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KARIMUNNISA BEGUM v. KAJI MIR JAMALUDDIN

Beaumont C. J.

a suit is necessary, but when the contract is embodied in an order, I see no reason why the parties should not avail themselves of the simple method of correcting such mistakes in an order provided by section 152. In my opinion, therefore, the Judge had power to entertain the application. I must set aside the order of the lower Court and send the case back to the learned Judge with a direction to deal with it on the merits and decide whether the case does or does not fall within the terms of section 152. If it does, I think he can make the alteration required without putting the parties to the delay and expense of filing a suit. The costs of this revisional application will be costs in the application to be dealt with by the Judge.

Order set aside: case sent back.

Y. V. D.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice.

1937
April 9

AURAJ JOHARMAL MARWADI AND ANOTHER (ORIGINAL DEFENDANTS), APPELLANTS *v.* DALPAT SUPADU, MINOR, BY HIS GUARDIAN, NAZIR, DISTRICT COURT, JALGAON, AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT No. 3), RESPONDENTS.*

Minor—Guardian—Suit against minor—Negligence of guardian ad litem*—Decree passed against minor—Whether minor can challenge decree in a substantive suit.*

A minor cannot challenge in an independent suit the validity of a decree passed against him on the ground of negligence of his guardian *ad litem*.

In the absence of fraud or collusion, if a minor wishes to challenge a decree against him on the mere ground of negligence by his guardian, he must do so in the suit, by such means as the rules of procedure provide.

Raghubar Dyal Sahu v. *Bhikya Lal Misser*,(1) *Beni Prasad* v. *Lajja Ram*,(2) and *Imam Din* v. *Puran Chand*,(3) approved.

Lalla Sheo Churn Lal v. *Ramnandan Dobey*,(4) and *Siraj Fatma* v. *Mahmud Ali*,(5) disapproved.

*Second Appeal No. 827 of 1933.

(1) (1885) 12 Cal. 69.
(2) (1916) 38 All. 452.
(3) (1919) 1 Lah. 27.
(4) (1894) 22 Cal. 8.
(5) (1932) 54 All. 646, F. B.

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AURAJ JOHARMAL v. DALPAT SUPADU

SECOND APPEAL against the decision of N. J. Shaikh, District Judge of East Khandesh at Jalgaon, confirming the decree passed by V. S. Desai, Subordinate Judge at Jalgaon.

Suit for declaration and injunction.

The plaintiff's father Supadu died in 1920. Plaintiff being then a minor his affairs were managed by his mother Zumkabai (defendant No. 3). In 1924, Zumkabai passed three money-bonds for different sums in favour of defendants Nos. 1 and 2.

In 1927, the defendants Nos. 1 and 2 filed a suit No. 1029 of 1927 against the plaintiff, represented by his guardian mother, Zumkabai, to recover money due on the three bonds and obtained a decree.

In September 1929, the plaintiff by his next friend Atmaram Umaji filed a suit for a declaration that the decree in suit No. 1029 of 1927 was not binding on him as his guardian mother was grossly negligent in not making any arrangements to lead evidence in that suit and in consequence his pleader retired by filing a purshis; that the bonds were not for legal necessity and were without consideration. He also prayed for an injunction to restrain defendants Nos. 1 and 2 from executing the decree.

The Subordinate Judge held that the minor's guardian was grossly negligent in suit No. 1029 of 1927 and, therefore, the plaintiff was entitled to get the decree in that suit set aside; that no consideration passed for the money bonds and they were not executed for any legal necessity. The suit was, therefore, decreed.

On appeal, the District Judge, confirmed the decree.

Defendants Nos. 1 and 2 preferred a second appeal to the High Court.

P. V. Kane, for the appellants.

K. H. Kelkar, for respondent No. 1.

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AURAJ JOHARMAL v. DALPAT SUPADU

BEAUMONT C. J. This is a second appeal from a decision of the District Judge of East Khandesh, and it raises a short point which is by no means free from difficulty. The plaintiff in the suit is suing to set aside a decree passed in 1927 against him on certain money bonds which had been passed by his mother. In that suit the mother was the guardian *ad litem* of the plaintiff in the present suit, who was a minor. She entered an appearance and engaged a pleader, but at the hearing of the suit the pleader put in a purshis that he had got no instructions, and, therefore, retired from the suit, and a decree was then passed against the property coming to the hands of the minor. That decree has not been challenged in review nor has an attempt been made to set it aside under Order IX, rule 13, Civil Procedure Code, 1908. In 1929, the minor by his next friend started this suit for a declaration that the decree made in 1927 was not binding on him on the ground that the guardian *ad litem* was guilty of gross negligence in the conduct of his defence, and he asked for an injunction to restrain the decree-holders from executing the decree. He also asked for relief in respect of a mortgage bond executed by the mother, but in respect to that he failed, and there is no appeal on that point. The trial Court held that the money bonds executed by the mother were not passed for legal necessity, and that the minor was entitled to challenge the decree founded on those bonds, and that decision was upheld by the District Judge. In second appeal, I am bound by the finding that these money bonds were not passed for legal necessity. The point, however, which arises on this appeal, is a pure question of law, i.e., whether a minor can challenge in an independent suit the validity of a decree passed against him on the ground of the negligence of his guardian *ad litem*. There is a good deal of authority upon the point in India, but it is conflicting. In *Raghubar Dyal Sahu* v. *Bhikya Lal Misser*,[1] *Beni Prasad* v. *Lajja Ram*,[2] and *Imam Din* v. *Puran*

[1] (1885) 12 Cal. 69.

[2] (1916) 38 All. 452.

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Chand,[1] it was held that the minor could not challenge a decree duly passed against him on the ground of negligence by the guardian, and that his only remedy would be by way of review if he could bring himself within the terms of Order XLVII, rule 1. On the other hand, in *Lalla Sheo Churn Lal* v. *Ramnandan Dobey*[2] and *Siraj Fatma* v. *Mahmud Ali*,[3] it was held that in such a case the minor could challenge the decree in a substantive suit. In the latter case, which was the decision of a full bench, Mr. Justice Sulaiman, as he then was, gave an exhaustive and, if I may say so, a very interesting and instructive judgment, in which he reviewed the whole matter. I agree with him that section 11 of the Civil Procedure Code relating to *res judicata* cannot apply when the previous judgment which is alleged to have decided the matter is challenged in the suit. The Court, I think, in that case went largely on the ground that in England there is in a minor a substantive right to set aside a decree against him on the ground of negligence by the guardian. I am not satisfied myself that that is so. There is no doubt one decision of Malins V. C., *In re Hoghton: Hoghton* v. *Fiddey*,[4] in which the learned Vice-Chancellor seemed to think that such a right existed, but I have not been referred to any other case on the subject, and I never in my experience came across any case of that sort in England. A judgment may of course be challenged in an independent suit on the ground of fraud or collusion, and if it were held that the negligent conduct of the guardian *ad litem* showed collusion with the plaintiffs, that undoubtedly would be a ground on which the judgment could be set aside. But mere negligence by a guardian cannot by itself be any evidence of fraud or collusion against the plaintiffs, who may very probably have no means whatever of ascertaining on what grounds the guardian acted. It seems to me in principle very dangerous to allow such a claim as this.

[1] (1919) 1 Lah. 27.
[2] (1894) 22 Cal. 8.
[3] (1932) 54 All. 646, F. B.
[4] (1874) L.R. 18 Eq. 573.

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A minor duly represented, as this minor was, by a guardian *ad litem* is bound by the order made just as effectively as an adult defendant would be, and to say that the decree against the minor can be set aside on the mere ground of negligence by the guardian for which the plaintiff is in no way responsible seems to me to open the door to a great deal of litigation. It might not be difficult for a minor on attaining majority to persuade his guardian *ad litem*, who is probably a relative, to admit negligence in the conduct of the minor's affairs in the suit. There appears to be no authority of this Court on the question, and I am not disposed to sanction anything in the nature of a fresh cause of action designed to re-open decrees legally passed. I myself prefer the view that in the absence of fraud or collusion, if a minor wishes to challenge a decree against him on the mere ground of negligence by his guardian, however gross that negligence may be, he must do so in the suit, by such means as the rules of procedure provide. In my opinion, therefore, the appeal must be allowed. No order as to costs.

Appeal allowed.

J. G. R.

ORIGINAL CIVIL.

Before Mr. Justice B. J. Wadia.

1936
November 25

SHIVRAMDAS AND OTHERS, PLAINTIFFS *v.* B. V. NERURKAR AND OTHERS, DEFENDANTS*. MESSRS. SABNIS, GOREGAOKAR AND SENJIT, APPLICANTS.

Practice—Solicitor—Costs—Charity—Trustee not to make profit out of trust—Solicitor trustee acting for the trust on behalf of himself and co-trustees—Entitled to costs taxed as between attorney and client out of trust estate—Rule in Cradock v. Piper, *applicable in India—Indian Trusts Act (II of 1882), section 50—Provisions of Act not applicable to charity trusts—English law and practice applicable in absence of definite provisions in Indian Law.*

The defendants were the managers of a public charitable trust belonging to their community. There was no regular deed of trust relating to that charity and the defendants were described indiscriminately as managers or trustees. There was

* O. C. J. Suit No. 1736 of 1928.