

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.490 of 1989

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Shashikant Pandey son of Lalan Pandey resident of village Konar,
Police Station Sheosagar and District Rohtas.

.....Plaintiff.....Appellant
... .. Appellant/s

Versus

1. Dulhin Fulgena Devi wife of Badri Nath Dubey resident of village Kharagpur, Police Station Kargahar and District Rohtas.
2. Mostt. Vidyadhari Kuer wife of Sheo Pujan Pandey.
3. (i) Sumitra Kuer wife of Late Janardan Roy
(ii) Hariom Pandey minor son of Late Janardan Pandey
(iii) Tripurari Pandey minor son of Late Janardan Pandey
4. Ram Sanathan Pandey son of Late Sheo Pujan Pandey
5. Chandrama Devi daughter of Sheo Pujan Pandey dead.
All sl. nos. 2 to 5 are resident of village Konar, Police
Station Sheosagar and District Rohtas.
6. Deleted vide order dated 28.8.1990
7. Deleted vide order dated 28.8.1990
.....Defendant 1st Set.....Respondent. 1st Set...Respondent 1st Set
8. Lalan Pandey son of Sheo Prasad Pandey resident of village
Konar, Police Station Sheosagar and District Rohtas

.....Plaintiff...Respondent 2nd Set

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Devendra Kumar Sinha, Sr. Advocate
Mr. Jitendra Kr. Singh, Advocate
For the Respondent/s : None

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CORAM: HONOURABLE MR. JUSTICE PARTHA SARTHY

CAV JUDGMENT

Date : 25-08-2020

The instant appeal has been preferred by the appellant against the judgment dated 12.9.1989 and decree dated 27.9.1989 passed by Shri Ram Prit Pathak, 7th Additional District Judge, Rohtas at Sasaram in Title Appeal no. 37 of 1978/8 of 1989 whereby he was pleased to dismiss the appeal and affirm the judgment dated 31.7.1978 and decree dated 24.8.1978 passed by Sri Chandeshwar Mochi, 1st Additional Munsif, Sasaram in Title Suit no. 98 of 1970.



2. Title Suit no. 98 of 1970 was filed by the plaintiffs praying therein for removal of encroachment over the land fully described in schedule 'A' of the plaint. The parties to the suit amicably settled the matter outside the Court and entered into an agreement. A compromise petition dated 13.9.1977 was filed in the Trial Court. Subsequent thereto an objection to the compromise petition was filed by the plaintiff no.1 stating that the defendants had got the compromise under the state of intoxication of the plaintiff. By order dated 31.7.1978 passed in T.S. no. 98 of 1970 the learned 1st Additional Munsif, Sasaram was pleased to reject the objection and the compromise petition filed by the parties was accepted. A preliminary decree was ordered to be drawn up in terms of the compromise and accordingly the decree dated 24.8.1978 was drawn up. The plaintiff no. 2 preferred T.A. no. 37 of 1978 against the judgment dated 31.7.1978 and decree dated 24.8.1978. By judgment dated 12.9.1989 the learned 7th Additional District Judge, Rohtas at Sasaram was pleased to dismiss the appeal in its present form as not maintainable. It is against this judgment dated 12.9.1989 and the decree dated 27.9.1989 that the instant appeal has been preferred under section 100 of the Civil Procedure Code (hereinafter referred to as 'the Code').

3. For the sake of convenience, the parties to the proceedings shall be referred to as per their description in the title suit.

4. The plaintiff no. 1 Lalan Pandey for himself as also on behalf of his minor son plaintiff no.2 Shashikant Pandey filed T.S. no. 98 of 1970 in the Court of Munsif 1st, Sasaram praying therein for removal of encroachment over the land fully described in Schedule 'A' of the plaint. The four defendants in



the suit were Ramkrit Pandey, his son Shiv Poojan Pandey and the two sons of Shiv Poojan Pandey namely Janardan Pandey and Sanatan Pandey. A written statement was filed on behalf of the defendants contesting the case of the plaintiffs and praying that the suit be dismissed with costs.

5. The parties to the suit arrived at an agreement and the matter was amicably settled between them outside Court. A compromise petition dated 13.9.1977 was filed by the parties in the Trial Court. Subsequently an objection petition dated 30.9.1977 was filed on behalf of plaintiff no.1 stating therein that the said compromise had been obtained by administering intoxicant to him and thus the said compromise be not accepted. Another petition dated 30.9.1977 was filed by Dulhin Jarwasi Devi (mother of plaintiff no.2) praying that the compromise not being in the interest of plaintiff no. 2, the same be rejected. On the prayer of the plaintiff the matter was enquired into and evidence was adduced by both the sides on the point as to whether the compromise had been entered into by administering intoxicant to or by prevailing upon the plaintiff no.1. By order dated 31.7.1978 the learned trial Court came to the finding that the plaintiff could not prove the fact that the defendants administered intoxication or caused the plaintiff to take intoxication. The trial Court in its order observed that it was admitted by the plaintiff no.1 that he had signed the compromise petition. He also admitted the terms and conditions of the compromise. Thus not finding any merit in the objection filed by the plaintiff against the compromise petition, the learned trial Court was pleased to accept the compromise petition filed by the plaintiff on 13.9.1977 and directed that a preliminary decree be drawn up in terms of the compromise. Accordingly, a decree



dated 24.8.1978 was drawn up in terms of the compromise.

6. On 30.8.1978 a title appeal being Title Appeal no. 37 of 1978 was preferred in the Court of learned Sub-Judge, Sasaram by the minor plaintiff no.2 Shashikant Pandey, son of the plaintiff no.1. The appeal was preferred under the guardianships of his mother Dulhin Jarwasi Devi while his father plaintiff no.1 was made respondent no. 5. A petition dated 30.8.2008 was also filed by the mother of plaintiff no. 2 stating therein that as plaintiff no. 2-appellant was a minor under the guardianship of his mother, she be permitted to file the appeal on his behalf. From the record it transpires that no order was passed thereon. Subsequently a petition dated 5.9.1989 was filed by the mother of the plaintiff no. 2 stating therein that she has been prosecuting the appeal on behalf of the minor plaintiff no. 2 all along in good faith. It was stated that the respondent at no stage prior to argument of the appeal in the Court had raised the point about incompetency of the appeal on the ground that the appeal was not filed through the plaintiff no.1 who was the next friend of the minor plaintiff no. 2 in the suit. It was further stated that due to inadvertence, petition was not filed for permitting the mother to file the title appeal as next friend of plaintiff no.2 and no permission could be obtained due to oversight and inadvertence. It was stated that with filing of the case law of 1952 of Hon'ble Pepsu High Court, it had become necessary to take the steps and thus the petition was filed on 5.9.1989 by the mother of the plaintiff no. 2 praying that an order be passed permitting her to prefer the appeal as the next friend of the plaintiff no. 2, who was then a minor and be further pleased to condone the delay and limitation for ends of justice. From the record of title appeal it transpires that the petition dated



5.9.1989 of the mother of plaintiff no. 2 was dismissed as not pressed.

The learned lower appellate Court on going through the memo of appeal formulated two points for its decision. They were as follows :-

1. Whether the appeal is maintainable against a consent decree as in the present case ?
2. Whether the appeal is admissible by a person other than the next friend?

7. The lower appellate Court after taking into consideration the provisions of Order XLIII Rule 1A(2) of the Code observed that there was express provision for the appellant to contest in appeal against the compromise decree and as such on point no.1 it held that the appeal against a compromise decree was very much maintainable.

8. On point no.2 the lower appellate Court observed that the suit was filed by the plaintiff no.1 for self as also on behalf of his minor son plaintiff no.2. Thus in the suit the plaintiff no.1 was the next friend of plaintiff no.2 but the title appeal was filed by minor plaintiff no.2 (appellant) with his mother as his next friend. Further referring to the judgment in the case reported in AIR 1952 Pepsu 63, the learned 7th Additional District Judge observed that it was on the pattern of the said judgment that in the instant appeal the mother of plaintiff no.2 had filed a petition seeking permission to act as plaintiff no.2's next friend and another petition for condoning the delay. By judgment dated 12.9.1989 the learned lower appellate Court held that the title



appeal was not properly presented rather it was without authority. Having held the appeal itself to be not properly presented and thus not legally being in existence, any petition including the petition under Order XXXII Rule 12 of the Code filed in the said appeal would be of no consequence. By judgment dated 12.9.1989 the lower Appellate Court held the appeal in its present form to be not maintainable as it was not properly presented and as such the same was dismissed.

9. The plaintiff no. 2 preferred the instant appeal under Section 100 of the Code against the aforesaid judgment and decree passed in Title Appeal no. 37 of 1978/8 of 1989 affirming the judgment and decree passed in Title Suit no. 98 of 1970. By order dated 12.2.1990 the guardian of the plaintiff no.2 was allowed to be discharged and the plaintiff no.2 (Appellant) was allowed to pursue the instant appeal as a major.

10. By order dated 1.3.1990, the appeal was admitted to be heard, notices were issued to the respondents and the following substantial question of law was framed.

“Whether the appellate Court was right in not entertaining the appeal in the light of the circumstances available on the record”.

11. Heard Sri Devendra Kumar Sinha learned Senior Advocate assisted by Sri Jitendra Kumar Singh, learned Advocate for the appellant. Noone appears on behalf of the respondents.

12. It was submitted by the learned Senior Counsel for the appellant that partition by registered deed had taken place on 24.1.1968 . The respondent first set wanted to open a door, window and drain over the house of the appellant which was in his share and so the suit for permanent injunction was filed by



the plaintiff to restrain the defendants. The defendants appeared in the suit and filed their written statement. It was further submitted that the plaintiff no.1 was in the habit of taking ganja and drugs and the defendants took the signature of intoxicated plaintiff no.1 on a one sided compromise and other papers, which were neither in the knowledge of plaintiff no. 2 nor of his father plaintiff no.1. It was submitted that objection to the compromise petition was filed by the plaintiff no.2 as also his father. The father filed a petition that he does not want to continue in the suit as guardian of plaintiff no.2, but no order was passed thereon. The compromise was entered into on behalf of the minor without permission under Order XXXII Rule 7 of the Code of Civil Procedure. It was further contended that the learned lower Appellate Court committed an error in holding that the appeal could not be filed by the mother as guardian of the minor plaintiff no.2 and it also erred in not allowing the plaintiff no.2, who had attained majority to pursue the appeal originally filed by his mother. Learned counsel further in support of his contentions relied on the judgments in the case of Vaidyanath Sahay vs Rambadan Singh (AIR 1966 Pat 383), Raman Gangadharan vs Raman Narayanan (AIR 1959 Ker 169), Mukesh vs Deonarayan (AIR 1987 MP 85), Manik Chand vs Ramchandra (AIR 1981 SC 519), Gitanjali Mishra vs Gangadhar Upadhyay (AIR 1997 Ori 88), Gopalaswamy Kounder vs Ramaswamy Kounder (AIR 2006 Ker 138), Nagaiah vs Smt. Chowdamma (AIR 2018 SC 459).

13. The facts which are not in dispute in brief are that the plaintiff no.1 for himself as also on behalf of his minor son plaintiff no.2 (appellant herein), on 17.4.1970 filed T.S. no. 98 of 1970 for removal of encroachment made by the defendants



over the land of the plaintiffs fully described in schedule A of the plaint. A written statement was filed on behalf of the defendants and on 12.3.1975 the issues were framed. During pendency of the suit the parties entered into a compromise and a compromise petition was filed in the suit on 13.9.1977. On behalf of the plaintiffs the compromise petition was signed by the plaintiff no. 1 for himself as also in the capacity of guardian of his minor son plaintiff no. 2. After filing of the compromise petition, an objection petition was filed by the mother of the plaintiff no.2-appellant on his behalf praying that the same be not accepted by the Court. One another petition was filed on behalf of the plaintiff no.2-appellant by his mother on 30.9.1977 praying to reject the compromise petition. A petition was also filed on 30.9.1977 by the plaintiff no. 1 praying to reject the compromise petition dated 13.9.1977.

On the objection petition to the compromise filed by the plaintiff, a rejoinder was filed by the defendants and the matter was enquired into. Plaintiff no.1 Lalan Pandey was examined as a plaintiff witness on 19.4.1978 and was cross-examined at length on behalf of the defendants on 19.4.1978 and 20.4.1978. Thereafter witness no.6 Rameshwar Pandey and witness no.2 Shivpujan Pandey (Defendant no.2) were examined on behalf of the defendants. By order dated 31.7.1978 the learned Trial Court held that the plaintiff had admitted of signing the compromise petition. He had also admitted the terms and conditions of the compromise. It held that although there were some minor discrepancies in filing the compromise petition in the Court but it found no reason to disallow the same. The compromise petition was accepted and it was ordered that a preliminary decree be drawn up in terms of the compromise.



14. In the title appeal preferred in the lower appellate Court, the Court held that in view of the provision of Order XLIII Rule 1A(2) of the Code of Civil Procedure, that an appeal against a compromise decree was maintainable.

15. On the other point admittedly the plaintiff no.1 had filed the suit, also on behalf of the minor plaintiff no.2 (appellant herein). The suit was disposed off in terms of the compromise decree. The title appeal in the lower appellate Court was preferred by the minor plaintiff no.2. However, the said title appeal, admittedly without obtaining permission of the Court was filed under the guardianship of his mother Dulhin Jarwasi Devi, although the title suit had been contested by the plaintiff no.2, through his next friend under the guardianship of his father Lalan Pandey (plaintiff no.1). The lower appellate Court was pleased to frame two points for consideration of which point no. 2 was “whether the appeal is admissible by a person other than the next friend”? Taking note of the case law reported in AIR 1952 Pepsu 63, it held the appeal in the present form (having been filed under the guardianship of mother without the permission of the Court) to be not maintainable and as such it dismissed the same.

16. The question which arises for decision in the instant appeal is “whether the appellate Court was right in not entertaining the appeal in the light of the circumstances available on the record ?”

17. Order XXXII of the Code deals with suits by or against minors and Order XXXII Rule 9 of the Code deals with the removal of the next friend.

18. At this stage the Court would like to deal with the judgments relied on by learned Senior Counsel appearing for the



appellant.

19. The first case relied on by the appellant is Vaidyanath Sahay vs. Rambadan Singh (AIR 1966 Pat 383). The facts of this case are clearly distinguishable from the present appeal in so far as in the case cited, due to the negligence on part of the guardian ad litem of the minor and his not defending the suit properly, the suit was decreed ex-parte. Thus, the Court held that it was not enough that a minor should be merely represented by a guardian but it was also necessary that the guardian should represent him effectively. In a case where the interest of the minor are not guarded in a litigation by the Court appointed guardian as a prudent man ought to do, the minor, after attaining majority can legitimately make a grievance of that to avoid the consequence of the litigation decided against him during his minority. This case is not applicable with respect to the question that arises in the instant appeal which is to the effect as to whether title appeal in the lower appellate court could have been preferred by a person as a guardian of minor plaintiff no. 2, the person not being the guardian in the suit.

20. The next case relied upon is Raman Gangadharan vs. Raman Narayanan (AIR 1959 Ker 169). In this case in reference to tarwad properties, while examining the position of a minor, the court was of the opinion that the contention of the appellant therein that the mother of the minor members of a tarwad was incompetent to be appointed as their guardian in a suit was untenable. Thus, in the opinion of this Court, the facts of the instant case being distinct, this judgment is of no assistance to the appellant.

21. In the case of Mukesh vs Deonarayan (AIR 1987 MP 85) the court took note of the fact that the father of the minor



had sworn an affidavit that his relations with his son were not cordial but were strained. Further, the mother of the minor had also sworn an affidavit that she was the natural guardian and capable of acting as next friend of her minor son. The learned Court on examining the agreement entered into was of the opinion that it in no way jeopardized the minor's interest. The facts of this case have no applicability to the instant appeal.

22. The next judgment relied on by the appellant is in the case of Manik Chand vs Ramchandra (AIR 1981 SC 519). The issue in the case was that a minor has no legal competence to enter into a contract or authorize someone else on his behalf to enter into a contract. The Court observed that under the Hindu law, the natural guardian is empowered to enter into a contract on behalf of the minor and the contract would be binding and enforceable if the contract is for the benefit of the minor. The facts of the instant appeal and the issue arising herein are clearly different.

23. In the case of Gitanjali Mishra vs Gangadhar Upadhyay (AIR 1997 Ori 88) the Court observed that in its view where the minor's interest was affected it could not have been justified on part of the mother to wait and see if the father was prepared to take up the cause of the minor whose interest in the property had been effected. The facts being different, this case also has not applicability in the instant appeal.

24. The appellant next relies on the judgment in the case of Gopalaswamy Kounder vs Ramaswamy Kounder (AIR 2006 Ker 138). Referring to other judgments it held that where the minor institutes a proceeding as a plaintiff, any person who does not have an interest adverse to that of the minor can figure as his next friend. It observed that appointment of the minor's mother



as his guardian in execution proceedings where the minor was impleaded as an additional respondent, will not disable Gopalaswamy Kounder from styling himself as the next friend of the minor for the purpose of filing the petition under Order XXI Rule 90 of the Code. This judgment also has no applicability in the instant appeal.

25. Learned Senior counsel for the appellant lastly relies on the judgment in the case of Nagaiah vs Smt. Chowdamma (AIR 2018 SC 459) to submit that in case of a suit filed by a brother on behalf of his minor brother even though the brother does not come within the meaning of guardian under section 4B of the Hindu Minority and Guardianship Act, even then brother can become guardian under Order XXXII of the Code. In this case the Hon'ble Apex Court held that while the next friend is a person who represents a minor who commences a law suit, guardian ad litem is a person appointed by the Court to represent a minor who has been a defendant in a suit. While the guardian ad litem is appointed by the Court, the next friend is not. Both possess similar powers and responsibilities, are subject to control by the Court and may be removed by the Court if the best interest of the minor so requires. In the facts of the case the Hon'ble Apex Court held that the order impugned therein relying upon the provisions of Hindu Guardianship Act to non-suit the plaintiff no. 2 was not justified. The facts of the instant appeal being clearly distinct, the above judgment would be of no assistance to the appellant.

26. As stated above, the question arising in the instant appeal is as to whether when the minor plaintiff no. 2 who was represented in the suit through his next friend and also his father and natural guardian (the plaintiff no. 1), could file an appeal



under the guardianship of his mother without obtaining permission of the Court.

27. Here itself it would be relevant to refer to the judgment relied on by the lower appellate Court ie in the case of Sawan Ram vs Nachittar Singh (AIR (39) 1952 Pepsu 63), specially paragraph no.3 thereof which is quoted herein below for ready reference :-

“3 The first point urged by the appellant’s learned Counsel is that the appeal was not properly presented. Counsel’s position is that Gurdev Singh who had been appointed next friend of the minor could only prefer the appeal and the mother of the minor could not take place unless Gurdev Singh had been removed as he had retired. He refers in this connection to the provisions of Order 32, Rules 9 and 10, C.P. Code and ‘MT. DAULAT BAI v. SHAUKAT RAI’, AIR (18) 1931 Lah 635, in which it was held that where the next friend of the minor plaintiff has once been appointed such appointment continues for the whole of the lis or until it is revoked by the Court or until the next friend has been removed under Order 32, Rule 9, and the next friend is the only person who can prefer an appeal on behalf of the minor. This view, with all respect, is correct and Gurdev Singh alone had the right to prefer the appeal on behalf of the minor. It appears that Gurdev Singh did not move into the matter and the mother of the minor considered it necessary to lodge the appeal herself as the minor’s next friend, because she believed that Gurdev Singh had neglected his duty. But if this was the case the proper course for her was to make an application to the appellate Court



stating all the facts and seeking the permission of the Court preferring the appeal. It is no doubt correct that the position of the guardian-ad-litem of a minor is quite different from that of a next friend and in the case of the guardian express order by the court for his appointment as such is necessary, while a next friend can himself come into Court on behalf of the minor. This means that while the guardian-ad-litem is appointed by the court the next friend appoints himself and unless it is shown that he has any interest adverse to the minor his appointment cannot be objected to. The fact, however, remained that when the next friend is once appointed, even though by himself, he continues to be the next friend throughout the lis and no one else can intervene on behalf of the minor until he applies to the Court to have the next friend removed. Accordingly I hold that the appeal when it was instituted by Nachittar Singh's mother was without authority and was not properly presented." (Emphasis supplied)

28. From the records of the case it transpires that during pendency of the title appeal, a petition dated 10.4.1987 was filed on behalf of the defendants to the effect that the appeal filed by the plaintiff no.2 through his mother was not maintainable. It was thereafter that a petition dated 5.9.1989 was filed stating that the respondents (defendants) at no stage prior to argument in the appeal in the lower appellate Court had raised any point about the incompetency of the appeal on the ground that the appeal was not filed through Lalan Pandey, the next friend of the minor in the suit. It proceeded to state that due to inadvertence, petition seeking permission for mother to file the



appeal as next friend could not be filed and permission could not be obtained due to oversight and inadvertence. Referring to the judgment in the case of Sawan Ram (supra) a prayer was made to pass order to permit the mother to prefer the appeal as next friend of the appellant, who was then a minor and to condone the delay and limitation. This petition of the appellant was also dismissed by the lower appellate Court as not pressed.

29. In the case of Sawan Ram (supra) the Court held that the fact, however remained that when the next friend is once appointed, even through by himself, he continues to be his next friend throughout the lis and no one else can intervene on behalf of the minor until he applies to the Court to have the next friend removed. Accordingly, in the said case the Court held the appeal which was instituted by the minor’s mother to be without authority and not properly presented.

30. Similarly in the instant case also, the title appeal filed by the minor plaintiff no. 2 (appellant) with his mother as his guardian, without the permission of the Court has rightly been held by the lower appellate Court to be not maintainable in its present form as it was not properly presented and the appellate Court was right in not entertaining the appeal.

31. In view of the above, I find no merit in the instant appeal and the same is dismissed.

(Partha Sarthy, J)

Prakash/-

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

