

APPELLATE CIVIL.

Before Nasim Ali and R. C. Mitter J.J.

BRAJENDRA KISHORE RAY CHAUDHURI

1937

Jan. 12, 13.

v.

SHAM SHER ALI.*

Execution—Guardian in execution proceedings—Guardian in suit—Code of Civil Procedure (Act V of 1908), ss. 7, 141; O. XXXII.

An order rejecting a decree-holder's execution case against a minor judgment-debtor for the decree-holder's non-compliance with order of Court to have a fresh guardian-*ad-litem* appointed for the execution cases is an order under s. 47 of the Code of Civil Procedure.

A guardian of a minor appointed in a suit continues to be so in the execution proceedings in that suit until his death or removal.

Thakur Prasad v. Fakir-Ullah (1) and *Krishna Pershad Singh v. Moti Chand* (2) relied on.

Salauddin v. Afzal Begum (3) and *Fani Bhusan Bhuiyan v. Surendra Nath Das* (4) distinguished.

APPEAL FROM APPELLATE DECREE by the decree-holder.

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

Naresh Chandra Sen Gupta and *Bama Prasanna Sen Gupta* for the appellant.

Upendra Kumar Ray for the respondents.

NASIM ALI J. The appellant obtained a decree for rent against the respondents on July 1, 1934. One of the respondents is a minor. His father was

*Appeal from Appellate Order, No. 580 of 1935, against the order of H. G. S. Bivar, District Judge of Mymensingh, dated May 30, 1935, affirming the order of Beerendra Narayan Ray, Munsif of Iswarganj, dated Mar. 14, 1935.

(1) (1894) I. L. R. 17 All. 106;
L. R. 22 I. A. 44.

(3) (1924) 28 C. W. N. 963.

(2) (1913) I. L. R. 40 Cal. 635;
L. R. 40 I. A. 140.

(4) (1921) 35 C. L. J. 9.

1937

*Brajenāra
Kishore Ray
Chaudhuri*

v.
*Shamsher
Ali.*

Nasim Ali J.

appointed his guardian for the suit in which the said rent-decree was passed. The appellant put this rent-decree into execution in the Court of the Munsif at Iswarganj on August 21, 1934. The office of the learned Munsif reported to him that the decree-holder had not filed an application or affidavit for the appointment of a fresh guardian of the minor judgment-debtor as required under the standing order of the District Judge. The learned Munsif ordered the appellant to file the petition and affidavit. The appellant, however, did not comply with this order, with the result that his application for execution was dismissed by the learned Munsif on September 5, 1934. An appeal was thereupon taken by the decree-holder to the lower appellate Court. The learned District Judge remanded the matter for rehearing to the Munsif on the ground that whether a fresh guardian-*ad-litem* should be appointed in the execution proceeding or not was a matter entirely in the judicial discretion of the Court and could not be decided by the standing order of the District Judge. The matter then went back to the Munsif again and the learned Munsif after hearing the case recorded the following order:—

Heard pleader. In my opinion a fresh guardian-*ad-litem* should be appointed in this execution proceeding. The decree-holder must file a petition and affidavit within eight days.

On March 14, 1935, the execution petition was dismissed by the Munsif for failure of the decree-holder to comply with this order. The decree-holder again appealed to the lower appellate Court and the learned District Judge has dismissed the appeal on the ground that it was not competent. Hence this Second Appeal by the decree-holder. The decree-holder has also filed an application for revision under s. 115 of the Code of Civil Procedure in the alternative.

A preliminary objection has been taken by the learned advocate for the respondent that the order of

the learned Munsif rejecting the decree-holder's application for execution is not one under s. 47 of the Code of Civil Procedure as the application was rejected for default of the decree-holder to comply with the Court's order. We are unable to accept this contention. The effect of the order of the Court below is that the present execution case is not maintainable until and unless the decree-holder gets a fresh guardian appointed by the Court.

The point for determination in this appeal is whether the decree-holder is bound to have a fresh guardian appointed to represent the minor respondent in the present execution proceeding. Order XXXII of the Code provides for the appointment of the guardian of minor defendants in the suit. There is no express provision for the appointment of the guardian of a minor judgment-debtor in execution proceeding. By s. 141 of the Code of Civil Procedure the procedure provided in the Code in regard to suits is to be followed as far as it can be made applicable in all proceedings in any Court of civil jurisdiction. This section has replaced s. 647 of the Code of 1882. Before 1892 there was a difference of opinion between the different High Courts on the question whether s. 647 of the Code of 1882 applied to execution proceedings. In order to explain the meaning of this section the following explanation was added to this section by Amending Act of 1892:—

This section does not apply to applications for the execution of the decrees which are proceedings in suits.

In the case of *Thakur Prasad v. Fakir-Ullah* (1) their Lordships of the Judicial Committee while considering this explanation made the following observations:—

Their Lordships' attention has been called to the recent Act VI of 1892, which would appear to have been passed in order to avoid the disturbance of practice caused by the Allahabad rulings. . . . But having regard to the controversies which had arisen, and the difference of opinion between

1937

Brajendra
Kishore Ray
Chaudhuriv.
Shamsher
Ali.

Nasim Ali J.

(1) (1894) I. L. R. 17 All. 106 (112); L. R. 22 I. A. 44 (50).

1937

*Brajendra
Kishore Ray
Chaudhuri*

v.
*Shamsher
Ali.*

Nasim Ali J.

the various High Courts, their Lordships have thought it right to state their opinion that the Act of 1892 does nothing more than express the true meaning of the Civil Procedure Code.

The effect of these observations of the Judicial Committee is that the procedure relating to suits laid down in the Code would apply to applications for execution which are proceedings in suits. An examination of the provisions of the Code indicate that wherever the legislature thought that certain provisions of the Code relating to suits should not apply to execution proceedings it said so expressly. See O. XXII, r. 12 and O. XXIII, r. 4. The object of mentioning the exceptions is to indicate that other provisions would apply to execution proceedings as they are proceedings in suits. If this is not the true meaning of the Code, there is no provision in the Code under which a guardian of a minor judgment-debtor can be appointed in an execution-proceeding.

The above view finds support also from the observation of the Judicial Committee in the case of *Krishna Pershad Singh v. Moti Chand* (1). In that case a decree was obtained against the minor appellant, his father and certain other persons in the Court of the Subordinate Judge at Benares. The *nāzir* of the Benares Court was appointed guardian of the minor appellant for the suit. After decree the suit was remitted to the Court of the Deputy Commissioner of Hazaribagh for the purpose of execution and the properties of the judgment-debtors were attached. Thereafter the father of the minor appellant died. No fresh guardian of the minor appellant was appointed after the death of his father. On these facts their Lordships of the Judicial Committee observed as follows:—

It is true that, in the original proceedings in the local Court of Benares in the life-time of his father, he and three other minors were added as defendants, and the *nāzir* of the Court was appointed *pro forma* guardian to them for the purposes of the suit. When, however, the proceedings were

(1) (1913) I. L. R. 40 Cal. 635 (645); L. R. 40 I. A. 140 (147).

transferred to the Court of the Deputy Commissioner of Hazaribagh, it was obviously impossible for him to act in this capacity, and he refused so to do. From and after the death of the judgment-debtor and down to the time of the actual sale there was, therefore, no effective representative of the infant heir.

1937
 ———
Brajendra
Kishore Ray
Chaudhuri
 v.
Shamsher
Ali.
 ———
Nasim Ali J.

The obvious implication of these observations is that, up to the death of the father of the minor appellant, the minor was properly represented in the execution-proceedings, as the *nâzir* of the Court was appointed his guardian-*ad-litem* in the original suit.

Much reliance was placed by the learned advocate for the respondent upon a decision of this Court in the case *Salauddin v. Afzal Begum* (1). In that case the learned Judges, relying on certain observations of Lord Lyndhurst in *Kinsman v. Kinsman* (2), observed that the guardianship of the guardian-*ad-litem* appointed during the suit terminated after the final decree made in the suit. The attention of the learned Judges, however, was not drawn to the decisions of the Judicial Committee to which we have already referred. Further the observations of Lord Lyndhurst were made in connection with the question of *lis pendens*. It may be mentioned here that, by the amending Act of 1929, an explanation has been added to s. 52 of the Transfer of Property Act, whereby the pendency of a suit or proceeding is to be deemed to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained. In the case before us we are concerned with the interpretation of the word "suit" in the Code. If applications for execution of decrees are proceedings in suits, a *guardian appointed in the suit* continues to be a guardian in execution-proceedings as well. Our attention was also drawn to another decision of this Court in the case of *Fani Bhusan Bhuian v. Surendra Nath Das* (3). In that

(1) (1924) 28 C. W. N. 963.

(2) (1831) 1 Russ. & My 617;
 39 E. R. 236.

(3) (1921) 35 C. L. J. 9.

1937

*Brajendra
Kishore Ray
Chaudhuri*

v.
*Shamsher
Ali.*

Nasim Ali J.

case, however, the guardian of the infant died in the course of the execution-proceedings and consequently the appointment of a fresh guardian was necessary.

Our conclusion, therefore, is that a guardian of a minor appointed in the suit continues to be the guardian of the minor in the execution-proceeding until he dies or is removed. The decree-holder is, therefore, not bound to have a fresh guardian of the minor judgment-debtor appointed in the present execution-proceeding.

The result, therefore, is that this appeal is allowed, the orders of the Courts below are set aside and the case is sent back to the trial Court. The learned Munsif is directed to proceed with the execution according to law.

In view of our decision in the appeal, no order is necessary in the application for revision under s. 115 of the Code of Civil Procedure.

Parties will bear their own costs in the Courts below. The Deputy Registrar's costs having been deposited in this Court, there will be no order for costs in this appeal.

MITTER J. I agree.

Appeal allowed.

A. K. D.