APPELLATE CIVIL.

Before Mr. Justice Mya Bu and Mr. Justice Darwood.

MA NGWE NYUN

v.

MA THWE.*

1928

May 22.

Arbitration—Appointment of guardian of minor whether could be made on reference to arbitrators—Civil Procedure Code (Act V of 1908), s. 141.

Held, that the selection of a guardian for a minor cannot be made by arbitrators and must be made by the Court, acting under the Guardian and Wards Act.

Ma Hla Win v. *Ma Pwe*, 2 U.B.R. (1892-96) 407; *Mahadeo Prasad* v. *Bindershri Prasad*, 30 All. 137; *Palaniandi Chetti* v. *Adaikalam Chetti*, 47 Mad. 459—*referred to.*

Sanyal for the appellant.

Chatterji for the respondent.

MYA BU and DARWOOD, JJ.—These two appeals have arisen out of Civil Miscellaneous Proceedings Nos. 105 and 111 of 1927 of the District Court of Mandalay which granted the respondent's application to be appointed guardian of the person and property of one Ma Aye Sein, a minor, but dismissed the appellant's application for the appointment. The appellant and the respondent each opposed the other's application, and the decision in one case was by consent to govern the fate of the other. During the pendency of the proceedings the parties came to an agreement and made a joint application praying that the matters in dispute between them be referred to the arbitration of the three arbitrators named in the application, of whom the decision of the majority was to prevail. The Court made the reference as prayed for, and in due course the majority of the

* Civil Miscellaneous Appeals Nos. 64 and 65 of 1927 (at Mandalay).

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arbitrators made their award in respondent's favour, to the effect that the respondent was, and the appellant was not, entitled to be appointed guardian of the minor, and submitted the same to the Court. The appellant then objected to the filing of the award on the ground that the Court had no power to refer the matter of appointment of guardian of a minor to arbitration, and that therefore, the reference itself was a nullity. The learned Additional Judge of the District Court disallowed the objection, expressing the opinion that, there being no provision either in the Guardians and Wards Act or in the Second Schedule to the Civil Procedure Code prohibiting the exercise of the Court's ordinary power of referring disputes to arbitration and having regard to the provisions of section 141 of the Civil Procedure Code, the Court was empowered to make such reference. In support of his opinion the learned Additional Judge quoted the case of *Ma Hla Win* v. *Ma Pwe* (1), which ruled that in view of the various allusions in the Guardians and Wards Act to the Code of Civil Procedure and having regard to section 141 of the Code, the provisions of the Code should be followed as far as may be in proceedings under the Guardians and Wards Act. The learned Additional District Judge's view, however, appears to us to be opposed to the fundamental principles of the substantive law of arbitration and also to the idea underlying the Courts' function in the matter of appointment of a guardian of a minor. It also appears that he overlooked the significance of the phrase "as far as may be" in the authority quoted by him. According to the accepted theory that the State is the guardian of all its minor subjects, the question of guardianship is not one of the

(1) II U.B.R. (1892-96) 407.

private civil rights of any private person which he is by law allowed to submit to arbitration. This is laid down in *Mahadeo Prasad* v. *Bindershri Prasad* (1), which also points out that section 131 of the Civil Procedure Code deals with procedure and procedure alone and does not touch the substantive law of arbitration. This case is followed in *Palaniandi Chetti* v. *Adaikalam Chetti* (2), in which there is a very pertinent dictum to the effect that the selection of a guardian could not be referred to arbitrators, as it was not a matter of private interest between parties, and as the law allowed a reference to arbitration only where all the parties interested agreed, whereas in a guardianship application the party most interested was the minor and he could not agree to a reference.

The course to be followed by the District Court in appointing or declaring a guardian is prescribed in sections 11, 13, 17 and 46 of the Guardians and Wards Act, and it is designed to satisfy the Court that it is for the welfare of a minor that a guardian should be appointed and as to the most suitable person for appointment. From this it appears that the intention of the legislature is that the question as to who is the most suitable person for the appointment is to be decided by the Court.

For these reasons we hold that the District Court cannot in law refer the selection of a guardian to arbitration.

A perusal of the judgment of the learned Additional District Judge shows that his decisions are based mainly, if not entirely, upon the award of the arbitrators, which, for the reasons stated above, is a nullity.

(1) (1908) 30 All. 137.

(2) (1923) 47 Mad. 459.

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We therefore allow these appeals and set aside the orders passed by the District Court in Civil Miscellaneous Proceedings Nos. 105 and 111 of 1927.

The District Court will now proceed with the enquiry and dispose of the applications according to law.

We make no order as to the costs of these appeals.

APPELLATE CIVIL.

Before Mr. Justice Pratt, Officiating Chief Justice, and Mr. Justice Cunliffe.

1928

May 28.

ALIBHAI MOHAMED, A FIRM
v.
MAHOMED NOORMAHOMED.*

Limitation Act (IX of 1908), Sch. I, Arts. 182, 183—Burma Courts Act (XI of 1922), s. 26—Decree of Chief Court governed by Art. 182 and is not a decree of High Court for purposes of limitation—Infructuous application for execution which is time-barred gives no fresh period for limitation.

Held, that Art. 182 and not Art. 183 of the Limitation Act applied as regards execution of a decree of the late Chief Court of Lower Burma, although an application for execution is made in the High Court. The object of s. 26 of the Burma Courts Act was simply to provide for the execution of decrees of the Chief Court by the High Court, which succeeded it. It is not intended to metamorphose a decree of the Chief Court into a High Court decree so as to apply the longer period of limitation attaching to a High Court decree.

Held, also, that where an application for execution is made, which is time-barred, and an order for arrest is made, but no warrant is issued and no process-fees are paid, the application becomes wholly infructuous and cannot give the decree-holder a fresh period of limitation under the provisions of Art. 182 (6) of the Limitation Act. Consequently a second application for execution is also time-barred, although presented within three years from the date of the infructuous application.

Bhagwan Jethiram v. *Dhondi*, 22 Bom. 83; *Bissessur Mullick* v. *Maharajah Mahatab Chunder*, 10 Suth. W.R., F.B.R. 8—*referred to.*

Mungul Pershad v. *Grija*, 8 I.A. 123—*distinguished.*

Jeejeebhoy for the appellants.

Rafi for the respondent.

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* Civil First Appeal No. 303 of 1927 from the order of the Original Side in Civil Execution No. 302 of 1927.