

(1955) 01 KL CK 0001

In the High Court Of Kerala

Case No : Civil Miscellaneous Appeal No. 165 of 1954

Kochunarayani Amma Nalini

APPELLANT

Vs

Velu Menon Govinda Menon

RESPONDENT

Date of Decision : 06-01-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, Order 9 Rule 9

Citation : AIR 1955 Ker 166

Hon'ble Judges : Vithayathil, J; Kumara Pillai, J

Bench : Division Bench

Advocate : K. Rama Iyer, S. Ananthasubramonia Iyer and S. Sivaraman, for the Appellant; V. Sankara Menon, for the Respondent

Final Decision : Dismissed

Judgement

Vithayathil, J.—Defendants 6 and 7 are the appellants in this Civil Miscellaneous Appeal. The appeal is from an order refusing to set aside the ex parte decree passed against the appellants. The suit is for partition. Defendants 6 and 7 were minors when the suit was instituted and their mother the second defendant, was appointed their guardian for the suit. She did not contest the suit either on her own behalf or on behalf of the minor defendants. Defendants 29, 31 and 42 contested the suit. A preliminary decree for partition was passed in the case on 26-6-1952.

Defendants 6 and 7 filed a petition on 17-9-1953 to set aside the ex parte decree passed against them. It was alleged in the affidavit filed in support of the petition that the petitioners came to know of the decree only on 12-9-1953 and that there was gross negligence on the part of their guardian in not contesting the suit on their behalf. The court below rejected the petition on the ground that it was not maintainable and also on the ground that there was no negligence on the part of the guardian in not contesting the suit. The appeal is from that order.

2. The questions that arise for consideration in the appeal are: (1) Whether the

petition to set aside the ex parte, decree is maintainable and (2) whether there has been negligence on the part of the guardian "ad litem" in not contesting the suit on behalf of the minor defendants.

3. The Court below held on the basis of the decision of a Single Judge of this Court in - "Bhavani Amma v. Govinda Pillai", AIR 1954 TC. 352 (A), that negligence on the part of the guardian ad litem in not defending the suit on behalf of the minor defendant is not a "sufficient cause" within the meaning of O. 9 R. 13, Civil P.C., for setting aside the ex parte decree passed against the minor. We do not think that that decision can be taken as an authority for the position that a minor defendant is not entitled to apply under O. 9 R. 13, Civil P.C., to set aside the ex parte decree passed against him in a case in which there has been gross negligence on the part of the guardian ad litem in not contesting the suit on his behalf.

That was a case in which a minor plaintiff's next friend instituted the suit on behalf of the minor. The suit was ultimately dismissed. The plaintiff filed a petition for restoration of the suit alleging that the next friend was guilty of gross negligence, fraud and collusion. The trial court held that the next friend was negligent in the conduct of the suit and that the question of limitation did not arise in the case. The petition was accordingly allowed. In revision filed from the order this Court held that there was no sufficient ground for the restoration of the suit or for condoning the delay in making the application for restoration.

The plaintiff had attained majority while the suit was pending and he did not choose to have the next-friend removed. It was, therefore, held that the plaintiff also was negligent in the conduct of the case. It was also observed on the authority of the decision of the Madras High Court in - Vaithilinga Naidu, represented by next Friend, Subbammal and Another Vs. Devanai Ammal and Another, , that the words "sufficient cause" in O. 9 R. 9, or in O. 9 R. 13, Civil P.C., could not be construed so as to include cases of negligence on the part of the next-friend of a minor plaintiff, or guardian for the suit of a minor defendant, in the conduct of the suit.

4. Both the Travancore High Court and the Cochin High Court have held that one of the remedies open to a minor defendant against whom a decree is passed ex parte as a result of the gross negligence on the part of the guardian ad litem in the conduct of the suit is to apply under O. 9 R. 13, Civil P.C., for setting aside the ex parte decree. The question was Considered by the Travancore High Court in - "Parameswaran Pillai v. Lekshmi Amma", 25 Trav LJ 171 (C). Venkita Rao J., who wrote the leading judgment in the case, discussed the question with reference to the rulings of the other Indian High Courts and held that if a minor defendant had a valid defence in the suit and the guardian ad litem did not put forward such defence he can apply under O. 9 R. 13, Civil P.C., for setting aside the ex parte decree. Reference was made to the rulings of the Madras High Court in - Kathasawmy Chettiar and Another Vs. Ramachandran and Another, ; and - Donthi Venkataratnam and Others Vs. Nagappa and Another, .

In the former case *Curgenven J.*, followed the decision of the Calcutta High Court in "*Kesho Pershad v. Hirdai Narain*", 6 Cal LR 69 (F). Reference was also made to the dictum of *Sheshagiri Iyer J.*, in - "*Neelaveni v. Narayana Reddi*", AIR 1920 Mad 640 (FB) (G), to the effect that negligence on the part of the guardian "*ad litem*" in defending the suit on behalf of a minor defendant would be a "*sufficient cause*" within the meaning of O. 9 R. 13, Civil P.C.

The other cases relied on are - *Dulhin Binodini Debi Vs. Parmeshwar Dayal Singh and Others*, ; and - *Moti Chand Vs. Balram Das*, . In the latter case *Sulaiman, C.J.*, held that a minor defendant against whom an *ex parte* decree has been passed owing to the default or negligence of his guardian "*ad litem*" may apply for setting aside the *ex parte* decree under O. 9 R. 13, and is not confined to the remedy of bringing a fresh suit.

5. The same view was taken by the Cochin High Court in - "*Gapala Menon v. Sardar*", 36 Cochin 417 (J). *Koshi J.*, (as he then was) who wrote the leading judgment in the case held that if a decree happens to be passed *ex parte* against a minor defendant on account of the negligence of the guardian *ad litem* the minor is entitled to apply under O. 9 R. 13, Civil P.C., to have the *ex parte* decree set aside.

6. We find no reason to disagree with the view taken by the Travancore High Court, in " 25 Trav. LJ 171 (C)" and by the Cochin High Court in "36 Cochin 417 (J)". If the decision in " AIR 1954 TC 352 (A)", is interpreted as laying down a different rule of law, we regret we are unable to follow it. *Vaithilinga Naidu*, represented by next Friend, *Subbammal and Another Vs. Devanai Ammal and Another*, , which is relied on in " AIR 1954 Trav.-C 352 (A)", was distinguished in a later decision of the Madras High Court, i.e., - *Gadikota Siva Narayana Reddi Vs. Badepalli Nagasubamma and Another*, . *Panchayakesa Iyer J.*, observed in that case that he could not agree with the view that a guardian's negligence to appear and defend a suit on behalf of the minor defendant is not a sufficient cause within the meaning of O. 9 R. 13. We are, therefore, unable to agree with the view taken by the court below that the petition filed by defendants 6 and 7 under O. 9 R. 13, Civil P.C., is not maintainable.

7. Coming to the merits of the petition, we are not satisfied that this is a case in which the guardian "*ad litem*" of defendants 6 and 7 can be said to have been guilty of negligence in not contesting the suit on their behalf. The plaint schedule properties belonged to the tarwad of the first defendant. Plaintiff had obtained a decree in O.S. No. 1026 of 1110 of the Ernakulam Munsiff's Court against the first defendant, his sister (deceased *Parukutty Amma*) and her son (*Sankara Menon*). According to the plaintiff, there was a partition in the tarwad in the year 1104 and the first defendant *Parukutty Amma* and *Sankara Menon* had become separate from the other members of the tarwad and they had thus separate interest in the plaint schedule properties.

In execution of the decree obtained by the plaintiff he attached the interest of

the judgment-debtors in the plaint properties and purchased the same in court auction. But, in order to defeat the plaintiff the members of the original tarwad entered into a fresh partition arrangement in 1111 ignoring the partition of 1104. If there was no partition in the tarwad before the date of the attachment it is clear that the judgment-debtors of the plaintiff would have no separate right in the properties which could be attached and sold. Plaintiff instituted the present suit on the basis that he had acquired 3/16 share in the properties by virtue of the court sale and claimed partition of that share.

Defendants 29 to 42 are subsequent alienees of the rights of some of the sharers under the partition of 1111. Defendants 29, 31 and 42 alone contested the suit. One of the contentions raised by them was that there was no partition in 1104 and that, therefore, the plaintiff's judgment-debtors had no separate right in the properties on the date of the attachment. The contention which the guardian ad litem of defendants 6 and 7 could have raised in the suit was the same as that raised by defendants 29, 31 and 42. That there was a partition in the tarwad in 1104 is clear from Ex. B. That is a hypothecation bond dated 23-3-1104 executed by all the adult numbers of the original tarwad. This is what is stated in the document. (Passage in vernacular omitted).

It is clear from the above statement in Ex. B, that the members of the tarwad had attained a divided status in Chingom 1104. There was, therefore, no valid contention to be raised in the suit on behalf of defendants 6 and 7. The contention was in fact, raised by other defendants but was not accepted by the court. We, therefore, agree with the court below that there was no negligence on the part of the guardian ad litem of defendants 6 and 7 in not contesting that suit on their behalf. The petition was, therefore, rightly rejected by the court below. The civil miscellaneous appeal is dismissed with costs.