

AFR

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.130 of 2002

Gandoram, S/o Litee Gond, by caste Gond, aged 60 years, (died)
Through his legal representatives

1. Maansai, S/o Late Gandoram Gond, aged about 40 years,
2. Gadruram, S/o Late Gandoram Gond, aged about 32 years,

All R/o Vill. Garhbengal, Tahsil Narayanpur, Distt. Bastar (C.G.)
(Defendants)
---- Appellants

Versus

1. Jhanko, S/o Monda Gond, Through next friend Jhankaya, S/o Monda Gond
2. Mankaya, S/o Monda Gond, Through next friend Jhankaya, S/o Monda Gond

All R/o Vill. Garhbengal, Tahsil Narayanpur, Distt. Bastar (C.G.)
(Plaintiffs)
---- Respondents

For Appellants:	Mr. Parag Kotecha and Mr. Shalvik Tiwari, Advocates.
For Respondents:	None present.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

07/12/2018

1. The substantial questions of law involved, formulated and to be answered in this defendants' second appeal are as under: -

“1. Whether the suit of the plaintiff was not maintainable on the principle of res-judicata in the light of judgment and decree dated 12.11.1990 passed in Civil Suit No.1-A/1987?

2. Whether in spite of the findings of the trial Court as well as the first appellate Court, that the will dated 02.05.1992 having been proved and established the relief could have been refused to the appellants /

defendants Gandoram?”

2. After hearing learned counsel for the appellants, the second substantial question of law is re-framed as under: -

“Whether the first appellate Court is justified in reversing the finding of the trial Court that the Will deed Ex.D-2 dated 2-5-1992 has been established which has been executed by Dumni in favour of Gandoram?”

(Parties hereinafter will be referred as per their status and ranking shown in the plaint before the trial Court.)

3. Four plaintiffs – Jhankai, Jhanki, Jhanko & Mankai, who are sons of Moda, filed a suit for declaration that the judgment & decree passed in Civil Suit No.1-A/1987 dated 12-11-1990 (Ex.P-4) in the matter of Dumni and another v. Somari and seven others is not binding on them and the plaintiffs & defendant No.12 (their mother) be declared title holders of the suit land and possession, if any, be delivered to them, as when the decree Ex.P-4 was passed, all the plaintiffs were minors and their natural guardian / mother defendant No.12 did not represent their interest effectively leading to passing of ex parte decree against them which is not binding on them, as they are the successors-in-interest of Moda, who was the original holder of the suit land.
4. Defendant No.14 Gandoram set up a plea of Will dated 2-5-1992 (Ex.D-2) said to have been executed by Dumni who was declared the owner and title holder of the suit property vide decree Ex.P-4 dated 12-11-1990, which was questioned by the plaintiffs in the present suit.
5. The trial Court after appreciating oral and documentary evidence on record, partly allowed the suit to the extent of plaintiffs No.3 & 4

holding that the judgment & decree (Ex.P-4) is not binding on the plaintiffs, as they were minors at the time when the ex parte decree was passed and further held that only plaintiff No.3 – Jhanko & plaintiff No.4 – Mankai are title holders and successors-in-interest of deceased Moda and directed that they are entitled for possession of the suit property, and further held that Dumni had executed Will (Ex.D-2) in favour of defendant No.14 – Gandoram, the appellant herein, with regard to the suit property.

6. On first appeal being preferred by defendant No.14 Gandoram, who died during the pendency of appeal and his legal representatives were brought on record, the first appellate Court principally agreed with the finding of the trial Court with regard to the title of plaintiffs No.3 & 4, but did not agree with the finding of Will and reversed that finding holding that the Will has not been proved in accordance with Section 63(c) of the Indian Succession Act, 1925 and dismissed the appeal against which this second appeal has been preferred and two substantial questions of law have been framed which have been set-out in the opening paragraph of this judgment.
7. During the hearing of first appeal, plaintiffs No.3 & 4 also questioned the finding of Will by Dumni in favour of Gandoram, the appellant herein / defendant No.14.
8. Mr. Parag Kotecha and Mr. Shalvik Tiwari, learned counsels appearing for the appellants herein / legal representatives of defendant No.14, would submit that the judgment & decree passed by the civil court in the earlier suit with regard to the suit property decreeing the suit in favour of Dumni would operate as res judicata

in this proceeding by virtue of Section 11 of the Code of Civil Procedure, 1908. They would further submit that the first appellate Court is absolutely unjustified in reversing the finding of Will recorded in favour of original defendant No.14, as the Will has been admitted by plaintiff No.4 – Mankai (PW-1) during his cross-examination in paragraph 6. Therefore, the first appellate Court is absolutely unjustified in reversing the finding of Will which was returned in favour of defendant No.14.

9. None appears for the respondents, though served.

10. I have heard learned counsel for the appellants and considered his submissions and also went through the record with utmost circumspection.

Answer to question No.1: -

11. Admittedly, the earlier suit was filed against four of the present plaintiffs along with their mother Somari as natural guardian on 18-3-1987. Complete order sheet has been filed vide Ex.P-3 in which it appears that Somari as defendant No.1 and natural guardian of her four sons was representing the present four plaintiffs in that suit and they were represented through Shri J.P. Dewangan, Advocate, in that suit, but on 12-9-1989, all the defendants were proceeded ex parte and ultimately, ex parte decree (Ex.P-4) was passed on 12-11-1990 against the present plaintiffs holding that after the death of Moda, the plaintiffs in the earlier suit namely, Dumni & Gope both are the title holders and they are entitled for decree for possession of the suit land.

12. In this view of the matter, the trial Court in the present suit has held that the present plaintiffs are entitled to question the earlier decree by way of civil suit by virtue of the provisions contained in Order 32 Rule 3-A(2) of the CPC which states as under: -

“3-A. Decree against minor not to be set aside unless prejudice has been caused to his interests.—

(1) xxx xxx xxx

(2) Nothing in this rule shall preclude the minor from obtaining any relief available under any law by reason of the misconduct or gross negligence on the part of the next friend or guardian for the suit resulting in prejudice to the interests of the minor.”

13. Order 32 Rule 1 of the CPC provides that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor. Sub-rule (1) of Rule 3 of Order 32 provides that where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. Sub-rule (2) of Rule 3 provides that an order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. A detailed procedure has been prescribed in sub-rules (4) & (5) of Rule 3 of Order 32 of the CPC to deal with the application for appointment of guardian. Sub-rule (2) of Rule 3-A of Order 32 of the CPC provides that nothing in Rule 3-A shall preclude the minor from obtaining any relief available under any law by reason of the misconduct or gross negligence on the part of the next friend or guardian for the suit resulting in prejudice to the interests of the minor. Sub-rule (1) of Rule 10 of Order 32 of the CPC goes to show that on the retirement, removal

or death of the next friend of a minor, further proceedings shall be stayed until the appointment of a next friend in his place. Even sub-rule (1) of Rule 11 of Order 32 of the CPC further goes to show that 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.

14. Thus, it appears that in order to adjudicate a suit instituted against the minor completely and effectively, the appointment of guardian is must. On reading Rules 4 & 11 of Order 32 of the CPC, it is quite vivid that unless guardian is appointed, the suit cannot proceed and even if he dies, retires or he does not perform his duty, a new guardian has to be appointed and till then the further proceeding has to be stayed.

15. In the earlier suit filed by Dumni & Gope, though no formal order of appointment of guardian to plaintiffs No.1 to 4 was either applied for or made by the court acting *suo motu*, but when the counsel appointed by the natural guardian of the plaintiffs on 12-9-1989 proceeded ex parte before the trial Court, the trial Court ought to have taken care of the provisions contained in Order 32 Rule 11 of the CPC, as natural guardian has failed to perform her duty in accordance with law in presenting the points raised in the written statement on behalf of the minor plaintiffs and failed to lead evidence and represent them effectively resulted in ex parte decree against them. Thus, the trial Court could not have proceeded with the trial of the suit and could not have passed decree without

appointing guardian to protect the interest of the minor plaintiffs and as such, the decree was passed in violation of the provisions contained in Order 32 Rule 11 of the CPC.

16. The question is, whether such an ex parte judgment & decree which was passed in the earlier suit filed by Dumni & Gope against the present plaintiffs in violation of Order 32 Rule 11 of the CPC would operate as *res judicata* in the instant suit filed by minor plaintiffs through the natural guardian.

17. The Supreme Court in the matter of Canara Bank v. N.G. Subbaraya Setty and another¹ while dealing with Section 11 of the CPC has held that if previous judgment is based on erroneous decision not giving effect to statutory prohibition, the principle of *res judicata* will not operate. Their Lordships while further elaborating the principle of *res judicata* carved out the principle as under: -

“33. ... (ii) An issue of law which arises between the same parties in a subsequent suit or proceeding is not *res judicata* if, by an erroneous decision given on a statutory prohibition in the former suit or proceeding, the statutory prohibition is not given effect to. This is despite the fact that the matter in issue between the parties may be the same as that directly and substantially in issue in the previous suit or proceeding. This is for the reason that in such cases, the rights of the parties are not the only matter for consideration (as is the case of an erroneous interpretation of a statute inter parties), as the public policy contained in the statutory prohibition cannot be set at naught. This is for the same reason as that contained in matters which pertain to issues of law that raise jurisdictional questions. ...”

18. Reverting to the facts of the case, it is quite vivid that in the instant case, the earlier judgment & decree passed in favour of Dumni is in teeth of the provisions contained in Order 32 Rule 11 of the CPC,

1 AIR 2018 SC 3395

as the natural guardian failed to perform his job and failed to protect the interest of the minor plaintiffs. The court proceeded ex parte and passed decree which is in teeth of the provisions contained in Order 32 Rule 11 of the CPC, as such, the principle of law laid down in Canara Bank (supra) would squarely attract and that judgment & decree will not operate as *res judicata* in the instant suit from which this appeal has arisen, as the said judgment & decree is in violation of the statutory provisions contained in Order 32 Rule 11 of the CPC. The first question of law is answered accordingly.

Answer to question No.2: -

19. The trial Court returned the finding that Dumni has executed a Will in favour of defendant No.14 Gandoram against which though the plaintiffs did not file appeal, but in appeal preferred by the present defendants, the plaintiffs have questioned that finding which has been reversed by the first appellate Court. Though in the matter of Santosh Hazari v. Purushottam Tiwari (deceased) by LRs², the Supreme Court has held that first appellate has to record its finding on all issues, but in the instant case, on the basis of oral submissions made by the plaintiffs, such a finding has been reversed. The Will is said to be executed by Dumni in favour of defendant No.14 / appellant Gandoram vide Ex.D-2, but none of the attesting witnesses Mandhar and Ramuram were examined to prove execution and attestation of Will though only one of the witnesses is said to be dead, but about the other attesting witness, nothing has been said that he is not available to be examined.

² (2001) 3 SCC 179

Even otherwise, if the attesting witnesses are dead, then execution and attestation of Will has to be proved in accordance with Section 69 of the Evidence Act, 1872, which has not been resorted to in the present case.

20. Lastly, an argument was raised that since the Will has been admitted by plaintiff Jhankai (PW-1) in para 6 of his evidence, the Will was not required to be proved. This submission runs contrary to the decision rendered by the Supreme Court in the matter of **S.R. Srinivasa and others v. S. Padmavathamma**³ wherein Their Lordships of the Supreme Court have clearly held that admission about making of Will does not amount to admission of due execution and attestation of Will and Will has to be proved strictly in accordance with Section 63(c) read with Section 68 of the Evidence Act, 1872. The second question of law is answered accordingly.

21. In view of the aforesaid analysis, I do not find any illegality or perversity in the judgment & decree passed by the first appellate Court. The second appeal deserves to be and is accordingly dismissed leaving the parties to bear their own cost(s).

22. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

³ (2010) 5 SCC 274