

Probhat Kumar Chatterjee and anr. Vs. Sm. Latika Debi and ors.

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Court : Kolkata

Decided On : Jun-27-1952

Reported in : AIR1953Cal196,56CWN757

Judge : K.C. Das Gupta and ;Lahiri, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13

Appeal No. : A.F.O.O. No. 66 of 1950

Appellant : Probhat Kumar Chatterjee and anr.

Respondent : Sm. Latika Debi and ors.

Advocate for Def. : Benoy Krishna Ghose and ;Mihir Kumar Sarkar, Advs.

Advocate for Pet/Ap. : Binayak Nath Banerjee, ;Sudhir Kr. Acharya, ;Paritosh Sarkar and ;Sushil Kr. Biswas, Advs.

Disposition : Appeal dismissed

Judgement :

K.C. Das Gupta, J.

1. This appeal is directed against an order of the learned Subordinate Judge, 24-Parganas, dismissing an application under Order 9, Rule 13, Civil P. C. This application was filed by two persons, Probhat Kumar Chatterji and Krishna Kumar

Chatterji, both minors. The decree which was sought to be set aside was passed in a suit brought by their father's brother's widow Latika Debi for partition, for return of certain ornaments and for accounts as a pauper. Both Krishna and Provat were impleaded in that suit as major persons and so there was no arrangement, for their representation through any guardian. The learned Subordinate Judge gave as the main reason of dismissing the application under Order 9, Rule 13 of the Code of Civil Procedure his conclusion being that in law these two petitioners could not be regarded as parties to the suit and consequently the decree was a nullity.

2. It has been contended before us that when the parties were, in fact, impleaded as defendants, the omission to describe them as minor did not affect the fact that they were defendants and that there was really a duty en Court to arrange for their representation.

3. Whatever might have been said on this question, if it was 'res integra', I am of opinion that we are compelled by the authority of the decision of the Judicial Committee in the case of *Mt. Rashid-un-nisa v. Muhammad Is Mail Khan*, 36 Ind App 168 (P.C.) to hold that the two petitioners who, though in fact minors, were described as major and so were not legally represented in Court, were not, in any proper sense, parties to the litigation and consequently the application by them under Order 9, Rule 13, Civil P. C., is not maintainable. In that case, a suit was brought by a minor for a declaration that two decrees and three sales in execution affecting her share in her father's estate were invalid as against her as not properly represented in the proceedings 'from which they resulted. There the plaintiff had been described as a minor but the person who was appointed as guardian was disqualified by the provisions of the Civil Procedure Code from such appointment. The Subordinate Judge passed a decree in the suit. The High Court in appeal set aside his decree and dismissed the suit upon the ground that the decrees upon which those execution proceedings were founded were not in any way impeached in the suit nor could they be. The impeached transactions were proceedings in execution of those decrees, and this being so it was the proper course for the plaintiff, if she had any objection to make to the execution of the decrees, to raise these objections under the provisions of s. 244, Civil P. C. and not by a separate suit. This decision, was overruled by the Privy Council and their Lordships of the

Privy Council dealt with matter in these words:

'.....With all respect to the learned Judges of the High Court, their Lordships are unable to agree with this conclusion. Sec. 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term..... '

There have been a large number of cases in the courts where, though a person had been properly represented by a guardian, applications under Order 9, Rule 13, Civil P. C., were entertained on the ground that the guardian who had been appointed had been negligent or fraudulent. There is no case of our Court in support of the proposition that an application by a minor person who had been legally represented, by a guardian was maintainable. Our attention was drawn to certain observations by their Lordships Mookherjee and Gunning JJ. in the case of -- 'Kalipada Sirkar v. Hari Mohan Dalai', 44 Cal 627. That was a case in which a decree for costs was sought to be executed against a lunatic plaintiff who had been represented in the proceedings by his wife who was herself a minor. The objection under s. 47 Civil P. C., to the execution of this decree was rejected by this Court, relying on the authority of Rashid-un-nisa's case 36 Ind App 16S (P.C.). Certain observations were made indicating that the decree for costs might have been challenged by a review or revision. I do not see how these observations which were not really necessary for the purpose of the case can in any way affect the legal position that these minors were not in law parties to the suit and consequently there was no legal decree against them and they not being in law 'defendants' to the suit could not make an application under Order 9 Rule 13, Civil P. C., to set aside a decree which had no legal force against them.

4. Mr. Banerjee presses for our consideration the fact that fraud had really been practised by the plaintiff on the Court. He has in this connection drawn our attention to her application in which she stated after a report was made by the peon entrusted with the service of processes on these two petitioners that they

were minors) that she had known them, since their infancy and so knew that they had attained majority. Assuming that the plaintiff made deliberate false statements to the Court, we do not think that it will be proper for us to make any order in these proceedings to set aside the decree in the inherent jurisdiction of the Court.

5. The appeal is accordingly dismissed, but in the circumstances of the case we order that the parties will bear their own costs in this appeal.

6. No order is necessary on the application under Section 115, Civil P. C.

Lahiri, J.

7. I agree.

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