

Sagwa vs Dalwa And Ors. on 17 July, 1951

Equivalent citations: AIR1952ALL97, AIR 1952 ALLAHABAD 97

JUDGMENT

Agarwala, J.

1. This is a defendant's appeal arising out of a suit for partition of a grove and for recovery of Rs. 200/- on account of the price of certain trees which were cut away by the defendants.
2. The parties belong to one family. The plaintiffs are the sons of one Bahadur. The defendants to the suit were the descendants of one Nathua, Bahadur's brother. The appellant, one of the defendants, is a minor, grandson of Nathua. Defendants Nos. 2 to 5 were the other descendants of Nathua. Defendant No. 6 was the transferee of the trees. The plaintiffs alleged that they were owners of one-half of the grove as it was the ancestral property of the parties. The defendants, on the other hand, alleged that the plaintiffs had no right in the grove in suit, and that the grove was planted about 40 years ago with the permission of the zamindar by the sons of Nathua in the plot which had come to their share. There were other pleas with which we are not concerned.
3. The trial Court held that the plaintiffs had no share in the grove and as such, dismissed the suit. There was an appeal by the plaintiffs. During the hearing of the appeal there was a compromise. It appears that the defendant appellants Sagwa minor was represented in the suit through his mother Shrimati Chunia as his guardian. She had signed a vakalatnama in favour of Sri Raghubar Dayal, advocate and it was filed in the trial Court. No vakalatnama was filed on her behalf in the Court of appeal. Sri Raghubar Dayal however, acting on the vakalatnama that had been filed in his favour in the trial Court signed the compromise which apparently had been entered into between the plaintiffs and the major defendants in the suit. No application was made to the Court for leave on behalf of the minor to compromise the suit, as required by Order 32 Rule 1, C. P. C. Ultimately the Court passed a decree in terms of the compromise. The compromise was to the effect that the plaintiffs would have a half share in the grove and that its land shall be partitioned as agreed upon between, the parties. Apparently the plaintiffs gave up their claim with regard to the price of the trees. Against this decree, Sagwa minor has come up in appeal to this Court and the ground urged on his behalf is that the decree passed by the Court below was vitiated inasmuch as no leave of the Court was obtained under the provisions of Order 32, Rule 1 and the compromise was not binding on him.
4. Learned counsel for the plaintiffs-respondents has taken a preliminary objection to the hearing of this appeal. He has contended that no appeal lies against a consent decree as provided under Section 98, C. P. C. The question, therefore, that falls to be determined is whether an appeal lies to this Court in the circumstances of this case. Section 96, C. P. C. no doubt provides that no appeal shall lie against a consent decree. We have no doubt that a consent decree spoken of in Section 96 must be a

valid consent decree. Could the decree passed by the Court below be said to be valid consent decree?

5. Now Order 32, Rule 7 provides, "7(1)--No next friend or guardian for the suit shall, without the leave of the Court, expressly recorded in the proceedings enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian.

(2) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all parties other than the minor."

The provisions of this rule are mandatory. Since no leave of the Court was obtained or expressly recorded in the proceedings, the compromise entered into on behalf of the minor could be avoided by the minor. If the compromise was not binding on the minor and could be avoided by him, the decree passed on its basis could not be said to be a decree passed with his consent. It is true that the advocate, appearing on behalf of the minor, had a vakalatnama in his favour in the trial Court which entitled him to compromise the suit and it may be assumed that the vakalatnama was operative in the proceedings in the appeal. At the same time since no leave of the Court was obtained for the compromise, it could not be said that the minor was bound by the compromise effected by the counsel appearing on his behalf. In our opinion, once it is shown that a compromise has been arrived at, contrary to the provisions of Rule 7 of Order 32, it cannot be said that it is a valid consent decree so far as the minor is concerned. It follows, therefore, that a minor can challenge a decree by way of appeal and Section 96 does not bar the appeal. There is no other provision debarring the minor from coming up in appeal against a decree which is void against him.

6. There is no direct authority of this Court on that point under discussion. In *Phulwanti Kunwar v. Janeshar Das*, 46 ALL. 575 at p. 590, Lindsay J. did observe that "a decree which is voidable can only be set aside by & regular suit or by bringing an application for review to the Court that passed the decree."

This observation was made in a suit which was filed by a minor to have a decree passed on the basis of a compromise set aside. The ground taken was that no leave of the Court to the compromise was obtained. The learned Judge did not say that the decree could not be set aside in appeal. The other learned Judge constituting the Bench did not express any opinion on the point.

7. In *The Gokuldas Bullabdas Manufacturing Co. Ltd. v. James Scott*, 16 Bom. 202, it was held on a construction of Section 375 of the old Civil P.O., corresponding in part to Section 96 of the present Civil P. C. "notwithstanding the declared finality of the decree, an appeal against it would be maintainable, where the party against whom the decree was passed alleged that there had been in fact no 'lawful agreement' come to, in which case the condition precedent to the making of the decree would not be fulfilled."

8. In *Sridharan v. Puramathan*, 23 Mad. 101, it was held that where a decree was passed on a compromise which was not a lawful compromise, an appeal lay against it and the decree was not final.

9. In *Brij Mohini Dasi v. Sm. Chinta Mani Dasi*, 5 Cal. Wh. 877, a decree on a compromise was passed in a partition suit in which two of the defendants were minors. An application was made on their behalf by their guardian for leave to compromise. The Court sanctioned the compromise on behalf of the minors and a decree was made in terms of the compromise. In an appeal the decree was challenged on the ground that there was no valid compromise to support the decree, because, firstly, the pleader who entered into the compromise on behalf of the appellant had no authority to enter into it and, secondly, that the Court, which sanctioned the compromise so far as the minor defendants were concerned, did not take into consideration the question whether the compromise was for the benefit of the minors. Maclean C. J. observed :

"That is a new and entirely distinct case raising new and distinct issues of fact, and may be of law, and which must be determined in a fresh and distinct proceeding. The appellant must get rid of that consent decree; they must have it set aside, if a proper case for setting it aside be made out; they cannot effect this object by appealing against It."

The other learned Judge, Banerjee J. observed:

"The learned vakil for the defendants appellants contends that although Section 375, Civil P. C., makes a decree on a compromise final, yet they are entitled to appeal against the decree in this case so far as the appeal seeks to show that there was no valid compromise to support the decree ; and he relies upon the case of *Brojo Durlab Sinha v. Ramanath Ghose*, 24 Cal. 908, as supporting, his contention :

It may be conceded that an appeal for that limited purpose may lie, as a matter of law, against a decree passed on a compromise, and having regard to the nature of the grounds urged in this case. I must hold that these are grounds which cannot be entertained by way of an appeal from a consent decree, whatever other remedy the appellant may have for substantiating those grounds and obtaining relief against that decree."

It would, therefore, appear that remedy by way of an appeal in that case was denied because the ground urged in the appeal raised distinct questions of law and fact which could more appropriately be gone into in a fresh proceeding. This case was followed in *Rakhal Moni Dassi v. Adwyta Prosad Roy*, 30 Cal. 613.

10. It may be observed that in both these cases there was no contravention of the mandatory provisions of Order 32, Rule 7. The permission of the Court was sought and expressly recorded in the proceedings.

11. In *Golnur Bibi v. Abdus Samad*, A.I.R. (18) 1931 Cal. 211, a reference to arbitration was made in a suit in which there were minors. It appeared that the leave of the Court was not obtained by referring the matter to arbitration. The arbitrators gave an award and after hearing objections to the award, the Court passed a decree in terms of the award. There was an appeal against the decree. A

Division Bench of the Calcutta High Court held that no appeal lay, even though no leave of the Court had been obtained for the reference to arbitration on behalf of the minors. Reliance was placed for this view upon the two earlier decisions of that Court already referred to. It appears that the guarded language in which the rule was expressed by Banerjee J., in *Biraj Mohini Dasi v. Sm. Chintamoni Dasi*, 5 Cal. W. N. 877, was not brought to their Lordships' notice. In any case, the view expressed in this case cannot now be sustained as good law in view of the latest decision of the Privy Council in *Chhabba Lal v. Kallu Lal*, A. I. R. (33) 1946 P.C. 72, The facts of this case were almost similar to the facts of the case in *Golnur Bibi v. Abdus Samad*, A. I. R. (18) 1931 Cal. 211. No leave to refer the case to arbitration on behalf of a minor was obtained. The arbitrators made an award and after hearing objections to the award, a decree was passed in terms of the award. There was an appeal to this Court and this Court held that Order 32, Rule 7 applied to an agreement to refer matters to arbitration, and that an appeal lay. The case then went to the Privy Council and the Judicial Committee held:

"In their opinion all the powers conferred upon the Court in relation to an award or) a reference made in a suit presupposes a valid reference on which an award has been made which may be open to question. If there is no valid reference, the purported award is a nullity, and can be challenged in any appropriate proceeding"

Their Lordships, therefore, held that an appeal lay to the High Court in that case. As to the effect of Order 32, Rule 7, their Lordships observed :

"The requirement in Order 32, Rule 7 that leave of the Court be expressly recorded in the proceedings was added in 1803. The rule is imperative and its terms must be strictly complied with.

Upon the question whether the agreement was for the benefit of the minors it was observed by their Lordships that there was no reason to doubt that it was so. In spite of that observation their Lordships held that an appeal lay even though the award was, upon the terms of para. 16 (2) of Schedule 11, Civil P. C., final and no appeal was provided for by that para against a decree made in terms of the award. In our opinion, this pronouncement of the Judicial Committee is conclusive on the point under discussion. Applying the principle laid down by their Lordships of the Privy Council we hold that, in order that an appeal may be barred against a so called consent decree, the consent decree must be a valid consent decree. A decree passed upon a compromise against a minor, for which leave of the Court was not obtained under the provisions of Order 32, Rule 7, cannot be said to be a valid consent decree. As such, the preliminary objection must be overruled.

12. The next point urged by learned counsel for the respondents was that the decree of the Court below should not be set aside unless the appellant proved that he was prejudicially affected thereby. It was urged that in the compromise the plaintiff respondent had given up his claim about the price of the trees. We think, on this point again, the Privy Council ruling referred to above is conclusive. Appointed out already, their Lordships expressly found that it could not be said in that case that the

reference to arbitration was not for the benefit of the minor and yet their Lordships held that the decree passed on the basis of an award, which was obtained upon a reference for which leave of the Court was not obtained, was a nullity and not binding on the minor and could be challenged in an appeal. We think that the question of prejudice to the minor does not arise in the case when the decree is challenged in an appeal. Order 32, Rule 7 (2) does not mention prejudice to the minor at all. The compromise for which no sanction of the Court is obtained is not binding on the minor and can be avoided by him. The provisions of Section 99, Civil P. C., in our opinion, must be confined to cases of irregularities or defects in procedure, in respect of the effect of which no specific provision exists in the Code. In Order 32, Rule 7 the Legislature has made a specific provision that such an agreement would not be binding on the minor. Section 99, therefore, does not affect the matter at all.

13. Our attention was drawn to certain cases in which it was held that, in order that a minor may avoid a decree passed against him on the basis of a compromise, he must show that he was prejudicially affected by such a decree. This view was expressed in cases in which the minor had sought to avoid a compromise decree by means of a separate suit. We express no opinion on the question whether, if a separate suit is instituted by a minor to have a decree set aside, he is bound to show prejudice. It is enough to point out that when a minor seeks to set aside a decree, in the circumstances like those of the present case, by means of an appeal, the question of prejudice is not relevant.

14. We, therefore, allow this appeal, set aside the decree of the Court below as against the minor appellant and remand the case to that Court for decision according to law.

15. Costs here and hitherto shall abide the result.