

(1993) 08 PAT CK 0036

In the Patna High Court

Case No : Appeal from Original Decree No. 536 of 1975

Binod Kumar Agrawala and Another

APPELLANT

Vs

Hazarimal Mahesh Kumar

RESPONDENT

Date of Decision : 20-08-1993

Acts Referred:

Citation : (1993) 08 PAT CK 0036

Final Decision : Dismissed

Judgement

S.N. Jha, J.—This is a Plaintiffs appeal. The, suit was filed for eviction of the Defendant. However, having regard to the pleadings of the parties and the evidence led by them bearing on Plaintiffs" title the suit can hardly be said to be a suit for eviction simpliciter.

2. The subject matter of the suit is portion of the premises bearing holding No. 350 appertaining to R.S. Plot Nos. 1106, 1107 and 1118 situate at Raxaul, popularly known as "Surtigola" in the locality. The property is said to have been purchased by one Pitamberlal Agarwal in the name of his two grand sons Binod Kumar Agarwal and Pramod Kumar Agarwal (Plaintiffs herein), sons of Nandlal Agarwal, as his nominees on 1.11.71. The suit was instituted in the names of the minor Plaintiffs through one Kailash Prasad Shrivastava holding power of Attorney on behalf of Pitambarlal Agarwal describing him "next friend" of the said minors. The suit premises are said to have been let out to the Defendant on rent Rs. 901/- per month in January, 1972. However, alleging that rent was not paid to the Plaintiffs at all, notice determining tenancy u/s 106 of the Transfer of Property Act was served on the Defendant and the suit was instituted. According to Plaintiffs, there is no document showing creation of tenancy but the relationship of landlord and tenant can be found from the corresponds between the parties.

3. The Plaintiff's further case as unfolded by the evidence led on their behalf is that a private partition in respect of various items of property including Surtigola took place amongst five sons of Hazarimal Agarwal from his first wife, namely,

Bohit Ram, Pitamberlal, Thare Ram, Mohanlal and Deoraj in 1931. Surtigola was allotted to the share of four brothers except Bohit Ram who along with his father Hazarimal got share in Anr. house at Raxaul. According to Plaintiffs, Bohit Ram did not accept the aforesaid partition. It is said that in 1945 purchased the suit premises by paying 3000/- each to his four brothers as price. It is said that during pendency of Title Suit No. 48 of 1958 brought by one Shyam Sunder Agarwal, Anr. son of Hazarimal j from his second wife, Bohit Ram gave an undertaking in favour of his four brothers on 22.2.61 in which he categorically stated that he had purchased the suit premises on payment of Rs. 3000/- to each of them. It is further said that in view of the said undertaking, the aforesaid suit was compromised on 7.1.65 and in terms of the compromise Bohit Ram, in whose name the Jamabandi in respect of Surtigola property all along stood, filed a petition before the Anchal Adhikari, Raxaul on 25.1.65 for bifurcation of the jamabandis in favour of the brothers and accordingly separate jamabandis were created in favour of all of them. The suit premise was sold by Bohit Ram in discharge of certain obligations which he owed to Pitamberlal.

4. According to the Defendant, Bohit Ram was not allotted any share in the Surtigola property in the family partition in 1931 where after he ceased to have any concern with the said property. Since Bohit Ram did not get share in the property, he could not have conferred any right, title and interest in the premises in favour of the Defendant. Thus, the impugned sale deed dated 1.11.71 was a bogus transaction conferring no right on the Plaintiffs. The Defendant accordingly denied the relationship of landlord and tenant between the parties and prayed for dismissal of the suit on the ground absence of title in the Plaintiffs.

5. The trial Court on consideration of the pleadings of the parties, inter alia, framed the following issues:

(i) Whether there is any relationship of landlord and tenant between the Plaintiffs and the Defendant?

(ii) Whether the Plaintiffs have proved default in payment of rent and their personal need for the suit premises as alleged by them and whether they are entitled to the reliefs claimed by them?

On consideration of the evidence oral as well as documentary adduced on behalf of the parties, the Court came to the conclusion that Bohit Ram did not get any share in the Surtigola property in 1931. He did not acquire any title by virtue of the alleged purchase in 1945 either. The Court accordingly held that there was no relationship of landlord and tenant between the parties and dismissed the suit.

6. The present appeal on behalf of the minor Plaintiffs has been filed in this Court through their father Nandlal Agarwal as natural guardian. An application for discharge of the previous guardian and permission to the natural guardian to prosecute the appeal on behalf of the minor Appellants was later filed after the Bench passed peremptory orders to that effect on 25.7.77. The Defendant-Respondent objected to the maintainability of the appeal on the ground that the

suit was instituted in the names of the minor Plaintiffs as nominees of Pitamberlal through Kailash Prasad Shrivastava holding power of Attorney on his behalf. Thus, only Kailash Prasad Shrivastava could have preferred the appeal and not the natural guardian of the minor Plaintiffs Appellants, namely, Nandlal Agarwal. It was also pointed out alternatively, that as Kailash Prasad Shrivastava has not been discharged from the guardianship of the two minor Plaintiffs nor the memorandum of appeal was, accompanied by any petition to that effect, on the date of the filing of the appeal, only he was competent to prefer the appeal. The matter came up for consideration on 7.8.78. A Bench of this Court after hearing the parties discharged Kailash Prasad Shrivastava from the guardianship and allowed Nandlal Agarwal to prosecute the appeal "subject to objection which may be raised on behalf of the Respondent at the time of hearing of the appeal". Learned Counsel for the Respondent, accordingly, raised a preliminary objection regarding maintainability of the appeal at the very outset of the hearing.

7. Two questions arise for consideration in this appeal; one whether the impugned sale deed dated 1.11.1971 (Ext. 3/b) confers title upon the Plaintiffs being nominees of Pitambarlal Agarwal and whether, thus the Plaintiffs are landlords with respect to the suit premises and, two whether the appeal as framed is maintainable. I shall take up the first question first.

8. It would appear from the pleadings of the parties, as briefly noticed hereinabove, that there is no dispute that partition of properties took place in 1931. It is also an admitted position that in that partition, as regards Surti gola property, no share was allotted to Bohit Ram. Persons no less than Bohit Ram himself (P.W. 16) and Tormal Agarwal (P.W. 14), the kingpin of the Plaintiffs case have admitted this. Even Ext. 6, the undertaking said to have been given by Bohit Ram on 22.2.61, sheet anchor of their case, says so. I shall again refer to this document later in this judgment. As stated above their case in this regard is that the 1931 partition was not acted upon. According to them further, Bohit Ram purchased portion of Surtigola being the suit premises herein in 1945 from his four brothers on payment of Rs. 3000/- each.

9. Bohit Ram admitted in his deposition that the family had two houses at Raxaul. He further admitted that he was in possession of the other house. Learned Counsel for the Appellants reiterated in the course of argument before me that Bohit Ram retained possession of the other house. It is difficult to appreciate that although the other house was allotted to Bohit Ram and his father Hazarimal in that partition, he would not accept the partition as binding on him despite the fact that he came and continued to be in possession of that house by virtue of the said partition, and stake his claim to a share in the house in question (Surtigola) which had been allotted to the four other brothers who had not been given any share in the other house. It should be kept in mind that the Plaintiffs having admitted the factum of partition of 1931 onus lies upon them to prove that the same was not acted upon. Terms of partition of property may be varied or modified. Occasion may arise justifying such variation or

modification in the division or allotment of properties. The party pleading such a case has to prove the existence of necessary facts and circumstances proving further that the partition was not acted upon. The Plaintiffs have singularly failed to prove this.

10. In the instant case the Plaintiffs do not appear to be very clear about their case. According to them, the previous partition was not acted upon. According to them further, their vendor Bohit Ram purchased the premises and became its owner. An erstwhile co-sharer of property on purchase of the portion allotted to the other co-sharer becomes its owner in his own right not because the partition was not acted upon or because of any re-adjustment or re-allotment of share but because of the purchase. However to be fair to the Plaintiffs, on close analysis, their whole case really appears to rest on the story of purchase of the suit premises in 1945. and not as a result of re-adjustment of shares in the Surtigola property because 1931 partition was not acted upon. Thus in the instant case, the Plaintiffs are required to prove the factum of purchase of the property by their vendor in 1945.

11. The striking feature of the Plaintiffs case in this regard is that although payment of consideration money in respect of the suit premises is said to have been made way back in 1945, no document, even unregistered was ever executed between the parties. There is no evidence regarding payment of money either. No less a person than Tormal Agarwal himself admitted this in his evidence vide paragraph 33 of the deposition.

12. Learned Counsel for the Appellants placed heavy reliance on Ext. 6 (supra) to substantiate the plea of purchase of the property in 1945. Described as undertaking, the document has been written on plain paper. It is in the nature of a unilateral declaration professedly made by Bohit Ram, allegedly, signed by him and none else. Counsel placed pointed reliance on paragraph 3 of the document which states that Bohit Ram had paid Rs. 3000/- each to his four brothers in 1945 and purchased the suit premises, registration of which was yet to be done. Paragraph 3 can not be read in isolation. In paragraphs 1 and 2 of the document a clear and categorical admission has been made to the effect that the family properties had been partitioned in 1931 and the statements made to the contrary in the written statement filed by him in partition Suit No. 48 of 1958 (supra) were not correct. Paragraph 2 of the document further states that written statement denying the 1931 partition was filed by Bohit Ram in Partition Suit No. 48 of 1958 because Shyam Sunder had made a false claim with respect to the other house of Raxaul standing over plot no. 1179, which had already been, allotted to his (Bohit Ram) share along with his father in the said partition.

13. I fail to appreciate how the contents of the documents of the nature as Ext. 6 can have any evidentiary value on the question of acquisition of rights and interest by the Plaintiffs, vendor in the property. Counsel, however, sought to utilize the document as a piece of corroborative evidence or a circumstance linking it with the compromise filed in Partition Suit No. 48 of 1958, and

bifurcation of jamabandi with respect to Surtigola property, which are said to be sequel, to the undertaking. It is said that the "undertaking" inspired the parties to compromise the dispute in Partition Suit No. 48 of 1958. I regret my inability find any nexus or connection between the undertaking said to be given on 22.2.61 and the compromise filed in the partition suit on 7.1.65 for the reason, inter alia, that Surtigola was not the subject matter of that suit. As indicated above the suit was instituted by Shyam Sunder claiming partition of certain properties including the house property situate over plot no 1179 at Raxaul. It is most unlikely that the undertaking said to be given on 22.2.61 would have induced the parties to compromise the suit with respect to of her properties four years after because Shyam Sunder was going to get and factually, did not get any share in the Surtigola property. Be that as it may in my opinion, read as a whole the document far from lending any support to the Plaintiffs case, falsifies their claim in view of the clear and specific statements admitting the partition of 1931.

14. Learned Counsel made detailed submission, regarding mutation proceedings which according to him is strong piece of evidence on the point that Bohit Ram all along continued to Exercise and assert his rights in the Surtigola property. The trial Court dealing with this aspect has held that the orders passed in the proceeding did not create any right, title or interest in the property. I am in complete agreement with this view. About the nature of the mutation proceeding the Privy Council as early as in 1926 in the case of Thakur Nirman Singh v. Thakur Lal Rudra Narain Pratap Singh AIR 1926 Privy Council 100 observed:

The perusal by their Lordships of the judgment of the Court of Judicial Commissioner leads their Lordships to think that its judgment is to a great degree based on the mischievous but persistent error that the proceeding for mutation of names is a judicial proceeding in which the title to and the property rights in immovable property are determined. They are nothing of the kind as has been pointed out times innumerable by the Judicial Committee. They are much more in the nature of fiscal enquiries instituted in the interest of the State for the purpose of ascertaining which of the several claimants for the occupation of certain denominations of immovable property may be put into occupation of it with greater confidence that the revenue for it will be paid.

In case of Bhola Singh v. Chandrabansh Choubey 1966 BLJR 759 it was observed that such proceedings are primarily administrative in nature. Following these and other cases on the point a Division Bench of this Court held in Lal Bihari Prasad v. State 1979 BBCJ 553.

They do not decide the dispute between the parties finally in the sense that any finding recorded by them is not of a binding nature, the sole object of such proceedings being as to from whom the State shall realise rent.

This Court has consistently taken the view that the orders passed in proceeding for mutation of names, creation or cancellation of jamabandi and the like do

neither create nor extinguish ones" title in the property in question.

15. However, in deference to the painstaking arguments advanced on behalf of the parties, I may briefly indicate the necessary facts in this regard. On 25.4.65 Bohit Ram addressed a letter (Ext. 7) to me Anchal Adhikari Raxaul for bifurcation of jamabandi No. 290 with respect Surtigola, which till then stood in his name making reference to the partition of 1931 and "the subsequent arrangement thereafter in 1945". The Anchal Adhikari passed order (Ext. 20/A) on 31.3.65 creating separate jamabandis in favour of all five brothers, one of them represented by the widow Munia, in different proportions. Munia, widow of Thare Ram, filed a petition (Ext. 5) objecting to the creation of jamabandi in different proportions. According to her, jamabandis should have been created in equal shares. The petition of Munia Devi, numbered as Case No. 82 of 1966-67, was referred to the Deputy Collector Incharge Land Reforms (DCLR). By order dated 15.11.66 (Ext. 20), the DCLR allowed the petition of Munia Devi holding that there was no material on the record suggesting different co-sharers were in possession of different portions of the building. It may be mentioned here that in the proceeding before the DCLR, Bohit Ram had filed an application on 11.10.66 (Ext. 5/a) pointing out, inter alia, that Ext. 7 was forged document and that his signature had been obtained on a blank paper.

16. Learned Counsel for the Respondent submitted that the orders passed by the Anchal Adhikari and the D.C.L.R. were collusive. It is not necessary on the facts of the case to find out whether the orders are collusive but I do find substance in the submission of the counsel that the orders were passed without serving notice to the parties concerned and giving them opportunity to contest proceedings. This, coupled with legal position regarding the effect of the orders passed in such proceedings, as indicated above, is sufficient to reject the entire argument of the Appellants' counsel on the strength of the said orders. Simply because Bohit Ram addressed letter to the Anchal Adhikari on 25.1.65, assuming he had done so, and filed objection to the petition of Munia Devi on 11.10.66 cannot be the basis for holding that Bohit Ram continued to assert his right and interest in the property. The Defendant has brought documents on record showing that the Plaintiffs' petition for mutation was rejected later.

17. Counsel for the Respondent referred to Exts. II and I to show that even Tormal Agarwal denied the rights and interests of Bohit Ram in the suit property as recently as in 1965. Ext. H is the letter dated 4.6.65 sent by Tormal Agrawal and Ext. 1 is the lawyer's notice dated 25.6.65 at his instance and in continuation of his letter dated 4.6.65 addressed to Mohan Lal Agarwal proprietor, M/s Dedraj Ramautar and Director, Dedraj Ramautar (Private) Ltd. making a grievance that "Mohan Lal. Agarwal in collusion with Bohit Ram had been realising rent from the suit property though Shri Bohit Ram has no interest or share whatsoever in the building and godown which were allotted to the shares of Shri Pitamberlal, Sri Thare Ram, Shri Mohan Lal (yourself) and Shri Dedraj by the partition effected in Bhado 1988 Samvat i.e 1931 to which Sri

Bohit Ram was also a party?. If Tormal Agarwal, who has been described by the Respondents counsel as the "kingpin" of the Plaintiffs' case himself denied the rights and interests of Bohit Ram as recently as in 1965, it is not understandable as to how Bohit Ram came to be possessed of any such right which he could confer on the Plaintiffs, as nominees of Pitamberlal. In my opinion, therefore, the Plaintiffs have singularly failed to prove that their vendor had any right, title or interest left in the suit property which he could have transferred to them by the impugned sale deed dated 1.11.71.

18. This, according to me, should be sufficient to disentitle the Plaintiffs to seek the Defendants' eviction from the suit properties. However on the question of the landlord-tenant relationship I would like to say a few words. It may be recalled that as per the case pleaded in the plaint there was no document creating the landlord tenant relationship between the parties. It was said in the plaint that the relationship is established by the correspondence between the parties. Kailash Prasad Shrivastva (P.W. 11), who held power of Attorney on behalf of Pitamberlal, stated in paragraphs 10 and 11 of his evidence that he had received written instruction from his employer in Calcutta to let out the premises on rent Rs. 901/- per month. But he admitted that no such written instruction had been filed. He also admitted that there was no witness on the point of letting out of the premises. Tormal Agarwal, however, referred to a letter (Ext. 6/f) said to have been written by Ram Krishna Agarwal on 22.11.71. In paragraph 40 of his evidence he (Tormal) stated that apart from the letter, there was no other document which could prove/establish creation of tenancy or relationship of landlord-tenant between the parties.

19. Ext. 6/f was the subject of considerable debate not only in the trial Court but also in this Court. It would be appropriate to refer to its contents in detail. After the usual message of greeting the letter, loosely translated, reads thus:

I learnt about your programme to visit Raxaul from Kailash Babu. I was happy to learn about it. Hope you will come early. All are happy here. Hope you all are O.K.

Thereafter, the writer of the letter has given the date as "22.11.71". However, in between, the words "Bharey Ka Binod Aur Pramod Ko 901/- per Maan De Denge" have been inserted. According to the Defendant the letter by reason of addition or insertion of the said words is forged. The dispute about the forgery was sought to be resolved with the help of opinion of the handwriting expert by both sides. The trial Court preferred" the opinion of Shri Shyamji Sahay Varma D.W. 17 and held that the writing is not the writing of Ram Krishna Agarwal and the forgery seems to have been created by Tormal Agarwal and Keshar Chakravarty (P.W.7). A bare look at the document (Ext. 6/f) makes it abundantly clear that the disputed words have been added later. After the words "App Sabhi Sakushal Honge" the writer of the letter has given the date (22.11.71), which means that after writing those words, he ended the letter, by giving the date. The sentence containing the controversial words has been, no doubt, written in continuation and in the same line but the sentence ending with words "Per Maan De Denge"

are, in, fact, below the line where the date has been mentioned. If the sentence has been written in continuation, the date would have been mentioned below and not above. Besides, the ink and the impression of the letters also are different. Most important, as the trial Court has observed, it cannot be believed that such a solemn transaction as to the creation of tenancy would come of by such a slipshod and cryptic sentence". I may add that the disputed sentence is completely out of place and, in the context it appears, wholly irrelevant. All these coupled with the evidence of the expert (D.W. 17) lead me to agree with the conclusion of the trial Court that the document (Ext. (6/f) is forged.

20. Having regard to the evidence of Tormal that there was no other document except Ext. 6/f on the point or creation of tenancy of landlord tenant relationship, once the document is believed the whole case of the Plaintiffs on that premise regarding such relationship has to fail and the Plaintiffs cannot be held entitled to relief of eviction. I, accordingly, hold in agreement with the trial Court that the Plaintiffs are not entitled to decree of eviction both on the ground of absence of right, title and interest in the suit property as also because they have failed to prove the relationship of landlord tenant between the parties.

21. I shall now consider the second point. It may be stated at the outset that Mr. Jagannath Tiwari, who made the leading argument on behalf of the Appellants did not deal with the preliminary objection in" course of his submission. It fell to the share of Mr. Sunil Singh to argue the point at the stage of reply. While considering the question of competency of this appeal, as framed, it should be kept in mind that the suit property, although standing in the names of the minor Plaintiffs in fact, to Pitambarlal Agarwal. This would evident from the recitals of the deed to the effect that "NOW THIS INDENTURE WITNESSETH that in consideration of sum of 40,000/- (Rupees forty thousand) Pitamberlal in the manner stated hereinbefore is entitled to get from the VENDORS, in lieu of the same the Vendors doth hereby grant and convey and transfer to the Purchasers, nominees of Pitambarlal, the property free from any encumbrance as described in the ...?Reference may also be made to the statement of Tormal Agarwal in paragraph 4 of his evidence that Bohit Ram the suit property to Pitambarlal in discharge of certain dues which he owed.

22. Mr. Prameshwar Prasad has contended that Kailash Prasad Shrivastava could "not have instituted the suit as next friend of the minor Plaintiffs under the alleged authority purportedly granted to him by virtue of a power of Attorney (Ext. 3/a) executed by Tormal Agarwal in his favour on 15.8.72. It was pointed out that the power of Attorney in favour of Tormal Agarwal under registered deed dated 30.9.64 (Ext. 3) was in respect of certain properties as mentioned therein. According "to the counsel since the suit property was allegedly acquired in 1971, the power granted to Tormal under the aforesaid deed could not relate to the suit property and, therefore, Tormal as the delegate could not have delegated the power which he did not possess with respect to the suit property under the deed dated 18.8.72 (Ext. 3/a). It appears from perusal of Ext. 3/a that the document

was executed in the name of Pitamberlal Agarwal himself, although executed by Tormal. By reason of the power delegated to him under Clause 18 of the deed dated 30.9.64, Tormal was fully competent to sign and execute document on behalf of Pitamberlal. In other words, the deed of power of Attorney dated 18.8.72 cannot be said to have been executed by Tormal. It will be deemed to be executed by Tormal on behalf of the principal Pitamberlal. The institution of the suit through Kailash Prasad Shrivastava describing him as next friend of the minor Plaintiffs on instructions of the principal, by virtue of the power delegated to him under the deed dated 18.8.72, therefore, cannot be said to be incompetent. It is doubtful if the institution of the suit through Kailash Prasad Shrivastava can be otherwise upheld as valid if the property were to belong to the minor Plaintiffs. Admittedly their father and natural guardian Nandlal Agarwal is alive and does not suffer from any legal infirmity to act as the next friend. It is true that in terms of Rule 4(1) of Order 32, Code of Civil Procedure, any person not suffering from any of the disability as mentioned therein, is entitled to act as next friend. However, as has been held in the case of *Narayani Amma Vs. Bhaskaran Pillai and Others*, , Rule 4(1) contained only an enabling provision. To quote:

a person who has no interest at all in the benefits of the minors and who has been put forward by Anr. person for achieving his objects is not entitled to act as a next friend of the minors and maintain a suit in the name of the minors.

It may be mentioned here that in paragraph 23 of his evidence Tormal Agarwal categorically stated that the suit had been instituted for the benefits of Pitamberlal.

23. Before considering the question of competency Anr. aspect may be noticed. Plaintiff-Appellant No. 1 Binod Kumar Agarwal was said to be 10-12 years old as on 25.7.75 vide paragraphs of the evidence of P.W. 11 Kailash Prasad Shrivastava and Promod Kumar Agarwal, the other Plaintiff Appellant was said to be two years younger than him. Thus, after expiry of 18 years they must be about 28-30 years old by now. No step has been taken to correct the cause title of this appeal as regards the description of the Appellants and they have continued to be shown as minors. No application-affidavit has been filed for permission on their behalf to prosecute the appeal as major. During course of hearing I pointedly asked counsel for the Appellants as to how and why the description of the Appellants has not been corrected and why necessary permission to prosecute the appeal in their own right as major was not sought by or on behalf of the Appellants. Counsel could not give any answer, whatsoever. It appears to me that there has been a deliberate attempt to keep not only the Plaintiffs but also Pitamberlal Agarwal away from the area of litigation. If the property belongs to Pitamberlal Agarwal, his other son, namely, Nandlal Agarwal too may have interest therein along with Tormal and, therefore, there may be reasons for keeping Pitamberlal in the background. The doubt gets reinforced by the statement of Tormal himself, vide paragraph 22 of his evidence wherein he

stated that he did not bring the plaint of the suit to the notice of Pitamberlal Agarwal. Although in paragraph 2 he stated that consent of Pitamberlal had been obtained" (statement of the witness recorded with objection), it is doubtful that it was so done. The fact that Pitamberlal Agrawal himself did not come forward to pledge his oath cannot be ignored. It would not be out of place to refer to evidence of Bohit Ram in Paragraph 9 wherein he stated that he had executed sale deed (impugned sale deed) as per the desire and dictate of Tormal, Once the property is held to be the property of a person other than the minor Plaintiffs, it becomes doubtful as to whether the present appeal could be preferred through their father as natural guardian.

24. The question posed by Mr. Parmeshwar Prasad which remains to be considered is whether without an order of discharge of the next friend representing the minor Plaintiffs at the stage of suit, the appeal can be filed through any other person. Counsel in support of his contention that it cannot be so done, placed reliance on Shambhu Vs. Kanhaya, and Sawan Ram v. Nachattar Singh AIR 1952 Pepsu 63. In Sambhoo v. Kanhaya, the minor was represented by Nazir appointed as guardian ad litem by the Court. It was held that where guardian ad litem has once been appointed his appointment continues for the whole of the lis in the (sic) of which it was made unless and until it was revoked by the Court. The Lahore High Court in the case of AIR 1931 635 (Lahore) , following the above decision, also held that where a next friend of the minor Plaintiffs has once been appointed such appointment continues for the whole of the lis or until it is revoked by the Court" or until the next friend has been removed under Order 32 Rule 9, CPC and the next friend is the only person who can prefer an appeal on behalf of the minors. In the case of Sawan Ram (supra) the distinction between guardian ad litem and next friend of a minor was pointed out stating that in the case of guardian, express order of the Court for his appointment as such is necessary while a next friend himself can come into the Court on behalf of the minor. While the guardian ad litem is appointed by the Court, the next friend appoints himself and unless and until it is shown that he has any interest adverse to the minor his appointment can, not be objected to. However, it was held that the status of the person, whether as guardian ad litem or as next friend, is to continue throughout for the whole of the lis. So far as that is concerned, there is no distinction between the status of a guardian ad litem and a next friend. The following observations made in this connection may be noticed.

The fact however remained that when the next friend is once appointed even though by himself he continues to be the next friend throughout the lis and no one else can intervene on behalf of the minor until he applies to the Court to have the next friend removed. Accordingly, I hold that the appeal when it was instituted by Nachittar Singh's mother was without authority and was not properly presented.

25. It has been stated above that memorandum of appeal was not accompanied

by any application for discharge of next friend representing the minor Plaintiffs in the trial Court. The application was filed only after the Court passed a peremptory order to that effect on 25.7.77. Mr Prameshwar Prasad stated that in the said petition no reason was assigned for the discharge of Kailash Prasad Shrivastava as the next friend except that the discharge was for "better prosecution" of the case. According to the learned Counsel this was not a sufficient ground. Counsel also contended that even if the ground is said to be germane sufficient, the appeal would be deemed to be validly presented (through the natural guardian) only when the Bench passed an order to that effect on 7.8.78 although subject objection which may be raised at the time hearing of the appeal. In other words the appeal would be deemed to be validly presented only on 7.8.78 or at the most when the application for discharge was filed. In support of the contention counsel referred to following passage in the case of Sawan Ram (Supra):

I am not prepared to hold that the District Judge had any power to make an order which could have retrospective effect, because no provision exists on the point in the Code of Civil Procedure. There are certain matters such as extension of it given for doing a particular purpose and permission to put in deficient Court fee in which the Court accepts the prayer, that is to say, grants the extension of time and allows deficiency of Court fee to be made up its order can take effect from the original date but these are matters which are specifically provided by CPC Code. I have not been referred to any such provision regarding the appointment of guardian ad litem or next friend of the minor and I am inclined to think that the appointment may take effect only on the date on which it is made. Consequently, the appeal in the District Judge's Court could be taken to have been instituted only on the day the minor's mother was appointed his next friend.

26. For the reasons stated above I am inclined to hold that presentation of the appeal through Nandlal Agarwal as natural guardian of the minor Appellant was not valid and the appeal as framed is not competent. This point is also, accordingly, answered in the negative against the Appellants.

27. Before concluding I may mention that an application for taking additional evidence under Order 41 Rule 2, CPC has been filed on behalf of the Appellants. A large number of documents have been mentioned. It is not the case of the Appellants that the documents in question were not within their knowledge during the course of trial or that the trial Court refused to admit the same in evidence. In my opinion, the materials already on record are sufficient to decide the appeal and the documents in question are not required for the purpose or for any other purpose. Thus no ground as envisaged in any of the clauses of Rule 27(1) of Order 41, CPC has been made out and the application is accordingly, rejected.

28. In the result I find no merit in this appeal which is dismissed with costs.