

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.61 of 2002****Judgment reserved on: 01/10/2018****Judgment delivered on: 08 /10/2018**

1. Satwantin Bai aged about 65 years widow of Sitaram resident of village Karmari P.O. Mahroom Tahsil and Distt. Rajnandgaon
2. Kamti Bai alias Kanti Bai aged about 40 years D/o Sitaram resident of Sindhi Chowk, Choukhadiya-Para Tahsil and Distt. Rajnandgaon
3. Kunwar Bai aged about 45 years D/o Sitaram, resident of Nandai Rajnandgaon, Tahsil and Distt. Rajnandgaon (CG)

---- Appellants**Versus**

1. Kishore aged about 25 years son of Anjori resident of Sonari, Kagaj Nagar Jamshedpur, Distt. Singhbhum (Bihar)
2. State of Chhattisgarh Through Collector, Rajnandgaon (CG)

---- Respondents

For Appellants	: Mr.Anand Shukla and Mr.Waquar Naiyer, Advocates
For Respondent No.1	: Mr.Aman Tamboli, Advocate
For Respondent No.2	: Mr.Ashish Surana, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Judgment**

1. The substantial question of law involved, formulated and to be answered by this Court in the defendants' second appeal is as under:-

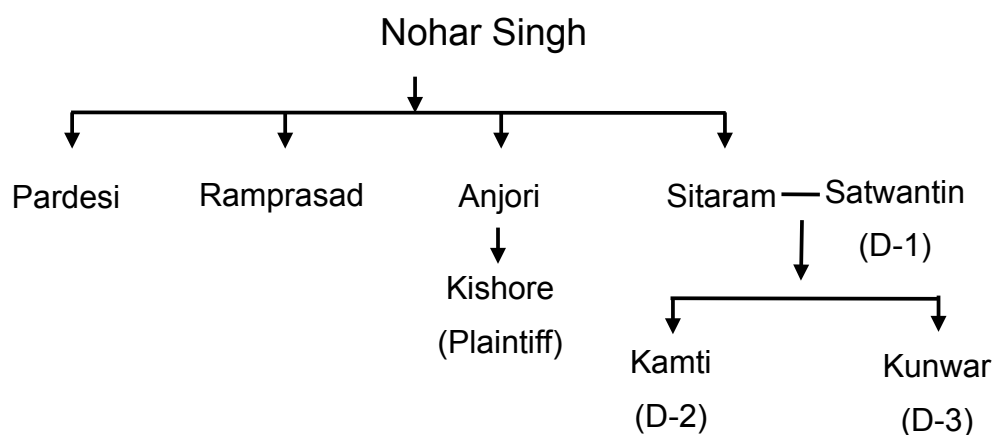
“Whether in the facts and circumstances of the case, the Court below was right in declaring the judgment and decree passed in Civil Suit No.49-

A/84 to be null and void ?”

[For the sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the trial Court]

The imperative facts required for determination of above-stated substantial question of law are as under:-

2. Following genealogical tree will demonstrate the relationship among the parties:-



2.1 The defendants No.1 to 3 had filed a Civil Suit No.49-A/84 against Pardesi, Ramprasad, Anjori and plaintiff-Kishore that sale deed executed by Sitaram, husband of Satwantin Bai in favour of respondent/plaintiff-Kishore is null and void and is not binding upon them. That civil suit was decreed ex-parte on 30.4.1986 (Ex.P/3) holding that sale deed dated 20.3.80 is forged and not binding on defendants No.1 to 3. Thereafter, the respondent/plaintiff filed the instant suit for declaration of his title and further declaration that ex-parte judgment and decree passed in Civil Suit No.49A/84 dated 30.4.1986 be declared null and void as he was minor on the

date of passing of decree and no legal guardian was appointed on his behalf by that Court, therefore, that judgment and decree be declared null and void.

3. By filing written statement, the defendants denied the plaintiff allegations stating inter-alia that summons was duly served, as such, the instant suit is not maintainable for setting aside ex-parte judgment and decree dated 30.4.1986 and therefore, the suit be dismissed with cost(s).

4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 20th July, 1995, held that the plaintiff is title-holder of the suit land and the judgment and decree passed in Civil Suit No.49A/84 is null & void and not binding on him and the plaintiff is entitled for decree of possession.

5. The judgment and decree passed by the trial Court was assailed by the defendants in First Appeal under Section 96 of the CPC and the First Appellate Court affirmed the judgment and decree of the trial Court holding that the plaintiff was minor at the time when ex-parte decree was passed against him. Since he was not effectively represented in that suit, ex-parte decree passed against him was not binding upon him.

6. In second appeal preferred by the defendants, substantial question of law has been framed by this Court, which has been

set-out in opening paragraph of this judgment.

7. Mr.Waquar Naiyar, learned counsel for the appellants/defendants, would submit that both the Courts below concurrently erred in holding that decree was passed against minor. In fact, he had become major and amendment was also incorporated in the suit on 23.11.84 stating the age to be 19 years. He would further submit that remedy of the plaintiff was to file appeal against ex-parte judgment and decree dated 30.4.1986 or to file appeal under Section 96 of the CPC as the suit was not maintainable and therefore, both the Courts below were absolutely unjustified in decreeing the suit in favour of the plaintiff, which is liable to be set aside.

8. Mr.Aman Tamboli, learned counsel for respondent No.1/plaintiff, would submit that both the Courts below have concurrently recorded a finding that the plaintiff was minor on 30.4.1986 when Civil Suit No.49A/84 was decreed and he was not properly represented in the suit and therefore, ex-parte decree that has been passed against the plaintiff is not binding on him, as such, decree is nullity and he can file a suit for setting aside ex-parte decree without filing appeal under Section 96 of the CPC or application under Order 9 Rule 13 of the CPC.

9. I have heard learned counsel appearing for the parties and considered their rival submissions made herein-above and also

went through the records with utmost circumspection.

10. At this stage, it would be appropriate to notice Order 32

Rule 3 of the CPC which states as under:-

“3. Guardian for the suit to be appointed by Court for minor defendant.- (1) 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.

(2) 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.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, [upon notice to the father or where there is no father, to the mother, or where there is no father or mother, to other natural guardian] of the minor, or, where there is [no father, mother or other natural guardian], to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

(4-A) The Court may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also.

(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any Appellate or Revisional Court

and any proceedings in the execution of a decree.”

11. From a focused perusal of the aforesaid provision, it cannot be doubted that Order 32 Rule 3 of the CPC is mandatory in nature and its disobedience leads to the consequence that there is no proper party to the suit in the eye of law and the minor is not a party to the suit or the proceeding, notwithstanding that his name appears on the record and, consequently, the jurisdiction of the Court to proceed against such a minor will be ousted and the Court will have no jurisdiction to render any judgment or pass any other order against such a minor.

12. It is well settled that if a minor is not effectively represented in a suit, such a defect is not one of mere form, but of substance and it goes to the root of the jurisdiction of the Court, and, therefore, such a minor in the eye of law is not a party to such a suit and as such, no decree made against him in such a suit will bind him or his estate at all.

13. The Supreme Court in the matter of Ramchandra Arya v. Man Singh¹, where a decree was passed against a lunatic without appointment of a guardian, and in execution of which his properties were sold, held that the decree against him was a nullity and the sale held in execution of that decree was void ab initio.

14. The principle of law laid down in Ramchandra Arya (supra)

1 AIR 1968 SC 954

has been followed by a Division Bench of this Court in the matter of Bhajan Singh Arora v. IVth Additional Judge to the Court of District Judge, Bilaspur & Ors.²

15. The Supreme Court in the matter of Begum Para Nasir Khan and others v. Luiza Matilda Fernandes and others³ set aside the ex-parte decree against minor on the ground that service of summons was formal and appointment of the Registrar of the Court as guardian was a formal and indifferent approach as a result of which the interest of the minors was prejudicially affected.

It was observed as under:-

“6.....The Court in this country being the guardian of all minors a mere detached observance of law brings it into disrepute and the Court as guardian should have made all efforts for effective participation by minors in the proceedings. Would the Court-appointed Registrar as guardian, deposit rent in the Court to save the tenancy? The answer is obviously in the negative. Such adherence to the provisions of the law brings infamy to the whole process of adjudication of dispute involving vital stakes more so when persons under disability such as minors are before the Court. And it is this aspect which compels us to reject some of the weighty submissions of Mr Tarkunde. The minors are entitled to an indulgent consideration so far as procedural lapses are concerned at the hands of the Court. It is not for a moment suggested that no ex parte decree can be made against the minors, but if the minors are represented by a person appointed by virtue of his office having no interest in the minors and if the decree is an ex parte decree, and the service was inefficient albeit formal we would be failing in our duty if we do not set aside an ex parte decree, and remit the case for adjudication on merits. We say

² AIR 2011 Chhattisgarh 89

³ (1984) 2 SCC 595

no more.”

16. In the light of principles of law enunciated in the above-stated judgments, reverting to the facts of the present case, Civil Suit No.49-A/84 was filed by Satwantin Bai against Pardesi, Ramprasad, Anjori and present plaintiff-Kishore for declaring sale deed dated 20.3.80 as null & void and not binding on him on 3.4.84, in which age of the present plaintiff was mentioned as 14 years. The trial Court noticing the present plaintiff, who was defendant No.4 in that suit to be minor, on 12.9.84 directed the plaintiff-Satwantin Bai of earlier suit to take steps for appointment of guardian for minor defendant in accordance with Order 32 Rule 3 of the CPC, but said Satwantin Bai did not take any steps for appointment of guardian instead filed an application under Order 6 Rule 17 of the CPC for correcting the age of the present plaintiff/defendant No.4 in that suit to be 19 years. That application was considered and age was directed to be corrected by order dated 23.11.1984 without noticing the present plaintiff-Kishore and defendant No.4 in that suit, as such, the present plaintiff was minor on the date i.e. 30.4.1986 when Civil Suit No.49-A/84 was decreed by the trial Court. The present plaintiff filed the present suit for declaring the judgment and decree dated 30.4.1986 as null & void and not binding on him, in which the trial Court has considered the issue and clearly recorded a finding that the present plaintiff was minor when the suit was filed by Satwantin Bai and decreed

against him and as such, he was not properly represented in that suit and against whom ex-parte decree has been passed and proceeded to set aside the decree, which has been affirmed by the First Appellate Court.

17. Thus, from the above-stated legal discussion and following the principles of law laid-down by the Supreme Court in the above-stated judgments (supra), it is manifestly clear that the plaintiff, who was minor, was not properly represented in Civil Suit No.49-A/84 when the decree dated 30.4.1986 was passed and is not bound by that decree and therefore, the trial Court is absolutely justified in setting aside the decree granted in Civil Suit No.49-A/84 and that has rightly been upheld by the First Appellate Court, as such, the decree of the First Appellate Court is hereby affirmed.

18. Accordingly, the substantial question of law is answered in favour of the plaintiff and against the defendants. The second appeal is dismissed. No cost(s).

19. A decree be drawn up accordingly.

Sd/-

(Sanjay K Agrawal)
Judge

B/-