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of proof was absolutely necessary. In the same way, in a Full Bench case in this Court, the *Maharajah of Burdwan* v. *Kristo Kamini Dasi* (1), it was held that the service at the *kachari* of the defaulter is essential, and that service upon the defaulter himself is not sufficient.

In the present case there is no evidence of service at the *kachari* of the defaulter: there is evidence of service upon the defaulter, but that will not do. There is no evidence, on which any Court could act, of any service by sticking up at the Collector's *kachari;* and there is no evidence at all of any compliance with the terms of the Regulation as to the preservation of the evidence of service at the sudder *kachari* of the defaulter.

On these grounds we think that the decree of the lower Appellate Court cannot be sustained. That decree will be set aside, and the decree of the Munsiff will be affirmed with costs in all Courts.

Appeal decreed.

Before Mr. Justice Field and Mr. Justice O'Kinealy.

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August 12.

RAGHUBAR DYAL SAHU AND OTHERS (DEFENDANTS No. 1) *v.* BHIKYA LAL MISSER (PLAINTIFF) AND ANOTHER (DEFENDANT No. 2).*

Guardian—Minor—Decree against infant, Sale under—Suit to set sale aside on attaining majority—Limitation—Act (XV of 1877), *Arts.* 44, 144—*Procedure.*

Where a decree has been made against an infant duly represented by his guardian, and the infant on attaining his majority seeks to set that decree aside by a separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian.

If the infant desire to have the decree set aside, because any available good ground of defence was not put forward at the hearing by his guardian, he should apply for a review. If the decree were an *ex-parte* one, the procedure adopted should be that given in the Civil Procedure Code for setting aside *ex-parte* decrees.

Where a certain period is allowed by the Law of Limitation, within which an instrument affecting a person's rights or immovable property must be impugned, and the person whose rights or property are affected fails to impugn

* Appeal from Original Decree No. 176 of 1884, against the decree of A. C. Brett, Esq., Judge of Tirhoot, dated the 13th of March 1884.

(1) I. L. R., 9 Calc., 931.

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such instrument within that period, *Held*, that he will not be precluded from availing himself of the longer period allowed for the recovery of immovable property, provided that he can prove that such instrument is null and void so far as his interests are concerned.

THIS is a suit brought to have the sale of certain lands in execution of a decree declared void, and to recover the property. The facts of the case are as follows:—

The plaintiff, Bhikya Lal Misser is the son of one Babua Misser (defendant No. 2) and grandson of one Debidut Misser, who in the year 1864 executed a deed, whereby he left his self-acquired property to the plaintiff and his two brothers Mokund Lal Misser and Nursingdut Misser, all then minors, and appointed Babua to be their guardian. On the 19th May 1873 Babua, in his capacity of guardian, borrowed the sum of Rs. 16,998 from Raghubar Dyal Sahu and Triboni Lal Sahu (defendants No. 1) and executed a bond for that amount. In that bond it was set out that certain properties of the infants were about to be sold in execution of a decree for Rs. 10,119-8-6; and in the Court below it was not disputed that there was such necessity pressing on the estate as justified Babua in borrowing so much. The bond further set out that the minors were in present need of Co.'s Rs. 6,876-7-6 to meet certain necessary expenses, and the expenses of an appeal then pending before the Privy Council. The bond not having been discharged, a suit was instituted upon it, and eventually a decree was made against the present plaintiff and his two brothers (one of whom was then of full age), in execution of which the properties now in suit were sold. This decree, so far as Bhikya Lal Misser was concerned, was made *ex-parte*.

In 1880 Bhikya attained his majority, and in 1883 brought a suit in the District Court of Mozufferpore to have the sale set aside, and to be put in possession of the property sold, on the ground that the bond of May 19th, 1873, was fraudulent and collusive on the part of Babua Misser, inasmuch as about Rs. 7,000 of the sum of Rs. 16,998 borrowed by him were a personal debt due by Babua, which in fact were never paid as part of the consideration money.

The case was heard by Mr. A. C. Brett, District Judge of Mozufferpore, on the 13th March 1884. A point of limitation was

raised, but was decided on the evidence in favour of the plaintiff. On the main point of fraud and collusion the District Judge found that Babua was certainly indebted to the obligees, and that plaintiff's evidence, which went to show that these debts had been incorporated into the bond, was preferable to that tendered by the defendants.

A decree was accordingly made in favour of the plaintiff, against which the defendants No. 1 have preferred the present appeal.

Mr. *W. C. Bonnerjee*, and Baboo *Abinash Chunder Bannerjee*, for the appellants.

Baboo *Mohesh Chunder Chowdhry*, Baboo *Demakali Mookerjee* and Baboo *Ram Churn Mitter*, for the respondents.

The following judgments were delivered by the Court (FIELD and O'KINEALY, JJ.):—

FIELD, J.—The plaintiff in this case is one Bhikya Lal Misser, who is the second son of Babua Misser. He has an elder brother, Mokund Lal Misser, and a younger brother, Nursingdut Misser. The father of Babua Misser, Debidut Misser, on the 5th of February, 1864, executed a document, whereby passing over his own son Babua Misser, he divided the bulk of his property between his three grandsons, Bhikya Lal Misser, Mokund Lal Misser and Nursingdut Misser. He was able to do this, because the property so disposed of was self-acquired. He gave to Babua Misser by the same deed certain plots of land which were ancestral, but which formed only a small portion of the whole property in his possession.

On the 19th of May 1873 Babua Misser, professing to act as guardian and manager of his three sons, borrowed Rs. 16,998, and executed a bond for this amount in favor of Raghubar Dyal Sahu and Tribeni Lal Sahu. This bond recited that Babua Misser had borrowed this sum of Rs. 16,998 from Raghubar Dyal Sahu and Tribeni Lal Sahu for the purpose of paying off certain decrees, and thus protecting the estate of the minors, and for the purpose of meeting other personal necessities and of defraying the expenses of a certain appeal which was pending before the Privy Council. The amount of the bond not having

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been discharged a suit was brought thereupon, and on the 18th of August 1876 a decree was made in that suit against Mokund Lal Misser, who was then of age, and Bhikya Lal Misser and Nursingdut Misser, minors. The plaintiffs in that suit were Raghubar Dyal Sahu and Tribeni Lal Sahu, in whose favour the bond had been executed. In execution of that decree two properties were sold, namely, four annas in mouzah Bourahar and eight annas in mouzah Jiroul. The four annas share of mouzah Bourahar was mortgaged by the bond of the 19th of May 1873, and the decree of the 18th of August 1876 directed the sale of this property in satisfaction thereof. The total amount of the decree not having been satisfied by this sale, the other property, Jiroul, was sold, although it had not been specifically included in the mortgage bond.

The present suit has been brought by Bhikya Lal Misser, who was at that time a minor, in order to recover those two properties, and his general contention is that the bond and the whole of the proceedings in the suit thereupon were fraudulent and collusive; that he is not and cannot be bound thereby; and that, therefore, he is entitled to treat those proceedings and the sale as nugatory; and to recover the two properties which were given to him by the deed executed by his grandfather on the 5th of February 1864.

It is to be observed that so far as Bhikya Lal Misser is concerned, the decree of the 18th of August 1876 was *ex-parte*.

The first question which has been argued in this appeal is concerned with limitation. It is said that this suit is barred, because it was not instituted within three years from the date on which the sale of these properties was made under the decree. On the other hand it is contended that, inasmuch as the object of this suit is to recover the properties, and not merely to set aside the decree of the 18th of August 1876, and the proceedings had thereunder including the sale, the twelve years rule of limitation ought to apply.

I shall first consider whether the three years rule is applicable to this suit. The Judge in the Court below is of opinion that the suit is not barred. He says: "The plaintiff comes in as a minor and the first issue relates to his age. I find that he was born in

Cheyt 1269, and the suit has therefore been instituted within three years of his attaining majority." Apparently then the Judge assumed that the three years rule of limitation was applicable. The Judge does not, however, say on what particular date in Cheyt he finds that the plaintiff was born, and his decision on the point of limitation is certainly so far unsatisfactory. This suit was instituted on the 14th of April 1883. The only evidence as to the plaintiff's age consists of the testimony of the witness, Jalpadat Jha, and the evidence supplied by the horoscope. The witness Jalpadat Jha swears positively that Bhikya Lal Misser was born on the 12th Cheyt 1269; the corresponding English date would be the 28th of March 1862. The plaintiff, therefore, attained his majority on the 28th of March 1880, and this suit having been instituted on the 14th of April 1883 was not brought within three years. Then as to the horoscope, this document describes the birth of the third son of Babua Misser as having taken place on Friday, the 12th day, in the light semibulation of Cheyt in the year 1918 of the *Sumbut*, corresponding with the year 1784 of the *Sak* era, and with the year 1269 of the common era. Now, the 12th day of Cheyt 1918 was not a Friday, and if the plaintiff's birth took place in that year he would have been born in 1861, and therefore a year earlier than the time of birth stated by the witness Jalpadat Jha. But it has been suggested that 1918 may be an error for the year 1919, and if that were so the 12th Cheyt of that year would be a Friday, and that day would correspond with the 30th Cheyt 1783, and to the 11th of April 1862, in which case also this suit would not have been instituted within three years from the date on which the plaintiff attained his majority. There can be no doubt therefore that the Judge's finding upon the assumption that the three years rule is applicable is based upon a misconception of the evidence, and is erroneous. The suit, if governed by the three years rule of limitation, is barred.

But then it has been contended that the twelve years rule ought to apply, and that the case ought to be governed either by Article 142 or Article 144. A learned argument has been addressed to us in support of this view, and amongst other cases

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that of *Raj Bahadoor Singh* v. *Achumbit Lal* (1) has been referred to. Now, that was a case of an adoption. The widow executed what was called a deed of adoption, by which she professed to adopt, and to make a gift of the property to the adopted son. But this gift was not to take effect until her death. Their Lordships of the Privy Council, referring to the argument that the suit was barred by the six years rule of limitation applicable to a suit brought to obtain a declaration that the adoption was invalid, say: "On the above view of the document, the words of the Statute would seem scarcely applicable to it. Their Lordships are clearly of opinion that this provision relating to adoption, though it might bar a suit brought only for the purpose of setting aside the adoption, does not interfere with the right which, but for it, a plaintiff has of bringing a suit to recover possession of real property within twelve years from the time when the right accrued, and that they regard as the nature of this suit. Inasmuch as according to the admitted construction of the document the widow conveyed by it no more than she had, which was but a life interest, the document is innocuous, and it is immaterial to the plaintiff whether it be set aside or not." If in that case the widow had proceeded to complete the proceedings in adoption by making over the property to the adopted son, instead of executing a deed under which he was to take at her death, the case would have been altogether different. Their Lordships said that the document was innocuous, that is, it had no effect or operation so as to affect the plaintiff's rights during the widow's lifetime, and until operation was sought to be given to it upon her death. It appears to me that this decision of the Privy Council has no application to the case in which a document at once operates upon rights or property intended to be affected thereby. Articles 91, 92 and 118 are particularly concerned with instruments or transactions which, if allowed to stand unchallenged once they became known, might become important evidence against the persons, whose rights they purported to affect. If those persons omit to challenge them within the shorter period of limitation allowed for doing so, they will not be precluded from having the longer

(1) L. R., 6. I. A., 110.

period of limitation allowed by the law for the recovery of immoveable property; but in this latter case they will probably have to show that the instrument or transaction which they neglected to challenge, is null and void so far as they and their interests are concerned. Where such instrument or transaction was made or done with authority, and had immediate operation given it so as to affect immoveable property, it is difficult to see how a person who omitted or neglected to have it set aside within the time allowed for a suit for doing this, can afterwards challenge its operation or effect and recover property, the title in which it, if valid, operated to transfer, such transfer being further actually carried out. In the present case, if the plaintiff is entitled to treat the proceedings in the former suit, the decree and the sale under the decree, as nullities, no doubt he would be entitled to say that he has twelve years to sue from the time when he was dispossessed by the purchaser at the execution sale. If on the contrary these proceedings were had with jurisdiction, and if the plaintiff was a party so as to be bound by the decree, I think there can be no doubt that he should have taken proceedings to set aside the sale within three years from the date on which such sale was confirmed, or within three years after his coming of age.

I must, therefore, deal with the questions raised in the subsequent portions of this appeal before I can say whether the present suit is barred by limitation or not. This leads me to a consideration of the effect of the decree of the 18th of August 1876.

In the first place there can be no doubt that the present plaintiff was properly made a party to that suit. He was made a party in his own name, and as represented by his guardian Babua Misser, who was his father. No doubt the decree was an *ex-parte* decree, but the Code of Civil Procedure contains provisions under which an *ex-parte* decree can be set aside; and I think that, if it was sought to set aside the decree on any ground upon which an *ex-parte* decree can be set aside, resort should have been had to those provisions. It is not suggested that any such resort was ever had. Then, seeing that the plaintiff

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was properly made a party to the suit, I think he must be taken to be bound by the decree, that is, unless he can show that it was obtained by fraud or collusion. The rule on this point was laid down in an old case, *Gregory* v. *Molesworth* (1), where it was said: "It is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action as if of full age; and this rule is general, unless gross laches, or fraud and collusion, appear in the *prochein ami*, then the infant might open it by a new bill." That case, so far as I am aware, has been followed down to the present time (see Daniel's Chancery Practice, pp. 149, 156 and 157). The practice in the Court of Chancery in England has been that, if it be sought to question a decree passed against a minor on the ground of fraud or collusion, this might be done by an original bill. If it were sought to impeach a decree passed against an infant on the ground of gross laches in the *prochein ami*, on the ground that the next friend had omitted to put forward proper available grounds of defence, this was usually done by re-opening the original case upon motion or petition. This practice will be found explained in pages 156 and 157 of Daniel's Chancery Practice already referred to, see as instance of the latter course being pursued, the case of *Hoghton* v. *Fiddey* (2). In this country we have a different procedure. If an infant desires to have a decree set aside on the ground that his next friend had neglected his interests, and had not put forward on his behalf good grounds of defence, which were available, the proper mode of proceeding would be to apply for a review. The provisions of the Code of Civil Procedure relating to reviews are sufficiently wide to include such a case. If it be sought to set aside a decree obtained against an infant properly made a party, and properly represented in the case, and if it be sought to do this by a separate suit, I apprehend that the plaintiff in such a suit can succeed only upon proof of fraud or collusion.

This then being in my view the proper principle applicable to the case, I have to see whether the plaintiff in the case now before us has given satisfactory proof of such fraud or collusion. His case is that the two *mahajans*, who obtained the decree

(1) 3 Atkyns, 626. (2) L. R., 18 Eq., 573.

of the 18th of August 1876, were in collusion with his own father Babua Misser. Babua Misser is admittedly living with the plaintiff, but he has not been put into the witness-box to give his account of the transaction conducted by him personally. The bond, as already mentioned, was for the sum of Rs. 16,998. As to a large portion of this sum, namely, Rs. 10,000, there is no dispute or controversy that it was borrowed to satisfy certain decrees under which the property belonging to the family, and to the present plaintiff, had been attached; and there can be no doubt that, as regards this amount, there was real necessity then subsisting, which justified Babua Misser, as guardian of, and manager for, his minor sons, in borrowing money, executing the bond, and incurring the liability on their behalf. But the Judge in the Court below has found that as regards the remaining sum of Rs. 6,998 there was no such necessity, and that this sum represented a personal debt due by Babua Misser—a debt for which his sons could not be liable, and for the discharge of which he was not justified in executing any bond which would bind their property. No doubt, if this were so, and if the defendants in the present case were aware of these facts (and in considering this part of the case it must be borne in mind that the decree-holders were themselves the purchasers), there would be a case of fraud sufficient to justify the decree of the Court below setting aside the decree of the 18th of August 1876 and the sale held thereunder. Let us see, however, what is the evidence in support of this fraud. We have first the testimony of the witness Doman Misser. He states in his examination-in-chief that out of the amount Rs. 17,000 for which the bond was executed, Babua Misser got Rs. 10,000 only in cash; that he had a personal debt of about Rs. 6,000; that is to say, this sum was deducted on account of the previous debts. Part of this debt was due under a bond, and the rest was the personal debt of Babua Misser; and that this previous personal debt was due under a decree. In cross-examination he admitted that he had not seen the former decree and bond; and that of the former debt he only knew what both the parties said, namely, that it was personal. To the bond, which is to be found at page 23 of the

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paper-book, there were no less than seven witnesses beside the writer. Doman Misser is not, however, one of these witnesses. We have next the witness Loke Nath Misser. He says that Rs. 10,000 were on account of the debt of the sons of Babua Misser, and that Rs. 6,000 were his personal debt. But he admits that he does not know what kind of debt this sum of Rs. 6,000 was. He says that it was on account of a bond and decree, and that when Babua Misser wanted to borrow money he told him that he got the loan from nowhere, and that Raghubar and Tribeni would lend money provided he included his personal debt in the bond. In cross-examination he admitted that the bond or the decree was not shown to him, and that he was not present at the time of the payment of the money. This man also is not one of the witnesses, whose names appear on the bond. Lastly, we have the witness Balbhudder Misser. He says that Babua Misser borrowed upwards of Rs. 10,000 to liquidate the debts of his sons, and that he included in the bond the balance Rs. 6,000 on account of his personal debt; that Raghubar Dyal declined to lend money unless the personal debt amounting to Rs. 6,000 was included in the bond. He says in his cross-examination that the whole of the amount of Rs. 6,000 was due under a decree, thereby contradicting the previous witness, who says that there were both a bond and decree. This man also is not one of the witnesses to the bond. It is quite obvious that none of these three witnesses had any personal knowledge of the transactions upon which depended this alleged antecedent personal debt of Rs. 6,000, and that they profess to state merely the result of conversations had and admissions made in their presence. I have already observed that Babua Misser has not been put into the witness-box. I may now make a further observation that not one of the witnesses to the bond has been called, and that there is nothing to show that they are dead or out of the way, or for other reasons could not have been produced. In the absence of that direct evidence of the transaction, which might reasonably be expected, I think that, in accordance with principle, it would be exceedingly dangerous, especially in this country, to rely upon verbal statements of oral admissions. I may refer to the

observations of their Lordships of the Privy Council in the case of *Lala Sheo Pershad* v. *Juggernath* (1); and the observations of an able Irish Chief Justice (Pennefather) in the case of *Lawless* v. *Queale* (2), which, though made with reference to a different class of admissions, are not without weight and application in the present case.

It has been contended that the three decrees, which are to be found at pages 32, 34 and 36 of the paper-book, are evidence that Babua Misser was indebted. There is nothing to show whether these decrees were or were not satisfied. There is nothing to connect them with the sum of Rs. 6,878 with which I am now dealing. The District Judge has made a calculation by which he arrives at the conclusion that the share in these decrees to which the obligees of the bond of the 19th of May 1873 were entitled, would come to the sum of Rs. 6,878. But, as I have already observed, there is no evidence to show that the amount due under these decrees was part of the amount for which the bond was actually executed. We are not aware whether these decrees were at the time barred by limitation or not. There is no information on the subject upon the record, and the learned pleader who conducted the case for the respondent was not able to give us any information. If they were barred by limitation, it is not likely that Babua Misser would have given a bond including the amounts due under those decrees. If they were not barred by limitation, it would be reasonable to expect that the *mahajuns* having obtained a bond would have been required to certify, and would have certified satisfaction of the decrees to the extent of their share. It is not shown that anything of the kind was done. This then being the evidence on the part of the plaintiff to establish a case of fraud, I am compelled to say that it is in my opinion altogether insufficient. On the other hand we have the evidence of Ram Golam Sahu who swears that the whole amount of Rs. 16,998 was paid in cash, and he further swears that no portion of the money was deducted on account of any former debt. He says that this large sum was required for protecting the properties of the minors by satisfying the decrees under which

(1) L. R., 10 I. A., 74. (2) 8 Irish L. R. Com. Law., 382.

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these properties had been attached, for meeting the expenses of the Privy Council appeal, and for celebrating the marriage of Mokund Lal. The marriage of Mokund Lal is not expressly stated in the original bond as one of the objects for which the money was borrowed, although it may well come under the head of necessary family expenses. That there was a Privy Council appeal at that time pending is admitted, and it was, as pointed out by the District Judge, decided by the Privy Council two days before the execution of the bond of the 19th of May 1873; and we have the evidence of Goberdhone Lal, a *mukhtar*, that Babua Misser had paid over to him Rs. 1,000 towards defraying the expenses of this appeal. Looking then at the whole of the evidence, I think it impossible to say that the plaintiff has satisfactorily shown that this sum of Rs. 6,998 was a debt contracted by Babua Misser personally, a debt for which his sons could not be made liable.

I think, therefore, that the plaintiff has failed to establish any case of fraud upon which he would be justified in recovering from the defendants the property sold in execution of the decree of the 18th of August 1876. He is, therefore, bound by that decree and by the sale had thereunder. This being so, he was bound to bring his suit to set aside that sale within three years of attaining his majority, and not having done so, his suit is barred by limitation. We must, therefore, reverse the decree of the District Judge, and dismiss this suit with costs in both Courts.

O'KINEALY, J.—In this case I am of the same opinion as my learned colleague.

The case is shortly this: The father of the present plaintiff executed a mortgage deed and mortgaged the property of his minor sons to the present defendants. Subsequently a suit was brought upon the mortgage deed, in which the minors were properly represented. In that suit a decree was obtained, which was drawn up in regular form, and at the sale in execution of that decree the decree-holders themselves purchased the property. When Mokund Lal, who was one of the minors, came of age, he re-opened the case, but subsequently acquiesced. We have then a judgment regular as to form in which one of

the sons subsequently acquiesced. Under this decree execution issued. Now the plaintiff comes into Court and says: "I charge my father and the decree-holders in that case with fraud, and the mortgagees, who are also the purchasers of the property, are bound to hand the property over to me."

We had a learned discussion on the question of limitation. But before limitation can be applied in this case the facts must be ascertained. On the one hand it is said that the sale was made without jurisdiction, and that it was a case of fraud. The man whose property has been sold says: "Babua Misser was nothing but a trustee for me; he could not pass the property; I do not seek to set aside the sale, the property is mine absolutely." I can understand such a case, and the limitation applicable would be twelve years. On the other hand, if it is necessary to set aside the sale in order to follow the property, the limitation applicable is, I think, not twelve but three years. Now in the present case I am of opinion that no fraud has been proved. The oral evidence in support of the admission alleged to have been made by Babua Misser before the execution of the mortgage deed is, in my opinion, utterly insufficient to support a case of fraud. Therefore, as in my opinion no fraud was committed, the decree is good, the execution is good, and the plaintiff cannot reach the property without setting aside the sale in execution of the decree, and as he cannot set aside the sale, he is out of Court.

I, therefore, concur in the opinion that has already been expressed by my learned colleague, and I think that this suit ought to be dismissed with costs.

Appeal allowed.