APPELLATE CIVIL.

Before Mr. Justice Mockett and Mr. Justice Horwill.

1937, January 25.

SETHURAJAN, MINOR, BY GUARDIAN NATARAJA SETHURAYAN (RESPONDENT—THIRD DEFENDANT), APPELLANT,

v.

GURUSWAMI PATHAR (PETITIONER—PLAINTIFF), RESPONDENT.*

Executing Court—Jurisdiction—Decree under execution—Validity of—Jurisdiction to go into question of—Minor—Decree passed against, on footing of his being a major—Validity of decree attacked on ground of.

An executing Court is not entitled to go into the question whether a person against whom the decree under execution was obtained on the footing that he was a major was in fact a minor and the decree was therefore void as against him.

Section 47 of the Code of Civil Procedure is not intended to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree.

Case-law reviewed.

APPEAL against the order of the District Court of East Tanjore at Negapatam dated 18th February 1933 and made in Appeal Suit No. 79 of 1932 preferred against the order of the Court of the District Munsif of Shiyali dated 22nd June 1932 and made in Miscellaneous Application No. 25 of 1932 in Original Suit No. 29 of 1929.

S. R. Muthuswami Ayyar for appellant.

M. S. Venkatarama Ayyar for respondent.

Cur. adv. vult.

* Appeal Against Appellate Order No. 146 of 1933.

JUDGMENT.

MOCKETT J.—This is a second appeal against the order of the District Judge of East Tanjore allowing the appeal against the order of the District Munsif of Shiyali. The decree-holder-respondent obtained a decree against the father of the appellant and the appellant. He impleaded the appellant as a major. In execution the third defendant obstructed and a petition was put in by the decree-holder to have his obstruction removed and possession of the property delivered. The appellant then appeared by his mother as guardian and pleaded that he was a minor. The lower Court having so found dismissed the petition. The lower appellate Court allowed the appeal on the grounds that this matter could not be raised by the appellant in execution and that his proper remedy was by way of suit. The point for decision is which of these two views is correct.

The appellant has argued that under Order XXI, rule 99, Civil Procedure Code, the petition was correctly dismissed because he, being a minor, was in the same position as a person "other than the judgment-debtor", and, according to the ruling of the Privy Council in *Rashid-un-nisa* v. *Muhammad Ismail Khan*(1), the appellant, not having been properly represented, was not a party at all. That argument, however, seems to beg the question in this case, which is, at what stage should the question of minority be gone into? And it is to be observed that in the above-mentioned case, the question was raised in connection with section 244 of the Code of 1882

(1) (1909) I.L.R. 31 All. 572, 582 (P.C.).

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(corresponding to section 47 of the present Code) and it was held that a suit to set aside execution proceedings by a minor on the ground of non-representation was not barred by the above section. There are conflicting authorities on the subject. In *Sami Chettiar* v. *Sesha Iyer & Co.* (1) DEVADOSS J. took the view that the question of a defendant being a minor could be taken at any time, even in execution. And in *Venkatasomeswara Rao* v. *Lakshmanaswami*(2) KUMARASWAMI SASTRI J., one of the referring Judges, stated that, at least, on the balance of convenience, it was better that the question whether a decree was void by reason of the defendant being a minor should be gone into in execution and not by means of a suit. DEVADOSS J. at page 284 says :

> " The second question is, can the executing Court entertain an objection to the execution of the decree against a minor on the ground that the guardian *ad litem* had an interest adverse to that of the minor in the suit ? If the decree is not illegal on the face of it, is it open to the executing Court to go behind it ? "

He then goes on to say that it is open to the minors to have these matters investigated in a suit. KUMARASWAMI SASTRI J. seems to draw a distinction between a void and voidable decree. In the former, he considers that the matter can be investigated in execution and so does DEVADOSS J. The Full Bench set at rest none of these questions. It is necessary to say a few words with regard to KUMARASWAMI SASTRI J.'s suggestion that the balance of convenience is in favour of investigating the question of minority in execution. That may be so, and that comment

(1) A.I.R. 1928 Mad. 1057. (2) (1928) I.L.R. 52 Mad. 275 (F.B.).

might frequently be made with regard to the preferability of investigations in execution to those in a suit. But, with great respect, it does not seem to me to satisfy the test laid down by section 47. The point that is raised in such cases seems to be not one "relating to the execution, discharge or satisfaction of the decree", but amounts to a plea that the decree is void and that it was wrongly passed by the trial Court. An examination of the cases mentioned shows that they are not direct decisions on this point, the observations in favour of the appellant in these cases being *obiter*. But the matter has been directly dealt with in two recent decisions of this High Court. In *Govindan Nadar* v. *Natesa Pillai*(1) JACKSON J. had to deal with this very question. In that case, it was raised in execution that the defendant was a lunatic, unrepresented. JACKSON J., following the decisions of the Calcutta High Court in *Kalipada Sarkar* v. *Hari Mohan Dalal*(2) and *Gora Chand Haldar* v. *Prafulla Kumar Roy*(3), took the view that it was not open to the executing Court to go into that matter. The rule to be derived from *Gora Chand Haldar* v. *Prafulla Kumar Roy*(3) seems to be that the voidness of the decree must be apparent on the face of it. JACKSON J. observes that the rule laid down by the Calcutta High Court conforms with the universally recognised principle, and he accepted those decisions. In *Lakshmanan Chettiar* v. *Chidambaram Chettiar*(4) a Bench of this High Court (CURGENVEN and CORNISH JJ.) has expressed approval of the above decision of

(1) (1931) 61 M.L.J. 520.
(2) (1916) I.L.R. 44 Cal. 627.
(3) (1925) I.L.R. 53 Cal. 166, 173 (F.B.).
(4) (1934) I.L.R. 58 Mad. 752.

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JACKSON J. and prefers his view to that of OLDFIELD J. in *Subramania Aiyar* v. *Vaithinatha Aiyar*(1) and MADHAVAN NAIR J. in *Arunachalam Chetty* v. *Abdul Subhan Sahib*(2). It may be mentioned that the High Court of Rangoon in *S. A. Nathan* v. *S. R. Samson*(3) has dissented from the Full Bench decision of the Calcutta High Court in *Gora Chand Haldar* v. *Prafulla Kumar Roy*(4). I prefer the Calcutta view expressed in *Kalipada Sarkar* v. *Hari Mohan Dalal*(5) and *Gora Chand Haldar* v. *Prafulla Kumar Roy*(4). I do not consider that section 47, Civil Procedure Code, is intended to be used for the purpose of investigating matters relating to the validity of the decree itself when on the face of it there is nothing illegal about the decree. Cases in which pleas of minority might be deliberately withheld for the purpose of obstructing future execution proceedings can be easily imagined and I am not impressed by the argument as to hardship. As to the question of hardship, in suitable cases, the Court in which the suit is filed to set aside the decree can always, by interlocutory orders, make provision against the minor's property being unjustly sold.

As to the point raised that the order of the District Munsif was not appealable it is quite clear that he purported to make it under section 47 and there is no substance in this contention. As a result of these conclusions, I would dismiss this appeal with costs.

HORWILL J.

HORWILL J.—I agree. There is no definite current of decisions in any High Court to the

(1) (1913) I.L.R. 38 Mad. 682. (2) (1925) 50 M.L.J. 232.
(3) (1931) I.L.R. 9 Ran. 480 (F.B.). (4) (1925) I.L.R. 53 Cal. 166, 173 (F.B.).
(5) (1916) I.L.R. 44 Cal. 627.

effect that an executing Court, whose business it is to execute, should institute an enquiry at the instance of any person to ascertain whether a decree, to all appearances a perfectly valid one, may not for some reason or other be invalid. It is against the well-established principles governing the duties of an executing Court that it should sit in judgment over a Court that has passed a decree, which may even be a superior Court. Cases do however arise where the executing Court is forced to notice that a decree is not executable and in such cases it should not execute. The unexecutability of the decree may be obvious from a perusal of the judgment and the pleadings or it may appear, when a decree-holder is seeking to make a legal representative of a judgment-debtor liable, that the legal representative is not liable because no decree was passed against the judgment-debtor while he was yet alive. Executing Courts must recognise these facts. I do however feel that it would be against the trend of decisions, above all, the decisions since the closely-reasoned judgments in *Kalipada Sarkar* v. *Hari Mohan Dalal*(1), to countenance an enquiry in execution whether a judgment-debtor was a minor. Although the principal case relied on by the appellants, *S. A. Nathan* v. *S. R. Samson*(2), disagrees with *Gora Chand Haldar* v. *Prafulla Kumar Roy*(3) regarding the distinction between a decree that is void on the face of it and one that is found to be void after enquiry, yet the effect of the judgment in *S. A. Nathan* v. *S. R. Samson*(2) is to make an

(1) (1916) I.L.R. 44 Cal. 627. (2) (1931) I.L.R. 9 Ran. 480 (F.B.).
(3) (1925) I.L.R. 53 Cal. 166 (F.B.).

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exception only with regard to a judgment-debtor who died before decree, a special case since distinguished even by the Calcutta High Court. In most of the decisions placed before us on behalf of the appellant, the effect of the Privy Council case, *Rashid-un-nisa* v. *Muhammad Ismail Khan*(1), has not been considered; but in the Rangoon case it is recognised that this decision of the Committee does stand in the way of an enquiry regarding the minority of a judgment-debtor. When a judgment-debtor appears in execution and asserts that he is a minor he is in fact saying that he was not a party to the decree, which admission precludes the executing Court from making an enquiry under section 47, Civil Procedure Code.

It is argued that if the District Munsif had no authority under section 47 to go into this matter, his order was not one under section 47 and so is not appealable. The fallacy of this argument is that although the District Munsif ought not to have made this enquiry, he assumed jurisdiction and purported to pass an order under section 47, Civil Procedure Code. His order, wrongly given though it was, was therefore under section 47, Civil Procedure Code, and appealable.

The respondent has put forward an alternative answer to the appellant. It is that as two brothers of the appellant, with identical rights and liabilities, were parties to the decree, they sufficiently represented the minor appellant. This is a reasonable contention but it is weakened, if not vitiated, by the fact that the plaintiff did

(1) (1909) I.L.R. 31 All. 572 (P.C.).

not treat them as representatives of the appellant's interest, because he impleaded him, as well as his brothers. In view of the fact that the appeal fails otherwise, we have not thought it necessary to decide this rather nice point.

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A.S.V.

APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., Chief Justice, and Mr. Justice Venkataramana Rao.

DAVOOD MOHIDEEN ROWTHER, PETITIONER,

v.

SAHABDEEN SAHIB, RESPONDENT.*

1937, February 11.

Provincial Insolvency Act (V of 1920), ss. 28 and 29—Suit by creditor against debtor after adjudication of latter as an insolvent in respect of a debt provable in insolvency—Maintainability of—Condition precedent to—Leave of Insolvency Court, if—Suit instituted without such leave—Power of Court in which suit instituted to grant leave to continue it.

After a debtor is adjudged an insolvent, a suit filed by his creditor for the recovery of a debt provable in insolvency without the leave of the Insolvency Court is not maintainable and the Court in which the suit is instituted cannot give leave to continue it.

When section 29 of the Provincial Insolvency Act speaks of a suit pending, it refers to a suit already begun but not finished when the order of adjudication is made. Under section 28 of the Act leave of the Court is a condition precedent to the right of action, the want of it is a defect fatal to the suit and subsequent leave cannot validate it.

Case-law reviewed.

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* Civil Revision Petitions Nos. 1295 of 1935 and 1167 of 1936.