APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

BALAJI NARAYAN GOKHALE (ORIGINAL PLAINTIFF), APPELLANT, *v.* NANA BIN BABAJI GHATGE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

1903. *January* 13.

Hindu Law—Joint Hindu family—Manager—Arbitration—Power of manager to refer a dispute to arbitration—Award—Minors bound by the award.

A manager of a joint Hindu family, even when he is not the father, has the power to bind the family by a reference of a dispute with any outsider regarding any family property to arbitration, provided such reference be for the benefit of the family. Minors in the family are bound by the reference and consequently by the award made upon it.

SECOND appeal from the decision of G. C. Whitworth, District Judge of Sátára, reversing the decree passed by Ráo Sáheb N. V. Samant, Subordinate Judge at Rahimatpur.

Suit to recover possession of certain land.

The land in question belonged originally to one Babaji Ghatge, who mortgaged it with possession to the plaintiff. Shortly afterwards the plaintiff leased it to Babaji under a written *kabulayat* (lease) dated the 10th November, 1888.

Babaji died about the end of 1889 leaving behind him four sons: (1) Nana, (2) Ganu, (3) Narahari, and (4) Dayanu (defendants 1—4). Of these Narahari and Dayanu were minors at Babaji's death and at the date of the suit.

On the 28th March, 1890, a decree in terms of an award was made between the plaintiff and the heirs of Babaji, by which the heirs of Babaji were ordered to pay to the plaintiff Rs. 19,731-15-0 and interest and costs on the 28th April, 1890, and to redeem the property: in default they were to stand foreclosed. To this decree the sanction of the Court under section 462 of the Civil Procedure Code (Act XIV of 1882) was not obtained.

Default was made. The plaintiff thereupon claimed to be owner of the property.

* Second Appeal No. 203 of 1902.

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In 1897 plaintiff brought this suit against the heirs of Babaji to recover possession of the land. It was contended (*inter alia*) that the award was not binding on the minor defendants. Defendants 1 and 2 further contended that the decree was collusive.

Defendant 4 (Dayanu) had been given in adoption in another family in 1892 and had ceased to be interested in the matter.

The Subordinate Judge found that the decree was binding except as against Narahari (defendant 3) who was a minor; and (without further regarding Dayanu (defendant 4) as he had passed out of the family) declared the plaintiff to be the owner of two-thirds of the property.

On appeal, the District Judge held that Narahari was not bound by the decree; that the adoption of Dayanu (defendant 4) having taken place in 1892, that is, after the date of the decree, plaintiff was not entitled to his share; that the decree was not collusive; that the compromise was grossly negligent of the minor's interests; that Dayanu's share would pass to the coparceners and not to the plaintiff; and that joint possession could not be decreed to the plaintiff. He therefore reversed the decree passed by the Subordinate Judge and dismissed the plaintiff's suit.

Plaintiff thereupon preferred a second appeal.

N. M. Samarth for the appellant (plaintiff):—The Courts below have based their decision on the ground that no sanction was granted by the Court under section 462 of the Civil Procedure Code (Act XIV of 1882) when the decree was passed in terms of the award. This, we contend, is wrong. Section 462 of the Civil Procedure Code (Act XIV of 1882) applies to awards made in the course of a suit; it does not apply to an arbitration not arising out of a pending suit: *Vithaldas* v. *Daltaram*.[1] In the present case there being already a decree the defendants ought to have filed a suit to set it aside within the period allowed by law. As defendants they cannot be allowed by law to take up a position which would not now be open to them as plaintiffs. Both the Courts below have found as a fact that there was neither fraud nor collusion as to the reference to arbitration, or

(1) (1901) 26 Bom. 298.

as to the award, or as to the final decree in terms of the award. That being so, it is not right in law to disregard the final decree merely because some terms of it are not so favourable as they might have been. It has been found that all the defendants were properly represented. Respondent 3 was not really a minor: the lower Court is wrong in thinking he was a minor. Even assuming that he was, the decree is good as against him. His adult brothers as managers of the family had authority to bind the whole family by a *bonâ fide* reference to arbitration. The reference, the award and the decree were all beyond suspicion and for the benefit of the whole family, including the minor members, if any. *Mahadev* v. *Krishnabai* [1] is not strictly applicable to the facts of this case. The view of the law laid down therein is impliedly dissented from in *Vithaldas* v. *Dattaram*.[2] In any case we are entitled to possession, our mortgage being a mortgage with possession and our present suit being within twelve years from the date of the mortgage.

K. H. Kelkar for respondent 3 :—It is found that respondent 3 was a minor when the decree was passed. Admittedly no sanction was given under section 462 of the Civil Procedure Code (Act XIV of 1882). Under these circumstances sanction cannot be implied from the mere fact that a decree has been passed: *Virupakshappa* v. *Shidappa*.[3] The procedure prescribed for passing decrees on awards resembles the procedure to be followed in passing decrees in suits: and even in the latter case the sanction of the Court is essential under section 462 of the Civil Procedure Code (Act XIV of 1882): *Mahadev* v. *Krishnabai*.[1]

Even assuming that the Code of Civil Procedure (Act XIV of 1882) does not apply, the Court is bound to see that the interests of the minors are safeguarded: *In the matter of Romon Kissen Sett* v. *Hurrololl Sett*.[4] The sole test in such cases is, was the compromise for the benefit of the minor? If not, the Court cannot uphold it: *Lalla Bunseedhur* v. *Koonwar Bindeseree Dutt Singh*.[5] The minor defendant having been in possession of his share all along, the decree was nothing more than a *brutum*

(1) (1896) P. J. p. 609.
(2) (1904) 26 Bom. 298.
(3) (1901) 26 Bom 109.
(4) (1892) 19 Cal. 334.
(5) (1866) 10 M. I. A. 454.

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fulmen, so far as he was concerned. He was not bound to get it set aside: *Orr* v. *Sundra Pandia*.[1]

B. A. Bhagwat for the remaining respondents.

CHANDAVARKAR, J.:—The principal ground on which the decision n this second appeal turns, and on which the District Judge has rejected the claim of the plaintiff for possession, is that the decree for foreclosure obtained by the plaintiff in March, 1890, in terms of an award is not binding on defendant 3 (Narahari) and defendant 4 (Dayanu) who were minors at the date of the award. It is found that the family to which these two defendants belonged consisted of themselves and their brothers, Ganu and Nana (defendant 1), when the reference to arbitration was made, and that Ganu and Nana were the adult members of the family at the time. It is not contended, nor has the District Judge found, that in an undivided Hindu family consisting partly of minors, the manager of it has no right to refer any matters in dispute to arbitration even though such reference be for the benefit of the family. In *Jagan Nath* v. *Mannu Lal*,[2] Edge, C.J., held that as a father in a joint Hindu family as manager fully represents the family, and, in the absence of fraud or collusion, his acts are binding on the other members of the family, it is competent for him to refer any dispute with reference to any matter, in which the family is interested, to arbitration. We are of opinion that the same principle would hold good in the case of a manager of a joint family where such manager is not the father, and he would have power to bind the family by a reference of its dispute with any outsider regarding any family property to arbitration, provided such reference be for the benefit of the family. Any minors in the family would be bound by the reference and consequently by the award made upon it. The District Judge has not in the present case impugned the award on the ground of any want of power in the adult members, who were managers of the defendant's family, to refer the dispute with the plaintiff to arbitration. What the District Judge holds is that the award is bad and not binding upon the defendants who were minors at its date, because some of its terms are not beneficial to those defendants. But

(1) (1893) 17 Mad. 255. (2) (1894) 16 All. 231.

the award of an arbitrator is the decision of a quasi-judicial tribunal and cannot be questioned as invalid merely on the ground that its terms are not favourable to one of the parties to it. What the District Judge really means, perhaps, is that before passing a decree in its terms the Court in which the award was filed ought to have considered the question whether it was for the benefit of the minor defendant as required by section 462 of the Civil Procedure Code. Mr. Kelkar for defendant No. 3 has taken up that position here and relied upon the decision of Parsons and Ranade, JJ., in *Mahadev Balkrishna Kelkar* v. *Krishnabai*.[1] That decision was cited in *Vithaldas Ganpat* v. *Dattaram Ramchandra*,[2] in which the learned Chief Justice and Chandavarkar, J., held that section 462 "obviously contemplates the existence of a guardian and a pending litigation"; and has, therefore, no application to an award filed in Court for having a decree passed in its terms. As to the decree passed in this case in terms of the award, it is found by the Courts below that there was neither fraud nor collusion as to it, as there was none as to the reference and the award themselves. Before the decree was passed, a guardian *ad litem* had been appointed to represent the defendants who were minors, as required by the Code of Civil Procedure. The minor defendants were, therefore, properly represented, and the Court accordingly passed the decree. It is not suggested that the decree was not in accordance with the provisions of the Code of Civil Procedure relating to arbitration. If the reference to arbitration was proper in the sense that it was for the benefit of the minors, the Court was bound to pass a decree in terms of the award passed on that reference, if there was none of the objections to the award pointed out in the chapter on arbitration in the Civil Procedure Code. There was no duty imposed on the Court at that stage of considering whether the terms of the award were for the benefit of the minors. The imposition of such a duty on a Court where the reference itself is not impugned as fraudulent or unauthorized would practically mean either that, where there are minors in a Hindu joint family, its manager has no power in any case to refer any dispute to arbitration, or that,

(1) (1896) P. J. p. 609. (2) (1901) 26 Bom. 208.

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though he can refer, the award would be nugatory if any of its terms are unfavourable to the minors. There is no law which lays down that as the principle governing in such cases or which contemplates such a result. As held by the Privy Council in *Ghulam Khan* v. *Muhammad Hassan*,(1) "the principle of finality which finds expression in the Code is quite in accordance with the tendency of modern decisions in this country. The time has long gone by since the Courts of this country showed any disposition to sit as a Court of Appeal on awards in respect of matters of fact or in respect of matters of law : see *Adams* v. *Great North of Scotland Railway Company*." (2)

For these reasons we reverse the District Judge's decree and award the claim with costs throughout on the respondents.

Decree reversed.

(1) (1902) 29 I. A. 58; 29 Cal. 167. (2) (1891) A. C. 31.

APPELLATE CIVIL.

Before Mr. Justice Chandavarkar and Mr. Justice Aston.

1903. *January* 15.

SITARAM APAJI KODE (ORIGINAL DEFENDANT No. 1), PLAINTIFF, *v.* SHRIDHAR ANANT PRABHU AND OTHERS (ORIGINAL PLAINTIFFS AND DEFENDANTS Nos. 2 AND 3), RESPONDENTS.*

Mortgage—Discharge of mortgage—Death of mortgagee—Heirs of mortgagee—Payment of mortgage debt to one of the heirs.

Where property is mortgaged to a person who subsequently dies leaving two or more heirs jointly entitled to his estate, payment made by the mortgagor of the amount due on the mortgage to one of those heirs, without the concurrence of the rest, does not amount to a valid discharge to the mortgagor.

SECOND appeal from the decision of T. Walker, District Judge of Ratnágiri, reversing the decree passed by Ráo Sáheb N. B. Mujumdar, Subordinate Judge of Devgad.

One Vasudev Balkrishna (ancestor of plaintiffs) owned one-sixth share in the khoti villages of Bharni and Chafet. This share he mortgaged with possession to Apashet in 1880 for Rs. 799.

* Second Appeal No. 318 of 1902.