

(1936) 03 CAL CK 0049
In the Calcutta High Court

Monmohini Das Purkayastha and Others	APPELLANT
Vs	
Behari Shaha and Others	RESPONDENT

Date of Decision : 25-03-1936

Acts Referred:

Citation : AIR 1936 Cal 421 : 166 Ind. Cas. 415

Judgement

1. This is an appeal from the decision of our learned brother R.C. Mitter, J. The plaintiff appellant instituted a suit, Title Suit No. 2149 of 1909, in the Court of the Munsif at Sunamgunj in the District of Sylhet, for possession, on declaration of his title, and there were other incidental and consequential reliefs prayed in the suit, which was filed in Court on 16th July 1909, against nineteen persons impleaded as defendants; to meet the objection on the score of defect of parties, raised by the defendants, 52 more persons were added as defendants. Of these defendants subsequently made parties to the suit, defendants 41 to 43 were minors at the time when they were made defendants to the suit; the mother of these three defendants was proposed as their guardian and the order of the Court relating to the matter of appointment of guardian of defendants 41 to 43, passed on 11th June 1910 was this:

Service of notice pressed on 16th April 1910. No objection petition filed yet. The proposed guardian be appointed guardian for the minor defendants to conduct the case.

2. There was no appearance by any of the defendants in the suit and the suit was decreed in favour of the plaintiff. The decree of the Court of first instance was ultimately affirmed by this Court on 23rd April 1914, on a second appeal preferred by some of the defendants in the suit. In the year 1918, defendants 41 to 43 in the suit instituted a suit, Title Suit No. 47 of 1918 subsequently registered Title Suit No. 12 of 1919, for a declaration that the decree passed against them in Title Suit No. 2149 of 1909 was invalid and inoperative against them, on the ground that there was no proper appointment of a guardian to represent them in the suit. The aforesaid suit No. 47 of 1918, was decided in

favour of defendants 41 to 43, the plaintiffs in that suit, on the ground that the mother proposed as guardian had not consented to her appointment, as the guardian-ad litem of her minor sons, and that it was settled law that no person could be appointed guardian-ad-litem of a minor without express consent. It was held that the decree passed in the suit being ineffectual and inoperative against defendants 41 to 43, they were not bound by it. The decree passed in Title Suit No. 2149 of 1909 was declared null and void and inoperative against these defendants by the decision and decree passed by the Additional Subordinate Judge, Sylhet, on 20th September 1919. Thereafter, on the January 1928, the plaintiff filed an application in the Court of the Munsif at Sunamgunj, praying that the Title Suit No. 2149 of 1909, be proceeded with, as against defendants 41 to 43, and the application was allowed, the suit being revived.

3. The result of the hearing of the suit after its revival was that the suit against defendants 41 to 43 was decreed in part on contest by, the said defendants. The decree passed by the trial Court on 16th December 1931 was affirmed by the Subordinate Judge, in the lower appellate Court, on 20th December 1932, with certain modification, as mentioned in the ordering portion of the judgment of the Subordinate Judge. On appeal by defendants 41 to 43 to this Court, the decision of the lower appellate Court was reversed, and the decree passed by the lower Court directed against defendants 41 to 43 were discharged by our learned brother R.C. Mitter, J., on the ground that the suit against the order of revival of the suit against defendants 41 to 43 was without jurisdiction. It may be noticed in this connexion that the decision of Mitter, J., is in favour of affirming the decision of the lower appellate Court on the other questions relating to the merits of the case before us and the question of limitation arising in the same.

4. In the appeal before us preferred by the plaintiff, the first ground urged was that the learned Judge of this Court was not right in the view taken by him that the rule was well settled that if a decree passed against a person was set aside by a decree passed in a suit brought to set it aside, the original suit was revived and must be proceeded with, could not be extended or applied to a case where the decree passed is null and void on the ground that it was passed against the minor who was represented by a guardian-ad-litem. In the case before us the Court made an order appointing a guardian-ad-litem without express consent, there having been no objection to the proposal for appointment of guardian; this was not strictly in accordance with law, in view of the provisions introduced some time before the order in question was made in the year 1910, that "no person shall without his consent be appointed guardian for the suit" [Order 32, Rule 4 (3), Civil P. C.]. A decree followed, after the order defective under the existing law was made. Defendants 41 to 43 instituted a suit for avoiding the decree, and relief was given to them in terms of the prayer made by them. The decree passed in Title Suit No. 2149 of 1909 was declared null and void and inoperative as against them, on the finding that they were not bound by it. The expression that the decree was set aside was not used in view of the position that defendants 41 to 43 prayed, for a declaration only and not for a consequential

relief, which they could very well have done in the circumstances of the case before us. The effect of the decree of the suit of 1918, brought by defendants 41 to 43, was that there was a declaration that the procedure adopted in the matter of appointment of guardian was defective and the decree passed in suit was inoperative so far as those defendants were concerned.

5. There is no difference in substance as between declaration that a decree is null and void and inoperative as such and setting aside the same in a case in which the only prayer was for a declaration that a decree was inoperative. This distinction was far too technical to be appreciated properly; and it could not, in our judgment, be allowed to stand in the way of justice being done in a case. The authority of decisions of this Court are, as has been pointed out by our learned brother, in favour of the position that the original suit is revived, and must be proceeded with, in the case of a decree being set aside in a suit brought for the purpose of setting aside the same; and no authority of any decided case was pointed out to us that there is any difference in substance as between a decree declaring a decree null and void and inoperative as such and a decree setting aside a decree previously passed on the ground that a procedure followed was defective under the law. In our judgment, there is no difference in substance or principle between a case in which a decree passed against a person is set aside by a subsequent proceeding and a case in which the decree is declared null and void and inoperative in subsequent proceedings; and the suit in which the inoperative decree was passed can be revived against a defendant in whose favour such a decree is passed in a subsequent proceeding.

6. The question next raised in support of the appeal was, whether Mitter, J., was right in his decision that defendants 41 to 43 were not parties to the suit in the eye of the law, and the suit could not for that reason be revived later on, against persons who were not parties to it at all, at the time when the decree was passed in it. So far as this question was concerned, it would appear that Mitter, J., has dissented from the view taken not only by the Courts below, but from the decision in *Bhagwan Dayal v. Param Sukh Das* 1917 All 477. It appears to us however that the position indicated by the learned Judges of the Allahabad High Court is sound; and we see no difficulty in giving effect to the same in the case before us. The suit was instituted and could be instituted against defendants 41 to 43 by name. The institution of the suit was complete and was not defective under the law, and it was the duty of the Court to appoint a proper person to be guardian for the suit for the minors (Order 32, Rule 3, Civil P. C.). The Court did appoint such a guardian; but the procedure followed was defective under the law; and a decree followed, to avoid the effect while a suit was instituted by defendants 41 to 43. The decree was ultimately declared null and void and inoperative, so far as the minor defendants 41 to 43 were concerned. The Court which followed a procedure held to be defective in a subsequent proceeding, and whose duty it was to see that a proper guardian was appointed had jurisdiction to revive the suit so as to restore the minors to the same position in which they were on the date on which the suit was filed against them. This is the position

indicated in the judgment in *Bhagwan Dayal v. Param Sukh Das* 1917 All 477 referred to above; and we unhesitatingly follow the same. It would not be right to hold and it would amount to denial of justice in the case before us, if we hold that defendants 41 to 43 were not to be regarded as parties to the suit when the suit was instituted by the plaintiff, and hold further that the suit could not be revived at the instance of the plaintiff after the decree that was passed against the defendant was declared to be null and void and inoperative as against them for the reason of a defect of procedure followed by the Court, in the matter of appointment of their guardian for the suit. If any case of prejudice so far as defendants 41 to 43 were concerned were made out, the position might have been different.

7. We are not unmindful of the decision of their Lordships of the Judicial Committee of the Privy Council, and of the decision of Courts in this country, that in certain cases and in certain circumstances it has to be held that a minor not properly represented by a guardian must be treated as a person who was never a party to the suit. The observations of the Judicial Committee in *Rashidunnessa v. Mahammad* (1909) 31 All 572 related to a case in which a guardian appointed by the Court had an interest adverse to that of the minor in question; and those observations in support of the position that in the case of an inherent defect in the matter of appointment of guardian, the minor should not be deemed to be party to a suit, could not be held applicable to a case like the one before us, in which the defect in the appointment of guardian was purely a formal one, arising out of the position that the mother proposed as guardian not having objected to her appointment, was taken to have consented to her appointment. The fact remains that in the suit not only the guardian of the minor defendants 41 to 43, appointed by the Court after an erroneous procedure was followed, but none of the defendants in the suit appeared to contest the same.

8. The conclusion we have arrived at, as indicated above, is that the suit was rightly revived in the year 1928, on the application of the plaintiff appellant before us. Defendants 41 to 43 who had attained majority by the time that the suit was revived defended the suit, and the decision of the final Court of fact substantially in favour of the plaintiff-appellant, has been affirmed by the learned Judge of this Court, on appeal. The decision of the learned Judge, R.C. Mitter, on the question of the Court's jurisdiction to revive the suit being reversed by us, the decision and decree of the Subordinate Judge in the Court of appeal below are restored. The plaintiffs-appellants in this appeal will get their costs in all the Courts from defendants 41 to 43, respondents in the appeal before us. The cross-objections filed in this Court are dismissed. There is no order as to costs in the crossobjections.