

1939.

SACHINDER
RAI
v.
KING-
EMPEROR.

against Hafiz could not possibly be accepted by any responsible jury. In my view, the charge in this case was deficient and the convictions based on it cannot possibly be sustained. I entirely agree that this is not a case in which a retrial should be ordered.

HARRIES,
C. J.

S. A. K.

*Appellants acquitted.***APPELLATE CIVIL.***Before Rowland and Chatterji, JJ.*

1939.

July, 27, 28.

UMAR

v.

MAHABIR LAL SAHU.*

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXII, rules 5 and 7—minor—reference to arbitration in contravention of rule 7—decree based on award, whether void or voidable—minor, whether can impeach the decree in execution proceeding—void and voidable decrees, difference between—minor effectively represented by a guardian—absence of formal appointment—effect—questions of effective representation and prejudice, whether can be investigated in execution proceeding.

A decree based on an award made on a reference which is in contravention of Order XXXII, rule 7, Code of Civil Procedure, 1908, is not void but voidable at the instance of the minor, and, therefore cannot be impeached in an execution proceeding relating to that decree.

Kedar Nath Sahu v. Basant Lal Sahu(1), *Sadashivappa v. Sangappa*(2), *Nurul Anwar v. Sm. Golenoor Bibi*(3) and *Khizarjmal v. Daim*(4), distinguished.

* Appeal from Original Order no. 91 of 1939, from an order of Babu J. N. Das Gupta, Subordinate Judge of Muzaffarpur, dated the 27th March, 1939.

(1) (1939) I. L. R. 18 Pat. 271.

(2) (1931) A. I. R. (Bom.) 500.

(3) (1934) A. I. R. (Cal.) 845.

(4) (1904) I. L. R. 32 Cal. 296, P. C.

A decree is void when the Court which passed it had no jurisdiction, whether territorial or pecuniary or over the subject-matter or in respect of the judgment-debtor's person, to make it. Where, however, the Court has complete jurisdiction to hear a case but passes a decree in disregard of some provisions of law, the decree is voidable and binding until it is set aside in an appropriate proceeding.

1939.

 UMAR
2.
MAHABIR
LAL
SHAHU,

Pande Satdeo Narain v. Ramayan Tiwari(1), *Girwar Narayan Mahton v. Kamla Prasad*(2) and *Junghi Lal v. Laddu Ram Marwari*(3), relied on.

Where a guardian for a minor defendant appears in the suit and effectively represents him, although no formal order of appointment is made, the decree cannot be said to be invalid against the minor unless prejudice is shown.

Walian v. Banke Behari Pershad Singh(4), relied on.

But the questions whether in a particular case a minor was effectively represented and whether he had suffered any prejudice cannot be investigated in an execution proceeding.

Appeal by the minor judgment-debtors.

The facts of the case material to this report are set out in the judgment of Chatterji, J.

B. C. De, for the appellants.

S. K. Mitra, for the respondents.

CHATTERJI, J.—This appeal which arises out of an execution proceeding is by Umar Mia and Bibi Asma two of the judgment-debtors who are minors. In the original suit which was for dissolution of partnership and accounts they were defendants 2 and 3 and in the plaint they were represented by their mother Musammat Sahebzadi who was herself a defendant as their guardian. It appears that Musammat Sahebzadi did not appear in the suit at all but at the very earliest stage the minors' step-brother

(1) (1923) I. L. R. 2 Pat. 335.

(2) (1932) I. L. R. 12 Pat. 117.

(3) (1919) 4 Pat. L. J. 240, F. B.

(4) (1903) I. L. R. 30 Cal. 1021, P. C.

1939.

UMMAI
v.
MAHABIR
LAL
SAHU.
CHAPTER VI,
J.

Muhammad Sadiq, who was also a defendant, appeared on his own behalf and also as guardian of the minors. However in the preliminary decree that was passed against them the minors were shown to be under the guardianship of their mother. In the course of subsequent proceedings in the suit there was an application by the parties concerned for reference to arbitration. In that application Muhammad Sadiq signed for himself and as guardian of the minors. He also made a separate application for permission to refer the matter to arbitration. Permission was accorded and the matter was referred to arbitration. In due course an award was submitted and on the basis of the award a final decree was passed against the minors and other defendants in the suit. Against that decree Muhammad Sadiq, for self and as guardian of the minors, presented an application for revision to the High Court with the result that their liability was reduced to some extent. Subsequently the decree-holder took out execution which was resisted by the minors on the ground that the final decree was not binding against them inasmuch as the reference to arbitration was invalid because their mother, who was their guardian did not join in the reference. This objection was overruled by the Subordinate Judge and he ordered the execution to proceed. Against this order the present appeal has been preferred by the minors.

The contention raised by Mr. De on behalf of the appellants is that under the provisions of Order XXXII, rules 5 and 7, of the Code of Civil Procedure the application for reference to arbitration could be made only by the guardian for the suit after obtaining the necessary leave of the Court and as Muhammad Sadiq, who made applications for the purpose, was not the guardian, there was no valid reference and, therefore, the award and the decree were wholly void. Order XXXII, rule 7, sub-rule 2, however, provides that any agreement or compromise entered into by the

guardian without the leave of the Court shall be voidable against all parties other than a minor. Obviously this means that a decree based on such agreement or compromise is not void but only voidable at the instance of the minor. Mr. De relies on a decision of this Court in *Kedar Nath Sahu v. Basant Lal Sahu*(¹), where their Lordships had to deal with a suit brought by a minor to set aside a decree based on an award which was made on a reference obtained by his guardian without the requisite sanction under Order XXXII, rule 7. It was held that in view of the provisions of Order XXXII, rule 7, which were applicable to the case the decree based on the award was not binding on the minor. Mr. De has referred to certain observations in the judgment of his Lordship the Chief Justice to the effect that the decree was invalid against the minor. Nowhere from that decision it appears that their Lordships decided, or were required to decide, whether the decree was void or only voidable at the instance of the minor. What their Lordships actually decided was that the express provisions of Order XXXII, rule 7, having been contravened, the decree was not binding on the minor. Indeed in the case of *Sadashivappa v. Sangappa*(²), which was referred to in that decision, their Lordships of the Bombay High Court observed that the award and decree based in terms of the award were void. But this observation cannot be taken to be an authority in view of the plain language of sub-rule 2 of Order XXXII, rule 7. In this Bombay case also their Lordships were dealing with a suit to set aside a decree. The position is quite different where objection to the validity of a decree passed in contravention of the provisions of Order XXXII, rule 7, is taken in the execution proceedings. It is a well settled principle of law that an executing Court cannot go behind the decree. No doubt if it appears that the Court had no jurisdiction

1939.

 UMAR
 vs.
 MAHABIR
 LAL
 SAHU.

 CHATTERJI,
 J.

 (1) (1939) I. L. R. 18 Pat. 271.

(2) (1931) A. I. R. (Bom.) 500.

1939.

UMAR

2.

MAHABIR

LAL

SAHU.

CHATTERJI,

J.

to pass the decree, the decree would be altogether void and in that case it would be open to the executing Court to disregard it and refuse to execute it. This was the view taken by a Full Bench of this Court in *Jungli Lal v. Laddu Ram Marwari*(1), where a decree passed against a dead man was held to be a nullity and therefore inexecutable against his legal representatives. Sir Dawson Miller, C. J. in that case very clearly pointed out the distinction between a void decree and a voidable decree. A void decree can be treated as non-existent and of no binding force or effect; a voidable decree is valid and binding until it is declared to be invalid by a competent tribunal. A decree is void when the Court which passed it had no jurisdiction, whether territorial or pecuniary or over the subject-matter or in respect of the judgment-debtor's person to make it. Where, however, the Court has complete jurisdiction to hear a case but passes a decree in disregard of some provisions of law, the decree is voidable and is binding until it is set aside in an appropriate proceeding. In this connection reference may be made to the decision of this Court in *Pande Satdeo Narain v. Ramayan Tewari*(2). Again in *Girwar Narayan Mahton v. Kamla Prasad*(3) it was clearly pointed out that there is a distinction between an inherent lack of jurisdiction in a Court and lack of jurisdiction on grounds which have to be determined by the Court itself. The first makes the decree a nullity which can be ignored and need not be set aside. The second does not make the decree a nullity but only voidable; such a decree can be set aside by adopting the proper procedure, but cannot be collaterally impeached. It was further held in that case that where minors were properly represented in a suit but there was no formal order for the appointment of their guardian, it was a case of a mere irregularity which did not vitiate the decree. In the present case there

(1) (1919) 4 Pat. L. J. 240, F. B.

(2) (1923) I. L. R. 2 Pat. 335.

(3) (1932) I. L. R. 12 Pat. 117.

is no justification for holding that the decree in question is a nullity. It is futile to suggest that the minors were not before the Court and therefore the Court had no jurisdiction over them; in fact they did appear in Court through a guardian who acted for them though there might be no formal order appointing him. The decision of the Privy Council in *Khiarajmal v. Daim*⁽¹⁾ relied on by Mr. De is distinguishable because in that case what was decided by their Lordships was that the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. There also the question was raised in a suit and not in an execution proceeding.

1939.

UMAR

2.

MAHABIR

LAL

SAHU.

CHATTERJI,

J.

There is an equally effective answer to Mr. De's contention. We are not quite sure on the face of the records before us if any order was at all made by the Court appointing the mother as guardian for the suit. On the other hand we find that at the earliest stage before the time for filing written statement came Muhammad Sadiq appeared for self and as guardian of the minors and at subsequent stages also he appears to have acted as their guardian. The application for reference to arbitration was signed by him for self and as guardian of the minors and he also asked for leave of the Court as required by Order XXXII, rule 7, Civil Procedure Code, which was allowed. Though there might be no formal order of the Court appointing him as the guardian of the minors the question may arise whether they were effectively represented in the suit. It has been held by their Lordships of the Judicial Committee in *Walian v. Banke Behari Pershad Singh*⁽²⁾ that where a guardian for a minor-defendant appeared in the suit and effectively represented him although no formal order of appointment was made the decree could not be said to be invalid against the minor unless prejudice was shown.

(1) (1904) I. L. R. 32 Cal. 296, P. C.

(2) (1903) I. L. R. 39 Cal. 1921, P. C.

1939.

UMAR

v.

MAHABIR

LAL

SAHU.

Whether in the present case the minors were effectively represented and whether they suffered any prejudice are questions which cannot be investigated in the execution proceeding.

CHATTERJI,
J.

For these reasons I must hold that the objection was rightly disallowed by the Subordinate Judge. I would, therefore, dismiss the appeal with costs.

ROWLAND, J.—I agree. All Mr. De's research and his interesting argument failed to produce before us any instance in which in a case of this nature the judgment-debtor against whom a decree had been passed had successfully objected to its execution on the ground of its being a nullity. The cases which he cited were cases in which the minors against whom a decree had been passed had brought suits and obtained declarations that the decree was not binding on them or had obtained a judgment and decree setting aside the decree. In one instance the minors had appealed from a preliminary decree and this decree was set aside on appeal. The mere fact that in *Sadashivappa v. Sangappa*⁽¹⁾ and *Nurul Anwar v. Sm. Golenoor Bibi*⁽²⁾ the word 'void' appears among the observations of the learned Judges will not suffice to make them authority for what was not decided and was not necessary to be decided in those cases. The decisions in *Khizarajmal v. Daim*⁽³⁾ and *Jungli Lall v. Laddu Ram Marwari*⁽⁴⁾ were cases affecting the estate of a deceased party whose estate after his death was not represented. That is quite a different position from the one before us.

Appeal dismissed.

S. A. K.

(1) (1931) A. I. R. (Bom.) 500.

(2) (1934) A. I. R. (Cal.) 845.

(3) (1904) I. L. R. 32 Cal. 296, P. C.

(4) (1919) 4 Pat. L. J. 240, F. B.