

I have read the text books on copyright cited to me on this subject—Drone, p. 445 *et seq.*; Copinger, p. 108; and Scrutton, p. 128. They, more especially the first, have not really dealt with the subject on the construction of the statute, but on *a priori* grounds have argued what the law ought to have been rather than considered what it was.

I must follow the ruling of Mr. Justice Parsons in *Munshi Shaik Abdurruhman v. Mirza Mahomed*<sup>(1)</sup>, and dismiss the suit with costs.

Attorneys for plaintiff:—Messrs *Payne, Gilbert and Sayani*.  
Attorney for the defendant:—Mr. *M. H. Khan*.

(1) I. L. R., 14 Bom., 586.

## ORIGINAL CIVIL.

*Before Mr. Justice Farran.*

CURSANDA'S NA'THA AND OTHERS, PLAINTIFFS, *v.* LA'DKA'VAHU  
AND OTHERS, DEFENDANTS.\*

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*February 28.*

*Minor—Infant—Decree against minor—Review—Right of minor to impeach decree—Practice—Procedure.*

One Kessowji Jádowji in his will directed his daughter-in-law Ládkávahn (defendant No. 1) to adopt his nephew Karamsi Mádhowji (defendant No. 2), and he devised the residue of his estate to him. The executors of Kessowji's will subsequently brought this suit to have the will construed and the rights of Karamsi Mádhowji in the testator's estate ascertained and declared. A decree was made on the 1st October, 1887, by which it was declared that Karamsi's adoption was a condition precedent to his inheritance, and that, unless he was adopted, he was not entitled to any part of the testator's property. On 22nd October, 1894, Karamsi Mádhowji (defendant No. 2) filed a petition of review, stating that at the date of the decree he was a minor and had only recently, *viz.*, on the 14th December, 1894, attained the age of eighteen years. He contended that there was error apparent on the face of the decree, inasmuch as it did not provide that he should have an opportunity of showing cause against it in so far as it affected his interests after he attained his majority.

*Held*, that the review could not be granted. The Courts in India after deciding an issue in which an infant, party to a suit, is interested, have no power to reserve to the infant the right of questioning such decision. At all events a decree is not erroneous for not containing such a provision when the issue in which the infant is interested has been fully gone into and argued before the Court. A decree passed against an infant properly represented is binding upon him like a decree passed against an adult, but it is open to the infant to impeach such decree by a suit in cases where his guardian has been guilty of fraud or negligence in allowing the decree to be passed against him.

\* Suit No. 135 of 1887.

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RULE *nisi* for review.

The judgment and decree, of which the review in this case was sought, were passed by Farran, J., on the 1st October, 1887. A report of the case will be found in I. L. R., 12 Bom., 185.

The rule *nisi* for review was obtained on the 22nd December, 1894, by the second defendant Karamsi Mádhawji, who was the adopted son of the first defendant Ládkávahu. She was the widow of one Liládhhar Kessowji, the son of Kessowji Jádhawji, a wealthy Hindu inhabitant of Bombay, who died in 1886 leaving a will, of which he appointed the plaintiffs his executors.

In his will the testator had directed that his daughter-in-law, the first defendant (the widow of his son Liládhhar), should adopt the second defendant Karamsi (who was the testator's nephew), and he devised the residue of his estate to him.

In April, 1887, the executors brought this suit to have the will construed. The plaint (*inter alia*) prayed that the rights and interest of the second defendant Karamsi Mádhawji in the testator's estate might be ascertained and declared.

Farran, J., held that upon the second defendant's adoption by Ládkávahu he would become entitled to the residue of the testator's estate to be made over to him on his attaining the age of twenty-one. No decision, however, was given as to the *quantum* of the estate taken by Karamsi in the residue. The learned Judge also found that until his adoption Karamsi Mádhawji was not entitled to the whole or any part of the residue of the said estate. (See I. L. R., 12 Bom., at pp. 201-2.)

On the 22nd December, 1894, the second defendant Karamsi Mádhawji filed a petition of review in which he set forth the portions of the decree to which he objected, and stated that at the date of the decree he was a minor and had only recently, *viz.* on the 14th December, 1894, attained the age of eighteen years. The following are the material clauses of the petition:—

“That the said Karamsi Mádhawji is advised and believes that the said decree should in accordance with the practice of Courts of equity have provided that he should be given an opportunity, after attaining his age of majority, of showing cause against the said decree in so far as it affected his interests, and that according to the said practice of the Court of equity the said Karamsi Mádhawji should have been

allowed a period of six months at least from the date of his attaining his majority for the purpose of showing cause as aforesaid.

"5. That the said Karamsi Mádhowji is advised that by reason of the omission of the said provision from the said decree there is an error apparent upon the face of the record entitling him to a review of the said decree and judgment upon which it was founded.

"6. That the father of the said Karamsi Mádhowji is a poor and illiterate man and has no means sufficient to enable him to obtain proper legal advice, and that the said Karamsi Mádhowji was, when he attained his majority, wholly dependent upon his said father, and had not the means of obtaining legal advice as to his rights in respect of the said decree, and has only obtained funds for the purpose of making this application and the further prosecution of legal proceedings through the assistance of a friend who declined to advance any money for the purpose aforesaid until the opinion had been obtained as to the chances of success from a barrister of his own selection whose opinion was received in Bombay on or about the 16th of December, 1894.

"7. That by reason of the circumstances in the last preceding paragraph set forth, the said Karamsi Mádhowji is advised and submits that he has sufficient cause for not making this application at any earlier date.

"8. That the said Karamsi Mádhowji is aggrieved by the said decree for the following amongst other reasons:—(a) That the said learned Judge held that the adoption of the said Karamsi Mádhowji by the said Ládkaávu was a condition precedent to the accrual of his rights under the said will of the said Kessowji Jádhowji, whereas the said learned Judge ought to have held that the said Karamsi Mádhowji was entitled to the residue of the estate of the said Kessowji Jádhowji irrespective of his adoption or non-adoption by the said Ládkaávu, on the ground that he was named as heir in the said will and took as a personal designation; (b) that the said learned Judge erred in holding that the case was undistinguishable from that of *Shámávahoo v. Dvárádkás*, I. L. R., 12 Bom., 202; (c) that by reason of the magnitude of the property at stake and in the interests of the said Karamsi Mádhowji an appeal should have been preferred against the said decree of the said learned Judge, and the case should, if necessary, have been carried to Her Majesty's Council for final decision, but no step was taken by any of the adult parties to the suit to test the correctness of the decision of the said learned Judge; (d) that the said Ládkaávu was, in fact, ready to adopt the said Karamsi Mádhowji as directed by the said will of the said Kessowji Jádhowji, and the parents of the said Karamsi Mádhowji were ready to give him in adoption, when the said Ládkaávu being on a pilgrimage suddenly died, and the said Karamsi Mádhowji was deprived of all chance of taking as heir of the said Kessowji Jádhowji according to the provisions of the said will, unless the said decree of the said learned Judge were varied or reversed in appeal.

"The said Karamsi Mádhowji, therefore, prays that a review of the said decree may be granted, and that the said decree may be rectified, and that he may be afforded an opportunity of showing cause against the said decree."

On the presentation of the above petition a rule nisi was granted calling on the plaintiffs to show cause why a review of

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judgment should not be granted. The rule now came on for hearing.

*Macpherson and Inverarity* for the plaintiffs showed cause. They relied on the affidavits and cited the following authorities:—Limitation Act (XV of 1877), Sec. 5, and Sch. II, art. 162; Seton on Decrees, Vol. II, p. 830; Simpson on Infants, p. 511; Mayne's Hindu Law (5th Ed.), para. 197; *Mungnirám v. Mohunt Gursahai*<sup>(1)</sup>; *Mirali v. Rehmubhoy*<sup>(2)</sup>.

*Lang* (Advocate General) and *Starling, contra*:—A review is the proper remedy under the circumstances—*Kelsall v. Kelsall*<sup>(3)</sup>. An infant may within six months after he attains his majority apply to set aside an order passed against him during minority—*Musleah v. Musleah*<sup>(4)</sup>. They cited *Penny v. Phillips*<sup>(5)</sup>; *Srimati Padmamoni v. Srimati Jagdamba*<sup>(6)</sup>.

FARRAN, J.:—In this suit, which was a suit for the construction of the will of the late Kessowji Jádhowji, a decree was passed on the 1st October, 1887, declaring (*inter alia*) that the defendant Karamsi Mádhowji was not entitled to the residue of the estate of the testator, or to any sum for his maintenance, or education, until his adoption. The defendant Karamsi Mádhowji was a minor at the date of that decree, but was represented by his guardian *ad litem*, his father Mádhowji Katchra, who put in a written statement and instructed counsel at the hearing on the minor's behalf.

On the 22nd of December last, Karamsi Mádhowji, having then attained his majority, presented a petition for review of the above decree and obtained a rule *nisi*, against which cause was shown by the plaintiffs on Thursday last.

The petition states that Karamsi Mádhowji attained the age of eighteen years on or about the 14th of December, 1894. As originally drawn, it stated that he had recently attained that age, and its sixth paragraph shows that when the petition was drafted it was intended to excuse the delay between his coming of age and the presentation of the petition by the poverty of his father, the

(1) L. R., 16 Ind. Ap., 195.

(4) Boulnois Rep., 58, 234.

(2) I. L. R., 15 Bom., 594.

(5) 17 Ves., 178

(3) 2 M. and K., 409.

(6) 6 Beng. L. R., 134.

necessity of obtaining assistance from a friend, and the need which the friend felt of obtaining an opinion from counsel of his own, situate out of Bombay. The plaintiffs have produced a birth certificate which shows that a son was born to Mádhowji Katchra on the 27th May, 1876. This, coupled with the entry in the books of the testator under date the 5th June, 1876, which shows that a customary present was then made to Mádhowji Katchra on the birth of a son, with the fact that the petition as originally drawn is only consistent with the boy having attained his majority some months before the 14th of December, 1894, and with the circumstance that no certificate of the boy's birth in December, 1876, is produced on his behalf, leaves no doubt on my mind, notwithstanding the affidavits of Mádhowji Katchra and Mánakbái, that the boy was born on or about the 27th of May, 1876, and that consequently he attained his majority on or about the 27th of May, 1894.

The main ground upon which the petition of review is based is that the decree does not provide that the defendant Karamsi Mádhowji should have an opportunity of showing cause against it, in so far as it affects his interest, after his attaining majority. This, it is contended, is a mistake or error apparent on the face of the decree. I am unable to accept that contention. The Code of Civil Procedure neither in its chapter relating to minors (Ch. XXXI) nor elsewhere contains any provision for the giving of such an opportunity to a minor, nor has it been the practice of this Court to insert such a reservation in favour of minors in its decrees. I have never in the course of my experience known it to be done, and I much doubt whether it is in the power of the Court so to reserve a minor's rights. In the judgment of the Privy Council in *Watson v. Collector of Rájsháhye*<sup>(1)</sup>, it was pointed out that the Courts in India had not the power which Courts of equity in England occasionally exercise of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. That was a mofussil case under the old Code; but the new Code, which has been made applicable to the High Courts, is similar in this respect, and I apprehend that the observation of

(1) 13 Moo. Ind. Ap., 160.

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the Privy Council would now be applicable to all Indian Courts. Similarly I think that the Courts in India after deciding an issue in which an infant, party to a suit, is interested, have no power to reserve to the infant the right of questioning such decision. The Code makes elaborate provisions for having infants' interests duly protected, but does not, in my judgment, extend this particular form of protection to them. At all events I am clear that a decree is not erroneous for not containing such a provision when the issue in which the infant is interested has been fully gone into and argued before the Court.

I have not been able to satisfy myself under what circumstances the reservation of infants' rights is inserted in decrees in Courts of equity in England. In the two cases referred to in Simpson on Infants—*Elsey v. Lutyens*<sup>(1)</sup> and *Lane v. Hardwich*<sup>(2)</sup>—the infant's common answer only was put in and the infant's case was treated as not having been gone into. It may be that it is under such circumstances only that this reservation is inserted. In foreclosure suits it appears to be the practice to pass only a decree *nisi* against an infant defendant, giving him time after he comes of age to show cause against the decree: Seton on Decrees, Vol. II, p. 711 (Ed. 1879).

It has been contended that without such a reservation an infant may show cause against a decree of the High Court or put in a new defence after attaining his majority. It was the practice in Courts of equity in England to allow an infant within six months after attaining majority to show cause against a decree passed against him. Whether this rule prevailed down to 1879 (the date of the edition of his work above referred to) Mr. Seton says was open to some question. Simpson in his work on Infants does not notice this as a privilege of infants still subsisting; but whether it exists in English Courts or not, I feel quite clear that it is not one which is preserved to infants by the Code of Civil Procedure. In truth, a decree passed against an infant properly represented is binding upon him like a decree passed against an adult, but it is open to the infant to impeach such decree by a separate suit in cases where his guardian has been guilty of fraud or negligence

(1) 8 Hare, 159.

(2) 9 Beav., 148.

in allowing the decree to be passed against him. For the former part of this proposition I refer to *Mungnirdam v. Mukunt Gursahai*<sup>(1)</sup> and *Eshan Chundra v. Nundamoni*<sup>(2)</sup>, and for the latter portion of it to *Mirali v. Rehmoobhoy*<sup>(3)</sup> and *Lalla Sheo v. Ramnandan*<sup>(4)</sup>.

The present application must, therefore, be treated like all other applications for review, save that the Court might perhaps scan with a more indulgent eye the grounds for review made by a defendant seeking to set right a decree passed against him in his infancy, than it would do in the case of an adult litigant.

The first objection made to the application is that it is barred by limitation under article 162 of the Limitation Act (XV of 1877). Having regard to the date at which the applicant attained his majority, which I have found to be the 27th May, 1894, there is no doubt but that the application is out of time. On the other side I am asked to say under section 5 of the Act that there has been sufficient cause shown for the application not being made in time. This will be more conveniently dealt with after I have considered the grounds for the application on its merits. Independently, however, of the objection to the decree in form which I have already dealt with, the petition of review does not disclose any ground, other than a puerile one, for supposing that there has been a mistake made in the decree; nor has it been contended before me that any fresh argument can be adduced or new cause shown for altering my decision. The same counsel supports this application who originally argued for the infant. That being so, it is clear that the review is sought, not in the expectation that the decree will or ought to be varied at the rehearing, but in order that the defendant Karamsi may have an opportunity afforded to him of appealing from the decree when it is re-affirmed. I ought not, I think, under these circumstances to extend the time for allowing the application to be made under the provisions of section 5. To do so would be to arrogate to myself the functions of an Appellate Court and in effect to extend the time for appealing. Without, therefore, expressing an opinion whether I should

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(1) L. R. 16 Ap., 195.

(3) I. L. R., 15 Bom., 594.

(2) I. L. R., 10 Calc., 357.

(4) I. L. R., 22 Calc., 8.

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deem the grounds put forward in the petition sufficient to warrant me under the peculiar circumstances of the case in holding that the applicant had sufficient cause for not making the application in time I must refuse it. I presume that the executors will not ask for costs.

*Rule discharged.*

Attorneys for the plaintiff:—Messrs. *Little, Smith, Nicholson and Bowen.*

Attorneys for the defendant:—Messrs. *Nanu and Hormasji.*

## APPELLATE CIVIL.

*Before Mr. Justice Jardine and Mr. Justice Ránade.*

1894.

July 10.

GOPAL NA'NA' SHET (ORIGINAL JUDGMENT-DEBTOR AND DEFENDANT),  
APPELLANT, v. JOHARMAL (DECREE-HOLDER, ASSIGNEE AND PLAINTIFF),  
RESPONDENT.\*

*Decree—Execution—Stay of execution on giving security—Subsequent execution—Default of judgment-debtor—Surety—Liability of surety in execution.*

The execution of a decree for partition was stayed pending appeal on the defendant giving security that he would satisfy such decree as might ultimately be passed against him by the Appellate Court. That Court confirmed the decree of the lower Court. In obedience of the decree the judgment-debtor deposited in Court certain property in his possession consisting of bonds, decrees and other articles. But as he did not produce the whole of the property as ordered by the decree, the Court directed execution to proceed against his surety. The surety paid into Court the full sum stipulated in the surety bond. Thereupon the judgment-debtor applied that the property deposited by him in Court should be valued and made over to the decree-holder in part satisfaction of the decree *pro tanto*, and that only the balance then remaining due should be paid out of the money paid in by the surety. The Court refused, holding that the decree-holder was entitled to be paid over the whole sum paid in by the surety. On appeal,

*Held* (reversing the order of the lower Court) that the property already produced in Court by the judgment-debtor should be first applied towards the satisfaction of the partition decree, and that if the decree-holder did not obtain complete satisfaction in this way, the money paid in by the surety should then be made available.

APPEAL from the decision of Ráo Bahádur G. V. Bhánap, First Class Subordinate Judge of Násik, in dharkást No. 166 of 1890.

\*Appeal No. 43 of 1894.