

1919.

YIRAMGAUM
MUNICI-
PALITYv.
BHAI HANU
DANODAR.

my mind as to how this question of a street ever was raised. I suppose something was assumed by both parties before the District Judge that is not assumed here. I think, therefore, the appeal must be allowed as proposed.

Decree reversed.

J. G. R.

APPELLATE CIVIL.

Before Mr. Justice Shah and Mr. Justice Hayward.

1919.

August 26.

SADASHIV RAMCHANDRA DATAR, AND ANOTHER (ORIGINAL DEFENDANTS),
APPELLANTS v. TRIMBAK KESHAV VAZE (ORIGINAL PLAINTIFF), RES-
PONDENT.^o

Civil Procedure Code (Act XIV of 1882), section 443—Decree in terms of award—Decree passed by consent of minor's mother—Mother not appointed guardian ad litem—Decree not binding on the minor.

In 1896, the plaintiff's father mortgaged his house to defendant No. 1 for Rs. 1,000. After his death, his widow, on behalf of her minor son (plaintiff), referred the mortgage claim to arbitration. The arbitrators settled the claim at Rs. 1,200. Defendant No. 1 applied to the Court for a decree in terms of the award; and the widow having consented, a decree was passed. In execution of the decree the house was put up to sale and purchased by defendant No. 1 for Rs. 1,700. The plaintiff attained majority in September 1911 and sued in August 1912 for a declaration that the decree was null and void, and for taking accounts of the mortgage of 1896 under the provisions of the Dekkhan Agriculturists' Relief Act (XVII of 1879). He alleged that the arbitrators in taking accounts did not give him the benefit of the Dekkhan Agriculturists' Relief Act; and that in the Court proceedings that followed on the award no guardian was appointed for him; and that at the Court sale the house was sold at an undervalue :—

Held, that inasmuch as the plaintiff's interest had not been duly protected the absence of a guardian *ad litem* in the Court proceedings of 1901 rendered the decree null and void under section 443 of the Civil Procedure Code of 1882.

Held, therefore, that the plaintiff was entitled to accounts of the mortgage of 1896, under the provisions of the Dekkhan Agriculturists' Relief Act, 1879.

SECOND appeal from the decision of R. B. Milne, Assistant Judge of Poona, varying the decree passed by R. B. Gupte, Joint Subordinate Judge at Poona.

Suit for declaration and accounts.

In 1896, the plaintiff's father mortgaged his house for Rs. 1,000 to defendant No. 1.

The plaintiff's father died in 1899, leaving him surviving a widow and a son (plaintiff).

In 1901, the plaintiff's mother and defendant No. 1 referred the mortgage claim to arbitration. The arbitrators took accounts and found that the plaintiff's mother was liable to pay Rs. 1,000 for principal and Rs. 200 for interest and made an award on the 4th May 1901.

On the 12th June 1901, defendant No. 1 applied to the Court for a decree in terms of the award. The next day the plaintiff's mother presented an application to the Court signifying her consent to the decree being passed. Neither the procedure prescribed by section 443 nor that laid down by section 462 of the Civil Procedure Code of 1882 was followed. The Court eventually passed on the 19th June 1901 a decree in terms of the award.

In execution of the decree the house was put up to sale and purchased by defendant No. 1 for Rs. 1,700 in November 1902.

The plaintiff attained majority in November 1911 and on the 10th August 1912 filed the present suit to obtain a declaration that the decree was null and void, and to have accounts taken of the mortgage of 1896 under the provisions of the Dekkhan Agriculturists' Relief Act, 1879. He alleged that the arbitration proceedings were bad as plaintiff's mother was coerced to them by undue influence; that the decree was void as plaintiff who was

1919.

SADASHIV
RAM-
CHANDRA
v.
TRIMBAK
KESHAV.

1919.

SADASHIV
RAM-
CHANDRA
v.
TRIMBAK
KESHAV.

a minor was not properly represented in the Court proceedings ; and that the Court sale was ineffectual as defendant had purchased the house fraudulently for a grossly inadequate price.

The trial Court was of opinion that the award was ineffectual as the accounts were not properly taken ; and that the decree was void as the procedure required by sections 433 and 462 of the Civil Procedure Code was not followed. The Court therefore held that both the award and the decree were null and void. It took accounts of the mortgage of 1896 under the provisions of the Dekkhan Agriculturists' Relief Act and found that Rs. 1,700 were due. The amount was directed to be paid in annual instalments of Rs. 400 each.

On appeal, the lower appellate Court also came to the conclusion that the decree and the sale in pursuance thereof were inoperative. The accounts were taken afresh and Rs. 1,425-13-9 was found due which sum was made payable in five equal annual instalments.

The defendants appealed to the High Court.

Jayakar with V. V. Bhadkamkar, for the appellant.—The award accepted by the plaintiff's mother as the guardian of the minor plaintiff and the sale in execution of the decree thereunder cannot be set aside unless fraud was proved. No undue influence or fraud in the award proceedings or sale has been proved. The decree in terms of the award was obtained on the 19th June 1901. An application to execute the decree was filed on the 19th December 1901. The plaintiff's mother applied for the stay of proceedings offering to pay up the decretal amount on 17th of March 1902 ; the application was granted but the mother did not pay up the amount and the sale was held in November 1902. It would, therefore, be inequitable to set aside the sale at the plaintiff's instance after so many years. The fact that the mother

took every precaution must non-suit the plaintiff. The fact that the arbitrator did not allow any instalments to the plaintiff is only a coincidence. As there was no fraud or collusion the parties should abide by the arbitrator's decision : see *Balaji v. Nana*⁽¹⁾.

As regards the appointment of a guardian by the Court, I submit, first, that there is nothing to show that there was not such an appointment ; no point of this has been made by the plaintiff in the plaint. Even if that be so, it is only an irregularity which does not vitiate the proceedings under the circumstances of this case : see *Walian v. Banke Behari Pershad Singh*⁽²⁾ ; *Vithaldas v. Dattaram*⁽³⁾ ; *Mahadev Balkrishna Kelkar v. Krishnabai*⁽⁴⁾.

Patwardhan with V. D. Limaye, for the respondents:—There is a finding, in this case, recorded by both the lower Courts that the reference to the arbitration was not for the benefit of the minor and as the finding of facts is binding on this Court, the award and the execution proceedings thereunder are rightly set aside.

There was no appointment of the mother as a guardian for the suit. This defect is not only an irregularity but makes the whole proceedings illegal and void : see *Partab Singh v. Bhabuti Singh*.⁽⁵⁾

Further, when an application was made to file the award and the mother appeared and consented without any objection to get a decree the transaction amounted to an agreement within the meaning of Order XXXII, Rule 7 of the Civil Procedure Code and sanction is necessary of the Court for such an agreement. In the

⁽¹⁾ (1903) 27 Bom. 287 at p. 291.

⁽²⁾ (1901) 26 Bom. 298.

⁽³⁾ (1903) 30 Cal. 1021.

⁽⁴⁾ (1896) P.J. 609.

⁽⁵⁾ (1913) L. R. 40 I. A. 182.

1919.

SADASHIV
RAM-
HANDRA
v.
TRIMBAK
KESHAV.

1919.

SADASHIV
 RAM-
 CHANDRA
 v.
 TRIMBAK
 KESHAV.

present case, no sanction was taken as required by law and therefore, these proceedings were void and the sale thereunder cannot bind the plaintiff : see *Hanmantram Radhakison v. Shivnarayan*⁽¹⁾.

Bhadkamkar, in reply:—As no fraud is proved in the arbitration proceedings and as that is a finding arrived at by both the lower Courts, the award, the decree and the sale thereunder should not be set aside.

SHAH, J. :—The facts which have given rise to this second appeal are these :

The father of the present plaintiff mortgaged the house in suit on the 4th of December 1896 to defendant No. 1 for Rs. 1,000 with interest at 6 per cent. The plaintiff's father died in 1899 leaving a son, the present plaintiff, and a widow the plaintiff's mother. In 1901 the mortgage claim was referred to arbitration by the defendant No. 1 and the mother of the plaintiff who was then a minor. An award was made in May 1901 under which the minor represented by his mother was to pay Rs. 1,000 and Rs. 200 and odd as interest with further interest at 6 per cent. on the principal within one month and the property was to be sold in case the money was not paid within the time specified. The present defendant No. 1 applied to the Court on the 12th of June 1901 to have a decree in terms of the award, and the present plaintiff's mother filed a statement on the 13th of June 1901 in which she consented to a decree being passed in terms of the award and stated that she had no objection to the award being filed in Court. She appeared through a pleader. A decree was accordingly passed in terms of the award on the 19th of June 1901. In execution of the decree the house was sold in November 1902 and purchased by the present defendant No. 1 for Rs. 1,700.

⁽¹⁾ (1918) 43 Bom. 258 at p. 269.

On the 10th of August 1912 the plaintiff after attaining majority filed the present suit to set aside the decree passed in terms of the award. The defendants contested the suit and several issues were raised representing the rival contentions between the parties.

The trial Court on a consideration of the evidence found that the plaintiff was not bound by the decree on the award, nor by the sale in execution of that decree and that he was entitled to the relief on the footing of the original mortgage of 1896. The accounts were taken under the Dekkhan Agriculturists' Relief Act as the plaintiff was an agriculturist, and a decree was passed in respect of the amount that was found due to the mortgagees on the mortgage.

The defendants appealed to the District Court of Poona, and the learned Assistant Judge has affirmed the decision of the trial Court on the main point that the plaintiff was not bound by the decree on the award and subject to a certain variation in the amount payable to the mortgagees has upheld the decree of the trial Court.

The defendants have appealed to this Court, and it is urged on their behalf that the decree is binding upon the present plaintiff. It is urged that it was open to the mother as the natural guardian of the plaintiff to refer the matter to an arbitration and that as neither fraud nor undue influence is proved, the award must be taken to be binding upon the parties. It is also urged that though there may have been some irregularity in the proceedings to file the award in Court in so far as no formal order was made appointing the mother as the guardian of her minor son, under the circumstances it must be taken to be a mere irregularity, which has not in any way prejudiced the interests of the minor.

1919.

SADASHIV
RAM-
CHANDRA
v.
TRIMBAK
KESHAV.

1919.

SADASHIV
RAM-
CHANDRA
v.
TRIMBAK
KESHAV.

It is conceded before us that apart from this objection relating to the decree on the award there is no further objection to the decree as passed by the lower appellate Court; that is, if the plaintiff is entitled to have relief on the footing of the mortgage of 1896 without any reference to the award proceedings, the decree now under appeal is not open to any objection. The principal question, therefore, is whether the lower Courts are right in holding that the decree in terms of the award is not binding upon the minor and that it is liable to be set aside at his instance.

It has been urged in support of the view taken by the lower Courts that there was no appointment of a guardian as required by section 413 of the Code of 1882 and that all the proceedings which resulted in the decree and the sale of the property are null and void, and further that under section 462 of the Code of 1882 corresponding to Order XXXII, Rule 7 of the present Code the leave of the Court for filing the award was necessary and that in the absence of such leave the decree based on the award is voidable at the instance of the minor.

The lower appellate Court has found that in the present case there has been a serious prejudice to the minor, as he has been deprived effectively of the benefit of the provisions of the Dekkhan Agriculturists' Relief Act, as the full amount was found payable by him without taking any account under the Dekkhan Agriculturists' Relief Act, as no instalments were allowed and as the time fixed for the payment of the whole sum was only one month. The lower appellate Court has not gone into the question of the valuation of the house and has not expressed any opinion on the finding recorded by the trial Court that the house was in fact sold for nearly half the amount of its real market value.

I shall first deal with the point relating to the irregularity in the proceedings initiated by the present defendants on the award arising in consequence of no appointment of a guardian for the minor defendant having been made in those proceedings. It is clear that under section 443 of the Code then in force it was incumbent upon the Court to appoint a proper person to be the guardian for the minor defendant in those proceedings which under the provisions of the Code were to be treated as a suit. All the papers connected with those proceedings are before the Court; and it is clear from those papers—and that is the conclusion reached by the lower appellate Court—that as required by section 443 no appointment of the mother or any other person as the guardian of the minor defendant was made. The question is as to the effect of this omission to appoint a guardian. When due regard is had to all the circumstances connected with these proceedings, it is difficult to avoid the inference that the minor's interests were not protected. The appearance of the mother as soon as the application for a decree in terms of the award was presented through a pleader, who is now stated by the mother to have been selected for her by the present defendant No. 1, and her consenting to a decree being passed in terms of the award are circumstances of some suspicion. When we have due regard to the terms of the award, and the subsequent result of the decree, namely, a sale for an undervalue in favour of the defendants, the conclusion of the lower appellate Court that the minor's interest had not been duly protected must be accepted. The inference is clear that the minor was not effectively represented in the proceedings initiated by the present defendants in 1901 and that the decree passed in those proceedings on the award and the subsequent proceedings in execution resulting in the sale of the property

1919.

in favour of the defendant No. 1 must all be treated as null and void.

SADASHIV
RAM-
CHANDRA
v.
TRIMBAK
KESHAV.

" It is not necessary to refer to all the decisions which have been cited in the course of the argument: but I may refer to the case of *Partab Singh v. Bhabuti Singh*⁽¹⁾ as supporting the above conclusion. The appellants have relied upon the decision in *Mussamat Bibi Walian v. Banke Behari Pershad Singh*⁽²⁾; but the *ratio decidendi* seems to me to be against the appellants. Their Lordships clearly point out in that case that it is obligatory upon the Courts to comply with the provisions of section 443, and the irregularity in that case was condoned on the ground that on the particular facts, the minor was held to have been effectively represented.

In the present case the question whether the omission on the part of the Court to comply with the provisions of section 443 should be condoned on a similar ground or not is a matter which must be decided with reference to the facts of this case. Both the Courts have taken the view on the facts against the defendants, and it seems to me that the conclusion reached by the lower Courts on this point is right.

In view of this conclusion it is not necessary to consider the further question which has been argued at some length in this appeal as to whether the leave of the Court under section 462 was necessary to give effect to the consent of the mother that a decree must be passed in terms of the award. This question involves the consideration of the point as to whether when the mother appeared through a pleader on the 13th of June 1901 and gave her consent to a decree being passed in terms of the award she acted in pursuance of any agreement between her and the defendant

⁽¹⁾ (1913) L. R. 40 I. A. 182.

⁽²⁾ (1903) L. R. 30 I. A. 182.

No. 1 or not. If the facts could reasonably give rise to the inference that there was such an agreement between the parties, no doubt the provisions of section 462 would apply and the absence of any leave of the Court for such an agreement with reference to the suit to file the award in Court would entitle the minor on attaining the age of majority to avoid the decree. Whether there was such an agreement between the plaintiff's mother and the defendant No. 1 is really a question of fact. It is urged for the plaintiff that the facts justify an inference as to such an agreement between his mother and the defendant No. 1 and that the decision in *Mahadev Balkrishna Kelkar v. Krishnabai*⁽¹⁾ supports their contention. On the other hand it is urged that apart from the agreement to refer the matter to an arbitration, there is no further agreement with reference to the suit to file an award in Court and Mr. Jayakar has relied upon the recent decision of the Full Bench in *Hanmantram Radhakison v. Shivnarayan*⁽²⁾. It is not necessary to pursue this point or to discuss the cases which have been cited with reference to the applicability of section 462 to facts such as we have in this case.

The appeal, therefore, fails and the decree of the lower appellate Court is confirmed with costs.

The cross-objections which are not pressed are dismissed with costs.

HAYWARD J. :—I agree. An arbitration can be entered into on behalf of a minor by his natural guardian provided it is for his benefit or reasonable and proper for the protection of his property, but the award would not be binding on him if that were not the case. The question of its binding effect could of course be decided in subsequent proceedings in which the minor was properly represented by his guardian. Such proceedings would include

⁽¹⁾ (1896) P. J. 609.

⁽²⁾ (1918) 43 Bom. 258.

1919.

SADASHIV
RAM-
CHANDRA
v.
TRIMBAK
KESHAV.

1919.

SADASHIV
RAM-
CHANDRA
v.
TRIMBAK
KESHAV.

those taken for filing the award, because the jurisdiction to file it would depend upon the question whether or not the award had been based upon due authority given on behalf of the minor by his natural guardian. It was held that that was a question to be decided in such proceedings in decisions on section 526 of the old Civil Procedure Code and the substance of those decisions has been incorporated in the opening words "where the Court is satisfied that the matter has been referred to arbitration" of section 21 of the Second Schedule of the present Civil Procedure Code. Where the question of the legality of the reference is not taken in such proceedings the ordinary inference would be that it was held to have been legal, so that here where the legality was not called in question, the point to be considered would be whether the minor was duly represented in the proceedings by his natural guardian, i.e., in the proceedings taken to file the award. Now a minor would not ordinarily be properly represented unless his guardian was formerly appointed as such by the Court. But on the other hand where the guardian was tacitly accepted throughout the proceedings as a proper person representing the minor and where the irregularity of not formally making the appointment in writing had not affected the merits, then no doubt the minor would be held to have been duly represented by his guardian by reason of the provisions of section 578 of the old Procedure Code which is now section 99 of the present Code. So that the real question in my opinion has been reduced to this whether the minor was or was not prejudiced by the irregularity of his natural guardian, his mother, not having been formally appointed by the Court. It has been definitely held that there was prejudice by the first appeal Court and it seems to me difficult for us to say that that finding is wrong in view of the several circumstances which

were brought to light. It was thus found that the ordinary procedure for settling the dispute between the parties would have been one in which the whole history of past transactions would have been inquired into under the provisions of the Dekkhan Agriculturists' Relief Act and that in place of this ordinary procedure the special procedure was adopted of referring the matter to the sole arbitration of an arbitrator specially selected by the minor's opponents. It was *prima facie* not for the benefit of the minor to substitute this special procedure before the special Judge chosen by his opponents, and this *prima facie* conclusion was proved to have been correct by the subsequent result. The award was for the whole amount claimed and ordered it to be paid within one month instead of the six months which would have been the least allowed by the ordinary procedure, quite apart from the question whether instalments could not have been granted under the provisions of the Dekkhan Agriculturists' Relief Act. Then the sale that resulted was far from satisfactory. The property was sold for Rs. 1,700 and was bought by the minor's opponents. The real value would appear to have been anything from Rs. 2,500 to Rs. 3,500. These latter facts were elicited at the trial though they have not been referred to in the judgment of the first appeal Court. It seems to me that that is sufficient to justify us in holding that the irregularity of not formally deciding whether the minor's natural guardian, his mother, was or was not a proper person to represent him in the proceedings did affect the merits. It would seem to me that this circumstance tends strongly to show that the irregularity did most certainly affect the merits and prejudice the minor. If the question had been carefully considered as it ought to have been, there is every probability that some other guardian would have been appointed such as the Nazir of the

1919.

SADASHIV
RAM-
CHANDRA
v.
TRIMBAK
KESHAY.

1919.

SADASHIV
RAM-
CHANDRA
v.
TRIMBAK
KESHAV.

Court who would have fully enquired into the circumstances of the arbitration. It seems to me that on this ground we ought to uphold the decree of the first appeal Court.

It is not necessary in these circumstances to consider the other question argued before us; that is to say, whether there was an agreement between the minor's natural guardian, his mother, and the minor's opponents that the award should be filed without objection in Court. If there had been any such formal agreement, then no doubt it would have been necessary to have obtained the formal sanction of the Court. But it is not necessary here to discuss that matter further as upon the other ground it seems to me clear that we ought to uphold the decree of the first appeal Court and dismiss this appeal with costs.

Decree confirmed.

R. R.

APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice and Mr. Justice
Batchelor.*

1917.

July 11.

HATHISING JEEBHAI BARIA AND OTHERS (ORIGINAL DEFENDANTS), APPELLANTS v. KUBER JETHA PATIL AND OTHERS (ORIGINAL PLAINTIFFS) RESPONDENTS.*

Land Revenue Code (Bombay Act V of 1879), section 135 J. —Record of Rights, entries in—Presumption of correctness—Retrospective effect.

The provisions of section 135 J of the Bombay Land Revenue Code, 1879, are not retrospective with regard to entries which for the purpose of determining the rights of the parties were until after the year 1913 innocuous.

APPEAL from an order passed by R. S. Broomfield, Joint Judge at Ahmedabad, reversing the decree passed by and remanding the suit to I. D. Munim, Subordinate Judge at Godhra.

* Appeal No. 54 of 1916 from Order.