SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Jamal Khan Mandokhail

Civil Appeal No.263 of 2014
(Against the judgment dated 13.05.2013 passed by the Peshawar High Court, Peshawar in C.R. No.1414 of 2021)

Muhammad Amjad Khan Afridi & others **... Appellant(s)**

Versus

Shad Muhammad & others **... Respondent(s)**

For the Appellant(s) : Mr. Muhammad Ikram Ch., ASC
Mr. Ijaz Khan Sabi, ASC.

For respondents No.1-6 : Mr. Abdul Sattar Khan, ASC.

Date of Hearing : 17.11.2021

Judgment

Syed Mansoor Ali Shah, J.- The facts necessary to state for decision of the present appeal are quite simple: The predecessor of the respondents instituted a suit for possession through preemption against the appellants and respondent No. 7, who is also father of appellants No. 1 and 2 and husband of appellant No.3. Appellants No. 1 and 2 were minors at that time, therefore, the trial court appointed respondent No. 7, their father, as their guardian for the suit (guardian *ad litem)* to represent and defend them in the suit. All four of them filed a joint written statement, contesting the claim made in the suit, and the trial court framed the issues for trial. On 16.04.2009 when the suit was fixed for evidence of the plaintiff, no one appeared on behalf of the defendants (appellants and respondents No.7); so, the trial court made order of proceeding against them *ex parte*. The evidence of the plaintiff was recorded *ex parte* on the next dates of hearing, and ultimately the suit was decreed *ex parte* on 30.05.2009.

2. The appellants, on 10.07.2009, filed an application in the trial court for setting aside the order dated 16.04.2009, whereby they had been proceeded against *ex parte*, as well as the *ex parte* decree dated 30.05.2009. Their said application was dismissed by the trial court vide its order dated 08.06.2010. The appellants appealed in the District Court, but it also failed on 02.06.2011. They then filed revision petition in the Peshawar High Court, which was dismissed *vide* the impugned judgment dated 13.05.2013. The appellants, as a last resort, knocked at the doors of this Court by filing a petition for leave to appeal, and this Court granted them the leave to examine the following question:

> Whether the learned forums below fell into error by not allowing the application filed by the Petitioners [appellants] for setting aside the ex-parte decree particularly in view of the fact that Petitioners [appellants] No. 1 and 2 were at that time minors.

3. We have heard the arguments of the learned counsel for the parties on the said question and perused the record of the case with their assistance.

4. The answer to the above question lies in the provisions of Rule 11 of Order 32 of the Code of Civil Procedure 1908 ("CPC"), which is reproduced below for ready reference:

> **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. (emphasis supplied)

Reading of the above Rule leaves little room to speculate as to what a Court is to do if the guardian *ad litem* appointed by it does not do his duty. As per the said Rule, where the guardian for the suit does not do his duty, the Court is to remove him and appoint a new guardian in his place. The failure of a guardian *ad litem* to appear in Court to defend the minor is by itself a clear proof of the fact that he has failed to do his duty of protecting the interests of the minor. The Court, in such circumstance, must act in accordance with Rule 11 of Order 32 of the CPC, remove that guardian, and appoint a new

guardian in his place, for the protection of the interests of the minor.

5. Justice Henry Brand, speaking for the Allahabad High Court, said in *Amar Chand v. Nem Chand (AIR 1942 All 150)* that the Court had inherent power, derived from the Crown as *parens patriae*, to protect the interests of minors. Similarly, the State of the Islamic Republic of Pakistan is also a *parens patriae*[1] for its own minor citizens and for all its vulnerable and marginalized citizens. Reference may be made to the preambular constitutional values of social justice and equality, of protecting the legitimate interest of the backward and depressed classes. Article 25(3) of the Constitution authorizes the State to make special provision for the protection of women and children and Article 35 lays down the principle of policy for the protection of the child.

6. The provisions of Order 32 of the CPC, which advance the mandate of Article 25(3) of the Constitution, are to be interpreted and applied with a dynamic and progressive approach to achieve the object for which they have been made, that is, the protection of the rights and interests of the minors. The Courts are to realize that a minor litigant is considered to be under their protection, and primarily it is their duty to watch over his interests and ensure that he is duly represented and defended in the proceedings before them. That is why, despite appointment of a guardian *ad litem*, no agreement or compromise can be entered into on behalf of the minor by that guardian without leave of the Court.[2] The Court is to see vigilantly the conduct of the guardian *ad litem* in representing and defending the minor, and to remove him if he fails to do his duty by acting in a manner that is detrimental to the interests of the minor.[3] Where there is no other person fit and willing to act as guardian for the minor, the Court is to appoint any of its officers to be such a guardian.[4] Order 32 of the CPC, thus, visualizes no such occasion where a minor defendant can be proceeded against *ex parte*.

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[1] The monarch, or any other authority, regarded as the legal protector of citizens unable to protect themselves.
[2] Rule 7 of Order 32 of the CPC.
[3] Rule 11 of Order 32 of the CPC.
[4] Rule 4 of Order 32 of the CPC.

7. In *Fauzia Parveen case,*[5] a four member Bench of this Court while maintaining the orders of the courts below setting aside an *ex parte* decree passed against the minors, observed:

> A fact noted by the District Judge as well as by the High Court which was by itself considered sufficient to set aside the ex parte decree was the fact that respondents 3 and 4 were admittedly minors at the relevant time. They were proceeded against in the litigation through their guardian Mst. Musarrat Begum respondent No.2 who was their mother. It is also an admitted fact that Mst. Musarrat Begum had defaulted in putting in appearance on her own behalf and on behalf of these minor respondents whom she was required to represent under the orders of the Court. It was, therefore, a case where the guardian had been negligent and had defaulted in representing and protecting the interest of the minors. Rule 11, Order XXXII, C.P. C. requires that "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." The same rule goes beyond further to prescribe "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".
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> In this case, the guardian had failed to do her duty and was liable to be removed and substituted by the Court. As the Court happens to be the custodian of the interest of the minors it has to be watchful whether a party discharges its duty or not. We are therefore, in agreement with the view taken by the two Courts at this omission to ensure proper representation of the minors was material factor to be taken note of while considering the application for setting aside the ex parte decree.

We find that these observations fully answer the question raised in this case. In view of what has been discussed above, we answer the question by holding that the Courts below fell into error by not allowing the application for setting aside the ex-parte decree to the extent of appellants No. 1 and 2, who were minors at the time of institution of suit as well as at the time of passing of the *ex parte* decree. However, the orders to the extent of appellant No.3 (mother), who was not suffering from any legal disability to pursue and defend the suit against her, do not suffer from any legal error.

8. We, therefore, dismiss the present appeal to the extent of appellant No.3 and accept it to the extent of appellants No.1 and 2, setting aside the impugned judgments and orders, and accepting the application for setting aside the *ex parte* order and *ex parte*

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[5] *Fauzia Parveen v. Sahib Khatoon (1988 SCMR 552)*

decree, to their extent. The trial court shall proceed with the suit against appellants No. 1 and 2 from the stage where it was on 16.04.2009 when the order of proceeding *ex parte* was made against them and shall decide the same as early as possible and not later than six months from the receipt of the copy of this judgment.

Judge

Judge

Islamabad,
17.11.2021.
Approved for reporting.
Iqbal