APPELLATE CIVIL.

Before Mr. Justice Venkatasubba Rao and Mr. Justice K. S. Menon.

1936, February 28.

MATTAI KRISHNAMURTHI, MINOR BY ADOPTIVE MOTHER AND GUARDIAN MATTA SURYAKANTAM (PETITIONER), APPELLANT,

v.

THE IMPERIAL BANK OF INDIA AT RAJAHMUNDRY (RESPONDENT), RESPONDENT.*

Executing Court—Decree under execution—Validity of—Jurisdiction to pronounce upon—Minor—Decree against—Plea of invalidity of, on ground of guardian ad litem *having interest adverse to minor.*

An executing Court has no power to question the validity of the decree under execution on the ground that the minor, against whom the decree was passed, was represented in the suit by a guardian *ad litem* whose interest was adverse to his own.

Review of the authorities on the question as to the power of an executing Court to pronounce upon the validity of the decree which it is called upon to execute.

APPEAL against the order of the District Court of East Godavari at Rajahmundry in Execution Application No. 412 of 1935, Execution Petition No. 116 of 1934 in Original Suit No. 43 of 1933.

P. V. Rajamannar and *K. Subba Rao* for appellant.

O. T. G. Nambiar for respondent.

Cur. adv. vult.

JUDGMENT.

VENKATASUBBA RAO J.

VENKATASUBBA RAO J.—This appeal raises the difficult question as to the power of an

* Appeal Against Order No. 389 of 1935.

executing Court to pronounce upon the validity of the decree which it is called upon to execute. In this case, on behalf of the minor third defendant, it was contended that, as he had been represented in the suit by his father whose interest was adverse to his own, the decree passed was a nullity and could not therefore be executed. This point was taken at the stage of execution and the lower Court held that it had no power to go into that question. The correctness of this view is challenged before us and we have had long and learned arguments on the point.

I do not think I can do better than refer at the very outset to the oft-quoted case of *Kalipada Sarkar* v. *Hari Mohan Dalal*(1). The decree in that case was one passed against a lunatic represented by a minor as his next friend and the learned Judges rightly treated that decree as a nullity. That being granted, the question arose whether an objection to its validity could be raised in proceedings in execution. MOOKERJEE and CUMING JJ. held that the Court executing a decree must take the decree as it stands and has no power to go behind it or to entertain an objection to its legality or correctness. They observe that the right principle is that a proceeding to enforce a judgment is a collateral and not a direct proceeding and therefore no enquiry into its regularity or validity can be permitted in such a collateral proceeding. In *Zamindar of Ettiyapuram* v. *Chidambaram Chetty*(2), though it must be observed that the case was one under section 21, Civil Procedure Code, and the point did not directly

(1) (1916) I.L.R. 44 Cal. 627. (2) (1920) I.L.R. 43 Mad. 675 (F.B.).

KRISHNA-MURTHI v. IMPERIAL BANK OF INDIA.

VENKATA-SUBBA RAO J.

arise, WALLIS C.J., delivering the judgment of the Full Bench, refers to the Calcutta case just quoted and approves of the principle it laid down (*see* page 687). In *Sami Mudaliar* v. *Muthiah Chetti*(1) the validity of a decree was challenged in a regular suit on the ground that, on the date it was passed, the defendant had died and his legal representative had not been brought on the record. It was contended before the High Court that the proper way of impeaching the decree was to raise the question in execution and that the regular suit did not therefore lie. The learned Judges repelled this argument, citing *Kalipada Sarkar* v. *Hari Mohan Dalal*(2) and *Zamindar of Ettiyapuram* v. *Chidambaram Chetty*(3). They declare :

> "It seems therefore clear that, as far as this Court is concerned, the executing Court cannot go behind the decree."

It is worthy of note that, although the decree there was a nullity having been passed against a dead person [see *Khiarajmal* v. *Daim*(4)], the learned Judges held that the executing Court could not go behind it. The reason given in the two Madras cases cited above for holding that the objection could not be taken in the executing Court is different from what was given in the judgment of the Calcutta High Court. In *Kalipada Sarkar* v. *Hari Mohan Dalal*(2) the view of the learned Judges was based not on a narrow but upon the general ground, namely, that an execution proceeding is one to enforce a judgment, that is to say, such a proceeding is collateral to the judgment, and therefore no enquiry into the

(1) (1922) 43 M.L.J. 293.
(2) (1916) I.L.R. 44 Cal. 627.
(3) (1920) I.L.R. 43 Mad. 675 (F.B.).
(4) (1904) L.R. 32 I.A. 23, 33.

validity of the judgment should be permitted in such a proceeding. But in the two Madras cases referred to above, although the same conclusion was reached, the reason given was that section 47, Civil Procedure Code, was a bar to the question of the validity of the decree being decided in execution and therefore a regular suit would lie. With great respect, there is a fallacy underlying this argument. Section 47 merely enacts that certain questions shall be determined by the executing Court and not by a separate suit; it does not profess to lay down what the questions are that an executing Court shall not go into [*Mahabir Singh* v. *Dip Narain Tewari*(1)]. However, I am concerned with the conclusion and not with the reasoning, and all that I wish to point out at this stage is, that the Calcutta view that an executing Court cannot go behind the decree was affirmed and approved in the two Madras cases aforesaid. I must mention that this principle, namely, that the executing Court should not take upon itself the determination of the validity of the decree, is much older than *Kalipada Sarkar* v. *Hari Mohan Dalal*(2). It was declared by WEST J., who delivered the judgment of the Bench in a very early case, that the sound rule was not to invest the executing Court with this power, for, as the learned Judge points out,

> "a contrary rule would virtually subject the decrees of the Civil Courts to revision and reversal by superior Courts (or even equal or inferior ones) to which they are not subordinate."

He points out that in case of doubt the Court where execution is sought may adjourn the execution in order to enable the party interested

(1) (1931) I.L.R. 54 All. 25, 38, 39 (F.B.). (2) (1916) I.L.R. 44 Cal. 627.

KRISHNA-MURTHI v. IMPERIAL BANK OF INDIA.

VENKATA-SUBBA RAO J.

to make an application to the Court passing the decree.

"Thence",

the learned Judge goes on to observe,

"the applicant may of course proceed by appeal, if dissatisfied, in the ascending scale of Courts until he reaches the highest of the province in which the decree was made." *Chogalal* v. *Trueman*(1).

The question that was attempted to be raised there in execution was that the Court that passed the decree had no jurisdiction. Then again, in *Kasturshet Javershet* v. *Rama Kanhoji*(2) it was contended that the defendant being an agriculturist, the decree passed by the Small Cause Court was a nullity. The Subordinate Judge, agreeing with this contention, refused to execute the decree. SARGENT C.J., who delivered the judgment of the Bench, held that the lower Court's duty was confined to enforcing the decree and that the Court was not competent to question its validity.

A distinction may be suggested (though no allusion was made at the Bar to this) based upon the executing Court being the same Court as passed the decree, or a different Court, i.e., the Court to which the decree is merely transmitted for execution. Order XXI, rule 7, Civil Procedure Code, deals with Courts of the latter description. The words "or of the jurisdiction of the Court which passed it", which occurred in the earlier Code, have been omitted. From this it may be argued, as has often been done, that, when the executing Court happens to be different from that which passed the decree, the intention of the Legislature is clear that the executing Court cannot

(1) (1883) I.L.R. 7 Bom. 481. (2) (1885) I.L.R. 10 Bom. 05.

arrogate to itself the function of pronouncing upon the validity of the decree it is called on to execute. Perfectly true, but the principle is of wider application as *Kalipada Sarkar* v. *Hari Mohan Dalal*(1) shows, for, in that case, the executing Court and the Court which passed the decree were identical and yet the doctrine that the executing Court cannot go behind the decree was enforced.

In a later case, *Gora Chand Haldar* v. *Prafulla Kumar Roy*(2), the Calcutta High Court gave but a qualified assent to the principle enunciated in *Kalipada Sarkar* v. *Hari Mohan Dalal*(1) and the various interpretations placed by different Judges on the observations in the case first mentioned have left the law on the subject in hand in a most uncertain state. There, the learned Judges held that the correct view is that, where the decree presented for execution was made by a Court which apparently had not jurisdiction, whether pecuniary or territorial or in respect of the judgment-debtor's person, to make the decree, the executing Court is entitled to refuse to execute it on the ground that it was made without jurisdiction.

> " Within these narrow limits ",

the learned Judges go on to say and those words are important,

> " the executing Court is authorised to question the validity of a decree."

The word " apparently " has been the subject of a good deal of debate. What is meant by that word ? Does it mean that if the defect is patent,

(1) (1916) I.L.R. 44 Cal. 627. (2) (1925) I.L.R. 53 Cal. 166 (F.B.).

KRISHNAMURTHI v. IMPERIAL BANK OF INDIA.

VENKATASUBBA RAO J.

the executing Court can question the decree, otherwise it cannot? But, upon the facts, the defect such as it was, far from being apparent or patent, became evident only on investigation and a finding had to be given that there was such a defect. Notwithstanding this, the learned Judges of the Full Bench assumed that the decree was void and a nullity. That being so, it is difficult to ascribe to the word "apparently" the meaning which has been given to it in some decisions. This point is well brought out in the judgment of COSTELLO J. in *Kalicharan Singha* v. *Bibhutibhushan Singha*(1). An attempt was made in that case on behalf of the judgment-debtor to get rid of the decree, at the stage of execution, on the ground that, when the decree was passed, the judgment-debtor had been a lunatic not properly represented in the action. The learned Judge held that the decree could not be challenged in execution and, after expressing considerable doubts as to the correctness of the Full Bench decision, felt himself constrained to distinguish it on the ground that that case "does not cover the exact point" before him. Then again, in *Govindan Nadar* v. *Natesa Pillai*(2) a similar contention was raised in execution proceedings and JACKSON J., purporting to follow *Gora Chand Haldar* v. *Prafulla Kumar Roy*(3), held that the executing Court ought not to enquire whether the judgment-debtor on the date of the decree was or was not a lunatic. The learned Judge says;

"It is an accepted principle that the executing Court *cannot go behind the decree*. To employ other words but the same metaphor it must take the decree *at its face value*."

(1) (1932) I.L.R. 60 Cal. 191.
(2) (1931) 61 M.L.J. 520. (3) (1925) I.L.R. 53 Cal. 166 (F.B.).

Then, referring to the Full Bench case, he observes that the word "apparently" is a third way of expressing the same principle, being synonymous with, "on its face" or "without going behind". It is significant that, although JACKSON J. expresses agreement with the view of the Judges of the Full Bench, he declares most unequivocally that the correct principle is to be found in *Kalipada Sarkar* v. *Hari Mohan Dalal*(1). What is more, he observes, referring to the crucial passage in that judgment, that it cannot be improved upon. In *Amalabala Dasi* v. *Sarat Kumari Dasi*(2) the decree was one passed by the Calcutta High Court on its Original Side. On its being transmitted to the Court of a Subordinate Judge for execution, the defendant contended that the High Court had no jurisdiction to pass the decree, the money not having been advanced at Calcutta and there having been no contract to repay it there. The Subordinate Judge, finding on the evidence that the defendant's contention was in fact well founded, refused to execute the decree. MUKERJI and GUHA JJ. set aside that order, observing that the word "apparently" in the Full Bench case means "on the face of the decree" and adding, by way of a rider, that the word "decree" means "decree and the relevant papers for the purpose of understanding it". In a very instructive judgment in *S. A. Nathan* v. *S. R. Samson*(3), PAGE C.J. deals with the question of the powers of an executing Court at great

(1) (1916) I.L.R. 44 Cal. 627. (2) (1931) 54 C.L.J. 593.
(3) (1931) I.L.R. 9 Rang. 480 (F.B.).

KRISHNAMURTHI v. IMPERIAL BANK OF INDIA.

VENKATASUBBA RAO J.

length. Referring to *Gora Chand Haldar* v. *Prafulla Kumar Roy*(1), he says :

"But was it rightly decided ? With all respect to the learned Judges who were parties to it, in my opinion it was not."

Then, referring to the word "apparently", the learned Chief Justice makes, if I may say so with respect, a pertinent observation, namely, that, if it is only a patent want of jurisdiction that can be questioned, the executing Court would not be entitled to question the validity of a decree passed against a dead person, for, whether the person was dead or not when the decree was passed can only be ascertained "*aliunde* by evidence or otherwise". In other words, such a defect would be a latent and not a patent defect, and would not fall within the purview of the Full Bench judgment. Referring to what is known as "defect of jurisdiction", PAGE C.J. points out that it would be against public policy and good sense that the executing Court should be empowered to question the validity of a decree as vitiated by such a defect. When the Court assumes jurisdiction and passes a decree, it must be presumed that the decree that it made was passed in the exercise of jurisdiction with which it was invested—*Omnia presumuntur esse rite acta* (page 494). The presumption is of course not irrebuttable, but is the Court charged with the duty of executing the decree entitled to question its validity ? I put this case : suppose the Court which passed the decree went into the question of jurisdiction fully and gave a specific finding, is the executing Court to be at liberty to give a different finding and in fact reverse the decision of the original Court ?

(1) (1925) I.L.R. 53 Cal. 166 (F.B.).

This would lead to the clashing of powers adverted to in the referring judgment in the same case. The following passage from the judgment of WEST J. in *Vishnu Sakharam Nagarkar* v. *Krishnarao Malhar*(1) cited by PAGE C.J. tersely states the principle :

"The order, which if beyond the jurisdiction might have been got rid of by proceedings directed to that object, was not allowed to be canvassed in a collateral inquiry."

The fundamental difference between a collateral and a direct proceeding is here clearly brought out, and I may observe that it is the very same principle that was acted upon in *Kalipada Sarkar* v. *Hari Mohan Dalal*(2). In the words of the Chief Justice, it is difficult to understand how it can reasonably be contended that a subsisting decree passed by a Court constituted in accordance with law against parties thereto who have been duly impleaded, can be regarded as a nullity, "a mere nothing" (page 493).

Even in the case of a decree against a dead person, as regards the power of the executing Court, there has not been unanimity of opinion. In *Subramania Aiyar* v. *Vaithinatha Aiyar*(3) OLDFIELD J. held that the objection to the decree could be taken in execution proceedings ; and to the same effect is the decision in *Jungli Lall* v. *Laddu Ram Marwari*(4). But the correctness of this view was doubted by CURGENVEN and CORNISH JJ. in *Lakshmanan Chettiar* v. *Chidambaram Chettiar*(5). PAGE C.J., in the ruling already referred to, seems to think that the case of a decree passed against a dead person constitutes

(1) (1886) I.L.R. 11 Bom. 153, 160.
(2) (1916) I.L.R. 44 Cal. 627.
(3) (1913) I.L.R. 38 Mad. 682.
(4) (1919) 4 P.L.J. 240 (F.B.).
(5) (1934) I.L.R. 58 Mad. 752, 759.

KRISHNA-MURTHI v. IMPERIAL BANK OF INDIA.

VENKATA-SUBBA RAO J.

one of the very few exceptions to the general rule that the validity of a decree should not be allowed to be questioned by the executing Court.

Where the party is a person under disability not properly represented, as to the power of the executing Court, there has been, as already pointed out, a similar conflict of opinion. In *Lahore Bank* v. *Ghulam Jilani*(1) and again in the two cases referred to above, namely, *Govindan Nadar* v. *Natesa Pillai*(2) and *Kalicharan Singha* v. *Bibhuti-bhushan Singha*(3), the view was taken that the executing Court must take the decree as it stands, although in *Arunachalam Chetty* v. *Abdul Subhan Sahib*(4) a different view prevailed.

In this appeal, the question is not in regard to a decree either against a dead man or a person under disability totally unrepresented ; nor is the question one of want of jurisdiction in the strict sense of the term. It is therefore unnecessary to express any final opinion as to the power of the executing Court when the vitiating circumstance falls within one of these categories.

In the present case, it is alleged that the interest of the guardian was adverse to that of the minor. If that be so, the question arises, is the decree a nullity ? On this point again, there has been a considerable difference of opinion. In *Sellappa Goundan* v. *Masa Naiken*(5), in Second Appeal No. 1092 of 1918 and also in *Paramasivam Pillai* v. *Venkatachellam Chettiar*(6) it was held that representation by a guardian whose interest is adverse is no legal representation at all and that

(1) (1923) I.L.R. 5 Lah. 54.
(2) (1931) 61 M.L.J. 520.
(3) (1932) I.L.R. 60 Cal. 191.
(4) (1925) 50 M.L.J. 232.
(5) (1923) I.L.R. 47 Mad. 79.
(6) (1935) M.W.N. 1109.

the decree obtained is null and void. A different view was taken in Appeal No. 347 of 1919, in *Payidanna* v. *Lakshminarasamma*(1) and in *Kuppuswami Ayyangar* v. *Kamalammal*(2), the Judges holding that the decree is valid until set aside. I may also observe that the two referring Judges in *Venkatasomeswara Rao* v. *Lakshmanaswami*(3) took opposite views on this point. The question however is, is the decree a nullity in the sense that the objection can be taken in the executing Court? For the purpose of the Limitation Act there is a distinction between a void and a voidable decree. The only effect of holding that the decree is void and not voidable is, that it need not be set aside within the prescribed period. But because a decree is null and void it does not necessarily follow that the question can be gone into in execution. The observation therefore of their Lordships in *Khiarajmal* v. *Daim*(4), that a void decree may be disregarded without any proceeding brought to set it aside, has no bearing on the present question [see *Lakshmanan Chettiar* v. *Chidambaram Chettiar*(5) already cited, at page 757].

There is no authority for the position that, when the decree is questioned on the ground that the guardian's interest was adverse to that of the minor, the objection can be entertained by the executing Court. Mr. Rajamannar contends that the necessary effect of their Lordships' decision in *Jnanendra Moham Bhaduri* v. *Rabindra Nath Chakravarti*(6) is that an executing Court can

(1) (1914) I.L.R. 38 Mad. 1076.
(2) (1920) I.L.R. 43 Mad. 842.
(3) (1928) I.L.R. 52 Mad. 275 (F.B.).
(4) (1904) L.R. 32 I.A. 23.
(5) (1934) I.L.R. 58 Mad. 752.
(6) (1932) L.R. 60 I.A. 71.

KRISHNAMURTHI v. IMPERIAL BANK OF INDIA.

VENKATASUBBA RAO J.

treat a decree passed without jurisdiction as a nullity. It is doubtful whether the Judicial Committee intended by the single sentence to which our attention has been drawn to lay down such a doctrine. It is unnecessary however for the present purpose to express my final opinion on the matter. Mr. Rajamannar's contention that the point must be deemed to have been concluded in his favour by implication by the opinion of the Full Bench in *Venkatasomeswara Rao* v. *Lakshmanaswami*(1) I am not prepared to accede to. The learned Judges disposed of the matter on the simple ground that the question raised was one of fact and I am not prepared to infer from the course adopted by them that the question has been answered in a particular way.

I have shown, by a review of the authorities, how even the Judges who wished to concede to the executing Court power to go behind the decree have used language to indicate that that power should be circumscribed and kept within the narrowest possible limits. It is against public policy and good sense alike, as PAGE C.J. points out in *S. A. Nathan* v. *S. R. Samson*(2), that the Court charged with the execution of a decree should be allowed to question its validity ; granting that certain exceptions have been and ought to be recognised to this salutary rule, I am not prepared to hold that, where the objection is that the guardian's interest was adverse to that of the minor, the point can be taken in execution. Such an objection if allowed in this country would indefinitely protract proceedings and, as CARR J.

(1) (1928) I.L.R. 52 Mad. 275 (F.B.).
(2) (1931) I.L.R. 9 Rang. 480, 495 (F.B.).

observes on page 505 of the same case there would be "no end to litigation".

Moreover, the appointment of a guardian *ad litem* is made in the exercise of judicial discretion [*Venkatasomeswara Rao* v. *Lakshmanaswami*(1)] and the order of appointment amounts therefore to an implied finding that the guardian's interest is not adverse to that of the minor ; cases also can be imagined in which the Court gives a specific finding to that effect. The observation I have made, when dealing with the question of jurisdiction, in regard to the clashing of powers, equally applies here. I am clearly of the opinion that the lower Court's view is right and must be upheld.

In the result the appeal is dismissed with costs.

K. S. MENON J.—I agree.

Solicitors for respondents : *King and Partridge.*

A.S.V.

(1) (1928) I.L.R. 52 Mad. 275, 284 (F.B.).