

## APPELLATE CIVIL

Before Mr. Justice G. H. Thomas, Chief Judge and  
Mr. Justice Ziaul Hasan

RADHA RAWAN PRASAD (JUDGMENT-DEBTOR-OBJECTOR-  
APPELLANT) v. RAJENDRA PRASAD AND OTHERS  
(DECREE-HOLDERS-RESPONDENTS)\*

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August, 8

*Civil Procedure Code (Act V of 1908), sections 47 and 68—  
Execution of decree—Decree sent to Collector for execution—  
Sale by Collector—Objection to sale on ground of fraud,  
whether covered by section 47—Objection, whether entertain-  
able by executing Court or by Collector—Judgment-debtor  
minor—Minor attaining majority during execution proceed-  
ings—Duty of informing Court of judgment-debtor's attain-  
ing majority, whether on minor or on decree-holder.*

Where a minor judgment-debtor attains majority in the course of execution proceedings, it is for him to inform the court that he had come to age, and the failure of the decree-holders to notify the fact to the court does not constitute a fraud on their part. *Lanka Sanyasi v. Lanka Lakshman Naidu* (1), and *Seshagiri Rao v. Hanumantha Rao* (2), relied on.

The question that a sale in execution of a decree was brought about by fraud is a question relating to execution, discharge or satisfaction of a decree within the meaning of section 47 of the Code of Civil Procedure, and the objection on that point can be entertained by the court which sent the decree for execution to the Collector. *Wahid-un-nissa v. Girdhari* (3), *Marahmat Husain v. Oudh Commercial Bank Ltd.* (4), and *Prosunno Goomar Sanyal v. Kasi Das Sanyal* (5), referred to.

Messrs. *Hyder Husain and Bhuwani Shankar*, for the appellant.

Mr. *Kashi Prasad Srivastava*, for the respondents.

THOMAS, C. J. and ZIAUL HASAN, J.:—This is an execution of decree appeal against an order of the learned Civil Judge of Gonda rejecting the appellant's objections brought under section 47 of the Code of Civil Procedure.

\*Execution of Decree Appeal No. 38 of 1935, against the order of Mr. Gauri Shankar Varma, Civil Judge of Gonda, dated the 25th of March, 1935.

(1) (1928) I.L.R., 51 Mad., 763. (2) (1916) L.L.R., 99 Mad., 1031.  
(3) (1905) I.L.R., 27 All., 702. (4) (1931) A.L.J., 166.  
(5) (1891-92) L.R., 19 I.A., 166.

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It appears that the appellant's father Lachman Prasad executed a bond in favour of Natha Mal, predecessor, in-interest of respondent No. 12, on the 28th of May, 1912, and died in 1914 leaving the appellant as his heir. On the 27th of July, 1918, Natha Mal, obtained a money decree against the appellant on foot of that bond. The appellant was admittedly a minor at the time of the suit and owing to the refusal of the proposed guardian to Act, the central nazir of the Gonda judgeship was eventually appointed the guardian *ad litem* of the minor defendant. Various applications for execution were put in by the decree-holder before the present application was filed on the 1st of February, 1930. In this application also the appellant was shown a minor under the guardianship of the central nazir. As the property sought to be sold in execution of the decree was ancestral the decree was transferred to the Collector on the 14th of April, 1931. The property was sold on the 25th of March, 1933 but owing to various circumstances, including a declaratory suit by the son of the appellant, the sale could not be confirmed till the 3rd of February, 1935. On the 15th of January, 1935, the appellant brought the objections which were disposed of by the lower court by its order dated the 25th of March, 1935, namely, the order under appeal before us. That order is very short and is as follows:

"This is an objection by the judgment-debtor. The objections in paragraphs 5—9 relate to irregularities about sale which was admittedly made by the sale officer to whom the decree was transferred. The objections clearly do not lie to this court, which has no jurisdiction to make or confirm the sale.

I reject these objections mentioned in paragraphs 5—9. The objection in paragraph 10 is also frivolous and absolutely untenable. There is no other objection. The application is rejected as absolutely misconceived and not maintainable with costs of the other side."

It is contended on behalf of the appellant that the learned Civil Judge was in error in throwing out the

appellant's objections on the ground that he had no jurisdiction in the matter or that the objections were not maintainable. The petition of objections is a rather lengthy document. Paragraphs 1 to 4 deal with the history of the case and the rest allege some irregularities in conducting and publishing the sale and also attribute fraud to the decree-holders. It is conceded before us that so far as the objections related to irregularities in conducting and publishing the sale they were cognizable by the Collector only. It is contended however that the question of fraud should have been gone into and decided by the court below. The learned counsel for the respondent on the other hand argues that once a decree is transferred to the Collector, the Civil Court which transferred the decree has no jurisdiction left in it in the case. We are of opinion that the contention put forward on behalf of the appellant is well-founded. In *Wahid-un Nissa v. Girdhari* (1) it was held that an application to set aside on the ground of fraud a sale held in execution of a decree could be made under section 244 (corresponding to present section 47) of the Code of Civil Procedure and that it could be brought even after the sale had been confirmed. Similarly in *Marahmat Husain v. Oudh Commercial Bank Ltd.* (2) it was held at page 170—

“Section 68 of the Civil Procedure Code does not use language which supports this allegation of the appellant; that section merely states that the execution of the decree shall be transferred to the Collector. It does not state that the Collector shall become the court executing the decree. We consider that the court executing the decree remains the court which sends the decree for execution to the Collector and that the powers conferred by the Civil Procedure Code on the court executing the decree remain with that court and do not pass to the Collector.”

In *Prosunno Coomar Sanyal v. Kasi Das Sanyal* (3), a suit had been brought for setting aside a sale on the ground that the sale was brought about by fraud and

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collusion on the part of the other co-sharers, the Judgment-creditor and the auction-purchasers, and their Lordships of the Judicial Committee upheld the finding of the Indian courts that the suit was expressly barred by section 244 of the Code of Civil Procedure. This means that the question that a sale in execution of a decree was brought about by fraud was considered to be a question relating to execution, discharge or satisfaction of a decree within the meaning of section 244 of the old Code of Civil Procedure, corresponding to section 47 of the present Code. We are therefore of opinion that the learned Judge of the court below was wrong in thinking that he had no jurisdiction to entertain the appellant's objections.

On this finding we would have remanded the case to the court below for trial but for the fact that we do not think that any fraud was made out by the appellant. The allegations in regard to fraud are contained in paragraph 7 of the appellant's objections which is as follows:

"That the applicant had attained majority during the execution proceedings and the execution proceedings were going on and the auction sale had not taken place. But the decree-holders on account of cunningness concealed this fact of the attainment of majority of the applicant from the court. The applicant had been living at Bombay for a long time and the decree-holders knew of it, but the decree-holders did not allow to reach any information to the applicant about the execution as well as of the execution proceedings, nor did the applicant come to know of the fraudulent proceedings of the opposite-parties and at last the opposite-party No. 2 who is the brother of the opposite-party No. 1, purchased the property entered in the list for Rs.17,000 in the name of the opposite-party No. 1, but the sale has not been confirmed yet."

It all comes to this that though the appellant-judgment-debtor attained majority in the course of execution proceedings the decree-holders took no steps to inform the court that he had become a major and continued to prosecute their application for execution against him as

a minor. The appellant no doubt appears to have attained majority in the year 1932 but we consider that it was for him to inform the court that he had come of age, and the failure of the decree-holders to notify the fact to the court does not constitute a fraud on their part.

In *Lanka Sanyasi v. Lanka Lakshman Naidu* (1) their Lordships of the Madras High Court referring to an earlier case of their Court namely, *Seshagiri Rao v. Hanumantha Rao* (2) remarked:

"In that case the learned Judges have clearly pointed out that there are no provisions in the Civil Procedure Code relating to suits by and against minors obliging a plaintiff to apply for discharge of the guardian *ad litem* of a defendant who had ceased to be a minor. There are provisions in the Procedure Code for a minor plaintiff on attaining majority electing to go on or not to go on with a litigation. That is obviously in view of the fact that the plaintiff is in a position to elect either to go on or not to go on with a litigation to which he is a party because he is *dominus litis*. No such consideration is available in respect of the defendant. A defendant having been made a party defendant to the action may no doubt confess judgment but has no such right of election as the plaintiff has. That is probably the reason why no provisions have been made in the Procedure Code in respect of a minor defendant attaining majority. Apparently, therefore, we must take it, as found by the learned Judge in that case, that the minor defendant who comes of age may, if he thinks fit, come on the record and conduct the defence himself. If, however, he does not do so and allows the case to proceed as though he was still a minor without bringing to the notice of the court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the court with respect to the matters in controversy on the basis of the suit at the time."

Similarly in *Umra v. Barkat Ali* (3) it was observed—

"Rules 12 and 13, order XXXII, Civil Procedure Code, lay down the course that a plaintiff may follow on attaining majority, but there is no corresponding rule relating

(1) (1928) I.L.R., 51 Mad., 763. (2) (1916) I.L.R., 39 Mad., 1981.

(3) (198) Lah., 371.

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to a defendant who should become major during the pendency of a suit. The reason for this omission obviously is that while a plaintiff on becoming major can put an end to the litigation a defendant on attaining majority can not do so and the case must proceed. He has notice of the case already and so no further notice of it need be given to him. It is absurd to say that the plaintiff or the court should give notice to him that he had become major, a fact which he must know. If he should fail to take any action on attaining majority, the presumption is that he choose to allow the case to be conducted by his quondam guardian or by the counsel that was engaged by that guardian. It cannot in these circumstances be said that the court had no jurisdiction to proceed with the case or that the decree passed by it was a nullity."

Owing to the view that we take on the question of fraud, it would be useless to send back the case to the court below.

We therefore dismiss the appeal with costs

*Appeal dismissed.*

### REVISIONAL CIVIL

Before Mr. Justice Ziaul Hasan and Mr. Justice R. L. Yorke  
GULZARI SINGH (DEFENDANT-APPLICANT) v. RAM ADHIN  
(PLAINTIFF-OPPOSITE PARTY)\*

1938

August, 12

*United Provinces Agriculturists' Relief Act (XXVII of 1934), section 7—Suit instituted and decreed ex parte before Act came into force—Ex parte decree set aside subsequently—Section 7, Agriculturists' Relief Act, if applicable—Civil Procedure Code (Act V of 1908), order VII, rule 10—Suit instituted in right court—Subsequent legislation requiring it to be filled in another court—Order VII, rule 10, whether applies.*

Section 7 of the United Provinces Agriculturists' Relief Act is applicable to suits instituted before the Act came into force, and the fact that an *ex parte* decree, subsequently set aside, was passed in the suit before the Act came into force is immaterial.

\*Section 115 Application No. 101 of 1938, against the order of Raghubar Dayal, Esq., I.C.S., District Judge of Unao, dated the 6th of October, 1936, reversing the order of Mr. Hasan Irshad, Munsif of Safipur at Unao, dated the 30th of April, 1936.