

(1966) 08 J&K CK 0001
In the Jammu And Kashmir High Court
Case No : Civil Revision No. 155 of 1965

Habib Teli and others

APPELLANT

Vs

Ali Teli and another

RESPONDENT

Date of Decision : 25-08-1966

Acts Referred:

Citation : (1966) 08 J&K CK 0001

Hon'ble Judges : Janki Nath Bhat, J

Bench : Single Bench

Advocate : Tassadaque Hussain, for the Appellant; K.N. Raina, for the Respondent

Final Decision : Allowed

Judgement

J.N. Bhat, J.—This is a revision application directed against the order of District Judge Baramulla dated 13-9-65 whereby he has remanded

the case to the trial Court Sub Judge Baramulla which had been decreed by him on 30-9-63.

2. The facts involved in this case need not be discussed in detail. The trial Court has after taking the written statement, striking the issues, and

taking the evidence decreed the suit after giving a finding on the issues raised in the case. The lower appellate Court has disposed of the appeal

before it on a very simple ground that Ali Teli a minor defendant was not properly represented before the trial Court and, therefore, the whole

proceedings are void. The original suit was brought by Rehim Teli and others against Abdulla Teli defendant No. 1 and Ali Teli minor defendant

No. 2 under the guardianship of Abdulla Teli. Notice of the suit was sent to the defendant which was served personally on Abdulla Teli both in his

personal capacity and as guardian of the minor Ali Teli. It may be incidentally mentioned here that Ali Teli is the real son of Abdulla Teli but is

alleged to be the adopted son of Remzan Teli.

Abdulla Teli appeared in the Court and the order of 22-7-59 is that Abdulla Teli appeared in his personal capacity and as guardian of Ali Teli

minor. Subsequent orders also indicated that Abdulla Teli has been appearing in his personal capacity as well as guardian of his minor son Ali Teli.

However, in the written statement filed by Abdulla Teli on 24-8-59 in the preliminary objections Abdulla Teli has stated that he did not like to act

as a guardian of Ali Teli minor and somebody else may be appointed as guardian. Then written statement purported to have been filed on behalf of

defendant No. 1 alone. Even on that date i.e. 24-8-59 Abdulla Teli appeared as guardian of the minor and in the subsequent proceedings also as

the orders indicate Abdulla Teli has been appearing as guardian of the minor. These facts I may mention only to give a brief narration of the

proceedings in the trial Court.

The trial Court struck issues on 25-11-59 and those issues also indicated that the burden of proof of the relevant issues had been placed on the

defendants. After recording the evidence of the parties the trial Court decreed the suit. The lower appellate Court, as already indicated has set

aside this decree and remanded the case to the trial Court on the point that the minor has not been properly represented in the trial as Abdulla Teli

had in his preliminary objections in the written statement objected to act as guardian of the minor Ali Teli. In this revision application it has been

contended that the order of the lower appellate Court should be set aside. The learned counsel for the respondent has however, drawn my

attention to an authority of this Court reported as AIR 1959 J&K. 122, wherein my predecessor in office Mr. Justice Nair has said :

If there is a sweeping order of remand after embroiling itself in comparatively unimportant aspects of the case but it has not acted without

jurisdiction or with illegality or material irregularity in exercising its jurisdiction the High Court sitting in revision would not interfere with the order.

3. I am afraid this authority will not help the respondent. In this case the question is of embroiling itself in comparatively unimportant aspect of the

case and as I would point out that no illegality has been committed which would

not oust the jurisdiction of the Court. In the case before me a most superficial and a cursory view of the fact has been taken and the remand order passed simply on one line in the preliminary objection of the defendant that Abdulla Tell was not prepared to act as guardian for the minor Ali Teli. I shall recount the circumstances which have compelled me to set aside the order of the lower appellate Court.

4. The question of appointment of a guardian for the minor defendant is the subject matter of Order 32 Rule 3. This rule requires that when the Court is satisfied that the defendant is a minor it shall appoint a proper person as the guardian-ad-litem for the conduct of the suit and an order for the appointment of a guardian-an-Iitem has to be passed on an application supported by an affidavit. The affidavit should disclose that the proposed guardian has no interest adverse to the minor in the matter in controversy. O. 32 Rule 4(3) further laid down that a guardian for a minor could not be appointed without his consent. The whole emphasis of the learned counsel for the respondent as well as of the lower appellate Court is on the plea in the preliminary objections of the defendant that Abdulla Teli would not act as the guardian for the minor Ali Teli, but when we examine the law on the subject in the light of the facts of this case I think that the grounds taken by the lower appellate Court for quashing the entire proceedings are not at all warranted.

It is true that there is no application for the appointment of a guardian-ad-litem nor is there any affidavit to that effect. Pleadings in this State are loosely drafted, and seldom do the parties observe the meticulous requirements of the procedure in drafting and submitting pleadings. However, it is settled law that absence of a formal application or an affidavit for the appointment of a guardian-ad-litem will not vitiate the entire proceedings if otherwise there has been substantial compliance with the requirement of this rule and decree passed therein will not be vitiated. Authorities need not be cited on this point but a reference may be made to AIR 1916 Pat 267 (FB), Anandram and Another Vs. Madholal and Others, , AIR 1950 All 218, AIR 1954 Pat 349 etc.

5. The whole emphasis, as I stated earlier, is on the question or consent of Abdulla Teb to act as guardian for Ali Teli. It has been argued that the consent must be express and unless there is express consent nobody's acting as

guardian for the minor will validate the proceedings. He has invited my attention to Jagadish Chandra De and Others Vs. Harihar De, , Musammat Champi and Another Vs. Lala Tara Chand and Tirloki Nath and Others , AIR 1936 Pesh 40. Jagadish Chandra De and Others Vs. Harihar De, lays down: The Court is not competent to appoint the mother of the infant defendants as their guardian-ad-litem without her express consent". In the Allahabad authority i. e. Musammat Champi and Another Vs.

Lala Tara Chand and Tirloki Nath and Others it was held :

That the minor who is unrepresented in the suit by any guardian cannot be held to be bound by the decree passed against him although he neither alleges nor proves that the decree passed against him is unjust or to his prejudice etc. etc.

In AIR 1936 Pesh 40 Middleton, Judicial Com missioner held :

That the representation of a minor by a non-consenting guardian is no representation at all and all proceedings while the minor is under such guardianship are null and void.

6. These authorities have been relied upon by the learned counsel for the respondent, but on the other hand there is a catena of authorities which

lay down that the consent of the proposed guardian need not be express. It may be implied from the circumstances of the case and from the

evidence as available on the record. Before quoting authorities on the subject we can come to the same conclusion on the bare perusal of the

wording of Order 32 Rule 4(iii) which is in the following words:

no person shall without his consent be appointed guardian for the suit.

(6-a) If the intention of the legislature were that the consent must be express the language would have been different and then we would find the

sub-rule in some such words without ""express consent"" or ""consent expressly given"" instead of the word consent. In the absence of any such

qualifying words along with the word consent it is only legitimate to infer that consent referred to in this sub-rule may be either express or implied.

Conduct of the parties particularly of the proposed guardian and lack of objection on the part of the minor may indicate that there has been

consent on the part of the proposed guardian to act as such. This in my opinion is the law on the bare perusal of sub-rule and the authorities to this

effect are not wanting.

In *Vasireddi Sriramulu Vs. Putcha Lakshminarayana*, , a Full Bench was constituted for the interpretation of sub-rule and the opinion of the Full

Bench on this point was given in the following words:

The statute does not contain the word ""express"", and I fail to see how Courts have a right to put into the statute a word which is not there. Consent

is a question of fact. A person may have consented and there may be no direct evidence of it. The evidence may be inferential, indirect and

circumstantial.... It is purely a question of evidence. We are unaware of any rule of evidence which says that this simple question of fact - aye or

no, did this person consent to act - is to be decided by any different laws of evidence from those which guide Courts, in arriving at the

determination of all questions of fact.

7. The other authorities on the subject may be mentioned. These are : *Chhatter Singh and Another Vs. Tej Singh and Others*, , AIR 1918 Oudh

95, and a very recent authority AIR 1966 Raj 172. This AIR 1960 Raj 172 has taken note of numerous authorities on the point which are

discussed in that authority and the conclusion of the learned Judge on this point is as follows:

While the law requires that it is not open for a Court to appoint a person to be the guardian-ad-litem of a minor without his consent, there is

nothing in the Code, or in the law of evidence, to require further that the guardian's consent must be expressly stated, or that it cannot be implied

from the facts and circumstances of the case. In the absence of any provision, or special rule of evidence, to the contrary, there is no reason why

the answer to the question should not be found on the evidence on the record. Where, therefore, the direct, the indirect, the circumstantial or the

inferential evidence leads to the conclusion that the guardian had consented to represent the minor, there is no reason why his consent should not be

implied even though it was not expressly stated. Thus the consent of guardian may be implied if the evidence on the record justifies that inference.

8. In view of the above I do not propose to dilate on this subject any longer. The view expressed by the different High Courts right from 1925

Mad 30 (FB) up to 1966 Rajasthan High Court mentioned above, therefore, on the facts of this case is the same.

From the circumstances and evidence of conduct or other facts in this case we can find implied consent to act as guardian of minor Ah Teli on

behalf of Abdulla Teli. The rule of law namely Order 32, Rule 4 (iii) has been sufficiently complied with and the proceedings of the trial court are

not without jurisdiction as held by the lower appellate Court.

The following circumstances would unequivocally show that there has been consent on the part of Abdulla Teli to act as a guardian of Ali Teh, his

real son. The only circumstance to the contrary is the plea in the preliminary objections that he is not prepared to act as guardian of Ali Teli.

The learned counsel for the respondent has further pointed out that the vakalatnamas executed by Abdulla Teh are only in his personal capacity. In

one it has been shown to be on behalf of the defendants; & even defendants 1 & 2 were mentioned. This vakalatnama is dated 24-8-59 in favour

of L. Puran Chand. Later on it seems that the figure two has been scored out in what way or in what circumstances, we do not know It does not

bear any initial on the correction The second vakalatnama of Abdulla Teli does not state whether it is in his own personal capacity or as the

guardian of the minor All Teli. In these circumstances the vakalatnamas do not carry us anywhere. The averment in the preliminary objections on

which so much stress is laid that Abdulla Teli would not act as guardian of Ali Teli is negative by overwhelming evidence and facts on the record.

I shall only enumerate in brief some facts and circumstances : (1) when the first summons went to defendants, Abdulla Teli was shown its guardian

of All Teli which was personally served on Abdulla Teli. He did not mention in the endorsement that he would not act as guardian of Ali Teli, (2)

when he appeared the Court up to the time he filed the written statement he did not mention that he was not prepared to act as his guardian, the

orders of the Court expressly state that his presence is recorded in his own personal capacity as well as the guardian of Ali Teli minor. (3) Even in

the written statement dated 24-8-59 he is shown as guardian of the minor. (4) In the subsequent orders out of which only a few may be mentioned

namely 8-7-59, 18-9-59, 17-10-59, 15-11-59 and so on he is shown as the guardian of Ah Teli. (5) In the issues the burden of proof is not

placed on the defendant No. 1 but on the defendants. (8) Further the written statement itself clearly takes all the pleas that could be taken on

behalf of Ali Teli minor, one of the Important allegations in the plaint was that Ali Teli was not the adopted son of Ramzan Teli. In the written statement in paragraphs 3, 4 and so on the definite plea is taken that Ali Teli is the adopted son of Ramzan Teli. (7) Adoption deed dated 2nd April 59 is also referred in the written statement. (8) An issue is struck about the adoption of Ali Teli and evidence is led with respect to this issue. The adoption deed executed by Ramzan Teli In favour of Ali Teli on 2nd April 1959 was also produced by Abdulla Teli and evidence is led to this adoption deed also. (9) When the case was decided by the trial Court on 30-9-83 an appeal was preferred by Abdulla Teli not only on his own behalf but on behalf of Ali Teli minor. In fact Ali Teli minor was shown appellant No. 1 and Abdulla Teli as Appellant No. 2. (10) In the grounds of appeal it is nowhere stated that Abdulla Teli was not properly constituted guardian of the minor. On the other hand most of the grounds taken before the lower appellate court only pertain to Ali Telis adoption. It is also stated in the grounds of appeal that the evidence of the minor appellant has not been properly appreciated and has been overlooked by the trial Court. In paragraphs 1, 3, 4 and 8 of grounds of appeal the conduct of Abdulla Teli would clearly connote the consent of Abdulla Teli to act as guardian of the minor Ali Teli. In fact he has acted as such, taken all pleas on behalf of the minor and fought them out. (11) When he filed the appeal before the lower appellate Court he did not object to act as guardian of the minor and in no way took the position that Abdulla Teli's acting as guardian of Ali Teli was illegal and without his consent. There is, therefore, no justification for upholding the judgment of the lower appellate Court which has not cared to look into the facts except the objections raised in the preliminary objections and the written statement. In my opinion this revision has, therefore, to succeed and the case has to go back to the lower appellate court to give his findings on other matters involved in the suit. It may be noted that the learned counsel for the respondent has vehemently argued here and has taken objection in his ground of appeal before the lower appellate Court also that he was not given proper opportunity to lead his evidence. I am not going into the merits of the case at the present moment. I trust that the lower appellate Court will ultimately examine all the facts and aspect of the case and then dispose of the appeal before it.

9. This case was fixed for orders today. I have already written the order but the learned counsel for the respondent wanted to address some further arguments in this case.

I gave him time and have heard the learned counsel in the presence of the learned counsel on the other side. Mr. Raina contested that under the provisions of Order 41, Rule 2 even if some pleas are not in the grounds of appeal the appellate Court has power to decide the matter on such pleas if it is satisfied that decision can be appropriately given on the pleas. Although many authorities were originally intended to be produced by the learned counsel for the respondent but none has been produced today. But so far as I know on the point Order 41, Rule 2 empowers the Court to decide a case on a point which emerges from the file, although that point is not specifically taken, but that point must be a point of law.

There is no authority that empowers the Court to decide a case on a point of fact against the proved facts of a particular case.

10. His argument in this case is that the minor was not properly represented before the trial Court. I have already held on the basis of numerous authorities that the consent of the proposed guardian need not be express but may be implied from proved facts or evidence in the case. To that effect I have already cited a number of authorities right from Vasireddi Sriramulu Vs. Putcha Lakshminarayana, to the latest Anandram and

Another Vs. Madholal and Others, . On this question I have given eleven grounds in my order which clearly prove that there has been consent on the part of the proposed guardian, who, as I have already remarked happens to be the real father of the minor. These grounds show an express and consistent conduct on his part to have acted as a guardian for the minor. I am afraid the invoking of Order 41, Rule 2 by the learned counsel for the respondent is uncalled for.

11. His second contention is that even if something is wrongly decided by the lower Court, I should not interfere in revision. He has referred in this behalf to a Supreme Court authority and another authority of this Court. The lower Court has not at all cared to go into the facts of the case. It has applied the law without seeing whether that law would apply to the facts of the case. Order 32, Rule 4 (3) is a mandatory provision and the question of discretion under that order does not arise. If it is proved that there is

no consent of the guardian the Court is bound to set aside the decree. There is no discretion of the Court not to set it aside; but at the same time if the facts indicate that there has been consent of the proposed guardian the question of discretion again does not arise. Then Court is bound to reject the contention of the minor. Therefore, this argument of the learned counsel is not well founded.

12. The last argument of the learned counsel is that the order of the lower Court should be upheld on the ground of equity, good conscience and justice. No such case is made out for the application of this doctrine of law. I am satisfied that Abdulla Teli has been fighting the battle of his son more vehemently than any other guardian would have done. He has taken the pleas that can be taken on behalf of the minor son. He has spared no pains in getting the evidence for his son and then filed an appeal on his behalf. This Abdulla Teli was the real father and natural guardian of the minor and he tried to get him recognized and adjudicated as the adopted son of Ramzan Teli. After preferring the appeal the burden of song in the appeal has been that the evidence of the minor was not properly appreciated and understood by the trial Court. He has done what could be expected of any other guardian, therefore, this plea of equity and good conscience is not made out.

I have already indicated that the lower Court will apply his open mind to all the grievances that have been taken in the grounds of appeal on behalf of the minor. If the lower Court finds that adequate opportunity has not been given to the minor it may pass any order it thinks fit. I however like to take note of one technical objection of the learned counsel for the respondent. There is already a written statement on the file which I construe to be a written statement from the defendants. If the minor shows to the lower appellate Court that some more pleas than already taken in the written statement, have to be taken by or on behalf of the minor, the guardian of the minor can move the lower appellate Court for permitting him to amend the written statement. That request, if and when made, shall be considered on its merits by the lower appellate Court. If found necessary by the lower appellate Court it may even remand the case on that score with such directions as are necessary. With these observations this revision petition is accepted and parties are left to bear their own costs in this Court.