1915.

Present: Shaw J. and De Sampayo J.

MUTTU MENIKA *v.* MUTTU MENIKA.

275—D. C. Kurunegala, 5,285.

Minor—Unrepresented by guardian in action—Is judgment null and void?

A judgment against a minor who is unrepresented by a guardian is at most an irregularity, and the judgment will stand as a valid adjudication against the minor until reversed, and will not be open to a collateral attack.

A person seeking to get rid of a judgment on the ground of his minority at the date of the judgment is to proceed under section 480 of the Civil Procedure Code, or to apply for *restitutio in integrum*. Until the judgment is set aside it can be pleaded as *res judicata* against the "minor"

THE facts are set out in the judgment.

G. Koch, for first defendant, appellant.

E. T. de Silva, for plaintiffs, respondents.

Cur. adv. vult.

September 3, 1915. DE SAMPAYO J.—

This is in form a partition action in respect of six lands, but it is in reality an action to establish title to certain shares. The lands belonged to one Sohandirala, husband of Kiri Menika. The plaintiffs' case is that Sohandirala left two children, namely, (1) Satanhamy, through whom they claim, and (2) Punchi Etana, the mother of the first defendant-appellant, whereas the first defendant says that Satanhamy was the son, not of Sohandirala, but of his wife Kiri Menika by a former husband. Satanhamy left five children, namely, the first plaintiff in this action, Punchi Menika (mother, now deceased, of the second plaintiff), and three others. In 1910 all these children of Satanhamy brought the action No. 3,589 of the District Court of Kurunegala against the same defendants as in this case, for the purpose of partitioning the same lands. In that action the Supreme Court in appeal held in favour of the defendants with regard to the question of Satanhamy's parentage, and also with regard to the claim by prescription which the plaintiffs had step up, and dismissed the plaintiffs' action. The plaintiffs in the present action set up the same title as in the previous action and seek to avoid the plea of *res judicata* by alleging that the first plaintiff and Punchi Menika (mother of second plaintiff) were minors at the date of the action No. 3,589, and that the decree therein is absolutely void as against them. The District Judge has come to the same conclusion as the Supreme Court in the former action as regards the percentage of Satanhamy, but has decided in favour of the plaintiffs on the question of *res judicata*, and also on the issue of prescription as to three out of the six lands, and has decreed partition accordingly. The first defendant has appealed.

It appears that at the date of the action No. 3,589 the first plaintiff and Punchi Menika were of the age of 17 and 19 years respectively, and the circumstances indicate that at that time Punchi Menika was married. They appeared with the other plaintiffs by proctor, and no question was raised as to their minority. The procedure for actions by and against minors is provided in chapter XXXV. of the Civil Procedure Code, and under section 502 a minor for the purposes of that chapter is to be deemed to have attained majority not only on attaining the age 21 years, but also on marriage or on obtaining letters of *venia aetatis*. Considering that the plaintiffs are seeking to avoid a decree already entered against them, I should say that the burden was on them to negative all the facts mentioned in that section as constituting the attainment of majority. Further, the plaintiffs themselves having sued as though they were majors, I do not think that they ought to be heard to allege the contrary, so as to affect the defendants, on whom no responsibility lay to have a next friend appointed for the plaintiffs, though, no doubt, if the defendants were aware of the fact, they might have raised an objection under section 478.

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Moreover, the decree once entered cannot, I think, be regarded as wholly void, so as to entitle the plaintiffs to ignore it altogether and to bring a fresh action. Hukum Chand's *Res Judicata* 165, 166, cites a number of authorities to show that a judgment against a minor who is unrepresented by a guardian is at most an irregularity, and that the judgment will stand as a valid adjudication against the minor until reversed, and will not be open to a collateral attack. This, I think, enunciates a right principle, and our Civil Procedure Code appears to me to proceed on that basis. For while it provides that in actions by or against a minor he shall be represented by a next friend or guardian *ad litem*, as the case may be, it also provides, by section 480, for an application being made for the discharge of an order in the action "in or by which a minor is in any way concerned or affected." In my opinion the proper course for the plaintiffs in this instance was to have applied under that section or by way of *restitutio in integrum*, but the decree, as matters stand, is binding upon the plaintiffs and is *res judicata* against them. Reference was made in the course of the argument to Walter Pereira's *Laws of Ceylon 211*, in which it is stated that "where a minor, being erroneously thought to be a major, is allowed to appear in Court without a curator, a judgment against him is null and void, while one in his favour is operative." This passage is founded on *Voet 5, 1, 11*. That title deals with matters of procedure; but I do not think that the Roman-Dutch procedure on a point like the present is quite relevant. In any case it is far from clear that the Roman-Dutch law regarded a judgment against a minor as *ipso jure* void, without any steps being taken to declare it so. The expression used in *Voet* is *nullius momenti*, but I do not think that it necessarily means that the judgment is for all purposes void, and that no application for *restitutio in integrum* is necessary to set it aside.

Apart from these legal questions, the plaintiffs in this action can only succeed on proof of prescriptive title. I may at once say that there is no evidence whatever of Satanhamy's possession, and much less of adverse possession on his part. It appears that he was the sole male in the family of Kiri Menika, and lived with other members of the family in the *mulgedara*, and all that is said about possession is that Satanhamy looked after the estate, and that the present plaintiffs are in possession of some twenty coconut trees and a house which was separated off for the benefit of the widow, Kiri Menika, who died two years ago. This evidence is wholly insufficient to establish prescriptive title.

I would set aside the judgment appealed from and dismiss the plaintiffs' action, with costs in both Courts.

SHAW J.—I agree.

Set aside.

H. C. COTTLE, GOVERNMENT PRINTER, COLOMBO, CEYLON.