Asharfi Lal vs Smt. Koili (Dead) By L.Rs. on 20 April, 1995

Equivalent citations: AIR1995SC1440, JT1995(5)SC496, (1995)2MLJ102(SC), 1995(2)SCALE827, (1995)4SCC163, 1995(2)UJ282(SC), 1995 AIR SCW 2140, 1995 (4) SCC 163, 1995 ALL. L. J. 1154, (1995) 5 JT 496 (SC), (1995) 2 CIVILCOURTC 318, 1996 HRR 162, (1995) 2 ALL WC 1230, (1995) 2 RENTLR 144, (1995) 2 MAD LJ 102, AIR 1995 SUPREME COURT 1440

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Bench: A.M. Ahmadi, S.C. Agrawal, N. Venkatachala

ORDER

S.C. Agrawal, J.

1. This appeal, by special leave, is directed against the judgment of the Allahabad High Court dated February 23, 1982 in Writ Petition No. 8876 of 1971.

2. The facts, in brief, are as follows:

> One Raja Ram was a tenant of agricultural lands in village Usrapur, Tehsil Sadar,District Pratapgarh in the State of Uttar Pradesh. Raja Ram died leaving behind his wife Smt. Nanki and sister Smt. Koili, respondent No. 1. The appellant, Asharfi Lal, claims to be the son of Raja Ram through Smt. Nanki. After the death of Raja Ram, Smt. Nanki applied for mutation of the name of the appellant, who was a minor at that time, in the revenue records. The said mutation was allowed by the Nyaya Panchayat on August 16, 1953, as well as the Tehsildar by order dated December 4, 1956. Smt. Nanki, the mother of the appellant, it was said, had remarried. On October 14,1958, Smt. Budhna, the mother of Nanki, filed a suit, as a next friend of the appellant who was a minor, under Section 229B, of the U. P. Zamindari Abolition and Land Reforms Act, 1950 for a declaration that the appellant is the son and the only heir of Raja Ram, deceased, and for possession of the agricultural lands of Raja Ram. The said suit was contested by Smt. Koili who denied that the appellant is the son of Raja Ram. By judgment dated January 2, 1961, the Judicial Officer, sadar, Pratapgarh, dismissed the said suit after finding that the plaintiff-appellant had failed to establish that he is the son of Raja Ram. The appeal filed against the said decision was dismissed by the Addl. Commissioner, Faizabad Division, Faizabad on May 25, 1962. Subsequently, consolidation proceedings were

initiated in the village under the provisions of the U. P. Consolidation of Holdings Act, 1953 hereinafter referred to as 'the Act'. In those proceedings, the appellant filed an objection under Section 9, of the Act claiming that he is the son of Raja Ram and is in possession of the plots in question since long. The said proceedings was contested by Smt. Koili on the ground that she is the sister of Raja Ram and is in possession of the lands and that her name should be recorded in the records. She asserted that the appellant is not son of Raja Ram. The Consolidation Officer, Sadar, Pratapgarh. by order dated July 8, 1967, rejected the objection filed by the appellant on the view that the issue involved in the case has been finally decided by the Addl. Commissioner and that there is no appeal pending against the said order and that the consolidation Court is not competent to set aside the order of the competent Court. As regards, the submission urged on behalf of the appellant that he was a minor and in contesting the previous litigation his guardian did not perform the responsibility of the guardian properly, the Consolidation Officer held that the said submission of the appellant appeared to be correct and reasonable in view of the evidence on the file but since the decrees were obtained through competent Courts and even if these decrees had been obtained by fraud and misrepresentation and may be avoidable, he was not competent to set aside the orders which have become final unless the decrees are got out of the way. It was also held that proper forum for cancellation of a decree is the Civil Court and that the consolidation Court was not competent to grant any relief to the appellant against the decree which operates as res judicata. The said order of the Consolidation Officer was set aside in appeal by the Assistant Settlement Officer (Consolidation) by his order dated September 15, 1970. Smt. Koili filed a revision under Section 48, of the Act against the said order of the Assistant Settlement Officer and the same was dismissed by the Deputy Director of Consolidation, Pratapgarh (hereinafter referred to as the Deputy Director (Consolidation) by order dated June 8, 1971. The Deputy Director (Consolidation) held that a minor has a right to file a suit to set aside a decree which was obtained against him on the ground of gross negligence on the part of the guardian and that the said rule would apply whether the guardian was a guardian ad item appointed by the Court or a friend or even the Hindu law guardian, i.e., his father. The Deputy Director (Consolidation) further observed that gross negligence means culpable neglect of the interest of a minor which leads to the loss of right which if a suit has been conducted or resisted with due care must have been successfully asserted. The Deputy Director (Consolidation) further found that the declaratory suit filed by Smt. Budhna, as the next friend of the minor appellant, was dismissed for the reason that Smt. Nanki was not examined as a witness and important documentary evidence such as rent receipts, extract of kutumb register and admission register were not filed. The Deputy Director (Consolidation), therefore, found that Smt. Budhna did not conduct the suit in the Court of Judicial Officer, Sadar, Pratabgarh, with due care and did not produce evidence that was available and that she was guilty of gross negligence. On the basis of the evidence on record produced in the consolidation proceedings the Deputy Director (Consolidation) has found that the appellant is the son of Raja Ram and is his sole heir.

3. Feeling aggrieved by the said order of the Deputy Director (Consolidation), Smt. Koili filed the Writ Petition, giving rise to this appeal. The said writ petition was allowed by the High Court by its judgment dated February 23, 1982 on the view that a decree obtained against a minor due to negligence of guardian is not void but voidable and that the decree passed in the declaratory suit was binding unless it was avoided by filing a suit in the proper Court. The High Court was of the view that the consolidation authorities, having limited jurisdiction, could not declare the decree passed by competent Court as nullity.

4. Shri J. P. Goyal, the learned Counsel appearing for the appellant, has submitted that the High Court was in error in holding that the consolidation authorities could not go into the question whether the decree passed in the declaratory suit was a nullity or not. The submission of the learned Counsel is that in view of Section 49 of the Act the jurisdiction of the Civil Court has been barred and the consolidation authorities alone are entitled to adjudicate upon the rights of tenant holders in respect of land lying in the area for which a notification has been issued under Section 4(2), of the Act.

5. Section 49, of the Act, as it stood at the relevant time, was in the following terms: Notwithstanding anything contained in any other law for the time being in force, the declaration and adjudication of rights of tenure-holders in respect of land lying in an area, for which a notification has been issued under Sub-section (2), of Section 4, or in regard to which a proceeding could or ought to have been taken under this Act, shall be done in accordance with the provisions of this Act and no Civil or Revenue Court shall entertain any suit or proceeding with respect to rights in such land or with respect to any other matters for which a proceeding could or ought to have been taken under this Act.

6. In Gorakh Nath Dube v. Hari Narain Singh , this Court has laid down: We think that a distinction can be made between cases where a document is wholly or partially invalid so that it can be disregarded by any Court or authority and where it has to be actually set aside before it can cease to have legal effect. An alienation made in excess of power to transfer would be, to the extent of the excess of power invalid. An adjudication on the effect of such a purported alienation would be necessarily implied in the decision of a dispute involving conflicting claims to rights or interests in land which are the subject matter of consolidation proceedings. The existence and quantum of rights claimed or denied will have to be declared by the consolidation authorities which would be deemed to be invested with jurisdiction, by the necessary implication of their statutory powers to adjudicate upon such rights and interests in land, to declare such documents effective or ineffective, but, where there is a document the legal effect of which can only be taken away by setting it aside or its cancellation, it could be urged that the consolidation authorities have no power to cancel the deed, and, therefore, it must be held to be binding on them so long as it is not cancelled by a Court having the power to cancel it. P. 3421 (of SCR): at p. 2453 of AIR)

7. The said view has been reiterated in Dularia Devi v. Janardan Singh and Sita Ram v. Chotta Bhondey .

8. The same principle would apply to a judgment of a Court in an earlier suit or proceeding. The judgment of a competent Court is normally binding on the parties to the proceeding and it operates as resjudicata in a subsequent proceeding between the same parties. An exception to the said rule is en grafted by Section 44 of the Evidence Act which provides that any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Sections 40, 41 and 42, and which has been proved by the adverse party was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. The effect of the said provision is that a judgment delivered by a Court not competent to deliver it or a judgment,, which is obtained by fraud or collusion docs not operate as res judicata and is not binding on the parties to the said proceedings. [See : Beli Ram and Brothers v. Chaudhri Mohammad Afzal . A judgment can be avoided in a subsequent proceeding by a party which is able to show that it was delivered by a Court not competent to deliver it or it was obtained by fraud or collusion. Since such a judgment does not operate as resjudicata it is not necessary to institute a proceeding for setting it aside. A party to a proceeding against whom a judgment in an earlier suit is relied can successfully avoid the said judgment if he can establish in the subsequent proceeding that the said judgment was delivered by a Court not competent to deliver it or that it was obtained by fraud or collusion.

9. The question is whether it is permissible for a minor to avoid a judgment delivered in an earlier proceeding to which he was a party on the ground of negligence of his next friend. In England, an infant plaintiff is as much bound by a judgment or order as an adult, even though there may have been irregularities in the conduct of the proceedings, unless there has been fraud or gross negligence on the part of his next friend. [See: Halsbury's Laws of England, 4th Edn., Vol. 24. Para 895.12]. In Re Hoghton, Hoghton v. Fiddey (1874) LR 18 Eq 573, Sir Richards Malins V. C, while considering the question whether an infant is to suffer by any negligence on the part of a next friend, has observed: The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and will protect her interests.

10. The Courts in India, by and large, have adopted the same approach. Till 1936 there was consensus of judicial opinion that it is permissible for a minor to avoid a decree obtained against him if there is negligence on the part of his next friend in the conduct of the case. [See: Lalla Sheo Churn Lai v, Ramnandan Dubey (1894) ILR 22 Cal. 8; Gursan Das Natha v. Ladakavahu (1895) ILR 19.Bom. 571; Hanmantapa Chundruna Punnayyah v. Rajan Viranna AIR 1922 Mad. 273; Kumar Ganganand Singh v. Maharaja Sir Rameshwar Singh Bahadur AIR 1927 Pat. 271; Imam Din v. Puran Chand (1919)ILR 1Lah27: AIR1920 Lahore417; Siraj Fatma v. Mahmud Ali (1932) ILR 54 All. 646 : AIR 1932 All 293 (FB).

11. In 1936, the Privy Council in Talluri Ventaka Seshayya v. Thadikonda Koliswara Rao AIR 1937 P.C.I, considered the question whether a decree can be set aside on the ground of gross negligence in the context of a representative suit under Order 1, Rule 8, C.P.C. In that case, their Lordships, after noticing the decisions of the Calcutta High Court and Madras High Court, have observed: Their Lordships are not concerned to discuss the validity of these decisions, or the illusive distinction between negligence and gross negligence, as they are satisfied that the principle involved in these cases is not applicable to such cases as the present one. The protection of minors against the

negligent actings of their guardians is a special one, and in these cases the plaintiff in the second suit was also the plaintiff in the former suit, although in the earlier suit he or she had sued through a guardian. [p.4]

12. The Privy Council did not, however, agree with the view expressed in Karri Bapanna v. Yerramma AIR 1923 Mad 718, that the principles of Section 44 of the Evidence Act can be extended to cases of gross negligence and observed: The provisions of Section 11 Civil P.C. are mandatory, and the ordinary litigant, who claims under one of the parties to the former suit can only avoid its provisions by taking advantage of Section 44, Evidence Act, which defines with precision the grounds of such avoidance as fraud or collusion. It is not for the Court to treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts. [P. 4]

13. After the said decision of the Privy Council, the matter has been considered by the various High Courts. Most of the High Courts have taken the view that though a judgment against a minor cannot be avoided on the ground of fraud or gross negligence on the part of his next friend under Section 44 of the Evidence Act, it is permissible for the minor to file a suit to set aside the. decree on the ground of fraud or gross negligence on the part of his next friend. See: Mahesh Chandra v. Manindra Nath ; Eqappa Chettiar v. Ramanathan Chettiar AIR 1942 Mad. 384; Iftikar Hussain Khan v. Beant Singh AIR 1946 Lah. 233 (FB); Mohammad Baksh v. Allah Din AIR 1942 Oudh 33; Kamkashya Narain Singh Bahadur v. Baldeo Sahai and Rameshwar Prasad v. Ram Chandra Sharma . The Bombay High Court has, however, taken a different view and has held that gross negligence, apart from fraud or collusion on the part of the next friend or guardian ad litem or a minor litigant cannot be made the basis of a suit to set aside a decree obtained against him. [See : Krishnadas Padmanabhrao Chandavarkar v. Vithoba Annappa Shetti AIR 1939 Bom. 66 (67) (Full Bench)]. In that case Beaumont C. J. has disagreed with the earlier decisions of the said High Court on the view that the said decisions were based on a misconception of English law and that under the English law an infant cannot challenge a decree properly passed against him on the ground that his guardian ad litem was guilty of gross negligence in suffering the decree, and if that is so, there was no reason why such a cause of action should lie in British India. Meredith J., in Kamkashya Narain Singh Bahadur v. Baldeo Sahai AIR I950Patna97 (FB) (supra), has dealt with the English law on the subject and has pointed out that Beaumont C. J. in Krishnadas Padmanabhrao Chandavarkarv. Vithoba Annappa Shetti AIR 1939 Bom 66 (FB) (supra) was not right in his appreciation of the English law on the subject. According to the learned Judge [Meredith j.] the substantive right of an infant, on attaining majority, 10 avoid a decree obtained against him owing to the gross negligence of his next friend was undoubtedly recognised in England from early times. The Privy Council in Talluri Venkata Seshayya v. Thadikonda Kotiswara Rao AIR 1937 P.C.I (supra) has also pointed out that protection of minors against the neglect actings of their guardians is a special one. In she instant case, the High Court has proceeded on the basis that it is permissible for a minor to file a suit to set aside a decree on the ground of gross negligence on the part of his next friend. We are in agreement with the said view.

14. The question for consideration is whether, apart from filing a separate suit for setting aside a decree on the ground of gross negligence on the part of his next friend, it is permissible for a minor to avoid a decree, if relied upon in a subsequent proceeding, on the ground that the said decree was

obtained on account of gross negligence on the part of his next friend in the previous suit. This would be permissible only if Section 44, of the Evidence Act can be invoked. As pointed out earlier, the Privy Council in Talluri Venkata Seshayya v. Thadikonda Kotiswara Rao AIR 1937 P.C. I (supra) has laid down that Section 44, of the Evidence Act cannot be extended to cases of gross negligence. But in the said case the Privy Council has observed that the Court cannot treat negligence, or gross negligence, as fraud or collusion, unless fraud or collusion is the proper inference from the facts. In other words, in cases where an inference of fraud or collusion can be drawn from the negligence or gross negligence of the next friend it would be permissible for a minor to avoid the judgment or decree passed in the earlier proceeding by invoking Section 44, of the Evidence Act without taking resort to a separate suit for setting aside the decree or judgment.

15. In the present case, the consolidation authorities have found gross negligence on the part of Smt. Budhna, the next friend of the appellant, in prosecuting the earlier declaratory suit filed by her in the name of the appellant inasmuch as Smt. Nanki, the mother of the appellant, was not examined as a witness and material documents were not produced although the said evidence was available. The question is whether an inference of fraud or collusion can be drawn from the said negligence on the part of Smt. Budhna, the next friend of the appellant. The Deputy Director (Consolidation) did not examine the case from this aspect. He has proceeded on the basis that gross negligence on the part of the next friend of the appellant entitles him to avoid the decree passed in the earlier declaratory suit. The High Court has set aside the said order of the Deputy Director (Consolidation) on the view that a decree obtained against a minor due to negligence of guardian is not void but voidable and the decree passed in the earlier declaratory suit was binding unless it was avoided by filing a suit in an appropriate Court and that the consolidation authorities were not competent to. grant the declaration of adjudication on validity or otherwise of the decree. The High Court has taken note of the provisions contained in Section 44, of the Evidence Act but has held that the same were not of any assistance to the appellant. In taking the said view the High Court, with respect, has failed to note that if a judgment falls within the ambit of Section 44, of the Evidence Act it can be avoided in the proceedings in which it is sought to be relied upon and it is not necessary to have it set aside by instituting independent proceedings in a competent Court. What was required to be considered was whether the judgment in the earlier declaratory suit fell within the ambit of Section 44, of the Evidence Act and for that purpose it was necessary to examine whether an inference of fraud or collusion could be drawn from the gross negligence on the part of Smt. Budhna, the next friend of the appellant, in conducting the earlier declaratory suit. Since the matter has not been examined from this aspect, we consider it appropriate that the matter be remitted to the Deputy Director (Consolidation) for considering whether in view of the finding recorded by him that there was gross negligence on the part of Smt. Budhna in prosecuting the earlier declaratory suit filed an inference of fraud or collusion can be drawn so as to attract the provisions of Section 44, of the Evidence Act. If he finds that such an inference can be drawn he would not be bound by the judgment in the earlier declaratory suit but if he finds that such an inference cannot be drawn he would be bound by the said judgment till it is set aside by the competent Court in an appropriate proceeding.

16. In the result, the appeal is allowed, the judgment of the High Court dated February 23,1982 as well as the order dated June 8,1971 passed by the Deputy Director (Consolidation) dismissing the

revision filed by the respondent are set aside and the matter is remitted to the Deputy Director (Consolidation), Sadar, Pralapgarh, to decide the revision in the light of his finding on the question whether an inference of fraud or collusion can be drawn in view of the finding recorded by him in his order dated June 8,1971, that there was gross negligence on the part of Smt. Btidhna, the next friend of the appellant, in the earlier declaratory suit filed under Section 229B of the U. P. Zamindari Abolition and Land Reforms Act, There will be no order as to costs.