LETTERS PATENT APPEAL.

Before Guha and Bartley JJ.

1936

Mar. 25.

LOKE NATH DAS PURKAYASTHA

v.

BIHAREE LAL SHAHA.

Minor—Defective appointment of guardian-ad-litem—*Decree against minor declared invalid—Revival of suit—Jurisdiction—Procedure.*

Where a decree, passed against a minor, is declared to be invalid and inoperative against him, in a subsequent suit by the minor on the ground that there was no proper appointment of a guardian-*ad-litem*, the Court has the power to revive the former suit against the minor.

Bhagwan Dayal v. *Param Sukh Das* (1) followed.

Rashid-un-nisa v. *Muhammad Ismail Khan* (2) distinguished.

LETTERS PATENT APPEAL by the plaintiff.

The facts of the case and arguments in the appeal appear sufficiently from the judgment.

Beerendra Kumar De for the appellant.

Bijan Kumar Mukherji, Nripendra Chandra Das and *Nikunjabihari Ray* for the respondents.

The judgment of the Court was as follows:—

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 Sunamganj 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 July 16, 1909, against nineteen persons impleaded as defendants. To meet

*Letters Patent Appeal, No. 37 of 1935, in Appeal from Appellate Decree, No. 590 of 1933.

(1) (1916) I. L. R. 39 All. 8.

(2) (1909) I. L. R. 31 All. 572; L. R. 36 I. A. 168.

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the objection on the score of defect of parties, raised by the defendants, fifty-two more persons were added as defendants. Of these defendants, subsequently made parties to the suit, defendants Nos. 41 to 43 were minors at the time when they were made defendants to the suits; 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 the defendants Nos. 41 to 43, passed on June 11, 1910, was this :—

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

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 April 23, 1914, on a Second Appeal preferred by some of the defendants in the suit. In the year 1918, the defendants Nos. 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 the defendants Nos. 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 the defendants Nos. 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 those defendants, by the decision and decree passed by the Additional Subordinate Judge, Sylhet, on September 20, 1919. Thereafter, on January 9, 1928, the plaintiff filed an application

in the Court of the Munsif at Sunamganj, praying that the Title Suit No. 2149 of 1909 be proceeded with, as against the defendants Nos. 41 to 43 and the application was allowed, the suit being revived.

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

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 not represented by a guardian *ad-litem*. In the case before us the Court made an order appointing a guarding-*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

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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" [O. XXXII, r. 4(*3*) of the Code of Civil Procedure]. A decree followed, after the order, defective under the existing law, was made. The defendants Nos. 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 the defendants Nos. 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 the 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 the suit was inoperative so far as those defendants were concerned. 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. The 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 is, 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.

The question next raised in support of the appeal was whether Mitter J. was right in his decision that the defendants Nos. 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 the case of *Bhagwan Dayal* v. *Param Sukh Das* (1). 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 the defendants Nos. 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 (O. XXXII, r. 3, Code of Civil Procedure). The Court did appoint such a guardian; but the procedure followed was defective under the law, and a decree followed, to avoid the effect of which a suit was instituted by the defendants Nos. 41 to 43. The decree was ultimately declared null and void and inoperative, so far as the minor defendants Nos. 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

(1) (1916) I. L. R. 39 All. 8.

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were on the date on which the suit was filed against them. This is the position indicated in the judgment in *Bhagwan Dayal's* case 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 the defendants Nos. 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 in any case of prejudice so far as the defendants Nos. 41 to 43 were concerned were made out, the position might have been different.

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 the case of *Rashid-un-nisa* v. *Muhammad Ismail Khan* (1) 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

(1) (1909) I. L. R. 31 All. 572 ; L. R. 36 I. A. 168.

the guardian of the minor defendants Nos. 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.

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. The defendants Nos. 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 J., 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 the defendants Nos. 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 cross-objections.

Appeal decreed.

G. K. D.