

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.525 of 1988

2. Shivanandan Jha alias Shivanand Jha son of Jai Krishna Jha, resident of Village Panchagachia, Police Station Saharsha, District Saharsa.
3. Vedanand Jha son of Jai Krishna Jha, resident of Village Panchagachia, Police Station Saharsha, District Saharsa.
4. Nityanand Jha son of Jai Krishna Jha, resident of Village Panchagachia, Police Station Saharsha, District Saharsa.
- 5.1. Manu Jha resident of Village Panchagachia, Police Station Saharsha, District Saharsa.
- 5.2. Ratan Devi resident of Village Panchagachia, Police Station Saharsha, District Saharsa.
- 5.3. Bijul Devi resident of Village Panchagachia, Police Station Saharsha, District Saharsa.
- 5.4. Pupul Devi resident of Village Panchagachia, Police Station Saharsha, District Saharsa.
6. Deokant alias Mahakant Jha son of Late Rameshwar Jha, resident of Village Panchagachia, Police Station Saharsha, District Saharsa.
7. Visheshwar Yadav @ Vishwanath Yadav s/o Late Feku Yadav, R/o Jhitkiye, P.S. Ghailadh, Distt Madhepura.

... .. Appellant/s

Versus

- 2.1. Most. Leela Devi w/o Late Bishundeo Mandal, resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
- 2.2. Vijay Kumar S/o Late Bishundeo Mandal, resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
- 2.3. Bimal Kumar, S/o Late Bishundeo Mandal, resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
- 2.4. Usha Devi D/o Late Bishundeo Mandal, resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
- 2.5. Nisha Devi D/o Late Bishundeo Mandal, resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
3. Deep Narain Mandal, son of Late Sitaram Mandal, resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
4. Bal Krishna Mandal, son of Late Sitaram Mandal resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
5. Ram Krishna Mandal, son of Late Sitaram Mandal resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
6. Bipin Kumar Yadav, son of Bisundeo Mandal alias Bisundeo Yadav resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
7. Binoy Kumar Yadav, son of Bisundeo Mandal alias Bisundeo Yadav resident of Village Parsari, Police Station-Madepura, District-Saharsa at present



Madhepura.

8. Upendra Yadav son of Late Rameshwar Yadav, resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
- 9.1. Pana Devi D/o Late Rameshwar Yadav, resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
- 9.2. Ganauri Devi D/o Late Rameshwar Yadav, resident of Village Parsari, Police Station-Madepura, District-Saharsa at present Madhepura.
10. Smt. Runam Devi alias Ruman Devi widow of Priyabrat Narain Yadav, resident of Village Shahpur, Police Station and District Saharsa.
11. Mostt. Sadha Devi D/o Late Smt. Kapurman Devi resident of Village Itahari, Police Station Singheshwar, District-Madhepura.
11. Sanjay Kumar son of Late Smt. Kapurman Devi resident of Village Itahari, Police Station Singheshwar, District-Madhepura.
11. Rubi Kumari D/o Late Smt. Kapurman Devi resident of Village Itahari, Police Station Singheshwar, District-Madhepura.
11. Khusbu Kumari D/o Late Smt. Kapurman Devi resident of Village Itahari, Police Station Singheshwar, District-Madhepura.
11. Dev Krishna Yadav S/o Late Smt. Kapurman Devi resident of Village Itahari, Police Station Singheshwar, District-Madhepura.
11. Sikandar Yadav D/o Late Smt. Kapurman Devi resident of Village Itahari, Police Station Singheshwar, District-Madhepura.
12. Manju Devi D/o Late Smt. Bulla Devi resident of Village Goriahari, P.O. Simraha, Police Station and District Madhepura.
12. Bindula Devi D/o Late Smt. Bulla Devi resident of Village Goriahari, P.O. Simraha, Police Station and District Madhepura.
12. Chandra Kala Devi resident of Village Goriahari, P.O. Simraha, Police Station and District Madhepura.
12. Sulochna Devi D/o Late Smt. Bulla Devi resident of Village Goriahari, P.O. Simraha, Police Station and District Madhepura.
12. Deviki Devi D/o Late Smt. Bulla Devi resident of Village Goriahari, P.O. Simraha, Police Station and District Madhepura.
12. Mamta Devi D/o Late Smt. Bulla Devi resident of Village Goriahari, P.O. Simraha, Police Station and District Madhepura.
12. Mala Kumari D/o Late Smt. Bulla Devi resident of Village Goriahari, P.O. Simraha, Police Station and District Madhepura.
12. Sagar Kumar Yadav, S/o Late Smt. Bulla Devi resident of Village Goriahari, P.O. Simraha, Police Station and District Madhepura.
13. Smt. Satbhama Devi W/o Lakshmi Yadav resident of Village Kabiaini, Police Station Singheshwar, District Madhepura.
14. Smt. Punam Devi W/o Bal Krishan Yadav, Vill-Dudhalla, P.S. Sonbarsha, Dist-Saharsa.

... .. Respondent/s

Appearance :



For the Appellant/s : Mr. Suraj Naraian Yadav, Advocate
Mr. Jata Shankar Jha, Advocate
Mr. Masoom Alam, Advocate
Mr. Chandra Mohan, Advocate
For the Respondent/s : Mr. Ashok Kumar, Advocate
Mr. Satish Kumar, Advocate
For the Intervenor : Mr. Durgesh Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE DR. ANSHUMAN
ORAL JUDGMENT

Date : 15-07-2024

Heard learned counsel for the appellants, learned counsel for the respondents and learned counsel for the intervenor.

2. The present second appeal has been filed against the appellate judgment and decree dated 02.08.1988 and 08.08.1988, passed and prepared by, the Additional District Judge-II, Madhepura in Title Appeal No.5/1985, arising out of original Judgment and decree dated 27.07.1984 and 13.08.1984, passed and prepared by the Subordinate Judge, Madhepura in Title Suit No.18 of 1978.

3. The present second appeal has been filed against the judgment of reversal.

4. In Title Suit No.18 of 1978, the present appellants were the plaintiffs and present respondents nos. 1 to 14 were defendants. The said title suit was decreed in favour of the plaintiffs (present appellants), then defendant nos. 1 to 9 (present respondent nos.1 to 9) preferred title appeal, being



aggrieved and dissatisfied with the original judgment and decree dated 27.07.1984 and 13.08.1984, passed by Subordinate Judge, Madhepura in Title Suit No.18 of 1978.

5. The said title appeal was numbered as Title Appeal No.5 of 1985, in which the appellants were the present respondent nos. 1 to 9. Respondents first set were appellant nos. 1 to 6 and respondents second set were respondent nos. 10 to 14. The said title appeal was allowed in favour of the appellant of the title appeal (respondents first set in the present second appeal) and the judgment and decree dated 27.07.1984 and 13.08.1984, passed in Title Suit No.18 of 1978 was set aside.

6. Thereafter, the present appellants (original plaintiffs) had preferred the present second appeal in which they had made the appellants of the title appeal as respondents first set (present respondent nos. 1 to 9) and respondent nos.10 to 14 as respondents second set, only challenging the judgment and decree dated 02.08.1988 and 08.08.1988 passed and prepared in Title Appeal No.5/1985.

7. This second appeal was admitted *vide* order dated 06.09.1989 in which the following substantial questions of law have been framed:-

Substantial question No.1:-



“Whether on account of the alleged death of the guardians of appellant Nos.6 and 7 who were respondent Nos.6 and 7 in the court below, the appeal became defective?”

Substantial question No.2:-

“Whether the decree under appeal is illegal on account of the fact that the minors were not represented at all?”

8. Learned counsel for the appellants submits that the lands situated in village *Jhitkia*, P.S.+District Madhepura appertaining to C.S. *khata* No.47 and 48 (R.S. *khata* No.289 and 291) total area 3 *Bigha*, 16 *Katha* and 19 *Dhur* is in question. Counsel submits that since substantial questions of law have been framed, therefore, he is confining his argument only on the substantial questions of law, so that the said substantial questions of law be decided in favour of the appellants. Counsel further submits that Title Suit No.18 of 1978 was filed originally with seven plaintiffs in which, Most. Shakuntala Devi, widow of Late. Shri Rameshwar Jha was the mother of her two minor sons, namely, Chandrakant Jha and Deokant @ Mahakant Jha. Since sons were minors, they appeared in the title suit through their mother and natural guardian. Counsel further submits that the said Title Suit No.18 of 1978 was decreed in favour of the plaintiffs and thereafter, the present respondents' 1st set had



preferred Title Appeal No.5 of 1985 before Additional District Judge-II, Madhepura in which the plaintiffs, namely, Shakuntala Devi and her two minor sons were made as respondents 1st set. Counsel also submits that the said minor sons of Shakuntala were respondent Nos.6 and 7 in the memo of appeal. According to him, the said respondent No.6 has been shown as major in the title appeal, but respondent No.7 was still minor during pendency of the appeal and during pendency of the appeal, Shakuntala Devi died but no substitution was filed by the present respondents 1st set being the appellants of the title appeal. As such, the title appeal which has been decreed in favour of the present respondents' 1st set has been passed against unrepresented minor and a dead person because his mother Shakuntala Devi died during pendency of the appeal, and hence, the interest of the minor become unrepresented. Therefore, the judgment and decree passed in Title Appeal No. 5 of 1985 become a nullity.

9. Learned counsel for the appellants submits that in the substantial questions of law, it has come that both respondent Nos.6 and 7 were unrepresented, but at the time of final argument on substantial questions of law, he submits that he is ratifying his argument only upto that extent that respondent



No.6 become major at the time of institution of appeal, but respondent No.7 was minor and unrepresented due to death of his guardian and therefore, decree under appeal become illegal on account of the fact that minor was not represented at all.

10. In support of his arguments, counsel for the appellants relied on the judgment, namely, ***Ramchandar Singh and Anr. Vs. Gopi Krishna Das & Ors.*** reported in ***AIR 1957 PATNA 260***. Counsel submits that in the above-said judgment it has been decided that the judgment and decree where no substitution made on behalf of minor, shall be abated, and therefore, the judgment and decree under challenge in the second appeal is fit to be set aside. Counsel for the appellants further relied on other Full Bench judgment of this Hon'ble Court in the case of ***Kamakhaya Narayan Singh Bahadur Vs. Baldev Sahay and Ors.*** reported in ***AIR 1950 PATNA 97 (FB)***. Counsel submits that according to the full Bench decision, if any minor has not been properly represented and the case or appeal proceeded, then in that case, the said judgment and decree become nullity. Counsel further submits that the responsibility of substitution has been laid down upon the appellants. He ought to file a substitution under Order XXII of the Code of Civil Procedure, 1908 and when he has not filed the



substitution nor followed the principles laid down under Order XXXII Rule 11 of Code of Civil Procedure, 1908, then it shall be the failure on the part of the appellants of the title appeal (present respondents 1st set) and in the light of the above said judgments, the judgment and decree passed and prepared in Title Appeal No. 5 of 1985 is not sustainable. Hence the substantial questions as framed by this Hon'ble Court for the purpose of deciding this appeal may be decided in favour of the appellants and this second appeal be allowed in favour of the appellants and it may be directed to the First Appellate Court to hear the appeal afresh on merit and then decide the appeal in accordance with the law.

11. Learned counsel for the appellants concludes his argument by stating that on account of the death of the guardian of respondent no.6, no guardian of a minor was appointed and in a result, his interest was unrepresented, hence, the appeal became defective. Therefore, the judgment and decree under appeal shall be illegal, as the minor is unrepresented.

12. Learned counsel for the respondent 1st set submits that they are the contesting parties in this appeal and throughout the litigation, it is the respondents first set who had contested. Respondents second set had no interest, rather, they are only



formal parties everywhere. Counsel submits that the contention of counsel for the appellants is not correct that respondent no.6 became major in appeal and respondent no.7 was still minor in appeal. Counsel submits that from the pleadings of the plaint, it is crystal clear that the said respondent no.6 was major at the time of filing of the suit itself. Therefore, the statement of the appellants that respondent no.6 was minor in the title suit and became major in appeal is not correct, rather, the correct position is that respondent no.6 is throughout major in the title suit as well as in the title appeal. Counsel further submits that respondent no.7 of the title appeal was minor at the time of the filing of the title suit and showing him as minor, title appeal was filed. But the said minor was represented through his mother who was the natural guardian. Counsel further submits that the appellants of the title appeal were completely unaware about the death of said Shakuntala Devi and therefore, they failed to file any substitution. But, counsel submits that in the year 1976, major amendments have come in the Code of Civil Procedure, 1908 and a provision order XXII Rule 10A has been inserted in the CPC in which duty has been casted upon the pleader to communicate to the Court about the death of a party.

13. Learned counsel for the respondents further



submits that the responsibility which has been casted upon the parties in the light of amendment of Order XXII Rule 10A of the CPC, the said duty was not performed. It is due to this reason, even after the death of said Shakuntala Devi who was respondent no.5, the decree was passed. Counsel submits that there were two heirs of Shakuntala Devi and after her death, the rights so vested in Shakuntala Devi had to devolve on her two sons who were already party to the suit and appeal. Therefore, due to the death of Shakuntala Devi and the passing order against dead Shakuntala Devi, the decree cannot become infructuous and it shall be valid. Counsel further submits that since respondent no.6 was major throughout and the right of minor respondent no.7 has been protected by respondent no.6 as he was major, the interests of both are common and not adverse. Counsel submits that it is nowhere pleaded in the entire memo of appeal that the interests of respondents nos. 5, 6 and 7 are not common and adverse. Counsel further submits that, according to him, respondent nos.6 and 7 were well aware and they have knowledge that they had become majors. In support of this argument, counsel submits that this Hon'ble Court has pleased to allow one I.A. i.e. I.A. No.2/2022 filed by the intervenor who has been added as party appellant no.7 in the second appeal on



the ground that interest of appellant no.7 with other appellants are common, due to the reason that before the filing of the title appeal, the said property was transferred in his name by respondent nos.6 and 7 being major. Counsel submits that the sale deed has been attached with the I.A. petition and indicates that the original plaintiff nos.6 and 7-respondent nos.6 and 7 of title appeal and appellant nos.5 and 6 in the present second appeal had executed the sale deed in favour of the appellant no.7 on 16.01.1985 being a major, whereas, the title appeal has been filed on 08.02.1985. Counsel further submits that in the present situation, it becomes clear that the respondents of the title appeal become major and they were not minor and if such defect occurred in the memorandum of appeal, then it is mere irregularity due to lack of knowledge and it may not be treated as a fatal defect on the basis of which judgment and decree passed in appeal be set aside.

14. In support of his argument, learned counsel for the respondents is relying on judgments firstly in the case of ***Ranjit Kumar Karmakar @ Dulal Karmakar Vs. Hari Shankar Das*** reported in ***(2019) 5 SCC 477*** in which it has been held that the second appeal shall be heard only on the substantial questions of law framed by the High Court under section 100(4) of the Code



of Civil Procedure, 1908 and therefore, High Court has to confine its inquiry to the questions framed and not beyond it. Counsel further relied on other judgment i.e. ***Shivshankara & Anr. Vs. H.P. Vedavyasa Char*** reported in ***2023 SCC Online SC 358*** particularly on paragraph no.32 and 36 and he submits that in this case, it has been decided that whether the suit ought to have been held has abated against all defendants as contended by the appellants for non-substitution or owing to be a failure to implead all legal representative on the death of the original third defendant. Counsel submits that in the light of the judgment, in such type of situation even in the event of the death of one of the defendant whose state/interest was being fully and substantially represented in the suit jointly by other defendants, then in that case, the suit shall not abate. Counsel further relied on a judgment in the case of ***Jagannath Singh Vs. Singhasan Kuer & Ors.*** reported in ***1984 PLJR 217 (Full Bench)*** in which in paragraph no.17, it has been held that when one or more heirs of the deceased defendant or respondent are not on record, then the estate is fully represented in the suit or the appeal as the case may be and the suit or the appeal will not abate for not bringing on record the other left outside. Counsel further relied on a judgment in the case of ***Paritosh Kumar Ganguly Vs. Smt.***



Sitala Bala Ghosh & Ors. reported in ***AIR 1985 Calcutta 164*** in which judgment of this Hon'ble Court relating to ***Ratan Prasad Marwari Vs. Bridhi Chand*** reported in ***AIR 1939 PATNA 601*** and the case of ***Gulab Chand & Ors. Vs. Mt. Kishori Kuer*** reported in ***AIR 1942 PATNA 348*** had been discussed. Counsel further submits that according to the said judgment, if, the final decree has been passed without removing the guardian *ad litem* and without describing the defendant as major is not nullity. Counsel also relied on a judgment in the case of ***Mushtaq Ahmad Mashki Vs. Mohd. Shafi Bhat & Ors.*** reported in ***AIR 1983 J&K 44*** in which in paragraph no.22, it was held that on the ground of non-substitution of any party in appeal, if his interest has been protected by other defendant or respondent, the judgment and decree passed in suit and appeal shall not abate. Counsel further relied on a judgment in the case of ***R.N. Gosain Vs. Yashpal Dhir*** reported in ***(1992) 4 SCC 683*** whose paragraph no.10 is relevant where it has been held that the law does not permit a person to both approbate and reprobate. Counsel also relied on a judgment in the case of ***S.P. Chengalvaraya Naidu (Dead) by LRS. Vs. Jagannath (Dead) by LRS. & Ors.*** reported in ***(1994) 1 SCC 1*** on the basis of which counsel submits that when a person whose case is based



on falsehood, he has no right to approach the Court and his case ought to be rejected.

15. In the conclusion of his argument, counsel for the respondents submits that in the present second appeal, argument has been made basically on the wrong factual matrix relating to respondent nos. 6 and 7 of the title appeal (present appellant nos.5 and 6). As both were major but they had not brought these facts on record. In Title Appeal, respondent no.6 is full brother of respondent no.7 and duly represented their interest/estate have been fully represented. Therefore, it may be ordered that the judgment and decree passed in title appeal under challenge may be declared sustainable in the eye of law and the present second appeal be dismissed.

16. Upon hearing the arguments of counsel for the appellants, respondents as well as counsel for the intervenor, and also, upon going through the Lower Court's Records of this appeal, it transpires to this Court that the present Second Appeal has arisen from Title Appeal No. 5 of 1985. The said Title Appeal has arisen from Title Suit No. 18/1978, but originally the said title suit had been filed not in the year 1978, but actually in the year 1968. From 1968 to 1978, the said Title Suit which was originally numbered Title Suit No. 193 of 1968 continued for 10



years and was subsequently returned to the proper forum and renumbered as Title Suit No. 18 of 1978. Thereafter, Title Suit No.193 of 1968 converted into Title Suit No.18 of 1978 with same plaint. It was decided by the original Court on merit by its judgment and decree dated 27.07.1983 and 13.08.1994 respectively. It transpires to this Court by the copy of the plaint that in the Title Suit, the present appellant No. 6 of Second Appeal was respondent No.7 in Title Appeal. They are a party in the title suit and at the time of filing of title suit in the year 1968 itself, he was major in the plaint. This contention has also been accepted by the counsel for the appellant that respondent No.6 became major at the time of filing of appeal and respondent No.6 was minor. Therefore, it is necessary for this Court to decide the substantial question of law only with regard to appellant No.7 and not to appellant no.6 as he was major since the inception of this litigation i.e. in the Title Suit No.193 of 1968 which converted into Title Suit No.18 of 1978 then Title Appeal as well as in the present Second Appeal.

17. With a view to decide the present substantial question of law, it is necessary to quote the relevant provision of law i.e. Order XXXII Rule 11 Order XXII Rule 10A of the Code of Civil Procedure which states as follows:-



“Order XXXII Rule-11. Retirement, removal or death of guardian for the suit.—(1) 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.

(2) Where the guardian for the suit, retires, dies or is removed by the Court during the pendency of the suit, the Court shall appoint a new guardian in his place.

Order XXII Rule-10A. Duty of pleader to communicate to Court death of a party.—Wherever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the Court about it, and the Court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.”

18. It is also necessary to quote the ratio laid down in the case of ***Ramchandar Singh and Anr. Vs. Gopi Krishna Das & Ors.(supra)*** which states that the judgment and decree where no substitution is made on behalf of a minor, shall be abated. Similarly, in the light of the Full Bench judgment rendered in the case of ***Kamakhaya Narayan Singh Bahadur (supra)*** in which it has been held that if any minor has not been properly represented and case or appeal proceeded, then in that case, the said judgment and decree become a nullity. It



transpires to this Court from the record that the interest of plaintiffs is common in the original suit mother his elder son who was major and one minor son were party along with other family members. The suit was decided in favor of the plaintiffs in the title appeal. All the plaintiffs were made party respondents including the mother his major son and one minor son along with other decree-holders. It is also correct that the mother died during pendency of the title appeal and no substitution was filed.

19. It is admitted that the said Title Appeal was filed in the year 1985 being Title Appeal no. 5 of 1985. In the intervenor petition which is placed before this Court, it is clear that in the month of January 1985, the alleged respondents No. 6 and 7 had sold the suit property to the intervenor showing themselves as major whereas the said title appeal was filed after selling the suit property. It also transpires to this Court that when the original suit is Title Suit No.193 of 1968 and the plaint of said suit was returned to the proper forum, renumbered as Title Suit No. 163 of 1978 and decreed in the year 1984. Meaning thereby, from the date of filing of the Title Suit to the date of judgment and decree in 1984-85 i.e. about 16-17 years have crossed from the date of litigation. Hence, it transpires to



this Court that actually the plaintiffs themselves have not opted to file any majority petition during the pendency of litigation. It also transpires to this Court that in the year 1976 major amendment came in the Code of Civil Procedure, 1908 including insertions of provisions of Order XXII Rule 10A. According to this, responsibility has also been casted upon the respondent to intimate to the Court about the death of a party, in which, the respondents of title appeal had failed to intimate in this regard to the Court. But actually, the interest of plaintiffs and respondent first set (total seven parties) were common and in particular even after the death of the mother, the interest of minor was represented in the litigation through the major son and his other relatives i.e. cousins, in this regard the judgment of ***Jagannath Singh Vs. Singhashan Kuer and Ors. (supra)*** is very relevant whose paragraph 17 is as under:-

“From the discussions of the several Supreme Court decisions made above, it emerges that when one or more heirs of the deceased defendant or respondent are on record, then the estate is fully represented in the suit or the appeal, as the case may be, and the suit or the appeal will not abate for not bringing on record the other left out side.

This will also include a case where some of the heirs at their own initiative are brought on the record of the case. Such heirs, who applied for bringing on record, would



represent the entire estate.

It may also include a case where through oversight or on account of such doubt as to who the heirs are, any heir is left out to be brought on record, still the estate of the deceased is fully represented by the heirs brought on record. The left out heirs may subsequently apply to be brought on record, but there will be no abatement.

The aforesaid propositions are, however, qualified by the following exceptions:

—
(i) Where the heirs on record collude with the plaintiffs or the appellants;

(ii) Where a special case could have been put forward by the left out heirs and they did not get an opportunity to present such cause in the proceeding; and

(iii) Where there is an act of deliberate omission to include an heir while bringing the other heirs on record which may be said to be mala fide.

It is further held that where one or more of the heirs of deceased defendant or respondent are on record, or they are already before the court in another capacity, but the left out heirs were not brought on the record, and no formal application was made showing them as heirs and legal representatives of the deceased, still the State of the deceased would be represented by the heirs on record and the decision will bind not only the heirs on record, but the entire estate including those not brought on record unless the case comes under any of the exceptions mentioned above. However, it will be open to the heirs on record to point out that they do not represent the interest of other heirs and in that case it becomes the duty of the plaintiff or the appellant, as the case may be to make diligent and bona fide enquiry of bringing other heirs on record in accordance with law. But if no such objection is taken, then after the



decision it will be deemed that there has been abandonment of technical plea of abatement.

These exceptions may not be taken as exhaustive. I say this because of the observation made by Desai, J. in the Supreme Court decision in *Jayram Redd'ys case* (Supra) to the effect that it is not possible to ratiocinate all these decisions as the task is difficult.

It may be stated here that the decisions of our High Court which have taken contrary view to those of the principles enumerated above are no longer good law in view of the recent pronouncement of Supreme Court in the decisions discussed above. Thus both the questions referred to the full Bench have been answered accordingly.”

20. In the case of *Paritosh Kumar Ganguly Vs.*

Smt. Sitala Bala Ghosh & Ors. (supra); in which ratio laid down in the case of *Ratan Prasad Marwari Vs. Bridhi Chand (supra)* and case of *Gulab Chand & Ors. Vs. Mt. Kishori Kuer (supra)* have been discussed and its paragraph 4 and 5 states as follows :-

4. *It has been contended by Mr. Protap Roy, Advocate appearing for the decree holders I opposite parties in support of the application for vacating the interim order that as the judgment debtor petitioner of the revisional application, Paritosh Ganguly, was represented by Court throughout the proceedings of the suit and the said guardian was not discharged by the Court after attainment of majority by him in 1975 the decree passed in the suit is binding on him. It is submitted that it was the duty of the minor defendant after attainment of majority to bring*



that fact to the notice of the Court and appear in the suit to contest the same as a major person and as he failed to do so, he is bound by the decree passed against him along with others and cannot challenge it as a nullity. In this connection, he has referred to the provisions of Order 32 R. 3, sub-rule (5) of the Code and the decisions reported in the case of Ratan Prasad v. Bridhi Chand, AIR 1939 Pat 601 in which a Division Bench of the Patna High Court has held that where there was a suit against a minor represented by guardian ad litem and the defendant became major after the preliminary decree the final decree passed without removing the guardian ad litem and without describing the defendant as major is not a nullity and that the same considerations apply to execution proceedings. In coming to the said decision, the learned Judges of the Division Bench referred to the provisions of sub-rule (5) of O. 32, R. 3 and have observed that the effect of this Rule is that a guardian ad litem does not cease to function automatically on a minor attaining his majority. He is to be discharged and as the minor who has attained majority is the best person to know the date of his attaining majority, it is for him to come to Court and apply for the discharge of the guardian and to take up the defence of the suit personally. In support of this view reference has been made to the decision of the Madras High Court in the case of Sanyasi v. Yerran Naidu, AIR 1928 Mad 294 where it has been laid down that no provision has been made in the Civil P.C. in respect of a minor attaining majority, therefore, the minor defendant who comes of age may, if he thinks fit, come on the record and conduct the defence himself. If however, 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. A similar view has been taken by this High Court in the case of Drupad Chandra v. Bindumoyi Dasi, AIR 1926 Cal 1053 referred to by their Lordships of the Patna High Court in AIR 1939 Pat 601. The view taken by the Patna High Court in the aforesaid decision has been followed by another Division Bench decision of the same High Court in the case of Gulab Chand v. Kishori Kuer, reported in AIR 1942 Pat 348. The said Division Bench was presided over by Harries C.J.

5. The learned Advocate appearing for the petitioner in the revisional application who has opposed the application for vacating or varying the interim order has argued that as the petitioner judgment-debtor Paritosh Ganguly had attained majority in 1975 he could not be represented by his mother as guardian and the subsequent proceeding in the suit resulting in the decree is not binding on him. There could not be any proper representation of the said petitioner on whom no summons or notice of the suit was issued and who was not given any opportunity of appearing and contesting the I suit. In this connection, he has relied on a decision of the Madras High Court in the case of Sherija Bi v. V. Pillai, AIR 1976 Mad 262 in which the learned single Judge of the Madras High Court has held that where a person had attained majority on the date of institution of the suit and the suit was brought against him describing him as a minor and his mother had been appointed as his guardian in that suit, there was no proper representation of the said defendant and the decree passed in such suit is a nullity. The distinguishing feature of the case cited by Mr. De is that there, on the date when the suit was instituted the defendant was a major but he



was sued as a minor and the Court appointed his mother as his guardian. But in the present case, the judgment-debtor petitioner of the revisional application was a minor on the date when he was brought on record in the proceedings of the ejectment suit as one of the heirs and legal representatives of the original defendant in 1970 and a guardian was appointed by the Court to represent him and later he attained majority in 1975. No doubt, in decisions relied on by Mr. Roy the minor defendant attained majority after the preliminary decree and final decree was passed against him while he was on record as a minor represented by guardian. But the legal position that follow from the provisions of sub-rule (5) to R. 3 of O. 32 of the Code has been clearly set out in the decision of the Division Bench of the Patna High Court reported in AIR 1939 Pat 601 as referred to earlier and it is consistent with the view taken by the decision of this Court reported in AIR 926 Cal 1053. In the present case, it was the duty of the defendant Paritosh Ganguly after attainment of majority to appear in the suit and apply for discharge of the guardian to enable him to defend the suit personally. As he failed to do so and allowed the suit to proceed as though he was still a minor without bringing to the Court's notice the fact of his attaining majority, the decree passed against him is binding on him and it cannot be challenged as a nullity. I therefore, allow the application for vacating or varying the interim order.”

21. Similarly, it is necessary to quote the relevant paragraph nos. 17 and 18 of the judgment rendered in the case of ***Mushtaq Ahmad Mashki Vs. Mohd. Shafi Bhat & Ors.*** (*supra*) which states as under :-



"17. The last decision, viz Kumara Kangaya Goundar v. Arumugha Goundar. AIR 1970 Mad 179 instead of supporting the contention of Mr. S.L. Kaul, supports the case of respondents 1 & 2. In this case it was clearly laid down that where the minor was effectively represented in the suit, and neither his guardian-ad-litem was shown to have any interest adverse to him, nor, was the minor shown to have been prejudiced as a consequence of the defect of procedure in appointing his guardian, the decree passed against him would not be vitiated because of such defect of procedure, or because his natural guardian was willing to act as his guardian-ad-litem to quote the learned Judge in his own words (at p. 183):

“Law insists that the minor's interests in the litigation should be taken care of and the minor represented in the litigation by an adult whose interests are not adverse to that of the minor. The minor's interests in the litigation should not be neglected or prejudiced, and courts have to be jealous in observing the requirements of the law in this regard in letter and spirit. All the same when it is found that the guardian who had been acting for the minor in the suit had not let down the interests of the minor and when the minor was in no way prejudiced, it is immaterial if some irregularity in the appointment is found. If the purpose for which a guardian ad litem is appointed — to put forward pleas properly available for the minor in the case and protect his interest in the litigation by necessary representation — has been achieved, the minor cannot later, by another guardian or on becoming a major avoid



the decree if it is against him, on the ground of some irregularity in the procedure adopted for appointing the guardian.”

18. The law is thus well settled that where a minor defendant is substantially and effectively represented by a guardian with the assent of the court, who is not shown to have any interest adverse to him, and who has done all that he could possibly do to safeguard his interest in the subject matter of the suit, the decree passed against the minor shall not be open to challenge, either because the plaintiff failed to make any application for appointment of his guardian, or because the court failed to pass a formal order appointing the guardian for him or because the guardian did not expressly consent to his appointment as such, or because the plaintiff failed to make a statement in the application for appointment of the guardian, or in the plaint that the proposed guardian did not have any interest adverse to that of the minor, unless prejudice is shown to have occurred to him on that account.”

22. Thereafter, with a view to decide this case, the judgment relied upon by the appellants rendered in the case of ***Kamakhya Narayan Singh Bahadur Vs. Baldev Sahay and Ors. (supra)*** relevant paragraph 74 whereof is very much relevant which is quoted as under :-

“74. I would sum up my views on



the question referred to us in the following sentences:—(1) A minor if he is properly represented in a suit is bound by the decision arrived at therein just as an adult is, and this is the combined effect of section 11 and Order XXXII of the Code of Civil Procedure. (2) A minor seeking to avoid the provisions of section 11 of the Civil Procedure Code can only do so by taking advantage of section 44 of the Evidence Act. (3) The principle of section 44 of the Evidence Act cannot be extended to cases of gross negligence. (4) The point referred to us should not be decided on the basis of English cases, firstly, because in England, there is a statute which gives protection to infants, and, secondly, because in India we have stereotyped and statutory rules for making effective decrees against minors.”

23. Here in the present case, it has been found that the said minor plaintiff no.7-respondent no.7 acquired majority and he himself sold the suit property after the judgment and decree of the title suit in the month of January 1985 itself, after long litigation of about 16-17 years in the appeal which was filed after selling of the property in the year 1985. The alleged minor has contested the appeal with the mother along with his elder brother who was a major and as per record since start of litigation and even after death of mother, interest of estate and



his right was represented through his elder brother. Instead of the fact, he became aware that he was a major and had not opted to file any majority petition, which he ought to be filed and even after the death of mother no intimation has been given to the court in compliance of the order XXII Rule 10A of the Code of Civil Procedure, 1908 by any of the respondent/party. The judgment rendered in the case of ***Kamakhaya Narayan Singh Bahadur Vs. Baldev Sahay and Ors. (supra)*** shall not help as the then minor of the suit become major in Title Appeal and Second Appeal. This Court is also of the view that the other judgment relied upon by the appellant in the case of ***Ramchandrar Singh and Anr. Vs. Gopi Krishna Das & Ors. (supra)*** shall also not help the present appellants due to the reason that the interest of the minor was duly represented through his elder brother and it transpires to this Court that both the brothers showing himself major had sold the suit property to the intervenor prior to filing of appeal.

24. It is made clear that the intervenor who has been added as a party in the second appeal had categorically mentioned that he had adopted the entire pleading of the present respondent which they have made in the original title suit. Although, any decision is binding on a party who is purchaser



pendente lite but in the interest of justice, this Court on the request of the intervenor has directed to add him as a party with a view to end the future litigation as well as the multiplicity of litigation.

25. In the light of the above discussion and the present facts and circumstances of this suit, the substantial question no.1 is hereby answered as that the death of the guardian of appellant no.7 shall not make the judgment and decree passed and prepared in appeal defective as the said minor is substantially and effectively represented by his brother as well as due to the reason that he become major prior to filing of title appeal and himself neither shown any interest to file majority petition before the Court nor intimate to the Court.

26. It also transpires to this Court that the appellants have failed to show any interest adverse to him and, therefore, in this circumstances, it transpires to this Court that no prejudice has been caused to him on this action and hence, the judgment and decree passed in Title Appeal is not defective.

27. Similarly in the light of the discussion made above, particularly when none of the respondents Nos. 6 and 7 were minor in the title appeal as both sold the suit property shown themselves as major, which is apparent from the



document filed by the intervenor before this Court by way of Interlocutory Application petition which has been duly accepted by the original appellants, intervenor as well as by respondents during argument, this Court in the exercise of the power vested in Order XLI Rule 33 of the CPC, 1908 accepts the sale deed and also finds that the litigation is of 1968. Title Appeal was filed in 1985 about lapse of 17 years and admittedly prior to the judgment of title appeal, as such none of the parties were minor and both were major, their interests were common. The alleged minor as his major brother who became major had neither opted to file a majority petition nor intimated to the Court about its majority or about the death of their mother in violation of Order XXII Rule 10A of the Code of Civil Procedure, 1908 and particularly, the ratio laid down on the judgments mentioned in paragraphs 19, 20 & 21 of this judgment in which it has been clearly held that when heirs of the deceased are on record and estate are fully represented in the appeal as respondent no. 6 was major and his interest in the litigation is common with respondent no. 7 in Title Appeal, judgment and decree shall not be defective. Therefore, it cannot be said that the decree has been passed against any minor, rather, the said decree had been passed against majors but due to procedural mistakes, one



brother who was major contested appeal but silent to intimate to the Court that another brother has also become major and hence, the second substantial question cannot be decided in the favour of the appellants. Both substantial questions answered accordingly and not in favour of the appellants.

28. In result, this Court finally held that the judgment and decree dated 02.08.1988 and 08.08.1988 passed and prepared by the Additional District Judge-II, Madhepura in Title Appeal No.5/1985 are not defective rather, it is absolutely valid and in accordance with the law.

29. In result, the present Second Appeal stands dismissed.

30. The decision of dismissal of the present Second Appeal and the judgment and decree passed in Title Appeal are hereby restored. The decree department of Patna High Court is directed to prepare decree within 30 days in the light of judgment of this Court in the case of **Sushil Kumar Goenka Vs. Nathmal Goenka & Others** reported in **2008(3) PLJR 411**.

31. It is directed to the office that copies of the judgment shall be made available to the parties after pronouncement in compliance of Order XX Rule 6B of the



Code of Civil Procedure, 1908.

32. The office is also directed to send the L.C.R.
and judgment and decree of second appeal to the Lower Court
forthwith, thereafter.

(Dr. Anshuman, J)

Divyansh/- Ashwini

AFR/NAFR	
CAV DATE	NA
Uploading Date	25/07/2024
Transmission Date	NA

