

(1928) 05 MAD CK 0008
In the Madras High Court

Sami Chettiar and Another

APPELLANT

Vs

T.R. Sessa Iyer and Co. and Another

RESPONDENT

Date of Decision : 03-05-1928

Acts Referred:

Citation : AIR 1928 Mad 1057 : 113 Ind. Cas. 663

Hon'ble Judges : Devadoss, J

Bench : Division Bench

Judgement

Devadoss, J.—This is an application to revise the order of the Subordinate Judge of Coimbatore granting the prayer of the plaintiffs for the amendment of a decree. The plaintiffs brought a suit on a mortgage bond executed in the year 1907 against defendant 1 and his three sons, of whom defendants 3 and 4 are minors. The plaintiffs asked the Court to appoint defendant 1 as guardian of the minor defendants. But as defendant 1 refused to be the guardian of his minor sons, an application was made by the plaintiffs to have the mother of the minors appointed guardian ad litem and she was accordingly appointed guardian ad litem for minor defendants 3 and 4: This appointment was made on 19th October 1920. The suit was compromised and an application for sanction to compromise was put in on 14th October 1921, and a preliminary decree was passed in terms of the compromise on 13th December 1922. In drawing up the preliminary decree the father was mentioned as the guardian of the minors defendants 3 and 4, and not the mother. The plaintiffs applied for the passing of a final decree on 11th July 1923. In that application they mentioned the father as the guardian & the minors. A final decree was passed on 6th August 1923. After the passing of the final decree execution was applied for and the execution proceedings were transferred to another Court. The mother of the minors made an application to the executing Court that she had no notice of the passing of the final decree and the proceedings against the minors should not be proceeded with. The executing Court, on hearing her objection, stayed its hands whereupon an application was made to the Court which passed the decree, that is, the Sub-Court of Coimbatore, for the amendment of the decree by omitting the name of defendant

1 from the decree and substituting the name of the mother as guardian. The Subordinate Judge without assigning any grounds has made the order with the following observation:

The petition is opposed. But I see no reason for not allowing the amendment prayed for Amend the judgment, preliminary decree and the final decree as prayed for.

2. Defendants 3 and 4 were represented in the suit by the mother as guardian. The compromise was by the mother on behalf of the minors. It is difficult to see how the mistake crept in. It must have been owing to an oversight in the office or to the carelessness of the clerk who drew up the decree. The plaintiffs, when they applied for the execution of the decree, ought to have known that it was the mother who was the guardian of the minors, defendants 3 and 4, and not the father. It may be that the plaintiffs also carelessly followed the preliminary decree in drafting the application for final decree. Whatever may be the reasons for not bringing to the notice of the Court the fact that the mother was the guardian of the minor defendants, the question is whether the Court had jurisdiction to amend the decree in such a way as to make it read differently from what it was. The contention of Mr. Alladi Krishnaswami Ayyar for the respondent is that it was only a clerical mistake and the clerical mistake was corrected by the Court. I am unable to accept the contention that it is a clerical mistake. When minors are before the Court the Court is bound to see that the minors are represented by a guardian ad litem and when there is a guardian ad litem; the Court is not entitled to treat some other person as the guardian of the minors and to pass any order for or against the minors. It is not merely a question of form; it is a question of substance; for the minors can afterwards say that they were not represented in the proceedings because they were not represented by their guardian, and therefore the proceedings against them are void; in fact they may say that there were no proceedings against them at all. It is not correct to say that the Court has wrongly described the minors by ascribing to them a guardian who is not a guardian for the suit and it is not correct to call that a mis-description of the names of parties. It has been held more than once that if minors are not properly represented in a suit the proceedings in the suit, so far as they are concerned, do not bind them. Where a guardian is appointed by the Court itself the Court is not justified in treating somebody else as guardian and proceed either with the suit or with the proceedings after it. Great reliance is placed by Mr. Alladi Krishnaswami Ayyar upon a decision of the Allahabad High Court in Mahadeo Pandey and Others Vs. Somnath Pandey and Another. In that case the nazir of the Court was appointed guardian of a minor. After the preliminary decree the father was treated as guardian and a foreclosure decree was passed. Walsh and Pullan, JJ. held in a suit by a minor to have the final decree set aside, the minor had not been prejudiced and was not entitled to the relief claimed.

3. With great respect I am unable to accept the position that when a guardian is

appointed by the Court the Court can ignore that guardian and treat somebody else as guardian of the minors and proceed to pass a decree whether preliminary or final. It is not a question of prejudice. It stands on a much higher footing. The question really is whether there has been a proper representation in the suit. In that view, so long as a proper guardian is not before the Court, no decree can be passed against a minor. The learned Judges of the Allahabad High Court were of opinion that there was authority for the proposition that when preparing a final decree it was not necessary to issue fresh notice to the judgment-debtor. No doubt under the old Cole there was no such thing as a final decree in the sense in which we use the expression. After a decree an application for passing what is tantamount to a final decree now was considered to be an application in execution and no notice was necessary if the application is made within a year of the passing of the decree. That was the view of *Pandu Prabhu v. Juje Lobo* [1904] 27 Mad. 40, which was followed in *Mahadeo Pandey and Others Vs. Somnath Pandey and Another*. Under the present Code notice is necessary before final decree can be passed. This has been laid down definitely in *Kanakasundaram Pillai Vs. Somasundaram Pillai and Another*, and it was followed recently by a Bench of this Court in *G. M. A. 269 of 1927*. In this case notice was not; sent to the proper guardian and the final decree was passed without the proper guardian on record. It is not a mere misdirection of the parties but a non-representation of the minors when the final decree was passed.

4. Mr. Alladi Krishnaswami Ayyar urges that there is no prejudice shown and this question ought not to be raised in execution. As already observed it is not necessary to show prejudice. In the view I take of the case there is no final decree at all against the minors because they were not represented by their guardian and nobody else was entitled to represent them. Therefore it is unnecessary to show prejudice. The question of there being no decree against the minors can be raised at any time. Mr. Alladi Krishnaswami Ayyar urges that the Court might correct any error that has crept into the decree. No doubt this Court has held in more than one case that errors which have crept into the pleadings and consequently into the judgment and decree can be rectified by a proper application to the Court; but where the proper party is not before the Court for want of representation the Court has no jurisdiction to make the right persons party by means of an amendment. In other words the effect of such an amendment is, a decree which has been passed against X is converted into a decree against Y and a decree passed against Y converted into one against X. In this view I hold that the lower Court had no jurisdiction to amend the decree in the manner it has done. I therefore set aside the order of the lower Court and allow this petition with costs here and in the lower Court.

5. [These cases having been set down to be spoken to this day, the Court delivered the following]:

JUDGMENT

6. This order does not affect the amendment of the preliminary decree in the

three cases. Petitioner to have his costs in all the three cases.