ALLAHABAD HIGH COURT

Siraj Fatima

Vs.

Mahmood Ali

(Sulaiman, J.)

27.02.1932

JUDGMENT

Sulaiman, J.

1. This is a second appeal by the defendants arising out of a suit for a declaration of title to certain zamindari properties consisting of shares in certain villages, and for recovery of possession and niesne profits. One Afzal Ali had two daughters Siraj Fatima and Nisar Fatima from his first wife, and ho had a second wife Sagirunnisa whose children are the plaintiffs. Abid Ali defendant 2 is the husband of Nisar Fatima and Kaniz Fatima defendant 3 is her daughter. Afzal Ali died in 1918, leaving his two daughters from the first wife, his second wife and her children. Two annas share in his estate devolved on his wife Mt. Sagirunnisa. Sagirunnisa also died later in the same year and according to the strict Mahomedan law her share devolved upon her own children and not on her stepdaughters. But the narn03 of all the children of Afzal Ali wore recorded in the revenue papers against the two annas share left to Sagirunnisa on her death. Some time after this Nisar Fatima also died and her share devolved on her husband and her daughter and sister.

2. An application for partition was filed in the Revenue Court by Abid Ali the husband of Niaar Patima (presumably both on his own behalf and on be-half of his minor daughter) and Siraj Patima against the other children of Afzal Ali, who are the present plaintiffs. The application is not before us, and it is not clear whether it was for a perfect partition of the mahal or for an imperfect partition. It appears however that the minors were represented in the proceeding by Wajid Ali who was the grand-father-in-law of the plaintiff Mahmood Ali. It is also clear that Wajid Ali had been the certificated guardian of the minors.

3. An objection was filed by the guardian ad litem that the plaintiffs were entitled to the entire share left by Sagirunnisa and that the applicants had no interest in that share. As the names of the applicants were already recorded in the revenue papers the partition Court decided to proceed under Section 111(1)(b), Land Revenue Act, and directed that the plaintiffs through their guardian should institute a suit in the civil Court within three months for the determination of that question. Admittedly no suit was filed by the guardian. The Revenue Court therefore acting under Sub-section (2) decided the question against the objectors and ordered partition. The final order for partition was made on 18th October 1922. Mahmood Ali attained majority in 1923, and

the present suit was filed by him, his brothers and sisters on 9th July 1924 against the defendants who had been the applicants for partition in the Revenue Court and also against Wajid Ali. The plaint was very badly drawn up and there were allegations in para. 8 of the plaint to the effect that defendant 2 Abid Ali won over the plaintiffs' guardian 'Wajid Ali and colluded with him to cause harm to the plaintiffs; accordingly the plaintiffs' guardian did not properly look after the partition case on behalf of the plaintiffs, nor did he put forth any objection with respect to the plaintiffs' right of ownership while the minor plaintiffs were unable to take any proceedings and when the defendants came out successful in the partition case they wanted to deprive the plaintiffs of their right, but; the proceeding has legally no effect as against the plaintiffs. The reliefs sought; wore for the establishment of the plaintiffs' right of ownership and proprietary possession over the property and for the dispossession of the defendants, mesne profits, interest and costs. There was a general prayer for any other relief which may be just and beneficial to the plaintiffs. The defendants contested the claim on the ground that there was no fraud, collusion or negligence on the part of the guardian and that the claim was barred by Section 233-K, Land Revenue Act,. They further pleaded that there had been an oral gift of the share made by Sagirunnisa to the defendants.

4. In spite of the allegations of fraud, collusion and negligence the second part of issue 2 was framed in a very vague and general way:

> Are the proceedings not binding on the plaintiff? as they were minors and were the plaintiffs minors at the time or not?

5. Both the Courts below have found that the alleged oral gift made by Mt. Sagirunnisa was not proved. They have also found that the plaintiff's were minors during the proceedings in the Revenue Court. None of the Courts finds that there was any fraud or collusion on the part of the defendants. The lower appellate Court has further found that there was gross or culpable negligence on the part of the guardian in not filing a civil suit. It has held that the suit was in consequence not barred by Section 233-K, Land Revenue Act, and that the plaintiffs had a right to maintain it.

6. The case was first disposed of ex parte and was subsequently restored. The Bench hearing the appeal have referred it to a Full Bench in view of an apparent conflict of opinion between the cases of *Beni Prasad v. Lajja Ram*[1] and *Bachan Singh v. Bhika Lingh*[2], on the one hand and the case of *Brij Raj v. Ram Sarup*[3], on the other.

7. The allegations in the plaint and the reliefs claimed therein wore vague and so was the issue framed at the time. But there is no doubt that the plaintiffs sought to avoid the effect of the Revenue Court partition by alleging the negligence of their guardian in addition to their allegations of fraud and collusion. The finding of the lower appellate Court that under the circumstances of this case there was gross or culpable negligence on the part of the guardian, must be accepted in second appeal. The only question that remains for consideration is whether a suit for possession of the property previously partitioned by the Revenue Court can lie in a civil Court.

[1] [1916] 38 All. 425
[2] AIR 1927 All 601
[3] AIR 1926 All 36 : (1926) ILR 48 All 44 : 90 Ind. Cas. 749

8. There are a largo number of cases containing observations for and against the view that

negligence of the guardian is a ground for avoiding the decree. It may be convenient briefly to refer to them before discussing the reasons on which those decisions are based. In the case of *Raghubar Dayal v. Bhikya Lal*[4] one of the learned Judges, Field, J., at p. 76 referred to *Gregory v. Molesworth*[5] where it was said:

> It is right to follow the rule of law, where it is held that an infant is as much bound by a judgment in his own action as if of full age, and this rule is general, unless gross laches, or fraud and collusion, appear in "proche in ami," then the infant might open if, by a now bill.

9. He then referred to the practice" in the Court of Chancery that if it were sought to question a decree passed against a minor on the ground of fraud or collusion, it might be done by an original bill, but if it were sought to impeach the decree passed against an infant on the ground of laches in the proche in ami," that the next friend had omitted to put forward proper available grounds of defence, this was usually done by reopening the original case upon motion or petition. Ha also referred to the case of *Hoghton v. Fiddey*[6] where this practice was explained. The learned Judge then said that for suits in this country the procedure was different, and if an infant desired to have a decree set aside on the ground that his next friend had neglected his interest and had not put forward on his behalf good grounds of defence which were available the proper mode of procedure was to apply for a review under the Civil Procedure Code; but if he sought to set it aside by a separate suit, then the plaintiff in such a suit could proceed only upon proof of fraud or collusion. The other learned Judge did not discuss the question but held that the decree was good because no fraud was established. The question as to the proper procedure did not therefore really arise in the case.

10. In the case of *Daulat Singh v. Baghu Bar Singh* [7]the learned Judges observed But short of fraud being established and proved and fraud not only on one side but on both, i.e., on the pait of the then plaintiff and on the part of the present plain tilt's then guardian, we know of no right which the present plaintiff can now have to dispute the validity of the decree which became final. Even if the guardian was negligent and through her negligence did not properly protect the interest of the minor in the previous suit the minor is well bound by the decree, so long as the guardian did not act fraudulently and in collusion with the minors then petitioners. If the law were otherwise no person could be certain of the finality of any decree obtained against a minor, whether the minor had been a plaintiff or defendant in the suit. The minor having been represented by a lawfully constituted guardian he is as much bound by the decree in that suit as if it had been sui juris at the time and had represented himself.

11. But in that case the plaintiff had come to Court on the allegation of fraud which was not proved, and there was oven no finding that there had been a negligence of the guardian. The observations were therefore obiter dicta.

12. In the case of *Chandra Sekhar Tewari v. Balakdhar Dube*[9] a learned Judge of this Court remarked:

[4][1886] 12 Cal. 69
[5]3 Atk. 627
[6][1874] 18 Eq. 573
[7][1894] A.W.N. 141
[9][1912] 15 I.C. 611

> If the guardian neglected to support the case of the defendant, and there is nothing to

> show that he did so deliberately, that circumstance alone would not entitle the defendant to avoid the operation of the decree.

13. There too the plaintiffs had come into Court on the allegation of fraud which was not established.

14. In the case of *Beni Prasad v. Lajja Ram* [10]the Bench remarked that they entirely agreed with the remarks of Field, J., in Baghubar Dayal's case [1886] 12 Cal. 69 which has been quoted by me above. But this observation also was an obiter dictum. There was no evidence of any kind to connect the opposite perty with the omission of the guardian to plead limitation,, and as was pointed out by the learned Judges the plea of limitation was one to which effect could have been given even though not pleaded, because the Court is bound to give effect to it under its own motion. The learned Judges clearly held that even if a minor could avoid a decree by a separate suit merely on the ground of gross negligence of his guardian, he could not do so in that case because no-such negligence had been established. In-the case of *Bechan Singh v. Bhika Singh*[11], a single Judge of this Court followed the view expressed in *Chandra Sekhar's case*[12] and in *Beni Prasad's case*[13]

15. On the other hand, it was laid down in the case of *Lalla Sheo Churn Lal v. Ram Nandan Dobey* [14]that gross negligence on the part of a next friend in the conduct of a suit brought on behalf of a person under a disability prevents the effect of the bar contained in the old Section 103, Civil Procedure Code (now Order 9, Rule 9). In the course of the judgment the learned Judges referred to the English law as contained in Macpherson on Infante that an infant plaintiff though bound by the decree can reopen the proceedings upon a new matter or on the ground of laches or of fraud and collusion. They also referred to Simpson on the Law of Infants, where it was stated that a decree may be impugned where there has been gross negligence by the next friend in the conduct of the infant's case or new matter discovered since the date of the decree. They quoted the observations of Sir R. Malins, V.C., *Re Hoghton*[15],

> I am clearly of opinion that she cannot be called upon to endure that inconvenience (to suffer by any negligence or want of knowledge on the part of her then next friend). The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and who will protect her interests.

16. They concluded that according to the law as administered in England, the gross negligence of his next friend could entitle an infant to obtain an avoidance of proceedings undertaken on his behalf. The learned Judges then, went on to point out that the setting up of fraud in a fresh suit was an answer to the statutory bar and remarked:

> As fraud and negligence arc on the same footing the plaintiff has the same relief in each case.

[10][1916] 38 All. 425
[11] AIR 1927 All 601
[12]15 I.C. 611
[13][1916] 38 All. 425
[14][1895] 22 Cal. 8
[15](1874) 18 Eq. 573

17. They distinguished an earlier case of the Calcutta High. Court on the ground that the general

propositions laid down therein were subject to the exception of fraud, and they considered that if the question of gross negligence had been in any way before the Bench, it would have been excepted in that case also. The principle laid down in Lalla Sheo Churn Lal's case [1895] 22 Cal. 8 has been applied to a fresh claim brought; even after a decree in a contested suit. I may simply give references to a few cases of the other High Courts: *Jwala Singh v. Jaimal Singh*[16] *Mohammad v. Sukha Singh*[17] *Bonda Chinnaya v. Pothala Aohanma*[18] *Subamma v. Narasamma*[19] *Mohan Lal v. Nehi*[20] *Hanmantapa v. Jivubai*[21] and *Punnayya v. Viranna*[22] I may also mention the case of *Ram Sarup Lal v. Shah Latafat Hossein*[23] where an application for the review of an order allowing the withdrawal of a suit by a next friend filed through another next friend was entertained and the case of *Parmeshwari Per shad v. Sheo Dutt Rai*[24] where an ex parte decree was set aside on the ground of the negligence of the guardian. See also the case of *Bipin Chandra Das v. Menajaddi*[25],

18. The case of *Brij liaj v. Ram Sarup*[26], decided by a Bench of this Court contains a well considered judgment reviewing at some length the various authorities. The learned Judges referred to Macpherson on Infants, Simpson on the Law of Infants, *In re Hoghton's case*[27] *Gregory v. Molesworth*[28] and also Halsbury's Laws of England, Vol. 17, para. 316. The Court concluded that the same rule of law would be applied in India, viz., that the gross negligence of his next friend would entitle a minor to the avoidance of proceedings undertaken on his behalf, and by parity of reasoning the same rule would apply in the case of a minor defendant who had been represented in a litigation by a guardian ad litem. The learned Judges then went on to hold that the negligence or laches of the guardian which entitles a minor to avoid a decree must be of a gross character.

19. There is thus a clear conflict of opinion between the observations made in the case of *Beni Prasad v. Lajja Bam*[29] and *Brij Raj v. Ram Sarup*[30], The cases which contain observations that negligence is not a good ground for the setting" aside of a decree passed against a minor proceed mainly on the doctrine that an infant is as much bound by a judgment or order as an adult, provitled he was represented by a proper guardian. The idea seems to be that the only duty cast upon the litigant is that he should see that the opposite party, if a minor, is properly represented by a duly constituted guardian and that there is no duty cast upon him to see that the guardian ad litem vigilantly prosecutes the case on behalf of the minor. On the other hand, the cases which have laid clown that negligence is a good ground proceed on the circumstance that according to English law the negligence of the guardian entitles a minor to avoid the decree, and infer that the same rule is applicable in India. In some oases the learned Judges have gone so far as to remark that negligence stands on the same footing as fraud.

20. That in England gross negligence of the guardian is a good ground for the avoidance of a decree against a minor cannot be doubted. It however appears that the usual practice there is to allow review in a case where negligence is asserted am remedy by a separate action where fraud or collusion is asserted. But no difficulty arises in England whore

[16] 1 I.C. 400 [18] [1912] 37 Mad. 538 [20] 37 I.C. 195 [22] A.I.R. 1922 Mad. 273
[17] 13 I.C. 20 [19] 26 I.C. 16 [21] [1900] 24 Bom. 547 [23] [1902] 29 Cal. 735
[24] [1907] 6 C.L.J. 448 [26] AIR 1926 All 36 : (1926) ILR 48 All 44 : 90 Ind. Cas. 749
[25] AIR 1927 Calcutta 865. [27] [1874] 18 Eq. 573, [28] 3 Atk. 627
[29] [1916] 38 All. 425 [30] AIR 1926 All36 : (1926) ILR 48 All 44 : 90 Ind. Cas. 749.

these provisions are part of the Common law and are not contained in any statutory enactments

The rule of equity allowing a party to avoid a decree on the ground of fraud or a minor to avoid it on the ground of negligence of his guardian is just as well established a rule as the rule of res judicata.

21. In India we have codified law. The rule of res judicata is contained in Section 11, Civil Procedure Code That section may not be absolutely exhaustive and the principle of res judicata may apply for instance to execution proceedings, although execution proceedings do not come within the letter of the section. But to say that Section 11 has certain exceptions not set forth therein is quite another matter. We here have a statutory enactment prohibiting a Court from retrying an issue in which the matter directly and substantially involved has been directly and substantially in issue in a former suit between the same parties litigating under the same title in a Court competent to try a' subsequent suit which has been heard and finally decided by such a Court. In the face of the express language of the Act it cannot be said that the section is not of general application, but that there are certain exceptions to it which are not set forth therein.

22. The rule of res judicata is however a rule of procedure. The Evidence Act also contains adjectival law and is an Act of procedure. Section 44 of that Act permits a party to a suit or other proceeding to show that a previous judgment or order which is relevant, was obtained by fraud or collusion. Thus we have a statutory provision permitting a party to show that a judgment or order which would have operated as res judicata is not binding upon the party because it had been obtained by fraud or collusion. Beading the two provisions of law together it would follow that a suit to avoid a previous judgment on the ground of fraud or collusion would not be barred. But Section 44 does not contain any exception as regards the negligence of the guardian of a minor. The effect of Section 11, Civil Procedure Code, therefore cannot be got rid of by a reference to Section 44, Evidence Act.

23. It has been contended before us that Section 44 read with the provisions of Section (2)(1) contains an exhaustive list of the circumstances under which a judgment can be avoided, and that all other rules of evidence, whether based on common law or otherwise, which permitted evidence to be led for avoiding a judgment are now excluded under the provisions of this latter section. But this last mentioned section merely excludes all rules of evidence not contained in any statute, act or regulation in force. The Evidence Act does not purport to destroy any substantive right that may exist independently of that Act. Section 44 is merely permissive and not prohibitive. It allows a party to prove fraud and collusion in order to avoid a judgment or order. But it does not go further to prevent him from adducing evidence of negligence of his guardian, provided of course he had a right independently of the Evidence Act. There is in fact no provision in the Evidence Act which would prevent a person from adducing evidence to prove his right to avoid a judgment, provided the right is a substantive right and not a mere matter of procedure. The right is not merely one of adducing evidence in a particular way. A person who wants to establish his alleged substantive right to avoid a decree is prepared to abide by all the rules of evidence laid down in the Evidence Act, and is not contravening any provision which prevents the leading of such evidence to prove the alleged right, provided of course such a right exists independently and is not excluded by any section of the Act, as for instance, hearsay evidence and evidence of a contemporaneous oral agreement are expressly excluded. There is therefore nothing in Section 44 or in Section 2, Evidence Act, which precludes the plaintiffs from proving that a judgment previously obtained had been obtained by negligence of the guardian.

24. This however does not by itself got rid of the difficulty created by Section 11, Civil Procedure Code The language of that section is unqualified, and no exception can be admitted to it. 13ut there is yet another aspect of the matter. When a person seems to avoid a judgment, for instance, on the ground of fraud, he concedo3 that the judgment so long as it stands is good but he claims that he has a right to avoid it. The option to avoid the judgment accrued to him after the judgment was delivered, and it was open to him to accept it or to avoid it. His right to exercise the option of avoiding the voidable judgment when exercised would vacate the judgment itself. Th9re would then no longer be any previous determination of the question as an obstacle in his way. Under Section 11, Civil Procedure Code, the Court is prevented from trying an issue which has already boon determine; but if the judgment previously determining that issue is vacated because of the right of the applicant to avoid the judgment on the ground of fraud, the obstacle contemplated by Section 11 is automatically removed.

25. In my opinion there can be no doubt that a right to avoid a judgment on the ground of fraud exists independently of Section 44, Evidence Act. A contract obtained by fraud is voidable at the option of the party defrauded. In the same way a judgment obtained by fraud is voidable at his option. One may give the instance of a compromise decree. The decree cannot stand on a footing higher than that of the contract itself. If the compromise was obtained by undue influence, coercion or fraud and was voidable, the decree could be equally a voided If this were not the case then a party against whom a judgment has been obtained by undue influence would have no remedy whatsever. Undue influence is not one of the exceptions mentioned in Section 44, Evidence Act, and would not be covered by it. Furthermore, as in the case of undue influence the party concerned has full knowledge of all the facts, his attempt to avoid the judgment subsequently would not be based on any matter analogous to the discovery of a new matter within the meaning of Order 47, Rule 1. As was observed by their Lordships of the Privy Council in the case of *Chhaju Ram v. Neki*[31] the general words any other sufficient reason mean a reason sufficient on grounds at least analogous to those specified immediately previously, viz., the discovery of a new matter or evidence, or some mistake or error apparent on the face of the record. A case of undue influence would not be covered by Order 47, Rule 1 : ***Nathu** Lal v. Raghuhir Singh*[32], That was a case of a compromise obtained by undue influence or collusion (not fraud). I pointed out in my judgment that the cases of fraud on the Court (not on a party) or a mutual mistake or where there is no due representation of a party might stand on quite a different footing. The case of fraud on a party might in certain circumstances, when the party is not aware of the' fraud practised upon him at the time, may be a matter analogous to the discovery of a new and important matter and the order may be open to be reviewed. But in the case of an undue influence knowledge exists all along. It may also be difficult to hold that a judgment obtained by undue influence would be open to be reviewed under the inherent jurisdiction of the Court, because it is no concern of the Court to watch that the parties are acting at arm's length.

[31] A.I.R. 1922 P.C. 122

[32] AIR 1926 All 50 : (1926) ILR 48 All 160

The only conclusion that one can therefore come to
is that a right to avoid a judgment on the ground of undue influence or fraud just as much as a right to avoid a contract on those grounds is a substantive right because the binding character of the transaction itself is impugned. It is not a mere matter of procedure or rule of evidence. It therefore exists independently of the Evidence Act.

26. The next question is whether the right of a minor to avoid a decree on the ground of negligence of the guardian is also a substantive right. That in Eng land such a right is recognized admits of no doubt. But it is wrong to say that negligence is either included in fraud or stands on exactly the same footing. In the case of fraud or collusion not only the guardian is to blame, but the blame also rests on the opposite party. Whereas in the case of a mere negligence of the guardian, short of collusion or fraud, the opposite party may be wholly innocent. Where the conduct of the opposite party has been tainted by fraud or collusion he has no real grievance if the order so obtained is set aside when the fraud or collusion is proved. On the other hand, a party who was innocent can have a serious grievance if an order obtained by him fairly in a contested matter is subsequently sought to be set aside on the ground that the minor's guardian acted negligently. There is some force in the observation that it is not any part of the duty of the opposite party to watch the conduct of the guardian ad litorn and to see that he is acting with duo care and caution. After all in many cases a minor litigant may suffer serious loss owing to the negligence of his guardian or trustee. A remedy may be recognized in law by way of a suit for damages for the negligence of the person whose duty it was to take proper care. Another difference between negligence and fraud or collusion is that the former does not come within the scope of Section 44, Evidence Act, which lays down exceptions whereas the latter do.

27. But the principles recognized in England show that the right of a minor to avoid a decree on the ground of the negligence of his guardian is a well-established rule of Common law, and is therefore a substantive right. But such negligence is recognized to give the minor a right to avoid the decree. No one should be allowed to obtain a decree of a binding character against a minor unless the latter has been properly represented, if there is no such proper representation the minor ought to have a substantive right to avoid it. The right of the minor is to impugn the judgment itself. lie is not trying to go behind a finding arrived at in the previous suit, but is attacking the very judgment itself. When the judgment itself is vacated, no question of res judicata would arise.

28. It seems to mo that it is also possible to avoid the effect of the provisions of Section 11, Civil Procedure Code, by holding that the minor cased to be a party to the suit when his guardian ad litem was grossly negligent. Of course, there can be no bar of res judicata where a party in the subsequent suit was not, properly speaking, a party to the previous suit.

29. The case of a minor litigant is very peculiar. While the litigation is being fought he is in a helpless position and cannot protect his interests or defend his rights. The Courts have therefore a duty cast upon them to watch his interest vigilantly and the minor is considered to he under the protection of the Court. The guardian ad litem who is appointed to represent the minor has to be appointed by the Court and he must be a proper person to be his guardian for the suit. There is however no such formal order in the case of a next friend who sues on behalf of a minor and who is not appointed by the Court. The guardian is hound to take care of the interest of the minor in the same way as a prudent man would look after his own interest. Negligence on his part would be a breach of duty.

30. The test of negligence should be the not doing of what a reasonable man, guided by prudent considerations which regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The minor who is not able to resist the claim

himself is represented by the duly constituted guardian, who is under an obligation to exercise due care and skill which a prudent man would exercise if he himself were a party. If the guardian appointed is not a proper guardian, for instance where his interest is adverse to that of the minor or where the guardian is grossly negligent in looking after the interest of the minor, it can hardly be said that the minor is properly represented in the litigation. Even where there was a duly constituted guardian and there was no flaw in his appointment, their Lordships of the Privy Council in the case of *Durga Prasad v. Kesho Persad Singh*[33] held that as the guardian named in the case was not a legal guardian and had no right to defend the suit on behalf of the minor, the decree was not binding upon him. In he case of *Rashidunnissa v. Mohammad* [34]their Lordships of the Privy Council remarked that where the guardian was a disqualified person, the minor "was never a party to any of these suits in the proper sense of the term." In the case of *Brij Narain Mal v. Mangla Prasad*[35] the counsel for the defendant had to admit before their Lordships of the Privy Council that the previous decree was not binding on the minors in respect that they were not properly represented. There the father had been appointed as their guardian though his own alienation was being impugned by the minor sons. Side by side with this view, their Lordships of the Privy Council have also laid down that even though thoro be no formal appointment of a guardian ad litem, a minor is bound by a decree obtained by him if his interest had been duly protected and he was effectively represented by his mother, even though there was an absence of an order appointing her as his guardian : *Waitan v. Bankey Behari* [36]

31. It therefore follows that the real basis of the binding character of a decree against a minor is the fact of his having been duly represented by a proper person, and not the mere existence of any formal order appointing a guardian for him. Even when there be such an order, if the guardian does not properly represent him, the decree would not be binding. On the other hand, even if there be any defect in the formal appointment of a guardian, the decree would be binding upon him, if he is sufficiently represented and his interests are well protected.

32. The rules contained in Order 82, Civil. P.C., relate to the appointment of a guardian ad litem which can be altered or added to by the High Courts. They are not substantive provisions of law. It seems to mo that even whore a guardian has been formally appointed, but ho is grossly negligent in his duties, he ceases to represent the minor properly and effectively, and the result is the same as if no proper guardian had been in existence. As pointed out above it is a part of the duty of the Court itself to see that the minor is properly represented and his interest is being looked after adequately. It is also

[33][1882] 8 Cal. 656 [35] A.I.R. 1924 P.C. 50

[34][1909] 31 All. 572 [36][1903] 30 Cal. 1021

the duty of the Court to see that the guardian appointed is a proper person who would safeguard the interest of the minor. If therefore the guardian ceases to take any interest in the case or is grossly negligent so as to sacrifice the interest of the minor, it cannot be said that the minor is still properly represented in the litigation. Wilful and wanton neglect on the part of the guardian disqualifies him. This also therefore appears to me to be a basis on which the avoidance of a decree against the minor can be allowed.

33. In ordinary civil cases the more speedy and appropriate remedy would be by way of a review of judgment on an application presented to the Court which passed the decree. Such an application can be said to be based on the discovery of a new and important matter or evidence because the minor cannot be considered to have been aware of the negligence of his guardian

during his minority. He must be deemed to discover it after attaining majority because it is only then that he can move in the matter. The ground of negligence is therefore analogous to that of a discovery of a new or important matter or evidence which will come within the purview of Order 47, Rule 1. But such a remedy is restricted by the law of limitation, and the application has to be made within the prescribed short time.

34. The question is whether a separate remedy by way of a suit is also not available. No doubt the question did not come up for consideration in the case of lit. *Walian v. Banlce Behari*[37] All the same their Lordships of the Privy Council did not throw out the subsequent suit brought by the minor on the mere ground that his remedy, if any, was by way of review of judgment and not by a separate suit. If the principle of res judicata is not a bar there is no ground for holding why a separate suit would not lie. The same thing happened in *Brij Narain Rai v. Mangla Prasad* [38]

35. In the present case there is clear reason for allowing a separate suit. There is no provision for a review of judgment by a subordinate Revenue Court under the U.P. Land Revenue Act. The doctrine of inherent jurisdiction can hardly be invoked in such a case. It would not be open to the Revenue Court to reopen the partition on the allegation that the guardian of the minor had been negligent. As a matter of fact so far as the provisions of that Act go there is no section expressly applying the provisions of the Civil Cole Procedure relating to the appointment of a guardian for a minor to the proceedings in the Revenue Court. The remedy of the minor, if any, can be only by a separate suit. The suit for avoidance of a previous order of a conpotent Court is undoubtedly one of a civil nature and fall within the scope of Section 9, Civil Procedure Code Such a suit is maintainable in a civil Court. It a review of judgment by the Revenue Court is not permitted, there is no reason why remedy by way of a fresh suit in the civil Court should not be allowed.

36. It may further he noted that in the present case the alleged negligence of the guardian consisted of the omission to file a suit, in the civil Court as directed by the Revenue Court, and not in omitting to do anything in the Revenue Court itself. The suit in the civil Court would have been brought by Wajid Ali as next friend of the minor and his position there would not have been identical with that of a guardian ad litem of a defendant to a suit. The question is therefore not one of a review of the Revenue Court's order in

[37][1903] 30 Cal. 1021
[38] A.I.R. 1924 P.C. 50

consequence of anything done in that Court.

37. In Brij Raj's case AIR 1926 Allahabad 36 : (1926) ILR 48 All 44 : 90 Ind. Cas. 749 the learned Judges quoted remarks made in some judgments that there was no substantial difference between "negligence" and "gross negligence;" but that it was the same thing with the addition of a vituperative epithet. The learned Judges however very properly pointed out that it was not every kind of negligence, which would entitle a minor to avoid a decree, but that the amount of care required should be judged by the standard of ordinary men. Of course, every sort of negligence, however trivial, would not be a sufficient ground, for there may be some negligence, the effect of which may not be prejudicial to the interest of the minor. The negligence in order to be a good ground for the avoidance of a decree must he of such a nature as to justify the inference that the minor's interests were not at ail protected and therefore he was not properly

represented. The direct result of the negligence must be a serious prejudice to the minor and the negligence must not be merely such as might be innocently committed even by a reasonable person taking the ordinary precautions which he would have taken in his own case. Where the negligence is so gross as to amount to a clear violation of the duty cast upon the guardian, although not brought to the notice of the Court at the time, the decree can be avoided. In the present case, the negligence lay in the omission to file a, suit as ordered by the Revenue Courts, and the lower appellate Court has found that in the circumstances of this case, when the legal rights of the plaintiffs were clear, it amounted to a gross or culpable negligence.

38. It has been contended by the learned advocate for the appellants that even if there is a right to avoid a decree or order passed by a competent Court on the ground of gross negligence of the minor's guardian there is an absolute bar created by Section 233-K, Land Revenue Act, against a civil suit being filed after a Revenue Court has partitioned the property.

39. The position was well settled under Act 19 of 1873 after the pronouncement of the Full Bench in the case of *Muhammad Sadiq v. Laute Ram*[39]The nature of the partition proceedings in a Revenue Court, the purpose and effect of the order for partition, and the nature of the adjudication of the rights of the parties were well explained in the elaborate judgment delivered by the Chief Justice in which the other learned Judges concurred. But the case turned on the language of Section 241(f) of the old Act, which said "redistribution of land" We now have Section 233-K in its place where the words are partition or union of mahals." In one sense it may ho said that the language of the new Act is more general and wider because partition includes distribution of lands and the section covers all suits with respect to" it.

40. The language is undoubtedly unhappy and has been a source of some conflict of opinion. In some cases it has been construed strictly literally and it has been held that a suit for possession filed in a civil Court relating to property allotted to the opposite party in a Revenue Court partition does not seek to disturb the partition of the mahal and is therefore not prohibited. If mahals are treated as geographical areas, the division into

[39] [1901] 23 All. 291

those areas is not interfered with by handing over possession of a small share or lands from the owner of one mahal to the owner of another mahal. It has been suggested that where no question of res judicata arises, the civil Court's jurisdiction is not barred.

41. On the other hand, in other cases it has been pointed out that a partition Court does not merely adjudicate upon the rival claims of recorder cosharers but must ascertain lands held in common and in severalty and has power to allot lands belonging to one cosharer to another cosharer if the partition cannot otherwise be conveniently made; and therefore after the partition has been effected and lands have been allotted in different mahals that allotment cannot be interfered with by a civil Court on the basis of any title that existed before the partition. Again a person may want to have his share and all his lands separated and constituted into a now and separate mahal. He does not want to have any longer any joint liability for the payment of Government revenue with the other cosharers. With this object in view he applies to the Revenue Court and gets his properties partitioned and put into a separate mahal. After this process has been gone through, it should not be left open to a cosharer in the other mahal to come to the civil Court and again claim that he still owns some lands in this separate mahal and is a cosharer with the owner of the mahal, or that the owner of the separate mahal is still a cosharer in the other

mahal and has therefore a joint liability for the payment of Government revenue. It has been suggested that the whole object of a partition proceeding is to allot specific lands to specific cosharers and place them into a separate mahal in the case of a perfect partition and into separate pattis in the case of an imperfect partition even though in order to prepare convenient compact areas it may be necessary to take some lands from one and give them to another in exchange for something else. Where parties were arrayed on different sides and a conflict of interest was necessarily implied, the allotment should not be allowed to be altered by the civil Court on the basis of a title prior to such allotments. Under Section 4(4), Land Revenue Act, it is an area under a separate engagement for the payment of land revenue. The engagement for payment of revenue with a cosharer would be disturbed if some plots allotted to him are taken out of his possession. There would have to be a fresh assessment of revenue on those particular plots.

42. Since Mohammad Sadiq's case [1901] 23 All. 291 there have been no less than three Full Benches of this Court on the question of the extent of the applicability of Section 233-K. The first two are *Shambhu Singh v. Daljit Singh* [40]and *Kalka Prasad v. Man Mohan Lal* [41]which were decided by the same Bench and on the same date. These were followed by another Full Bench in the case of *Bijai Misra v. Kali Prasad Misra*[42] In this last mentioned case (Banerji and Tudbail,) J., Richards, C.J. dissenting) held that a subsequent civil suit was barred. They applied the principle laid down in Mohammad Sadiq's case [1901] 23 All. 291 to a case under Section 233-K. It may be noted that Tudbail, J., was also a member of the previous Full Benches, and so was Richards, C.J. The latest Full Bench appears to have been consistently followed in a number of cases: vide *Ganga Prasad v. Beni Prasad* [43]A contrary view appears to have been taken in the case of *Data Din v. Nohra*[44], but *Bijai Misra's case*[45] does not appear to have been referred to by counsel. In the case of *Ram Sukh Pandey v. Prithi Singh, AIR 1931 Allahabad 47*, *Ganga Prasad's case* [46]was distinguished. The position has been recently reviewed in the case of *Ram Rikha*

[40][1916] 38 All. 243 [42][1917] 39 All. 469 [44] AIR 1930 All 419 : 121 Ind. Cas. 825
[41][1916] 38 All. 302 [43][1929] 130 I.C. 717 [45][1917] 39 All. 469 [46][1929] 130 I.C. 717

v. Lallu Misra[47], in which a contrary view has undoubtedly been expressed. The latest Full Bench case of *Bijai Misra v. Kali Prasad Misra*[48] was referred to by one learned Judge and was presumably distinguished as it could not have been dissented from by a Division Bench. Of course, so long as a latest Full Bench case is not overruled it has to be followed, if it cannot be distinguished. In the present case however the question does not directly arise, and it is therefore unnecessary to consider the correctness of the decision in Bijai Misra's case [1917] 39 All. 469.

43. It seems to me that we may assume in favour of the appellants that ordinarily a civil suit does not lie for the possession of property, which has been allotted to the opposite party by a Revenue Court at a partition. But it does not follow that the bar created by S, 233-K is so absolute as to prevent a party from going behind an order of the Revenue Court even on the ground of fraud, or collusion or on the ground of the negligence of the guardian of the minor. With an original decree of a civil Court can be set aside by a minor on the ground of the gross negligence of his guardian, I can see no valid reason why a Revenue Court's order in a partition proceeding cannot be sot aside on the same ground. No case has extended the scope of Section 233-K to such an extent.

44. The only other question that remains is as to the actual form which our decree should take. It has been contended by Mr. Khwaja, who has argued the whole case with ability, that the proceedings in the Revenue Court up to the time when it directed the plaintiffs' guardian to file a

civil suit, should be restored inasmuch as there was no negligence of the guardian up to that time. He further contends that the mere tiling of an application for partition in the Revenue Court ousts the jurisdiction of the civil Court altogether, and while such an application is pending and remains undisposed of, the civil Court cannot go on with a suit relating to the possession of the same property.

45. It seems to mo that the present case is not analogous to a civil suit brought against a minor in which there has been some irregularity in the appointment of a guardian for the minor which baa prejudiced him and the claim against the minor would be barred by time if a fresh suit were instituted against him. In such a case a mere declaration may be granted and the former suit restored, or if the same question can be raised in the second suit and the merits gone into afresh, the Court may itself determine them. As pointed out above, in the present case the Revenue Court has no power to review a judgment as no sr.ch power is conferred upon it by the U.P. Land Revenue Act, nor do the provisions of Section 114 and Order 47, Civil Procedure Code, apply to Revenue Court proceedings. The plaintiffs would therefore have no remedy whatsoever unless a civil Court can grant them a substantial relief, viz., that of recovery of possession.

46. When the order of the Revenue Court for the final partition can be vacated, it would no longer stand as an obstacle in the way of the plaintiffs. When the order under Section 112 itself falls to the ground, Section 233-K would have no application. That section could be applied only when there is an order for partition passed by a Revenue Court which is binding on the plaintiffs. I see no force whatsoever in the contention that the original application for partition must be deemed to be still pending in the Revenue Court,

[47] AIR 1931 All 462 : (1931) ILR 53 All 568

[48][1917] 39 All. 469

nor do I see any force in the argument that the more fact that such an application has been filed in a Revenue Court at once ousts the jurisdiction of the civil Court to try the question of title.

47. In my opinion the decree passed by the lower appellate Court was right, and the appeal should be dismissed.

Boys, J.

48. This appeal came first before Sen, J., and myself on 12th May 1931, when we allowed the appeal, no body appearing on the other side. On the application of the respondent the appeal was subsequently restored and came up for hearing before the same Bench again on 12th January 1932, when we directed that the case he laid before the Hon'ble the Chief Justice for the appointment of a Full Bench. The case has now come before a Full Bench for disposal.

49. The appeal is a defendants' appeal arising out of a suit for declaration of the plaintiffs' title for possession, and for mesne profits. The facts are as follows:

50. Afzal Ali married twice. By his first wife he had two daughters, Siraj Fatima and Nisar Fatima. His first wife died in his lifetime. Nisar Fatirna's husband was Abid Ali. Nisar Fatima died on 29th August 1920, leaving a daughter Kaniz Fatima. Siraj Fatima is defendant 1. Abid Ali is defendant 2 his wife Nisav Fatima haying died. Kaniz Fatima, Nisar Fatima's daughter, is defendant 3.

51. Afzal Ali's second wife was Saghirunnissa and she had three sons, who were minors, and two daughters who were minors at the date of the partition proceedings which led to this suit. Afzal Ali died on 29th March 1919, and Saghirunnissa died on 29th September 191.8.

52. Two annas of her husband's property descended to Saghirunnissa. It is only about this two annas and not about any of the rest of Afzal Ali's property that there is dispute in these proceedings.

53. On Sagliirunnissa's death the two mannas was recorded in the names of Siraj Fatima and Nisar Fatima, the children of the first wife, and also in the names of the three sons and two daughters of Saghirunnissa, the second wife. It is manifest that in the absence of any further explanation the names of the step-children Siraj Fatima and Nisar Fatima were wrongly recorded.

54. Siraj Fatima and Abid Ali, the husband of Nisar Fatima, now deceased, applied for partition of their share in this two annas against the sons and daughters of Mt. Saghirunnissa who were represented by a certificated guardian, Wajid Ali, who is described to us as being a retired tahsildar and grandfather of the wife of the eldest of Sagliirunnissa's sons.

55. On behalf of the minors Wajid Ali objected that the representatives of the first wife could have no right in the personal property of the second wife. Wajid Ali as guardian was directed to file a suit. He failed to file any suit, and as a result a final order was passed for partition on 18th October 1922.

56. In 1923 Mahmud Ali, the eldest son of the second wife Saghirunnissa, became a major. On 19th July, 1924, the present suit was filed by Mahmud Ali and the other sons and daughter of Saghirunnissa under his guardianship.

57. The plaint alleged that Nisar Fatima assisted by her husband Abid Ali had filed the partition suit, had won over the plaintiff's guardian Wajid Ali, and had colluded with him, and as a result thereof Wajid Ali did not properly look after the partition case. As an instance of the failure to look after the partition case properly the plaint specified not his failure to file a suit but his failure to put forward any objection with respect to the plaintiff's title.

58. The defendant set up an oral gift which has been found to be not proved; denied that there was any negligence on the part of Wajid Ali, the guardian; and relied upon Section 233-K as a bar to the suit.

59. Both the Trial Court and the lower appellate court have held (1), that there was no oral gift; (2) that Wajid Ali had been guilty of negligence in not filing the civil suit and (3), that Section 233-K, Land Revenue Act was no bar to the suit, and the plaintiff has had his decree.

60. The defendants have appealed, and two questions have been pressed before us, firstly, that while a decree may be treated as a nullity if proved to have been obtained by fraud or collusion, it cannot be set aside on the ground of negligence whether gross or otherwise; and secondly, it has been contended that Section 233-K is in any case a for toa suit in the civil Court.

61. In regard to Section 233-K it was contended that it constituted a bar not only to any interference by a civil court with the distribution of mahals but to interference with the allotments to particular co-sharers. The question is very far from being free from difficulty, but it does not call for decision in the present case. There can be no question but that the decree of any Court may be treated as a nullity if it can be shown to have been obtained by fraud or collusion. In such a case the reasoning would be as follows. A plaintiff has normally the right to come into Court and ask for a declaration of his title for possession and for mesne profits. He is met at the outset by a judgment of the Revenue Court where, as in the present case, he has had an opportunity of contesting or getting contested the question of title, has not contested it and it has been decided against him. The defendant will, of course rely upon Section 11 Civil Procedure Code The plaintiff will counter this by relying upon Section 44, Evidence Act. The judgment tendered by the defendant is of course relevant, and Section 44, Evidence Act declares that evidence directed to show that the judgment was obtained by fraud or collusion is relevant. So far whether Section 44 be regarded or not as engrafting an exception on Section 11, Civil Procedure Code the decision is clear. It only remains to consider whether "gross negligence" is on the same footing as "fraud" or "collusion" for our present purpose.

62. It is not necessary to enter into what may be the distinction between "negligence" and "gross negligence." There is as said in one of the earlier orders in this case no practical difference, but I would express it otherwise as it has been more happily expressed in other cases, that there is no definite line between the two. The question whether the negligence was sufficiently grave or gross is a question which would have to be decided in the particular circumstances of each case provided that it be first determined that negligence, whether gross or otherwise, is on the same footing as fraud or collusion, for the purposes of holding a decree to be a nullity.

63. I am not however able to arrive at a conclusion that they are on the same footing. By Section 11, Civil Procedure Code, the judgment, given that other necessary conditions exist, is conclusive. An exception as it were in favour of being allowed to plead that the judgment was obtained by fraud or collusion is made by Section 44, Evidence Act. Can any such exception be made in favour of negligence? Section 2, Evidence Act, declares that on and from the first day of September 1872 all rules of evidence not contained in any Statute, Act or Regulation in force in any part of British India shall be repealed. Now I cannot get beyond the fact that Section 44 embodies a rule of evidence. Nor can I get beyond the fact that there is no distinction between a rule of evidence permitting proof of fraud or collusion, and a rule of evidence permitting evidence of negligence. This seems to me therefore conclusive that evidence cannot be given of negligence on the part of a guardian in order to arrive at a conclusion that a decree can be treated as a nullity. It has been suggested that a guardian who is negligent is in fact no guardian at all and that in that aspect of the matter it can be held that the minor was not properly represented. But this appears to me a straining of the words "not properly represented" which is not permissible.

64. It was also further pressed upon us that if we were to hold that a judgment cannot be treated as a nullity on the ground of the gross negligence of a guardian it might lead to the interests of minors very gravely suffering. This is manifestly so, but there are many cases in which a minor or a cestui que trust may suffer at the hands of a trustee or a pardanashin lady at the hands of her mukhtar or relatives without there-being a remedy against an innocent third party. Again it is not possible to suppose that gross negligence was omitted from Section 44 otherwise than deliberately. In view of the state of the law in 1872 there cannot be any doubt that the idea of

putting gross negligence by a guardian on the same footing as fraud and collusion must have been present to the minds of the legislature.

65. Whatever weight however may be attached to these last considerations, I have considered and reconsidered Section 2 and Section 44, Evidence Act, and I cannot escape from the definite conclusion that to allow evidence of gross negligence on the part of a guardian as relevant for the purpose of destroying the effect of a decree or judgment would be to act upon a rule of evidence which is not embodied in the Evidence Act or in any statute or regulation, and which I am therefore debarred by Section 2 from acting upon.

64. I would therefore hold on this single point that the plaintiff was debarred from setting up negligence as a ground for holding the decree of the Revenue Court to be a nullity, I would therefore allow the defendants' appeal with costs and dismiss the suit.

Sen, J.

65. (After stating facts, his Lordship proceeded): An attempt was made to challenge the findings on the two main issues of facts indicated above. The appellants cannot be allowed to do this. The findings are based upon evidence and are not vitiated by any misapplication of substantive law or of any rule of procedure affecting the merits.

66. It was next contended that the use of the expression "gross negligence" is vague and indefinite and that the degree of negligence ought to have, been defined inasmuch as the plaintiffs cannot be clothed with a right of action for mere negligence in all cases. In my view the amount of care which a guardian is under obligation to take may vary with the flexible posture of each case. The word 'gross" qualifying negligence is not indicative of any standard of negligence. In judicial decisions, the word has been understood in different senses; sometimes signifying non-specialist negligence, sometimes, signifying the amount either of specialist or of non-specialist negligence. Lord: Cranworth in a well-known case, *Giblin v. Mc. Muller*[49] before the Judicial Committee, while allowing that the epithet gross" was not without its significance, stated in clear terms that degrees of care are not definable. "Famous in legal, history is the dictum of Baron Rolfe in *Wilson v. Brett* [50]I could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet.

67. I understand the term to include in excusable absence of such ordinary care which under the circumstances of the case a prudent man was bound to take to safeguard his interest or that of a person who was dependent upon him. Where the prudent man abandons his prudence without any excuse in the conduct of any affair affecting the interest of his wards he must be held to be guilty of negligence. Where negligence is established liability follows for all resultant consequences.

68. It has been contended that the bar raised by Section 233-K is absolute and that the said bar is not liable to be set aside even where the order of the Revenue Court is vitiated by fraud, collusion or negligence.

69. To clear the ground, it may be pointed out here that the bar can in no case extend to one of the villages in suit, viz., Narkhurd. This village was not partitioned by the Revenue Court. Mr.

Khwaja for the appellant, who has argued the case with ingenuity, skill and conspicuous ability, has contended that in partition proceedings the question of title could only be raised within the limits indicated by Section Ill, Land Revenue Act, and that the remedy of the unsuccessful objector lies in an appeal under Section 112 and not by a separate suit. He has also contended that his remedy is by way of review. He takes his stand on Section 233-K which provides that no person shall institute any suit or other proceedings in a civil Court with respect to partition or union of mahals except as provided in Sections 111 and 112. He has called to his aid a decision of the Full Bench *In Re Mohammad Sadiq v. Laute Ram* [51]This decision turned upon an interpretation of Section 241-F, Act 19 of 1873, the language of which is in many respects different from that of Section 233-K, Act 3 of 1901. It is not permissible to construe the provisions of one statute in the light of any judicial decision on a provision of another statute unless the

[49][1868]2 P.C. 317
[50][1843] 11 M. & W. 113
[51][1901] 23 All. 291

two are in pari materia and are identical in terms. Opinions
vary, but in my judgment, the scope of Section 233-K is narrower than that of 241-F. The distribution of the land of a mahal by partition is not the same thing as the partition or union of mahals. In the latter case, each mahal is a consolidated unit and the section is not trenched upon by a decision of the civil Court which does not affect the integrity of the mahal as a whole. The case law as to the import and scope of Section 233-K - and I include how my own judgment - presents a hopeless tangle. There are three Full Bench decisions which are reported in *Shambhu Singh v. Daljit Singh*[52] *Kalha Prasad v. Manmohanlal*[53] *Bijai Misra v. Kali Prasad* (28). These have been followed by a large number of Division Bench rulings such as *Ram Bikha v. Lallu Missir*[54], *Ganga Prasad v. Beni Prasad*[55] *Data Din v. Nohra,* and *Lal Behari v. Parkhin Koer*[57] It is not necessary to notice or discuss these authorities in detail. It will suffice to say that there is no consensus of judicial opinion in support of Mr. Khwaja's plea, that when once a partition proceeding has been initiated in a Revenue Court, no suit of whatever description relating to the subject-matter can be entertained by the civil Court. Indeed there is a sharp cleavage of judicial opinion on the point.

70. It may be conceded that in the normal state of things, the civil Court cannot entertain a suit which may have the result of affecting the partition or union of mahals. But the material point which calls for determination in this case is whether it is open to the civil Court to ignore any order as to partition made by the Revenue Court where the order has been passed affecting the interest of minors by reason of negligence on the part of the guardian. It is too late in the day to question that a decree or order in a civil suit may be ignored by the party aggrieved, where the order has been procured by fraud or collusion. In the Duahess of Kingston's case (decided in 1776) the proposition laid down was as follows:

> Fraud is an extrinsic collateral act which vitiates the most solemn proceedings of the Courts of justice. Lord Coke says it avoids all judicial acts ecclesiastical or temporal.

71. Section 44, Evidence Act, is an enabling, section and provides that any party to a suit or other proceeding may show that any judgment, order or decree... was obtained by fraud or collusion. This section enacts a rule of evidence and may be taken to graft an exception upon a rule of res

judicata as enunciated in Section 11, Civil Procedure Code This section does not enact any rule relating to the substantive right possessed by a citizen nor does it enumer ate and exhaust the grounds upon which a decree or order may be attacked. If fraud or collusion vitiates the order or decree passed by a civil Court, there does not appear to be any ground for holding that it does not or cannot make inoperative or nugatory an order passed by the Revenue Court in a partition proceeding. If a minor plaintiff has a right either to ignore or to challenge the propriety of an order passed by the Revenue Court against him in partition proceedings, the said right is undoubtedly a substantive right. If the minor possesses a substantive right, the right should be capable of

[52][1916] 38 All. 243 [54] AIR 1931 All 462 : (1931) ILR 53 All 568
[53][1916] 38 All. 302 [55][1929] 130 I.C. 717
[56] AIR 1930 All 419 : 121 Ind. Cas. 825 57[1920] 42 All. 309

being enforced by a suit. A suit for enforcement of such right is clearly a suit of a civil nature within the purview of Section 9, Civil P. C. The jurisdiction of a civil Court to entertain a suit of this description exists unless it has been taken away by clear legislative enactment. I have already set out the reliefs which the plaintiffs claim in this suit and have also indicated that the plaintiffs have treated the Revenue Court proceedings as a nullity on the ground of negligence on the part of their guardian. It has been contended by the appellant that having regard to the provisions off Sections 2 and 44, Evidence Act, the plaintiffs are precluded from leading any evidence to prove that the order of the Revenue Court is vitiated by culpable negligence on the part of their guardian. The answer to the argument is that the right claimed by the plaintiffs is a substantive right and is not merely a rule of evidence; and in order to establish that right, they can always avail themselves of the provisions of the Evidence Act relating to the admissibility of relevant evidence. The plaintiffs are always entitled to prove their case by relevant and admissible evidence within the Act and not beyond it.

72. In many of the judicial decisions, which have been cited by the respondents the decree or order has been declared to be nugatory on the ground that negligence stands on the same footing as fraud or collusion. There can be no manner of doubt that the incidents of fraud or of collusion are in many respects different from those of negligence. Notwithstanding this difference, it is patently clear that their effect is much the same. A minor cannot act for himself. He has to depend upon his guardian whose position is fiduciary and as such uberrimae fidei. If the guardian does not fulfil his obligations to the ward, and wilfully, wantonly or inexcusably abondons his trust, with the result that loss or injury occurs to the ward, the latter may have two remedies. He may bring an action against his guardian for tort. Cases however are conceivable where a decree for damages may not amount to a complete remedy or may be no remedy at all. The guardian may be a penniless pauper. The other remedy which, to my thinking, is justly available to the minor is to treat the order as a nullity and to press for such reliefs as he is lawfully entitled to as the owner of the property in dispute. In doing so, the minor cannot be successfully met by a plea of res judicata. Where in a suit or proceeding the minor is represented by a guardian ad litem, but the latter does not function as such, and through inexcusable negligence fails to carry out the duties, which justice demands or necessity compels, the minor for all practical purposes is unrepresented in the suit. A decree or order obtained against a minor who is not properly represented in the action cannot be pleaded as a bar to a suit instituted by the minor relating to the same subject-matter.

73. There is a preponderance of authority in favour of the view that a minor can always sue for

avoidance of a decree or order which could not have been passed against him but for the negligence of his guardian. Mr. Khwaja contends for the opposite view. He has referred to a number of authorities. I proceed t6 deal with them now.

74. *Daulat Singh v. Baghubir Singh* [57]decided by Edge, C. J. and Banerjee, J., contains no more than an obiter dictum that a specific fraud attributed must be alleged and proved, that such fraud must be fraud on both sides and that mere negligence on the part of the guardian in protecting the minor's interest would not be sufficient to prevent the decree being binding on the minor. It was further held that if the law were otherwise no person could be certain of the finality of any decree obtained against a minor, whether the minor

[57][1894] A.W.N. 141

had been a plaintiff or a defendant in the suit. No authorities have been cited in support of the observation qua negligence. In *Sham Lal v. Ghasita* [58]the point did not arise. A previous decree was repudiated on the ground that the minors were not properly represented as their guardian ad litem, Mt. Durga Dei was a married woman. This case has no bearing except in so far that a reference was made to *Baghubar Dayal v. Bhikya Lal* [59]which was distinguished. I shall deal with the last mentioned case presently.

75. In *Chander Shehhar Tewari v. Balakdhar Dubey* [60]the minor sought to repudiate the decree on the ground that it was vitiated by fraud. No fraud was proved. Banerjee, J., held that a minor who was represented in a suit by a duly constituted guardian was as much bound by a decree passed in that suit as if he were of full age, when there was nothing on the record to show that there was any fraud on the part of the guardian. The decree was not attacked on the ground of negligence on the part of the guardian. The learned Judge however made the following observation in the case:

> If the guardian neglected to support the case of the defendant, and there is nothing to show that he did so deliberately that circumstance alone would not entitle the defendant to avoid the operation of the decree.

76. It was not considered in the case whether the minor is represented at all where the guardian practically abandons his trust and refuses to fulfil his duties to the minor. The observation quoted above suggests that if the guardian's neglect was deliberate, matters might wear a different complexion.

77. In *Beni Prasad v. Lajja Ram* [61]Richard, C.J., took the same view as Banerjee, J. and ruled that the decree obtained against a minor except upon proof of fraud or collusion on the part of the guardian was not liable to avoidance. The dictum of Field, J., in *Baghubar Dayal v. Bikhya Lal* [62]has been relied upon in support of this view. But in an earlier part of the judgment, the learned Judge observes:

> No doubt it is possible for a minor where the guardian has conducted his case with gross negligence to come lo the Court and seek relief by way of review of judgment.

78. If a review of judgment is open to the minor why is not a suit permissible? How does an application for a review lie on the ground of negligence or misfeasance on the part of the

guardian? With due respect, it is submitted that the case has not been approached from the proper angle. In *Baghubar Dayal v. Bikhya Lal* [63]the learned Judges delivered separate judgments. Field, J., ruled that where a decree had been passed against an infant duly represented by his guardian and the infant, on attaining majority sought to avoid the decree by a separate suit, he could succeed only on proof of fraud or collusion on the part of the guardian. The decree impugned in the case was an ex parte decree. The learned Judge observes:

> If an infant desires to have a decree set aside on the ground that his next friend had neglected his interest and had not put forward on his behalf good grounds of

[58][1901] 23 All. 459 [60]15 I.C. 611 [62][1886] 12 Cal. 69
[59][1886] 12 Cal. 69 [61][1916] 38 All. 425 [63][1886] 12 Cal. 69

> defense, which were available, the proper mode would be to apply for a review.

79. The provisions of Section 623, Civil Procedure Code, 1882 (the corresponding provisions in the present Code of Civil Procedure is Order 47, Rule 1 allows a review upon the ground of error apparent on the face of the record, the discovery of new evidence which was not available notwithstanding due diligence or for any other sufficient, cause. In *Ghajju Ram v. Nejci*[64] their Lordships of the Judicial Committee laid down that "any other sufficient cause" meant a reason sufficient on grounds at least analogous to those specified immediately previously. A review on ground of negligence cannot be said to be ejusdem generis with discovery of new evidence or error apparent on the face of the record. Negligence on the part of the guardian therefore can be no ground for review under the Code of Civil Procedure.

80. En passent, it may be observed that the provisions of the Civil Procedure Code are not applicable to partition suits in a Court of Revenue except within the limits defined in Section 112, Land Revenue Act. Moreover there is no provision for review of judgment of an inferior Court of revenue. The only review permitted is under Section 220, and its application is restricted to judgments of the Board of Revenue. It is manifestly clear that the plaintiff's could claim no remedy by way of review of judgment. The ruling in *Baghubar Dayal v. Bhikya* [65]has been dissented from by the Madras High Court, in *Punnayya v. Viranna* [66]and *C. Moolaswami v. Gurram Tatayya* [67]I am in full accord with the view of the learned Judges of that Court and endorse their reasoning. In *Bachan Singh v. Bhilcha Singh*[68], Iqbal Ahmed, J., followed the decisions in *Chandra Shakhar v. Balakdhar*[69] and *Beni Prasad v. Lajju Ram*[70] He ruled that where the defendant was represented by a duly constituted guardian in the execution proceedings, the mere failure of the guardian to diligently prosecute the case on behalf of the defendant could not have the effect of vitiating the order of the executing Court. No reason for this is to be found in the judgment. It may be that the opposite party may not be under an obligation to see that the duly constituted guardian is alive to his duties for the protection of the minor, but where the guardian is un-dutiful to his trust in such a degree as would leave the minor without any protection whatsoever in a matter in which protection was most needed, the minor is really unrepresented. In *Anjaneyulu v. Chinna Subbiah* [71]the question now in issue did not arise. The point considered was whether a given set of circumstances, constituted gross negligence on the part of the guardian. The question was decided in the negative. The decision in *Nawab Singh v. Gur Bux Singh* [72]does not assist the appellant. All that it lays down is that mere failure on the part of the guardian ad litem to defend a suit or to appeal from a decree was of itself not gross

negligence, since it was possible that there might be a good case against the minor and the guardian ad litem might have thought fit not to incur additional expense in do fending the suit. I am in agreement with this view. It would be most unwise and imprudent on the part of the guardian to incur expenses on behalf of the minor in defending a suit where he had no defence. In such a case a failure or omission on the part of the guardian does not amount to negligence. Indeed it is an act of common prudence.

[64] A.I.R. 1922 P.C. 122
[65][1886] 12 Cal. 69
[66] A.I.R. 1922 Mad. 273
[67] A.I.R. 1926 Mad. 1079
[68] AIR 1927 All 601
[69]15 I.C. 611
[70][1916] 38 All. 425.
[71] A.I.R. 1924 Mad. 860
[72] A.I.R. 1925 Lah. 116

81. I would now turn to the reverse side of the shield.

82. Under the English law, negligence equally with fraud and collusion vitiates a decree or order passed against a minor. Simpson on the Law on Infants, (2nd Edn., p. 512) says:

> A decree may also be impeached, where there has been great negligence by the next friend in the conduct of the infant's case

83. The same rule should apply to the case of the guardian ad litem.

84. In Macpherson on Infants (p. 386), there occurs the following passage:

> An infant plaintiff, though thus favored in the course of the suit is as much bound by the decree and by all the proceedings in a cause as a person of full age, and cannot nor can his representative, open the proceedings, unless upon new matter, or on the ground of gross laches, or of fraud or collusion, which will annul the proceedings of the Courts of justice as much as any other transaction,

85. In Halsbury's Laws of England (Vol. 17, para. 316, p. 138) the law has been summarised and expressed in the following terms:

> An infant plaintiff is as much hound as an adult by a judgment or order in the cause, even though there may have been irregularities in the conduct of it, unless there has been fraud or gross negligence on the part of his next friend. But in special circumstances he may be allowed on coming of age to amend his claim or to bring a fresh action.

86. It is clear that under the English law a bill for review is not the only remedy.

87. In re *Houghton v. Fiddey* [73]Mallins, V.C., is reported to have said:

> The question which I have to decide is whether this infant on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence or want of knowledge on the part of her then friend. I am clearly of opinion, she cannot be called upon to endure such inconvenience.... The proposition that an infant of tender years may have her whole

fortune wrecked by the neglect of her friend is so monstrous that I cannot pay attention to it.

88. The rules of law set out above are not founded upon any peculiarities of English Statutes. They are general principles broadly based upon rules of justice, equity and good conscience and as such form part of universal jurisprudence. It is on this ground that they have been followed in this country in numerous cases.

89. I do not think it necessary to deal in detail with the case law on the other side of the line. These cases are *Sheo Charan Lal v. Ram Nandan*[74] *Bam Siuarup Lal v. Shah Latafat Hussain* [75] In this case the former next friond of the minor, though guilty of no fraudulent

[73][1874] 18 Eq. 573
[75][1902] 29 Cal. 735
[74][1895] 22 Cal. 8

misconduct, was grossly negligent of the
minor's interest in withdrawing from the suit. Review of judgment was applied for on this ground and granted. The judgment of *Lord Hardwick in Gregory v. Molesworth*[76] was followed, in which it, had been laid down that the infant had such a remedy, when either gross laches or fraud or collusion appeared in the next friend: *Parmeshwar Prasad Narain Singh v. Sheo Dut Rai* [77]

90. This is an illuminating judgment of Mukerjee, J., in which many of the leading cases on the subject have been referred, to: *Bipin Chandra Das v. Mena Jaddi*[78], This case mainly turned upon the question whether the minor was properly represented by a duly constituted guardian and as to whether there was no proper representative, the appointment of the guardian having been obtained by contrivance. In *Karsan Das Natha v. Ladkavahu* [79] Farpan, J., ruled that it was open to the infant to impeach a decree by a suit, in cases where his guardian had been guilty of fraud or negligence, in allowing the decree to be passed against him. In *Hanmantapa v. Jivibai* [80]Parsons and Eanade, JJ. decided that where fraud or negligence was established against the guardian of a minor in the conduct of a previous suit, the minor or his administrator had the right to bring a suit to set aside the previous decision. In *G. Subbamrha v. G. Narasamma* [81]Shankaran Nair and Spencer, JJ., held that a minor was not bound by a decree passed against him, where it was established that his guardian was guilty of gross negligence. It was further held in this case that where the guardian had neglected to put forward the rights of the minor under a will of which he was aware, a decree obtained against the minor under such circumstances did not operate as res judicata against him. In *Dada Saheb v. Gajraj Singh*[82]Devadoss, J., held that where the guardian ad litern absented himself at the hearing and the vakil was not able to explain why witnesses summoned were not present in Court and consequently a decree was passed against the minor, the application for adjournment being refused, there was gross negligence on the part of the guardian and that the decree must be set aside. *Subbiahpandaram v. Arunaohala Pandaram*[83], is not a case in point. All that was hold in this case was that a bona fide suit instituted by a guardian without considering the legal aspect of the case did not amount to gross negligence.

91. In *Jogarao v. K. Venhamma*[84], Devadoss, J., held that failure to set up proper defences to a suit against the minor is gross negligence and that the minor can, on that ground sue for the avoidance of the decree. I fully agree with this view. I would submit with respect that it would be

going too far to say that the fact that the defences might have been very successfully met by the plaintiff in that suit did not make the guardian not negligent, would be going too far. The duties of the guardian in such a case have been discussed by their Lordships of the Privy Council in *Baboo Lekraj Roy v. Baboo Mahtab Chand* [85]The law on the subject of the minor's right to institute a suit for the avoidance of the decree passed against the minor on account of the negligence of the guardian has been discussed at great length by Wazir Hasan and Neave, A.J. Cs., in Re *Rameshwar Bakhsh Singh v. Mt. Bidh Kunivar*[86], It has been held that a minor is as

[76]3 Atk. 627
[77][1907] 6 C.L.J. 448
[78] AIR 1927 Cal 865
[79][1895] 19 Bom. 571
[80][1900] 24 Bom. 547 at p. 552
[81][1915] 26 I.C. 16
[82] A.I.R. 1925 Mad. 204
[83] AIR 1925 Mad 689 : AIR 1925 Mad 379
[84] AIR 1927 Mad 497 : 1927-25-LW 523
[85][1871] 14 M.I.A. 393
[86] AIR 1925 Oudh 633 : 87 Ind. Cas. 238

much bound by a judgment in his own action as if of full age, unless gross laches or fraud or collusion is established on the part of the guardian. I agree with the reasoning upon which the judgment proceeds. The case of *Jammu v. Mahadeo Prasad*[87] was not a case of a minor instituting a suit for the avoidance of a decree on the ground of his guardian's negligence. While holding that the Revenue Court had exclusive jurisdiction in matters relating to tenancy it was held that where fraud intervened in the creation of the tenancy, the proper forum for the declaration of the title of the person who had been defrauded was the civil Court.

92. The most exhaustive decision on the question in issue is that of Lindsay and Kanhaiya Lal, JJ., in *Brijraj v. Ram Sarup and others*[88], Principles have been examined and important decisions on the question have been fully dealt with. I am entirely in agreement with the view of the learned Judges. It would appear from the above that the balance of authorities is distinctly in favour of the view that a minor is entitled to bring a fresh suit to repudiate a decree passed against him on account of gross laches on the part of the guardian. I have not a particular liking of the adjective laws.

93. My conclusions may be briefly summarized:

(1) Where a minor had a substantial claim or defence, but the decree was passed against him during his minorlity by reason of wanton, wilful or inexcusable neglect on the part of his next friend or guardian ad litem in not duly prosecuting or defending the suit, the minor on attaining majority was competent to sue for the setting aside of the decree;
(2) the guardian is under no legal obligation to prosecute or defend every suit or proceeding in disregard of its merits. The prime factor in each case is the consideration of the fact as to how far ,it is in the interest of the minor to prosecute or defend;
(3) whether or not the guardian is guilty of negligence in the prosecution or defence of a suit or proceeding is in each case a question of fact and does not admit of an inflexible answer, but has to be determined with reference to time, place or other circumstances relating to each case;
(4) the standard of conduct which is required from the guardian is one which might be reasonably expected in view of all the circumstances of the case from a person in a fiduciary position who is required to protect the interest of persons committed to his care. He is to act like a reasonably prudent man;

(5) where the guardian is required either to initiate or continue any proceedings in a Court of law, which are necessary for protecting the interest of the minor, the failure of the guardian to act is undoubtedly negligence;

(6) the remedy of the minor may be against his guardian, but that is not his exclusive remedy. He can institute a suit in the civil Oourt for the avoidance of the decree or order which has been passed against him by reason of the lachos or negligence on the part of the guardian. The minor may repudiate the decree on the ground of negligence quite as much as ho can do so where the decree is vitiated by fraud or collusion;

[87] A.I.R. 1922 All. 294

[88] AIR 1926 All 36 : (1926) ILR 48 All 44 : 90 Ind. Cas. 749

(7) the order of the Revenue Court in the circumstances proved in this case cannot operate as a bar under Section 233-K, Land Revenue Act or Section 11, Civil Procedure Code

94. The granting of the reliefs claimed in the suit does not affect the integrity of the mahals. The order moreover of the Revenue Court cannot raise the bar of res judicata, as the minors must be taken not to have been duly represented by the guardian on the crucial occasions when they should have been represented. In view of the findings arrived at by the lower Appellate Court, the decree passed in favor of the plaintiffs-respondents is the right decree. I would therefore dismiss the appeal.

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