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where there has been a provision for a particular arbitrator who is either dead or retired. If he has died or refused to act, it is as though there were no provisions. But apart from that we think that the case is entirely covered by the decision in the rather curious case of *Bhagwan Das* v. *Gurdayal* (1), and particularly by the principle laid down in that case which we entirely endorse: "where a party has gone to arbitration in a case in which if he had refused to go to arbitration an order of reference would have been made under paragraph 17, it is too late for him, when a difficulty arises at a later stage of the proceedings which has not been provided for unless an order of reference has been made, to dispute the right of his opponent to obtain an order of reference under paragraph 17." The decision in the case of *Bala Pattabhirama Chetti* v. *Seetharama Chetti* (2) really supports the appellant, although the learned Judge did not seem to think it applicable, and the decision which he followed, namely, the case of *Ahmad Nur Khan* v. *Abdur Rahman Khan* (3), to which a member of this Bench was a party and which both of us endorse, has nothing whatever to do with the question raised in this case. The appeal must be allowed with costs and the matter sent back to the Subordinate Judge with directions to file the agreement of reference and to proceed with the appointment of the arbitrator in accordance with the provisions of the schedule.

Appeal allowed.

Before Mr. Justice Lindsay and Mr. Justice Eyves.

MURLIDHAR (DEFENDANT) *v.* PITAMBAR LAL (PLAINTIFF) AND MANNI LAL AND OTHERS (DEFENDANTS).*

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Civil Procedure Code (1908), *order XXXII, rule* 4—*Guardian* ad litem—*Suit by minor to set aside a decree against him on the ground that he was not properly represented in the former suit.*

In all cases where a minor subsequently sues to set aside a decree as against him on the ground that he was not properly represented, the merits have to be gone into.

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*Second Appeal No. 705 of 1920, from a decree of Lal Gopal Mukerji, Additional Judge of Allahabad, dated the 26th of February, 1920, reversing a decree of Gauri Shankar Tewari, Subordinate Judge of Allahabad, dated the 12th of December, 1918.

(1) (1921) 19 A. L. J., 828. (2) (1894) I. L. R., 17 Mad., 498.
(3) (1919) I. L. R., 42 All., 191.

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A joint Hindu family consisted of two persons, G. D and his minor cousin P. G D having executed a mortgage of the joint family property, the mortgagees brought a suit for sale against both G D and P and nominated G D as P's guardian *ad litem*. Notice was served on G D, who did not appear in answer to the notice, but on the date fixed for the hearing appeared and confessed judgment on his own behalf and on behalf of the minor and a decree followed. The mother of the minor was alive, but her existence was not brought to the notice of the court, nor did it appear that the court had applied its mind to the consideration of whether G D was a fit and proper person to represent the minor or whether even he had consented to do so. He had in fact at first refused, but this refusal was not brought to the notice of the court.

In these circumstances it was *held*, on suit by the minor to set aside the decree against him, that the minor had not been properly represented in that suit. *Malkarjun* v. *Narhari* (1), *Walian* v. *Banke Behari Pershad Singh* (2), *The Collector of Meerut* v. *Umrao Singh* (3), *Baijnath Rai* v. *Dharam Deo Tiwari* (4), *Chhattar Singh* v. *Tej Singh* (5), *Khiarajmal* v. *Daim* (6) and *Hanuman Prasad* v. *Muhammad Ishaq* (7) referred to.

THE facts of the case are fully stated in the judgment of RYVES, J.

Dr. *Kailas Nath Katju*, for the appellant.

Pandit *Uma Shankar Bajpai* and Babu *Piari Lal Banerji*, for the respondents.

RYVES, J. :—Ghazi Din and his first cousin Pitambar formed a joint Hindu family of which Ghazi Din was the *karta*. Pitambar was a minor. On the 27th of April, 1913, Ghazi Din made a mortgage of the joint family property in favour of Munni Lal and Kashi Prasad. The mortgagees sued Ghazi Din and Pitambar under the guardianship of Ghazi Din on foot of their mortgage. Ghazi Din confessed judgment and a preliminary decree was passed on the 30th of March, 1916. This was duly made final and the property was attached and put up for sale, and the 6th of February, 1918, was the date fixed for the sale. On that date Pitambar, still a minor, filed the suit out of which this appeal arises, against Kashi Prasad and the representatives of Munni Lal, the mortgagees, and Ghazi Din, for a declaration that the decree in the former suit was void and illegal as against the plaintiff and that he was not bound by it and that in execution

(1) (1900) I. L. R., 25 Bom., 337.
(2) (1903) I. L. R., 30 Calc., 1021.
(3) (1915) 13 A. L J., 437.
(4) (1916) I. L. R., 38 All., 315.
(5) (1920) I. L. R., 43 All., 104.
(6) (1904) I. L. R., 32 Calc., 296.
(7) (1905) I. L. R., 28 All., 137.

of the said decree the remaining half of the joint family property was not saleable. The property was sold and purchased by Murlidhar, and the sale was confirmed on the 9th of March, 1918. On the 22nd of March, 1918, the plaint was amended, Murlidhar was made a defendant, and an additional clause was inserted in the plaint to the effect that in execution of the decree in the said suit the house was sold by auction on the 6th of February, 1918, and was purchased by defendant No. 4, that is, Murlidhar, and an additional prayer was added for a declaration that the said sale was void and illegal. It was alleged in the plaint that the mortgagees, in spite of their having knowledge of the fact that the rights of Ghazi Din were adverse to those of the plaintiff, appointed him the guardian of the plaintiff, and in collusion with him obtained a decree; that in fact there was no lawful guardian of the plaintiff; that the whole proceedings were kept concealed from the mother of the plaintiff who only got to know of the suit when execution was taken out; that Ghazi Din had no power to execute the mortgage deed and that it was not for the benefit of the plaintiff.

The first court found that the mortgage was not made for family necessity or for the benefit of the family. It also found, however, that there was no evidence to show collusion between Ghazi Din and the mortgagees, and that the plaintiff was properly represented in the former suit. It nevertheless dismissed the suit. On appeal the court below upheld the finding that the mortgage was not executed for legal necessity or the benefit of the minor. It further found that Ghazi Din was not a proper person to be appointed guardian in the suit, and on this ground allowed the appeal and decreed the suit.

This appeal is by the auction-purchaser. The connected appeal No. 736 of 1920 is by the mortgagees.

It was argued very strenuously by Dr. *Katju* for the appellant that Murlidhar being a stranger to the litigation "was justified in believing that the court has done that which by the direction of the Code it ought to do": *Malkarjun* v. *Narhari* (1). He further argued, relying on the same case, that the only court competent to decide who was a proper person to be the

(1) (1900) I. L. R., 25 Bom., 337.

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guardian of the minor was the Judge in whose court the suit was filed. He decided very naturally that Ghazi Din, the *karta* of the family, was a proper person and he had jurisdiction so to decide, and so, even if he decided wrongly, his decision is binding and the minor cannot re-open the question in the absence of fraud or collusion.

With reference to certain rulings of this Court, which will be noticed later, his argument was that the utmost length to which they went was, that where it was apparent that there had been an irregularity in the procedure adopted by the court in the appointment of a guardian, then and then only could the court inquire into the question whether the minor had been prejudiced; and if it found that the minor had not been prejudiced, the decree stood, even if in fact no guardian at all had been formally appointed: *Walian* v. *Banke Behari Pershad Singh* (1) and *The Collector of Meerut* v. *Umrao Singh* (2). In this case it is said there was no irregularity in the procedure, and no fraud or collusion was found.

On behalf of the respondents it has been argued that, if the minor was not properly represented in the suit, the decree and every thing that followed from it was, so far as the minor was concerned, a nullity. In order to ascertain whether he had been properly represented it was necessary to go into the facts, and that could only be done in most cases in a subsequent suit. If in such suit it was found that there had been irregularity in the appointment of the guardian, then, if the court was satisfied that the minor was prejudiced, the decree against the minor was void—*Baijnath Rai* v. *Dharam Deo Tiwari* (3), followed in *Chhattar Singh* v. *Tej Singh* (4),—and if it was found that the guardian appointed was not a proper person, that was a gross irregularity which inevitably avoided the decree. Before deciding which of these arguments should be adopted, I propose to set out the provisions of the Code applicable, and the facts leading up to the appointment of Ghazi Din as guardian *ad litem* to his minor cousin, and his subsequent conduct.

Order XXXII, rule 3 (1), provides: "Where the defendant is a minor, the Court, on being satisfied of the fact of his

(1) (1903) I. L. R., 30 Calc., 1021. (3) (1916) I. L. R., 38 All., 315.
(2) (1915) 13 A. L. J., 437. (4) (1920) I. L. R., 43 All., 104.

minority, shall appoint a proper person to be guardian for the suit for such minor."

Sub-paragraph (3) of the rule provides that an application for the appointment of a guardian "shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed."

Sub-paragraph (4) directs that "no order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or other natural guardian, or to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule." Rule 4 of the same order defines who is a proper person, namely, "any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit, provided that the interest of such person is not adverse to that of the minor." It is further directed that "no person shall, without his consent, be appointed guardian for the suit."

When the mortgagees filed their suit against Ghazi Din and the plaintiff, they stated that the latter was a minor and that he and Ghazi Din formed a joint Hindu family of which Ghazi Din was the *karta*. They filed an affidavit to this effect and stated therein that Ghazi Din had no adverse interest to the minor and was a fit person to be appointed his guardian. They did not state that the mother of the minor was alive.

Thereupon notices were issued to the minor and to Ghazi Din. The notice to the minor was affixed to the door of his house. Ghazi Din was served personally. He endorsed a note on the duplicate returned to court, in the Mahajani character (which the court apparently could not read), refusing to act as guardian. The attention of the court was not drawn to this endorsement either by the serving peon or by anybody else. I do not think, however, that anything turns on this circumstance. It was the duty of Ghazi Din to appear in obedience to

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the notice and object, if so advised. He did not appear, and the court, not unnaturally, concluded from his abstention that he consented, and appointed him guardian without further inquiry. On the date fixed for the hearing of the suit Ghazi Din appeared and confessed judgment both on his own behalf and on behalf of the minor, and the mortgagees' suit was thereupon decreed. There was no irregularity in the procedure laid down in order XXXII, rule 3. But that procedure is only enacted to enable the court to appoint a proper person as a guardian. I think that if the nominated guardian does not appear, the court may assume that he consents to being appointed, but that does not absolve the court from inquiring into the question whether he is a proper person to represent the minor. In fact, where, as here, the mortgage was made by the *karta* of the joint property of himself and the minor, I think even if the *karta* consented to be guardian, a duty was cast on the court to consider whether the *karta*, who could not repudiate his own mortgage, was at all a proper person to represent the minor. It is quite clear that the court could only appoint a proper person as defined in rule 4. If it appoints a person disqualified under that rule, it seems to me it commits an illegality rather than a mere irregularity. Suppose, for instance, the court, merely relying on a false affidavit of a plaintiff, appointed a lunatic to be the guardian *ad litem* of a minor defendant, could it possibly be maintained that the minor was properly represented, and that, even if no steps were taken to defend the minor's interests, nevertheless the minor could never challenge the decree passed against him ?

I think it only necessary to give this instance to show that Dr. *Katju's* main argument is far too broadly stated. In the present case, however, he points out that the person appointed was the *karta*, the natural person to be the guardian and whose interest would not *necessarily* be adverse to the minor's, and it is therefore suggested that the court was right in appointing him.

The case in I. L. R., 25 Bombay, page 337, was considered by their Lordships of the Privy Council in *Khiarajmal* v. *Daim* (1). Lord DAVEY there said (at page 312 of the Report): "Their Lordships agree that the sales cannot be treated as void

(1) (1904) I. L. R., 32 Calc., 296.

or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But, on the other hand, the court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons, the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside."

And later on, at page 314, after giving the facts of the Bombay case, he quoted from the judgment of that case,—'In so doing the court was exercising its jurisdiction. It made a sad mistake, it is true, but a court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed for setting matters right, and if that course is not taken, the decision, however wrong, cannot be disturbed'—and proceeded, "Their Lordships think that these observations do not apply to the case now before them. In suits Nos. 372 of 1879 and 160 of 1878 the Judge seems to have accepted without question the statement on the record that Amir Baksh was legal representative of Naurez and Alahnawaz was his guardian, and never applied his mind to the matter. Doubtless he would have done so if the suits had proceeded in the ordinary course, but in the former case the proceedings were cut short by the agreement for reference and in the latter case it was in effect a consent decree. It was not, therefore, the case of an erroneous decision, ruling or exercise of discretion of the Judge in a matter in which the court had jurisdiction. Their Lordships think that the estate of Naurez was not represented in law or in fact in either of the suits, and the sale of his property was, therefore, without jurisdiction and null and void." I think that these remarks exactly apply here. The court did not apply its mind to the question whether Ghazi Din was a proper person having regard to the proviso to rule 4. If it had only read the mortgage-deed, it must have been put on inquiry.

I think the matter is really concluded by the decision of this Court in *Baijnath Rai* v. *Dharam Deo Tiwari* (1), which was followed in *Chhattar Singh* v. *Tej Singh* (2). It may be noted that the same argument was raised in that case. Mr. *Agarwala*

(1) (1916) I. L. R., 38 All., 315. (2) (1920) I. L. R., 43 All., 104.

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is reported to have argued (I. L. R., 38 All., p. 317): "The requirements of section 456 of the old Code having been complied with, and the court having once passed an order appointing Bhondu Tiwari as guardian *ad litem*, there is an absolute presumption that the court had satisfied itself on the materials before it that he was a fit and proper person to be so appointed and that he had no interest adverse to that of the minors. Throughout the course of the proceedings in the former suit there was nothing to indicate that he was not such a person or that he had any adverse interest. No exception was taken to the appointment either by Bhondu Tiwari himself or by his adult son who was a defendant in that suit and whose interest, at all events, would be identical with that of his minor brothers. When a guardian *ad litem* has been appointed of a minor-defendant in a suit, then, unless the minor shows that the guardian acted fraudulently and in collusion with the plaintiffs, the minor is bound by the decree passed in that suit."

The Court, however, overruled this argument.

From all these authorities which have already been cited, it is abundantly clear that in all such cases where a minor subsequently sues to set aside a decree as against him on the ground that he was not properly represented, the merits have to be gone into. Indeed in the case relied on by Dr. *Katju, viz.*, *The Collector of Meerut* v. *Umrao Singh* (1), the decision of the Court seems to have been that it was necessary first of all to inquire whether the minor had been prejudiced by the appointment of the guardian, because, if it found that he had not been prejudiced, then it was unnecessary to go into any other question.

Now, it seems to follow that there must first of all be an investigation into the merits. In this case it has been found that Ghazi Din was only 21 years of age when he executed the mortgage. It was stated in the mortgage-deed that the money was borrowed "for home expenses and also for the improvement of the *theka* business in the Sheoghar market." There were no details given of these "home expenses" and it was found by both courts, quite definitely, that the mortgagees' allegations that

(1) (1915) 13 A. L. J., 497.

the money was required for the marriage of a daughter and the payment of certain debts were false, and that the *theka* business in the market was a private speculation of Ghazi Din's, and that the minor was in no way concerned in it and got no benefit from it. Having come to this finding, the lower appellate court held that the trial court, having found that the mortgage was invalid against the minor, could not consistently find that the minor was properly represented. He said: "I think that both findings cannot go together. If you once say that the elder cousin mortgaged the property of the minor without proper grounds for the transfer, how can you say that the man who threw away, so to say, the property of the minor was a right and fit person to have been appointed guardian, for the purpose of contesting the very transfer which ought to have been contested in the interest of the minor?"

Now, the real facts were known of course to the mortgagees. They knew, therefore, that the interest of Ghazi Din was adverse to the minor and they deceived the court by their affidavit that he was a proper guardian. I think it is only necessary to cite one more case which, although not mentioned at the Bar, is, I think, very much in point. It is *Hanuman Prasad* v. *Muhammad Ishaq* (1). In that case also the auction-purchaser was a stranger to the mortgage suit. STANLEY, C.J., and BURKITT, J., said: "Now the provisions of section 443 (of the old Code) are imperative." (Section 443 of the old Code is the same in substance as order XXXII, rule 3, (1) of the present Code). "They direct that where a defendant is a minor, the court shall appoint a proper person to be guardian for the suit for such minor, to put in a defence and generally to act on his behalf in the conduct of the case. It is abundantly clear in this case that Munna Das was not a proper person whom the court, if it had been made aware of the facts, would have appointed as guardian. In the first place, he was the mortgagor who purported to mortgage as his own the property which he afterwards alleged was the property of his ward. He, therefore, had a conflicting interest, an interest which should have precluded any court from appointing him as guardian *ad litem* in a suit

(1) (1905) I. L. R., 28 All., 137.

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brought by the mortgagees of Munna Das. It is perfectly clear that the court had not the facts before it, and it also appears to us to be clear that the court was never called upon by the plaintiff, whose duty it was to see that a proper guardian was appointed guardian *ad litem*, to appoint such a guardian. The fact is that Hanuman Prasad was not properly represented as a party to that suit and, therefore, any decree which was passed against him was a mere nullity." For the reasons given above, having regard to the various decisions which have been cited, I think the decree of the court below was right and would dismiss the appeal with costs.

LINDSAY, J.—I agree.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Ryves.

SHANKAR LAL AND ANOTHER (DEFENDANTS) *v.* MUHAMMAD AMIN AND ANOTHER (PLAINTIFFS)*

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March, 21.

Civil Procedure Code, (1908), *section* 105—*Interlocutory order—Appeal.*

Where there is some unappealable interlocutory order, its irregularity or any defect in it may, so far as it affects the decision of the case, be raised when the decree in the suit in which it was passed is appealed from, and this power is not affected by the fact of an appeal having been erroneously filed against the order itself and dismissed. *Ganpat Lal* v. *Bindbasini Prashad Narayan Singh* (1) referred to.

THE facts of this case are fully stated in the judgment of WALSH, J.

Munshi *Kailash Chandra Mital*, for the appellants.

Mr. *Hamid Hasan*, for the respondents.

WALSH, J.—This is an appeal from an order of remand. The suit is brought by certain alleged minors through the guardianship of their mother in an effort to redeem property which has been already sold over their heads as the result of a decree for sale obtained in a suit by the mortgagee against their father, the original mortgagor. It has the aspects of being a proceeding of a some what suspicious character, but nonetheless these suspicions have to be confirmed and not inferred. In some respects the attempt which they have made resembles

*First Appeal No. 196 of 1921, from an order of Abdul Halim, Subordinate Judge of Meerut, dated the 5th of August, 1921.

(1) (1920) I. L. R., 47 Calc., 924