LAHORE HIGH COURT

Kanta

Vs

Kalawati

(Abdur Rahman, J.)

23.01.1946

JUDGMENT

Abdur Rahman, J.

1. (For pedigree, see page 421.) A suit was instituted by Mt. Kanta Devi minor through her husband as her next friend in the Court of a Subordinate Judge at Delhi (Suit No. 69 of 1935) on 9th May 1935 against Mt. Kalawati (defendant l), Mt. Khopi (defendant 2), Mt. Lachhmi (defendant 8), Madan Mohan Lal (defendant 4) and others for a declaration that she was the daughter of Kam Chand and would be, after the death of her mother Mt. Lachhmi, entitled to succeed to the joint properties either left by her father at the time of his death or acquired subsequently out of the joint funds. No declaration to the effect that Madan Mohan Lal (defendant 4) had not been adopted by his widow Mt. Kalawati to her husband Nand Kishore was asked for in the plaint; but its validity was expressly challenged in para. 18 of the plaint and the declaration that she would be entitled to succeed to her father's property after her mother's death may incidentally cover the point that Madan Mohan Lal had not been validly adopted to Nand Kishore. Issues were framed in this case on 30th January 1936. The suit dragged on for some time as I find from the record that it was to come up before the trial Court on 16th August 1937 presumably for recording evidence. No evidence was, however, recorded on that date but a compromise (Ex. A) printed at pages 48 and 49 of the paper book was put in. As the plaintiff and defendant 4 were minors, applications were presented under Order 32, Rule 7, Civil Procedure Code, by the next friend of the former and the guardian ad litem of the latter for leave to enter into the compromise on behalf of the minors. These were adjourned by the Subordinate Judge to 24th August 1937 and leave was granted by him to enter into the compromise on 24th August 1937 as he was of the view that it was for the benefit of the minors. A commissioner was then appointed to record the statements of the ladies who had signed the compromise. Their statements as also the statement of Balwant Rai were recorded by the Commissioner on 26th August 1937. These must have been presented to the Court on the following day when a decree was passed by it in terms of the compromise. The decree is printed at pp. 53 and 55 of the record.

2. Another suit was filed by Mt. Lachhmi (Suit Ho. 59 of 1936) on 27th February 1936 for the administration, of Nand Kishore's estate. This was pending in the Court of another Subordinate Judge at Delhi and was also compromised. Mt. Kanta Devi does not seem to have been impleaded as a defendant in this suit. A decree in that suit was passed on 30th August 1937. It is printed at pp. 44 to 46 of the printed record. According to para. 9 of the decree Mt. Kanta Devi was to succeed to the property which had fallen to her mother's share: Balwanfc Rai was to be one of the joint reversioners.

3. On attaining majority Mt. Kanta Devi brought a suit, out of which the present appeal arises, on 11th May 1940 in the Court of the Subordinate Judgeat Delhi for a declaration that the compromises entered into the above-mentioned suits (Nos. 69 of 1935 and 59 of 1936) were not binding on her and that the whole of the estate left by Ram Chand at the time of his death and the property subsequently acquired out of that estate was inherited by Mt. Lachhmi who was not bound by the debts incurred by Shiba Mai and Nand Kishore. She had also asked for other reliefs but it is unnecessary to state them.

4. It was alleged in para. '22 of this plaint that the plaintiff's husband who was acting as a next friend on her behalf had acted with gross negligence and carelessness in entering into the compromise in Suit No. 69 of, 1935 and in agreeing to be bound by the debts, a list of which was annexed in Suit No. 59 of 1936. The compromise was also alleged to be prejudicial to the plaintiff for reasons given in para. 24 of the plaint. It was also stated in para. 23 that "the Court in sanctioning the compromise under o. 32, Rule 7, Civil Procedure Code, did not appreciate the facts of the case or their consequences to the minor plaintiff and allowed the compromise as a mere matter of course." This suit was transferred to this Court in consequence of an order passed by this Court on 8th November 1940. Monroe, J. before whom it came up for hearing, framed the two following preliminary issues: (1) Is the court-fee sufficient? (2) Are the allegations of negligence on the part of the guardian ad litem sufficient basis for setting aside the compromise?

5. He decided the first issue in favor of the plaintiff but the question covered by issue 2 was referred by him to a larger Bench with the following remarks:
6. "The question involved is an important one, particularly important in the present case because should it eventually be held that the allegations of negligence are insufficient, a very long and involved trial with the attendant expense will be avoided."

7. The case was heard by a Division Bench composed of Sir Douglas Young C.J. and Beckett, J. It was held by them (vide *Mt. Kanta Devi v. Kalawati*[1] that the negligence of a guardian ad litem was not, in itself, a ground for setting aside a consent decree against a minor, which could only be set aside on the ground of fraud, actual or constructive. It must, however, be observed that the Division Bench refused to adjudicate on the case itself and confined itself to the decision of the abstract question of law as to whether the allegations of negligence on the part of a guardian ad litem or of a next friend could per se, and without any allegation of fraud form a sufficient basis

for the purpose of getting rid of a compromise, and of the decree based thereon. When the learned Chief Justice and the learned Judge were asked to apply the law to the pleadings in the suit and to say whether the case could proceed or not, they

[1] A.I.R. 1942 Lah. 205

refused so to do. They observed at p. 121 as follows:

8. "That this is the correct position in regard to a consent decree against a minor is not seriously disputed by either side in the present case, but we have been asked to apply the law to the pleadings in the suit and to say whether the case should now proceed or not. In the ordinary way, it is for the trial Judge to apply the law to the facts set out in the pleadings; and since it is only the legal question in its general form which has been referred to us, we see no reason for departing from the usual practice. The question referred will accordingly be answered by saying that negligence of a guardian ad litem is not in itself a ground tot setting aside a consent decree against a minor, which can only be set aside on the ground of fraud, actual or constructive."

9. With that decision the proceedings were returned to the referring Judge, i.e., to Monroe, J. for further action. An application was then made to the learned Judge on behalf of the appellant to permit her-to put in a better statement. Monroe J. did not accede to that prayer and ordered the appellant to make an" application for leave to amend her plaint. An application was consequently made on 31st March 1942, which is printed at pp. 26 to 29 of the printed record, in which she asked for leave to add allegations in regard to fraud alleged to have been committed by her husband who was acting as her next friend in the previous litigation. A copy of the proposed plaint was also put in along with this petition. It is printed at pp. 29 to 38 of the record. It could not be taken up and disposed of by Monroe J. The suit then came up before Muhammad Munir J. on 25th March 1943. He refused to decide it or to consider the application for leave to amend the plaint but finding no reason why the suit should be heard on the extraordinary Original Side of this Court re-transferred it to the Subordinate Judge at Delhi. It was, however, ordered that the application for leave to amend should be disposed of before the suit is tried on the "merits and decided.

10. The case came up before Mr. Tara Chand Aggarwal, a Subordinate Judge at Delhi, who, in pursuance of the orders passed by this Court, took up the application for leave to amend. But after hearing learned Counsel for the parties he refused to grant leave as he did not find any strong or exceptional circumstances to be in existence which alone could have entitled a plaintiff to permit a plea of fraud to fee added when it had not been alleged by her at the time when the plaint was put in on her behalf. No exception can be taken to this decision as the Courts are not only reluctant but averse to permitting a party to amend his pleading to substitute a new and a distinct kind of fraud, what to say of introducing a plea of fraud for the first time when it had never been pleaded before. And in view of the opinion expressed by the Division Bench in *Mt. Kanta Devi v. Kalawati A.I.R. 1942 Lah. 205(SUPRA)*, by which he naturally considered himself to be bound, the learned Subordinate Judge dismissed the suit, for the plaintiff had attacked the compromise mainly, although, not solely, on the ground of her next friend's negligence and this

alone, according to the view of the Division Bench of this Court, could not have furnished a good cause of action to the identify. Aggrieved by this decision the plaintiff has preferred the present appeal.

11. In the meantime, however, the question " whether a minor can avoid a decree passed against him on the ground of gross negligence on the part of his guardian ad litem, even if he has not succeeded in proving fraud or collusion on the part of such guardian" came up for decision before a Full Bench of this Court (*Iftkhar Hussain Khan v. Beant singh Reported in*[3] and the learned Judges were unanimously of the view that it was not necessary to allege or prove fraud in order to enable a person to get rid of a decree passed against him during his minority and that gross negligence by his next friend or guardian ad litem would alone, if established, entitle him to avoid a decree if found to have been passed in consequence of that negligence. The leading judgment was delivered by Abdul Rashid, J. and what fell from my brother Mahajan in concurring with Abdul Rashid J. may be referred to with advantage. The decision in *Mt. Kanta Devi v. Kalawati A.I.R. 1942 Lah. 205(SUPRA)*, it may be added, was expressly referred to and dissented from.

12. When this appeal came up before us yesterday, I was of the view that although the decision given by the Division Bench in *Mt. Kanta Devi v. Kalawati A.I.R. 1942 Lah. 205(SUPRA)* was not correct, yet it would be binding on the parties to this suit on the principles of res judicata Section 11, Civil Procedure Code, not being exhaustivefor the question had been heard and finally decided by this Court in this suit and the fact that the decision was erroneous in law would be immaterial. It was not then realised that the abstract question of law was alone decided by the Division Bench and that instead of applying to the facts of the case, the task was left to be performed by the referring Judge. I have already referred to the circumstances under which the matter was left undecided by a learned Judge on the extraordinary Original Side of this Court and was determined for the first time by the Subordinate Judge at Delhi, by his judgment now under appeal. It might be added that it would have made no difference in my view if the decision by the Division Bench in *Mt. Kanta Devi v. Kalawati A.I.R. 1942 Lah. 205(SUPRA)* had been applied for the first time by a learned Single Judge of this Court. The only difference in that case would have been that the appeal to this Court would have been preferred under the Letters Patent and not Under the Punjab Courts Act.

13. The real questions that arise for determination at this stage is whether the learned Judges of the Division Bench were competent to decide the abstract question of law without applying their decision to the facts of the case? And even if they were competent so to do, can their opinion be held to be res judicata between the parties to the present litigation?

14. A Division Bench cannot, first of alii in my view, merely express its opinion on an abstract question of law detached from the facts of the case which it is called upon to decide. That is, I think, the province of a Full Bench when a point is referred to it for opinion. I am aware of the

fact that the referring Judge had in this case referred an abstract question of law for decision. But it should have been placed before a Full Bench and not before a Division Bench both because strictly speaking it falls in my view within the legitimate scope of a Full Bench to decide abstract questions of law and because, in view of conflict of judicial opinion amongst the High Courts on the point, the decision should have been given so as to be binding on the other Division Benches of this Court. In any case the present contention advanced on behalf of the appellant -cannot be held to be barred by the principles of res judicata. If I were to

[3] A.I.R. 1946 Lah. 233

hold otherwise, the result would be startling. This case itself furnishes a very good illustration. Since the Division Bench did not adjudicate on the case and merely expressed an opinion as to what was the law on the subject, and left that opinion to be applied by the trying Judge, who happens to be a Subordinate Judge in the present case, his decision would be, if I were to accept the respondent's contention, res judicata between the parties and would debar this Division Bench from considering its correctness although it has been appealed from. If I were to hold that we were prevented by the principles of res judicata from deciding this case, it would be not on account of the decision by the Division Bench in *Mt. Kanta Devi v. Kalawati A.I.R. 1942 Lah. 205(SUPRA)* but on account of the decision of the Subordinate Judge although it must be admitted that in deciding the matter he had applied the opinion expressed by the Division Bench. But would not his decision have been open to attack if he had applied the decision of another Division Bench given in a case between different parties altogether if we found that the law laid down by the Division Bench in that case was erroneous and was subsequently overruled by a Full Bench of this Court? If, therefore, I am even mistaken in thinking that the determination of a purely legal question falls within the legitimate scope of a Full Bench and not that of a Division Bench, I do not think I would be wrong in holding that the decision by the Subordinate Judge could not be in the present case held to be final or to constitute res judicata between the parties. Had the decision been given by the Division Bench on the facts of the case, it could not have been open to appeal to this Court, but would have been so if it had been given by a learned Single Judge of this Court or by any Subordinate Court of this Province. That is why, if for no other reason, the decision by the Division Bench should not have been on an abstract question of law but on the facts of the case which had been referred to it. It would not have been then possible for us to question the correctness of that decision. But detached from the facts of the case, the opinion of a Division Bench on a pure question of law could not have the same binding effect on us as the decision of a Full Bench would have had although I must concede for obvious reasons that it is improper for a Division Bench to dissent from the opinion of another Division Bench. At all events, even if the Division Bench in *Mt. Kanta Devi v. Kalawati A.I.R. 1942 Lah. 205(supra)* was competent to express its opinion without applying it to the facts of the case, it is not that decision but the decision which applied that law to the facts of this particular case which could debar a Court from re-hearing the question that had been heard and finally decided and as that decision which applied the law is at present under appeal, it cannot be held to be res judicata. The decision of the Division Bench in *Mt. Kanta Devi v. Kalawati ('42) 29 A.I.R. 1942 Lah. 205(supra)* cannot be held to be res judicata as it was not its final decision on the facts of this

case. And as the view of the law expressed by it has been dissented from by the Full Bench in *Iftkhar Hussain Khan v. beant singh Reported in A.I.R. 1946 Lah. 233(supra)* a it can no longer be accepted.

15. For the'above reasons the judgment under appeal cannot be upheld and must be set aside. In view of the decision of the Full Bench, the application made on behalf of the plaintiff to amend the plaint and to allege fraud has also become unnecessary. The plaintiff had in view of the decision of the Full Bench made quite sufficient allegations to entitle her to bring a suit. Whether she would be able to substantiate those allegations is a different matter but that is a question on the merits and will have to be decided by the trial Court, after evidence has been led on behalf of the parties.

16. The application for leave to amend must consequently remain rejected. This does not, however, mean that if the plaintiff wishes to make any other application for leave to amend, that application for leave to amend would have to be necessarily refused. If and when an application is made by either one party or the other, it would be heard and decided by the trial Court according to law.

17. The case must now go back for decision on the merits in the light of the observations contained in this judgment. It is unnecessary to pass any orders with regard to costs of this appeal at this stage. They will be costs in the cause. The case has been pending for many years and would now be taken up by the Subordinate Judge and decided expeditiously. The parties have been directed to appear before the trial Court on 18th February 1946.

Mahajan, J.

18. I agree.

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