

(1913) 02 CAL CK 0038
In the Calcutta High Court

Purna Chandra Kumar

APPELLANT

Vs

Maharajadhiraj Bejoy Chand Mahatap Bahadur and Others

RESPONDENT

Date of Decision : 26-02-1913

Acts Referred:

Citation : 18 Ind. Cas. 859

Hon'ble Judges : Lawrence Jenkins, C.J.;N. Chatterjea, J

Bench : Division Bench

Judgement

1. This appeal arises out of a suit for a declaration that a rent decree passed in suit No. 7 of 1896 of the Court of the Subordinate Judge of Hooghly, and the proceedings in execution thereof were fraudulent, collusive and inoperative against him, and for recovery of Rs. 2,076-7-6 which the defendant had realized from him, by arresting him in execution of the said decree.

2. The plaintiff alleged that the patni taluk, in respect of which the rent decree was passed, belonged exclusively to one Lakshi Narain, and he, the plaintiff, had no interest therein, that he was a minor at the time the said decree was passed, but was described in the suit as if he was of age, that no summons had been served upon him and an ex parte decree was passed against him, that the said Lakshi Narain put in vakalatnamahs and applications in the execution proceedings purporting to have been signed by him, that in execution of the decree, after the patni taluk had been sold and some portion of the decretal amount had been realized, the plaintiff was arrested and Rs. 2,076-7 was realized from him.

3. The Court of first instance held that the decree and the execution proceedings were inoperative against the plaintiff and passed a decree for the amount claimed in his favour. On appeal, the District Judge reversed that decree and dismissed the suit. The plaintiff has appealed to this Court. As there was no definite finding by the lower Appellate Court upon the question of the minority of the plaintiff, the case was remanded for a finding whether the plaintiff was a minor at the date of the institution of the said suit No. 7 of 1896 and at the date

of the decree passed in that suit. The District Judge has returned his finding that the plaintiff was a minor.

4. The present suit was instituted on the 21st December 1905, and the plaintiff attained his majority several years before the suit. If, however, the decree is a nullity as against him, no question of limitation would arise. The question, therefore, is whether a decree passed against a person, who is really a minor but who is described in a suit as if he was of age, can be treated as a nullity as against such person, or is one which it is necessary to set aside, in other words, whether it is merely voidable.

5. There can be no doubt that a decree against a person who is neither a party nor is properly represented on the record is a nullity and might be disregarded without any proceeding to set it aside. If any authority is needed for this proposition, we may refer to the case of *Khairaj Mal v. Daim* 32 C. 296 :2 A.L.J. 71 :1 C.L.J. 584 :7 B.L.R. 1 :9 C.W.N. 201 :32 I.A. 23. In the present case, the plaintiff is found to have been a minor when the suit for rent was brought and the decree was passed. Having been sued as if he was of age, no guardian ad litem was appointed for him. His name appeared as a defendant on the record, but was he a party in the eye of law? So long as a guardian ad litem is not appointed, a minor cannot take any steps in the suit and cannot be said to be a party to a suit in the proper sense of the term. The ruling of the Judicial Committee in the case of *Rashid-un-Nisa v. Muhammad Ismail Khan* 13 C.W.N. 1182 :10 C.L.J. 318 :3 Ind. Cas. 864. : 6 A.L.J. 822 :6 M.L.T. 280 (P.C.) 11 :B.L.R. 1225 : 31 A. 572 :36 I.A. 168 is conclusive upon this point. There a decree had been obtained on an award made by arbitrators, and in the award the elder sister of the minor appellant in that case was described as acting for herself and as guardian of the minor. As a matter of fact, an application by the elder sister was pending at the date of the award before the District Judge for a certificate of guardianship of the minor, which was ultimately rejected. The Privy Council held that the appellant was entitled to a declaration that the award was a nullity so far as she was concerned. There were several other decrees against the minor in which she was described as under the guardianship of her elder sister and at least in one of the suits the sister was appointed guardian ad litem of the minor by the Courts. But the sister being a married woman could not be appointed guardian ad litem and the Court of first instance held that the minor not having been properly represented, the decrees and sales were not binding on the minor. The decision of the Subordinate Judge was reversed by the High Court, on the ground that the decrees upon which the execution proceedings were founded were not and could not be in any way impeached, and that the transactions impeached being proceedings in execution could only have been objected to under the provisions of Section 244 of the Civil Procedure Code. The Privy Council pointed out that Section 244 applied to questions arising between the parties to the suit in which the decree is passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code, and their Lordships held that the minor was never a party to any of

the suits in the proper sense of the term and restored the decree of the Subordinate Judge.

6. In the case of Narsingh Narain v. Shaikh Jahi Mistry¹⁵ C.L.J. 3 :13 Ind. Cas. 414 where the mother of an infant defendant, a married woman, was appointed guardian ad litem without her consent, it was held following the above case that the infant must be taken not to have been represented for the purpose of the suit and that in such a case, he is in the same position as if he was not made a party to the suit at all, and referring to the case of Khairaj Mal v. Daim 32 C. 296 :2 A.L.J. 71 :1 C.L.J. 584 :7 B.L.R. 1 : 9 C.W.N. 201 : 32 I.A. 23 the learned Judges said that it was clear from the decision of the Judicial Committee in that case that the contravention of the statute is not merely an irregularity but renders the proceedings a nullity so far as the infant is concerned

7. These decisions are binding upon us, and we must accordingly hold that the plaintiff was no party to the rent suit in the proper sense of the term and is entitled to treat the decree as a nullity so far as he is concerned.

8. It may be said that in the cases cited above, the minority of the defendant was known to the plaintiff and to the Court, but so far as the questions whether a minor without a proper guardian ad litem being appointed for him is a party to the suit, and whether a decree in such a suit is a nullity are concerned, there is no difference in principle between a case where the minority is known and a case where the plaintiff and the Court are not aware of the minority of the defendant. Besides, the knowledge or ignorance of the plaintiff cannot affect the rights of an infant.

9. The case of Musammat Bibi Walian v. Banke Behari Pershad Singh³⁰ C. 1021 (P.C.) :30 I.A. 182 : 7 C.W.N. 774 :5 B.L.R. 882 is distinguishable. There the suit was instituted against the minors as represented by their mother as their guardian with the sanction of the Court. The mother appeared throughout the proceedings as guardian of the minors. The Privy Council held that the minors were effectively represented in the suit by their mother and with the sanction of the Court, that the only defect was that no formal order appointing her as guardian was drawn up, but that it was not shown that the alleged defect caused any prejudice to the minors and their Lordships accordingly were of opinion that the defect of procedure was cured by the provisions of Section 578, Civil Procedure Code.

10. The decree being a nullity so far as the plaintiff is concerned, the suit cannot be held to be barred by limitation. But if he was liable with the other defendants for the rent of the patni for which the decree was obtained, we do not think he should be allowed to recover the amount realized from him under the decree. The Court of first instance found upon the evidence that plaintiff had no interest in the patni. The learned District Judge, while holding that on the evidence "it would be exceedingly doubtful that the plaintiff had supported any part of the burden which is on him to show that the taluk was Lakhi's private property",

does not come to a definite finding on the point. The case should, therefore, go back to the lower Appellate Court, in order that that Court may decide whether the plaintiff had any interest in the patni during the period for which the rent decree was obtained so that he was liable for the patni rent along with the other defendants in the rent suit. The decree of the lower Appellate Court is accordingly set aside, and the case is remanded to that Court for disposal according to law after coming to a finding upon the point stated above. Costs to abide the result.