

## APPELLATE CIVIL.

*Before Sir L. H. Jenkins, Chief Justice, and Mr. Justice Chandavarkar.*

1901.  
November 26.

VITHALDAS GANPAT AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS,  
v. DATTARAM RANCHANDRA, A MINOR, BY HIS GUARDIAN MANILAL  
JAGJIVANDAS (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Minor—Setting aside a decree—Representative of minor—Agreement to refer to arbitration—Guardian—Civil Procedure Code (Act XIV of 1882), sections 443 and 462.*

The step-mother of a minor, against whose estate the defendants had claims, referred the matter to arbitration, purporting to act on the minor's behalf. No suit had then been filed by or against the minor. An award was made in 1899 directing the minor to pay to the defendants a sum of Rs. 950, and a decree was passed in terms of the award. In the following year the minor by his next friend brought this suit to set aside the decree, on the ground (a) that the minor had not been properly represented and (b) that leave of the Court under section 462 of the Civil Procedure Code (XIV of 1882) had not been obtained. The lower Courts allowed the plaintiff's claim and set aside the decree. On appeal by the defendants,

*Held* (reversing the decree of the lower Courts and remanding the case for hearing on the merits), (1) that there was nothing on the record to show that the minor had no guardian when the agreement to refer was made, and there was no allegation to that effect in the plaint; (2) that section 462 of the Civil Procedure Code did not apply. That section contemplates the existence of a guardian and a pending litigation. Here when the agreement was made there was neither a guardian for a suit nor a suit.

SECOND appeal from the decision of H. F. Aston, District Judge of Poona, confirming the decree of L. G. Fernandez, First Class Subordinate Judge.

Suit by a minor to set aside a decree passed against him by a Small Cause Court.

The deceased father of the minor plaintiff in his lifetime had dealings with the defendants. After his death the minor's step-mother, purporting to act on behalf of the minor, agreed with the defendants that their claims in respect to the said dealings should be referred to arbitration. This was done, and on the 16th January, 1899, the arbitrators awarded Rs. 950 to the defendants.

\* Second Appeal No. 235 of 1901.

On the 10th July, 1899, a decree (No. 569 of 1899) was passed against the plaintiff in terms of the award.

The plaintiff now brought this suit (No. 95 of 1900) by his next friend, Mohanlal Jagjivandas, to set aside the decree, alleging that no leave had been obtained under section 462 of the Civil Procedure Code.

The Subordinate Judge, on the authority of *Mahadev v. Krishnabai*,<sup>(1)</sup> set aside the decree.

The defendants appealed. The Judge summarily dismissed the appeal under section 551 of the Civil Procedure Code, being of opinion that the ruling in *Mahadev Balkrishna v. Krishnabai*<sup>(2)</sup> governed the case, that the leave of the Court not having been obtained under section 462 of the Civil Procedure Code for Suit No. 569 of 1899, and the plaintiff not having been properly represented in that suit according to section 443, the decree could not stand.

The defendants preferred a second appeal.

*S. R. Bakhle* for the appellants (defendants) :—The decree which we obtained against the minor in Suit No. 569 of 1899 was a valid decree, and ought not to be set aside. The award was filed under section 525 of the Civil Procedure Code. The only questions that arose on that application for the consideration of the Court were those that are mentioned in sections 520 and 521 of the Code.

[CHANDAVARKAR, J. :—But how do you get over the decision in *Mahadev Balkrishna v. Krishnabai* <sup>(3)</sup> ?]

We submit that the decision in that case was based upon section 462 of the Code, and we contend that that section is not applicable to the present case. It applies only when there is a suit already pending before the Court.

*P. P. Khare* for the respondent (plaintiff) :—The ruling in *Mahadev Balkrishna v. Krishnabai*<sup>(2)</sup> shows that the sanction of the Court is necessary in a case like the present, and that the minor plaintiff is not bound by the decree passed on the award *Kalavati v. Cheditlal*, (*Aman Singh v. Narain Singh*).<sup>(3)</sup>

(1) (1896) F. J. p. 609.

(2) (1895) 17 All. 531.

(3) (1897) 20 All. 98.

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It was necessary under section 443 of the Code to appoint a guardian for the suit: *Suresh Chander v. Jugut Chander*.<sup>(1)</sup>

There is nothing on the record to show that the mother was served with notice as the minor plaintiff's guardian. She was therefore not a party to the proceeding in the capacity of the minor's guardian for the suit.

JENKINS, C. J.:—The plaintiff sues to set aside a decree in a Small Cause suit of the Poona Court, No. 569 of 1899. The decree was passed on an award made under an agreement of reference to which the present plaintiff's mother was a party and purported to act on his behalf. The first Court decided in the plaintiff's favour on the ground that the Court's leave had not been obtained under section 462 of the Civil Procedure Code. The District Judge on appeal confirmed this decree, basing his decision both on section 462 of the Civil Procedure Code and on the fact that the present plaintiff had not been represented in that suit. From this decree the present appeal has been preferred.

The representation of a minor in a suit is governed by section 443 of the Civil Procedure Code, which provides that—

Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and generally to act on his behalf in the conduct of the case.

It is conceded before us that there is nothing on the record to show that no appointment of a guardian under section 443 was made in the Small Cause Court suit, and the plaint contains no allegation to that effect. No doubt Mr. Bahulikar did in the District Court concede that the mother was merely granted letters of administration to the estate of Dattaram, but he clearly did this in reference to the allegation that the mother had been appointed guardian of the present plaintiff under the Guardians and Wards Act, which is wholly distinct from an appointment under section 443. So far, therefore, as the decision of the lower Appellate Court proceeds on this ground, it is not supported by the record as it at present stands, whatever may be shown hereafter.

(1) (1886) 14 Cal. 204.

Can, then, the decision be supported on the ground that there has been no such leave as section 462 contemplates? We think not. That section obviously contemplates the existence of a guardian and a pending litigation; but here, when the agreement was entered into, there was neither a guardian for a suit nor a suit. But though section 462 can have no application, that does not preclude the plaintiff from showing that on other grounds the decree is not binding on him. The result is that we must reverse the decree of the lower Appellate Court and remand the case for a hearing on the merits. The costs will abide the result.

*Case remanded.*

## APPELLATE CIVIL.

*Before Mr. Justice Gandy and Mr. Justice Fulton.*

PURSHOTTAM DEVJISHET THAKAR (ORIGINAL PLAINTIFF),  
APPELLANT, v. KALA GOVINDJI THAKAR (ORIGINAL DEFENDANT),  
RESPONDENT.\*

1901.  
December 2.

*Executor—Legacy—Suit by one legatee for a legacy—Right of executor to have other legatees made parties to the suit—Civil Procedure Code (Act XIV of 1882), sections 32 and 34—Form of suit—Practice—Procedure—Liability of executor for breach of trust—Trust Act (II of 1882), section 23.*

A legatee is entitled to sue an executor for a legacy bequeathed to him by a Hindu testator in the mofussil.

In case such a suit is brought by one legatee, the executor may apply for his own protection that other legatees shall be made parties, so that if any rateable abatement is requisite the extent of such abatement may be ascertained in a manner binding on all parties interested. But any such application must be made at the earliest possible opportunity, having regard to the provisions of section 34 of the Civil Procedure Code (XIV of 1882), and in any case it is within the discretion of the Court to decide whether the addition of such parties is necessary "in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit" (see section 32).

If an executor commits a breach of trust in respect of trust property that has come to his hands, he is liable under section 23 of the Indian Trusts Act (II of 1882) to make good the loss to the beneficiaries or legatees.

\* Second Appeal No. 290 of 1901.