Kaushalya Devi and Others

Vs

Baijnath Sayal and Others

Civil Appeal No. 216 of 1956

(P.B. Gajendragadkar, K.N. Wanchoo JJ)

09.02.1961

JUDGMENT

GAJENDRAGADKAR, J. –

This appeal by special leave arises from a partition suit filed by Baij Nath against his other coparceners. Baij Nath is the son of Behari Lal and he had four brothers Kidar Nath, Raghunath Sahai, Jagan Nath and Badri Nath. Kidar Nath was dead at the time of the suit, and his branch was represented by his five sons Ghansham Lal, Shri Ram, Hari Ram, Tirath Ram and Murari Lal, who were impleaded as defendants 1 to 5 respectively. On the death of Ghansham Lal pending the suit his two minor sons Jai Pal and Chandar Mohan were brought on the record as his legal representatives and their mother Mst. Kaushalya was appointed guardian ad litem. The two minors are the appellants before us. Chuni Lal, the son of Raghunath Sahai was defendant 6, Bal Kishan and Hari Kishan the two sons of Jagan Nath were defendants 7 and 8, and Badri Nath was defendant 9. Baij Nath's case was that the family was undivided and he wanted a partition of his share in the family properties, and so in his plaint he claimed appropriate reliefs in that behalf. The several defendants made out pleas in respect of the claims made by Baij Nath, but for the purpose of this appeal it is unnecessary to refer to the said pleas. The suit was instituted on June 11, 1941.

It appears that by consent of parties a preliminary decree was drawn by the trial court on October 30, 1941, but the validity of this decree was successfully challenged by an appeal to the Lahore High Court. It was held by the High Court that all parties had not joined in the compromise and so the preliminary decree could not be sustained. In the result the said decree was set aside and the case was remanded for trial.

It further appears that after remand parties again came together and by consent requested the court to pass a preliminary decree once again. This was done on October 15, 1943. This preliminary decree specified the shares of the respective parties and left three outstanding issues to be determined by Chuni Lal, defendant 6, who it was agreed should be appointed Commissioner in that behalf. Pursuant to this preliminary decree the Commissioner submitted his interim report on November 19, 1943, and his final report on November 29, 1943. On receipt of the reports the trial court gave time to the parties to consider the said report which had been explained to them. Parties wanted time and so the case was adjourned. Since the property in dispute was valuable and the parties were unable to make up their minds about the said reports further time was granted to them by the court to consider the matter. Ultimately, when parties did not appear to come to any settlement about the reports the case was adjourned the December 17, 1943, for objections to be filed by the parties. Tirath Ram, defendant 4 alone filed objections; nobody else did. The said objections were considered by the court in the light of the evidence which had been led and a final

decree was drawn on June 21, 1944.

Against this decree an appeal was preferred by the appellants before the High Court of Punjab, and it was urged on their behalf that the preliminary decree was invalid in that at the time passing the said decree the court had failed to comply with the mandatory provisions of O. 32, r. 7 of the Code of Civil Procedure. The High Court did not allow the appellants to raise this point because it held that their failure to make an appeal against the preliminary decree precluded them from challenging its correctness or validity under s. 97 of the Code. Certain other minor objections were raised by the appellants on the merits but they were also rejected. In the result the appeal failed and was dismissed, but in view of the circumstances of the case the parties were directed to bear their own costs. It is this decree that is challenged by the appellants in their present appeal by special leave; and the only point which has been urged by Mr. Jha on their behalf is that the High Court was in error in disallowing the appellants to challenge the validity of the preliminary decree in their appeal before it.

Mr. Jha contends that in dealing with the question about the competence of the plea raised by the appellants the High Court has misjudged the effect of the provisions of O. 32, r. 7. It is common ground that at the time when the preliminary decree was passed by consent and the appellants' guardian Kaushalya Devi agreed to the passing of such a preliminary decree and to the appointment of Chuni Lal as Commissioner the appellants were minors and that leave had not been obtained as required by O. 32, r. 7 Order 32, r. 7(1) provides that 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 the minor with reference to the suit in which he acts as next friend or guardian. It is also not disputed that the agreement which resulted in the drawing up of the preliminary decree and the appointment of Chuni Lal as Commissioner fell within the scope of this rule and that sanction required by the rule had not been recorded in the proceedings. The argument is that the failure to comply with this mandatory provision of the rule makes the agreement and the preliminary decree void, and if that is so s. 97 of the Code of Civil Procedure would be no bar in the way of the appellants challenging the validity of the decree at the appellate stage.

The effect of the failure to comply with O. 32, r. 7(1) is specifically provided by O. 32, r. 7(2) which says that 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. Mr. Jha reads this provision as meaning that the impugned agreement is voidable against the parties to it who are major and is void in respect of the minor; in other words, he contends that the effect of this provision is that the major parties to it can avoid it and the minor need not avoid it at all because it is a nullity so far as he is concerned. In our opinion this contention is clearly inconsistent with the plain meaning of the rule. What the rule really means is that the impugned agreement can be avoided by the minor against the parties who are major and that it cannot be avoided by the parties who are major against the minor. It is voidable and not void. It is voidable at the instance of the minor and not at the instance of any other party. It is voidable against the parties that are major but not against a minor. This provision has been made for the protection of minors, and it means nothing more than this that the failure to comply with the requirements of O. 32, r. 7(1) will entitle a minor to avoid the agreement and its consequences. If he avoids the said agreement it would be set aside but in no case can the infirmity in the agreement be used by other parties for the purpose of avoiding it in their own interest. The protection of the minors' interest requires that he should be given liberty to avoid it. No such consideration arises in respect of the other parties to the agreement and they can make no grievance or complaint against the agreement on the ground that it has not complied with O. 32, r. 7(1). The non-observance of the condition laid down by r. 1 does not make the agreement or decree void for it

does not affect the jurisdiction of the court at all. The non-observance of the said condition makes the agreement or decree only voidable at the instance of the minor. That, in our opinion, is the effect of the provision of O. 32, r. 7(1) and (2).

The question as to the procedure which the minor should adopt in avoiding such an agreement or decree has been the subject-matter of several decisions, and it has been held that a compromise decree may be avoided by the minor either by a regular suit or by an application for review by the court which passed the said decree. The decision in Manohar Lal v. Jadu Nath Singh [(1906) L.R. 33 I.A. 128], is an illustration of a suit filed by the minor for declaration that the impugned decree did not bind him. It is, however, not necessary for us to deal with this aspect of the matter in the present appeal any further.

In support of his argument that the failure to comply with the requirements of O. 32, r. 7(1) makes the decree a nullity Mr. Jha has very strongly relied on the decision of the Privy Council in Chhabba Lal v. Kallu Lal [(1946) L.R. 73 I.A. 52]. In that case an objection to the validity of a reference to arbitration was taken by a party in an appeal against the decree passed on an award; and one of the points raised for the decision before the Privy Council was whether an appeal lay against the decree in question. Under Schedule 2, paragraph 16(2) of the Code which was then in force it was provided that upon the judgment pronounced according to the award a decree shall follow and no appeal shall lie from such decree except in so far as it is in excess of or not in accordance with the award. The argument urged against the competence of the appeal was that the objection against the validity of the reference and the award could and should have been raised under paragraph 15(1)(c) of the said Schedule, and since such an objection had not been so raised and a decree was drawn in accordance with the award under paragraph 16, r. 1 no contention could be raised against the validity of the decree outside the terms of paragraph 16(2). This argument was repelled by the Privy Council. It was held that the objection against the validity of the reference based on the ground that the requirements of O. 32, r. 7(1) had not been complied with did not fall within the purview of paragraph 15(1)(c). The said paragraph specified the grounds on which an award could be challenged. It provided that the award could be set aside if it was made after the issue of an order by the court superseding arbitration and proceeding with the suit or if it was made after the expiration of the period allowed by the court, or if it was otherwise invalid. It is on the last clause in paragraph 15(1)(c) that reliance was placed in support of the contention that the challenge to the validity of the reference should have been made under the said clause. The Privy Council did not uphold this argument. "In their opinion," observed Sir John Beaumont, who spoke for the Board, "all the powers conferred on the court in relation to an award on a reference made in a suit presuppose 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." It is on this last observation that Mr. Jha has naturally relied; but, in our opinion, the observation in question does not purport to be a decision on the interpretation of O. 32, r. 7(2). The context shows that the said observation was made in support of the decision that the challenge to the validity of the arbitration and the award could not have been made under paragraph 15(1)(c) and nothing more. We are not prepared to extend this observation to cases like the present where the point in dispute is in regard to the interpretation of O. 32, r. 7. It is significant that while describing the award as a nullity the Privy Council has also added that it can be challenged in any appropriate proceeding which postulates the adoption of necessary proceedings to avoid the award. The point for consideration by the Privy Council was whether a proceeding under paragraph 15(1)(c) was indicated or whether an appeal could be regarded as an appropriate proceeding; but it was assumed that a proceeding had to be adopted to challenge the award. The decision of the Privy Council was that the validity of the award could be challenged by an appeal because it could not have been challenged under paragraph

15(1)(c). Since it could not be challenged under paragraph 15(1)(c), according to the Privy Council paragraph 16(2) could not be invoked against the competence of the appeal. It is unnecessary for us to examine the merits of the said decision in the present appeal. All that we are concerned to point out is that the observation in the judgment on which Mr. Jha relies cannot be treated as a decision on the interpretation of O. 32, r. 7(2). That question did not directly arise before the Privy Council and should not be treated as concluded by the observation in question. As we have already pointed out, the words used in O. 32, r. 7(2) are plain and unambiguous and they do not lend any support to the argument that non-compliance with O. 32, r. 7(1) would make the impugned decree a nullity.

Mr. Jha has also relied upon another decision of the Privy Council in Jamna Bai v. Vasanta Rao [(1916) L.R. 43 I.A. 99]. In that case two defendants of whom one was a minor compromised a suit pending against them, and in doing so entered into a bond by which they jointly agreed to pay a certain sum to the plaintiff at a future date. The leave of the court was not obtained on behalf of the minor as required by s. 462 of the Code of Civil Procedure, 1882, which was then in force. When a claim was made on the said bond it was held that the bond was not enforceable against the minor but it was enforceable for the full amount against the joint contractor. We do not see how this case assists the appellants. It appears that Jamna Bai who was the joint contractor on the bond advanced the plea that one of the two promisors can plead the minority and consequent immunity of the other as a bar to the promisee's claim against him. This plea was rejected by the Privy Council, and that would show that the bond which was executed in pursuance of a compromise agreement was not treated as null and void but as being unenforceable against the minor alone. In that connection the Privy Council observed that the minor's liability could not be enforced in view of the fact that the requirements of s. 462 of the Code had not been complied with. Indeed, in the judgment an observation has been made that the Privy Council was not expressing any opinion as to whether the bond could be enforceable against a minor even if s. 462 had been complied with. Thus this decision is of no assistance to the appellants.

Similarly, the decision of the Privy Council in Khiarajmal v. Daim [(1904) L.R. 32 I.A. 23], can also be of no help to the appellants, because in that case all that the Privy Council decided was that a court has no jurisdiction to sell an equity of redemption unless the mortgagors are parties to the decree or the proceedings which lead to it, or are properly represented on the record. In other words, if a minor is not properly represented on the record no order passed in the proceedings can bind him. We are unable to see how this proposition has any relevance to the point which we are called upon to decide in the present appeal.

If the preliminary decree passed in the present proceedings without complying with the provisions of O. 32, r. 7(1) is not a nullity but is only voidable at the instance of the appellants, the question is : can they seek to avoid it by preferring an appeal against the final decree ? It is in dealing with this point that the bar of s. 97 of the Code is urged against the appellants. Section 97, which has been added in the Code of Civil Procedure, 1908, for the first time provides that where any party aggrieved by a preliminary decree passed after the commencement of the Code does not appeal from such decree he shall be precluded from disputing its correctness in any appeal which may be preferred from the final decree.

It is urged for the appellants that an appeal is a continuation of the suit and so the appellants would be entitled to challenge the impugned preliminary decree as much by an application made in the suit itself as by an appeal preferred against the final decree passed in the said suit. It is true that the proceedings in appeal can be regarded as a continuation of the proceedings in suit; but the decision of the question as to whether the appellants can challenge the said preliminary decree in their appeal

against the final decree must in the present case be governed by the provisions of s. 97 of the Code. The whole object of enacting s. 97 was to make it clear that any party feeling aggrieved by a preliminary decree must appeal against that decree; if he fails to appeal against such a decree the correctness of such a decree cannot be challenged by way of an appeal against the final decree, which means that the preliminary decree would be taken to have been correctly passed. When s. 97 provides that the correctness of the preliminary decree cannot be challenged if no appeal is preferred against it, it clearly provides that if it is not challenged in appeal it would be treated as correct and binding on the parties. In such a case an appeal against the final decree would inevitable be limited to the points arising from proceedings taken subsequent to the preliminary decree and the same would be dealt with on the basis that the preliminary decree was correct and is beyond challenge. It would be ideal to contend that what is prohibited is a challenge to the factual correctness of the decree on the merits, because if the said decree is voidable, as in the present case, the very point as to its voidable character is a part of the merits of the dispute between the parties. Whether or not O. 32, r. 7(1) applies to the case would certainly be a matter of dispute in such a case and the object of s. 97 is precisely to disallow any such dispute being raised if the preliminary decree is not challenged by appeal. The whole object which s. 97 intends to achieve would be frustrated if it is held that only the factual correctness of the decree cannot be challenged but its legal validity can be even though an appeal against the preliminary decree has not been filed. Therefore, in our opinion, the High Court was right in coming to the conclusion that it was not open to the appellants to challenge to validity of the preliminary decree in the appeal which they had preferred against the final decree before the said High Court.

The result is the appeal fails and is dismissed with costs.

Appeal dismissed.

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