Rameshwar Prasad vs Ram Chandra Sharma And Ors. on 31 August, 1950

Equivalent citations: AIR1951ALL372, AIR 1951 ALLAHABAD 372

JUDGMENT

Malik, C.J.

1. The point that has been referred to us for decision is :

> "Whether a decree obtained against a minor is void because the guardian appointed by the Court had been guilty of gross negligence or is it merely voidable?"

2. The reference was made by reason of the fact that there was a difference of opinion on the point between the Oudh Chief Court and the Allahabad High Court before its amalgamation. In Mohammad Baksh v. Allah Din, 17 Luck. 1: (A. I. R. (29) 1942 Oudh 33) a Bench of the Oudh Chief Court -- Bennett and Madeley JJ. -- had held that such a decree was merely voidable at the option of the minor; while in Dwarika Halwai v. Sitla Prasad, I. L. R. (1940) ALL. 344; (A.I.R. (27) 1940 ALI. 256), Bennet and Verma JJ. had held that the decree was null and void. Both. the decisions were, however, said to be based on a Full Bench decision of this Court in Mt. Siraj Fatma v. Mahmud Ali, 54 ALL. 646 : (A. I. R. (19) 1932 ALL. 293 F. B.).

3. The point for consideration before the Full Bench in Mt. Siraj Fatma, v. Mahmud Ali, (54 ALL. 646 : A. I. R. (19) 1932 ALL. 293 F. B.) was whether a minor had a right to institute a suit in the civil Court to avoid a decree or order passed by a competent Court against him on the ground of negligence of his guardian. The question whether such a decree was void or voidable did not directly arise. The Full Bench was of the opinion that a minor had a right to file a suit in the civil Court to avoid such a decree. Certain observations in the judgment of Sulaiman J. were relied upon by Bennet and Verma 33., while certain other observations In the same judgment were relied upon by Bennett and Madeley JJ. of Lucknow.

4. The question whether the minor has a right to file such a suit is not for consideration before us and we need not, therefore, express any opinion on the point. The view of Calcutta, Madras, Lahore and Patna High Courts is that such, a suit is maintainable, while the Bombay High Court has held to the contrary. (See Mahesh Chandra v. Manindra Nath, I. L. R. (1941) 1 Cal. 477 : (A. I. R. (28) 1941 Cal. 401); Egappa Chettiar v. Ramanathan Chettiar, I. L. R. (1942) Mad. 526 : (A. I. R. (29) 1942 Mad. 384); Iftikhar Hussain Khan v. Beant Singh, I. L. R. (1946) Lah. 515: (A. I. R. (33) 1946 Lah., 233 F. B.); Kamakshya Narain Singh v. Baldeo Sahai, A. I. R. (37) 1950 pat. 97 : (27 Pat. 441 F. B); and Krishnadas Padmanabhrao v. Vithoba Annappa, I. L. R. (1939) Bom. 340: (A.I.R. (26) 1939 Bom. 66 F. B.). The Bombay High Court took the view that a plaintiff after he had got a proper

person appointed as guardian-ad-litem of the minor defendant could not be held responsible for the failure of the guardian ad litem to perform his duty and the anxiety of the Courts to protect an infant who cannot protect himself at the expense of finality in suits against infants was to be deprecated. It was pointed out by the learned Judges that in Venkata Seshayya v. Kotiswara Rao, 64 I. A. 17 : (A. I. R. (24) 1937 P. C. 1) their Lordships of the Judicial Committee had held that Section 44, Evidence Act could not be extended to cases of gross negligence and that the provisions of Section 11, Civil P. C. were mandatory. Section 44, Evidence Act I [1] of 1872) is as follows :

> "Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

Their Lordships of the Judicial Committee pointed out that Section 44, Evidence Act, defined with precision the grounds of such avoidance as fraud or collusion, and that negligence or gross negligence could not amount to fraud unless fraud or collusion was the proper inference from the facts. The other High Courts have, however, taken the view that the guardian of a minor is a trustee for the minor and he is under an obligation to look after the best interest of the minor, and if the minor can show that the guardian had not done his duty and the minor's interest was thereby jeopardised, the minor has a substantive right to avoid the decree. These Courts have held that Section 44, Evidence Act was permissive and not prohibitive.

5. As I have already said, we are not called upon to decide the question whether the Full Bench of this Court in Siraj Fatma's case, (54 ALL. 646 : A. I. R. (19) 1932 ALL. 293 F. B.), laid down the correct law. The only point that we have to consider is whether a decree passed against a minor is void or voidable if the guardian ad litem of the minor was negligent in protecting the interest of the minor.

6. The difference between a void decree and a voidable decree is that while in the case of a void decree, the decree does not exist in the eye of law and may be completely ignored, in the caae of a voidable decree, the decree is valid for all intents and purposes go long as it has not been duly avoided by the party having the right to avoid it and within the period of limitation prescribed for the purpose. A decree passed by a Court having jurisdiction to pass such a decree must be held to be binding as between the parties to the decree. Even a valid decree, however, only binds those who are parties to it unless it is based on a judgment which is a judgment in rem. We have, therefore, to consider whether in a case where a guardian has been duly appointed by a Court having jurisdiction to entertain the suit and make such appointment, the mere fact that in a subsequent litigation it is held that the guardian was negligent there was an automatic cessation of guardian, ship so that it could be held that the minor wag not a party at all. It is necessary in this connection to refer to Order 32, Civil P. C. Under Order 32, Rule 3 where the defendant is a minor a duty has been placed on the Court to appoint a proper person to be the guardian for the suit of such minor. Where, however, there is a certificated guardian of the minor, it is only the certificated guardian who can be appointed his guardian unless there are special reasons to the contrary. Order 32, Rule 11 gives the Court the power to remove a guardian who desires to retire or does not do his duty or for other

sufficient ground.

7. Where, therefore, a guardian has been duly appointed there is no automatic cessation, except by death, of such guardianship unless there is an order of the Court to that effect. If therefore, a guardian was duly appointed, the mere fact that he was negligent in the discharge of his duty does not result in an automatic cessation of guardianship. The minor, therefore, must be deemed to be a party to an action through such guardian, though, if he can prove that his guardian was negligent, he may have the right to have the decree set aside. If the Court had jurisdiction and the minor was a party to the decree, I do not see how the decree can be deemed to be a nullity entitling the minor to ignore the same.

8. Coming to the cases on the point, I have already said that the Full Bench in Siraj Fatma's case, (54 ALL. 646 : A. I. R. (19) 1932 ALL. 293 F. B.), was not called upon to decide whether the decree was void or voidable. It is on certain observations in the judgment that the conflict of opinion has arisen between Allahabad and Lucknow.

9. In Dwarika Halwai v. Sitla Prasad, I. L. R. (1940) ALL. 344 : (A. I. R. (27) 1940 ALL. 256), a suit was brought against a minor and the plaintiff had first nominated the father of the minor as his guardian ad litem. No notice was served on him, but the plaintiff suggested that Vakil should be appointed guardian ad litem. The Vakil was so appointed. The plaintiff paid to such guardian the funds required for the defence of the case, but the Vakil never entered appearance, nor did he at all contest the suit. After the decree the property of the minor was sold and was purchased by a third party. The question arose whether the decree was void or voidable. The Bench quoted the following observations in Siraj Fatma's case, (54 ALL. 646 : A. I. R. (19) 1932 ALL. 293 P. B.):

> "It, therefore, follows that the real basis of the binding character of a decree against a minor is the fact of his having been represented a proper person, and not the mere existence of an; formal order appointing a guardian for him. Even when there is 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"

and went on to say that "the passage showed that the Full Bench was of opinion that even when there was an order appointing a person as guardian, if that guardian did not properly represent the minor, the decree would not be binding on the minor".

and then came to the following conclusion:

> "We understand that the Full Bench meant that such a decree would be void ab initio and not merely voidable"

This decision, therefore, is clearly based on what was considered to be the decision of the Full Bench in Siraj Fatma's case, (54 ALL, 646: A. I. R (19) 1932 ALL 293 F B). I have already said that in Siraj

Fatma's case, (54 ALL. 646: A. I. R. (19) 1932 ALL. 293 F.B.) the learned Judges were not called upon to decide whether the decree was or was not voidable, The only point for decision was whether the minor had a right to challenge such a decree by a subsequent suit. The quotation given above from Siraj Fatma's case, (54 ALL. 646: A. I. R. (19) 1932 ALL. 293 F.B.) was, if I may say so with great respect, not correctly applied. What their Lordships were dealing with was the question whether a minor, who was a party to a suit through a properly appointed guardian, could challenge the decree passed in such a suit. Their Lordships pointed out that the question whether the decree was binding on the minor would not depend merely upon a valid order of appointment of a guardian or absence of such an order and relied on the decision in Walian v. Banks Behari Pershad Singh, 30 Cal. 1021; (30 I. A. 182 P. C.), where their Lordships of the Judicial Committee had held that in that case as the Court must be deemed to have sanctioned the appointment, the absence of a formal order was merely an irregularity. From that the converse proposition cannot necessarily be deduced that where a guardian had been duly appointed the decree can be a nullity, if it is established that the guardian was negligent and had not put up the best defence available to the minor.

10. In Mohammad Baksh's case, (17 Luck. 1 A. I. R. (29) 1942 Oudh 33) the learned Judges of the Oudh Chief Court quoted certain other passages from the judgments of Sulaiman and Sen JJ. in Siraj Fatma's casa, (54 ALL. 646: A. I. R. (19) 1932 ALL. 293 F.B.) where they had said that the minor had a right to avoid the decree by establishing the fact that the guardian had been negligent. The learned Judges said:

> "Where there is a properly appointed guardian act litem (as in the present case), and a decree has been passed by a duly constituted Court it must be presumed, we think, that there was justification for it, and the presumption can only be rebutted in a suit brought with that object, The existence of a flaw in the appointment of a guardian, resulting in the minor not being properly represented, is one thing; the negligence of a properly appointed guardian is quite another." They further said:
>
> "We do not consider that it is open to him to assume such negligence and to treat the decree as void on that ground."

They also quoted the following passage from the judgment of Sulaiman J. in Siraj Fatma's case, (54 ALL, 646: A. I. R. (19) 1932 ALL. 293 F.B.) "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, bat 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 the 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" and said:

> 'If we may say so with respect we entirely agree with this distinction, but it seems to us to follow from it that there would be lees justification for allowing a minor on

> attaining his majority to treat a decree as void on the ground of negligence than there would be for allowing him to treat it void on the ground of fraud. Bat both grounds in our opinion demand a full judicial enquiry before a decree is set aside, and no party to the case is entitled until such an enquiry has been held and decided in his favour to ignore it."

11. In Karuppa Goundan v. Komaraswami Gounder, A. I. R. (37) 1950 Mad. 558: (1950-1 M. L. J. 665), dealing with the question whether a decree obtained against a minor whose guardian had been negligent was void or voidable, the learned Judge said:

> "Dwarika v. Sitla Pd., I. L. R. (1940) All. 344: (A. I. R. (27) 1940 All. 256) relied on for the appellant is no doubt in his favour; bat then there is Mohammad Baksh v. Allah Din, 17 Luck. 1; (A. I. R. (29) 1942 Oudh 33), cited for the respondents which is to a contrary effect. I am inclined to think that the latter represents the correct view which is that a decree against a minor vitiated by gross negligence of the guardian on record is only voidable and not void."

12. In Madhusudan Raj v. Jogendra Kar, 23 Pat, 640: (A. I. R. (32) 1945 Pat. 138) Fazl Ali C. J., and Manohar Lall J., agreed with the view that a decree obtained against a minor which was vitiated by the guardian's negligence was voidable and not void. The learned Judges said:

> "In truth the words that the decrees are null and void against the minors are often loosely used. That a decree is void as being without jurisdiction is one thing and that a decree may be act aside as being voidable at the instance of a minor who is not properly represented and has been prejudiced is another."

The point was discussed at some length by Das J. in Satdeo Narain v. Ramayan Tewari, A. I. R. (10) 1923 Pat. 242 (2): (2 Pat. 835). Dealing with the question whether a decree obtained against a minor was void or voidable where there were defects in the proceedings, the learned Judge said:

> "I think that a clear distinction exists between a judgment which is void and a judgment which is voidable. An erroneous judgment is a voidable judgment, for the argument that a judgment is erroneous assumes both the regularity of the procedure and the jurisdiction of the Court to render it. An erroneous judgment is one which though regularly rendered, is contrary to law or facts, and is therefore liable to be reversed by an appellate tribunal. An irregular judgment is also a voidable judgment, but the distinction between an erroneous judgment and an irregular judgment is this, that whereas an erroneous judgment will always be reversed by an appellate Court, an irregular judgment will be reversed in appeal or ignored in a collateral proceeding only when it is shown that the irregularity in the proceedings has affected the merits of the case between the parties. A void judgment, on the other hand, is a judgment where there was a total lack of jurisdiction in the Court to render it. Such a judgment is a mere nullity. It is not necessary to set it aside. It can be completely disregarded whenever it is pleaded, either in support of a claim or in answer to a claim." The

learned Judge went on to say:

> "Where there does not exist any jurisdiction to try and determine the cause, the judgment is void, and it can be impeached collaterally. But where there does exist such a jurisdiction, but, in the exercise of the jurisdiction, the Court has acted illegally or with material irregularity, the judgment is voidable, and it can be vacated in an appropriate proceeding either by the Court which rendered it, or, under our Code by the appellate Court, either in appeal or in revision ..... Now jurisdiction has been classified under different heads by different Judges; but I think that we may take it that it falls under four different heads (1) territorial jurisdiction; (2) pecuniary jurisdiction, (3) jurisdiction of the subject-matter, and (4) jurisdiction of the person."

Dealing with the question of a suit against a minor, the learned Judge said:

> "To take a simple ease, a minor is not a party to the suit, unless he is represented in the record of the suit by a guardian competent to act as such. Where the record of the suit itself shows that the minor is wholly unrepresentative, or that he is represented by a guardian disqualified from acting as such guardian under the express provision of the statute, the result is that the minor is not properly a party to the suit, and a judgment rendered against the minor is without jurisdiction and null and void. But where he is properly a party to the suit, and he is properly a a party if he is represented in the record by a guardian not disqualified from acting, the jurisdiction of the Court to try and determine the cause as against the minor is complete, and such jurisdiction will not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian."

In the case before us, which is a stronger case, such jurisdiction cannot be ousted on proof of the fact that the guardian had been negligent in safeguarding the interest of the minor.

13. I am, therefore, of the opinion that a decree obtained against a minor where the guardian appointed by the Court has been guilty of gross negligence cannot be void and is merely voidable.

Wanchoo J.

14. I agree and have nothing to add.

Mushtaq Ahmad J.

15. Having read the opinion of the learned Chief Justice, with which my brother Wanchoo has agreed, I regret I have arrived at a different conclusion on the point referred. The point was whether a decree against a minor was void, because the guardian appointed by the Court has been guilty of gross negligence, or it was merely voidable.

16. On a careful consideration of the question in the light of the relevant authorities, I have come to the conclusion that such a decree is void and not merely voidable.

17. It would be useful at the very start to examine the principle underlying the provisions of Order 32, Rule 3, Civil P. C. which must determine the answer to the question referred. These provisions would reveal that the Legislature thought fit to impose a series of mandatory instructions to be followed by the Court, when appointing a guardian ad litem for a minor defendant for the full protection of his interests in the case. This protection was intended to be observed not only with reference to the initial appointment of a person as a guardian, but also to the subsequent stages in the proceedings right up to the passing of the decree, so that the minor may not be exposed to the slightest risk of being prejudiced in the cause until its final end. Any other view of these rules would bring out the anomaly that, while the Court is required to take precautions when appointing a guardian ad litem, it need not concern itself with his conduct in the proceedings, no matter how the minor's interests may have suffered owing to the guardian's negligence or misbehaviour in representing his ward. The injunctions embodied in Order 32, Rule 3 may be summarised as follows;: (1) that on being satisfied of the fact of the defendant's minority, the Court shall appoint a proper person to be guardian for him, (2) that there shall be an affidavit verifying that the proposed guardian has no interest in the matters in controversy adverse to that of the minor, (3) that the proposed guardian is a fit person to be appointed, (4) that an order of appointment shall be made only upon notice to the minor and to a guardian already appointed or declared by an authority competent in that behalf, (5) that in the absence of such a guardian, notice shall be given to the father or other natural guardian of the minor, and in the absence of these, to the person in whose care the minor is, and on hearing their objections, if any, the order shall be made, and (6) that the person appointed guardian shall continue as such throughout all proceedings arising out of the suit.

18. The above requirements obviously cover the entire proceeding from its initiation up to its final conclusion, embracing even the proceedings in the appellate and revisional Courts and those in the execution of the decree. This mast mean that the Court has to make the appointment with due regard to the propriety and fitness of the person to be appointed, not only when the appointment is made but also in the light of the nature of the duties and functions which he will have to carry out in the best interests of the minor, until the final decree is passed and even until it has been fully executed. This would naturally involve not only a consideration of the man's mental equipment but also his antecedents, social status and capacity to serve the best interests of the minor without the least possibility of those interests being neglected, so that no injury or disadvantage may accrue to the minor on account of his personal disability.

19. Therefore, if there is a flaw, either in the initial appointment of the guardian, and this may take a variety of forms, or if, having regard to the subsequent conduct of the guardian, the Court may be taken to have made a bad choice in its selection and the minor has actually suffered in the process, the rule contained in the aforesaid provisions cannot be deemed to have been properly observed. In such a case, it would be right, I think, to say that the minor was not 'properly represented'. And the intention of the Legislature being to enjoin on the Court to appoint a person who would so represent the minor, a decree passed against him in a case in which such representation is subsequently found to have been lacking would be contrary to the imperative provisions of the statute, a violation which

would destroy the very basis of the jurisdiction assumed by the Court. In emphasising the impropriety and extreme injustice involved in the absence of such representation, Sir R. Malins V. C. in Hoghton v. Fiddey, (1874) 18 Eq. 573 : (43 L. J. Ch. 758) observed:

> "The proposition that an infant of tender years may have her whole fortune wrecked by neglect of bee friend is so monstrous that I cannot pa; attention to it. She is entitled to have a next friend who is diligent and who will protect her interests."

20. To the same effect was the observation, of Stanley, C. J. in the Full Bench case of Bhura Mal v. Har Kishen Das, 24 ALL. 383 at p. 386: (1902 A. W. N. 76 F. B.) :

> "A Court cannot be to jealous in observing the requirements of the law in regard to infants, and in seeing that in suits affecting them their interests are properly safeguarded."

It cannot be denied that want of proper representation of a minor in judicial proceedings would tantamount to the minor not having been a party in those proceedings at all. A fortiori, if the Court nonetheless proceeded to pass a decree against him, it surely acted without jurisdiction, and, for the same reason, the decree passed would be a nullity and not merely voidable so as to require the minor to challenge it within a certain period. The proper approach to the question would, therefore, be by considering whether the minor was properly represented or not; where his guardian had acted with gross negligence. If this question can be answered in the negative, namely that he was not so represented in such a case, the answer to the further question, whether the decree passed was a mere nullity or only voidable, would become fairly easy. I consider, the answer would be--it was wholly void. I now proceed to examine the various] authorities cited at the bar as bearing on this-question.

21. As mentioned in the referring order the matter came before this Bench owing to a conflict between a Division Bench case of this Court in Dwarika Halwai v. Sitla Prasad, I. L. R. 1940 ALL. 344: (A. I. R. (27) 1940 ALL. 256) itself based on the Full Bench case of this Court in Siraj Fatma v. Mahmud Ali, 54 ALL. 646: (A. I. R. (19) 1932 ALL 293 F.B.) and a Bench decision of the Oudh Chief Court in Mohammad Baksh v. Allah Din, 17 Luck, 1: (A. I. R. (29) 1942 Oudh 33). In the later Allahabad case just mentioned a certain observation from the judgment of Sulaiman, C. J. in the earlier Full Bench case was cited with the remark that the observation meant that "such a decree would be void and not merely voidable." This interpretation has not been accepted by the learned Chief Justice, and my brother Wanchoo is also of the same view. They are of opinion that, no question of the decree being void or voidable having arisen in that Full Bench case, this interpretation by the learned Judges in the later case of Dwarika Halwai v. Sitla Prasad, (I. L. R. (1940) ALL. 344: A. I. R. (27) 1940 ALL. 256) is not correct. I very much regret to have come to a different conclusion. The question of the nature of the decree passed against the minor was essentially before the Full Bench, and it was open to the learned Judges to pronounce their views on that question, and, although the shorter point of the decree being void or voidable might not have specifically arisen in that case, their Lordships left no doubt in their discussion of the controversy that the decree was a nullity and, therefore, void; and they expressed themselves on the point in the

clearest terms. If an examination of the judgments delivered by Sulaiman, C. J, and Sen J. in the Full Bench case confirms this position, then, at least so far as this Court is concerned, there would be ample authority in favour of the view which I have felt inclined to take in this case. I have, therefore, first to see what the learned Judges on the majority side in that case had said on the point in question.

22. The neglect in that case was that the guardian had failed to institute a suit in the civil Court within three months of an order of the revenue Court to that effect for the determination of the minor's title with the result that the revenue Court eventually decided the question against him. The lower appellate Court had found that this was a gross and culpable negligence on the part of the guardian. The main question, no doubt, was, whether the minor was entitled to bring a suit for a declaration of title in respect of the decree passed by the revenue Court, and it was answered in the affirmative. Considering, however, the nature and value of a decree passed against a minor in a suit where the guardian had been guilty of gross negligence, Sulaiman C. J. inter alia observed:

> "No one should be allowed to obtain a decree of a binding character against a minor, unless the latter has been properly represented.
>
> If the guardian appointed is not a proper guardian, for instance, where his interest was adverse to that of the minor or where the guardian is grossly negligent in looking after the interests of the minor, it can hardly be said that the minor is properly represented in the litigation." and "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."

I take it that the word 'represented' here had-reference not only to the formal order of appointment made by the Court, but, what is more important, also to the subsequent acts of the guardian in representing the minor up to the last stage. Later, the learned Judge remarked :

> "It seems to me that, even where a guardian has-been formally appointed, but he is grossly negligent in. his duties, he ceases to represent the minor properly and effectively, and the result is the fame as if no proper guardian had been in existence. As pointed out above, it is apart of the duty of the Court itself to see that the minor is properly represented and his interest is being looked after adequately ..... 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."

23. The passage above the last was quoted with approval in Mathura Singh v. Rama, Rudra Prasad Singh, A. I. R. (23) 1936 pat. 231 at p. 239 : (14 pat. 824), and it was with reference to the same passage that the Bench in the later decision of this Court in Dwarika Halwai's case (I. L. R. (1940) ALL. 344 : A.I.R. (27) 1940 ALL. 266), had remarked that:

> "We understand that the Full Bench meant that such a decree will be void ab inttio and not merely Voidable."

Sen J.

24. who agreed with Sulaiman C. J., expressed himself thus :

> "A minor cannot act for himself. He has to depend upon his guardian whose position is fiduciary and as-such uberrimœ fidei. If the guardian does not fulfil his obligations to the ward, and wilfully, wantonly or inexcusably abandons 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..... 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,"

Referring to the judgment of Sulaiman C. J., Mahajan J., (now a member of the Supreme Court Bench) observed :

> "In that decision the learned Chief Justice expressed the opinion that, where a guardian has been grossly negligent in the conduct of the minor's case, in substance it becomes a case where the minor has not been represented in /act, though he has been technically represented in law. Substantially speaking, the minor's case has gone by default and, therefore, the minor should not be prejudiced and his adversary allowed to reap the benefit of an unequal fight. With great respect I express my agreement with that view."

The two Allahabad cases Mt. Siraj Fatma v. Mahmud Ali, 54 ALL. 646 : (A. I. R. (19) 1932 ALL. 293 F. B.) and Dwarika Halwai v. Sitla Prasad, I. L. R. (1940) ALL. 344 ; (A. I. R. (27) 1940 ALL. 256), were again followed by Meredith J., while delivering the majority judgment in the Full Bench case of Kamakshya Narain Singh v. Baldeo Sahai, A.I.R. (37) 1950 Pat. 97 at p. 100: (27 Pat. 441 F. B.), and he held that, where the guardian was guilty of gross negligence the minor was not properly represented in the suit, nor was he a party to the suit in the proper sense of the term.

25. Therefore, on the question whether in such a case the minor can be regarded as having been properly represented by his guardian, there is an absolute consensus of opinion in the Allahabad, Lahore and Patna High Courts, which are all agreed that such neglect amounts to a total lack of proper representation of the minor. Indeed, Mukerji and Dalal JJ., in Mt. Chambi v. Tara Chand, A. I. R. (11) 1924 ALL. 892 : (46 ALL. 744), held that, where the minor was not represented, there was no question whether or not any injury had been caused to him in the result.

26. There can be no doubt that both the learned Judges in the Allahabad Full Bench case were of the view that a decree passed against a minor as a result of his guardian's gross negligence was a nullity, and as such void. The net result of their observations was that such neglect amounted to a total lack of proper representation of the minor, and it was on that fundamental ground that; the decree was to be taken as a mere nullity.

27. This lack of proper representation may arise in a variety of cases. There is no representation of any kind where no guardian is appointed at all, or there may be no proper representation, where, either no proper person was appointed as a guardian, as in the case of Rashidunnisa v. Mohammad Ismail Khan, 31 ALL. 572 : (36 I. A. 168 P. C.), followed by this Court in Ali Yagin v. Bhagwan Das, 1947 A. L. J. 297 at p. 300 : (A. I. R. (34) 1947 ALL. 357), or the guardian appointed, on account of his neglect or misbehaviour, did not properly represent the minor in the proceedings. A mere irregularity in the appointment will not matter, though a breach of the mandatory requirements prescribed by Order 32, Rule 8, Civil P. C., would amount to a complete absence of representation. Where, for instance, the guardian appointed was a disqualified person, the minor would be deemed to have never been a party to the proceedings. Again, where a person is appointed guardian without his consent, as in the case of Annada Prasad v. Upendra Nath, A. I. R. (8) 1921 Cal. 600: (65 I. C. 18), there is no proper representation.

28. If a minor is not properly represented, there is, of course, no representation of him at all, and, therefore, the Court has no jurisdiction to pass a decree against him. This was emphasised by the Judicial Committee in the case of Rashidunnisa, (31 ALL. 572 : 36 I. A 168 P. C.), already cited and that of Khiarajmal v. Daim, 32 Cal, 296 : (32 I. A. 23 P. C.), at p. 312, their Lordships remarking "on the other hand, the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons all decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside."

To the same effect is the case of Mahboob Husain v. Anjuman Imdad Qarza, A.I.R. (29) 1942 Lah. 129 : (201 I. C. 311).

29. I now proceed to examine the cases cited by the defendant's counsel to contend that a decree passed in such circumstances is not void but only voidable within the prescribed period of limitation. The first was naturally the case of Mohammad Baksh v. Allah Din, 17 Luck. 1: (A. I. R. (29) 1942 Oudh 33), a conflict between which and the Allahabad case of Dwarika Halwai v. Sitla Prasad, I. L. R. (1940) ALL. 344 : (A. I. R. (27) 1940 ALL. 256), led to the present reference. The particular features in the judgment in this case are that it draws a distinction between the effect of improper appointment of a guardian and that of his negligence on the rights of the minor to challenge the decree, that, according to the learned Judges, the question whether the decree was void or merely voidable had not been expressly considered in the Full Bench case in Siraj Fatma v. Mahmud Ali, 64 ALL. 646 : (A. I. R. (19) 1932 ALL. 293 F. B.), and that there is no independent discussion of the question whether the decree is void or merely voidable. Indeed, the point whether, in the case of gross neglect of the guardian, the minor can be deemed to have been properly represented was not considered at all. I have already said that, from the standpoint of the minor,

there is no difference worth the name between the effect of the improper appointment of the guardian and that of his neglect In either cage, the minor would be deemed not to have been represented, and the decree passed against him would on that account be a nullity. I have also pointed out that both the concurring Judges in the Full Bench case (Sulaiman C. J. and Sen J.) had observed that the minor in that case had not been properly represented and that the position was as if there was no decree against him at all The words 'void or voidable' may not have been used by the learned Judges, but they had said every thing pointing to the conclusion that the decree against the minor was absolutely void. The proper approach to the question, in my opinion, would be by considering the larger question whether the minor can be regarded to have been properly represented, that is to say, whether the guardian, at every stage of the proceedings up to the end, had done what a prudent person would have done in a matter of his own. I, therefore, think that the authority of the two Allahabad cases was in no way shaken by this later case of Oudh,

30. The next case cited was a single Judge decision in Karuppa Goundan v. Komaraswami Gounder, A. I. R. (37) 1950 Mad. 558 : (1950-1 M. L. J. 665). The learned Judge, after referring to the later Allahabad case and the Oudh case last mentioned, simply remarked that he preferred the latter to the former. There was no discussion of the question whether the decree was void or voidable. He also relied on the fact that the Courts below had found that a different result was not likely to follow, even if the mother of the minor had appeared in the earlier proceedings. This to my mind, was an erroneous approach, as pointed out in Mt. Chambi v. Tarachand, A.I.R. (11) 1924 ALL. 892: (46 ALL. 744), already cited.

31. Then was cited the case of Madusudan Ray v. Jogendra Kar, A. I. R. (32) 1945 Pat. 133 : (23 Pat. 640). In that case also, the particular question I am considering did not receive the attention of the learned Judges. They only held that a mere irregularity in the appointment of a guardian ad litem would not render the decree null and void, unless the interest of the minor had suffered by reason of such it regularity. This was only a case of an error of form and it could not certainly be said that this alone would make the decree void, there being no question of negligence there.

32. Next the learned counsel for the defendant cited the Full Bench case of Krishnadas Padmanabhrao v. Vithoba Annappa, A. I. R. (26) 1939 Bom. 68 (I. L. R. (1939) Bom. 310 F.B.), This, again, did not touch the question under consideration. The learned Judges held that, under the English Law, an infant could not challenge a decree properly passed against him on the ground that his guardian ad litem was guilty of gross negligence in suffering the decree and there is no reason why such a cause of action should lie in British India, remarking further that gross negligence, apart from fraud or collusion on the part of the next friend art guardian ad litem of a minor litigant, could not be made the basis of a suit to set aside a decree obtained against him. It is now well settled in this Court and not denied by counsel for either party that a suit of this nature lies and the Full Bench decision in Dwarika Halwai v. Sitla, Prasad, 54 ALL. 646 : (A. I. R. (19) 1932 ALL. 293 F. B.), still remains undoubted on that point. The case was expressly dissented from in the Full Bench ruling in Kamakshya, Narain Singh v. Baldeo Sahai, A. I. R. (37) 1950 pat. 97 : (27 Pat. 441 F. B.), already cited.

33. Last of all the counsel for the defendant relied on the judgment of Das J. in Satdeo Narain v. Ramayan Tewari, A. I. R. (10) 1923 Pat. 242 (2) . (2 pat 335). The learned Judge, after classifying jurisdiction under various heads, the last being 'jurisdiction of the person' made the following observation:

> "To take a simple case, a minor is not a party to the suit, unless he is represented in the record of the suit by a guardian competent to act as such. Where the record of the suit itself shows that the minor is wholly unrepresented or that he is represented by a guardian disqualified from acting as such guardian under the express provisions of the statute, the result is that the minor is not properly a party to the suit and a judgment rendered against the minor is without jurisdiction and null and void. But where he is properly a party to the suit, and he is properly a party if he is represented in the record by a guardian not disqualified from acting, the jurisdiction of he Court to try and determine the cause as against the minor is complete, and such jurisdiction will 'not be ousted on proof that the Court did not follow the appropriate procedure for the appointment of the guardian."

34. It is the portion underlined (here italicised) by ma on which specific reliance was pinned by the learned counsel. I find nothing in the passage to militate against the view I have taken. The whole question is whether the minor can be deemed to have been properly represent-ed by his guardian, even though the latter may have acted with gross neglect. On this point there is no opinion expressed at all in the judgment. Surely, the learned Judge could not have meant that, once a guardian not disqualified from acting as such had been appointed, the minor would be deemed to have been properly represented throughout the case. The fact of appointment essentially referred to the initial authorization of a person to act for a minor by an order of the Court. If, in spite of a proper appointment, that person has misconducted himself, either by gross negligence or otherwise, there is surely no representation of the minor in any sense of the term. From his point of view nothing was done to protect his interests in the case and a decree was suffered to be passed in complete disregard of those interests. It does not matter to him if there was no initial flaw or defect in the original appointment of the guardian. In law he has suffered all the same where, in spite of there being no such defect, his case was not put before the Court and a decree was passed as if he was not a party to the proceedings at all. I would only say that this specific question of the decree being void or only voidable, where the guardian, though legally appointed bad misbehaved himself in representing his ward and allowed a decree to be passed against the latter, did not receive the consideration of the learned Judge in this case.

35. On a careful consideration of the matter, I have come to the conclusion that the answer to the question referred should be that the decree passed in the circumstances mentioned therein would be void and not only voidable.

36. By the Court.--The answer to the question referred to us is that a decree obtained against a minor, where the guardian appointed by the Court has been guilty of gross negligence, is not void, but is merely voidable.

37. Let this answer be returned to the Bench concerned,