Majeti Venkatasurya Subbarayudu Sowcar, Being Minor by Mother and Next Friend Venkatasurya Satya Parvatamba Now Declared a Major and the Guardian Discharged Vs. Majeti Bapannarao Sowcar and ors.

LegalCrystal Citation : legalcrystal.com/786246

Court : Chennai

Decided On : Jan-30-1935

Reported in : AIR1935Mad565; (1935)68MLJ615

Appellant : Majeti Venkatasurya Subbarayudu Sowcar, Being Minor by Mother and Next Friend Venkatasurya Satya Par

Respondent : Majeti Bapannarao Sowcar and ors.

Judgement :

Horace Owen Compton Beasley, Kt., C.J.

1. This is an appeal against the order of the Additional Subordinate Judge of Masulipatam refusing, on the appellant's application under Order 9, Rule 9 of the Code of Civil Procedure, to set aside a previous order dismissing the suit and to restore the suit to the file. The appellant is the plaintiff's next friend and the plaintiff is the son of the first defendant. There are a large number of defendants most of them alienees of property from the first defendant, the father of the plaintiff. The suit was filed in 1925; and various reliefs were claimed in it, one relief of course being to set aside the alienations as not binding on the joint family. The other matters in the suit as between the father and the plaintiff, his son, were compromised in 1927 and the matters remaining, namely, the questions relating to these alienations, stood over, and the suit did not come up for final hearing until the 21st January, 1931 nearly 4 years after the compromise, which fructified into an interlocutory decree, had been come to. Some explanation is required for this very long pendency and the learned Subordinate Judge who had all the records in the case including the B diary before him which we have not was in a better position than ourselves to arrive at a conclusion as to whether this long pendency was due to the plaintiff's act or the action of the defendants and this is a matter which has a somewhat strong bearing upon the question of the bona fides of the petition which he had before him to set aside the order dismissing the suit and to restore the suit to the file. The next friend of the plaintiff was the plaintiff's mother. She, being a woman, was not taking an active part in the ligation and that part was being taken by the plaintiff's maternal grandfather and he seems to have been in charge of the litigation. On the date in question, namely, the 21st January, 1931, the pleader for the plaintiff was unfortunately called away to another place. Owing to a sudden death in the family he left Masulipatam and, before going away, does not appear to have taken the necessary steps to get somebody else to represent him. He accordingly did not appear. The maternal grandfather of the plaintiff did not appear either although according to him he made an effort to get to the Court which effort was frustrated by an accident to the vehicle in which he was travelling. It is one of those accidents

which always seems to happen to persons who are going to Courts and who fail to arrive there in time and whose suits are accordingly dismissed in their absence and who seem thereafter to have the ex parte decree set aside. The learned Subordinate Judge appears to accept as reasonable the explanation put forward jwith regard to the pleader. He did not appear and the suit was dismissed. Then a petition was filed nine days later to set aside the ex parte order. The Subordinate Judge is not satisfied with the bona fides of the petition and he observes that the other matters in the suit had been compromised between the plaintiff, the son, and his father the first defendant. He thinks that the suit was allowed to be dismissed for default purposely leaving the minor plaintiff to re-open the question of alienations by the first defendant within three years of his becoming a> major. He is, therefore, not unfamiliar with the tactics which minor litigants so frequently pursue. He thinks that it was to the advantage of the plaintiff to put off a final decision on this issue and he might possibly rightly have come to the conclusion that the plaintiff was not anxious to get a decision upon that question at that moment and thought that it was better to have the pending litigation hanging over the heads of the alienees with the object--and this is one of the allegations made in the counter-affidavit--of forcing them to a compromise. This case of course is not so strong a one as the cases where minor members of a family are seeking to set aside mortgages executed by the managing member. In such cases they are in possession of the property and nothing is to be gained by a speedy decision of the issues which they themselves have raised. They are prepared to remain in possession for as long a time as they possibly can and there is therefore no incentive to have the case speedily disposed of. In the present case most of the alienations were sales. However, there is some^ thing to be said for the view expressed by the Subordinate Judge here that it was possibly to the advantage of the plaintiff to postpone a decision of this issue and to keep the litigation hanging over the heads of the other defendants. He doubts the bona fides of the petition. He had before him the records and the B diary which neither party has thought necessary to produce here and he was able, on an examination of the B: diary, to see who was to blame for the long pendency of the suit; and he says : 'the plaintiff took no steps in the matter'. That Mr. Lakshmanna argues means that the plaintiff had not taken any steps in the matter up to that time. If that was so and if the records before the Subordinate Judge supported that view, that certainly was a very material consideration in coming to the conclusion that the petition was not bona fide in that the plaintiff was not really ready to go on with his case and that, even if his pleader had turned up, he would only have asked for an adjournment and, if it had been refused, would have reported no instructions. In ray opinion, there is no reason for thinking that the view taken by the learned Subordinate Judge with regard to the bona fides of the petition is incorrect.

2. I think it necessary, however, to say something with regard to some decisions which were relied upon in the course of the learned Counsel for the appellant's argument. He referred to Venkataratnam v. Nagappa (1934) 67 M.L.J. 387 a decision of mine. In that case I held that if there are minor plaintiffs and defendants who are represented, as they must be, by a next friend, and the next friend is absent through whatever cause it may; be at the trial, then that fact alone is a sufficient reason for setting aside an ex parte decree passed against minor defendants or for setting aside an order of dismissal of the suit in the case of minor plaintiffs. In the course of my judgment and in support of it I relied upon a decision of the Calcutta High Court, namely, Kesho Pershad v. Hirday Narain (1980) 6 C.L.R. 69 and the decision of Curgenven, J. in Kathaswamy Chettiar v. Ramachandran : AIR1934Mad428 . I see no reason for thinking that I wrongly decided that case or that the cases on which I relied were wrongly decided. I think indeed that they were all correct; but this

decision of mine has been quoted recently in other cases in support of the argument that, whenever a minor is a plaintiff or a defendant and is represented by a next friend or a guardian-ad-litem and that next friend or guardian-ad-litem is absent and the suit is dismissed or decreed ex parte on account of that absence, the Court is bound to restore the suit to the file or set aside the ex parte decree because the minor has not been represented in the suit. It is argued that, it does not matter what the cause of the absence may be, these decisions are to be taken as decisions that whenever the next-friend or the guardian-ad-litem is absent, the minor is entitled to have the suit restored to the file or the ex parte decree set aside irrespective of other considerations. That is not so. The three cases to which I have referred are cases in which there were bona fides. They cannot be taken to apply to cases where as a manoeuvre or in pursuance of tactics agreed upon between the plaintiff and the defendant or between the defendants themselves the next friend or guardian-ad-litem deliberately absents him or herself in order to gain some advantage in the litigation. Cases like those are not cases of bona fide negligence. They are cases where for ulterior and improper motives and as part of a deliberate plan this manoeuvre is resorted to. I wish it to be clearly understood that the three cases to which reference has been made are cases which deal with bona fide conditions and none other. I think it necessary to say that about this decision because, as I have said before, this is not the first time in which it has been relied upon in support of a contention that, whatever happens, whenever there is an absence of a next friend or guardian, the minor is entitled to have the case restored to the list or the ex parte decree set aside. This would of course lead to manifest injustice. Take, for example, the case of an alienation made by a father of a joint Hindu family. The mortgagee files a suit making the father the first defendant and the other members of the family the other defendants. These other members of the family are very often represented by the father or if not by somebody else and the father remains ex parte and an ex parte decree is passed against him. Colluding with the father the guardian of the minor is absent. If an ex parte decree is passed in the absence of the guardian, then it is liable to be set aside because the minor was not represented at the trial; and as such a decree is rightly set aside where the absence of the guardian is bonafide; but the guardian cannot be permitted to go on absenting himself time after time. If such a thing as that were to be allowed, it would mean that an ex parte decree could never be passed against a minor during the minor's minority. Every time the guardian was absent the minor would be able to say that he was not represented by his guardian and his guardian was absent through neglect, illness or otherwise. There must be some limitation to the rule stated in those cases and the limitation must be that, where it is shown that the guardian absents himself or herself deliberately in pursuance of a plan in order to obstruct a litigation, or the absence is not bona fide the minor cannot claim the benefit of these decisions.

3. This appeal must be dismissed with costs.