CALCUTTA HIGH COURT

Mahesh Chandra Bayan

Vs

Manindra Nath Das

(B.K Mukherjea , J.)

24.01.1941

JUDGMENT

B.K. Mukherjea, J.

1. This appeal is on behalf of defendant 1 and it arises out of a suit commenced by three minor plaintiffs through their maternal uncle as next friend to establish their title to the property in suit on setting aside an ex parte decree, which was obtained by defendant 1 in a suit, to which the plaintiffs along with other persons were impleaded as parties defendants. Defendant 1, Mahesh Chandra Bayan, and the pro forma defendant 4, Pitambar Das, are the two surviving brothers of Gopi Nath Das, the father of the plaintiffs. The plaintiffs' case is that the three brothers lived separately and had independent sources of income and that the disputed property belonged exclusively to Gopi Nath being purchased by him with his own money and the other two brothers had no right to, or interest in the same. Gopi Nath died in 1930.

2. In 1934, a creditor of Gopi Nath obtained a decree against him and attached the property in suit in execution of his decree. Mahesh, defendant 1, preferred a claim setting up his right to one-third share of the property. His claim was rejected. Thereupon he filed a suit, being suit No. 934 of 1934, for establishing his title to one-third share of the property, making the plaintiffs and Pitambar parties to the suit. The plaintiffs were represented in that suit by their mother as natural guardian. The natural guardian entered appearance and filed a written statement on behalf of the infants, resisting the claim of Mahesh to any share of the property and asserting the exclusive title of the infants to the whole property. It appears from the records of that suit that this written statement was filed on 6th August 1934 and on 20th August following, issues were framed. On 4th September 1934, the mother applied for the examination of herself as well as of another witness on commission and that prayer was granted. The witnesses however were not eventually examined and a few days later the mother made an application stating that she was unable to conduct the suit on behalf of the infants and prayed that she might be discharged from guardianship and that another guardian might be appointed in her place. This application was rejected by the Court and thereupon she abandoned all contest and the minors practically remained unrepresented in the further proceedings of the suit which culminated in an ex parte decree in favour of Mahesh declaring his one-third share in the property in suit. On the strength of this decree, it is said, a creditor of Mahesh who was made defendant 2 in this suit attached his one-third share of the property and likewise defendant 3, a creditor of Pitambar, also attached his

one-third share in the same. The plaintiffs' case is that neither Mahesh nor Pitamber has any interest in the property and the ex parte decree which was passed in the previous suit was not binding on them. Pitamber, who was made defendant 4, did not contest the suit and it was contested by defendant 1 alone. The case of defendant 1 was that the minors were properly represented in the previous suit and the decree in that suit operated as res judicata and a bar to the present litigation.

3. The trial Court dismissed the suit holding that the mother of the infants having been formally appointed a guardian ad litem by the Court, represented the minor plaintiffs effectively and that as she had a brother who was a pleader of that Court, under whose advice she acted she must be deemed to have acted bona fide and not negligently when she gave up contesting the suit. On the merits, however, the learned Munsif found that the property in dispute belonged exclusively to Gopinath and Mahesh and Pitambar had no interest in it. There was an appeal taken against this decision to the Court of appeal below and the special subordinate Judge, who heard the appeal, reversed the decision of the trial Court and decreed the suit. In the opinion of the learned special subordinate Judge, the Court in the previous suit ought to have appointed another person as guardian for the infants when the mother refused to act further in that capacity, and though technically the minors were not unrepresented, the Judge held that it was gross negligence on the part of the mother not to contest the suit by adducing evidence at the time of the trial. On the merits, the special subordinate Judge agreed with the trial Court in holding that the property belonged solely to Gopinath. It is against this decision that the present second appeal has been preferred.

4. The learned advocate, who appears for the appellant, has taken two points in support of the appeal. He has contended, in the first place, that, in the absence of fraud or collusion, mere negligence on the part of the guardian is not a sufficient ground upon which a decree obtained against the minor can be set aside in a subsequent suit instituted by him. The second ground is that on the facts admitted and found the Court of appeal below ought to have held that there was no culpable or gross negligence on the part of the mother and that she acted in good faith.

5. The first point raises a question of some nicety upon which there is considerable divergence of judicial opinion. The latest pronouncement on this question is that of the Pull Bench of the Bombay High Court in *Krishna Das Padmanabhrao v. Vithoba Annappa*[1], where it was held by three learned Judges that gross negligence, apart from fraud or collusion, on the part of the next friend or guardian ad litem does not afford the basis of a suit to set aside a decree obtained against a minor. There were previous decisions of the Bombay High Court which took a contrary view, but those decisions were overruled by the Pull Bench and held to have been incorrectly decided. Though the Pull Bench decision attempted to settle the law so far as the Bombay Presidency is concerned, yet the cleavage of opinion between the Bombay High Court and the other High Courts in India still remains marked. In the Allahabad High Court there was a conflict of opinion on this point between the observations made in *Beni Prasad v. Lajja Ram*[2], and in Brij Raj v. Ram Sarup , which necessitated a reference to a Pull Bench: vide Mt. Siraj Fatma v. Mahmud Ali . The three Judges, who constituted the Pull Bench however failed to reach an agreement. Sulaiman C. J. and Sen J., who were two of the three Judges composing the Bench, held definitely that a minor has the right to avoid a decree passed against him on the ground of negligence of his guardian ad litem and this right, which was recognized in English law, was not founded on any peculiarity of the English legal system but upon broad principles of equity,

justice and good conscience. There was no reason therefore why this principle should not be recognized in India.
6. Boys J. on the other hand dissented from the majority view and expressed his opinion that Section 44, Evidence Act, which allows evidence to show that a judgment has been obtained by fraud or collusion, makes the only exception to the operation of the rule of res judicata embodied in S.11, Civil P.C. To allow evidence of 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 not embodied in the Evidence Act or any other statute and was therefore prohibited by S.2, Evidence Act.

7. In Madras the course of decisions has been uniform throughout and it has been held that a minor against whom an ex parte decree was passed could institute a fresh suit to avoid a decree on the ground of gross negligence on the part of the guardian ad litem even though no fraud or collusion were established: vide *Chunduru Punnayyah v. Rajam Viranna* [3]This view has also been taken in the majority of decisions of the Lahore High Court and the only case in which a contrary opinion has been expressed is that in *Imam Din v. Puran Chand*[4]. The Patna High Court has adopted the Madras view {vide *Ganganand Singh v. Rameshwar Singh*[5] *Mathura Singh v. Rama Rudra Prasad Sinha*[6]*),* and has gone to the length of saying that gross negligence amounts to fraud and affects the proper representation of the minor and takes away the jurisdiction of the Court to pass a decree.

8. In the Calcutta High Court there is no authority exactly in point, but there are at least two reported cases where this matter has been discussed. I will first of all examine these decisions with some care with a view to ascertain, if possible, as to whether there is any authoritative pronouncement by our Court on the law on this point. The first of these cases is that of *Raghubac Dyal v. Bhikya Lal*[7]This case arose out of a suit instituted by the plaintiff, Bhikya Lal Misser, to recover certain properties on a declaration that the sale of these properties in execution of a decree was fraudulent and void. He attacked the bond executed by his father as his guardian and upon which the decree was obtained as a collusive document and the whole of the proceedings in the suit leading up to the sale of the properties were challenged as fraudulent. The trial Court gave him a decree but on appeal to this Court the decree was reversed. The appeal was heard by two learned Judges (Meld and O'Kinealy JJ.) who delivered separate but concurrent judgments. Field J. in course of his judgment referred to the case in *Gregory v. Molesworth* [8]which said:
It is right to follow the rule of law, where it is held 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 the prochein ami, then the infant might open it by a new bill.

9. The learned Judge after that referred to the practice in the Chancery Court that if it were sought to question a decree passed against a minor on the ground of fraud or collusion, this might be done by an original bill. If it were sought to impeach a decree on the ground of gross negligence that the next friend had omitted to put forward proper or available grounds of defence, this was usually done by re-opening the original case upon motion or petition. It was then observed that in this country the procedure was different. If the infant desired to have a decree set aside on the ground that his next friend neglected his interests, the proper mode of procedure would be to apply for review under the Civil Procedure Code; but if he wanted to have it set aside by a separate suit, he can proceed only on grounds of fraud or collusion. The other learned Judge did not discuss this point but simply said that as there was no fraud proved, the

decree and the execution were good and the plaintiff was out of Court as he could not reach the property without setting aside the sale. As I read the facts of this case, the plaintiff attempted to have the decree and the execution sale vacated, not on the ground of any culpable negligence on the part of the guardian but only on grounds of fraud and collusion. In the opinion of the High Court he failed to establish his case. The observation of Field J. was therefore in the nature of an obiter. It would be noticed however that in the opinion of the learned Judge the minor had a remedy even when there was gross laches on the part of the next friend, but the remedy, according to him, lay by way of an application for review of judgment under the Civil Procedure Code.

10. It is doubtful whether in view of the pronouncement of the Judicial Committee in *Chhajju Ram v. Neki*[10] this remedy is at all open to the minor; for a review on the ground of negligence cannot strictly speaking be said to be ejusdem generis with an error apparent on the face of the record, or discovery of new and important evidence.

11. The other case decided by this Court is that in *Lalla Sheo Churn Lal v. Ramnandan Dobey*[11] Here a suit, instituted by certain minors through their next friend to establish their title to some property, was dismissed for default on account of gross want of care and diligence on the part of the next friend. The minors having attained majority brought a suit to establish their title to the property and for a further declaration that the order of dismissal that was passed in the previous suit was not binding on them. The question was whether such suit was barred under Section 103, Civil P.C., corresponding to C. 9, Rule 9 of the present Code. It was held by this Court that gross negligence of the next friend would prevent the operation of the bar. The learned Judges, Trevelyan and Ameer Ali, referred to certain passages from Macpherson's and Simpson's treatises on the Law of Infants, where it was stated that a decree obtained against a minor might be impeached when there was gross negligence by the next friend in the conduct of the case, or new matters were discovered since the date of the judgment and then quoted with approval the following observation of Sir *R. Malins, V. C. in In re Hoghton; Hoghton v. Fiddey*[12]
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 next friend. I am clearly of opinion she cannot be called upon to endure that 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.
12. The conclusion which the learned Judges arrived at was expressed as follows:

From this it is clear that, according to the law as administered in England, the gross negligence of his next friend would entitle an infant to obtain the avoidance of proceedings undertaken on his behalf. We can see no reason why in this country an infant should be in a worse position.

13. In my opinion, the principle enunciated in this decision applies with full force to the facts of the present case. The fact that in the present case a decree was passed against the infants and there was not merely an order of dismissal for default in my opinion, does not make any difference. The bar under Order 9, Rule 9, Civil P. C, would prevent a fresh suit almost in the same way as the bar of res judicata under Section 11, Civil P.C. This case has been followed in numerous decisions of the different High Courts in India and they were approved of by the Bombay High Court in several cases : vide *Cursandas Natha v. Ladkavahu*[13] *and Hanmantapa v. Jivubai*[14] prior to the decision of the Full Bench.

14. I will now attempt to discuss the principal grounds upon which the contrary view is sought to be supported. The main ground that has been put forward in certain cases (vide the judgment of Boys J. in Mt. Siraj Fatma v. Mahmud Ali , is that to allow an infant to annul a decree on the ground of culpable negligence of the guardian would be to go against the provisions of Section 11, Civil P. C, and Section 44, Evidence Act. This argument which was not accepted by the Bombay High Court in the Full Bench decision which has been referred to above, does not appear to me to be sound. Section 11, Civil P. C, prevents a Court from re-trying an issue which was directly and substantially in controversy in a previous suit between the same parties or their predecessors and was heard and finally decided. That section does not say or purport to lay down on what grounds a decree or order can be vacated. For that purpose we have got to look to the substantive law which defines the rights of the parties. If a party has a right to get a decree set aside on the ground of fraud, Section 11, Civil P. C, does not stand in the way. The judgment so long as it stands is conclusive, but if it is vacated on any ground upon which it can be vacated in law, the bar created by Section 11, Civil P. C, is automatically removed. Section 44, Evidence Act, also, in my opinion, does not stand in the way. The provision of Section 44, Evidence Act, is permissive and not prohibitive. It allows a party to avoid a judgment by proving fraud or collusion but it does not destroy his substantive right which exists independently of the Evidence Act. That Section 44, Evidence Act, does not take away the rights of the minor, if any, to impeach a decree on the ground of negligent acts of the guardian would be clear from the observation of the Judicial Committee in the recent case in Venkata Seshayya v. Kotiswara Rao . After referring to the oases in 22 Cal 812 and Chunduru *Punnayyah v. Rajam Viranna*[15] their Lordships of the Judicial Committee observed as follows: Their Lordships are not concerned to discuss the question of the validity of these decisions, or the elusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one.

15. Their Lordships added further: The provisions of Section 11, Civil P.C., are mandatory and the ordinary litigant, who claims under one of the parties to the former suit, can only avoid its provisions by taking advantage of Section 44, Evidence Act, which defines with precision, the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence as fraud or collusion, unless fraud or collusion, is the proper inference from the facts.

16. The case of a minor, therefore, is treated as an exception to the ordinary rule according to which a decree could be set aside only on grounds of fraud and collusion. The Bombay High Court in the Full Bench case referred to above based its decision not upon Section 11, Civil P. C, or Section 44, Evidence Act, but upon the broad principle that to give such rights to the minor would be to take away the finality of litigation in suits against infants and deprive the innocent plaintiff of the fruits of his judgment. The learned Judges further pointed out that there was no reported case in England where such an action was actually brought by an infant. It may sound unjust that an innocent plaintiff should suffer because the legal guardian of the minor did not act properly and it may be said that the duties of the plaintiff cannot go further than to see that a proper guardian has been appointed to represent the minor in the suit. He cannot possibly exercise any control over the guardian or ensure the due discharge of his duties. This is however only one side of the picture. Minors are often in a most helpless condition and the Courts of

equity in England have always evinced a particular anxiety for the infants whom they consider to be under their charge and protection. There are cases, as has been pointed out by Sir E. Malins, V. C. in In re Hoghton; Hoghton v. Fiddey (1874) L R 18 Eq 573,(Supra) that the whole property of an infant may be wrecked because of some gross laches on the part of the next friend. To deny the infant a right to avoid a decree in such cases would be to deny justice. Of course the Court would interfere only when there is gross and culpable negligence which caused serious prejudice to the minor and the infant cannot sue simply because the guardian ought to have acted with more prudence. That the English law recognizes this principle is quite clear from the authorities pointed out by Trevelyan and Ameer Ali JJ. in Lalla *Sheo Churn Lal v. Ramnandan Dobey*[16] referred to above, and this has been accepted in a large number of cases. There may be paucity of reported cases on this point even in England, but that, in my opinion, is not a sufficient ground to doubt the existence of the right. Speaking for myself, I think I am bound by the decision in 22 Cal 8,l2 which is a judgment of a Division Bench of this Court and I have no hesitation in holding that gross and culpable negligence on the part of the guardian ad litem would be a sufficient ground to enable the infant to set aside the decree obtained against him. The first contention of the learned advocate must therefore fail.

17. The next question is as to whether the circumstances of the present case justify the finding of the lower appellate Court that the guardian ad litem acted in a grossly negligent manner in the previous suit. I agree with Sulaiman C. J. in the view expressed in Mt. Siraj Fatma v. Mahmud Ali , that the negligence of the guardian in order to be a good ground for the avoidance of a decree must be of such a character as to justify the inference that the minors' interests were not at all protected, and in substance, though not in form, the minor went unrepresented in the trial Court. In the present case, both the Courts below have found that the minors had a perfectly good defence and in fact the concurrent finding of both the Courts is that the property was the exclusive property of the father of the infants. The mother had actually put forward this defence in the written statement but she abstained later on from adducing any evidence at the time of the trial and gave up contesting the suit. I agree with the special subordinate Judge that it would have been better if the Court had appointed another guardian for the minors when the mother expressed her unwillingness to act as the guardian of the minors. Be that as it may, I think that the failure on the part of the guardian to defend the suit when there was a perfectly good defence available, resulting in serious loss of rights of the infants would amount to gross and culpable negligence. The result therefore in my opinion is that the view taken by the appellate Court is right and this appeal must be dismissed. I make no order as to costs.

Cases Referred.

1('39) 26 AIR 1939 Bom 66
2('16) 3 AIR 1916 All 324
3('22) 9 AIR 1922 Mad 273
4('20) 7 AIR 1920 Lah 417
5('27) 14 AIR 1927 Pat 271
6('36) 23 AIR 1936 Pat 231
7 12 Cal 69
8(1736-55) 3 Atk 626
9('22) 9 AIR 1922 PC 112
10('95) 22 Cal 8

12(1874) L R 18 Eq 573
13('95) 19 Bom 571
14(1900) 24 Bom 547
15('22) 9 AIR 1922 Mad 273
16('95) 22 Cal 8