

(1971) 05 PAT CK 0006
In the Patna High Court
Case No : F.A. No. 543 of 1963

Sri Paturan Singh and Others

APPELLANT

Vs

Sri Chandradip Singh and Others

RESPONDENT

Date of Decision : 25-05-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 3(4), Order 32 Rule 7(1), Order 5 Rule 20
Hindu Minority and Guardianship Act, 1956 — Section 6

Citation : (1971) PLJR 535

Hon'ble Judges : G.N. Prasad, J;A.N. Mukharji, J

Bench : Division Bench

Advocate : R.S. Sinha, B.N. Chatterjee, Govind Prasad and Rajendra Sinha, for the Appellant; Ugra Singh, Birendra Mohan Singh and Upendra Prasad Verma, for the Respondent

Final Decision : Allowed

Judgement

A.N. Mukharji, J.—This is an appeal by defendants 1 to 7 in a suit for partition of the properties filed by the plaintiff-respondents. The relationship between the plaintiffs and defendants will be better appreciated from the genealogical table given below:--

Plaintiffs' case is that Ramcharan Singh, Prayag Singh and Maniyar Singh were full brothers. Manogi Singh, who was son of Maniyar Singh died issueless and so the properties left by him devolved on Ramcharan Singh and Prayag Singh. Prayag Singh had one son Roshan Singh, who had one son Kuldip Singh. After the death of Kuldip Singh, his widow Mt. Jamuna Kuer sold the entire properties left by her husband to the branch of Ramcharan Singh. Ramcharan Singh had three sons, Balchand Singh, Balgobind Singh and Paturan Singh, who was defendant no. 1 in the suit. Balgobind Singh had two sons, Saryug Singh, father of plaintiff no. 1, Chandradip Singh and Ram Bhagwan Singh, defendant no. 9. Balchand Singh died without leaving any issue. Saryug Singh died leaving his

widow Siya Kuer, plaintiff no. 2 and a minor son, plaintiff no. 1. The plaintiffs' case, therefore, is that the entire ancestral and acquired properties of the joint family of three brothers, namely, Ramcharan Singh, Prayag Singh and Maniyar Singh have been coming in possession of the branch of Ramcharan Singh. Paturan Singh, defendant no. 1 is the Karta of the joint family and he is managing the entire affairs since a long time. The plaintiffs' case is that after the death of Saryug Singh, the attitude of the defendants became inimical to the plaintiffs, who requested the defendants to divide the joint family properties and to allot a separate Takhta to them, but the defendants in spite of repeated demands having putting (Sic) off the matter, it became necessary for the plaintiffs to file the suit for partition claiming 4 annas share in the entire joint family properties.

2. After the suit was filed, defendant nos. 1 to 7 filed a joint written statement. Subsequently, the plaintiffs filed a petition for amendment of the plaint in which they urged that prior to the filing of the written statement the plaintiffs had no knowledge about the Title Partition Suit No. 42/7 of 1953/55. The plaintiffs enquired into the matter having come to know of this partition suit after filing of the written statement and learnt on enquiry that the defendants in collusion with Kuldip Singh got a Title Partition Suit No. 42/7 of 1953/55 filed and obtained a compromise decree in that suit. In that Title Partition Suit No. 42/7 of 1953/55, plaintiff no. 1 was shown to be under the guardianship of Ram Bhagwan Singh, defendant no. 9. The plaintiffs contended that they never compromised the Title Partition Suit No. 42/7 of 1953/55 nor did Ram Bhagwan Singh, defendant no. 9 ever remain the guardian of plaintiff no. 1. It is alleged on behalf of the plaintiffs that after the death of Saryug Singh, his widow Mt. Siya Kuer, plaintiff no. 2 had been the guardian of plaintiff no. 1. Further contention is that no land was ever allotted to the plaintiffs by virtue of a compromise decree in Title Partition Suit No. 42/7 of 1953/55 nor were the plaintiffs in separate possession over any land. Plaintiff no. 1 was a minor when the Title Partition Suit No. 42/7 of 1953/55 is alleged to have been compromised and this compromise never endured to the benefit of plaintiff no. 1. It is further urged that no guardian effectively represented the interest of plaintiff no. 1 in the title partition suit and the guardian ad litem appointed by the court remained negligent and careless and did not properly look after the interest of the minor and so the decree passed in that Title Partition Suit No. 42/7 of 1953/55 was fraudulent and void and not binding upon the plaintiffs. So the plaintiffs' prayer was not only for a decree for partition in respect of their 4 annas share in the properties in suit and but also for a declaration that the compromise decree in Title Partition Suit No. 42/7 of 1953/55 is fraudulent and void.

3. Defendant nos. 1 to 7 contested the suit in the court below and they contended inter alia that plaintiff no. 2 Siya Kuer is not the widow of Saryug Singh nor is she the mother of plaintiff no. 1; that one Kamla Kuer was the widow of Saryug Singh and she had gone to Prayag on pilgrimage where she died; that after the death of Kamla Kuer, Ram Bhagwan Singh, defendant no. 9

who is the only uncle of plaintiff no. 1 has been looking after his affairs; that the defendants deny that Jamuna Kuer, widow of Kuldip Singh, sold her properties to the branch of Ram Charan Singh; that there was a private partition in the family by which Balgobind Singh, Manogi Singh and Paturan Singh, defendant no. 1 remained joint at one place, while Balchand Singh and Roshan Singh separated and came in possession of their respective shares; that about 5 or 6 years after, there was another partition in family as a result of which Balgobind Singh separated while defendant no. 1 Paturan Singh and Manogi Singh remained joint at one place; that although there had been partition in the family but since the Laggit remained joint, Kuldip Singh filed a Title Suit No. 42/7 of 1953/55 in the court of the Subordinate Judge, Patna impleading plaintiff no. 1 of the present suit as a defendant under the guardianship of his natural guardian Ram Bhagwan Singh, who is defendant no. 9 in the present suit; that the well-wishers of the parties intervened and got the Title Partition Suit No. 42/7 of 1953/55 compromised on the basis of the previous partition and consequent possession of the parties and a compromise petition dated 16.8.1955 (Ext. A) was filed; that Sri Kamleshwari Prasad, Pleader-guardian ad litem signed the compromise petition on behalf of the minor Chandradip Singh (present plaintiff no. 1); that this compromise decree confirmed the previous partition arrived at between the members of the family; that Manogi Singh, who was joint with these defendants got an attack of heart disease and as he had no issue he executed a deed of relinquishment dated 5.10.1956 in favour of these defendants in order to avoid future trouble; that this deed of relinquishment was signed by Ram Ishwar Singh as Manogi Singh could not put his signature on account of his illness as his hands used to tremble but Manogi Singh had put his thumb impression on this deed; that this deed of relinquishment could not be presented for registration on 5.10.1956 as it had become late; that the condition of Manogi Singh further deteriorated and he died two or three days after and so the deed of relinquishment was registered on the admission of defendant no. 1, Paturan Singh. These defendants came in possession over the entire properties left by Manogi Singh. Kuldip Singh died in Aghan 1366 Fasli leaving behind his widow Jamuna Kuer, defendant no. 10, who sold her properties by virtue of two sale deeds dated 20.2.1959 for Rs. 2,500/- to these defendants who came in possession over these properties that Jamuna Kuer is also alleged to have sold 17 Kathas of her land by virtue of a sale deed to Sukar Paswan, who is in possession over the same; that after the partition in the family, plaintiff no. 1 and his uncle Ram Bhagwan Singh also sold 12 decimals of land to Jhumak Gope by virtue of a sale deed dated 22.12.1956; that Jhumak Gope in his turn sold the same plot of land to Lakhan Gope. The defendants, therefore, contended that there being no unity of title and unity of possession, the plaintiffs are not entitled to any relief in the suit.

4. On a consideration of the oral and documentary evidence adduced before him, the learned Additional Subordinate Judge came to the following findings:--

(i) Plaintiff no. 2 Siya Kuer is the mother of plaintiff no. 1 Chandradip Singh and

she was the widow of Saryug Singh. Siya Kuer was also called Kamla Kuer.

(ii) Plaintiff no. 1 Chandradip Singh was not properly represented in the Title Partition Suit No. 42/7 of 1953/55 and as such the compromise decree is not binding on him.

(iii) There had been no partition by metes and bounds between the joint family and that there was no confirmation of the previous partition alleged to have been made by compromise decree in Title Partition Suit No. 42/7 of 1953/55. The finding of the learned Subordinate Judge is that the plaintiffs and the defendants have been coming in possession over the family properties jointly.

(iv) Manogi Singh did execute the deed of Ladavi in favour of Paturan Singh, defendant no. 1 and his son in respect of the interest he had in the family properties.

(v) The suit is not bad for defect of parties.

(vi) The suit is neither barred by limitation nor by the principle of res judicata.

(vii) The share of the plaintiffs in the entire joint family properties is 2 annas and that the plaintiffs are entitled to get a decree for partition in respect of their two annas share.

The learned Subordinate Judge accordingly decreed the suit in part holding that the compromise decree in a Title Partition Suit No. 42/7 of 1953/55 was not binding on the plaintiffs.

5. Being dissatisfied with the judgment and decree, which were passed by the Additional Subordinate Judge, Bihar-sharif, the defendants 1 to 7 have preferred this appeal in which it is contended that the court below was in error in holding that plaintiff no. 2, Siya Kuer, is the mother of plaintiff no. 1 and that Kamla Kuer is another name of Siya Kuer. It is further contended that the court below has erroneously held that the decree passed in the Title Partition Suit No. 42/7 of 1953/55 was not binding on the plaintiffs. The finding of the court below that the families of the plaintiffs and defendants remained joint and not separate has also been assailed in this appeal. It is urged that the court below was in error in brushing aside a large number of transactions inter se and also to strangers in accordance with the terms of partition in the family. Further contention of the defendant-appellants is that the share claimed by the plaintiffs and decreed by the court below is illegal. It is contended that the share of the plaintiffs in the family properties was not more than 1/3rd. The other grounds, which have been taken in the memorandum of appeal, were not pressed at the time of hearing of this appeal.

6. I shall first take up the point as to whether plaintiff no. 2, Siya Kuer, is the mother of plaintiff no. 1. It is admitted that plaintiff no. 1, Chandradip Singh, is son of Saryug Singh. The defendants' case is that Kamla Kuer was the mother of plaintiff no. 1, while Siya Kuer is a sister of Kamla Kuer. According to the

defendants, Kamla Kuer had gone to attend Kumbha mela at Prayag several years ago where she died. Eleven witnesses have been examined on behalf of the plaintiffs to prove that Siya Kuer and Kamla Kuer are the names of one and the same woman and that she is the mother of plaintiff no. 1. It is important to note that P.Ws. 3 to 7 are five sisters of the mother of plaintiff no. 1. The fact that these witnesses, P.Ws. 3 to 7, are sisters of the mother of plaintiff no. 1 is not denied on behalf of the defendants. All these witnesses who are admitted sisters of the mother of plaintiff no. 1 stated in the court below that Siya Kuer, plaintiff no. 2, is also called Kamla Kuer and that she is the mother of plaintiff no. 1. The plaintiffs further examined P.W. 8, Rajo Devi, who is the mother of P.Ws. 2 to 7 and she says that plaintiff no. 2, Siya Kuer, is also called Kamla Kuer and that she is the mother of plaintiff no. 1. Plaintiff no. 2, Siya Kuer, who has also been examined in the court below as P.W. 2, has fully corroborated the plaintiffs' case on this point. P.W. 1, Deoki Singh, is husband of P.W. 3, who is sister of P.W. 2, and P.W. 1 also supports the plaintiffs' case on this point. Apart from these witnesses, who are thoroughly competent to depose on the point of relationship, the plaintiffs have examined P.W. 9 and P.W. 10, who also corroborate the plaintiff's case that plaintiff no. 2 is the mother of plaintiff no. 1.

7. The defendants, no doubt, have examined some witnesses, who stated that Kamla Kuer, who was the mother of plaintiff no. 1, died in the Kumbha Mela at Prayag several years ago, D.W. 4, who is one of the witnesses, who has come to depose on this point, is not a member of the family of defendants. He simply knows the name of Siya Kuer amongst the females of the family of plaintiffs and defendants. D.W. 4 does not even know the name of the wife of Saryug Singh. He adds that he had gone to Prayag ten or eleven years ago and he was accompanied by eighteen persons. In the cross-examination, he had given the names of three persons, namely, Ganga Singh, Jaddun Singh and Harihar Pandey, who are alleged to have died at the Mela. This witness further says that the aforesaid persons returned home from the Mela. If this statement of this witness (D.W. 4) is accepted, then it follows that the wife of Saryug Singh had also returned from the Mela on that occasion. D.W. 1, who is a Sala of defendant no. 1 and D.W. 3, deposed in the court below that they heard in the village about the death of the mother of plaintiff no. 1 at Prayag. Evidence of such witnesses can hardly be relied upon. On the other hand, the statement of D.W. 1 lends support to the case of the plaintiffs that Siya Kuer is the mother of plaintiff no. 1, D.W. 1, says that he had seen Siya Kuer going to the house of D.W. 9, Bhagwan Singh, who is the own uncle of plaintiff no. 1. It is not expected of Siya Kuer to visit the house of defendant no. 1 if she was not the wife of Saryug Singh, brother of defendant no. 9.

8. No doubt, the learned counsel, appearing on behalf of the defendants, has referred to some documents (Exts. E/9 and E/6) executed by defendant no. 9 for self and as guardian of plaintiff no. 1. The contention of the defendants is that the recitals of these documents show that Saryug Singh, father of plaintiff no. 1, died leaving his brother. Bhagwan Singh and his son, plaintiff no. 1. It is said that

if Saryug Singh died leaving a widow, Mossamat Siya Kuer, these documents ought to have mentioned the name of this lady as the widow of Saryug Singh. It may be that the recitals in these deeds might be incorrect or that the executant of the deeds did not think it necessary to mention in these deeds that Saryug Singh died leaving a widow, named, Siya Kuer. In my opinion, the plaintiffs have examined most reliable witnesses to prove that Siya Kuer is the mother of plaintiff no. 1, I see no reason to disbelieve their statements. I, therefore, confirm the finding of the court below on this point.

9. The learned counsel, appearing for the appellants, has, at first, contended that the learned Subordinate Judge was in error in holding that the compromise decree passed in Title Partition Suit No. 42/7 of 1953/55 is not binding on the plaintiffs. The main ground for the court below to come to the above finding is that the plaintiff no. 1, who was a minor during the pendency of the Title Partition Suit No. 42/7 of 1953/55 was not properly represented in that suit. It appears that the plaint (Ext. F) of Title Partition Suit No. 42/7 of 1953/55 was filed by Kuldeep Singh against Paturan Singh (present defendant no. 1), Manogi Singh, Bhagwan Singh (present defendant no. 9), Chandradip Singh (present plaintiff no. 1) and sons and grandsons of Paturan Singh. This plaint shows that Chandradip Singh, plaintiff no. 1 who was impleaded as defendant no. 4 of that suit was shown under the guardianship of Bhagwan Singh (defendant no. 3 of Title Partition Suit No. 42/7 of 1953/55). The first objection of the plaintiffs is that it was illegal on the part of Kuldeep Singh to sue minor Chandradip Singh under the guardianship of Bhagwan Singh in that suit when Bhagwan Singh was not the natural guardian of the minor. There is no dispute about the fact that Bhagwan Singh is an uncle (father's brother) of Chandradip Singh, plaintiff no. 1. Section 6 of the Hindu Minority and Guardianship Act, 1956 (No. 32 of 1956) lays down that the natural guardian of a Hindu minor boy in respect of his person as well as in respect of his property will be his father and after him, his mother. It has been urged on behalf of the plaintiffs that although this Act No. 32 of 1956 came into force on the 25th August, 1956, the law, which was in existence before this Act came into force was the same after this Act has come into force with respect to the definition of the "Natural Guardian". In support of this contention, reference has been made to the case of Jijabai Vithalrao Gajre Vs. Pathankhan and Others, The contention urged on behalf of the plaintiffs is that it has been found as a fact in this case that Siya Kuer, plaintiff no. 2, is the mother of plaintiff no. 1, and, as such, plaintiff no. 2 ought to have been shown as a guardian of plaintiff no. 1 in Title Partition Suit No. 42/7 of 1953/55 in the absence of the father of plaintiff no. 1. It appears from the order-sheet (Ext. L) of the Title Partition Suit No. 42/7 of 1953/55 that Kuldeep Singh, plaintiff of that suit, filed requisites for service of summons and notices on the natural guardian of the minor defendants of that suit under the provisions of Order V, Rule 20 of the Code of Civil Procedure. The court below ordered on the 14th August, 1954 for issue of notice on the natural guardian of the minor defendants. After the publication of the summons and the notices in the Bihar Gazette, defendant no.

6, Mathura Singh, of that suit appeared and filed petition for time to file written statement. As the natural guardian did not appear in the suit after the publication of the notice in the Gazette, the court directed the plaintiff to deposit the cost for appointment of a guardian ad litem for minor defendants. At first, one Shri Govind Prasad, Pleader, was appointed guardian ad litem, but later on, this appointment was cancelled as he was not available. Shri Mohit Narain Yadav, Pleader, was thereafter appointed guardian ad litem of the minor defendants while the suit was pending at Patna. Thereafter the suit was transferred to Biharsharif where another guardian ad litem, namely, Shri Kamleshwar Prasad, Pleader, was appointed as guardian ad litem who filed written statement.

10. The contention of the learned counsel, appearing for the plaintiffs, is that the provisions of Order XXXII, Rule 3(4) of the CPC have not been complied with in this case. This clause provides that before a court can appoint a guardian of the minor defendants, it is incumbent that the notice should be served on the natural guardian of the minor defendant. The contention is that in the instant case, notice, as contemplated under Order XXXII Rule 3(4) of the Code of Civil Procedure, might be deemed to be served on the defendant no. 9, who was shown as guardian of Chandradip Singh, defendant no. 4, of Title Partition Suit No. 42/7 of 1953/55, but admittedly this notice was not served on the plaintiff no. 2, who is the natural guardian of plaintiff no. 1, in the absence of his father.

It may be that plaintiff no. 2 was the natural guardian of plaintiff no. 1 and that the notice as required under Order XXXII Rule 3(4) of the Code of Civil Procedure, was not served on the plaintiff no. 2, as natural guardian of plaintiff no. 1. But this defect in the procedure will not have the effect of making the decree passed against the minor plaintiff no. 1 in Title Partition Suit No. 42/7 of 1953/55 a nullity when it is seen that there was a substantial representation of the minor plaintiff no. 1 in Title Partition Suit No. 42/7 of 1953/55. It will appear that when Title Partition Suit No. 42/7 of 1953/55 was filed, the plaintiff no. 1, who was defendant no. 4 in that suit, was shown under the guardianship of his own uncle, Ram Bhagwan Singh, defendant no. 9. It is not disputed that the plaintiff no. 1 and defendant no. 9 were joint when that Title Partition Suit No. 42/7 of 1953/55 was filed. Section 236 of the Principles of Hindu Law by Mulla, 13th Edn., says that property belonging to a joint family is ordinarily managed by the father or other senior member for the time being of the family. The manager of joint family is called "Karta". Section 519 of Mulla's Principles of Hindu Law further lays down that the father as the Karta or manager is entitled to the management of the whole coparcenary property including the minor's interest and after the father's death, the management of the property including the minor's interest therein passes to the eldest son as Karta. In the instant case, when Saryug Singh died, his son, plaintiff no. 1, was a minor, and so the brother of Saryug Singh remained manager of the joint family properties belonging to the plaintiff no. 1 and defendant no. 9. The defendant no. 9 therefore, was quite competent to act as a guardian of plaintiff no. 1 in that suit especially when there is no evidence at all on the record that the interest of the defendant no. 9 is

adverse to that of the plaintiff no. 1. Plaintiff no. 2 who was examined in the court below, as P.W. 2, stated that there is no dispute between the plaintiff no. 1 and defendant no. 9. She further admits that she has been living at her sasural after her husband's death and that she has joint messing with the defendants. It follows from the above statement of plaintiff no. 2 that she is living jointly with the defendant no. 9 and in this circumstance, it can be said that defendant no. 9 could properly represent plaintiff no. 1 in the Title Partition Suit No. 42/7 of 1953/55. The mere fact that notice, as contemplated under Order XXXII Rule 3(4) was not served on the natural guardian will not be fatal to the proceeding as held in the case of (2) AIR 1923 575 (Lahore) where it has been held that the failure of the court to issue notice required by Rule 3(4) of Order XXXII of the CPC to a minor defendant is a mere irregularity and does not invalidate the appointment of guardian ad litem.

11. The learned counsel, appearing on behalf of the plaintiffs, has referred to the case of Ramchandrar Singh and Another Vs. B. Gopi Krishna Dass and Others, wherein, it has been held that Order XXXII Rule 3(4) of the CPC is mandatory and imperative and its terms must be strictly complied with. It is further mentioned in this decision that unless the notice in terms of Order XXXII Rule 3(4) of the CPC is served on the minor and his guardian and when in spite of the service of such notice, the guardian does not choose to appear, then and then only, the court gets jurisdiction to appoint a guardian ad litem for such minor. There is absolutely no dispute about the proposition of law enunciated by their Lordships. On the basis of this decision, it has been strenuously urged on behalf of the plaintiffs that the trial court in Title Partition Suit No. 42/7 of 1953/55 was not competent to appoint a guardian ad litem for the minor defendants of that suit when the notice was not served on his natural guardian. I may state that the facts of this case referred to above are not similar to the facts of the instant case. In the reported case, a guardian ad litem appears to have been appointed without service of notice on the minor's guardian, as contemplated under Order XXXII Rule 3(4) of the Code of Civil Procedure. In the instant case, however, it is clear from the order-sheet of Title Partition Suit No. 42/7 of 1953/55, that notice, as required under Order XXXII Rule 3(4) of the Code of Civil Procedure, was actually served on Ram Bhagwan Singh, who was shown as guardian of minor Chandradip Singh in that suit. So, in the instant case, it cannot be said that the notice, as required under the law, was not at all served. In my opinion, the provisions of Order XXXII Rule 3(4) of the CPC appear to have been substantially complied with.

12. The question, which now arises for consideration, is whether any prejudice has been caused to the plaintiff no. 1 in Title Partition Suit No. 42/7 of 1953/55 and whether the interest of the minor Chandradip Singh was duly protected. The order-sheet (Ext. L of the Title Partition Suit No. 42/7 of 1953/55) will show that the learned Subordinate Judge took proper step for appointment of the guardian ad litem for plaintiff no. 1 in that suit. The said guardian ad litem filed a written statement for the minor plaintiff no. 1. Subsequently, a petition of compromise

was filed by both the parties on the 31st August, 1955, before the court below in Title Partition Suit No. 42/7 of 1953/55. The guardian ad litem also joined in the compromise. The court noticed that the guardian ad litem has not filed any petition for permission, who joined the compromise, the guardian ad litem filed a petition on the 6th September, 1955 praying for permission to join the compromise. The court accorded the permission to the guardian ad litem to compromise the suit on behalf of the minor. The learned counsel, appearing for the plaintiffs, has urged that the guardian ad litem signed on the compromise petition on behalf of the minor without taking permission of the court, and, as such, the compromise decree cannot be said to be binding on the minor plaintiff no. 1. It is true that under Order XXXII Rule 7(1) of the Code of Civil Procedure, a guardian ad litem should not enter into an agreement or compromise without, at first, taking leave of the court to do so. It does not mean that leave should be taken before entering into negotiation for compromise. It is enough if the leave is obtained by the guardian ad litem before the compromise is recorded by the court, as held in the case of (4) Boda Pati Rajeshwara Rao V. Puligedda Satyanarayana reported in Bodapati Rajeswararao Vs. Puligedda Satyanarayana and Others, . Their Lordships have observed:--

No doubt, he (guardian) must obtain the consent of the court before the compromise is concluded, but the conclusion of the compromise comes about when that compromise is made a decree of the court.

This is what has been done in the instant case. In my opinion, the compromise decree cannot be assailed by the minor plaintiff no. 1 simply because a guardian ad litem obtained permission of the court after putting his signature on the compromise petition on behalf of the minor.

13. The learned counsel, appearing for the plaintiffs, has further urged that the trial court in Title Partition Suit No. 42/7 of 1953/55 did not apply its judicial mind in permitting the guardian ad litem to compromise the suit on behalf of the minor, because the compromise did not enure to the benefit of the minor nor is this fact mentioned in the order-sheet at the time the compromise was recorded. It appears from the order-sheet, dated the 6th September, 1955 of Title Partition Suit No. 42/7 of 1953/55 that after the guardian ad litem filed a petition praying for permission to join the compromise, the court accorded the permission to the guardian ad litem to compromise the case on behalf of the minor. It is true that in the order-sheet, dated the 6th September, 1955, it is not mentioned that this compromise was for the benefit of the minor, but, in my opinion, it was not necessary for the court to record an order that the compromise was for the benefit of the minor. From the mere fact that the court permitted the guardian ad litem to compromise the suit on behalf of the minor, it is implied that in the opinion of the court, the compromise would be beneficial to the minor. In this connection, reference may be made to the case of (5) Ganesh Chandra Das and Another Vs. Jogendranath Nayaban and Others wherein it has been held that it is not necessary that an express record should also be made that the compromise

is for the benefit of the minor. All that the rule requires is that leave has to be expressly recorded. The fact that the compromise would be for the benefit of the minor is a reason for the grant of the leave and as held in the case of (6) Rajeshwar Prasad Singh Vs. Ambika Prasad Singh and Others, it is not necessary for the court in granting the leave to give reasons for giving the leave.

14. The compromise decree obtained in Title Partition Suit No. 42/7 of 1953/55 has also been assailed as fraudulent. It is well settled that if a minor is properly represented before a court, the compromise decree recorded by that court is binding on the minor unless the minor can prove that the said decree was obtained due to fraud or negligence of the next friend or guardian ad litem. As authority for this proposition, reference may be made to the case of (7) Bishundeo Narain and Another Vs. Seogeni Rai and Jagernath, In this case, their Lordships of the Supreme Court observed:--

If a minor on attaining majority is able to show that division was unfair and unjust, the court certainly set it aside. The rule, however, does not apply to decrees if the minor is properly represented before the court and the decree is as binding on him as on the adult parties, unless the minor can show fraud or negligence on the part of his next friend or guardian ad litem.

15. It may be stated that in Paragraph 13(a) of the plaint of the present suit there is a bare allegation that the decree passed in that Title Partition Suit No. 42/7 of 1953/55 was fraudulent. Except this bare allegation in the plaint, there is no evidence worth the name to prove that any fraud was committed in obtaining the decree in Title Partition Suit No. 42/7 of 1953/55, or that the guardian ad litem of the minor plaintiff was guilty of fraud in obtaining the decree. It was, no doubt, urged on behalf of the plaintiffs that Kuldip Singh, who filed Title Partition Suit No. 42/7 of 1953/55 has placed the plaintiff no. 1 under the guardianship of defendant no. 9 although the mother of the plaintiff no. 1 was alive and this is stated to be an evidence of fraud in filing that suit. I do not agree with this contention urged on behalf of the plaintiffs. I have already stated that defendant no. 9 was an uncle of the plaintiff no. 1 and after his father's death he was entitled to look after the affairs of plaintiff no. 1 and, as such, Kuldip Singh did not commit any serious illegality in showing plaintiff no. 1 under the guardianship of his own uncle, defendant no. 9. In my opinion, on the evidence adduced in this case, the plaintiff failed to establish fraud on the part of guardian ad litem or any other person in obtaining the compromise decree in Title Partition Suit No. 42/7 of 1953/55. The learned counsel appearing for the plaintiffs, has, no doubt, drawn my attention to the statement of defendant no. 1, Paturan Singh, (D.W. 14, to the effect that Title Partition Suit No. 42/7 of 1953/55 filed by Kuldip Singh was a false one. On the basis of this statement, it is urged that the decree obtained in that suit was a collusive one. I do not also agree with this contention. The case of the defendants was that there was a previous partition in the family prior to the filing of Title Partition Suit No. 42/7 of 1953/55 and so what D.W. 14 meant to say was that the claim of Kuldip Singh in Title Partition Suit No. 42/7 of

1953/55 was a false one. But, this will not mean that a collusive decree was obtained. It will appear that Title Partition Suit No. 42/7 of 1953/55 was filed on 1.8.1953 and it remained pending at Patna court and thereafter at Bihar court for about two years. The written statement was filed by one of the defendants of that suit contesting the claim of Kuldeep Singh. Simply because the plaintiff no. 2 was not impleaded as a party to the Title Partition Suit No. 42/7 of 1953/55, it cannot be said that the suit was a collusive one. Defendant no. 9 was brought on the record as defendant no. 3 of that suit and naturally he being the uncle of plaintiff no. 1 was the Karta of the family and, as such, Kuldeep Singh might have thought that defendant no. 9 would properly represent the interest of plaintiff no. 1 in that suit. These circumstances prove that the suit was not a collusive one. There is no material before this Court to hold that there was any collusion between Kuldeep Singh and defendants of Title Partition Suit No. 42/7 of 1953/55 in filing that suit.

16. The learned counsel appearing for the defendants has further urged that there are sufficient materials on the record to prove that this compromise decree passed in Title Suit No. 42/7 of 1953/55 was not a collusive decree as it was acted upon by the respective parties. This compromise decree was passed on 6.9.1955. Final decree Ext. "H" of this Title Partition Suit No. 42/7 of 1953/55 will show that 2.37 acres of land appertaining to Schedule 1 of the final decree was allotted to Kuldeep Singh, plaintiff of Title Partition Suit No. 42/7 of 1953/55; 1.31 acres appertaining to Schedule 3 was allotted to defendants 3 and 4 of Title Partition Suit No. 42/7 of 1953/55 (who are defendant no. 9 and the plaintiff of the present suit); and 9.34 8/4 acres of land appertaining to Schedule no. 2 were allotted to defendants 1, 5, 6, 7, 8 (who are contesting defendants of the present suit) and Manogi Singh (defendant no. 2 of Title Partition Suit No. 42/7 of 1953/55). The case of the defendants is that as Manogi Singh remained joint with the family of defendant no. 1, Paturan Singh, Manogi Singh was given land jointly with the branch of defendant no. 1 under this partition decree. Shortly after this partition decree, Manogi Singh executed a deed of relinquishment Ext. "D" dated 5.10.1956 relinquishing his entire interest in the land of Schedule 2, which he got jointly with other defendants. It further appears that Jamuna Kuer, widow of Kuldeep Singh, executed a sale-deed Ext. (3), dated 20.2.1959 in favour of one Chandeshwar Paswan with respect to 0.52 acres of land out of her share. This Mosstt. Jamuna Kuer also executed two sale-deeds. Exts. E(4) and E(5) in favour of the sons of defendant no. 1, Paturan Singh in respect of her remaining shares in the joint family property, which her husband got by the partition decree and left the village. Defendant no. 9 for self and guardian of plaintiff no. 1 also executed another sale-deed Ext. E(6), dated the 22nd December, 1956, in favour of Jhumak Gope. It follows that the parties, who got separate lands under the partition decree, executed separate documents separately dealing with the properties allotted to their share. This is a clear evidence to prove that the compromise decree in Title Partition Suit No. 42/7 of 1953/55 was acted upon.

17. It was, however, urged that these documents referred to above were all

collusive transactions and that the court should not rely on them. Simply because some of these documents were executed in favour of some of the contesting defendants, it cannot be said that these documents are sham transactions. It will be seen that not only did Jamuna Kuer wife of Kuldip Singh execute documents in favour of some of the defendants, but she had executed a sale-deed Ext. E(3) in favour of Chandeshwar Paswan son of Sukar Paswan, who is a complete stranger to the family and nothing has been pointed out to show that he has any connection with the defendants in any way. It will also be seen that even defendant no. 9, Ram Bhagwan Singh, uncle of plaintiff no. 1, who was a party to the compromise, executed a deed in respect of a portion of the land allotted to his share. I have already adverted to above that the interest of defendant no. 9 cannot be adverse to that of the plaintiff no. 1. There is no allegation in the plaint of the present suit that defendant no. 9 was acting against the interest of plaintiff no. 1 in Title Partition Suit No. 42/7 of 1953/55. The plaintiff no. 1 has also not assailed this sale-deed Ext. E(6). It is neither stated in the plaint nor in the oral evidence of the plaintiffs' witnesses that this document Ext. E(6) was executed without any legal necessity. It is not expected that defendant no. 9 will be a party to any collusive decree being passed against his own interest.

18. It may be stated here that court below has held that Manogi did execute the deed of Ladavi Ext. "D" in favour of the contesting defendants. This finding has also not been assailed on behalf of the plaintiffs in this appeal. This is also a circumstance to show that the compromise decree was acted upon by the parties. The learned counsel appearing for the plaintiffs, however, has drawn my attention to Paragraph 28 of the judgment of the trial court where it has held that the deed of relinquishment executed by Manogi Singh would enure to the benefit of the surviving members of the joint family. In coming to this conclusion, the trial court has relied on the case of (8) Chella Subbanna and Another Vs. Chella Balasubbareddi and Others, Facts of this case are not similar to the facts of the instant case. In the reported case, the fact was that the parties were joint when one of the members of the joint family executed a deed of relinquishment, but in the instant case, there has been disruption in the joint family as soon as Kuldip Singh filed Title Partition Suit No. 42/7 of 1953/55. It is well settled by authorities that when a member of the joint Hindu family files a suit expressing his intention to separate, that brings about a disruption in the family. Of course, if it is proved on evidence that a partition suit was a sham transaction, which was resorted to for the purpose of creating evidence of separation and that the parties never, in fact, intended to separate, there is no severance of the joint family members and the parties continued to be joint. As authority for this proposition reference may be made to (9) Bhagwant Kishore and Another Vs. Bishambhar Nath and Others, The Title Partition Suit No. 42/7 of 1953/55 has not been shown to be sham or collusive, and, as such, the relinquishment by Manogi will not enure to the benefit of all the members of the family. The contesting defendants only in whose favour this deed of relinquishment was executed will get the property in the share of Manogi Singh to the exclusion of

other members.

19. The question, which now arises for consideration, is whether the guardian ad litem was negligent in guarding the interest of minor plaintiff no. 1 in the previous Title Partition Suit No. 42/7 of 1953/55. The fact that the guardian ad litem was negligent in his duty will clearly appear in his statement made by him in the court below. This guardian ad litem was examined as D.W. 2. He has simply stated that he has represented the plaintiff no. 1 in Title Partition Suit No. 42/7 of 1953/55 and that he signed the compromise petition on behalf of the minor. He does not remember if he had made any negligence regarding the interest of the minor defendant. In cross-examination, he was constrained to admit that he only signed on the compromise petition as guardian ad litem and did nothing else. He did not go to the village Ghosi where the parties reside nor did he make enquiry at the spot. He also admits that he did not take any part in the negotiation of the compromise. So the statement of the guardian ad litem clearly prove beyond any shadow of doubt that he failed to take adequate and proper steps for safeguarding the interest of the minor in Title Partition Suit No. 42/7 of 1953/55.

20. The fact that the guardian ad litem did not guard the interest of the minor at the time of compromise in Title Partition Suit No. 42/7 of 1953/55 has also been proved from other circumstances appearing on the record. It will appear from the compromise decree Ext. H of Title Partition Suit No. 42/7 of 1953/55 that the properties mentioned in Schedule 3 of the decree were allotted to the share of defendant no. 9 and plaintiff no. 1. This schedule consists of six plots, namely, 541, 538, 329, 722, 752 and 700. These plots have an area of 1.31 acres. The contention urged on behalf of plaintiff no. 1 is that most of the plots allotted to his share do not belong to the joint family, and, as such, the plaintiff will not be able to take possession over those plots. It has been pointed out that plot no. 329, which is one of the plots allotted to the plaintiff no. 1, belongs to one Chhatardhari Gorai and this fact is admitted by one of the defendants in his statement Ext. I, filed in Title Partition Suit No. 42/7 of 1953/55. The plaintiff no. 1 cannot be given any share in plot no. 329. Another plot no. 538 has been given in the share of plaintiff no. 1, but in paragraph 10 of the written statement Ext. I, this plot is claimed to be the exclusive property of the defendants. It has not been proved in this case that plot no. 538 is the exclusive property of the defendants and in this circumstance, there would be no difficulty in plaintiff no. 1 getting his share in this plot no. 538.

21. So far as plot no. 700 allotted to the share of plaintiff no. 1 is concerned, the case of the plaintiff is that in Paragraph 9 of the written statement Ext. I, the defendants claimed to have purchased this plot in a state of separation and hence it is urged on behalf of plaintiff no. 1 that this plot no. 700 should not have been allotted to his share. It appears from the sale-deed Ext. E(7), dated 21.7.1925 that Paturan Singh (defendant no. 1), Balchand and one Kailash Gorain purchased several plots of land including this plot no. 700. This sale-deed

shows that Paturan had 8 annas share, Balchand had 4 annas share while Kailash Gorain had 4 annas share in all the plots purchased by them. So it appears that Kailash Gorain had some share in plot no. 700. There is no satisfactory evidence on the record as to whether Kailash Gorain has any subsisting interest in plot no. 700 or whether he had transferred his interest to anybody. Reliance has, no doubt, been placed on a sale-deed Ext. E(6), dated 22.12.1956 executed by defendant no. 9 for self and as guardian of plaintiff no. 1 in favour of Jhumak Gope with respect to the entire plot no. 700. There is a recital in this deed that this plot no. 700 exclusively belonged to the executant of this deed having fallen to his share by virtue of a private partition between the coparceners, but it is silent as to how Kailash Gorain had parted with his interest in this plot. Kailash Gorain was not a coparcener of this family of the plot no. 700, which does not appear to be free from any trouble, should not have been allotted to plaintiff no. 1. This plot may remain in the allotment of defendant no. 9. Plot no. 722 is also one of the plots, which were allotted to plaintiff no. 1. It appears that Kuldip Singh had executed a Rehan deed, dated the 9th April, 1943 in favour of one Madhu Kahar with respect to 0.41 acres of plot no. 722. The recital in this deed Ext. 2 is that this plot is exclusive property of the executant of this deed. There is no clear evidence on the record as to whether this Rehan was redeemed: The contention urged on behalf of the defendants is that this Rehan must have been redeemed; otherwise the defendant no. 1 and defendant no. 9 would not have been able to execute a sale deed Ext. E(8) dated 19.2.1952 in favour of one Gagiadhari Kuer wife of Dukhi Gorain. It is mentioned in this deed that 0.19 acres of land Out of 0.44 acres towards northern side were sold to the vendee. In spite of 0.19 acres of land out of plot no. 722 having been sold away, the compromise decree allots 0.41 acres of land out of plot no. 722 to the share of plaintiff no. 1. This shows that at least 0.19 acres of plot no. 722 was not the property of the family when this was allotted to the plaintiff no. 1 by virtue of the compromise decree.

22. On a consideration of the evidence discussed above, I find that these three plots, namely, plot nos. 700 (Sic) (0.12 acres) should not have been allotted to the share of plaintiff no. 1. There is no clear proof that the joint family members were actually in possession over these plots when the compromise decree was passed making allotments of these plots to the share of plaintiff no. 1 and defendant no. 9. I find the evidence adduced in this case discloses that these plots are not in possession of the members of the family. If the guardian ad litem was careful in guarding the interest of the minor Chandradip Singh (plaintiff no. 1) in Title Partition Suit No. 42/7 of 1953/55, such plots would not have been allotted to the plaintiff no. 1. The guardian ad litem was clearly negligent of his duties in Title Partition Suit No. 42/7 of 1953/55.

23. It is further urged on behalf of the defendants that the lower court was in error in holding that the plaintiff no. 1 is entitled to 2 annas share in the entire subject-matter in dispute. It appears that Kuldip Singh filed a suit (Title Partition Suit No. 42/7 of 1953/55) for partition of the joint family properties claiming

1/3rd share in those properties. So there was unequivocal expression of the intention on the part of Kuldeep Singh to separate from other members of the family. I have already adverted to above that it has not been proved in this case that the partition suit was a sham transaction. By virtue of this compromise decree, three separate Takhtas were carved out, out of which one Takhta was allotted to Kuldeep Singh, one to Manogi Singh and the other to plaintiff no. 1 and defendant no. 9. I have also held above that each branch was separately executing documents with respect to the share of land allotted to them. This shows that the compromise decree was acted upon and one branch was separate from other branch. It will appear from the genealogical table given above, that Ram Charan Singh, who was the ancestor of plaintiff no. 1 and defendant nos. 1 to 7 and 9 had two other brothers, namely, Prayag and Maniyar. The branch of plaintiffs became separate from the other branches as already indicated above, after the filing of the Partition Suit No. 42/7 of 1953/55. The share of Ram Charan Singh in the joint family property was admittedly 1/3rd. Balchand son of Ram Charan having died issueless, 1/3rd share of Ram Charan Singh devolved on Balgovind Singh and defendant no. 1, Paturan Singh each having 1/6th share in the share of Ram Charan Singh. In this circumstance, the share of the plaintiffs in the joint family property would be 1/12th and that of defendant no. 9 also will be 1/12th. Plaintiff no. 1 being separate from the branches of Kuldeep Singh and Manogi Singh cannot get share in their properties. The learned subordinate Judge was in error in holding that the share of the plaintiffs in the entire property in the suit was two annas or 1/8th.

24. Land mentioned in Schedule 1 of the present plaint, which is the subject-matter of dispute, has an area of 12.62? acres. So the share of the plaintiffs in the joint family properties will be 1.05 acres. It will, however appear from the compromise decree in Title Partition Suit No. 42/7 of 1953/55 that the total area of land allotted to the plaintiff no. 1 and defendant no. 9 was 1.31 acres, which means that plaintiff no. 1 was allotted only 0.65? acres of land instead of his legitimate share of 1.05 acres. This also shows that the division of the properties was unjust so far as plaintiff no. 1 was concerned. This is another circumstance to indicate that the guardian ad litem was negligent of his duties. In the circumstances, the compromise decree has to be re-opened to this extent that a suitable takhta should be allotted to the plaintiff no. 1 with respect to his 1/12th share. It may be noted that the plaintiff no. 1 should not be allotted any share in plot nos. 700, 722 and 329. The plaintiff no. 1 should be allotted a total area of 1.05 acres in all. At the time of final allotment care should be taken to allot such lands to plaintiff no. 1 in respect of which there is no dispute or litigation. It appears that the parties have executed several documents in respect of the subject-matter of dispute in this case and so care should be taken to allot these lands in the share of the respective vendor of the deed as far as practicable. In the result, the appeal is allowed in part as indicated above. Since the appellants succeed in part, I make no order for costs.

G.N. Prasad, J.

I agree.