

(1953) 02 CAL CK 0020
In the Calcutta High Court
Case No : A.F.A.D. No. 1000 of 1948

Dwijapada Mondal and Another

APPELLANT

Vs

Bholanath Mondal and Others

RESPONDENT

Date of Decision : 22-02-1953

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 32 Rule 3, Order 32 Rule 3(4)

Citation : AIR 1954 Cal 85

Hon'ble Judges : Renupada Mukherjee, J

Bench : Single Bench

Advocate : Bankim Chandra Roy, for the Appellant; Manan Kumar Ghosh, for the Respondent

Judgement

Renupada Mukherjee, J.—This appeal arises out of a suit for partition. The suit was instituted by the plaintiffs-respondents who claimed one-sixth share in the properties in suit and alleged that the remaining share was owned amongst the defendants in different shares. It was admitted by both the parties that the original defendant 1, Debendra Mondal, who died during the pendency of this suit in the trial Court had eight annas share in the disputed properties. His sister's son who was a minor named Haradhan Ghose was substituted in his place.

2. The suit was contested in the trial Court by deceased Debendra Mondal and defendants 2 and 3 their main contention being that the suit was bad for partial partition. It was also contended by them that the representation of minor Haradhan Ghose was not made in accordance with law. Some other objections were also raised by the contesting defendants in the trial Court with which we are not concerned in the present appeal. All these contentions were negatived by the trial Court and a preliminary decree for partition was made. Thereafter an appeal was preferred before the lower appellate Court by defendants 2 and 3, but their appeal was dismissed. So the two last named persons have preferred this second appeal.

3. Two objections were urged on behalf of the appellants in this appeal. The first objection was comparatively of a minor nature. It was contended that the Courts below should have upheld the contention of the appellants that the suit for partition was bad on account of partial partition. This point appears to have been argued at some length before the lower appellate Court where the appellants contended that the plaintiffs of the partition suit have not brought into the hotchpot some other properties in which the parties to the partition suit were jointly interested.

The lower appellate Court, however, found as a fact that the so-called properties which have been left out belonged not only to the present parties but also to some other co-sharers of theirs who, how-ever, have admittedly got no interest in the properties under partition. That being the case, it is not at all necessary that the properties which are alleged to have been excluded from the scope of the partition suit should have been brought into the hotchpot in my judgment, the lower appellate Court is perfectly justified in holding that the suit was not bad on account of a prayer for partial partition.

4. The second contention urged with some amount of force on behalf of the appellants was that minor Haradhan was not properly represented in the trial Court and as he was not a party in the eye of law, the entire decree is liable to be set aside for exclusion of a necessary party from the partition suit.

The objection taken by the appellants arises in the following way : I have already observed that Debendra Mondal was originally defendant 1 in the partition suit, He died during the pendency of the suit after having filed a written statement jointly with defendants 2 and 3. Upon his death his sister's son minor Haradhan Ghose was substituted in his place. After the minor was brought on the record, notice appears to have been served upon the minor and his mother Labanya Protima Dassi. The mother of the minor did not appear to contest the suit on behalf of her minor son, and so pleader Sri Rajendra Mohan Mukherjee who was already representing defendants 2 and 3 was appointed court Guardian of the above minor. Rajendra Babu corresponded with the mother of the minor and as she did not furnish him with any instruction, he submitted a final report that there was no separate contest on behalf of the minor and the suit was contested by defendants 2 and 3.

5. It is, however, an admitted, fact that the father of Haradhane Ghose is alive. The learned Advocate for the appellants contended that the father being alive, he was the proper person upon whom notice should have been issued in the first instance under the provisions of Order 32, Rule 3 (4), Civil P. C. for representing the minor and if he did not appear, then only the Court should have appointed a Court guardian. It was further urged that the notice to the mother when the father was alive was not sufficient compliance with the provisions of the above requirement of law and it did not confer jurisdiction upon the Court to appoint a Court guardian on behalf of the minor.

This contention of the appellants, however, does not appear to be sound to me. It is no doubt true that notice should have been issued in the first instance upon the father before appointment of the Court guardian. The omission to send such a notice is, however, a mere irregularity not vitiating the proceedings unless it could be shown that the minor has been prejudiced in his defence thereby or that there was some fraud or collusion on the part of the plaintiff or the guardian: Vide the case of -- K. Tirumalacharyulu alias Ramanujacharyulu and Others Vs. Ammisetti Venkiah and Others, (A) and also the case of --" Sadho Sahu Vs. Sarda Pathak and Others, (B).

6. In the present case, it could not certainly be pointed out on behalf of the appellants that any fraud was committed by the plaintiffs in the matter of representation of the minor or that the minor had suffered any injury or prejudice by the irregularity noticed above. The predecessor of the minor filed a joint written statement along with defendants 2 and 3", who contested this suit to the best of their ability. In these circumstances, I hold that the minor had been properly represented in the Courts below and there is no ground for holding that the representation of the minor was void and he was not a party to the suit in the eye of law simply on account of the irregularity mentioned above.

7. In the result, the appeal must fail.

8. In view of the circumstances of the case, I direct that the parties will bear their own costs in this appeal.

9. The real contest in a partition suit often arises after the passing of the preliminary decree because the allotments which a Commissioner makes may not be to the liking of the parties concerned. That being the case, an opportunity will be given to the father of respondent Haradhan Ghose to appear and represent the minor in future proceedings.

10. I, therefore, direct that soon after the receipt of the records by the trial Court, that Court will issue a notice on the father of minor Haradhan Ghose (substituted defendant 1 in the trial Court) for appearing on behalf of the minor and representing him if he so desires. This notice will be issued free of costs. If the father of the minor chooses to appear on his behalf, then the appointment of the Court guardian will be cancelled and Haradhan's father will continue to represent him in all future stages of the present suit. If, however, the father of the minor does not appear on receipt of the notice, then the appointment of the Court guardian will stand.