APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Spencer.

1911. October 9 November 7.

K. SOMAKKA (PETITIONER IN CIVIL REVISION PETITION No. 245 OF 1910), APPELLANT,

v.

K. P. RAMIAH (PETITIONER IN CIVIL REVISION PETITION No. 245 OF 1910), RESPONDENT.*

Guardian and Wards Act (VIII of 1890)—Jurisdiction of District Court—No power to order payment of money for minor's marriage by person not guardian —Concurrent jurisdictions—When order passed under one jurisdiction can be taken to be passed under another.

The Guardian and Wards Act (VIII of 1890) does not give the District Court any power or authority over persons other than the guardian or the minor except in so far as it deals with the question as to who is the proper person to be appointed guardian, or whether a particular guardian should be removed or not and for the purpose of restoring the ward to the custody of the guardian.

Under the Guardian and Wards Act no order can be passed directing a person not a guardian, to pay a sum of money for the purposes of a minor's marriage. Where a judge passing such an order under the Guardian and Wards Act, could have passed a similar order as a judge of a court of ordinary civil jurisdiction, the order cannot be treated as a decree in a suit. The two jurisdictions are wholly distinct though exercisable by the same official.

Sadasiva Pillai v. *Ramalinga Pillai*, [(1875) 2 I.A., 219], and *Ledgard* v. *Bull* [(1887) I.L.R., 9 All., 191 (P.C.)], distinguished.

APPEAL under section 115 of the Civil Procedure Code (Act V of 1908) against the order of M. GHOSE, the Acting District Judge of Cuddapah, dated the 26th November 1909, in I.A. No. 127 of 1909 (Original Petition No. 32 of 1909).

The facts of this case are sufficiently stated in the judgment.

The Hon. Mr. *L. A. Govindaraghava Ayyar* for appellant.

The Hon. Mr. *T. V. Seshagiri Ayyar* for respondent.

ABDUR RAHIM, J.—In this case we are asked to revise by way of appeal or under section 115, Civil Procedure Code, an order made by the District Judge of Cuddapah upon a petition presented to him under sections 24 and 43, Guardian and Wards Act, by the guardian of a certain Hindu female minor praying for permission to give the minor in marriage to a certain

* Appeal Against Order No. 70 of 1910.

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person mentioned in the petition, and for an order directing the appellant in this appeal, who is the surviving widow of the father of the minor girl and in possession of his estate, to pay Rs. 800 for the expenses of the contemplated marriage. The appellant appeared in answer to the notice and pleaded that, under the circumstances mentioned in her counter-petition, she was not liable to make any payment, and that the proposed marriage was not suitable. She took no objection to the jurisdiction of the District Court to make any order against her on the petition, and after hearing the pleaders on both sides the Court passed this order : "The petition is allowed with costs. Rs. 300 is sanctioned. Fees Rs. 5." The order having regard to the prayer in the petition has the effect of directing the counter-petitioner to pay Rs. 300 and costs to the guardian. No issues were framed and no evidence appears to have been taken and apparently none was adduced by either party.

The first question argued is that the order is bad for want of jurisdiction and must be set aside on that ground. Now there can be no doubt that so much of the order as directs the appellant to pay Rs. 300 to the petitioner for purposes of the minor's marriage is not warranted by any provision of the Guardian and Wards Act. This is conceded by Mr. Seshagiri Ayyar, who appeared for the respondent. But he contends that, as the District Court could have in a suit properly framed for the purpose passed a decree to the same effect, this order cannot be said to have been passed without jurisdiction, but at the worst there was only an irregularity in the way the court assumed jurisdiction, and, as no objection was taken to the course adopted at the time, it must be deemed to have been waived and the order cannot now be impeached for want of jurisdiction or on the ground of irregular exercise of jurisdiction. He does not however contend, and very rightly, that, if the order is without jurisdiction altogether, either waiver of objection or consent on the part of the appellant to the course followed could make the order valid. There can be no doubt that the District Court which passed the order appealed against could have in a regularly instituted suit passed a decree against the appellant to substantially the same purport. At the same time the power vested in the District Court under the Guardian and Wards Act is so totally dissimilar to its power as a court of ordinary civil jurisdiction that I think it will be going

much too far to say that an order purporting to be made under but which in fact is not warranted by the provisions of that Act can be treated as a decree passed in a suit. The two jurisdictions are wholly distinct, though exercisable by the same official. It is not a case of exercise of the same jurisdiction by different forms of procedure.

The whole scheme of the Guardian and Wards Act, generally speaking, is to entrust to the District Court the duty of looking after the welfare of the minor's person and property, and for this purpose it gives it power to appoint a guardian to have charge of the minor's person and property as the most feasible mode of discharging its duty. The guardian is really the hand of the District Court, and is to act under its advice, control and constant supervision. The Act does not profess to give the District Court any power or authority over persons other than the guardian or the minor except in so far as it deals with the question as to who is the proper person to be appointed guardian or whether a particular guardian should be removed or not and for the purpose of restoring the ward to the custody of the guardian. Otherwise the enforcement of rights or claims of the ward or against the ward is left to be regulated by ordinary proceedings by suits and the Act does not provide any machinery for deciding upon or enforcing any such claims, though so far as the guardian is concerned the District Court is vested with very wide disciplinary powers over him in order that it may enforce the orders passed against him under the Act. The jurisdiction or power conferred upon the District Court by this Act is of a very special and limited character, and the procedure prescribed under the Act, which is of a summary character, though appropriate for the determination of questions arising therein, is very different from the procedure laid down by the Civil Procedure Code for the trial of suits. That being so, can we uphold an order such as this, which purports to be made under, but is not in fact warranted by, the provisions of that Act as a decree passed in a suit? After the best consideration I have been able to give to the matter, my conclusion, as already indicated, is that the question must be answered in the negative.

In dealing with the question certain facts must be borne in mind. In the first place the order in question in this case is impeached in the course of the same proceedings by way of appeal

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and not collaterally, as when a party who has allowed a decree or order to become final impugns its validity for the first time when it is sought to be enforced in execution or wishes to reopen the question in a subsequent proceeding, treating the previous adjudication as null and void. Then this is not a case in which the parties expressly agreed that the Court should adopt the particular course alleged to be beyond its power, or where one party by his conduct has estopped himself from raising the question of validity of a particular proceeding. Here all that happened was, the appellant failed to object to the District Court dealing with the matter by proceeding under the Guardian and Wards Act. Again the District Court purported to make the order in the exercise of a jurisdiction conferred on it by a special statute very different in its nature, scope and the way in which it is to be exercised from its jurisdiction as a court of ordinary civil jurisdiction. It is not therefore a case in which a Court purports to act in the exercise of a particular jurisdiction, but adopts a form of procedure prescribed for one department of that jurisdiction rather than another.

If these facts be borne in mind, the present case is easily distinguishable from the class of cases relied on by Mr. Seshagiri Ayyar. For instance in the case of *Sadasiva Pillai* v. *Ramalinga Pillai*(1), the question was whether mesne profits which accrued after the decree and were not expressly provided for in it could be recovered from the respondents in the appeal before the judicial committee in execution or only by a separate suit. It appeared that the respondents had executed bonds to account for mesne profits after the date of the decree in accordance with an order which was objected to either in the first instance or by way of appeal, and their Lordships held that the liability to account was made "a question relating to the execution of the decree" or that at all events the respondents by their own agreement and subsequent conduct were estopped from saying that the mesne profits in question were not payable under the decree according to the principle laid down in *Pisani* v. *Attorney-General for Gibraltar*(2). On the question whether the order was without jurisdiction, they observe :—" The Court had a general jurisdiction over the subject-matter though the exercise of *that* jurisdiction by the particular proceeding may have been irregular." The Court in that case

(1) (1875) 2 I.A., 219. (2) (1874) L.R., 5 P.C., 516.

was in fact exercising its ordinary civil jurisdiction, though by means of a proceeding prescribed for the execution of decrees and not for the trial of suits. The principle thus enunciated by the Privy Council has no application therefore to this case. Nor is this a case, as I have already pointed out, of estoppel. In *Pisani* v. *Attorney-General for Gibraltar*(1), the Attorney-General had filed an information claiming for the Crown certain lands which belonged to a deceased person as escheat for want of heirs. The defendants put forward their several claims to the land, and on the motion of the Attorney-General, when he found that he failed to establish the claim of the Crown, it was agreed among all the parties that the rights of the defendants as between themselves should be declared whatever might be the event of the suit regarding the claim of the Crown. By the decree it was declared that the lands had not escheated to the Crown and that a certain will of the deceased was valid. On an appeal being preferred to the Judicial Committee from that decree, a preliminary objection was taken to the competency of the appeal on the ground that the decree, so far as it declared the rights of the defendants, must be treated as an award of an arbitrator. It was held that the agreement was binding, but the preliminary objection was overruled on the ground that, though the course adopted by consent was a deviation from the *cursus curiæ*, yet, as the parties meant to keep themselves *in curiæ* and the judge clearly so understood them, there was an appeal. The court had jurisdiction over the subject and the assumption of the duty of another tribunal was not involved in the question. They then point out that departures from ordinary practice by consent are of frequent occurrence, and that unless there is an attempt to give the court a jurisdiction which it does not possess or something occurs which is such a violent strain on its procedure that it puts it entirely out of its course, so that the court of appeal can't review the decision, such departures have never been held to deprive either of the parties of the right of appeal. Mr. Seshagiri Aiyar has not raised any question as to our power to revise the order. Then is not this a case of assumption by one tribunal of the duties of another? As I have tried to show, the powers and the duties of the District Court under the Guardian and Wards Act are wholly dissimilar to its powers and duties as a court of civil jurisdiction, and, when it

(1) (1874) L.R., 5 P.C., 516.

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acts under such special statute, it must in my opinion be regarded to be acting as a tribunal other than a tribunal of general civil jurisdiction. When, as here, the difference between the two jurisdictions is not one merely of form but of a radical nature, having regard to their scope, subject-matter, and the rules regulating their exercise, the fact that both are vested in one and the same tribunal would not make an order which is made in the exercise of one jurisdiction liable to be regarded as if it was properly made in the exercise of the other jurisdiction.

In *Ledgard* v. *Bull*(1) another judgment of the Privy Council, all that is laid down is that in a suit tried by a competent court the parties, having without objection, joined issue and gone to trial upon the merits, cannot subsequently dispute the jurisdiction on the ground of irregularity in the initial procedure, which if objected to at the time would have led to the dismissal of the suit. But in this case, as I view the matter, the liability of the appellant never formed the subject of trial by the District Court as a court of general civil jurisdiction. The same answer applies to the case reported in *Gurdeo Singh* v. *Chandrikah Singh*(2), in which the learned judges discuss at length the distinction between inherent absence of jurisdiction and irregular assumption of jurisdiction.

I think the proceeding in question ought also to be set aside on the ground that it is such a violent strain on the procedure that it puts it entirely out of its course, so that the court of appeal cannot review the decision. I may observe here that the course adopted by the District Court not being by agreement of the parties, there could be no question of its acting as arbitrator so as to deprive either party of his right of appeal. If the case had been tried as a suit under the Civil Procedure Code, it would have to be tried in the court of the District Munsif, and the parties would then have a right of successive appeals to the District Court and to the High Court. There is no authority to which our attention has been drawn which would justify us in saying that, because the appellant did not take objection to the course adopted by the District Court, he must be taken to have waived such rights of appeal as he would have had, it the matter had been properly tried as an action. If the proceeding in

(1) (1887) I.L.R., 9 All., 191 (P.C.). (2) (1909) I.L.R., 36 Calc., 193.

question were to be treated as one under the Guardian and Wards Act, there would be no appeal as it is not covered by section 47, and, if it be regarded as a decree in a suit tried by the District Court in its ordinary civil jurisdiction, then we must hold that by mere failure to object to the District Court dealing with the matter under the Guardian and Wards Act, the appellant has deprived himself of the right of second appeal, which otherwise he would have had. This I am not prepared to hold in the absence of express authority. Further if the matter had been tried as a civil action, issues would have had to be framed and there would have been a proper judgment and a decree. As it is, there are no issues, no judgment, and no decree and it is difficult to see how we can properly revise the order of the District Court on the merits.

All this shows that the proceeding of the District Court is so completely outside the ordinary course of trial of civil actions, that it must be held to be without jurisdiction. Besides even if it were possible to treat the order as a decree in an action it would be liable to be set aside on the ground that there has been no proper trial. But as I am of opinion that the order has been made without jurisdiction under the Guardian and Wards Act, it must be set aside under section 115, Criminal Procedure Code. I would therefore allow the Civil Revision Petition and set aside the order of the District Court in so far as it directs the counter-petitioner in that court to pay Rs. 300 with costs in this court and leave each party to bear his own costs in the District Court.

SPENCER, J.—Assuming that the District Judge intended his order: "The petition is allowed with costs. Rupees 300 is sanctioned. Fees Rs. 5" to be tantamount to a money decree for Rs. 300 and costs and executable as such against the respondent, I agree with my learned brother, whose judgment I have had the advantage of reading, that the order was irregular and without jurisdiction, although the question before us is not covered by authority and presents some difficulty.

In the petition presented under section 10 of the Guardian and Wards Act for the appointment of a guardian for the minor, it was stated that the property left by the minor's father devolved on his second wife, the respondent, and is in her enjoyment, and that the minor has no property whatever. It was not alleged at the hearing of the present appeal that the minor has any separate

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estate. Her step-mother has, it appears, a widow's estate and she has only an expectancy. It is possible that the District Judge in passing orders about the minor's marriage may have lost sight of the fact that there was no fund under the control of the court out of which the marriage expenses might be defrayed, and this surmise is rendered probable by the use of the word "Sanctioned" instead of "Decreed." If the minor had property of her own and if the District Judge only intended to fix the amount which in his opinion was a suitable amount to spend on the minor's marriage, there would clearly have been nothing beyond his competence in the order passed. The petition under sections 23 and 47 however contained a prayer to direct the respondent to pay Rs. 800 for marriage expenses, and both parties have construed the order as a direction to her to pay a sum of Rs. 300. Treated as such, the Guardian and Wards Act gave the Judge no power to make the order, and I agree that it should be set aside as without jurisdiction, the parties to bear their own costs in the District Court, and the respondent to bear his own and the appellants' costs in this court.

APPELLATE CIVIL.

Before Mr. Justice Abdur Rahim and Mr. Justice Sundara Ayyar.

1911. August 1, 2 and 11.

R. P. CHELAMANNA AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

R. P. RAMA RAO (PLAINTIFF), RESPONDENT.*

Res judicata—*Compromise decree—Compromise also affecting land not in suit —Registration Act (III of 1877), sec. 17, clause (i)—compulsory registration.*

Where a compromise affected land not in suit and a decree was passed in terms of the compromise in so far as it related to the property sued for, to render the compromise available as a defence to a future suit as regards property not formerly sued for, it must have been registered in accordance with the provisions of the Registration Act (III of 1877), section 17.

If any portion of a *razinama* has not passed into a decree or order of court, it is *primâ facie* difficult to see how a recital of it in the proceedings of the court

* Second Appeal No. 853 of 1910.