

(1913) 07 BOM CK 0025

Bombay High Court

Case No: None

Kunwar Partab Singh

APPELLANT

Vs

Bhabuti Singh

RESPONDENT

Date of Decision: July 23, 1913

Acts Referred:

- Specific Relief Act, 1877 - Section 42

Citation: (1913) 15 BOMLR 1001

Hon'ble Judges: Samuel Griffith, J; Parker of Waddington, J; John Edge, J; Atkinson, J;
Ameer Ali, J

Bench: Full Bench

Final Decision: Allowed

Judgement

John Edge, J.

The suit in which this appeal from a decree of the Court of the Judicial Commissioner of Oudh has arisen was brought by Kunwar Partab Singh and Kunwar Ahbaran Singh in the Court of the Subordinate Judge of Sitapur against Bhabuti Singh and others on the 22nd February 1908. The plaintiffs, who are the appellants here, sought by their suit to have it declared that a decree which was made on the 15th December 1899 in a suit for preemption which had been brought by Bhabuti Singh, who is respondent here, on the 26th June 1899, against certain vendees and others, and in which the appellants, who were then minors, had been added as defendants, was not binding as against them. The plaintiffs-appellants also sought in this suit to have a decree set aside which had been made on the 15th December 1899 in a suit for preemption which had been brought on the 27th July 1899 by them under the guardianship of one Hari Pershad against vendees and others and in which Bhabuti Singh had been added as a defendant, and they claimed to be restored to the position which they had held prior to the 15th December 1899 and such other relief as they were entitled to.

2. The material facts which their Lordships find are briefly as follows: The plaintiffs were the sons of Raja Balbhaddar Singh who died on the 27th December 1897. The property of the joint family consisted of, amongst other things, shares in Mahal Ismailganj and Mahal Khushalpur, in respect of which Raja Balbhaddar Singh was at his death recorded in the Revenue Papers as the proprietor. After the death of Raja Balbhaddar Singh the defendant-respondent, Bhabuti Singh, assuming to act as the guardian of the plaintiffs and as the manager of their property, obtained in April 1898 mutation of names in the Revenue Papers in their favour. Syed Mohammad Ismail, Syed Idur Hasan and Syed Mohammad Sadig on the 3rd August 1898 sold certain shares in Mahal Ismailganj and Mahal Khushalpur to Munshi Niaz Ahmad, Babu Ram and Bhagwan Das. It was in respect of that sale that the suits for preemption of the 26th June 1899 and the 27th July 1899 were brought. The vendors and the vendees were original defendants to these suits. Bhabuti Singh had a right of preemption equal but not superior to the right of pre-emption of Partab Singh and Ahbaran Singh in respect of the shares which were sold in Mahal Khushalpur, and he had a right of pre-emption inferior to theirs in respect of the shares which were sold in Mahal Ismailganj. It is obvious that the interests of the minors Partab Singh and Ahbaran conflicted with the interests of Bhabuti Singh. On the 26th June 1899 Bhabuti Singh on his own behalf brought a suit to pre-empt the shares which had been sold in the two Mahals, and made the vendors and vendees defendants to the suit. On the 5th August 1899 Bhabuti Singh caused Partab Singh and Ahbaran Singh, who were then minors, to be added as defendants to that suit. According to the amended plaint, Partab Singh and Ahbaran Singh, minors, under the guardianship of Hari Pershad, were added as defendants under an Order dated 5th August 1899. The Court appears to have made an Order on the 5th August 1899 that Partab Singh and Ahbaran Singh should be added as defendants, but it does not appear that the Court had ordered that they should be added as defendants under the guardianship of Hari Pershad. The amendment of the plaint adding Partab Singh and Ahbaran as defendants was not attested by the signature of the Judge. No Order appointing Hari Pershad as a guardian for the suit for Partab Singh or Ahbaran Singh was applied for or was made. By Section 443 of the Code of Civil Procedure, 1882, it was enacted that:-

Where the defendant to a suit is a minor, the Court, on being satisfied of the fact his minority, shall appoint a proper person to be guardian for the suit for such minor, to put in the defence for such minor, and general" by to act on his behalf in the conduct of the suit.

3. By Section 441 of the same Code it was enacted that:-

Every application to the Court on behalf of a minor (other than an application u/s 449) shall be made by his next friend, or by his guardian for the suit.

4. The result is that the minors, Partab Singh and Ahbaran Singh, were not in law represented in the suit which was brought by Bhabuti Singh.

5. On the 27th July 1899 Bhabuti Singh, who was then the de facto guardian of the minors Partab Singh and Ahbaran Singh and the manager of their property, caused a suit for pre-emption in respect of the sale of the 3rd August 1898 to be brought by Partab Singh and Ahbaran Singh under the guardianship of Hari Pershad against the same vendors and vendees who were defendants to the suit of the 26th June 1899. The shares which it was sought to pre-empt by the suit of the 27th July 1899 were the same shares which it had been sought to pre-empt by the suit of the 26th June 1899. On the 7th August 1899 Bhabuti Singh was added as a defendant to the suit of the 27th July 1899. On the 27th July 1899 Hari Pershad had, in the suit in which Partab Singh and Ahbaran Singh were the plaintiffs, filed an application to be appointed their guardian ad litem. The application purported to be made u/s 456 of the Code of Civil Procedure, 1882. The Subordinate Judge to whom the application was made by his Order of the 27th July 1899 held that the application was unnecessary, and directed that the costs should be borne by the plaintiffs in that suit in any event.

6. Bhabuti Singh, the vendors, the vendees, and Hari Pershad, professing to act on behalf of Partab Singh and Ahbaran Singh, entered into an agreement of compromise, and on the 15th December 1899 filed in the suit in which Bhabuti Singh was the plaintiff a petition in which it was stated that it was agreed that Bhabuti Singh should pay Rs. 15,000 without costs to the vendees, and that a decree for possession of the property sold should be passed in favour of Bhabuti Singh by right of pre-emption. On that petition the then Subordinate Judge passed a decree in that suit in favour of Bhabuti Singh. As Hari Pershad had not been appointed guardian for the suit for the minors Partab Singh and Ahbaran Singh, they were in law unrepresented, and the decree did not bind them. Further, Hari Pershad had not obtained the leave of the Court to enter into that agreement of compromise on behalf of the minors Partab Singh and Ahbaran Singh.

7. In pursuance of the agreement of compromise to which their Lordships have referred, Hari Pershad, professing to act as guardian of the minors Partab Singh and Ahbaran Singh, on the 15th December 1899, presented to the Court a petition in the suit in which Partab Singh and Ahbaran Singh were the plaintiffs, in which it was stated that it had been settled between the parties that a decree should be passed in favour of Bhabuti Singh in his suit ; that the compromise had been filed in Court; and that Partab Singh and Bhabuti Singh were willing to withdraw their claim ; and it was prayed that the withdrawal of their claim should be sanctioned, and that their suit should be dismissed. That petition was signed by Hari Pershad, Bhabuti Singh, the vendors, and the vendees. Hari Pershad appeared in Court in support of that petition, and stated that: "Since Bhabuti Singh has acquired this hakkiat on the basis of pre-emption, therefore the minors have now no objection, and they do not advance a claim to the said hakkiat as against Bhabuti Singh." On that petition the then Subordinate Judge dismissed the suit of Partab Singh and Ahbaran Singh. It does not appear that Subordinate Judge was informed that the minors Partab Singh

and Ahbaran Singh were in law unrepresented in the suit of the 26th June 1899, in which Bhabuti Singh had obtained a decree as against them and others for the pre-emption of the shares which Partab Singh and Ahbaran Singh were in their suit claiming to pre-empt; nor does it appear that the Subordinate Judge was informed that the petition for the dismissal of the suit of Partab Singh and Ahbaran Singh was made in pursuance of an agreement of compromise which Hari Pershad, acting as next friend of the minors Partab Singh and Ahbaran Singh, had entered into without the leave of the Court. This Board has held in *Manohar Lal v. Jadu Nath Singh* (1906) L.R. 33 IndAp 128, that in cases to which Section 462 of the Code of Civil Procedure, 1882, applies there ought to be evidence that the attention of the Court was directly called to the fact that a minor was a party to the compromise, and it ought to be shown, by an order on petition, or in some way not open to doubt, that the leave of the Court was obtained, and that it is not sufficient proof that the exigencies of Section 462 were complied with to show that the minor was described in the title of the suit as a minor, as in that case, suing "under the guardianship of his mother," and that the terms of the compromise were before the Court. The agreement of compromise in pursuance "of which Hari Pershad obtained the dismissal of the suit of Partab Singh and Ahbaran Singh was void as against them and on that ground, if there were no other, they are entitled to have the decree dismissing the suit of the 27th July 1899 set aside.

8. Hari Pershad had been a karinia of Raja Balbhaddar Singh, and he acted in a subordinate capacity under Bhabuti Singh in the management of the property of Partab Singh and Ahbaran Singh after Bhabuti Singh assumed the guardianship of the minors. Their Lordships agree with the learned Judicial Commissioner that in the proceedings to which they have referred "Hari Pershad was a mere dummy, that there was no one to protect the interests of the plaintiffs (Partab Singh and Ahbaran Singh), and that in fact Bhabuti Singh took advantage of his position." Their Lordships find that Hari Pershad was introduced into the suits of 1899 by Bhabuti Singh as the guardian or next friend of the minors Partab Singh and Ahbaran Singh to advance the interests of Bhabuti Singh and to defeat the interests of Partab Singh and Ahbaran Singh, for whom previously and subsequently Bhabuti Singh was acting as guardian and as the manager of their property. Hari Pershad throughout acted under the directions and on behalf of Bhabuti Singh and in his interests and contrary to the interests of Partab Singh and Ahbaran Singh, and to their detriment. Upon these findings of fact it follows as an obvious conclusion that the compromise and the proceedings which were taken in pursuance of it were not binding upon Partab Singh and Ahbaran Singh, and it is clear, apart from the other considerations which their Lordships have already discussed, that Partab Singh and Ahbaran Singh are also on these findings of fact entitled to relief.

9. The Subordinate Judge of Sitapur in this suit gave Partab Singh and Ahbaran Singh a decree on the 29th July 1908. From that decree Bhabuti Singh appealed to the Court of the Judicial Commissioner of Oudh. The appeal was heard by a Bench

consisting of the Judicial Commissioner and the First Additional Judicial Commissioner. The learned Judicial Commissioner, on the facts found by him, held that Partab Singh and Ahbaran Singh were entitled to the decree which they had obtained from the Subordinate Judge, and that the appeal shall be dismissed with costs. The First Additional Judicial Commissioner agreed with the findings of the Judicial Commissioner on all the material facts. In his judgment the First Additional Judicial Commissioner stated :-

I agree with my learned colleague in holding that it is satisfactorily established that the appellant [Bhabuti Singh] was de facto manager of the minors' property at that time [1899], and that Hari Pershad in withdrawing the minors' suit acted under his instructions. If the case has been fought out the minors [Partab Singh and Ahbaran Singh] would probably have obtained a decree for the larger portion of the property and lots might have been drawn with respect to a small portion thereof. In arranging for this compromise the appellant acted in his own interests, and the reason why he got a pre-emptive suit instituted on behalf of the minors was to protect himself in case other persons who had a better right of pre-emption than himself instituted suits claiming pre-emption of the property-After the period of limitation for such suits had expired he withdrew the minors' claim and obtained a decree in his own favour.

10. Notwithstanding that finding the First Additional Commissioner, for reasons which appear to their Lordships to be irrelevant, considered that exercising a discretion u/s 42 of the Specific Relief Act, 1877, he ought to refuse to grant the relief for which Partab Singh and Ahbaran had prayed, and held that the appeal should be allowed and the suit dismissed with costs. Section 42 of the Specific Relief Act, 1877, did not apply. The Judicial Commissioner and the First Additional Judicial Commissioner having differed in opinion on the point of law as to whether Section 42 of the Specific Relief Act, 1877, applied to the case, directed that the appeal should be laid before the Second Additional Judicial Commissioner u/s 98 of the Code of Civil Procedure, 1908. The Second Additional Judicial Commissioner did not apparently confine himself to a consideration of the point of law with which alone he had u/s 98 of the Code of Civil Procedure, 1908, jurisdiction to deal ; he apparently agreed with the opinion of the First Additional Judicial Commissioner that Section 42 of the Specific Relief Act, 1877, applied, and held that the appeal should be allowed and the suit should be dismissed with costs in both Courts. In accordance with the opinions of the First Additional Commissioner and the Second Additional Judicial Commissioner a decree was passed on the 14th March 1910 by the Court of the Judicial Commissioner of Oudh allowing the appeal and dismissing the suit with costs. From that decree this appeal has been brought.

11. Their Lordships are of opinion that this appeal should be allowed and the decree of the Court of the Judicial Commissioner should be set aside, and that the appellants, Partab Singh and Ahbaran Singh, should have a decree setting aside the

decree of the-15th December 1899 in their suit, and declaring that the agreement of compromise and the decree of the 15th December 1899 in the suit of Bhabuti Singh are not binding upon them or either of them, and that they are entitled to such rights as they had before their suit was dismissed on the 15th December 1899. Their Lordships will advise His Majesty accordingly. Bhabuti Singh, the respondent, must pay the costs of this appeal and of his appeal to the Court of the Judicial Commissioner of Oudh.