fact, or of law and cite

Adams v. Great North of Scotland Railway Co., (1891) A.C. 31. But there is no reference to the point whether the minors were bound by the

award; see also *Jones v. Powell* (1886) 6 Cas. 489 *Weightson v. Bywater* (1988) M W. 199.

17. In my opinion therefore the agreement contemplated in Schedule II, paragraph I et seq. is an "" agreement with reference to the suit"" under

Order 32, Rule 7 and it is not validly entered into on behalf of a minor where the guardian of the minor purports to bind the minor without the leave

of the Court expressly recorded and thus exceeds the authority given to him by the said rule.

18. The last ground (d) mentioned above must now be considered. It was contended that the decision of the Judicial Committee reported in

Ghulam Khan v. Muhammad Hassan ILR (1902) C. p. 167 is a direct authority in its favour.

19. Before dealing with this aspect of the case it is necessary to refer to the relevant provisions of the Code with particular reference to the

question whether any means are available to a minor for rectifying an order of

reference made without leave of Court under Order 32, Rule 7.

20. The first stage in arbitration proceedings under Schedule II is, as I have already said, to agree to refer. Next comes the application to the Court

under paragraph 8. The leave of the Court under Order 32, Rule 7, may then be obtained. Where this is omitted to be done, the arbitration

proceeds independently of the Court, unless the Court is asked to make an incidental order subserving the course of the arbitration proceedings,

which it is empowered to make in regard to the following matters:

(1) fixing or enlarging the time for making the award : paragraphs 3 (1), 4 (2), and 8.

(2) providing for the course to be followed in cases of disagreement between two or more arbitrators (when the parties are not able to agree) :

paragraph 4 (1)(d).

(3) appointing an arbitrator or umpire : paragraph 5(2).

(4) giving leave to the arbitrator to state a case : paragraph 11. Apart from these incidental orders, the powers of the Court that has made an order

of reference, as well as of the Appellate Court over the litigation or the arbitration are restricted (paragraph 3(2)) to making one of the following 6

classes of orders:

(i) The Court making the reference may make an order superseding the arbitration, but only where there has been failure (a) to appoint an

arbitrator or umpire or (b) to make the award in time; paragraphs 5, 8.

(ii) It may modify or correct the award if (a) it deals with a matter not referred to, or contains some, (b) formal or (c) obvious or (d) clerical

mistake etc : paragraph 12.

(iii) It may remit the award to the reconsideration of the arbitrator if (a) some matter that ought to be determined by him has been left

undetermined, or (b) vice versa, or (c) if it is indefinite, or (d) there is an objection to its legality apparent on the face of it ; paragraph 14.

(iv) It may supersede the arbitration and proceed with the suit after setting aside the award in the circumstances mentioned or implied in paragraph

15, viz., (a) for corruption or misconduct of the arbitrator; (b) for fraudulent concealment etc.; (c) the award having been made-

(1) after an order of supersession by the Court (under paragraph 5 or 8).

- (2) after the expiration of the period allowed by the Court;
- (3) being otherwise illegal;
- (d) the award having been remitted and the arbitrator or umpire having failed to re-consider it (paragraph 15, first sentence) ;
- (v) it may pronounce judgment in accordance with the award : (paragraph 16).
- (vi) From a judgment pronounced by the Court making the reference under the last mentioned provision there is no appeal except in so far as the decree is (a) in excess of, or (b) not in accordance with the award.

21. It will be observed that the first class of orders may be made before, and the rest after the award has been made : the 5th is merely to give

effect to the award : the first 5 are powers to be exercised by the Court making the reference; the 6th class alone refers to the powers of the

Appellate Court, which (so far as the provisions now under consideration are concerned) are defined only in regard to cases where the Court

making the reference has passed an order under the fifth head : there are no provisions regarding the Appellate Court's power where the Court

making the reference has exercised any of its powers under the first 4 heads.

22. These powers do not, it is apprehended, affect the Court's powers of reviewing its own judgment. But the power of review need not now be

considered. I now come to deal with the decision in Ghulam Khan v. Muhammad Hassan ILR (1902) C. 167.

23. The argument before the Privy Council was that the award was not a valid and legal award - (1) having been made without jurisdiction -

jurisdiction having been taken away, from the Civil Courts by the Punjab Tenancy Act, and (2) the agreement, to refer to arbitration having been

without leave of the Court under Order 32 Rule 7.

24. The question directly decided was whether there was any ground, (1) on which an appeal lay, or (2) on which the Chief Court of the Punjab

could have exercised its powers of revision. Each head of this question was answered in the negative for the reasons.

(1) that no appeal lies except in so far as the decree is in excess of or not in accordance with the award, (6th head above) and this was not alleged,

(2) that revision was not permissible, as (a) it would lay the finality of an award open to question, (b) being avowedly an application to set aside the

award it was barred by limitation, and (c) even if it were not barred, the Subordinate Judge had in the events that had happened, no option but to

pass a decree in accordance with the award, and had strictly followed the course prescribed by the Code.

25. Their Lordships' decision therefore referred directly only to the powers of the Appellate Court in cases where the Court making the reference

has proceeded under the fifth head and consequently where the Appellate Court's powers are subject to the 6th head above.

26. Previous to this decision it had been held by the Privy Council (approving the trend of decisions in India) that the finality of a decree on an

award depends upon the award itself being valid and legal and that therefore an award may be shown in appeal to be illegal in which case the

decree on the alleged award would be set aside and suits ordered to be proceeded with; *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar*

ILR (1891) A. 300 A.c. See also *Maharajah Joymungul Singh Bahadoor v. Mohanram Marwaree* (1875) 23 W.R. 129 C.R. (referred to in

Nandram Dahuram v. Nanchand Jivchand ILR (1892) B. 357.

27. I need not consider such cases as *Atchutayya v. Thimmayya* 18 M.L.J. 229 which had held that on appeal from the final decree passed after

an award has been set aside, the propriety or otherwise of setting aside the award may be considered by the Appellate Court. Those cases have

reference to the powers of the Appellate Court when they are not restricted by the 6th head above. In *Raja Har Narain's* case (1) their Lordships

of the Privy Council approved of this view, and proceeded further. For, reversing the decrees of both Courts in India, they set aside a decree

based on an award which was shown to have been made after the expiry of the time fixed for the making of the award, thus in effect enlarging the

powers of the Appellate Court under the 6th head, by adding to it the power to set aside a decree passed in accordance with the award when it is

found that the award itself was illegal on one of the grounds mentioned in paragraph 15. On this point there seems to be a conflict between *Raja*

Har Narain's Case (1891) 13 A.P 300 and *Ghulam Khan v. Muhammad Hassan* (1901) 29 C. 167. In the judgment in *Ghulam Khan's* case ILR

(1901) C. 167, however the point (though argued in appeal) was not alluded to. The decision in *Raja Har Narain's Case* ILR (1891) A. 300 was

apparently not cited to the Privy Council in *Ghulam Khan v. Muhammad Hussan* ILR (1901) C. 167, nor is it alluded to in the judgments of the Punjab Chief Court.

28. The conflict between *Raja Har Narain's* case ILR (1891) A. 300 and *Ghulam Khan v. Muhammad Hussan* ILR (1901) C. 167, is explained

in *Rajaram Dassi v. Ganesh Prasad Mohapatra* 14 C.W.N. 626, by the fact that in the earlier case the question of the competence of a Court of

appeal was not raised, but it is noticeable that Lord Morris said in the beginning of his judgment that the case had to be decided upon the

construction of Sections 508, 514 and 522 of the Civil Procedure Code; and in the absence of express reference to *Baja Har Narain's* case ILR

(1891) A. 300 in *Ghulam Khan v. Muhammad Hussan* ILR (1901) C. 167, we cannot proceed on the basis that that case has been overruled :

and we must as far as possible give effect to both pronouncements of the Judicial Committee.

29. The two decisions can be partially reconciled if *Ghulam Khan v. Muhammad Hassan* ILR (1901) C. 167 is taken as deciding that the matters

on which the decision of the Court making the reference is final (provided it upholds the award) must be connected with the proceedings before the

arbitrator (see paragraphs 14 and 15). That something to this effect was in the minds of their Lordships is indicated by the following expressions :

The Court makes an order of agreement (which must be the agreement of all the parties to the-suit""), ""In cases falling under head 1 the agreement

to refer and the application to the Court founded upon it must have the concurrence of all parties concerned and the actual reference is the order of

the Court. So that no question can arise as to the regularity of the proceedings up to that point. "" Thus they assume that the regularity of the

proceedings up to that point is not in question. Their Lordships also cite *Adams v. Great North of Scotland Raiway Co.* (1891) A.C. 31, the first

portion of the head note to which seems to me to represent correctly the views expressed by Lords Halsbury and Watson in the following terms

The Act of Regulations of 1695, which provides that"" for the cutting off of groundless processes in time coming the Lords of session sustain no

reduction of any decrees arbitral pronounced on a prescribed submission upon any cause or reason whatsoever unless that of corruption, bribery,

or falsehood to be alleged against the Judges" arbitrators was intended to put an end to the practice which had previously obtained of reviewing awards upon the merits; but not to prevent the Courts from setting aside an award where the arbitrator has exceeded his jurisdiction or has disregarded any one of the expressed conditions or the submission, or the conditions implied by law, or has been guilty of misconduct in the course of the reference or in the making of the award.

30. This view of the case in *Ghulam Khan v. Muhammad Hussan* (1891) 13 A.P 300, seems also to have been taken in *Walji Mathuradas v. Eliji*

Umersey ILR (1000) B. 289, by Jenkins, C.J. and Batchelor, J., who referring to *Nandram Daluram v. Nemchand Jadawhand* ILR (1892) B.

289, say "" But the Bombay case only decides that an appeal lies where the award is illegal ab initio, or, in other words, where in law there is no

award. Obviously if there is no award, there is no basis for the decree."" The case in *Ghulam Khan v. Muhammad Hassan* ILR (1892) B. 357, is

cited by them at the end of the judgment. *Surya Narayana Rao v. Sarabhaiah* (1910) 21 M.L.J. 263, may seem at first sight to be against the view

I am taking, but the question referred to the Full Bench shows that the objection to the award was that on the refusal of two arbitrators to act and

on their subsequent death the Court had appointed new arbitrators in their stead and three of the old and the two new arbitrators had made the

award. This was clearly an objection to the proceedings in arbitration, on all of which the Court making the reference has to decide finally under

the new Code, The Chief Justice (with whom Ayling J. agrees) at page 276 distinguishes *Raja Har Narain's Case* ILR (1891) A. 300, from

Ghulam Khan v. Muhammad Hussan ILR (1902) C. 167. *Krishnaswami Aiyar, J.* does the same and points out (page 278- 279) one kind of

invalid awards which would not be covered by paragraph 16.

31. In the case before us the award is not said to be invalid for any corruption or misconduct on the part of the arbitrator or of the parties to it

during the arbitration. The Court is not asked as a Court of Appeal to examine whether or not the conclusion at which the arbitrator had arrived

was sound in point of law or in point of fact. *Adams v. Great North of Scotland Railway Co.* (1891) A.C. 31 per Lord Halsbury. What we are

asked to pronounce upon is quite distinct, whether the proceedings not of the

arbitrator, but of the Court bind the minors or are voidable by them.

32. It seems to me therefore though not without hesitation that the principle of finality which finds expression in the Code Gulam Khan v.

Muhammad Hassan ILR (1902) C. 167 does not affect matters which are outside the arbitration proceedings. The objection in the present case is

therefore not barred.

33. It has not been contended before us that the minors could in the present case have avoided the arbitration proceedings except by instituting a

suit to have it declared that the decree which purports to bind them is a nullity.

34. For these reasons in my opinion it was competent to the minors to institute the present suit and to obtain a declaration that the decree on the

award does not bind them.

Ayling, J.

35. I agree.

36. This Second Appeal came on for further hearing on Monday the 6th September 1915, when the Court delivered the following.

JUDGMENT

1. On a previous occasion, we delivered our judgment holding that the minor was entitled to avoid the decree against him. We let the appeal stand

over in order that the learned vakils may address us on the exact form in which our order should be framed.

2. It has been argued before us to-day that the decree which the minor seeks to avoid is of such a nature that it cannot be avoided only as against

him and not as against the other parties to it. It is a partition decree under which the property is divided into two moieties. We have referred to the

terms of the decree and to the facts of the case and we are satisfied that the contention is correct. In our opinion it would be quite impracticable

and highly inequitable to allow the minor to avoid the decree only in part. His avoidance of it must be entire as his rights and liabilities under the

decree are not separable from the rights and liabilities of the other party to the partition.

3. It was then argued by Mr. Nagabushanam that we cannot in the present appeal order that the original suit which has been compromised in the

decree that has now been declared to be voidable, should proceed. We accede to

the contention We are not seised of that suit and we cannot pass any orders with reference to it. Formally our order will merely be that the minor is entitled to avoid the decree and we shall (should the minor exercise that option) record the fact that he has exercised the option but we cannot further give any directions in regard to the previous suit.

4. It is, however, a part of Mr. Nagabhushanain's argument not only that we cannot in our decree give any such directions as aforesaid to the

Court seised of the other suit, but that our order will not have the effect of reviving that other suit. This is a point concerned with the effect and

interpretation of our order and we have heard arguments on the point and consider it imperative on us to give a decision on it. We are of opinion

that the effect of our order is that the minor has the option of avoiding the decree in to to, but that he has no option (even if it were possible to be

done in the circumstances of this case) to avoid the decree in part only. Should then the minor avoid the decree the appellant will be able in our

view to go to the Court of the District Munsif of Gudivada where the original, suit was institute 1 and ask the Court to proceed on the basis that

there is no decree in the suit, inasmuch as the minor has been declared to be entitled to avoid the decree and has exercised that option. On this we

expect that the Court will proceed with the trial of the suit, as after the avoidance of the decree the suit will be without any proper or final

adjudication.

5. Mr. Nagabhusanam relied upon Bhimaji Govind v. Rukmabai ILR (1895) B. 338 in which the Court refused to have the suit restored to the file.

We do not intend to lay down that the Court may not on occasions do that. The avoidance by the minor of a decree against him may in some cases

ipso facto be tantamount to an adjudication of the suit; in others it may be possible and proper for the Court merely to avoid such a part of the

decree as would affect the minor and that part may be separable from the rest. This seems to have been the case in Pasupathi Nath Bose v. Nando

Lal Bose ILR (1902) C. 118 where however in any case the matter arose in execution, and the Court considered that the decree had not as a

matter of fact been set aside as against or between the parties other than the minor. The same seems to have been the case in Manohar Lal v.

Jadunath Singh ILR (1906) A. 585, where the Privy Council evidently considered

that it would be proper to let the decree stand as against others than the minors. In these cases however it was not, and could not be, considered what was to be the result of the suit so far as the decree had been set aside i.e. as between the minor and the other parties to the decree. As to that part of the decree the cases show that the parties are relegated to their original rights.

6. The decision in *Earl of Bandon v. Bicher* 3 Cl. & Fin 479 cited in *Bhimaji Govind v. Rukmabai* ILR (1885) B. 333 is not opposed to the view

we have expressed. In form we cannot order that a suit from which there is no appeal before us should be proceeded with, notwithstanding that it might have been instituted in a Court subordinate to us, any more than the Court of Chancery could review a decree of the Court of Exchequer.

But that is not what we are doing. We are merely declaring the terms on which in the present case the minor can avoid the consent decree. In our opinion it is impossible to let him avoid it only in part.

7. *Mewa Lal Thakur v. Bhujhunja* (1874) 13 Beng. L.R. App. 11 proceeds on the basis that the only proper course where a decision is alleged

to be fraudulently obtained is to apply by review. That course is not in the light of more recent decisions now alleged, to be the only available

course. Apart from this *Mewa Lal Thakur v. Bhuihun Jha* (1874) 13 Beng. L.R. App. 11 supports the view that the real effect of avoiding a

decree is to require that the the suit should proceed till a valid decree is passed therein.

8. The view we have taken seems to us to be supported by *Khaioornissa v. Rowghan Jehan* ILR (1876) C. 184.

9. We declare therefore that the minor is entitled if he elects to avoid the decree in Suit No. 416 of 1905 on the file of the District Munsif of

Gudivada and we give him 10 days to let us know whether the option hits been exercised.

10. [This case again came on for further hearing on Thursday, the 16th day of September 1915 when the Court delivered the following]

JUDGMENT

1. It is now stated to us that the minors elect to avoid the decree in Original Suit No. 416 of 1905 and we declare that the decree is of no effect.

The trial of that suit will no doubt proceed if a proper application is made to the

proper Court, though we cannot make any order as to that in the present appeal.

2. We set aside the decree of the Lower Court so far as the 1st defendant is ordered to put the plaintiffs into possession.

3. We have heard the vakils on the question of costs. In our opinion the suit has resulted from errors in procedure for which we cannot hold one

side to be more at fault than the other. The most proper course seems to us to order each side to bear his or her own costs throughout.