APPELLATE CIVIL.

Before Mr. Justice Odgers and Mr. Justice Hughes.

SELLAPPA GOUNDAN (FIRST DEFENDANT—FIRST RESPONDENT), APPELLANT,

1923, July 24.

v.

MASA NAIKEN AND OTHERS (PLAINTIFFS AND SECOND DEFENDANT—APPELLANTS AND SECOND RESPONDENT), RESPONDENTS.*

Minors—Guardian ad litem*—Adverse interest—Decree against minors, effect of—Suit against a Hindu father and his minor sons—Suit on mortgage bond executed by the father, not for an antecedent debt—Father appointed by Court as guardian* ad litem*—Appointment, whether proper and legal—Father's interest whether adverse to sons' interests—Decree and sale in execution of entire mortgaged property—Decree whether binding on sons' shares—Previous decree and sale in a Sub-Court—Subsequent suit to declare decree invalid, instituted in a District Munsif's Court, whether competent—Jurisdiction of latter Court—Right of purchaser to get father's share in this suit without being driven to a fresh suit.*

A minor represented in a suit by a guardian *ad litem* whose interest is adverse to that of the minor, is not legally represented at all; *Rashid-Un-Nisa* v. *Muhammad Ismail Khan* (1909) I.L.R., 31 All., 572 (P.C.), relied on.

In a suit for sale instituted in a Sub-Court against a Hindu father and his minor sons on a mortgage bond executed by the father, the father was appointed by the Court as guardian *ad litem* of his minor sons. A decree was passed against the entire mortgaged property which was sold in execution and purchased by the decree-holder. On a suit being instituted on behalf of the minor sons by their mother as their next friend in a District Munsif's Court against their father and the auction purchaser, for a declaration that the decree and sale in the

* Second Appeal No. 368 of 1921.

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previous suit were invalid against them and their shares in the family property,

Held, that the interest of the father was adverse to that of the minor sons, and that the appointment of the father as guardian was improper and illegal;

that the decree and sale were consequently invalid so far as the shares of the minor sons were concerned;

that the District Munsif's Court had jurisdiction to entertain the suit for a declaration that the decree passed by the Sub-Court was invalid; *Arunachelam Chetty* v. *Rangasami Pillai* (1915) I.L.R., 38 Mad., 922 (F.B.), followed; and

that the purchaser was entitled to ask for partition without being driven to a fresh suit to secure at least the share of the father in the family properties; *Davud Bivi Ammal* v. *Radhakrishna Aiyer* (1923) 44 M.L.J., 309, followed.

SECOND APPEAL against the decree of P. SUBBAYYA MUDALIYAR, the Subordinate Judge of Coimbatore, in Appeal Suit No. 80 of 1920, preferred against the decree of C. S. DEVARAJA AYYAR, the Additional District Munsif of Coimbatore, in Original Suit No. 552 of 1918.

The plaintiffs, who were the minor sons of the second defendant, instituted the present suit in the Additional District Munsif's Court of Coimbatore for a declaration that a decree passed in favour of the first defendant herein by the Subordinate Judge of Coimbatore in Original Suit No. 156 of 1915 against their father and themselves who were minors and represented by their father as their guardian *ad litem* in that suit, was invalid as against them, and that the subsequent sale in favour of the first defendant in execution of the decree was also invalid and did not operate on their shares in the family property. The previous suit was to recover money on a mortgage bond executed to the first defendant by the plaintiff's father; the bond was not for an antecedent debt but the amount was utilized, for purchase of new lands. The father was duly appointed by the Sub-Court as guardian *ad litem* for the minor sons who were co-defendants in that suit. It appeared that

the father had engaged a pleader for himself and his minor sons; but the pleader did not take, on behalf of the minor sons, the plea that the mortgage bond was not binding on them as it was not for an antecedent debt. The hypothecated family properties were sold in execution of the decree and the entire properties were purchased by the decree-holder who was the first defendant in the present suit. The District Munsif held that the previous decree was binding on the minor sons and dismissed the suit. On appeal the Subordinate Judge held that the minors were not properly represented in the previous suit, that the decree and sale were not binding on the minor sons, and that their shares in the mortgaged properties were not affected by the decree and sale, and he accordingly granted a declaration and an injunction in favour of the plaintiffs so far as they and their shares in the properties were concerned in the decree. The first defendant preferred this second appeal.

A. Krishnaswami Ayyar for appellant.

T. Narasimha Ayyangar for respondents.

JUDGMENT.

ODGERS, J.

ODGERS, J.—This was a suit shortly for a declaration that the decree in Original Suit No. 156 of 1915 on the file of the Sub-Court of Coimbatore is not binding on the plaintiffs in this suit. The lower Appellate Court has found that the decree is not binding on the ground that the minor plaintiffs were not properly represented in that suit by their father as guardian *ad litem* as the interest of the latter was adverse to theirs. I think the lower Appellate Court further intended in paragraph 21 of the judgment to find that the guardian did not raise

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the proper defences to the suit on the minors' behalf—thus imputing negligence to him in the conduct of the suit. The appeal is by the first defendant as purchaser in 1918 and the decree-holder in Original Suit No. 156 of 1915 and the plaintiffs are the sons of the second defendant. The suit, Original Suit No. 156 of 1915, was in respect of a mortgage (Exhibit C) and the money advanced was utilized for the purchase of new lands—this is admitted. The suit was brought in 1915 and the final decree (Exhibit E) was passed in February 1917. It is against the father and his minor sons (inter alia) and directs sale of the property and if necessary a personal decree against the father, the first defendant in that suit. The written statement of the first defendant (Exhibit B) settled by his vakil Mr. N. Ramaswami Iyer, alleges discharge and points as to payment of interest. The point made against defendant No. 1 is that he ought to have pleaded that the mortgage was not binding on the minors—not being for an antecedent debt. Leading up to the appointment of the father as guardian we have Exhibit F the plaintiff's affidavit asking for the appointment of the father and stating that he had no interest adverse to that of his minor sons. He was duly appointed by the Court. On 19th December 1915 the defendant on behalf of himself, and his minor sons, appointed vakil, Mr. N. Ramaswami Iyer to appear for him. The present suit was filed on 5th July 1918 by the minors through their mother, none of them having yet attained majority. Mr. A. Krishnaswami Iyer's first point for the appellant is that there was no disability on the part of the father and that even if he was not a proper person to be appointed on the ground of interest, his appointment was a mere irregularity. Some of the cases cited for appellant turn on the distinction as to whether the proceedings against the minors where their

guardians' interest is adverse are mere nullities or only voidable. (See per SADASIVA AYYAR, J., in Appeals Nos. 347 and 338 of 1919 (unreported) and *Kuppuswami Ayyangar* v. *Kamalammal*(1), *Mannu Lal* v. *Ghulam Abbas*(2). This distinction is without importance in the present case.

In Second Appeal No. 407 of 1919 to which my learned brother was a party it was held on the facts that there was no divergence of interest and in Second Appeal No. 1092 of 1918 to which he was also a party, it was held, relying on *Rashid-un-nisa* v. *Muhammad Ismail Khan*(3), that representation by a guardian whose interest is adverse is no representation at all. It is true that the Privy Council in *Walian* v. *Banke Behari Pershad Singh*(4) decided that defects in procedure are mere irregularities. In that case there was no formal order of appointment and neither the minors nor their mother were served with notice and in *Mannu Lal* v. *Ghulam Abbas*(2) the absence of an affidavit was held not sufficient to render the proceedings illegal and void. In *Beni Prasad* v. *Lajja Ram*(5) it was held that a decree against the minor properly represented cannot be set aside save on proof of fraud or collusion by the guardian. See also *Raghubar Dyal Sahu* v. *Bhikya Lal Misser*(6). Here in my opinion we have much more than a mere irregularity. It was improper and in fact illegal to appoint the father guardian at all. *Murlidhar* v. *Pitambar Lal*(7) and *Ramjiban* v. *Dhiku*(8). It was manifestly to his interest to throw as much of the burden of the mortgage debt as he could on the minors' shares and to exonerate his own share pro-

(1) (1920) I.L.R., 43 Mad., 842. (2) (1910) I.L.R., 32 All., 287 (P.C.).
(3) (1909) I.L.R., 31 All., 572 (P.C.).
(4) (1903) I.L.R., 30 Calc., 1021 (P.C.).
(5) (1916) I.L.R., 38 All., 452. (6) (1886) I.L.R., 12 Calc., 69.
(7) (1922) I.L.R., 44 All., 525. (8) (1912) 16 C.L.J., 264.

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portionately. It is difficult to imagine a case where one defendant's interest could be more adverse to that of another than the present case. The debt not being antecedent, and the money having been borrowed for the purpose of buying new lands, the defence that the minors' shares were not liable ought to have prevailed if it had been set up on their behalf. The father and his vakil must have known that this defence was open, and I am prepared to hold if necessary that the guardian showed gross negligence in not setting up this defence within the decision in *Punnayyah* v. *Viranna*(1). However a decision as to this may be unnecessary as I hold that the law goes to this length that a minor represented by a guardian whose interest is adverse is not legally represented at all. This is I think the result of the decision in *Rashid-un-nisa* v. *Muhammad Ismail Khan*(2) as followed in Second Appeal No. 1092 of 1918 (supra) in this Court. In the former case the Privy Council laid down that as the guardian *ad litem* had an adverse interest to that of the minor, the latter was never a party to the suit in the proper sense of the term. In that case the so-called guardian *ad litem* bought up the decrees obtained against the estate of his deceased brother, whose daughter he represented as guardian *ad litem*. He thus appeared as the representative of the debtor and as the sole creditor of the estate in his own right. Their Lordships thereupon held that the daughter was never represented at all. This disposes of the main point argued before us. There are two other points which may be briefly disposed of—

(1) That the District Munsif's Court had no jurisdiction to entertain the suit. Mr. A. Krishnasami Iyer admitted we were bound by the ruling in *Arunachelam*

(1) (1922) I.L.R., 45 Mad., 425. (2) (1909) I.L.R., 31 All., 572 (P.C.).

Chetty v. *Rangaswamy Pillai*(1), but desired to keep the point open in the event of a further appeal.

(2) Appellant may ask for partition without being driven to a fresh suit in order to secure at least the share of the father, second defendant here, *Davud Beevi Ammal* v. *Radhakrishna Aiyar*(2). This is not resisted by Mr. T. Narasimha Ayyangar for respondents and will be decreed.

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The appellant has failed on the main question raised before us and I would dismiss the appeal with costs. The decree of this Court will contain a provision to carry out the effect of the preceding paragraph of this judgment. The Civil Miscellaneous Appeal is therefore allowed but there will be no order as to costs.

HUGHES, J.—I agree. The interests of the father and the sons in Original Suit No. 156 of 1915 were divergent. A defence was open to the sons which was not open to the father and could not be pleaded by the father for himself, and the father would profit at the son's expense if that defence were not raised in the suit as in fact it was not. The question therefore is whether the decree passed in that suit, in which the father represented his sons as their guardian *ad litem* is a nullity so far as the sons are concerned and I think it is. In Second Appeal No. 407 of 1919 (unreported) there was as a matter of fact no adverse interest and that settled the question there. In the case in *Kuppuswami Ayyangar* v. *Kamalammal*(3) it is not clear that there was any adverse interest on the part of the mother. In Second Appeal No. 1092 of 1918, in the judgment to which I was a party, it was held that the appointment of a guardian whose interests were adverse, gives no legal representation at all and the decision obtained in such

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(1) (1915) I.L.R., 38 Mad., 922 (F.B.). (2) (1923) 44 M.L.J., p. 309.
(3) (1920) I.L.R., 43 Mad., 842.

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proceedings is null and void. That decision is based on *Rashid-un-nisa* v. *Muhammad Ismail Khan*(1) Privy Council case. The effect of this decision in *Rashid-un-nisa* v. *Muhammad Ismail Khan*(1) was discussed in *Payidanna* v. *Lakshminarsamma*(2) and WALLIS, J. (as he then was), appears to have thought that a decree passed against a minor, not properly represented, was a nullity, whereas SADASIVA AYYAR, J., was of opinion that the Privy Council did not definitely decide whether the sales in that case were void or merely voidable.

In Second Appeal Nos. 347 and 348 of 1919 (unreported) SADASIVA AYYAR, J., expressed the opinion that the view taken in Second Appeal No. 1092 of 1918 (referred to above) was erroneous and NAPIER, J., agreed with him. But both the learned Judges in that case found that there was as a matter of fact no adverse interest on the part of the guardian appointed. So the further discussion was really unnecessary.

In the case in *Rashid-un-nisa* v. *Muhammad Ismail Khan*(1) in the application for execution Manladad was the real applicant and yet he was the guardian *ad litem* of the minor respondent. It was held that the minor was not a party to the proceedings in the proper sense of the term. It is true that Manladad was apparently not appointed guardian *ad litem* by the Court, but I do not think that affects the question. A plaintiff cannot represent a minor defendant as guardian *ad litem*. That is an extreme case. But the same disability exists to a less extent when the interests of a guardian are in other cases adverse to those of the minor.

In the present case the debt was not an antecedent debt and in the plaint it was alleged that the transaction was not binding while in the written statement there is

(1) (1909) I.L.R., 31 All., 572 (P.C.). (2) (1915) I.L.R., 38 Mad., 1075.

no allegation that there was any prior contract such as would make the debt antecedent, though it has been suggested in arguments before us that such a contention might possibly have been raised.

It is clear, therefore, as already stated, the interests of the father were adverse to those of his sons and the sons were not legally represented in the suit and the decree does not bind them, and this appeal fails; but provision may be made for the partition as this has been agreed to.

I agree with the order proposed in the last part of the judgment of my learned brother.

K.R.

INSOLVENCY JURISDICTION—FULL BENCH.

Before Sir Walter Salis Schwabe, Kt., K.C., Chief Justice, Mr. Justice Coutts Trotter and Mr. Justice Krishnan.

In re SELLAMUTHU SERVAI AND ANOTHER (INSOLVENTS), RAMAIYA AND ANOTHER (PETITIONERS).*

1923 October 8.

Hindu Law—Father's "antecedent" debts neither illegal nor immoral—Right of father to sell sons' shares also to discharge such debts. Father's insolvency—Right of Official Assignee to sell sons' shares.

A Hindu father who had incurred debts in his trade was adjudged an insolvent and his estate vested in the Official Assignee.

Held by the Full Bench that in order to discharge such debts which were neither illegal nor immoral, the Official Assignee standing in the shoes of the father could exercise the father's right of selling the sons' shares also in the ancestral estate.

The view uniformly held by the Madras High Court that the father has this right has not been upset by the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1917) I.L.R., 39 All., 437

* Petition No. 179 of 1921.