

1929

BOMBAY
BARODA AND
CENTRAL
INDIA
RAILWAY
CO., LTD.

ARYODAYA
SPINNING,
WEAVING
AND
MANUFACTURING
CO., LTD.

Kemp Ag. C. J.

necessarily connotes that the other two documents must be of the same date.

I would, therefore, set aside the decree of the learned Small Cause Court Judge.

Now, coming to the question whether the suit should be remanded for trial on the other issues in the case, I have already stated that the trial proceeded on all the issues. This is not a case in which the railway company have lost any of the goods, so it is unnecessary to consider what evidence, if any, must on the decided cases be furnished by the railway company in the first instance. This is a case of damage to goods which have been delivered, and it was for the plaintiffs to show that the case came within the exception relating to misconduct on the part of the railway company's servants. They have failed entirely to establish this and from the evidence on the record we are not in a position to come to a finding in their favour. I think that issue No. 4 should be decided in the negative.

Rule absolute with costs throughout.

MURPHY, J. :—I agree and have nothing to add. I think the facts of the case are covered by the ruling in *Tamboli v. Great Indian Peninsular Ry. Co.*⁽¹⁾

Rule made absolute.

J. G. R

⁽¹⁾ (1927) L. R. 55 I. A. 67 : 52 Bom. 169.

APPELLATE CIVIL

Before Mr. Justice Madgavkar.

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July 18.

SHIDDAPPA IRAPPA DUBALGUNDI, MINOR, EXECUTOR RAGHAVJI NATHURAM DECEASED AFTER THE ORIGINAL DECREE OBTAINED, BY ANOTHER EXECUTOR R. S. SHIVLINGRAO JAGDEVRAO DESHMUKH (ORIGINAL PLAINTIFF), APPELLANT v. REVAPPA SOMAPPA SAJJAN (ORIGINAL DEPENDANT), RESPONDENT.*

Civil Procedure Code (Act V of 1908), Order XXI, rule 7—Decree Appeal—Minor plaintiff—Death of next friend pending appeal—No new next friend

*Second Appeal No. 863 of 1927.

appointed—Appeal heard and decided—Appointment of new next friend after decree—Nullity of decree—Irregularity in procedure only—Executing Court cannot go behind decree.

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Held, that the mere fact that a next friend of a minor decree-holder died during the pendency of an appeal and was not replaced by another would not be a sufficient ground to invalidate the decree, if the hearing of the appeal proceeded without any objection.

Kamalakshi v. Ramasami Chetti⁽¹⁾; *Gobardhan Sahai v. Mahabir Singh*⁽²⁾; *Subramania Aiyar v. Vajithinatha Aiyar*⁽³⁾ and *Goda Coopooramier v. Soondarannmall*⁽⁴⁾ referred to.

Held, also, that the only contention open to the judgment-debtor to raise in execution was that the decree was a nullity; an executing Court otherwise had no power to question the jurisdiction of the Court which passed the decree under execution.

Vishwanath v. Lallu Kabla⁽⁵⁾; *Hari Govind v. Narsingrao Konherra*⁽⁶⁾; *Shiraji v. Vithal*⁽⁷⁾; *Gora Chand Haldar v. Prafulla Kumar Roy*⁽⁸⁾ referred to.

SECOND appeal against the decision of G. S. Rajadhyaksha, District Judge at Bijapur, reversing the decree passed by N. D. Uppani, Subordinate Judge at Bijapur.

Proceedings in execution.

One Irappa Dubalgundi owned two shops, one at Talikot and the other at Bijapur. At the Talikot shop business was carried on in the name of Shiddappa Irappa and at the Bijapur shop in the name of Irappa Dubalgundi. Defendants Nos. 1 and 2 had dealings with the Talikot shop.

Irappa died leaving a will in favour of his son Shiddappa and appointed three executors among whom one was Raghavji Nathuram and another was Rao Saheb Shivlinga Jagdev Deshmukh.

In 1922 a suit was filed for recovering the dues to Talikot shop. The plaintiff was described as follows :—

“Shiddappa Irappa Dubalgundi’s shop, owner Shiddappa Irappa, minor, by his executor Raghavji

⁽¹⁾ (1895) 19 Mad. 127.

⁽²⁾ (1912) 34 All. 321.

⁽³⁾ (1913) 38 Mad. 682.

⁽⁴⁾ (1909) 33 Mad. 167.

⁽⁵⁾ (1909) 11 Bom. L. R. 1070.

⁽⁶⁾ (1918) 38 Bom. 194.

⁽⁷⁾ (1926) 28 Bom. L. R. 1367.

⁽⁸⁾ (1925) 53 Cal. 166.

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Nathuram." The suit was decided partly in plaintiff's favour and partly in defendant's favour. The plaintiff appealed. Before the hearing of the appeal Raghavji Nathuram died on July 5, 1924, and no legal representative was brought on record in his place. The appeal was heard and decided on June 29, 1925. After the decision, the plaintiff applied that the appeal should be taken on file again and the name of another next friend substituted in place of the deceased Raghavji Nathuram. The defendant-respondent objected to the application.

The District Judge ordered that it was not necessary to reopen the appeal as the minor appellant's interests were not prejudiced by the decree as it stood.

The plaintiff proceeded to execute the appellate Court's decree and was met with the plea that the decree was a nullity.

The Subordinate Judge held that the failure to replace the next friend by another was an irregularity which did not invalidate the decree. He, therefore, allowed the Darkhast to proceed.

On appeal the District Judge held that the real plaintiff in the case was Raghavji Nathuram and the minor's name appeared merely as the owner of the shop; that the appellant before the Court being dead the decree passed was a nullity. The objection was, therefore, upheld and the Darkhast dismissed.

The plaintiff appealed to the High Court.

G. N. Thakor, with *S. B. Jathar*, for the appellant.

H. B. Gumaste, for the respondent.

MADGAVKAR, J.:—The question in this appeal is whether the decree in appeal No. 4 of 1924 of the District Court of Bijapur was a nullity as the judgment-debtor the defendant-respondent contended. The trial Court held that it was not a nullity and dismissed the

respondent's objection. In appeal by the defendant judgment-debtor the District Court allowed the appeal and dismissed the Darkhast with costs. The plaintiff decree-holder appeals.

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One Irappa Dubalgundi who had a son, the minor Shiddappa, owned two shops, one at Bijapur which went by his own name, and the other at Talikot which went by the name of the minor. The respondent-defendant judgment-debtor passed a Khata to the Talikot shop, which bore the name of the minor. Irappa died leaving a will and appointing three executors among whom one was Raghavji Nathuram and another Rao Saheb Shivlinga Jagdev Deshmukh. After his death Suit No. 173 of 1922 was instituted against the respondent in the Subordinate Court at Bijapur and ended in a decree against the respondent. Being dissatisfied with the amount the plaintiff appealed. During the pendency of the appeal Raghavji Nathuram died. The appeal was allowed and the decretal amount increased.

Madhvarkar J.

The only question of fact on which the present appeal turns is whether the plaintiff in Suit No. 173 of 1922 and the appellant in the appeal No. 4 of 1924 was the minor Shiddappa or whether it was Raghavji Nathuram as the executor of Irappa's will. The precise title on the plaint and on the appeal was "Shiddappa Irappa Dubalgundi's shop, owner Shiddappa Irappa, minor, by his executor Raghavji Nathuram." On this question each party relies on certain documents in suit and in appeal. It is also conceded that after the appellate decree on June 29, 1925, an application was made by the appellant's pleader on July 13, 1925, bringing the fact of Raghavji's death to the notice of the District Court and asking that in place of Raghavji Nathuram Rao Saheb Shivlingrao Jagdevrao Deshmukh, another executor, should be appointed as the next friend and the

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appeal should be taken back on the file and reheard. To that application an objection was taken orally for the respondent and the District Court on November 24, 1925, thought it unnecessary to grant the application, its reason being as follows:—

“As the minor appellant's interests are not prejudiced by the decree as it stands, I see no reason to reopen the appeal only for the irregularity mentioned and I reject the application with costs.”

The only other relevant fact not very material is that in the original plaint instead of the words “owner Shiddappa Irappa” the words were “owner Irappa”. The defendant took an objection, Exhibit 16. The plaintiff filed a counter-written statement, Exhibit 20, and an application, Exhibit 12, to make the correction to its present form “Shidappa Irappa.”

Four contentions are taken for the appellant. Firstly, the decree and the order of the District Judge of November 24, 1925, quoted above, speak of the minor appellant. Secondly, the present respondent himself opposed the application to substitute Rao Sahab Deshmukh in place of the deceased Raghavji and on both these grounds it is not open to the respondent to raise his present plea that the decree is a nullity. Thirdly, the executing Court cannot go behind the decree and question the jurisdiction. Fourthly, the plaintiff and the appellant was not the executor Raghavji but the minor Shidappa, executor being a misnomer for next friend and executor under the will. It is argued for the respondent, firstly, that the words “owner Shiddappa Irappa minor” in the plaint and in the appeal are surplusage and Raghavji was the real plaintiff and the appellant. Secondly, in view of Raghavji's death during the hearing and before the decision in appeal the appellate decree is a nullity. Thirdly, there is no estoppel on which the respondent is debarred from raising this contention.

Numerous authorities have been quoted at the Bar and references similarly have been made to a number of documents on the question as to who the real plaintiff was. That question, however, cannot be solved by stray phrases in any particular document or by a number of them taken and weighed together. The plaintiff is the party who institutes the suit, the appellant the party who institutes the appeal, in whose favour or against whom the decree original or appellate, was made. It is not a question what party thinks himself or the other party the plaintiff, but which party the Court treats as the plaintiff and the appellant.

The will itself has not been produced. Presumably Irappa and his minor son were joint. The minor son was admittedly the owner of the Talikot shop after his father's death. The detailed provisions of the will are not available on the record, but it may be assumed for the purpose of the present appeal, that the deceased, in view of the minority of his son, appointed the executors to look after both the shops and that the debt in suit was alleged to be due to the Talikot shop which bore the name of the minor.

The question is whether, according to the appellant, the words "his executor" are a mistake for "next friend" or whether the words "Owner Irappa minor etc." are surplusage. It is, in my opinion, a very strong point for the appellant that in the application Exhibit 10P dated July 13, 1925, the pleader expressly referred to the minor appellant without challenge by the opposite party, and the District Court referred again to the minor appellant. There can be no question, therefore, that the District Court treated the minor as the appellant and not Raghavji. That fact is in my opinion decisive. That apart, taking the entire wording of the description of the plaintiff and the appellant in their plain sense, it is impossible to hold that the words

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“ Owner Shiddappa Trappa minor ” were surplusage. The man in charge of the litigation appears to have been a Gumastha called Parappa Basappa Avaradi. The plaint itself, in all probability, was drafted by the pleader's clerk. Either the necessity for the words “ next friend ” escaped the attention of the pleader in the first instance, or possibly he thought that, as Trappa's will had appointed the executors, the description sufficed. The wording, therefore, was in no way inconsistent and was rightly treated to apply to the appellant plaintiff minor and not Raghavji.

In this view I may deal shortly with the other contentions. As regards the power of the executing Court to go into the question of jurisdiction, apart from the alteration in Order XXI, rule 7 from the old section 225, Civil Procedure Code, the general view appears to be that the only contention which it is open to a judgment-debtor to raise in execution is that the decree was a nullity: *Vishvanath v. Lallu Kabla*.⁽¹⁾ Otherwise the executing Court has no power to question the jurisdiction of the Court which passed the decree under execution: *Hari Govind v. Narsingruo Konherruo*⁽²⁾ and *Shivaji v. Vithal*.⁽³⁾ The limitations on the power of a decreeing Court in this respect as to jurisdiction, whether pecuniary, territorial, or in respect of the judgment-debtor's person, have been stated by a Full Bench of the Calcutta High Court in *Gora Chand Halldar v. Prafulla Kumar Roy*,⁽⁴⁾ a view consistent with the decision of Mookerjee J. in *Kulipada Sarkar v. Hari Mohan Dalal*.⁽⁵⁾

There is no express bar to the respondent's raising the question of the nullity of the decree, as distinguished from the question as to who was the plaintiff or the

⁽¹⁾ (1909) 11 Bom. L. R. 1070.⁽²⁾ (1918) 38 Bom. 194.⁽³⁾ (1926) 28 Bom. L. R. 1367.⁽⁴⁾ (1925) 53 Cal. 166.⁽⁵⁾ (1916) 44 Cal. 627.

appellant on which the decision of the trial or the appellate Court, as I have stated above, was final. It is not necessary to go, therefore, into the various documents or stray phrases whether in favour of the contention of the one party or the other. For instance, the words in the counter-written statement which the respondent seeks to contend as an admission are "As one of the said executors has brought this suit the same is properly brought." This phrase lends itself equally to one contention as to the other. As I have stated above, an examination of the documents and the stray phrases is unnecessary and, in my opinion, irrelevant, the Court alone being competent to decide whom it has to treat as the plaintiff or the appellant.

The last question remains whether, the minor being the plaintiff, the appellate decree is still a nullity. It has been contended for the respondent that although the lower appellate Court has not proceeded to this extent, it had been admitted apparently in the argument that if the minor was the appellant, the decree could not be a nullity. Under Order XXXII, rule 10, Civil Procedure Code, "On the death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place." The appeal did not therefore in the present case abate. The proper procedure thus brought to the notice of the Court would have been the procedure for which the appellant applied after the decree, namely, the appointment of Rao Saheb Deshmukh and the rehearing of the appeal. To that procedure the respondent who would thereby secure a rehearing of the appeal decided against him, objected. In the result the application was rejected. Nevertheless, it would have been better if the District Judge had granted the application for the minor and appointed another next friend and reheard the appeal. The respondent's objection notwithstanding, it expressly

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declined to do so on the *ground that there was no pre-
judice to the appellant. Under these circumstances
I find it impossible to accept the view now put forward
for the respondent, that nevertheless, the decree in the
appeal, for the rehearing of which the appellant had
applied and to which the respondent objected and which
the Court refused for want of prejudice as it supposed
to the appellant, is a nullity. In my opinion, there is
ample authority to hold that it was at the most an irre-
gularity and further, if anything, one which the
respondent himself waived. Such a waiver is possible,
as, for instance, where the defendants without objection
allowed the minor to prosecute the suit he would not be
allowed to raise the objection of minority in appeal :
Kamalakshi v. Ramasami Chetti.⁽¹⁾ The mere fact
that a guardian *ad litem* of the decree-holder died and
had not been replaced was an irregularity and would
not necessarily invalidate the decree : *Gobardhan Sahai*
v. Mahabir Singh.⁽²⁾ The case is widely different where
a decree has been passed after the death of the respon-
dent and before his legal representative is brought on
the record : *Subramania Aiyar v. Vaithinatha Aiyar*.⁽³⁾
In such a case the decree may be a nullity. But in the
case of a plaintiff, who is a minor, it is not necessarily
so : *Goda Coopooramier v. Soondarammall*.⁽⁴⁾ There
is no express decision of this Court on the point except
that in *Janardhan v. Ramchandra*⁽⁵⁾ it has been held
that the decree was a nullity as the appellant had died
during the hearing of the appeal to the District Court,
and that Court and not the High Court was the proper
forum for an application to excuse the delay in bringing
the legal representative on the record. In fact most
of the cases deal with a decree passed after the death
of the defendant which for obvious reasons the

⁽¹⁾ (1896) 19 Mad. 127.

⁽²⁾ (1912) 34 All. 321.

⁽³⁾ (1913) 38 Mad. 632.

⁽⁴⁾ (1909) 33 Mad. 167.

⁽⁵⁾ (1901) 26 Bom. 317.

Courts have held to be a nullity and one that can be taken in execution: *Jungli Lal v. Laddu Ram Marwari*⁽¹⁾; *Anwar-ul-Haq v. Nazar Abbas*⁽²⁾; *Sripat Narain Rai v. Tirbeni Misra*.⁽³⁾

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For these reasons I hold that it was the minor who was the plaintiff and the appellant and not Raghavji, the failure to appoint a next friend after the death of Raghavji and before the appellate decree was an irregularity, and that in any case it is not open to the respondent to avoid the decree in view of his own failure to have the appeal reheard after the appointment of a next friend as the appellant had applied.

The appeal must, therefore, be allowed, the order of the lower appellate Court set aside, and that of the trial Court restored with costs throughout on the respondent.

Appeal allowed.

J. G. R.

⁽¹⁾ (1919) 4 Pat. L. J. 240.

⁽²⁾ (1924) 6 Lah. 313.

⁽³⁾ (1918) 40 All. 423.

APPELLATE CIVIL.

Before Sir Norman Kemp. Kt., Acting Chief Justice, and Mr. Justice Murphy.

THE BOMBAY BARODA AND CENTRAL INDIA RAILWAY COMPANY, LIMITED (ORIGINAL DEFENDANTS), APPLICANTS *v.* THE RAJNAGAR SPINNING, WEAVING AND MANUFACTURING COMPANY, LIMITED (ORIGINAL PLAINTIFFS), OPPONENTS.*

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Indian Railways Act (IX of 1890)—Risk note form B†—Consignment of goods—Loss in transit—Misconduct of railway administration's servants, meaning of—Burden of proof—High Court—Revisional powers.

When goods are consigned through a railway company under risk note form B, the railway administration is not to be held responsible for loss except

*Civil Revisional Application No. 289 of 1928.

†Risk Note Form "B".

"Whereas the consignment of _____ tendered by me/us, per Forwarding Order No. _____ of this date, for despatch by the _____ Railway Administration to _____ station, and for which I/we have received railway receipt No. _____ of same date is charged at a special reduced rate instead of at the ordinary tariff rate chargeable for such consignment, I/we, the undersigned do, in consideration of such lower charge, agree and undertake to hold the