

Birbhan vs Harmukh Rai on 19 November, 1951

Equivalent citations: AIR1952ALL240, AIR 1952 ALLAHABAD 240

ORDER

Harish Chandra and Sapru, JJ.

1. A question of law arises in this case which it seems necessary to refer to a Full Bench. A similar question arose in the case of *Mariam v. Amna*, 1936 ALL. L. J 1333 and the matter was referred to a Full Bench and the Full Bench gave an answer. Subsequently, a similar point of law arose in the Privy Council case of *Ghhabba Lal v. Kallu Lal*. 1946 ALL. L J 254 and certain observations contained in the judgment of their Lordships of the Judicial Committee seem to throw doubt as to the correctness of the answer given by the Full Bench in *Mariam's* case.

2. We, therefore, direct that this case be laid before the Hon'ble the Chief Justice for the constitution of a Full Bench for the decision of the following questions :

(1) Does the omission by the next friend of a minor party to a suit to obtain the leave of the Court as required by Sub-rule (1) of Rule 7 of Order 32 Civil P. C. to enter into an agreement to refer the case to arbitration render the order of reference and the award void or only voidable at the option of the minor ?

(2) In case such an order of reference and the award are only voidable at the option of the minor, is it necessary for the minor to file a suit in order to avoid them within a certain period of limitation ? If so, what Article of the Indian Limitation Act would govern such a suit ?

Opinion of the Full Bench Sapru J.

3. Two questions have been referred to this Full Bench by a Bench of this Court. They are as follows :

1. Does the omission by the next friend of a minor party to a suit to obtain the leave of the Court as required by Sub-rule (1) of Rule 7 of Order 32, Civil P. C. to enter into an agreement to refer the case to arbitration render the order of reference and the award void or only voidable at the option of the minor ?

2. In case such an order of reference and the award are only voidable at the option of the minor, is it necessary for the minor to file a suit in order to avoid them within a certain period of limitation ? If so, what Article of the Indian Limitation Act would govern such a suit ?

The opinion of the Bench which 'made the reference was that certain observations contained in the judgment of their Lordships of the Judicial Committee in the Privy Council case of *Ghhabba Lal v.*

Eallu Lal, 1946 A. L. J. 254 (P. c.) were somewhat irreconcilable with the answer given by a Full Bench of this Court in the case of Mariam Bibi v. Amna Bibi, I. L. R. (1937) ALL. 317. In order to answer this question satisfactorily it may be convenient to give a few facts relating to this case.

4. The plaintiff Birbhan claims to be the adopted son of Lala Earn, whose father was Kalyan Das. Kalyan Das had two sons, namely, the plaintiff's adoptive father Lala Ram and Munni Lal. After Lala Ram's death his wife, St Bitto, adopted the plaintiff and thereafter a suit was filed on behalf of the plaintiff who was a minor by his mother who was acting as his next friend in 1929. That suit was numbered as suit No. 12 of 1929 and was for a partition of the family property. In this suit there was a reference to arbitration by the parties. It may be mentioned that this reference was made without compliance with the provisions of Order. 32, Rule 7 (1), Civil P. C. that is to say, without the leave of the Court. The arbitrator gave his award on 29-6-1929 and the award was made a rule of the Court on 18-7-1929.

5. The suit out of which the present appeal, which is pending before a Bench, arises was filed on 14-11-1941 by the plaintiff who is not sure as to whether he is a minor or a major, for partition of the family property. It is under these circumstances that the two questions have arisen.

6. The first question which the Bench referring this case has invited us to answer is whether the decree of 18-7-1929 is, in all the circumstances of this case, a nullity or not. On this point our attention has been invited to the provisions of Order. 32, Rule 7 of the Code which we quote below :

"7 (1) No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

7. As has been mentioned before, the agreement referring the case to arbitration on the basis of which the decree was framed in this case was entered into by the next friend of the minor without the leave of the Court expressly recorded in the proceedings. It is argued that the provisions of Rule 7 are mandatory and that there has been no compliance with them. It is urged that Sub-rule (1) of Rule 7 has the effect of making an agreement or compromise on behalf of a minor which has been entered into by a next friend or guardian without the leave of the Court expressly recorded in the proceedings a complete nullity. It is urged that this being so, it is unnecessary for the minor to bring any suit or to have the agreement or compromise set aside. There would be force in this argument if Clause (1) was read without any reference to Clause (2) of Rule 7. It is, however, unnecessary to go further into this question as we think that the point which has been urged before us is covered by authorities which are binding on this Court. In the case of Mariam Bibi v. Amna Bibi, (1936 ALL. L. J. 1333), it was held by a Full Bench of this Court that the omission of the next friend or the guardian ad litem of a minor party to obtain the leave required under Rule 7 (1) merely renders the order of reference, the award and the decree based upon it voidable at the option of the minor as against all the parties; but not voidable at the option of the other parties thereto as against the

minor. In other words, the effect of a non compliance of the mandatory provisions of Rule 7 (1) is not to make the agreement or compromise which in this case is the award decree null and void, but voidable at the option of the minor. This was the interpretation which was placed by a Bench of this Court and the argument which has necessitated a reference to this Court is that this view is not in agreement with the opinion of their Lordships of the Judicial Committee in the case of Chhabba Lal v Kallu Lal, (1946 ALL. L. J. 254 P. C.) (ubi supra). In that case their Lordships observed at page 256 that :

"In their opinion all the powers conferred upon the Court in relation to an award on a reference made in a suit presuppose a valid reference on which an award has been made which may be open to question. If there is no valid reference, the purported award is a nullity, and can be challenged in any appropriate proceeding."

Learned counsel for the appellant emphasises the fact that the word 'nullity' which has been used with reference to the purported award should be interpreted to mean that it was void ab initio. If the award was void ab initio he contends that it was unnecessary for the plaintiff to have it set aside by a Court of law. On a careful reading of the judgment of their Lordships of the Privy Council, we are of the opinion that there is no force in this contention. It strikes us that the word 'nullity' has been used, if we may respectfully say so, somewhat loosely for a reading of the entire judgment makes it clear that their Lordships' view was not that the agreement or compromise would be ab initio void but merely that it was to be voidable at the instance of the minor. Attention may further be prominently drawn to the following passage of their Lordships which throws light on the meaning to be attached to the word 'nullity' :

"Be that as it may, the rule is imperative and in their Lordships' view its terms must be strictly complied with. Their Lordships agree with the view of the High Court following on this point, a ruling of a Full Bench of the Allahabad High Court in *Mariam Bibi v. Amna Bibi*, I.L.R.(1987) All. 317 disagreeing with certain other Indian rulings, that Order 32, Rule 7 applies to an agreement to refer matters in dispute to arbitration. Such an agreement, which removes the decision of a matter in dispute from the jurisdiction of the Court and refers it to some outside party is clearly an agreement with reference to the suit and not only falls within the terms of the rule, but comes within the mischief at which the rule appears to be aimed. The interests of minors might well be sacrificed by an improper reference to arbitration and it is necessary that their interest be protected by the Court. If minors successfully challenge an agreement to refer as not made in compliance with Sub-rule (1) of Rule 7, it is avoided against all parties under Sub-rule (2)."

The reference to successful challenge by minors can only mean that their Lordships contemplated that it was for the minors to decide whether they will accept or they will reject the agreement or compromise which had been entered into on their behalf by their next friend or guardian ad litem without the consent of the Court. In other words, their Lordships looked upon an agreement or compromise of that nature not as being intrinsically void but as merely voidable at the option of the minors.

8. We may say that we were also referred to a recent decision of the Supreme Court where this question came up for consideration. In delivering the judgment of the Bench, Bose, J. in that case made it clear that if Order 32, Rule 7, is read as a whole it would be found that no next friend or guardian for the suit can enter into an agreement or compromise which would bind the minor unless the Court sanctioned it. According to the view which found favour with the Supreme Court a compromise without the leave of the Court and a decree passed thereon is not a nullity but is merely voidable at the option of the minor. Bose, J. observed that it is necessary to read Order 32 Rule 7 as a whole:

"Sub-rule (2)," says that learned Judge, "contemplates a position where the mandatory provisions of Sub-rule (1) have been ignored. In such a case, the resultant agreement or compromise is not to be held a nullity. It is only voidable. Therefore, it is good unless the minor chooses to avoid it. It follows that a decree or order based on the agreement is also good unless the minor chooses to challenge it. That is the position where there is no sanction of the Court. Heading the two provisions together, the rule merely means this. No next friend or guardian for the suit can enter into an agreement or compromise which will bind the minor unless the Court sanctions it,"

9. It is quite clear from what we have quoted that the case reported in *Mariam Btbi v. Amna Bibi*, I. L. R. (1937) ALL. 317 has now the authority behind it of the Supreme Court, In these circumstances we are bound to accept the view of the Supreme Court as correct.

10. Our attention was also drawn to the case of *Johara Bibi v. Mohammad Sadak Thambi Marakayar*, (1951) 2 Mad. L. J. 50. In this case, after an elaborate discussion the view taken by the learned Judges who decided it was that the absence of sanction on behalf of the minor under Order 32, Rule 7, Code of Civil Procedure, for an agreement to refer the dispute in suit to arbitration has the effect of making a reference a nullity and the award made on such a reference cannot be said to have any legal effect. It is quite clear that the law laid down in this case is not on all fours with that which has found favour with the Supreme Court. It is, therefore, unnecessary to discuss this case any further. We are bound to follow the observations of their Lordships of the Supreme Court and on a full consideration of the relevant law on the point our opinion in regard to question No. 1 is as follows: "In our opinion, the omission by a next friend of a minor to obtain leave of the Court as required by Sub-rule (1) of Rule 7 of the Order 32, Code of Civil Procedure to enter into an agreement to refer the case to arbitration has not the effect of rendering the order of reference and the award, void ab initio, but has merely the effect of rendering it only voidable at the option of the minor." We now come to the second question in this case. That question, shortly stated, is that assuming the award and the decree to be voidable and not void, what is the period of limitation for avoiding it by means of a suit? This question assumes that it is necessary for the minor to file a suit in order to avoid the decree within a certain period of limitation. There can be no doubt that in this case the minor has instituted proceedings for partition and in those proceedings one of the issues is whether any permission of the Court for reference to arbitration on behalf of the minor was necessary and, if so, what is the effect of the permission not having been obtained. It is unnecessary to answer this question as both parties agree that in this particular case the period of limitation will

be three years from the date of attainment of majority by the plaintiff-appellant.

11. These are our answers. They will be sent to the Bench deciding it. No question of costs arises.