

A. Ramaswami Chetty Vs. Doraisami Alias Latchuman Chetty and ors.

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Court : Chennai

Decided On : Nov-24-1922

Reported in : AIR1923Mad465; 73Ind.Cas.409; (1923)44MLJ299

Appellant : A. Ramaswami Chetty

Respondent : Doraisami Alias Latchuman Chetty and ors.

Judgement :

1. This Second Appeal arises from a suit for partition by the plaintiffs against their father, the 1st defendant and the 2nd and 3rd defendants, 2nd defendant being an alienee of certain property under a decree against the 1st defendant and the plaintiffs. The question is whether that decree binds the plaintiffs, in as much as it is said that it was obtained against them, when they were minors in circumstances which make it invalid. Those circumstances were set out in the plaint as being that the decree was obtained by fraud and was not binding on the minor plaintiffs.

2. The fraud in question was not further specified in the plaint. Primarily however we are concerned with the grounds, on which the lower appellate Court has given judgment in the plaintiff's favour. Those grounds are not that there was generally any fraud in the obtaining by the 3rd defendant of the decree or in the purchase by the 2nd defendant at the subsequent Court sale but that the 2 to 5 defendants then in that suit (plaintiffs) were not represented by any guardian legally appointed, the Head Clerk of the Court, who was on the record as their guardian, not having been legally appointed as such. The lower appellate Court held that the plaintiffs

were not properly represented and the proceedings are not binding on them. It therefore went on to retry the issues in the previous case on their merits.

3. The objection to the appointment of the Head Clerk which the lower appellate Court has sustained, was (as we understand it) that there was no affidavit alleging there was no other person fit and willing to act as the guardian of the plaintiffs and no attempt was made to appoint the uncle of the plaintiffs as their guardian ad litem. 'Though evidence was taken for the purpose of passing a decree against the plaintiffs also the plaintiffs were practically undefended, for, no evidence was tendered on their behalf after 1st defendant's oath was accepted. Even the evidence then on record throws a certain amount of suspicion on the claim then made. Merely because another was appointed the guardian of the plaintiffs in the place of 1st defendant who refused to act it cannot be said that the plaintiffs had been properly represented in that suit. 'This statement of the grounds of the lower appellate Court's decision is taken from its judgment. But it is a little difficult to understand the reference to the absence of any evidence adduced for the defence in the previous suit, especially in view of its finding that the guardian appointed was careful and diligent and properly conducted the defence and was not negligent. We shall however return to that point in the sequel.

4. At present we deal only with the objection that there was no proper appointment of the head clerk as guardian. The main grounds on which the lower appellate court held the appointment invalid, were the absence of an affidavit alleging there was no other person fit and willing to act as guardian and of any attempt to appoint the uncle of the plaintiffs. There is no obligation imposed by the relevant portion of the Code, Order XXXII, on the Court to insist or on the plaintiff to produce an affidavit to the effect that there is no other person fit and willing to act as guardian for the suit or to ascertain and exhaust the relatives of the minor defendants before appointing an officer of the Court. Order 32, Rule 4, Clause 4 says only that an officer of the Court may be appointed, where there is no other person fit and willing to act as guardian for the suit. But the fulfilment of this condition must be considered with reference to the circumstances of the case. Here the plaintiff lived in a different district from that of the minors or their father, then and now 1st defendant. The plaintiff attempted first to appoint the 1st defendant as the

guardian. He refused to act and apparently did not co-operate in any way. We cannot hold that a plaintiff is entitled to proceed with a Court guardian only at his own risk and unless he can demonstrate affirmatively that he has made absolutely exhaustive enquiries and that there is in the words of the rule not merely no other relative but also 'no other person fit and willing to act as guardian '. Putting a reasonable construction on the rule, we are not prepared to say that the plaintiff in this case failed in his duty, especially as there is nothing (so far as we have been shown) regarding the uncle of the minors, his residence, the plaintiff's knowledge of his existence, his interest in the minors' affairs or, what is more important, regarding any subsequent attempt by him to protect their interest.

5. Another objection made is that there was no notice to the minors themselves of the proceedings. That is based on a misapprehension. For Order 32, Rule 3, Clause 4 had been amended before the proceedings on the 19th May, 1910 by the omission of the words 'to the minor 'and it is also pointed out that under Order 32, Rule 3, Clause 4 notice was necessary to the father or other natural guardian, or, where there is no father or other natural guardian, to the person in whose care the minor is. In the present case there was no doubt no distinct notice to the father of the proposal of the Court guardian, but the father was himself a party to the proceedings at one of the hearings, at which the appointment was made, and the father had refused to act himself. It does not seem to us that a separate notice was necessary of an incident, of which the father must have been aware. It is further material that the father never during the proceedings took the smallest objection to the conduct of the minor's case by the head clerk.

6. As regards the law the absence of notice to the father of the appointment of the head clerk would in any case be in our opinion an irregularity which would not affect the validity of the proceedings in the absence of proof of fraud or gross negligence on the part of the person appointed, the present case not resembling *Rashid-un-nissa v. Muhammad Ismail Khan* 20 M.L.J. 591 (PC), but *Munnu Lal v. Ghulam Abbas* 19 M.L.J. 631. (PC).

7. The lower appellate Court's ground of decision that the appointment of the Head Clerk was illegal and the proceedings conducted by him therefore are not binding

on the minors failing, we must consider the argument attempted here that, the appointment being an irregularity for want of notice, the proceedings were in fact fraudulently or grossly negligently conducted and the decision resulting from them must be set aside. The lower Courts have no doubt in the present case reached a decision on the merits in the plaintiff's favour. But that is not sufficient, unless it can be shown that the failure to produce the evidence, which was not produced at the first trial was the result of gross negligence and fraud. It is sufficient that there is nothing in the judgment of the lower appellate court to justify us in finding to that effect nor it may be added in the judgment of the District Munsif. The lower appellate Court's characterisation of the conduct of the case by the head clerk as careful and diligent and not negligent has already been referred to. The fact that no evidence was given for the defence on behalf of the minors is in no way decisive, when there was no evidence, which the head clerk is shown to have then been able to adduce or ought to have known to be available. The new evidence now produced does not come within either of those descriptions. In those circumstances we must adopt the lower appellate Court's finding that there was neither fraud nor negligence. The result is that the decision as regards the decree in O.S. No. 738113 and the sale to 2nd defendant must be set aside. The result of our decision sustaining the decree and sale will be that no properties are available for partition, since the properties sold are the only properties set out in the plaint schedule. We therefore, allowing the second appeal, set aside the decrees of the lower Courts and dismiss the plaintiffs' suit with costs throughout of the 2nd defendant.