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

Date of decision: 29.08.2023

+ CM(M) 1483/2019 & CM APPL. 45060/2019

MANOJ & ORS

..... Petitioners

Through: Mr. Arvind Chaudhary and Mr. Sachin Chaudhary, Advocates

versus

RAVINDER YADAV AND ANR

..... Respondents

Through: Mr. Vivek Kr. Chaudhary along with Ms. Meghna Singh and Mr. Rohit Jain, Advocates

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CORAM:

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

J U D G M E N T

MANMEET PRITAM SINGH ARORA, J (ORAL):

1. This Petition filed under Article 227 of the Constitution of India impugns the order dated 04.09.2018 passed by ADJ-01, Central District, Tis Hazari Courts, Delhi ('Trial Court'), in M. No. 49/2017, in a Civil Suit No. 06/2003, titled as **Sh. Ravinder Yadav v. Sh. Rajinder Singh through LRs**, whereby the Trial Court has dismissed the application filed under Order XXXII Rule 5 (2) of the Code of Civil Procedure, 1908 ('CPC') for setting aside the judgment and preliminary decree dated 14.05.2004.



2. The Petitioners herein were impleaded as defendant nos. 2 to 4 in the civil suit. The Respondent No.1 was the plaintiff. The defendant no.1 i.e., late Sh. Rajender Singh passed away on 16.11.2010.

2.1. The civil suit was filed for partition of the House No. 80 (Part) Samaipur, Main Market ('subject property') by the plaintiff on the plea that he is the son of defendant no.1 and half-brother of defendant nos. 2 to 4. It was the plea in the suit that the subject property is coparcenary property.

2.2. Defendant nos. 2 to 4 were minors on the date of the institution of the civil suit and were represented by their natural guardian i.e., defendant no.1 in the civil suit.

2.3. The Respondent No.2 is the wife of defendant no.1 i.e., late Sh. Rajender Singh and the mother of defendant nos. 2 to 4. She was appointed as the guardian of the said defendants by the High Court in the appellate proceedings.

3. For the sake of convenience, the parties are being referred to in this judgment as per their original status and rank before the Trial Court.

4. The Civil Suit No. 06/2003 was filed by the plaintiff herein, seeking partition of the subject property, rendition of accounts and permanent injunction against the Defendant Nos. 1 to 4 on 15.03.2003.

5. The Defendant No.1 filed written statement on behalf of all the defendants on 20.05.2003 and contested the claims raised in the suit.

6. Issues were framed in the suit on 24.07.2003 and evidence was led by the parties. The Trial Court thereafter vide judgment dated 14.05.2004 partly decreed the civil suit no. 06/2003 in favour of the Plaintiff with key observations which are summarised as under:

(i) The Trial Court passed the preliminary decree for partition of the



subject property as shown in red colour in the site plan at Ex. PW1/1 annexed along-with the plaint.

(ii) The Trial Court held that Plaintiff and Defendant nos. 1 to 4 have 1/5th share each in the subject property.

(iii) The Trial Court also passed a preliminary decree in favour of the Plaintiff for rendition of accounts in respect of rent realised by Defendant no.1 from the two (2) shops in the subject property.

(iv) Lastly, the Trial Court restrained the defendants from selling, assigning or parting with the possession of the suit property till its partition in terms of this judgment.

7. The preliminary decree of partition dated 14.05.2004 passed by the Trial Court was challenged by the Defendant no.1 along with the Defendant nos. 2 to 4 before this Court in RFA 410/2004.

7.1. The sole issue raised before this Court in RFA 410/2004 was, whether the date of birth of plaintiff is 01.03.1975 and whether Smt. Murti Devi (Mother of plaintiff) married Defendant no.1 on 20.04.1974 as is the case of the Plaintiff or later on 15.12.1975 as per the case of Defendant nos. 2 to 4.

7.2. In the meanwhile, when the said appeal was pending before this Court, the Defendant no.1 passed away on 16.11.2010 and thereafter the Defendant nos. 2 to 4 herein were represented by their mother, natural guardian, Smt. Roshni Devi i.e., Respondent No.2 herein.

7.3. After the demise of the Defendant no.1 this Court vide order dated 11.07.2011 in RFA 410/2004 appointed Respondent No.2 as the next friend of the Defendant nos. 2 to 4 in an application filed by Respondent No.2.

7.4. The appeal was contested by Respondent No.2 as the guardian of Defendant Nos. 2 to 4. However, this Court dismissed the appeal i.e., RFA



410/2004, *vide* judgment dated 09.05.2012 and upheld the preliminary decree of partition passed by the Trial Court. This Court while dismissing the appeal observed as under:

“A civil case is decided on balance of probabilities. The balance of probabilities in this case; and which is clear from the marriage certificate Ex. PW2/A, ration card Ex. DW 1/4 and also the presumption which can be drawn under Section 114 of the Evidence. Act, leads to the irresistible conclusion that the trial Court has rightly decreed the suit for partition and injunction.”

(Emphasis supplied)

8. Thereafter the Plaintiff filed an application on 09.10.2014 before the Trial Court for passing the final decree of partition.

9. At this stage, Defendant nos. 2 to 4 moved an application 31.01.2017, under Order XXXII Rule 5(2) CPC for setting aside the preliminary decree of partition dated 14.05.2004. The said application was moved on the grounds which reads as under:

(i) That the defendant nos. 2 to 4 did not have any knowledge of the suit being pending against them, which was contested by their father i.e., defendant no.1.

(ii) That though pleading was filed by Smt. Roshni Devi i.e., Respondent No.2 in the appeal, but she was not aware about the facts and is an illiterate lady who did not understand any consequence of her action.

(iii) That the plaintiff did not file any application for appointment of guardian of minor defendants in the suit.

10. The Trial Court vide the impugned order dated 04.09.2018 has dismissed the aforesaid application and held that the interests of Defendant Nos. 2 to 4 were duly represented by their father Defendant No.1 initially and thereafter by their mother Respondent No.2 herein.



11. The learned counsel for the Defendant Nos. 2 to 4 admits that their mother i.e., Respondent No. 2 duly represented the said defendants in RFA 410/2004 and contested the said appeal. Further submissions made by the learned counsel for the Defendant Nos. 2 to 4 reads as under:

- (i) He admits that late Sh. Rajender Singh Yadav, i.e., the father of Defendant Nos. 2 to 4 represented their interest before the Trial Court. He states that however during the suit proceedings before the Trial Court, no formal order was passed appointing late Sh. Rajender Singh Yadav i.e., Defendant No.1 as guardian for the Defendant Nos. 2 to 4.
- (ii) He states that the prejudice caused to the Defendant nos. 2 to 4 due to the non-appointment of the guardian ad-litem during the suit proceedings is to the effect that the plea that the subject property was the personal property of late Shri Rajender Singh Yadav and not a coparcenary property was not raised. He states that the effect of the said plea is that the Plaintiff could not have maintained a suit for partition during the lifetime of late Shri Rajender Singh Yadav.
- (iii) He states that other than this plea there is no other plea which has not been raised either by late Shri Rajender Singh Yadav or their mother, Smt. Roshni Devi.
- (iv) He fairly submits that this plea noted at para (ii) herein above has not been raised either before the Trial Court in the application filed under Order XXXII Rule 5 (2) CPC or in this petition.

12. In reply, learned counsel for the Plaintiff states that the suit was filed on the specific averment that the subject property is a co-parcenary property.

- (i) He states that there is a finding of the Trial Court in the preliminary decree dated 14.05.2004 holding that the subject property



is a co-parcenary property.

(ii) He states that the objection that interests of Defendant Nos. 2 to 4 were not defended and represented is without any merit. He states that in the RFA no. 410/2004, the Defendant Nos. 2 to 4 were impleaded as appellant Nos. 2 to 4 and after the death of late Shri Rajender Singh Yadav, the mother of Defendant Nos. 2 to 4 i.e., Smt. Roshni Devi was duly impleaded in the array of parties as Appellant No.1 on 18.05.2011 and a formal order appointing her as guardian was also passed on 11.07.2011 by this Court.

(iii) He states that RFA No. 410/2004 was duly contested by Respondent No.2 on behalf of Defendant Nos. 2 to 4 and admittedly she has no interest adverse to the Defendants Nos. 2 to 4.

(iv) He states that the present proceedings have been filed to obstruct the trial and passing of the final decree in the suit.

13. This Court has considered the submissions of the parties and perused the record.

14. The Trial Court *vide* impugned order dated 04.09.2018 has duly considered the facts of the case and the relevant law and returned a finding that no prejudice was caused to Defendant Nos. 2 to 4 on account of non-passing of a formal order of appointment of Defendant No.1 i.e., late Shri Rajender Singh Yadav as the guardian ad litem before passing of decree dated 14.05.2004. The relevant portion of the judgement reads as under:

*“Perusal of the record reveals that guardian ad-litem under Order 32 Rule 3 of CPC was never appointed by the Learned Trial Court since the filing of the suit till the passing of preliminary decree on 14.05.2004. **It is also matter of record that in the appeal contested by the applicants through their mother after the demise of their father/defendant No.1, the objection regarding non appointment of guardian ad-litem was never raised by the applicants or their mother/ next friend Smt. Roshni Devi.** It is also a matter of record that after having failed to obtain any relief from the Hon’ble High*



Court on merits and after the judgment dated 14.05.2004 was upheld by the Hon'ble High Court vide judgment dated 09.05.2012, the applicants filed the present application in February 2017 on technical grounds i.e., on the ground that guardian ad-litem was not appointed by the Learned Trial Court."

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"It is a settled principle of law that a decree against a minor defendant without appointment of guardian ad-litem is void and inoperative in law, but in a case where the minor is effectively represented in a suit by a guardian although not formally appointed and where such minor suffered no prejudice on account of such informality, the absence of formal order of appointment of guardian is not fatal to the suit (Nirmal Vs. Khandu AIR 1965 Cal. 567; Karam Vs. Narijan AIR 1938 Lah. 709; Brij Kishore Vs. Sat Narain AIR 1954 All. 599; Amrik Vs. Karnel AIR 1974 P7H 715).

Coming to the facts of the present case. It was never argued before this court or by the next friend/ mother of appellants before the Hon'ble High Court that the interest of the father of the applicants was adverse to the interest of applicants. As per Section 6 of Hindu Minority & Guardianship Act 1956, defendant No.1 was natural guardian of the applicants during his lifetime and this fact is not even disputed in the application filed by Smt. Roshini Devi before the Hon'ble High Court under Order 22 rule 3 of CPC. Further the said objection never cropped up for five years after the judgment of the Learned Trial Court was upheld by Hon'ble High Court and the manner in which the said objection has been taken for the first time after thirteen years of the passing of the judgment and preliminary decree dated 14.05.2004 shows that the said objection has been taken only to take benefit of the fact that the guardian ad-litem of the applicants was not formally appointed by the court before passing of the judgment/ preliminary decree dated 14.05.2004.

In the opinion of the court the doctrine of substantial representation is a matter of substance and not form and in the present case the minor applicants during their minority were Rajender Singh and after his demise by their natural guardian/ mother Smt. Roshini Devi. **No prejudice is caused to the applicants because of non-passing of formal order of appointment of defendant No.1 as guardian ad-litem before passing of decree dated 14.05.2004.**

Accordingly, in the opinion of the court, the judgment and decree dated 14.05.2004 cannot be held to be illegal, void-ab initio and not binding upon the applicants only for the reason that no formal order for the appointment of defendant No.1 (their natural guardian) as guardian ad-litem was passed by Learned Trial Court at that stage. The application is accordingly dismissed."

(Emphasis supplied)



15. The facts as noted hereinabove clearly show that late Shri Rajender Singh Yadav i.e., Defendant No.1 vehemently opposed and contested the claims of the Plaintiff before the Trial Court. The preliminary decree dated 14.05.2004 was passed after the evidence was led by parties. Pertinently, the Trial Court returned a categorical finding that the subject property is co-parcenary property and in this regard, the relevant finding of the Trial Court reads as under:

*“14. This is not in dispute that house in question is ancestral property, it has been alleged in para no.2 of the plaint that this house is ancestral house of the parties. There is no denial of this averment in para no.2 of the written statement where it has been claimed that the property was partitioned during the lifetime of the elder brother of the defendant no.1 and all the three brothers are residing separately in their accommodation. There is neither any averment nor any evidence that house in question was self-acquired property of the father of the defendant no.1 and was not inherited by him. Had this house been self-acquired property of the father of defendant no.1 it would have devolved upon defendant no 1 and other legal heirs of late Shri Deep Chand Yadav, under Section 8 of Hindu Succession Act. But, as it was an ancestral house it would mean that this house was inherited by Deep Chand Yadav father of defendant no.1 and was not his self-acquired property. Therefore, it shall be considered to be coparcenary property in which the plaintiff acquired a right by his birth, being a co-parcener. There is no averment or evidence that late Deep Chand Yadv, father of defendant no.1 had separated from his father in his lifetime. Had he separated from his father in his lifetime and got this house during separation/partition, defendant no. 1 and his brothers would have acquired it under Section 8 and not under Section 6 of Hindu Succession Act. **However, in the present case, as defendant no.1 inherited this house as an ancestral property along-with his brothers, it would be a co-parcenary property and being his son the plaintiff has a share in it.** Plaintiff is therefore, entitled to seek, partition of this house. Admittedly defendant no.1 has been realizing rent from the tenants of the shops in this house. The plaintiff is entitled to a share in the rent realized by defendant no.1. Therefore, the plaintiff is entitled to a decree for rendition of accounts in respect of the rent realized by defendant no.1 from two shops in this house. So long as, the house is not partitioned and the plaintiff does not get his share in it, the defendants have no legal right to sell it, assign it or part with its possession. Hence, the plaintiff is entitled to a decree of permanent injunction. The issues are decided against the defendants and in favour of the plaintiff.”*

(Emphasis supplied)

16. The Trial Court in the preliminary decree has therefore returned a



categorical finding that the subject property is a coparcenary property and has further returned a finding that it was not the contention of any party that it is a self-acquired property of late Shri Deep Chand Yadav father of defendant no.1 i.e., late Shri Rajender Singh Yadav.

17. Though Defendant Nos. 2 to 4 are precluded from raising oral pleas for the first time in these proceedings, which do not form part of the pleading in this petition, even if the argument of Defendant Nos. 2 to 4 is considered that this was the personal property of late Shri Rajender Singh Yadav, then the Defendant Nos. 2 to 4 would have neither been a necessary nor a proper party to the civil suit. Therefore, this argument of Defendant Nos. 2 to 4 is merely a red herring and has been raised with the intent of protracting these proceedings.

18. In the opinion of this Court the Trial Court rightly formulated the question that the test after a preliminary decree of partition has been passed is to see whether any prejudice has been caused to the Defendants due to the non-passing of the formal order of appointment of guardian ad-litem. The Trial Court rightly concluded that the interest of Defendant No.1 who contested the suit was not adverse to Defendant Nos. 2 to 4. So also, Respondent No.2 who represented the interests of the Defendant Nos. 2 to 4 in RFA No. 410/2004 was not adverse. No facts evidencing any prejudice to Defendant Nos. 2 to 4 due to absence of a formal order appointing guardian has been placed on record.

19. In this regard, the judgment of the Division Bench of this Court in ***Keshav Chander Thakur & Anr. v. Krishan Chander & Ors., 2014 SCC OnLine Del 3092*** authoritatively answers the issue raised in this petition that since an order for appointment of guardian ad-litem is a formal order, non-



passing of the said order will not be a ground to set aside the decree, if no prejudice was suffered by the minor. The relevant portion of the judgment reads as under:

“28. The learned Single Judge has in the impugned order held that the provisions of Order 32 CPC are procedural in view of the provisions of Order 32 Rule 3A CPC. A decree for non-compliance of Order 32 would be a nullity only on prejudice being suffered by a minor being shown and not merely by reason of non-compliance of some procedure. The grandfather of the appellant No. 1 Late Lt. Col. Dina Nath was a defendant in the suit and did not claim any share in any of the properties. It is the claim of the appellants themselves that Late Lt. Col. Dina Nath was very protective towards the appellant No. 1 and had brought him up like his own son. The proceedings were duly conducted under his supervision. Hence, the impugned order holds that no prejudice was caused to appellant No. 1.

29. We may first see the judgment of the Full Bench of the Punjab & Haryana High Court in the case of Amrik Singh (supra). The Punjab and Haryana High Court in the said case held as follows : -

“13....The object of Order 32 is to see that no decrees are passed against minors where they are not effectively represented. I have deliberately used the words ‘effectively represented’ in contradistinction to the ‘representation’ contemplated by Order 32, Rule 3. If a minor is represented by a guardian ad-litem and the interests of the other major defendants are identical with him and those defendants are effectively prosecuting the litigation it can hardly be said that a minor is not effectively represented. Too much insistence on technical provisions of a procedural law can at times lead to absurd results and cause injustice to parties. It is only where a Court comes to the conclusion that the minor was not effectively represented and thus he was in fact not a party to the proceedings that the result envisaged by the learned Judges would necessarily follow. But where the minor is effectively represented, though technically not in line with the provisions of Order 32, Rule 3, the said result will necessarily not follow.”

30. Similarly, in AIR 1973 Madras 12 (V 60 C 5), Rangammal v. Minor Appasami the Madras High Court held as follows: -

“9.....Ramamsami who had no interest adverse to that of the adopted son represented his son in the further proceedings and he filed an appeal against the preliminary decree on his behalf and as guardian of his son and in the second appeal in the High Court he represented the minor's interest. He put forward the adoption of the minor in the above proceedings and no contention was put forward by him contrary to the minor's interest. In the above circumstances, it cannot be said that any prejudice has been caused to the minor on account of the formal defect in not passing a formal order appointing him as guardian ad litem to the minor.....”



31. The judgment of the Madras High Court as above would be squarely applicable to the facts of this case. The facts of the present case would show that the appellant No. 1 was represented by his mother appellant No. 2 in the proceedings. **In that eventuality merely because a formal order was not passed appointing the mother as a guardian would not be a ground to set aside the decree passed by the Jammu Court.**

(Emphasis supplied)

20. In this regard, it would also be instructive to refer to dicta of Supreme Court in *Nagaiah and another v. Chowdamma (dead) by Legal Representatives and another* (2018) 2 SCC 504 wherein similarly, the Supreme Court has held that a decree passed against the minor cannot be set aside in the absence of prejudice to the minor defendant. The relevant portion of the judgment reads as under:

“14. Not only is there no provision for appointment of next friend by the court, but the permission of the court is also not necessary. However, even in respect of minor defendants, various High Courts are consistent in taking the view that the decree cannot be set aside even where certain formalities for the appointment of a guardian ad litem to represent the defendant have not been observed. **The High Courts have observed in the case of minor defendants, where the permission of the court concerned under Order 32 Rule 3 of the Code is not taken, but the decree has been passed, in the absence of prejudice to the minor defendant, such decree cannot be set aside. The main test is that there has to be a prejudice to the minor defendant for setting aside the decree.** For reference, see *Brij Kishore Lal v. Satnarain Lal* [*Brij Kishore Lal v. Satnarain Lal*, 1954 SCC OnLine All 86 : AIR 1954 All 599] , *Anandram v. Madholal* [*Anandram v. Madholal*, 1959 SCC OnLine Raj 48 : AIR 1960 Raj 189] , *Rangammal v. Appasami* [*Rangammal v. Appasami*, 1973 SCC OnLine Mad 32 : AIR 1973 Mad 12] , *Chater Bhuj Goel v. Gurpreet Singh* [*Chater Bhuj Goel v. Gurpreet Singh*, 1983 SCC OnLine P&H 412 : AIR 1983 P&H 406] & *Mohd. Yusuf. Rafiquddin Siddiqui* [*Mohd. Yusuf v. Rafiquddin Siddiqui*, 1974 SCC OnLine Del 6 : ILR (1974) 1 Del 825] . In the matter on hand, the suit was filed on behalf of the minor and therefore the next friend was competent to represent the minor. Further, admittedly no prejudice was caused to Plaintiff 2.”

(Emphasis supplied)

21. In the facts of the present case, the Defendant Nos. 2 to 4 have been duly represented before the Trial Court by their father, who was their natural



guardian and thereafter, by their mother Respondent No.2. In fact, in the RFA No.410/2004 a formal order dated 11.07.2011 appointing the mother as their guardian was passed.

22. Further, it is a trite law that the preliminary decree dated 14.05.2004 merged into the judgment dated 09.05.2012 passed by this Court in RFA no. 410/2004 and since admittedly the judgment dated 09.05.2012 was passed after formal order (dated 11.07.2011) for appointing Respondent No.2 as the guardian of Defendants 2 to 4 has been passed, this objection of non-appointment of a guardian before the Trial Court, if any, stood cured in the RFA. The RFA was dismissed on 09.05.2012 after considering all the pleas of the Defendant Nos. 2 to 4. In fact, Defendant No.2 had already turned major as on the date of passing of the Judgment dated 09.05.2012.

23. The application under consideration filed on 31.01.2017; 13 years after the Trial Court has passed the preliminary decree is an abuse of process since in the facts of this case the Defendants Nos.2 to 4 was duly represented first by late Rajender Singh Yadav (father) and thereafter by Respondent No.2 (mother).

24. Accordingly, this Court finds no merit in the challenge to the impugned order dated 04.09.2018. The said order is correct in fact and in law. Therefore, the Petition is dismissed and interim orders stand vacated.

25. At this stage, learned counsel for the Plaintiff states that though the preliminary decree was passed in favour of the Plaintiff on 14.05.2004, the proceedings before the Court have remained pending due to the dilatory tactics adopted by Defendant nos. 2 to 4.

25.1. It is a matter of record that the civil suit was instituted on 22.03.2003 and has remained pending for 20 years. In the facts of this case, the Trial Court



is requested to hear and decide the civil suit expeditiously.

25.2. Both the parties are directed to cooperate with the Trial Court in expeditious disposal of the suit and in case either party seeks an unnecessary adjournment, the Trial Court is requested to exercise its jurisdiction under Order XVII CPC.

26. Pending applications stand disposed of.

MANMEET PRITAM SINGH ARORA
(JUDGE)

AUGUST 29, 2023/rk/sk



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