

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of decision: 3rd February, 2016.**

+ **CM(M) 775/2015 & CMs No.4062/2016 (for exemption) & 4063/2016 (of R-1 for condonation of 133 days delay in filing reply)**

MOHIT & ANR

..... Petitioners

Through: Mr. Anupam Srivastava and Mr. Abhishek Yadav, Advs.

Versus

RAM PYARI & ORS

..... Respondents

Through: Mr. Davinder Varma, Adv. for R-1.
Mr. Ramesh Kumar and Mr. H.C. Nainawal, Advs. for R-2 & 4 to 6.
Mr. Y.K. Solanki and Mr. Rakesh Kumar, Advs. for R-3 & 7 to 9.

AND

+ **RFA 490/2015 & CMs No.13210/2015 (for condonation of 1947 days delay in filing the appeal) & 13211/2015 (for stay)**

MOHIT & ANR

..... Appellants

Through: Mr. Anupam Srivastava and Mr. Abhishek Yadav, Advs.

Versus

RAM PYARI & ORS

..... Respondents

Through: Mr. Davinder Varma, Adv. for R-1.
Mr. Ramesh Kumar and Mr. H.C. Nainawal, Advs. for R-2 & 4 to 6.
Mr. Y.K. Solanki and Mr. Rakesh Kumar, Advs. for R-3 & 7 to 9.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. Both proceedings arise from the same suit before the learned Additional District Judge (ADJ) and accordingly CM(M) No.775/2015, though not in the Roster of this Bench was ordered to be placed before this Bench to be decided along with RFA No.490/2015.

2. The counsels have been heard.

3. The nomenclature of the parties hereinafter is as per their nomenclature in RFA No.490/2015.

4. The respondent No.1 Smt. Ram Pyari instituted the suit from which these proceedings arise, for partition of as many as seven properties left by her husband, between herself and her sons (respondent No.2 Sh. Shishu Pal, respondent No.3 Sh. Inderjeet Singh, respondent No.4 Sh. Raj Singh) daughters (respondents No.7 to 9 namely Smt. Nirmala, Smt. Anita and Smt. Kavita) and widow (respondent No.5 Smt. Kamla Devi) / children (respondent No.6 Smt. Chanchal and the two appellants namely Sh. Mohit and Sh. Shobhit) of the pre-deceased son Sh. Satbir Singh.

5. The two appellants at the time of institution of the suit on 29th May, 2004 were minors and their mother respondent No.5 Smt. Kamla Devi was

appointed as their guardian for the purpose of the suit and was representing the appellants and had engaged Mr. H.R. Verma, Advocate who filed written statement dated 2nd August, 2004 on behalf of the respondent No.5 Smt. Kamla Devi for herself and as guardian of the two appellants and on behalf of the respondent No.6 Smt. Chanchal being the sister of the appellants.

6. The counsel for the appellants informs that it was a defence *inter alia* in the said written statement that the properties already stood partitioned and each of the parties was in possession / occupation of their respective share as per the said partition which was averred to be oral.

7. On 29th October, 2009, a settlement / compromise was arrived at in the said suit being Suit No.370/2004 of the Court of ADJ Central-7, Delhi and in terms of the said compromise, Mr. H.R. Verma Advocate, on behalf of the respondent No.5 Smt. Kamla Devi being the mother of the two appellants who were mentioned in the proceedings as as “Master” and on behalf of the respondent No.6 Smt. Chanchal, made a statement that the two appellants and their mother and sister i.e. respondents No.5&6 namely Smt. Kamla Devi and Smt. Chanchal were together entitled to 1/8th share in the seven properties and that they had no objection to a preliminary decree for partition being passed declaring the respondents No.1 to 4 and the respondents No.7

to 9 having 1/8th share each in the properties and to the two appellants and the respondents No.5&6 together having the remaining 1/8th share in the properties. The said settlement was however made subject to the condition that the two appellants and their mother and sister shall be given 1/8th share jointly out of the properties under their occupation and that they will surrender the excess portion beyond 1/8th share held by them.

8. A preliminary decree for partition was accordingly passed on 29th October, 2009.

9. Mr. H.R. Verma, Advocate continued to represent the appellants and the respondents No.5&6 even after the preliminary decree.

10. The counsel for the appellants states that the two appellants though minor at the time of institution of the suit and when written statement on their behalf were filed attained majority in the years 2005 and 2007 respectively (the counsel for the appellants is unable to give the dates of birth of the two appellants). It is his contention that the statement made by Mr. H.R. Verma, Advocate on 29th October, 2009 describing the two appellants as 'Master', meaning thereby that they were still minors, was in violation of the procedure prescribed in Order 32 Rule 7 of the Civil Procedure Code, 1908 (CPC) for effecting compromise on behalf of minors.

11. The counsel for the appellants states that the Court Commissioner appointed in pursuance to the preliminary decree for partition visited the suit property in July, 2010 and it was then that the appellants for the first time realised that a preliminary decree of partition had been passed, and on 20th August, 2010 filed an application through Mr. Sanjeev Dutta, Advocate under Order 32 Rule 7 of the CPC for setting aside of the preliminary decree on the basis of consent.

12. The said application was dismissed by the learned ADJ vide order dated 28th October, 2010 impugned in CM(M) No.775/2015. In the said order, the learned ADJ has recorded that the two appellants attained majority on 14th September, 2005 and 9th June, 2007 and has reasoned:

(i) that neither of the appellants moved the Court for participating in the proceedings and continued to participate in the proceedings through their mother Smt. Kamla Devi;

(ii) that Mr. H.R. Verma, Advocate had on 29th October, 2009 made a statement not only on behalf of the mother Smt. Kamla Devi but also on behalf of the appellants through their mother;

(iii) that the interest of the appellants was represented by their mother and thus it could not be pleaded that appellants were

unrepresented;

(iv) that even otherwise, the settlement could not be said to be to the detriment of the appellants inasmuch as it was not in dispute that the appellants along with their mother and sister had only a 1/8th share in the properties;

(v) that the tendency amongst the litigants and lawyers to blame previous counsel is growing alarmingly, non-serious allegations like the one made against Mr. H.R. Verma, Advocate were being made, when no complaint had been made with the Bar Council of Delhi against Mr. H.R. Verma, Advocate and no affidavit of the mother Smt. Kamla Devi was placed on record to the effect that Mr. H.R. Verma, Advocate had no authority to depose before the Court;

(vi) that the application had been filed belatedly, to stall the proceedings and to usurp the excess share in occupation / possession of the appellants and their mother and sister than their entitlement.

13. The appellants then did not impugn the said order and continued to participate in the proceedings pursuant to the preliminary decree, through Mr. Sanjeev Dutta, Advocate for a further period of about two and a half years.

14. Thereafter, on 2nd January, 2013 the appellants filed an application under Order 20 Rule 18 of the CPC to contend that the preliminary decree for partition was bad, as some of the properties which had been partitioned were governed by the provisions of the Delhi Land Reforms Act, 1954 and could not have been partitioned by the Civil Court. This application was filed through a new advocate Mr. D.S. Sehrawat.

15. The said application of the appellants under Order 20 Rule 18 CPC was dismissed vide order dated 13th May, 2014, holding that the lands were not governed by the Reforms Act and were urbanised and thus partible by the Civil Court.

16. The appellants then engaged a new advocate and filed CM(M) No.642/2014 before this Court impugning the order dated 13th May, 2014 dismissing their application under Order 20 Rule 18 CPC.

17. The said CM(M) No.642/2014 came up before this Court on 11th July, 2014 when the appellants withdrew the same with liberty to file review.

18. The appellants thereafter on 26th August, 2014 applied for review of the order dated 13th May, 2014, engaging yet another advocate namely Mr. Nitin Khanna but it is informed that the said application was argued by Mr. D.S. Sehrawat, Advocate only and was ultimately dismissed on 28th April,

2015. The said order has also attained finality.

19. It is thereafter that the appellants, on 29th May, 2015 filed these proceedings i.e. RFA No.490/2015 in which the preliminary decree dated 29th October, 2009 for partition is impugned and CM(M) No.775/2015 in which the order dated 28th October, 2010 of dismissal of the application under Order 32 Rule 7 is impugned. Needless to state that the appeal is accompanied with an application for condonation of 1947 days delay in filing thereof. The CM(M) No.775/2015 though filed after nearly five years of the order impugned therein, is not accompanied with any application for condonation of delay. The counsel for the appellants states that there is no limitation prescribed therefor. The counsel however admits that the principle of laches, acquiescence and waiver would apply thereto.

20. The counsel for the appellants has sought to raise lengthy arguments by relying on *Kaushalya Devi Vs. Baijnath Sayal* AIR 1961 SC 790, *Bishundeo Narain Vs. Seogeni Rai and Jagernath* AIR 1951 SC 280, *Byram Pestonji Gariwala Vs. Union Bank of India* (1992) 1 SCC 31 & *Jineshwardas Vs. Smt. Jagrani* (2003) 11 SCC 372, all on Order 32 Rule 7 of the CPC and on *Basawaraj Vs. The Spl. Land Acquisition Officer* (2013) 14 SCC 81, *Maniben Devraj Shah Vs. Municipal Corporation of Brihan*

Mumbai (2012) 5 SCC 157, *Perumon Bhagvathy Devaswom, Perinadu Village Vs. Bhargavi Amma* (2008) 8 SCC 321, *Ram Nath Sao @ Ram Nath Sahu Vs. Gobardhan Sao* (2002) 3 SCC 195, *Concord of India Insurance Co. Ltd. Vs. Smt. Nirmala Devi* (1979) 4 SCC 365 & *J. Kumaradasan Nair Vs. IRIC Sohan* (2009) 12 SCC 175, on the aspect of limitation.

21. The counsel for the respondent No.1 who is the grandmother of the appellants states that the respondent No.1 is a senior citizen and the appellants by abusing the process of the Court are grabbing more share in the properties than their entitlement.

22. Being of the opinion that the appellants are abusing the process of the Court to delay appeal as well as the CM(M) petition have been taken for final hearing and the counsels have been heard.

23. *De hors* the aspect of limitation, I have enquired from the counsel for the appellants, what is the relevance of the judgments cited by him on Order 32 Rule 7 of the CPC laying down the procedure for effecting compromise on behalf of minors, when admittedly the appellants on the date of the compromise were not minors.

24. No answer is forthcoming.

25. Order 32 Rule 7 prohibits the guardian to the suit, as the respondent No.5 Smt. Kamla Devi mother of the appellants was, from entering compromise on behalf of a minor without the leave of the Court and provides the procedure for seeking such leave and for grant of leave by Court. The said provision can have no application when there is no minor. It is not the case that the compromise resulting in the preliminary decree for partition was not with the consent of the mother of the appellants. The mother of appellants, on the date of compromise i.e. 29th October, 2009 would have certainly known that her sons i.e. the appellants were no longer minors and thus did not feel the need to seek leave of the Court under Order 32 Rule 7 CPC or to follow the procedure prescribed thereunder.

26. Though the learned ADJ in the order dated 28th October, 2010 has recorded that Mr. H.R. Verma, Advocate, on 29th October, 2009 had made statement on behalf of the mother of the appellants as their guardian also but a perusal of the statement recorded on that day does not show it to be so.

The statement of Mr. H.R. Verma, Advocate is under the following head:

“18. Statement of Ld. Counsel Sh. H.R. Verma, Advocate on behalf of defendant no.4 Ms. Kamla Devi W/o Late Sh. Satbir Singh, defendant no.5 Ms. Chanchal D/o Late Sh. Satbir Singh, defendant No.6 Master Mohit and defendant no.7 Master Shobit both sons of Late Sh. Satbir Singh all r/o 129A, Katwaria Sarai,

New Delhi-16.”

27. In my opinion, mere description of the appellant as ‘Master’ would not mean that the Court on that date proceeded on the premise of the appellants being minors. The names etc. are generally taken by the stenographer/typists of the Courts from the description in the Memorandum of Parties of the proceeding and that can explain the use of ‘Master’ against the name of appellants, as is generally used for minors. I am however unable to find any legal basis for use of ‘Master’ preceding the name of a minor and of ‘Mister’ preceding the name of a major or an adult. Shorter Oxford English Dictionary Sixth Edition explains ‘Master’ as a noun meaning—a man having control or authority and also as used preceding the name of a boy not old enough to be called ‘Mister’. The General Clauses Act, 1897 in Section 3(33) defines ‘Master’ when used in Central Acts and Regulations with reference to a ship, as a person having for the time being control or charge of the ship. The Guardians and Wards Act, 1890 enacted in exercise of the State’s responsibility towards persons incompetent to take care of themselves *inter alia* because of their age is also not found to be containing any provision prescribing the use of the pre-fix ‘Master’ against the name of a minor. In the absence of any legal basis, merely from the prefix ‘Master’

before the names of appellants, the Court recording the compromise on 29th October, 2009 cannot be presumed to be proceeding on the premise of the appellants being minors. It is quite evident from the statement of Mr. H.R. Verma, Advocate that he was not making statement on behalf of the mother of the appellants as the guardian of the appellants but on behalf of the appellants.

28. It cannot be lost sight of that Mr. H.R. Verma, Advocate had been the Advocate since the institution of the suit in 2004 i.e. for six years prior to the date when he made the statement aforesaid. Judicial notice can be taken of the manner in which litigation is conducted in the District Courts, especially in relation to the civil suit i.e. of the litigants regularly being in touch with their advocates and appearing before the Court mostly on each and every date. With the litigation remaining pending for a considerable long time, a strong bond is developed between the advocate and the litigant and from the factum of Mr. H.R. Verma, Advocate on 29th October, 2009 having not made statement on behalf of the mother of the appellants as the guardian of the appellants, it is evident that he was aware of the appellants having become major in the years 2005 and 2007 i.e. well before the date on which the compromise was being effected.

29. Moreover, even if it were to be held that the Court as well as Mr. H.R. Verma, Advocate were oblivious of the appellants having attained majority and were under the belief that the appellants were still minor and effected the compromise in violation of procedure prescribed in Order 32 Rule 7 CPC, now when it is not in dispute that the appellants were not minors on that day, it is still not open to the appellants to challenge the compromise as bad on the ground of being violative of Order 32 Rule 7 CPC.

30. I am therefore of the view that the bogey of Order 32 Rule 7 of the CPC raised by the appellants is misconceived.

31. In my view, what the appellants, if desirous of challenging the preliminary decree for partition on the basis of consent, were required to show was that the procedure required by law to be followed, after the appellants as defendants in the suit and earlier represented by their mother attained majority in the years 2005 and 2007 respectively, had not been followed.

32. The counsel for the appellants states that he has not looked at the matter in this light.

33. In this regard it may be mentioned that though Order 32 Rules 12 to 14 CPC lay down procedure to be followed by a minor plaintiff on attaining

majority i.e. of election, whether to pursue suit or not but do not make any provision for the minor defendant. The counsel for the appellants has only suggested that since in a partition suit, all parties enjoy the same status i.e. of plaintiff as well as defendant, the provisions of Order 32 Rules 12 to 14 of CPC will be attracted. Though undoubtedly all parties in a partition suit enjoy the same status but only for the purposes of pursuing the suit and not for the purpose of the procedure to be followed by a minor defendant on attaining majority.

34. High Court of Allahabad in *Achhaiber And Anr. vs Smt. Shakilunnisa Bibi* AIR 1984 All 275 noted that though Order 32 of the CPC provides for the course to be followed in the case of a minor plaintiff attaining majority but is silent qua the defendant and held that there is important difference between a minor plaintiff and a minor defendant and for which reason no provision has been made in the CPC in respect of the minor defendant attaining majority during the pendency of the suit; while a minor plaintiff on becoming a major can elect either to go on with or put an end to the litigation, the defendant has no such choice available to him and the suit must proceed against him, notwithstanding his becoming a major. Relying on *Drupad Chandra Naskar Vs. Bindumoyi Dasi* AIR 1926 Cal 1053 and in

Lanka Sanyasi Vs. Lanka Yerran Naidu AIR 1928 Mad 294 it was held that a minor defendant who comes of age, if thinks fit to come on record and conduct the defence himself can make an application to the Court in this regard and further held that if he does not do so and allows the case to proceed as though he was still a minor, without bringing to the notice of the Court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the time. It was accordingly held that a judgment given by a competent Court against a defendant who during the pendency of the suit attained majority having ceased to be a minor, is not a nullity. Same is the view of the High Court Orissa in *Saraswati Das Vs. Pravat Kumar Sahoo* MANU/OR/0061/2002. I respectfully concur with the said view.

35. In this context, it is important to notice that it was / is not the plea of the appellants that they, after attaining majority were not in the know of the said fact or that after attaining majority they had any differences with their mother and sister or that the statement given by Mr. H.R. Verma, Advocate on 29th October, 2009 was not on their behalf. The counsel for the appellants admits that the appellants or their mother and sister at no time confronted

Mr. H.R. Verma, Advocate of having wrongly given the statement on 29th October, 2009 on their behalf. In fact the counsel for the appellants admits that the mother and sister of the appellants are even today not challenging the compromise and are bound by the statement given by Mr. H.R. Verma, Advocate. It is not the case of the appellants that their interest in the properties is any different from that of their mother and sister. The application filed by the appellants before the learned ADJ and impugning the dismissal whereof CM(M) No.775/2015 has been filed. The entire case of the appellants is that the compromise recorded treating them as minors is in violation of the provisions therefor and which has been held to be misconceived as above.

36. The counsel for the appellants on enquiry states that the appellants and their mother respondent No.5 herein are still living in the same house and there was no animosity of the appellants with their mother and sister as on 29th October, 2009 or even today. No such case also has been pleaded. The counsel for the appellants, on enquiry, further states that the mother of the appellants is a housewife and has never worked. In these facts, when Mr. H.R. Verma, Advocate admittedly had instructions from the mother and sister of the appellants to make the statement on 29th October, 2009, it is

unbelievable that Mr. H.R. Verma, Advocate was not so instructed by the appellants who were then as well as now one with their mother and sister.

37. I have enquired from the counsel for the appellants, whether the appellants have taken any action against Mr. H.R. Verma, Advocate. The answer is in the negative. The counsel for the appellants also, on enquiry, states that he has not made any enquiries from Mr. H.R. Verma, Advocate before blaming him in these proceedings, as to what transpired between Mr. H.R. Verma, Advocate and the appellants and / or their mother and sister. In this view of the matter, the observation of the learned ADJ in the order dated 28th October, 2010 that the attempt of the advocates to blame the earlier advocate and take a contrary stand has to be condemned, is quite apposite.

38. Not only this, from the appellants continuing to contest the final decree proceedings from 28th October, 2010 till now also, it is evident that the appellants have in the interregnum considered themselves to be bound by the preliminary decree proceedings and took other steps to frustrate passing of final decree and only on being unsuccessful therein have again chosen to fall back on blame game, blaming the Court and the advocate, without even giving an opportunity to the advocate to respond. The question of the appellants on 2nd January, 2013 filing the application under Order 20 Rule 18

CPC, CM(M) No.642/2014 against the order therein and thereafter for review of the order in the application under Order 20 Rule 18 CPC shows that it is not open to the appellants to file these proceedings contending that the statement made by Mr. H.R. Verma, Advocate on their behalf was not proper. The appellants cannot be permitted to blow hot and cold as per their convenience. The appellants first contended that the compromise decree was bad being in violation of Order 32 Rule 7 of the CPC. Thereafter they accepted the compromise decree and contested the same on merits. Such contest on merits obviously was on the premise that the appellants were bound thereby. After being unsuccessful in the same, the appellants now again want to state that the compromise is bad for want of their consent. The conduct of the appellants shows that the appellants are taking factual pleas, not on the basis of truth as they should but on the basis of advice of Advocate engaged by them from time to time and which they should not and cannot be allowed to.

39. The counsel for the appellants faced therewith states that all the said proceedings, filed by Mr. D.S. Sehrawat, Advocate and by Mr. Nitin Khanna, Advocate were misguided.

40. On enquiry, whether he has found out from the said advocates, as to

what transpired, the reply again is in the negative. On further enquiry, whether any action has been taken against the said advocates for giving the wrong advice to the appellants, it is stated that no proceedings have been taken, since the appellants are not blaming the advocates and the advocates may have *bona fide* given a wrong advice.

41. If that is so, then the appellants having chosen the advocates, are bound by what advocates did on their behalf as their agents and cannot now renege therefrom.

42. The settled position in law is that while an innocent party acting *bona fide* and diligently cannot be made to suffer injustice merely because of the advocate chosen, putting entire blame on counsel, is unacceptable. Reference in this regard can be made to *Salil Dutta Vs. T.M. and M.C. Private Ltd.* (1993) 2 SCC 185, *Indian Sewing Machines Co. Pvt. Ltd. Vs. Sansar Machine Ltd.* 56 (1994) DLT 45, *Jai Gopal Goyal Vs. Bishen Dayal Goyal* MANU/DE/7650/2007 and *Rabi Shanker Sen Gupta Vs. ITDC* MANU/DE/8419/2007.

43. From all the aforesaid, the abuse of process of Courts by the appellants to perpetuate their possession of share larger than their entitlement in the properties is abundantly borne out and though it is fit case for

proceeding against the appellants for criminal contempt of the Court and issuing notice to the appellants therefor but I am refraining therefrom, this being a family matter and with the hope that better sense will prevail upon the appellants and the appellants at least now will not hold up the final decree proceedings, pursuant to the preliminary decree for partition, which is more than five years old.

44. Dismissed.

No costs.

Decree sheet in RFA No.490/2015 be drawn.

RAJIV SAHAI ENDLAW, J.

FEBRUARY 03, 2016

Bs..