

(2011) 08 OHC CK 0026
In the Orissa High Court
Case No : O.J.C. No. 242 of 2001

Premananda Nayak and Others

APPELLANT

Vs

Biswambar Nayak (dead) and Others (represented through
L.Rs.)

RESPONDENT

Date of Decision : 19-08-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 11, Order 32 Rule 11(1), Order 32 Rule 11(2), Order 32 Rule 15, Order 32 Rule 2

Citation : (2012) 113 CLT 187

Hon'ble Judges : B.K. Nayak, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.K. Nayak, J.—Whether an ex-parte preliminary decree for partition passed against minor Defendants, who were represented by GAL, is a nullity and whether a final decree proceeding to make such preliminary decree final can be challenged as not maintainable on such ground are the questions that arise for determination in this Writ Petition.

2. The undisputed facts are that T.S. No. 42 of 1959 was filed in the Court of Learned Civil Judge (Junior Division), Kendrapara by Krushna Nayak, the predecessor in interest of the present Petitioners and his brother Biswanath Nayak claiming partition of their half share in the suit properties. Defendant Nos. 9 and 10 to the suit were minors and they were represented by GAL, who filed a written statement on behalf of the said minors. The suit was ultimately heard ex-parte and ex-parte preliminary decree was passed against the Defendants including minor Defendant Nos. 9 and 10. Plaintiff No. 1 having died after passing of the preliminary decree, his legal heirs, the present Petitioners, filed petition for making the preliminary decree final. Defendant No. 8 and legal representatives of Defendant No. 1 filed their objection to the application for final decree stating that the final decree proceeding is not maintainable inter alia on

the ground that the preliminary decree was a nullity as minor Defendant Nos. 9 and 10 were not properly represented. The Trial Court by its Order Dated 1.7.1999 came to hold that the GAL of minor Defendant Nos. 9 and 10 filed written statements which the Plaintiffs' claim of half share in the suit properties has not been denied and that even though an ex-parte decree was passed the same cannot be said to be nullity. Accordingly, the Trial Court rejected the objection filed by Defendant No. 8 and legal heirs of Defendant No. 1. The said order of the Trial Court was challenged before the Learned Additional District Judge, Kendrapara in Civil Revision No. 33 of 1999. The Revisional Court allowed the Civil Revision and set aside the order of the Trial Court holding that the GAL on behalf of minor Defendants having not participated in the ex-parte hearing of the suit and the Trial Court having not appointed another GAL as required under Order 32 Rule 11 (2), C.P.C., the ex-parte preliminary decree was a nullity and, therefore, the final decree proceeding was not maintainable. For giving such finding the Revisional Court placed reliance on the decisions reported in Manoranjan Samanta Kumar Vs. Brundabati Veergam, and Ram Chandra Arya Vs. Man Singh and Another, The order passed by the Revisional Court has been assailed in this Writ Petition.

3. In assailing the impugned order the Learned Counsel for the Petitioners contends that the decision of this Court in the Manoranjan Samanta Kumar (supra) and that of the Apex Court in the case of Ram Chandra Arya (supra) relate to cases where the guardian of the minor Defendants did not appear at all and, therefore, there was total non-representation of the minor Defendants for which the decree was held to be nullity for which it could be set aside in appropriate proceeding and such decree was inexecutable. His contention is that the facts of the present case are completely different inasmuch as the GAL was duly appointed by the Court for minor Defendant Nos. 9 and 10 and the GAL filed a written statement but considering that there was no substantial defence to be raised did not participate in the ex-parte hearing of the suit and this cannot be said to have rendered the preliminary decree a nullity. It is submitted that Order 32 Rule 11 (2), C.P.C. has no application in the present case. He has relied on several decisions including a decision of this Court reported in Bhagabat Sahu Vs. Parbati Samal and Others, ; where this Court took note of the decision in the case of Manoranjan Samanta Kumar (supra) and made a distinction between a case where there is total non-representation of the minor Defendants and a case where a properly constituted guardian was appointed, who represented the minors for some length and ultimately allowed the suit to proceed ex-parte against the minors finding that there was no substantial defence to be raised on their behalf.

4. Order 32, Rule 3, CPC requires that where the Defendant is a minor, the Court, on being satisfied of the fact of such minority, is to appoint a proper person to be guardian for the minor for the suit. The provision is mandatory in nature and if the suit continues without the minor being represented and decree is passed therein, it would be a clear case of the decree being a nullity. But, what

would be the consequence where a guardian has been duly appointed for the minor, who acts for some time and then Omits to take steps. The issue has been answered by this Court in the case of Bhagabat Sahu (supra) which arose on an application u/s 47, C.P.C. challenging execution of decree passed against minors, who were represented by their mother guardian, who appeared and took steps and participated in the final decree proceeding for some time and thereafter did not take any step resulting in an ex-parte decree final being passed. In the circumstances, this Court held as under:

Order 32, Rule 3, CPC requires that where the Defendant is a minor, the Court, on being satisfied of the fact of minority, is to appoint a proper person to be guardian for the suit for such minor. This provision was obviously applicable to the facts of this case. The Court had done its duty in ensuring that the minor children of the original Defendant were appropriately represented by their natural guardian. If the final decree proceeding had been allowed to continue without the legal representatives of the Defendant being represented possibly it would be a clear case of the decision being a nullity. It is open to a guardian representing the interests Of the minors after he or she is aware of the scope of the litigation while acting prudently not to contest the lis. This would be certainly a matter of prudent management of the minors interests and, therefore, a matter within the competence of the guardian. Once the Defendants are appropriately impleaded and represented, the duty under Rule 2 of Order 32, CPC would come to an end and the proceeding before the Court must be taken to have been duly constituted. A distinction must be drawn between a case where the minors are not adequately represented from the commencement and the proceeding at its inception, therefore, is a nullity and a case where the minors are adequately represented and there is a duly constituted proceeding where the guardian acts for some time and then omits to take steps.

In coming to the aforesaid conclusion, this Court took note of the earlier decision in Manoranjan Samanta Kumar (supra) and distinguished the same as because that was a case where there was total non-representation of the minors, who were sued through their mother guardian, who did not at all appear either for herself or on behalf of the minors on receipt of summons. Therefore, that was a case of total non-representation inasmuch as the mother guardian having failed to appear on behalf of the minors no step at all was taken by the Court to appoint a properly constituted guardian for the minors.

5. Similarly, the decision reported in Ram Chandra Arya Vs. Man Singh and Another, cited by the Learned Counsel for the Opp. Parties relates to a case where in a suit a decree was obtained against a lunatic without appointment of GAL and the decree in the suit was put to execution and the property of the Judgment-debtor was sold, it was held by the Apex Court that the decree was a nullity and therefore sale of the lunatic's property in execution was void. This was also a case of total non-representation of the lunatic in violation of Order 32 Rule 15, C.P.C. Evidently, therefore, this decision has no application to the facts

of the present case.

6. In the case reported in AIR 1953 TC. 450; Thomman Thommankunji & Ors. v. Kunjumeethiyan Kochukunjali Nayana, where the mother of minor Defendants was appointed as GAL and remained ex-parte in trial stage and ultimately a decree was passed against the minor, it was held by the Division Bench that if the guardian after being appointed had no valid defence on behalf of the minors it would be necessary for her to enter appearance and raise untenable contention. If she had no contention to offer and she remained ex-parte, that would not make the decree invalid.

7. The Madras High Court in the decision reported in Saradamani Vs. Rajendran, where the mother guardian representing the minor Defendant in a suit for partition remained ex-parte and ultimately an ex-parte decree was passed, held as under:

In the present case, there is no controversy about the respective shares allotted to the Plaintiff and the 5th Defendant. That being so, the mere fact that the guardian had allowed the suit to be determined ex-parte cannot be regarded as amounting to gross negligence on the guardian's part. The Petitioner cannot, therefore, ask for a declaration that the decree itself was a nullity.

8. A Division Bench of the Kerala High Court in the decision reported in Raman Gangadharan and Others Vs. Raman Narayanan and Others, held as under :

It cannot be said that in every case the guardian representing the minor Defendant is bound to enter appearance and to contest the suit by filing written statement, The guardian has a discretion to act in a manner which will best serve the interests of the minor. The guardian can certainly refrain from contesting the suit where it is clear that there is no valid defence to be raised on behalf of the minor. To contest the suit merely for the sake of contest, will not be to advance the interest of the minor....

9. As appears from the records of the present case, the Plaintiffs' suit was for partition of their moiety in the suit properties. Admittedly, the other adult Defendants remained ex-parte and ultimately suffered the ex-parte decree, evidently because they did not have any substantial defence to make. The GAL for minor Defendant Nos. 9 and 10 filed the written statement (Annexure-1) taking formal objections that there was no cause of action for the suit and that the suit was not maintainable. Merely, a general plea of denial of plaintiff allegations was taken without raising any specific plea resisting the Plaintiffs' claim probably because there was no substantial defence to raise on behalf of the minors, particularly when the other adult Defendants also remained ex-parte. In such circumstances, the GAL had the discretion to act in a manner which would best serve the interest of the minors. Therefore, for the absence of the GAL during ex-parte hearing of the suit, it cannot be said that the GAL was grossly negligent. In the circumstances, it cannot be said that the preliminary decree was a nullity on the ground of non-representation of minor Defendant Nos. 9 and

10. The impugned revisional order is, therefore, indefensible.

10. Taking a cue from the impugned order, the Learned Counsel for the Opp. Parties contends that the Trial Court while passing the preliminary decree has violated the mandatory provision of Order 32 Rule 11(2), C.P.C. since the GAL did not participate in ex-parte hearing and, therefore, the minors cannot be said to have been properly represented in the suit.

11. Rule 11 of Order 32 provides as under:

11. Retirement, removal or death of guardian for the suit -(1) Where the guardian for the suit desires to retire or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as it thinks fit.

(2) Where the guardian for the suit retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

Sub-Rule 2 of Rule 11 as seen above enjoins a duty on the Court to appoint a new guardian where the earlier guardian for the minor retires, dies or is removed by the Court. Retirement as contemplated under Sub-Rule 1 of Rule 11 is a conscious voluntary act on the part of the GAL expressing desire before the Court not to continue with guardianship of the minors. Removal of a guardian is within the discretion of the Court when the Court becomes satisfied that the guardian does not do his study or there is other sufficient ground. Mere, non-performance of duty by a guardian would not be a ground for his removal by the Court in each and every case. The discretion of the Court has to be exercised keeping in view the facts and circumstances of each case. Where it is made to appear to the Court that the minor has a substantial defence to make and unless proper contest is made by the guardian, valuable rights and interest of the minor is going to be defeated or affected, the Court may in its discretion remove the guardian for non-performance of his duty. But where there is no substantial defence to make, as in the case where adult co-Defendants whose interests are not adverse to the minors and rather identical to them are not entering contest as because there is no real contest to be made, the non-performance on the part of the guardian for minors may not be a ground for his removal. Therefore, it cannot be said that non-performance of duty by the guardian in each and every-case would be a ground for his removal or it would tantamount to non-representation of the minor. The contention raised by the Learned Counsel for the Opp. Parties has, therefore, no force.

12. In view of my finding in paragraph-8 above the other question, whether the maintainability of final decree proceeding can be challenged on the ground that the preliminary-decree was a nullity for non-representation of minor Defendants is not considered necessary to be decided.

13. In the light of the discussions made above, I allow the Writ Petition and

quash the impugned revisional order under Annexure 3. No costs.