
(1924) 05 AHC CK 0044
In the Allahabad High Court

Raja Babu

APPELLANT

Vs

Balmukund and Others

RESPONDENT

Date of Decision : 26-05-1924

Acts Referred:

Citation : (1924) 05 AHC CK 0044

Hon'ble Judges : Daniels, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Daniels, J.—This appeal arises out of a suit by the plaintiffs respondents to set aside an ex parte decree passed against them as minors under the guardianship of their father Beni Madho, on the ground that their father was improperly appointed as their guardian in the previous suit, that they were not liable for the debt, and that the decree is not binding on them. The father was himself a defendant in the previous suit, and was also impleaded as guardian of his sons. The two questions which arise in a case of this kind were laid down in Chhatter Singh and Another Vs. Tej Singh and Others, They are—

1. Whether the guardian was irregularly appointed?

2. Whether the minors have been prejudiced?

2. Both these questions have been answered by the Courts below in favour of the plaintiffs. There may be some doubt as to the proper answer to the first question but the defendant-appellant is undoubtedly entitled to succeed on the second.

3. The suit was brought on two hundies. Notice was issued to Beni Madho, father of the plaintiff to state whether he had any objection to being appointed guardian. This is the ordinary form in which notices for the appointment of a guardian are issued by this Court. (See Form No. H.C.J. Part I, 1921 18 H.C. 442). The notice was served by affixation on his house under Order 5, Rule 17, but was held by the Court trying the case to have been duly served. He did not

appear or make any objection and he was appointed guardian ad litem under Order 32, Rule 3, on 3rd April, 1917. A week later Beni Madho appeared, stated that he had not received the notice in time and objected to being appointed guardian. The Court held that as he had already been appointed he could not retire without leave of the Court under Rule 11 or without procuring some one to take his place under Rule 8. As he had not offered to pay the cost of appointing a successor, and as in the opinion of the Court no sufficient reason for allowing him to withdraw was made out, the Court refused to allow him to retire.

4. Now, it is quite true that under Order 32, Rule 4(3), no person can be appointed guardian for a suit without his consent. Consent can, however, be presumed where the guardian is given an opportunity to object to his appointment and does not do so. This was laid down in the case of Chhatter Singh and Another Vs. Tej Singh and Others, already cited and by the Patna High Court in Thulcur Tejeswar Dutt v. Lakhan Prasad Singh AIR 1923 Pat 231. It is doubtful how far the Court in the present case was justified in going behind the decision of its predecessor that the service on Beni Madho was sufficient. When once a guardian has been duly appointed he cannot retire except with the leave of the Court and under the conditions laid down in Order 32, Rules 8 and 11. The Court would undoubtedly have exercised a wise discretion in allowing him to retire under the circumstances and in appointing the mother of minors who was willing to be appointed to act for them. It is, however, difficult to say that the Court acted illegally in the matter:

The only ground on which the Courts below have held that the father was not a proper person to be appointed guardian and that the minors were prejudiced by his appointment is that no pious obligation to pay the father's debt arose during his lifetime. That idea is now finally exploded by the judgment of the Privy Council in Brij Narayan v. Mangal Prasad AIR 1924 P.C. 50. The debt was a simple money debt which the sons were under a legal liability to pay unless it were proved to be illegal or immoral. The sons in the present case set up a plea that the debt was illegal or immoral, but the trial Court found against them. No evidence was offered to show that the debt taken was for illegal and immoral purposes and it has not been suggested either in the Court below or in this Court that this plea could be substantiated. Under these circumstances the plaintiff's were properly represented by their father and there was no defence open to them which he could not have taken. The plaintiff's suit should have been dismissed and we allow the appeal set aside the decrees of the Courts below and dismiss the suit with costs in all Courts including in this Court fees on the higher scale.