1915

RENKA
v.
BHOLA NATH

entitled to remain in possession of her husband's estate during her life-time and she is not liable to account to any one. Of course, she can be restrained from committing wilful waste where it is clearly and distinctly proved that she has been guilty of such action. A Hindu widow is entitled to give the property to anyone she likes to enure so long as she lives and she need ask for no rent or other compensation for what she has done. She is clearly entitled to grant a lease and to take a premium provided that that lease is not to last longer than the term of her own life. If a Hindu widow alienates or deals with the property to the prejudice of the reversioners in a way not authorized by law, the reversioners are entitled to bring a suit for a declaration that the acts of the widow shall not prejudice the reversioners. In our opinion in the present case no acts of any kind were proved which would in any way justify the court in taking away the life estate of the widow and appointing a receiver. The widow is entitled to spend as she thinks best the entire income of the estate during her life-time.

We must set aside the decree of the court below and dismiss the plaintiff's suit with costs in all courts. If the receiver has taken possession he should forthwith file and verify his final account in the court below and when the same has been accepted by the court below he will be at once discharged.

Objections have been filed by the respondent upon which there was a deficiency in court fee which has not been made good though time has been allowed. These objections are therefore rejected with costs.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1915
January, 14.

BHAGWAN DAYAL AND ANOTHER (PLAINTIFFS) v. PARAM SUKH DAS (DEFENDANT)*

Civil Procedure Code (1908), *order IX, rule* 13; *order XXXII, rule* 3—*Guardian* ad litem—*Illusory appointment of guardian—Competence of minors to have a decree passed without their being represented set aside.*

A suit was brought against certain minor defendants naming as guardian *ad litem* their uncle, who was also a defendant. The uncle refused to act as

---

*Second Appeal No. 1612 of 1913, from a decree of Rama Das, first Subordinate Judge of Aligarh, dated the 2nd of September, 1913, confirming, decree of P. K. Roy, Munsif of Koil, dated the 18th of January, 1913.

1915

BHAGWAN DAYAL v. PARAM SUKH DAS.

guardian *ad litem* and stated that the minors lived with their mother. No notice was served upon the mother, but upon the application of the plaintiffs the court Amin was appointed guardian *ad litem* of the minors. The plaintiffs did not deposit any amount for the expenses of the guardian, who did not take any steps to defend the suit or to inquire whether there was a defence. A decree was passed *ex parte* against the minors, and an application on their behalf, through their mother, to have the case restored was rejected. The courts below found that the decree was not void and dismissed the suit. *Held* that in the circumstances above set forth the minors were entitled to a declaration that the decree was null and void as against them. *Walian* v. *Banke Behari Pershad Singh* (1) and *Munnu Lal* v. *Ghulam Abbas*, (2) distinguished.

Held also that the minors were not debarred from bringing this suit by reason of their not having applied to have the *ex parte* decree set aside under order IX, rule 13, of the Code of Civil Procedure.

THE facts of this case were as follows:—

One Chote Lal, the father of the plaintiffs, and his brother Raghubir Sahai made a mortgage of their property in favour of the defendant on the 17th of September, 1904. The defendant instituted a suit for sale of the mortgaged property in September, 1910. By that time Chote Lal had died, and the plantiffs, who were minors, were made parties under the guardianship of Raghubir Sahai, their uncle. Notice of the application for appointment of Raghubir Sahai as guardian was served upon him, but he sent by post a letter to the court refusing to accept guardianship and stating that the minors were living with their mother in the house of their maternal grandfather. The court took no notice of this, and the then plaintiff had notices issued again. Failing to have these served the then plaintiff (present defendant) applied that the court Amin might be appointed guardian *ad litem*, and the court made the necessary order, without serving the minors with notice as required by order XXXII, rule 3 (4) of the Code of Civil Procedure. Notice of the suit was, however, served upon Raghubir Sahai both for himself and for the minors. On the date of hearing neither the defendant nor the Amin appeared, and the court passed an *ex parte* decree for sale of the mortgaged property. When the decree-holder, after obtaining the decree absolute, proceeded to sell the property, the plaintiffs under the guardianship of their mother applied to have the *ex parte* decree set aside. The application was rejected. They thereupon brought the present suit for a declaration that the decree was not binding

(1) (1903) I. L. R., 30 Calc., 1021. (2) (1910) I. L. R., 32 All., 287.

on them inasmuch as they had never been properly represented. The courts below dismissed the suit. The plaintiffs appealed.

Pandit *Uma Shankar Bajpai*, for the appellants :—

The procedure prescribed by the Code of Civil Procedure, order XXXII, rule 3, was not followed, and the omission to follow it vitiated the whole proceeding. Omission to follow the procedure prescribed was not merely an irregularity. The minors therefore must be treated as not having been parties to that suit at all and the decree was not binding on them. The courts below have dismissed the suit relying on *Munnu Lal* v. *Ghulam Abbas* (1); *Walian* v. *Banke Behari Pershad Singh* (2); *Dammar Singh* v. *Pirbhu Singh* (3); *Pokhpal* v. *Chhiddu Singh* (4) and *Maruthamalai Gownden* v. *Palani Gownden* (5). In all these cases the minors were in fact represented, though the appointment of the guardian might have been irregular. But here the minors were not represented at all. The uncle refused to act on their behalf and the officer of the court did not move at all in the matter. The plaintiffs are therefore entitled to the declaration sought. The mere dismissal of their application for restoration does not debar them from maintaining the present suit.

Dr. *Satish Chandra Banerji*, for the respondent :—

The plaintiffs had not alleged any fraud on the part of the defendant and could not maintain the suit. When an *ex parte* decree has been passed by a competent court it must be set aside according to the procedure prescribed by the Code, order IX, rule 13. A regular suit can be maintained only when it is shown that the first suit was an imposition on the court; *Khagendra Nath Mahata* v. *Pran Nath Roy* (6); *Maruthamalai Gownden* v. *Palani Gownden* (5); *Ramdhani Misir* v. *Parmeshar Kurmi* (7). Any person can act as a next friend of a minor plaintiff who is bound by all the proceedings which follow. On the same principle the mother of the minor plaintiffs was entitled to make an application to set aside the *ex parte* decree and the dismissal of that application would bar the present suit.

(1) (1910) I. L. R., 32 All., 287.
(2) (1903) I. L. R., 30 Calc., 1021.
(3) (1907) I. L. R., 29 All., 290.
(4) (1912) 9 A. L. J., 653.
(5) (1912) 16 I. C., 182.
(6) (1902) I. L. R., 29 Calc., 395.
(7) (1912) 16 I. C., 5.

1915

BHAGWAN DAYAL v. PARAM SUKH DAS.

The whole question was whether the Amin was or was not validly appointed. If he was not validly appointed, the mother could make the application, but if he was validly appointed his failure to make the application would bar the suit. The court, according to the rulings of the Madras Court followed here, can set aside an *ex parte* decree upon grounds other than those mentioned in order IX, rule 13. The failure of the court to follow the procedure prescribed by order XXXII, rule 3, strictly was only an irregularity and was not necessarily fatal. The decree therefore was not a nullity; *Walian* v. *Banke Behari Pershad Singh* (1). The minors could have no defence to the suit on the merits as an antecedent debt was proved against their uncle, who was the *karta* of the joint family when the suit was brought, and the decree should not be set aside upon a technical ground.

Pandit *Uma Shankar Bajpai*, was not heard in reply.

RICHARDS, C. J., and BANERJI, J.—This appeal arises out of a suit in which the plaintiffs claimed a declaration that a decree obtained against them *ex parte* on the 30th of August, 1911, was null and void as against them. The decree in question was a decree obtained on foot of a mortgage alleged to have been executed by the father of the plaintiffs and their uncle Raghubir Sahai. The facts are as follows. The plaintiffs were at the time of the institution of the mortgage suit and still are minors. The plaintiffs in the previous suit sought to implead them as defendants through the said Raghubir Sahai as their guardian *ad litem*. Raghubir Sahai refused to be the guardian *ad litem* and informed the court that the minors lived with their mother and not with him. Eventually the court appointed the Amin as the guardian *ad litem* of the minors. This order was made without any notice having been given to the minors, or to their mother in whose care they were. There was no appointed or natural guardian other than the mother. It is not pretended that the court required the plaintiff to deposit any sum of money to enable the court Amin to employ a pleader, or to make any inquiry as to the minors' defence. Nor is it pretended that the court Amin did in fact take any step to defend the case or to inquire whether there was a defence. An *ex parte* decree was granted on the 30th of August, 1911.

(1) (1903) I. L. R., 30 Calc., 1021 (1030).

An attempt was made on behalf of the minors through their mother to have the case restored, but this application was refused. The present suit was then instituted.

Both the courts below have dismissed the suit, and the plaintiffs come here in second appeal. There can be no doubt that there was great irregularity in the proceedings prior to the granting of the *ex parte* decree. The provisions of order XXXII, rule 3, were not observed. The courts below, however, were of opinion that the decree was not void and could not be set aside on account of the irregularity. They refer to the cases of *Walian* v. *Banke Behari Pershad Singh* (1) and *Munnu Lal* v. *Ghulam Abbas* (2) We think the courts below were wrong. Assuming that the decree is not a nullity, that in itself would not be a sufficient ground for dismissing the plaintiffs' suit. The court ought to have considered whether the plaintiffs were prejudiced by the irregularity. If the minors had no opportunity of putting forward a defence to the suit, or, in other words, if they were not represented in the court below, they would be prejudiced. It seems to us that the appointment of an officer of the court as guardian *ad litem* of minors without requiring the party at whose instance he is appointed to deposit the necessary funds to enable the guardian to defend the case, is generally little more than a farce. If however, in the present case the order had been made with notice to the mother she might have objected to the appointment of the Amin, or at least have given him instructions as to the defence of the minors. There is no real hardship in requiring the party to deposit money to enable the court official to inquire and get instructions on behalf of minors. If the party is successful in the litigation, the funds so deposited can be subsequently recovered. In the case of *Walian* v. *Banke Behari Pershad Singh* (1) the minors had been sued and had appeared throughout the proceedings with their mother as guardian *ad litem*. The irregularity in the case was the absence from the record of a formal order appointing the mother guardian *ad litem*. The mother was the person who would naturally have been appointed guardian had an application been made. By appearing in the proceedings she showed that she had no objection to being guardian. The decree was granted

(1) (1903) I. L. R., 30 Calc., 1021. (2) (1910) I. L. R., 32 All., 287.

1915

BHAGWAN DAYAL v. PARAM SUKH DAS.

in the year 1881 and the suit challenging its validity was not instituted until January, 1895. Their Lordships held that the minors were "substantially" sued in the former suit. Their Lordships quote from the judgement of the High Court the following words:—"It is necessary that the court should see that a proper guardian be appointed to protect their interest. Section 443 of the Code is imperative on this point." Their Lordships then say:—"In this statement of the law their Lordships entirely concur and they desire to impress upon all the courts in India the importance of following strictly the rules laid down in the section referred to." After this statement it seems to us impossible to contend that minors cannot have a decree declared not binding on them under circumstances like the present where the appointment of the guardian was not only irregular but where in fact a decree was made without even notice to the minors. In *Munnu Lal* v. *Ghulam Abbas* (1) the only irregularity was the absence of the affidavit specified in section 457 of the Code of Civil Procedure, 1882. This case was even a weaker one than the case above referred to. The minors were clearly "substantially" represented and had every opportunity of putting forward their defence. It is contended by the learned advocate on behalf of the respondent that the only remedy the minors had was to apply to have the *ex parte* decree set aside under the provisions of order IX, rule 13, of the Code of Civil Procedure. This rule enables a defendant who has not been served with the summons, or was prevented by some sufficient cause from appearing when the suit was called on for hearing, to have an *ex parte* decree set aside. It is argued that the defendant against whom an *ex parte* decree has been made who neglects to avail himself of the provisions of this rule, cannot afterwards bring an independent suit. This may be so. But this is not the case here. If the minors were parties to the suit the only person who could make an application to have the *ex parte* decree set aside would be the court Amin who was their irregularly appointed guardian *ad litem.* No such application was made by him. In our opinion we have to see whether the irregularity in the present case prejudiced or may have prejudiced the minors. Holding, as we do, that the minors were never properly

(1) (1910) I. L. R., 32 All., 287.

1915

BHAGWAN DAYAL v. PARAM SUKH DAS.

represented and that the decree was made without notice to them or their natural guardian, we think that they are entitled to the declaration sought in the present suit.

We accordingly allow the appeal, set aside the decrees of both the courts below and decree the plaintiffs' claim with costs in all courts.

Appeal allowed.

Before Sir Henry Richards, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

1915
January, 21.

JAGANNATH GIR (PLAINTIFF) *v.* TIRGUNA NAND AND OTHERS (DEFENDANTS).*

Act No. I of 1877 (Specific Relief Act), section 42—Suit for declaration of title—Property involved in possession of Court of Wards for person entitled thereto—Parties to suit.

On the death of a mahant, the right of succession to whose *math* was disputed, the Court of Wards took possession of the *math* and declined to hand it over until some one should establish his right to the mahantship. *Held,* in a suit for a declaration of his title to the mahantship brought by a claimant thereto, (1) that the Court of Wards was not a necessary party, and (2) that this did not offend against the provisions of section 42 of the Specific Relief Act. *Goswami Ranchor Lalji* v. *Sri Girdhariji,* (1) distinguished.

THE facts of this case were as follows:—

The plaintiff sued for a declaration that he was entitled to certain *math* property as the mahant thereof in succession to the last mahant. It appears that the last mahant, one Narain Gir, was a minor and that the property was taken over by the Court of Wards. After his death the plaintiff made claim, as did certain other persons who are the defendants to the present suit. The Court of Wards, which is in possession of the property, declined to hand over possession until some one should establish his title to the mahantship.

The lower court without going into the merits dismissed the plaintiff's suit upon two grounds, namely, that the Court of Wards was not made party to the suit, and that the plaintiff did not claim possession.

The plaintiff appealed to the High Court.

---

* First Appeal No. 270 of 1913, from a decree of B. J. Dalal, District Judge of Benares, dated the 24th of April, 1913.

(1) (1897) I. L. R., 20 All., 120.