

APPELLATE CIVIL.*Before Harries, C.J. and Manohar Lall, J.*

KEDAR NATH SAHU

v.

BASANT LAL SAHU.*

1939.

January, 27.

Code of Civil Procedure, 1908 (Act V of 1908), Order XXXII, rule 7, and Schedule II, paragraph 1—reference to arbitration by guardian or next friend of a minor party—leave of court, whether must be obtained—paragraph 1 of Schedule II, whether is subject to the provisions of Order XXXII, rule 7—omission to obtain leave, whether renders the award and the decree voidable against the minor.

Paragraph 1 of the second Schedule to the Code of Civil Procedure, 1908, is subject to the provisions of Order XXXII, rule 7, of the Code.

Where, therefore, the next friend or guardian ad litem of a minor party agrees to join in a reference to arbitration, the leave of the court to do so on behalf of the minor must first be obtained by the next friend or guardian ad litem and expressly recorded in the proceedings in compliance with the terms of Order XXXII, rule 7, of the Code; the omission to obtain leave renders an award or any decree based upon it voidable at the instance of the minor.

Mariam Bibi v. Amna Bibi(1), *Davuluru Vijaya Ramayya v. Davuluru Venkatasubba Rao*(2), *Sadashivappa Gangappa v. Sangappa Charvirappa Mahamadkoti*(3), *Hanuman Rai v. Jagdis Rai*(4) and *Nurul Anwar v. Sm. Golenoor Bibi*(5), followed.

Debiruddin v. Amina Bibi(6) [judgment of Suhrawardy, J.], dissented from.

Ganesh Row v. Tuljaram Row(7), referred to.

*Appeal from Original Decrees nos. 182 and 190 of 1937, from a decision of Babu Ananta Nath Banarji, Subordinate Judge, Muzaffarpur, dated the 23rd August, 1937.

(1) I. L. R. (1937) All. 317, F. B.

(2) (1915) I. L. R. 39 Mad. 853.

(3) (1931) A. I. R. (Bom.) 500.

(4) (1916) A. I. R. (Pat.) 223.

(5) (1934) A. I. R. (Cal.) 845.

(6) (1925) A. I. R. (Cal.) 475.

(7) (1913) I. L. R. 36 Mad. 295, P. C.

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Appeal no. 182 on behalf of the plaintiff, and appeal no. 190 on behalf of defendants nos. 2 to 4.

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

B. C. De and *K. K. Singh*, for the appellants.

Ray Guru Saran Prasad (with him *Ray Parasnath* and *Brahmadeva Narayan*), for the respondents.

HARRIES, C.J.—These are two connected appeals from a decree of the learned Subordinate Judge of Muzaffarpur dismissing the plaintiff's claim for a declaration that a certain award and a final partition decree based upon it is not binding against the plaintiff-appellant.

First Appeal no. 182 of 1937 is an appeal brought by the unsuccessful plaintiff, whereas First Appeal no. 190 of 1937 has been preferred by defendants nos. 2 to 4. As will appear hereafter, it is clear that these defendants cannot challenge the decree of the Court below, and Mr. De who has appeared on their behalf has asked for permission to withdraw the appeal. In the circumstances, I think it is right that this appeal should be withdrawn; but these defendants must pay to Basant Lal Sahu, defendant no. 1, the costs which the latter has incurred as a result of this appeal.

In the year 1929 Basant Lal Sahu, defendant no. 1, brought a partition suit no. 89 of 1929 against defendants nos. 2 to 4, and the present plaintiff who was a minor, represented by his guardian ad litem defendant no. 3. On the 29th of February, 1932, a preliminary decree was passed and defendant no. 2 who was the karta of the joint family was ordered to furnish a full account of his dealings with the family property. On the 18th of December, 1934, during the pendency of the proceedings relating to the account which had been ordered the parties agreed to refer the matter to arbitration and in due course a

reference to arbitration was made by the court. At this stage the present plaintiff, who was then a minor and a defendant, was represented, as I have stated, by defendant no. 3 as his guardian ad litem. No application was made on behalf of the present plaintiff to the court for leave to refer the matter to arbitration. On the 2nd of March, 1935, the appointed arbitrator made his award. Objections were preferred by various parties which were disposed of, and in due course a decree was passed in terms of the award.

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The suit out of which this appeal arises was brought by the plaintiff for a declaration that this award and the final decree, which is based upon it, is null and void and not binding upon him. It was contended on behalf of the plaintiff that as the leave of the court was not obtained by the guardian ad litem before agreeing to refer the matter to arbitration the whole of the proceedings thereafter were vitiated and in consequence the award and decree are a nullity. Defendants nos. 2 to 4 did not file a written statement and have in fact appeared through Counsel in this Court and supported the plaintiff's contention. Defendant no. 1 contested the suit in the Court below and urged that the omission to obtain the leave of the court before agreeing to arbitration did not vitiate the proceedings.

The learned Subordinate Judge came to the conclusion that the failure to obtain leave of the court before referring the matter to arbitration was not fatal and that the award and the decree based upon it were binding upon the plaintiff. As I have stated, both the plaintiff and the defendants nos. 2 to 4 have preferred appeals; but as the appeal by defendants nos. 2 to 4 has been withdrawn, it is now only necessary to consider the plaintiff's appeal.

It is common ground that no application was made to the court by the guardian ad litem of the present plaintiff for leave to enter into an agreement to refer the matter to arbitration. According to the plaintiff's

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contention, the failure to obtain such leave vitiates the whole of the subsequent proceedings. Defendant no. 1, who is the only contesting respondent, has argued that no such leave is necessary and accordingly that failure to obtain leave does not vitiate the whole proceedings.

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The procedure to be followed when all parties to a suit agree to refer their differences to arbitration, is governed by paragraph 1 of the Second Schedule, Code of Civil Procedure, and that paragraph is in these terms :

"(1) Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference.

(2) Every such application shall be in writing and shall state the matter sought to be referred.

This paragraph makes no reference to the procedure to be adopted where one of the interested parties is a minor. However, Order XXXII, rule 7, of the Code of Civil Procedure, deals with the procedure to be followed when a next friend or guardian of a minor enters into any agreement or compromise. Order XXXII, rule 7, provides as follows :

"(1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

On behalf of the plaintiff-appellant it has been argued that paragraph 1 of the Second Schedule, Code of Civil Procedure, is subject to the provisions of Order XXXII, rule 7. Accordingly it is contended that where the next friend or guardian ad litem of a minor party agrees to join in a reference to arbitration, the leave of the court to do so on behalf of the minor must be obtained by the next friend or guardian

ad litem and expressly recorded in the proceedings in compliance with the terms of Order XXXII, rule 7, of the Code of Civil Procedure, and that the omission to obtain leave will render an award or any decree based upon it voidable at the instance of the minor.

In my opinion this view is well founded. The precise point arose in a case decided by a Full Bench of the Allahabad High Court, *Mariam Bibi v. Amna Bibi*(1). The Full Bench, of which I was a member, held that paragraph 1 of the Second Schedule to the Code of Civil Procedure was subject to the provisions of Order XXXII, rule 7. Accordingly it was held that where a guardian ad litem had failed to obtain the leave of the Court to refer a matter to arbitration an award and a decree based upon it were voidable at the instance of the minor. There was some difference of opinion in that case; but upon this point the three Judges comprising the Bench were unanimous.

In the case of *Davuluru Vijaya Ramayya v. Davuluru Venkatasubba Rao*(2) a Bench of the Madras High Court also stressed the necessity of a guardian ad litem obtaining the leave of the court before entering into an agreement. The Bench held that a suit could be brought on behalf of minors to set aside a decree passed on a compromise in another suit or appeal in which the minors were parties, on the ground that leave of the court under Order XXXII, rule 7, of the Code of Civil Procedure, was not obtained by their guardian ad litem to enter into the compromise on their behalf. The Bench further held that leave of the court under Order XXXII, rule 7, must be obtained by a guardian ad litem of minors for agreeing on their behalf to refer through court the subject-matter of a suit to arbitration; and where no such leave was obtained, a decree passed on an award is not binding on the minors and a suit could be

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instituted on behalf of the minors to obtain a declaration that the decree was not binding on them. It was further held that the avoidance of a decree in a partition suit will have the effect of re-opening the whole suit in respect of all the parties thereto, and on an application being made, the Court must proceed with the trial of the suit.

A similar view was taken by a Bench of the Bombay High Court in *Sadashivappa Gangappa v. Sangappa Chanvirappa Mahamadkoti*(¹), in which it was held that the provisions of Order XXXII, rule 7, were imperative, and that where one of the parties to a suit was a minor and represented by his mother as guardian and the suit was referred to arbitration by the parties by a reference made without the sanction of the court, the award and decree passed in terms of the award were void. The case of *Nurul Anwar v. Sm. Golenoor Bibi*(²) is to the same effect.

There is also a decision of this Court, *Hanuman Rai v. Jagdis Rai*(³), which supports the contention of the appellant in this appeal. In that case it was expressly held that no next friend or guardian could compromise a case on behalf of a minor without the leave of the Court expressly recorded in the proceedings and that the action of a court in referring a case to arbitration in accordance with the compromise between the guardian of a minor and other parties to a suit was not equivalent to approving of the compromise on behalf of the minor. At page 225 Chamier, C.J., observed :

“ I am not prepared to whittle away the salutary provisions of O. 32, R. 7. In my opinion the compromise was not binding on the minor, inasmuch as the leave of the Court had not been obtained before his guardian thought fit to withdraw her application for that leave.”

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

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

(3) (1916) A. I. R. (Pat.) 223.

The importance of a guardian ad litem obtaining the leave of the court before entering into any compromise on behalf of the minor was considered by their Lordships of the Privy Council in the case of *Ganesha Row v. Tuljaram Row*(¹). In that case a member of a joint family brought a suit for partition. Defendant no. 3 was the father of defendant no. 6 who was a minor, and the court appointed the father guardian ad litem of his son. The father entered into a compromise without obtaining the leave of the Court, and their Lordships held that such compromise and the decree passed upon it was not binding upon the minor on his attaining majority. This decision of their Lordships does not deal with the question whether an agreement to refer to arbitration is within Order XXXII, rule 7; but it does lay down that the provisions of Order XXXII, rule 7, are mandatory and that failure to comply strictly with them will render any compromise or agreement or any decree based on such voidable at the instance of the minor.

Counsel for the respondents has relied upon a Bench decision of the Calcutta High Court, *Debir-uddin v. Amina Bibi*(²). In that case Suhrawardy, J. did in terms hold that an agreement to refer to arbitration is not such an agreement as is contemplated by Order XXXII, rule 7, of the Code of Civil Procedure. Page, J., who was the other member of the Bench, does not appear to have taken the same view; and in my judgment the view of Suhrawardy, J. cannot be accepted in face of the large body of authority to the contrary to which I have referred.

In my judgment the agreement to refer to arbitration is such an agreement as is contemplated by Order XXXII, rule 7, of the Code of Civil Procedure. Where a minor is a party to litigation no effective reference to arbitration can be made by the parties unless the next friend or guardian ad litem first

(1) (1913) I. L. R. 36 Mad. 295, P. C.

(2) (1925) A. I. R. (Cal.) 465.

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obtains the leave of the court to agree to any such reference. Merely obtaining an order referring the matter to arbitration is not sufficient. The court must first be asked on behalf of the minor for its leave to permit the guardian to agree to a reference to arbitration and the court must expressly record its reasons for giving or refusing such permission. It is only after obtaining the leave of the court that the guardian can agree to a reference to arbitration and any agreement without such leave will render all subsequent proceedings invalid at the option of the minor. It is clear from the terms of Order XXXII, rule 7, that the minor only can challenge an award or a decree based upon it made after a reference without obtaining the court's leave. Sub-section (2) of Order XXXII, rule 7, of the Code of Civil Procedure, expressly provides that the minor can avoid the award or decree; but the other parties to the reference cannot. As the reference in the present case was made without the guardian of the minor first obtaining the leave of the court, the plaintiff, who was the minor defendant in the suit, can challenge the award and the decree based upon it. The other parties to the suit, namely defendants nos. 2 to 4, cannot challenge the proceedings and for that reason the appeal preferred by them has in my view been rightly withdrawn.

For the reasons which I have given, I am satisfied that the award and decree based upon it passed in the partition suit no. 89 of 1929 are not binding upon the plaintiff-appellant, and that being so, his suit in the Court below should have been decreed. I would, therefore, allow this appeal, set aside the decree of the learned Subordinate Judge and decree the plaintiff's claim as prayed. The effect of this will be that the whole suit will be re-opened in respect of all the parties from the point at which the matters were referred to arbitration and the court on application being made to it must proceed with the trial of the suit from that point. The plaintiff-appellant will have his costs in

this Court and in the Court below. The defendant appellants in appeal no. 190 of 1937, which has been withdrawn, must pay the costs of the defendant-respondent in that appeal, which we fix at one hundred rupees.

MANOHAR LALL, J.—I agree.

Appeal no. 182 allowed.

Appeal no. 190 withdrawn.

S. A. K.

REVISIONAL CIVIL.

Before Khaja Mohamad Noor and Dhavle, JJ.

SOURENDRA MOHAN SINHA

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Receiver—mortgage decree—administration suit between mortgagors—appointment of Receiver—debt incurred by Receiver for purposes other than protection of estate—priority—salvage lien, rule of—application by mortgagee decree-holder for leave to execute the mortgage decree—question of priority, whether should be investigated in a summary proceeding—Court, power of, to make an order altering mortgagee's priority—leave to execute mortgage decree, whether at all necessary.

Subject to the rule of salvage lien, which is applied in India as a rule of justice, equity and good conscience, the Court, when administering the estate of the mortgagors in a suit between them inter se, has no power to destroy or curtail the rights of the mortgagees in the exercise of its discretion to grant them leave to execute their mortgage decree obtained before the estate came in custodia legis.

Likewise it has no power, while administering the estate through a Receiver, to order that the priority of a mortgage

* Civil Revision nos. 389, 442 and 443 of 1938, from an order of Babu Raghunandan Prasad, Subordinate Judge of Bhagalpur, dated the 10th June, 1938.