

Rajendra Prasad Gupta Vs Km. Purrima Sharma and Others

Court: Allahabad High Court

Date of Decision: May 23, 2006

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 23 Rule 1, Order 23 Rule 1(1), Order 32 Rule 1, Order 32 Rule 14, Order 32 Rule 7
Provincial Small Cause Courts Act, 1887 – Section 17

Citation: AIR 2006 All 270 : (2006) 4 AWC 3438

Hon'ble Judges: Prakash Krishna, J

Bench: Single Bench

Advocate: P.K. Jain, Amitabh Trivedi and Shashi Nandan, for the Appellant; V.D. Ojha, Siddharth and Sanjay Kumar, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Prakash Krishna, J.

The present revision is directed against the order dated February 19, 2001 passed by the Second Additional District

Judge (Senior Division), Muzaffarnagar in Misc. Case No. 21 of 1999 (O.S. No. 337 of 1994. Smt. Sarla Sharma v. Ganga Prasad) whereby the

court below has allowed the application 3 Ka and restored the suit to its original number after recalling the order dated 25th of August, 1994. The

original suit no. 337 of 1994 was instituted for permanent injunction and cancellation of sale deed dated 24th of August, 1994 on behalf of two

minors and their mother through Smt. Sarla Sharma (mother) who died during the pendency of the suit and in her place Om Prakash Sharma was

allowed to act as next friend of the minors. The said suit was decreed ex parte on March 21, 1998. This ex-parte decree was set aside.

Subsequently, an application was filed by Shri Ashok Kumar, Advocate, on behalf of the plaintiff minors that he does not want to continue with the

suit and the suit may be dismissed accordingly. On the application of Shri Ashok Kumar, Advocate, filed on 20th of August, 1998, the suit was

dismissed accordingly. Thereafter, an application purporting to be u/s 151 C.P.C. was filed through one Janeshwar Prasad Gautam as next friend

of minors for the recall of the order dated 25th of August, 1998 passed in the O.S. No. 337 of 1995 and to restore the suit to its original number

on number or grounds including that while passing the order dated 25th of August, 1998 the court overlooked the provisions of Order 23 Rules 1

C.P.C. which has vitiated the order dated 25th of August, 1998. It was also stated therein that the provisions of Order 32 Rule 1 to 14 are

applicable and If there was any compromise on behalf of the minor, the compromise application should have been filed with the leave of the court

and in absence of terms of compromise before the court, the order dated 25th of August, 1998 is illegal and contrary to law. In para 15 of the said

application it was stated that Dr. Janeshwar Prasad Gautam is taking care of minors and has no interest adverse to the interest of minors and he is

looking after them and is entitled to acts their next friend as he is maternal uncle of the father of the minors.

2. The aforesaid application was opposed by filing objections by the present applicant on the allegation that one of the minors namely Ravi Kant

Sharma has become major and he has not come forward for recalling the order dated 25th of August, 1998, dismissing the suit. The statement of

Sri Ashok Kumar, Advocate, was recorded while passing the order dt. 25th of August, 1998 and the court rightly dismissed the suit for want of

prosecution by the order dt. 25th of August, 1998.

3. The trial court by the order under revision recalled the order dt. 25th of August, 1998 and restored the suit to its original number on the findings

that Shri Ashok Kumar, advocate failed to watch the interest of the minors and the mandatory provisions of Order 23 and Order 34 C.P.C. were

not followed by the court while passing the order dt. 25th of August, 1998 and that the order dt. 25th of August, 1998 being in the teeth of the

mandatory provisions of Order 23 and Order 32, the order dt. 25th of August, 1998 being contrary to law, cannot be allowed to stand. It also

rejected the objection by the present applicant that the application is barred by time on the ground that no period of limitation for filing an

application u/s 151 C.P.C. is prescribed and the order should be passed after affording opportunity of hearing to both the parties of a matter,

feeling aggrieved with the aforesaid order, the present revision has been filed by the defendant of the aforesaid suit.

4. Sri Pramod Kumar Jain, the learned Counsel for the applicant, submitted that Ravi Kant Sharma, who has become major is not coming forward

to recall the order dated 25th of August, 1998 and that Km. Purnima Sharma has also become major during the pendency of the present revision,

has also not come forward to join the application filed by Dr. Janeshwar Prasad Gautam claiming himself as guardian and next friend of Km.

Punima Sharma, in the revision. The finding of the court below that the application is not barred by time was also raised during the course of

argument.

5. In contra. Sri Siddharth, the learned Counsel for the contesting opp.party, submitted that since the order dated 25th of August, 1998 was

passed without following the mandatory provisions of Order 23 and Order 32 C.P.C. no interference with the impugned order by this Court is

called for specially in exercise of discretionary jurisdiction conferred on it u/s 115 of Code of Civil Procedure.

6. I have given careful consideration to the respective submissions of the counsel for the parties. For the sake of convenience the Order 23 Rules 1

and 2 are reproduced below.

Withdrawal of suit or abandonment of part of claim. - (1) At any time after the institution of a suit, the plaintiff may as against all or any of the

defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the

suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to Sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such

other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the

benefit of the minor or such other person. Order 32 Rule 7 reads as follows:

Agreement or compromise by next friend or guardian for the suit-

(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.

7. The Supreme Court in the case of Dokku Bhushayya Vs. Katragadda Ramakrishnayya, has held that it is duty of the court, so far as practicable

to safeguard the interest of minors. The aforesaid rule overrides any general or customary law and should be strictly construed. Rule forbids the

next friend or the guardian to enter into an agreement or a compromise on behalf of minor without express leave of the Court and by implication it

requires the Court to consider, in exercise of judicial discretion, propriety of the same in the interest of minor. In Sita Ram and Anr. v. Director of

Consolidation, Agra Division, Agra and Ors. 1967 ALJ 723 : it has been held that minor can plead in defence that agreement arrived at in total

disregard of Order 32 Rule is not binding on him.

8. A conjoint reading of Order 23 Rule 1 and Order 32 Rule 7 clearly show that it envisages that there should be an affidavit of the next friend and

also if the minor or such other person is represented by a pleader, a certificate of the pleader to the effect that the amendment proposed is, in his

opinion for the benefit of the minor or such other person. Similarly the legislatures have taken full precaution under Order 32 Rule 7 that there

should be express leave by the Court, recorded in the proceedings permitting the next friend or guardian for the suit to enter into an agreement or

compromise on behalf of a minor with reference to the suit property. In other words, Rule 7 of Order 32 mandatorily requires that an application

for leave under Sub-rule (1) of Order 32 Rule 7 should be accompanied by an affidavit of the next friend to the effect that the agreement or

compromise proposed is in his opinion for the benefit of the minor." See Ram Dev and Others Vs. Ram Badan,

9. It further provides that when an application for leave is made, the court will, having regard to the interest of the minor pass a decree in terms

there of under Order 23 Rule 3 C.P.C. The idea behind the enactment of proviso to Order 23 Rule 1(1) and Order 32 Rule 7 C.P.C. is to

safeguard the interest of minor, as a minor is not in a position to safeguard his or her interest. The law provides special protection to protect the

interest of minors and his property. These provisions are couched in mandatory form and should be interpreted in the like manner keeping in mind

the object and purpose of the aforesaid provisions.

10. Coming to the facts of the present case, this Court finds that an application was filed by Shri Ashok Kumar, Advocate, stating that a

compromise has taken place in between the plaintiffs and the defendant No. 8 and the plaintiffs do not want to press the suit further. Therefore, the

suit be dismissed as such. This application is dated 20th of August 1998. There is no supporting affidavit of the next friend/guardian of the minors

as mandatorily required under Order 32, Rule 7, C.P.C. Therefore, the said application does not fulfil the requirements of Order 32, Rule 7,

C.P.C. and should not have been entertained by the trial judge. The trial judge passed the order dated 25th of August, 1998 a routine manner and

its attention was not invited by the parties towards the requirement of the Order 32, Rule 7, C.P.C. The fact that the plaintiffs were minors escaped

the notice and attention of the court which resulted in infraction of Order 32, Rule 7, C.P.C. This mistake has occurred obviously as the express

permission as required under Order 32, Rule 7, C.P.C. was not sought for by the next friend of Lie minors for the obvious reason.

11. Apart from above, there is no material on record to show as to how the said withdrawal of the suit, abandonment of the claim was in the

interest of the minors, the filling of the said application dt. 20.8.1998 was rather against the interest of minors. The facts of disclose that he minors

and their mother were one side and the father of minor who is defendant acted against the interest of minor which led to the filing of the present suit

by the mother of the minors to safeguard the interest of minors.

12. The Broom's Legal Maxims (page 73) Actus curle Neminen gravabit - an act of court shall prejudice no man, is attracted. This maxim is

founded upon justice and good sense which serves a safe and certain guide for the administration of law. The other maxim is, lex non cogit ad

impossibilia - the law does not compel a man to what he cannot possibly perform. The law itself and its administration is understood to disclaim as

it does in its general aphorisms, all intention of compelling impossibilities, and the administration of law must adopt that general exception in the

consideration of particular cases. The applicability of the aforesaid maxims has been approved by Apex Court in Raj Kumar Dey and Others Vs.

Tarapada Dey and Others, Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others, and Mohammad Gazi v. State of

M.P. and Ors. JT 2000 (4) SC 55 : 2000(4) SCC 342 : AIR 2000 SC 1806

13. In Munna and Ors. v. Champa Kali 1979 UPRCC 420 : 1979 ALJ 534 it has been held by this Court that where a case has been taken by a

court on date not fixed by it and a decree is passed, an application for recall of the decree shall lie on behalf of the aggrieved person and in such

circumstances there is no need to comply with the provisions of Section 17 of the Provincial Small Causes Courts Act which otherwise provides

the deposit or furnishing of decretal amount as a condition precedent for the entertain of an application for setting aside the exparte decree.

14. Obviously, it was a case of mistake or omission on the part of the trial court also and the court by recalling its earlier order dated 25.8.1994

has corrected the mistake. No case for interference u/s 115 C.P.C has been made out. There is no merit in the revision. The revision is dismissed

with costs.