

(1886) 03 CAL CK 0010
In the Calcutta High Court

Beni Ram Bhutt and Others

APPELLANT

Vs

Ram Lal Dhukri and Others

RESPONDENT

Date of Decision : 30-03-1886

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2

Citation : (1886) ILR (Cal) 189

Hon'ble Judges : Mitter, J;Agnew, J

Bench : Division Bench

Judgement

Mitter and Agnew, JJ.—It is contended on behalf of the respondents that no appeal lies against an order passed u/s 442, but we are of opinion that although the Subordinate Judge says "that the order in question was passed by him u/s 442, it was not really an order under that section. Section 442 is to the following effect: "If a plaint be filed by or on behalf of a minor without a next friend the defendant may apply to have the plaint taken off the file, with costs to be paid by the pleader or other person by whom it was presented. Notice of such application shall be given to such person by the defendant; and the Court, after hearing his objections, if any, may make such order in the matter as it thinks fit." That section refers to a case where, on the face of the plaint, it appears that it was filed, by a person who was a minor. It does not contemplate any enquiry into the question of minority as in this case, where it is brought by persons professing them-selves to be adults, and where the defendant objects to the suit on the ground that they are not adults but minors, and where, upon "these conflicting allegations, an issue is raised for trial. In a case like this the order of the Court, if it finds that the defendants' allegation is correct, is not passed u/s 442. A case of this nature is not expressly provided for in the Procedure Code, but there are decided cases which show that in a case of this nature the former practice which, not being abrogated by the present Code, must be considered to be in force, was to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented in the suit by a "next friend; but be that as it may, the order which has been passed in this case does not appear to us to be

an order u/s 442. It is, therefore, not necessary for us to decide the question whether an order u/s 442 is appealable. The present order, although it professes to have been passed u/s 442, must be an order rejecting the plaint or dismissing the suit on the ground that the suit was instituted by persons who were established on the evidence to be minors. Whether considered as an order rejecting the plaint or dismissing the suit, it would be appealable because it comes within the meaning of the word decree as given in Section 2 of the Civil Procedure Code, and there is no reason why the words rejecting the plaint used" in Section 2 should be limited to the cases provided for in Sections 53 and 54. We are of opinion that the preliminary objection taken before us must be overruled. Then, as regards the merits of the appeal, it seems to us that, even if we were inclined to agree with the lower Court that all the plaintiffs were minors at the time when the suit was instituted, still we should have held that the lower Court was not justified in dismissing the suit upon that ground. We have already referred to the practice that prevailed before the new Code of Procedure was passed, and we have already said that that practice has not been abrogated by any provision in the Civil Procedure Code. But in this case, taking the finding of the lower Court to be correct, yet, at the time when the trial took place, the plaintiff No. 1 was admittedly of age, and therefore it would have been unnecessary to suspend proceedings in order to allow him to appear by a next friend. In fact, being an adult, he was competent to proceed with the suit himself. Furthermore, we have referred already to the order of the 30th of July 1884, by which the plaintiff No. 1 was appointed next friend to the two minor plaintiffs. At that time he was of age, and we are at a loss to understand how, in the face of that order, the lower Court dismissed the whole suit upon the ground that all the four plaintiffs were minors at the time of the institution of the suit. So far as the plaintiffs Nos. 3 and 4, who were then admittedly minors, and who are now admittedly minors, are concerned, the suit was not liable to be dismissed, because they were represented by their eldest brother and next friend appointed by an order of the Court. We further find that, when the appeal was preferred to this Court by the plaintiffs, and on that appeal the Court directed the lower Court to allow them to adduce their evidence, no objection was taken by the respondents on the score of their minority, That being so, we are of opinion that they were precluded from relying upon that objection in the lower Court when the case was remanded to that Court for trial. If it were necessary to express any opinion upon the evidence given in the Court below, we should be inclined to hold that the conclusion to which the lower Court has come upon that evidence is not correct. The mother of the plaintiffs deposes that the plaintiff No. 1 was, at the time her deposition was taken, 23 years of age, and the Judge rejects this evidence, although it was supported by a horoscope filed and proved, upon the ground that it was the uncorroborated testimony of a single witness. He says, referring to the evidence of the another: "The evidence of Munni Bohu, the mother of the plaintiffs, would indeed show the age of these persons to be more than what the other witnesses have stated; but the uncorroborated testimony of a single witness, especially when rebutted by the evidence on the same side,

cannot be relied upon. Munni Bohu indeed is the mother of the plaintiffs, but that is no reason why her testimony should be relied upon, when it is contradicted by the other evidence adduced on the plaintiffs' side." The other evidence to which the Subordinate Judge refers is merely the loose statements of some witnesses as to the ages of the respective plaintiffs, and from their testimony it is quite clear that they could not speak with any degree of precision as to the ages of the plaintiffs. It is a matter of some surprise to find the Subordinate Judge saying that, because Munni Bohu is the mother of the plaintiffs, her testimony is not to be relied upon. A mother's evidence would be the best evidence upon the question of the age of her sons, especially when that testimony is supported by the evidence of a horoscope which has been produced and proved by a competent witness. The Subordinate Judge should have accepted that evidence as fully trustworthy.

2. Upon these grounds we think that the decision of the lower Court is erroneous. We set it aside, and as the defendants' evidence has not been taken, the case will be remanded to the lower Court.

3. Costs will abide the result.