

APPELLATE CIVIL.

Before Mr Justice Spencer and Mr. Justice Srinivasa Ayyangar.

PARVATHAMMAL (SECOND RESPONDENT), PETITIONER,

1917,
April, 26.

v.

CHOKKALINGA CHETTY (PETITIONER), RESPONDENT.*

Guardians and Wards Act (VIII of 1890), sec. 34—Civil Procedure Code (Act V of 1908), sec. 36—Order—Decree—Marriage expenses of person dependent on the ward—Order against guardian—Ward attaining majority—Discharge of guardian—Application for execution against ward after majority—Jurisdiction of Court to order execution—Omission to object before attachment—Waiver—Estoppel.

An order under section 34 of the Guardians and Wards Act directing a guardian to pay a sum of money out of his ward's estate for the marriage-expenses of a person dependent on his ward is neither a decree nor an order executable as a decree under the Civil Procedure Code, and cannot be enforced against the ward after he has attained majority and the guardian has been discharged.

There being an initial want of jurisdiction in the Court to execute such an order, the omission of the ward to object, after notice, to an order for attachment of his property, does not estop him from objecting to the jurisdiction of the Court to sell the property after attachment.

Somakka v. Ramiah (1913) I.L.R., 36 Mad., 39, referred to.

PETITION under section 115 of the Code of Civil Procedure (Act V of 1908), praying the High Court to revise the order of J. T. GILLESPIE, the District Judge of Salem, in Execution Petition No. 14 of 1914, in Interlocutory Application No. 20 of 1908 connected with Original Petition No. 28 of 1906.

The material facts appear from the judgment of SPENCER, J. *Pattabhirama Ayyangar* for the petitioner.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for the respondent.

SPENCER, J.—One Anganna Chetti had three wives. At his death he left surviving him a daughter by his first wife, named Thayammal, and Parvathammal, his third wife. Application was made to the District Court of Salem to appoint a guardian for the estate of Parvathammal. As the result of a *razinama* put in by

* Civil Revision Petition No. 181 of 1916.

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the contending parties, it was arranged that Chokkalinga Chetty should be guardian of Thayammal. Subsequently Gurunatha Chetty was appointed by Court guardian of the person and property of the minor Parvathammal, he being her own father. In 1908 an application was made to the Court to allot a sum of money for the marriage-expenses of the minor Thayammal. The District Judge after considering all the circumstances of the case, fixed Rs. 1,600 as a proper sum to be paid out of the estate for the said marriage, and on appeal to this Court, the order was confirmed. Parvathammal has now attained majority and her guardian Gurunatha Chetty has been discharged. Chokkalinga Chetty now seeks to have the order directing the minor's guardian to pay Rs. 1,600 for the marriage-expenses of Thayammal, executed under the Civil Procedure Code by attachment and sale of the property of Parvathammal and the District Judge has made an order accordingly.

Objection has been taken in appeal that the Court was not competent to pass an order of this kind as though it was an order passed between parties in execution, orders passed under the Guardians and Wards Act being by way of administrative directions to the guardian.

Under section 34 of the Guardians and Wards Act, a guardian may apply for the maintenance, education and advancement of the ward and of such persons as are dependent on him, and for the celebration of ceremonies to which the ward or any of the persons dependent on him may be a party, such portion of the income of the property of the ward as the Court may direct to be employed for the purpose. But this Act contains no provision for the execution of such order as decrees of the Court. It is however sought to justify the District Judge's order by a reference to section 36, Civil Procedure Code. That section says :

“ the provisions of this Code relating to the execution of decree shall, so far as they are applicable, be deemed to apply to the execution of orders,”

and an “ order ” has been defined in section 2 (14) of the Civil Procedure Code as, “ the formal expression of any decision of a civil Court which is not a decree.” I do not think that the order passed by the District Judge in 1908 was such an order as is contemplated in this section. Moreover the order was one

intended to be obeyed by the guardian appointed by the Court and to relate to the property of the minor who was a ward of Court. There is now no guardian and no minor. It is therefore not possible to execute it against Parvathammal who has now become a major, without allowing her an opportunity to contest the order in her own right. In *Somakka v. Ramiah*(1) to which I was a party, it was pointed out by ABDUR RAHIM, J., that the Guardians and Wards Act does not provide any machinery for deciding upon and enforcing claims of third parties for or against a ward as those are left to be regulated by ordinary proceedings by suits.

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We decided that an order purporting to be made under the Guardians and Wards Act, could not be enforced as a decree passed in a suit.

Secondly, an attempt has been made to justify the order by relying on the fact that notice was given to Parvathammal of the application and that she did not object that the Court had no jurisdiction. In *Somakka v. Ramiah*(1), that point also was considered, but there the respondent's pleader did not attempt to argue that, if the Court did make an order without jurisdiction altogether any waiver of objection or consent on the part of a party would make it valid. I am clearly of opinion that if there is an initial absence of jurisdiction, the conduct of the parties cannot validate an order passed without such jurisdiction.

Lastly, it is suggested that justice does not require the order to be set aside, that it is an order held by three Courts to be a fair one and therefore that we should not interfere in revision. In the previous proceedings, Parvathammal was represented by her guardian Gurunatha Chetty who has since been discharged. She has had no opportunity of raising any contention as to her personal liability to pay the sum now sought to be recovered, the order in that case being one of the nature of a direction to the guardian appointed by Court. It is thus an open question whether Parvathammal should justly be made to pay the sum.

I therefore consider that the order under appeal was one that the Court was not competent to pass and it should be set aside with costs here and in the lower Court.

(1) (1913) I.L.R., 36 Mad. 39.

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SRINIVASA AYYANGAR, J.—I agree. The facts of the case have been fully stated in the judgment just delivered. The order that was passed in favour of Chokkalinga Chetty on behalf of the minor girl Thayammal in the guardianship matter of Parvathammal was in these terms: "I accordingly direct that the respondent (i.e., Gnrnatha Chetty) pay this amount (viz., Rs. 1,600) to the petitioner (i.e., Chokkalinga Chetty)." This order was passed under section 34, clause (e) of the Guardians and Wards Act, under which a Court may direct a guardian to apply the income of the property or if the Court so directs the whole of the property for among other things the celebration of the ceremonies of any person who is dependent on a ward. This is in the nature of a direction to the guardian over whom the Court has control, to pay a certain sum of money out of the funds of the minor in discharge of the liability of the minor's estate. If this is obeyed by the guardian, that would be so far as between himself and the minor a good payment, and to that extent the guardian will be discharged of his liability to account for that sum. But this does not, in my opinion, give any right to the person to whom the money is directed to be paid, to enforce it as if there was a decree in his favour. The order, as a matter of fact, does not purport to adjudicate upon the relative claims of the minor and the person who seeks to enforce the liability against the minor's estate. If, for example, a person calling himself a creditor of the minor's estate applies to the Court for a direction to the guardian to discharge that debt, and if on enquiry, the Court comes to the conclusion that the liability is subsisting and the debt is payable out of the minor's estate, and makes an order to pay that debt, still I conceive that the minor would be entitled to challenge the order or the amount of debt so directed to be paid. That is the nature of the order and I think there was nothing to execute. It was quite competent to the person in whose favour this order was made to go to the Court which had jurisdiction in the guardianship matter and ask for a direction that the guardian should pay the money or the income of the minor's estate in his hands into Court, and if he gets such an order the Court will be competent to pay the money on behalf of the guardian or of the minor to the person so entitled. But I do not think that this so-called order can be executed as if it was a decree. In this case, as has been pointed out, the guardian has been

discharged and the minor has been allowed to take possession of her property.

One argument which was advanced by Mr. Krishnaswami Ayyar is that at the time the guardian was discharged, in view apparently of some objection by the guardian with reference to this order for payment of Rs. 1,600 which he had not obeyed, there was an undertaking by Parvathammal who had then attained majority that she would pay this sum. That undertaking evidently was given in order that the guardian may be free from all liability with reference to this matter. But that, to my mind, does not, by itself, impose any liability on the minor, for it is not shown that undertaking was given to or that agreement was made with Chokkalinga Chetty on behalf of Thayammal.

The next objection taken is, there having been notice to Parvathammal of an application made to execute this order and there having been an order for attachment, that order is *res judicata* and binding on her. But it is clear that she is entitled to raise the question that the order cannot be executed at all, in that it is not an order within the meaning of section 36, Civil Procedure Code. I do not think there is any substance in the contention and further it was quite open to the Court which previously passed the order on objection made at a later stage to vacate the previous order, if it came to the conclusion that that order was *ultra vires*, as I think it was in this case.

I do not wish to add anything with regard to the last contention of the learned pleader, viz., that in this case we ought not to interfere in the interests of justice, for we do not know whether the order directing Rs. 1,600 to be paid out of the minor's estate is just or unjust.

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