
(2015) 12 PAT CK 0010
In the Patna High Court
Case No : First Appeal No. 464 of 1983

Bijendra Mandal and Others	Vs	APPELLANT
Ganpat Mandal and Others		RESPONDENT

Date of Decision : 04-12-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 8, Order 32 Rule 32, Order 32 Rule 32(3A)(2), Order 32 Rule 3A, Order 32 Rule 3A(2)
Criminal Procedure Code, 1973 (CrPC) — Section 145
Evidence Act, 1872 — Section 101, 102, 44
Limitation Act, 1963 — Section 7

Citation : (2016) 1 PLJR 704

Hon'ble Judges : Aditya Kumar Trivedi, J.

Bench : Single Bench

Advocate : Rajiv Kumar Verma, Naresh Kumar Sinha and Rajneesh, Advocates, for the Appellant; Awadh Bihari Ojha, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Aditya Kumar Trivedi, J.—Plaintiffs/appellants being aggrieved by and dissatisfied with the judgment dated 12.08.1983, decree dated 29.08.1983 passed by Sub-Judge, Khagaria in Title Suit No. 17/1974/15/1977 whereby and whereunder dismissed the suit on contest with cost, have filed the instant appeal.

2. For the sake of convenience, the status of the parties are being acknowledged in same way as they stood before the learned lower court.

3. Asking for declaration with regard to the properties detailed under Schedule-1 of the plaint to be joint family property of a family consisting plaintiff, defendant-2nd party, defendant-3rd party and further defendant-1st party, has got no concern with the same, the judgment and decree passed in Partition Suit No. 12/1963 be declared as collusive, fraudulent and not binding upon the plaintiff, defendant-2nd party, identification of share of plaintiff as well as defendant 2nd party to the extent of 1/4th each followed with demarcation by

appointing pleader-commissioner, final decree with possession thereupon cost at the suit, other relief or reliefs which the plaintiff is found entitled for and for that, it has been pleaded that plaintiffs No. 1 and 2 (major), plaintiff No. 3 and 4 (minors) being under guardianship of their natural guardian, mother plaintiff Nos. 5 and 6 as well, respectively, are the members of a joint Mitakshra family.

4. It has also been disclosed that the plaintiffs, defendant-1st party, defendant-2nd party and defendant-3rd party are the descendants of Bhuj Das, Dhunj Das. Baiju Das was their brother who died in jointness, issueless. It has further been pleaded that Ayodhya Mandal, Lutan Mandal happen to be sons of Dhuj Das whose descendant Ganpat Mandal is Defendant No. 1. For better appreciation a genealogical table is given below in terms of Schedule-2 of the plaint:--

5. It has further been disclosed that plaintiffs are the sons of Dhanu Mandal, Kamli Mandal, Tilakdhari Mandal and Dhyani Mandal. Dhanu Mandal was Karta and Karobari of his family during his life time who indulged in different kinds of activities adverse to the interest of the plaintiffs as well as on account thereof, the family suffered a setback, loss and disgrace.

6. It has further been pleaded that Jorawar Mandal (Defendant No. 15) had drawn Partition Suit No. 12/1963 before Sub-Judge, Munger wherein after due elapse of time, Ganpat Mandal (Defendant No. 1) substituted himself as plaintiff. It has also been disclosed that he (Ganpat Mandal) took Dhanu Mandal in his collusion and got a collusive WS that no partition by metes and bounds was effected amongst the family members of Dhuj Das, Bhuj Das which happens to be false as well as contrary to the actual affair. It has further been pleaded that the lands detailed under schedule-I of the plaint is coming under the peaceful joint possession of the parties.

7. It has further been pleaded that sons of Ram Keshav Mandal, namely, Dhanu Mandal, Kamli Mandal, Tilakdhari Mandal, Dhyani Mandal sailed under jointness. In the year 1933, there was partition and one branch was cared by Dhanu Mandal as well as became Karta (Manager) of joint family and during his tenure the family also made acquisition.

8. Then it has been submitted that Dhanu Mandal was, virtually, influenced by Ganpat Mandal and on account thereof, he deliberately left to do proper Pairvi in Partition Suit No. 12/1963 as well as in likewise manner also failed to take proper care to protect the interest of the plaintiffs who were minor at the relevant time. On account of such collusive act of Dhanu Mandal in association with Ganpat Mandal, ultimately led the Partition Suit No. 12/1063 to be decreed affecting adversely to the interest of plaintiff. Not only this, though an appeal was filed before the Hon''ble High Court but again Pairvi was left intentionally to allow dismissal of the appeal for want of deposit of Talwana etc that too comprising of a meagre amount. It has also been pleaded that later on dispute arose whereunder Dhanu Mandal was murdered by the accused persons. In the

aforesaid background, the plaintiff have pleaded that the judgment and decree of Partition Suit No. 12/1963 is found not at all binding upon the plaintiff. It has also been pleaded that delivery of possession has not been taken into effect in pursuance of the judgment passed in Partition Suit No. 12/1963 and that being so, the report whatsoever available on the record on that very score happens to be collusive one and is not binding upon the plaintiffs. Subsequently thereof, discharging the other formalities, paying court-fee, detailing the property under Schedule-1, pedigree of the family of the Schedule-2 filed instant suit with a relief as disclosed above.

9. From the lower court record, it is evident that WS has been filed by the Defendants in two sets. As per joint pleading made on behalf of Defendants No. 1, Ganpat Mandal and 19, Sumitra Devi, apart from raising an ornamental objection, it has been pleaded that the suit is bad for non joinder of necessary party on account of non arraying sons of Jorawar Mandal, Tilakdhari Mandal as well as one son of Itwari Mandal. A plea of res judicata has also been raised in the background of judgment of Partition Suit No. 12/1963 as well as passing of final decree under Execution Case No. 10/1971 on the plea that in terms of Execution of final decree, the respective parties are over the land and in the aforesaid background, parties have lost unity of title as well as unity of possession.

10. Now denying the averments of the plaint, a genealogical table has been furnished in order to show the correct status of the family of which Sheo Charan Mandal (deceased) was the common ancestor. It has also been pleaded that Dhanu Mandal during his life time was Karta and Karobari of the joint family during whose life time there was acquisition.

11. Now coming to the status of Partition Suit No. 12/1963, it has been submitted that all the persons were duly impleaded and as the natural guardians failed to represent the minor coparceners on account thereof, Sri Sagar Singh, Advocate, Munger was appointed by the court as guardian ad litem who had filed WS on their behalf as well as defended the suit till its conclusion properly. It has also been pleaded that though defendants have filed WS contrary to the actual affair and on account thereof, they failed to substantiate the same during course of proceeding with the trial which ultimately, concluded acknowledging the share of the Ganpat Mandal to the extent of half and in pursuance thereof, preliminary decree was prepared followed with Pattibandi and ultimately concluded by way of final decree under Execution Case No. 10/1971.

12. It has further been pleaded that plaintiff, in order to make out a case have intentionally and purposely introduced peculiar story that Dhanu Mandal, their ancestor, who was Karta and Karobari of the joint family, acted adverse to their interest after going into collusion of Ganpat as well as being drunkard and lecherous. At one point of time, plaintiff himself pleaded that during his tenure being as Karta of the family there was acquisition, at the other end, stamped him like so, therefore, the aforesaid version of plaintiff is fit to be rejected.

13. It has further been pleaded that Dhanu Mandal was of pious person having good character. When they have seen that they would not succeed even in appeal, in that event, left to do Pairvi.

14. Ajo Yadav, intervener defendant had also filed WS wherein he had virtually, followed the same version as advanced on behalf of Ganpat Mandal and Sumitra Devi as disclosed above.

15. WS has separately been filed on behalf of minor defendants by the guardian ad litem challenging the status of plaintiff praying for dismissal of the suit.

16. After considering the rival pleading the learned lower court had framed the following issues:--

1. Is the suit, as framed, maintainable?
2. Have the plaintiffs got any valid cause of action for the suit?
3. Is the suit barred by Law of Limitation and by the principles of res judicata, estoppel and waiver?
4. Is the suit bad for defects of the parties?
5. Whether the decree passed in Title Partition Suit No. 12 of 1963 of the court of the learned 2nd Sub Judge, Munger, is fraudulent, collusive and not binding on the plaintiffs for the reason that their interests in the said suit were not properly watched by their guardians, causing prejudice to them?
6. Had there been any partition between the branches of Bhup Das and Dhuj Das in the year 1933 as alleged by the plaintiffs, and if so, whether the defendant No. 1, Ganpat Mandal was not entitled to get any share in the ancestral joint family properties in the previous suit?
7. Whether the properties described in Schedule No. 1 of the plaint sought to be partitioned in the instant suit are joint among the plaintiffs and the defendants, 2nd and 3rd parties only?
8. Are the plaintiffs entitled to get a decree for partition as claimed.

17. The learned lower court decided the issue No. 6 against the plaintiff in favour of defendant which ultimately gave a passage to other points to be decided against plaintiff in favour of the defendant ultimately, dismissed the suit, hence this appeal.

18. Learned counsel for the appellant made strenuous effort to scuttle the findings recorded by the learned lower court on the plea that same has been decided by the learned lower court ignoring the status of the plaintiffs during course of continuance of Partition Suit No. 12/1963 followed with final decree under Execution Case No. 10/71, to be minor. The learned lower court, in the aforesaid background, should have considered in terms of privilege granted under Order 32 of the C.P.C. and further, would have properly scrutinized the

findings recorded by the court in passing the judgment of Partition Suit No. 12/1963 to conclude over issue whether interest of plaintiffs, being minor, were duly protected. Simultaneously, would have also concluded in the instant proceeding. Being failed on that very score, is sufficient to get the judgment impugned reversed. In its continuity, learned counsel for the appellant further argued that the learned lower court, basically, did wrong while adjudicating upon the matter in the background of the fact that the first event which the learned lower court should have perceived, would have been relating to the propriety of the judgment passed in Partition Suit No. 12/1963 and for that, the learned lower court should have minutely gone through the averments, the evidence, the status of the parties along with finding recorded by the court while delivering judgment of Partition Suit No. 12/1963 and then, would have come to the conclusion regarding status of the plaintiffs coupled with nature of the properties so detailed under Schedule-1. Then thereafter, the learned lower court should have proceeded with the second chapter whereunder a relief has been sought for regarding partition of the properties excluding presence of Defendant No. 1. From the judgment impugned, as submitted, it is apparent that the learned lower court became confused and inter-mingled the same. Hence, that happens to be the reason behind that the judgment is suffering from confusion as well as tumultuariness.

19. It has also been submitted that from the conduct of Dhanu Mandal as has been disclosed in the plaint itself and is also found corroborated from the judgment of Partition Suit No. 12/1063 that he gave up his proper attentiveness towards proper sailing of the aforesaid Partition Suit and on account thereof, lost the game at the lower court and in likewise manner, allowed the boat to be capsized even at appellate stage. As his conduct was not a natural one, as no prudent man would allow interest of whole family including the interest of minors at stake contrary to it, is found duly influenced, hence, was sufficient to undo the finding recorded under T.S. No. 12/1963. As such, it has been pleaded by the learned counsel for the appellant that in spite of presence of sufficient material on this score, the learned lower court bypassed the same and dismissed the suit which is fit to be set aside.

20. The learned counsel for the respondents have controverted the submissions made on behalf of appellants and had submitted that the argument made on behalf of appellants/plaintiffs have got no dearth at all. First of all, it has been submitted that there happens to be severe defect in framing of the suit because of the fact that no court-fee has been paid for declaration in order to nullify the effect of Partition Suit No. 12/1963 and on account thereof, the suit in its present form is not maintainable.

21. It has further been submitted that learned counsel for the appellant has rightly contended that the instant suit contains two independent events, the first one is with regard to sterilizing the effect of judgment of Partition Suit No. 12/1963 and if it is made so, then the remaining part of relief asking for partition

that too excluding the defendant No. 1. Further elaborating the issue, it has been submitted that the suit has been filed by the plaintiffs being six in number out of whom plaintiffs No. 3 and 4 were identified to be minor duly represented by their respective mothers who also stood as plaintiff independently and so on their behalf, the suit was not maintainable in terms of Order 32 Rule 3A which, allowed the suit to be brought up at the end of minor plaintiff, after attaining majority which as per Limitation Act is to be filed within three years in order to challenge the finding recorded against them in earlier suit.

22. So far as plaintiffs No. 1 and 2 are concerned, they have not come up before the court at any time, even during course of evidence and so, the suit in its present form happens to be non maintainable and in likewise manner, submission has been made relating to plaintiff No. 5 and 6, whose status also has been challenged, independently.

23. Furthermore, it has also been submitted that plaintiff will have to place strong, positive case in order to nullify the earlier findings recorded by the competent court which, in the facts and circumstances of the case, is found not at all duly substantiated. Hence, the appeal is fit to be dismissed.

24. After hearing the rival parties as well as after going through the lower court record, coupled with the issues framed by the learned lower court, it is found fit to cover all the persisting controversies and are found abditory for present purpose, also.

25. Before coming to adjudge, on a cursory perusal of the lower court record, it is evident that altogether 22 PWs have been examined out of whom PW-1, Sri Chhotan Pd, PW-2, Sri Vasudeo Ram, PW-3, Sri Baldeo Sah, PW-4, Sri Bhagwat Pd. Yadav, PW-5, Sri Mahadeo Sah, PW-6, Sri Maheshwar Mandal, PW-7, Sarangdhar Sharma, PW-8, Jorawar Mandal, PW-9, Ram Swaroop Yadav, PW-10, Fauji Mandal, PW-11, Gulab Mandal, PW-12, Rajeshwar Mandal, PW-13, Somauli Sao, PW-14, Prasad, Mandal, PW-15, Palakdhari Prasad, PW-16, Natho Mandal, PW-17, Uma Kant Yadav, PW-18, Saragdhari Pd. Yadav, PW-19, Botal Yadav, PW-20, Baldeo Sah, PW-21, Vishundeo Mandal, PW-22, Basudeo Ram.

26. Side by side, on behalf of plaintiff/appellant, the following exhibits have been made which are as under:--

Ext-1, Power dated 21.11.79, Ext-2, Signature of Sri Lala Ganeshar Pd, Advocate, Khagaria on power, Ext-2/a, Signature of Dukha Baitha on the registered sale deed dated 24.7.1952 executed by Baldeo Sahu in favour of Dhani Mandal, Ext-2/b, Signature of Sri Janardan Pd, Advocate on power, Ext-3, Original Sale deed, Ext-2/c, Signature of Sri Lala Ganeshar Pd, Advocate, Khagaria on power, Ext-4 to 4C, Six rent receipts, Ext-3/a, Sale deed executed by Kanhaiya Lal in favour of Dhani Mandal dated 27.06.61, Ext-3/b, Sale deed executed by Govind Verma in favour of Botal Yadav and Asharfi Yadav dated 23.02.1981, Ext-3/c, Sale deed executed by Baldeo Sah in favour of Tilakdhari dated 27.04.1952, Ext-3/d, Sale deed executed by Baldeo Sah in favour of

Tilakdhari dated 27.04.1952, Ext-3/e, Sale deed executed by Daiwati Kumari in favour of Ramkesho dated 04.01.1928, Ext-5, A deed of agreement executed by Ajodha Yadav dated 29.06.1933, Ext-6, simple mortgage deed executed Bhup Das dated 09.02.1922, Ext-6/a, One simple mortgage deed executed by Ram Kesho Das dated 14.06.1933, Ext-7, Certified copy of Khatiyan, Ext-8 and 8/A, Two certified copy of order sheets of case No. 68/55, Ext-3/f, One original sale deed executed by Khusru Mandal dated 05.07.1927, Ext-3/g, Original sale deed dated 08.08.1925, Ext-3/h, Sale deed dated 22.06.1927, Ext-3/i, Original sale deed dated 3.3.43, Ext-9, C.C. of Decree of M.S. No. 631/35, Ext-9/A, C.C. of decree of rent suit No. 20/52, Ext-10, C.C. of judgment of M.S. 631/35, Ext-11, proceeding under Section 145 Cr.P.C.,

27. On the other hand, defendant had also examined altogether 19 DWs out of whom DW-1, Jugeshwar Pd. Yadav, DW-2, Krishnadeo Prasad, DW-3, Gopi Krishna Prasad, DW-4, Sekha Lal Yadav, DW-5, Ghuran Yadav, DW-6, Lorik Yadav, DW-7, Maheshwar Prasad, DW-8, Rang Bahadur Prasad, DW-9, Chandeshwari Yadav, DW-10, Abul Hasan, DW-11, Jagrup Yadav, DW-12, Basudeo Yadav, DW-13, Ganpati Mandal, DW-14, Brajnandan Prasad, DW-15, Sarju Mochi, DW-16, Sagar Sinha, DW-17, Mahadeo Mandal, DW-18, Kripal Yadav, DW-19, Sheo Nandan Pd. Chaudhary. On behalf of Defendant the following exhibits have been exhibited which are as follows:--

Ext-A to A/1, Two rent receipts, Ext-B, Sale deed dated 3.3.55, Ext-B/1 Saled deed dated 24.12.73, Ext-B/2, Sale deed dated 09.1.74, Ext-B/3, Sale deed, Ext-C, Complaint of T.S. 12/63, Ext-D, WS of T.S. 12/63, Ext-D/1 WS of G.A.L. in T.S. 12/63, Ext-E, Commissioner's report in T. Ex. No. 10/71, Ext-E/1, Commissioner's report in T.S. 12/63, Ext-F, Signature of Urupal Yadav on D.P. of T. Exm. 10/71, Ext-F/1, Endorsement and Signature of Deo Narain Yadav on Ext-F, Ext-F/2, Signature of Doe Narain Pd. Yadav on Ext-g, Ext-F/3, LTI of Panchu Mochi with signature of Deo Narain Pd. Yadav on Ext-g, Ext-G, Writing of Ganpat Mandal regarding execution of D.P., Ext-G/1, Writing of Ganpat Mandal regarding execution of D.P. of T. Exn No. 10/71, Ext-H, D.P. of T. Exm. No. 10/71, Ext-I, C.C. of Judgment of T.S. No. 12/63, Ext-I/1, CC of order-sheet of Misc. 1/64, Ext-J, CC of deposition of DW No. 1 of T.S. 12/63.

28. In order to analyze the judgment impugned, the first and foremost point happens to be regarding status of the plaintiffs. When the plaint was filed, status of plaintiff No. 3 and 4 have been shown to be minor who joined hands with plaintiffs No. 1 and 2, shown to be major, through their respective natural guardian, mother who also stood as plaintiff No. 5 and 6 respectively. Order 32 Rule 3A, which gives a liberty to a minor to file a suit after attaining majority which provides such opportunity on the ground so enumerated under Order 32(3A)(2) of CPC within three years of attaining majority so guided by the law of limitation having some sort of relaxation while extending the period. Suit filed by a minor, while his interest was under subjudication being a minor is another circumstance wherein the status of natural guardian or the guardian appointed

by the Court as Guardian ad litem is to be perceived in corresponding way. Not only this, in the backdrop of aforesaid event, the privilege so having in favour of minor under Order 32 Rule (3 A) will found completely vanished, consequent thereupon, his plea will also be found duly eclipsed through law of limitation. T.S. (Partition Suit) No. 12/1963 was disposed of on 31/07/1964 while instant suit has been filed on 23.01.1974, approximately after 9 years 7 months without having any explanation.

29. So, as per Order 32 Rule 3A (2) of the C.P.C., it is abundantly clear that the grounds available to the minor to challenge the finding is confined to the extent of misconduct and/or gross negligence of the guardian or next friend while defending their interest. So, the only question now rests whether the plaintiffs have been able to substantiate the same. Simultaneously, it could also be seen whether plaintiffs No. 3 and 4 have purposely been clubbed because of the fact that plaintiffs No. 1, 2, 5, 6 are major since before and they failed to exercise their right which is found barred by limitation and probability of keeping at bay during conduction of trial on the above score, cannot be ruled out.

30. Pleading as well as from the evidence of one of the plaintiff (PW-21), (who deposed after attaining majority), it is evident that though he had stated that Dhanu Mandal was the Karta and Karobari of the family and further, he was taken under control at the end of Ganpat Mandal, defendant No. 1 and under whose influence, he had left to do Pairvi and had gone to such extent that even by filing appeal before the High Court, he left to care and on account thereof, the appeal was dismissed. Then thereafter, he had deposed on factual aspect which he claimed to know from Bijo Mandal, who himself happens to be plaintiff, as disclosed by him. Hence his evidence is based upon hearsay category, which, for want of non examination of Bijo Mandal, whose temporary absence on account of being away for livelihood, is found inadmissible in the eye of law. It is further evident that in plaint there happens to be specific averment that during course of Dhanu Mandal being Karta, the family had made acquisition (Para-6), which he left to depose during course of his evidence, and that has purposely been left out to slur against Dhanu Mandal, as suggested by them.

31. Mere suggestion without any proof is another drawback. Though, the plaintiffs asserted that Dhanu Mandal had gone in collusion of Ganpat Mandal but save and except the oral allegation, it has not been substantiated by the documentary proof.

32. Although plaintiffs have prayed for annulment of judgment of T.S. No. 12/1963 on the grounds as stated above but failed to exhibit the WS filed on behalf of Dhanu Mandal as well as the judgment and decree, which has been brought up by the defendant and is Ext-D of the record wherefrom it is evident that WS was filed by altogether eight Defendants including Dhanu Mandal which speaks a lot over their conduct, contesting. Questioning the assertion of plaintiff in the aforesaid Ext-D, the Ganpat Mandal had not joined. Partition, since before is found pleaded in the WS (Ext-D)

33. Apart from this, from judgment of T.S. No. 12/1963 (Ext-J), it is apparent that Dhuj Mandal along with others have contested the suit (para-6), and further from para-21 of the judgment it is crystal clear that same plea as has been deposed by the PW-21 which were deposed by Dhanu Mandal, who stood as DW-1. The aforesaid event, in the background of absence of positive evidence at the score of plaintiff to substantiate his plea by cogent, reliable evidence that Dhanu Mandal had acted perverse to their interest did not inspire confidence for its acceptance.

34. The second aspect, over which the suit has been filed is with regard to conduct of guardian ad litem. From the record itself it is apparent that WS was filed on behalf of minors and Guardian Ad litem had proper presence to defend the cause of plaintiffs in earlier instituted Suit bearing No. 12/1963 (Ext-D-1). Again, the plaintiffs have not been able to expose the conduct of the Guardian ad litem adverse to their interest save and except asserting so orally.

35. The right of the minor, after attaining majority in order to challenge earlier judgment and decree passed against him in terms of Order 32 Rule 3A of the C.P.C. has been considered by the Hon'ble Apex Court in the case of Kameshwari Devi (Smt) alias Kaleshwari Devi and Others Vs. Barhani (Smt) Dead by Lrs. and Others, wherein it has been held as follows under para-4:--

It is true, as rightly contended by Dr. Shankar Ghose, learned Senior Counsel, that in a case where the estate of the minor is involved in an action for partition or any other suit, the estate of the minor is required to be properly represented taking all diligent steps by either guardian ad litem or the court guardian. If the interest or the estate of the minor is not protected necessarily, the minor on his attaining majority or within three years thereafter is entitled to file the suit under Section 7 of the Limitation Act, after cessation of the disability to question the correctness of a decree which is sought to be made binding on him. But in that case, the limited defence that could be open to him is that either the decree in the earlier suit was obtained by fraud/collusion or by negligence by the court guardian or that the guardian ad litem did not safeguard the interest of the estate of the minor. On proof of those facts, necessarily, the decree does not bind him and it is open to the court to go behind the decree and consider the right of the minor dehors the decree.

36. In the case of Asharfi Lal Vs. Smt. Koili (dead) by L.Rs., it has been held under following paragraphs which are as follows:--

9. The question is whether it is permissible for a minor to avoid a judgment delivered in an earlier proceeding to which he was a party on the ground of negligence of his next friend. In England, an infant plaintiff is as much bound by a judgment or order as an adult, even though there may have been irregularities in the conduct of the proceedings, unless there has been fraud or gross negligence on the part of his next friend. [See: Halsbury's Laws of England, 4th Edn., Vol. 24. Para 895. 12]. In Re Hoghton, Hoghton v. Fiddey, (1874) LR 18 Eq

573, Sir Richards Malins V.C., while considering the question whether an infant is to suffer by any negligence on the part of a next friend, has observed:

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

10. The Courts in India, by and large, have adopted the same approach. Till 1936 there was consensus of judicial opinion that it is permissible for a minor to void a decree obtained against him if there is negligence on the part of his next friend in the conduct of the case. [See : Ramnandan Dobey and Another Vs. Lalla Sheo Churn Lal and Another, ; Gursan Das Natha v. Ladakavahu, (1895) ILR 19 Bom. 571 ; Chunduru Ponniyya and Others Vs. Rajam Viranna and Others, ; Kumar Ganganand Singh and Others Vs. Maharaja Sir Rameshwar Singh Bahadur and Another, ; Mt. Siraj Fatima and Others Vs. Mahmood Ali and Others-->].

11. In 1936, the Privy Council in Talluri Venkata Seshayya and Others vs. ThadikondaAIR 1937 1 (Privy Council) , considered the question whether a decree can be set aside on the ground of gross negligence in the context of a representative suit under Order 1, Rule 8 , CPC. In that case, their Lordships, after noticing the decisions of the Calcutta High Court and Madras High Court, have observed:

"Their Lordships are not concerned to discuss the validity of these decisions, or the illusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the negligent actings of their guardians is a special one, and in these cases the plaintiff in the second suit was also the plaintiff in the former suit, although in the earlier suit he or she had sued through a guardian." [P. 4]

12. The Privy Council did not, however, agree with the view expressed in Talluri Venkata Seshayya and Others vs. ThadikondaAIR 1937 1 (Privy Council) , that the principles of Section 44 of the Evidence Act can be extended to cases of gross negligence and observed:

"The provisions of S. 11 Civil P.C. are mandatory, and the ordinary litigant, who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of S. 44 , Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts." [P. 4]

13. After the said decision of the Privy Council, the matter has been considered by the various High Courts. Most of the High Courts have taken the view that though a judgment against a minor cannot be avoided on the ground of fraud or gross negligence on the part of his next friend under Section 44 of the Evidence

Act, it is permissible for the minor to file a suit to set aside the decree on the ground of fraud or gross negligence on the part of his next friend. (See : Talluri Venkata Seshayya and Others vs. ThadikondaAIR 1937 1 (Privy Council) ; Talluri Venkata Seshayya and Others vs. ThadikondaAIR 1937 1 (Privy Council) ; Iftkhar Hussain Khan vs. Beant Singh minor through his maternalAIR 1946 Lahore 233 ; Mohammad Bakhsh vs. Allah DinAIR 1942 33 (Oudh) ; Mohammad Bakhsh vs. Allah DinAIR 1942 33 (Oudh) and Mohammad Bakhsh vs. Allah DinAIR 1942 33 (Oudh)). The Bombay High Court has, however, taken a different view and has held that gross negligence, apart from fraud or collusion on the part of the next friend or guardian ad litem or a minor litigant cannot be made the basis of a suit to set aside a decree obtained against him. [See : Mohammad Bakhsh vs. Allah DinAIR 1942 33 (Oudh)]. In that case Beaumont C.J. has disagreed with the earlier decisions of the said High Court on the view that the said decisions were based on a misconception of English law and that under the English law an infant cannot 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 if that is so, there was no reason why such a cause of action should lie in British India. Meredith J., in Mohammad Bakhsh vs. Allah DinAIR 1942 33 (Oudh) , has dealt with the English law on the subject and has pointed out that Beaumont C.J. in Mohammad Bakhsh vs. Allah DinAIR 1942 33 (Oudh) was not right in his appreciation of the English law on the subject. According to the learned Judge [Meredith J.] the substantive right to an infant, on attaining majority, to avoid a decree obtained against him owing to the gross negligence of his next friend was undoubtedly recognised in England from early times. The Privy Council in Talluri Venkata Seshayya and Others vs. ThadikondaAIR 1937 1 (Privy Council) has also pointed out that protection of minors against the neglect acting of their guardians is a special one. In the instant case, the High Court has proceeded on the basis that it is permissible for a minor to file a suit to set aside a decree on the ground of gross negligence on the part of his next friend. We are in agreement with the said view.

37. Plaintiffs, who have come forward and claimed relief to be adjudicated upon as well as be granted to them on the facts so enumerated in the plaint, is further found under obligation to substantiate the same by cogent and reliable evidence in terms of Section 101 , 102 of the Evidence Act. Furthermore, in terms of Order 32 Rule 3A of the C.P.C. which permits the minor after attaining majority to challenge the previous decree being adverse to him on the ground of misconduct, gross negligence on the part of next friend or guardian, was required to, in terms thereof, to be duly substantiated by the cogent and reliable evidence.

38. As stated above, neither in the plaint nor in the evidence of PW-21, party himself divulged the event conclusively as well as able to show the conduct of the guardian ad litem adverse to their interest and in likewise manner, even considering to some extent, that there was slackness on the part of Dhanu Mandal at the level of High Court where appeal was pending in not getting

process fee deposited, though not properly explained regarding presence of sumptuous amount at the proper juncture by the family, was not to be considered in the background of the fact that it has not been properly substantiated.

39. Apart from this, the reason best known to the plaintiff, in spite of having asserting positively that partition took place in the family long-long ago, have mentioned the fact that in spite of having partition, the land under Schedule remains joint. It is uncontroverted legal principle that there happens to be legal presumption with regard to jointness of Mitakshra Hindu Family but once there happens to be clear cut assertion over disruption has already taken place, then in that event, the burden lies upon the party who pleads that property remained joint. Again as this score, the plaintiffs failed to prove the case to the hilt so much so that PW-21, plaintiff himself could not be able to stand firmly.

40. That being so, the finding recorded by the learned lower court dismissing the suit needs no interference. Consequent thereupon, the appeal is dismissed but in the facts and circumstances of the case, parties will bear their own costs.