REPORTABLE

IN THE SUPEME COURT OF INDIA CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION (C) NO.2492 OF 2021

K.P. NATARAJAN & ANR. … PETITIONER(S) VERSUS

MUTHALAMMAL & ORS. …RESPONDENT(S)

J U D G M E N T

V. Ramasubramanian, J.

1. In a Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, 1908 (for short "the Code"), challenging an order of the trial Court refusing to condone the delay of 862 days in seeking to set aside an ex-parte decree for specific performance, the

High Court found that the ex-parte decree was a nullity, as it was

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Reason:

guardian duly appointed in terms of the procedure contemplated

under Order XXXII, Rule 3 of the Code. Therefore, the High Court, exercising its power of superintendence under Article 227 of the Constitution, set aside the ex-parte decree itself on condition that the petitioners before the High Court/defendants pay a sum of Rs.2,50,000/-, representing the amount already spent by the decree holders in purchasing stamp paper etc. Aggrieved by the said order of the High Court, the decree holders are before us in this special leave petition.

2. We have heard Mr. S. Nagamuthu, learned senior Counsel appearing for the petitioners/plaintiffs and Mr. R. Balasubramanian, learned senior counsel appearing for the respondents/defendants.

3. In a suit O.S. No.264 of 2013 filed by the petitioners-herein for specific performance of an agreement of sale dated 25.04.2011, the respondents were duly served with summons, but after having entered appearance through counsel they remained ex-parte. The trial Court decreed the suit ex-parte on 08.04.2015.

4. At this stage it may be relevant to take note of one fact, namely, that the petitioners sought, as an alternate relief, a decree

for refund of the money paid with interest at 18% per annum in the event of the Court not granting the relief of specific performance. But the trial Court held albeit without reasons, that the petitioners are entitled, for the primary relief of specific performance.

5. In the plaint as it was filed by the petitioners-herein, the third defendant was described as "minor S Aravindarajan, aged about 16 years, son of Sampathkumar represented by the next friend father M. Sampathkumar". Therefore, the petitioners had filed, along with the plaint, an application in I.A No.981 of 2013 under Order XXXII, Rule 3 of the Code for appointing the second respondent-herein (his father and the second defendant) as the guardian of the minor. As noted by the High Court, the trial Court, after serving notice on the second defendant, passed an Order in I.A.No. 981 of 2013 on 23.03.2014 to the following effect:-

"Batta served. Vakalat by guardian to minor filed. Hence this petition is closed."

6. Seeking execution of the decree, the petitioners filed E.P No.33 of 2015. Notices were served on all the respondents in the Execution Petition and the Execution Petition is said to have come

up for hearing on two dates in December-2015 and on several dates in the year 2016. Eventually the respondents were set ex-parte in the Execution Petition on 18.10.2016 and the petition was allowed.

7. Thereafter the respondents filed an application in November- 2016 for setting aside the ex-parte order in the Execution Petition. It was numbered only in the year 2017 as E.A. No.40 of 2017.

8. But in the meantime the petitioners were called upon to deposit non-judicial stamp papers of the value of Rs.1,98,000/- for the execution of the sale deed. They did so and a sale deed was in fact executed by the Court on 04.01.2017.

9. It is only thereafter that the respondents filed an application in

I.A No.142 of 2017 for condonation of the delay of 862 days in seeking to set aside the ex-parte decree. This application filed on 19.09.2017 was dismissed by the trial Court by an order dated

28.11.2017, primarily on three grounds namely: (i) that there was no proper explanation for the delay; (ii) that even the written statement was not filed within the time stipulated in Order VIII, Rule 7; and (iii) and that after allowing even the execution to proceed ex-parte and after having allowed the sale deed to be

executed by the Executing Court, the respondents cannot seek condonation of the huge delay.

10. Aggrieved by the dismissal of the petition to condone the delay in seeking to set aside the ex-parte decree, the respondents filed a revision petition under Section 115 of the Code before the High Court. Entertaining a doubt about the appointment of a guardian for the third defendant, the learned Judge summoned the original records in the suit from the trial Court. Finding that I.A

No.981 of 2013 filed along with the plaint for the appointment of a guardian for the third defendant, was not properly dealt with and that there was no appointment of a guardian for the minor as required under Order XXXII, Rule 3, the learned Judge invoked the general power of superintendence under Article 227 of the Constitution and set aside the ex-parte decree itself, without going into the question of delay and without examining whether there was sufficient cause for condonation of delay. In order to ensure that the petitioners/decree holders are not poorer after a decree (or because of the decree), the learned Judge put the respondents on condition that they should pay of Rs.2,50,000/- as cost to the petitioners-herein on or before

16.10.2020, as the petitioners/decree holders had already deposited stamp papers of the value of Rs.1,98,000/- and got the sale deed executed.

11. It appears that pursuant to the aforesaid order of the High Court, the respondents deposited the cost of Rs.2,50,000/- on 12.10.2020. As a consequence, the trial Court appears to have taken up the suit for trial after framing issues. It is stated by Mr. R. Balasubramanian, learned senior counsel for the respondents that the suit now stands posted for examination of PW-1.

12. The main grounds of attack, to the impugned order of the High Court, as articulated by Mr. S. Nagamuthu, learned senior counsel for the petitioners are :- (i) that the High Court ought not to have set aside an ex-parte decree, in a revision petition arising out of an application under Section 5 of the Limitation Act, 1963; (ii) that the Court was not even entitled to invoke equity in favour of the respondents who were grossly negligent, first in defending the suit, next in defending the executing proceedings and then in seeking to set aside the ex-parte decree after nearly a year of seeking to set aside the ex-parte order passed in the Execution Petition; and (iii)

that it was not even one of the grounds raised or points argued by the respondents-herein in their revision petition before the High Court either that the procedure prescribed under Order XXXII, Rule 3 of the Code was not followed or that a grave prejudice or injustice has been caused to the defendant/minor, on account of the failure, if any, on the part of the trial Court.

13. Mr. R. Balasubramanian, learned senior counsel appearing for the respondents contended in response, that the revisional jurisdiction of the High Court under Article 227 are wider in nature and that when the High Court finds that the trial Court has not taken care of the interest of the minor who was a party

to the proceeding, by following the procedure prescribed by law, the High Court cannot shut its eyes on the basis of technicalities.

14. We have carefully considered the rival contentions. There is no dispute on facts and there is no escape from the conclusion that the respondents have been grossly negligent in defending the suit as well as the execution proceedings. But the fact remains that while the parties can afford to remain negligent, the Court cannot. The High Court has found, after summoning the records from the

trial Court that as a matter of fact, the trial Court failed to appoint a guardian for the third respondent/minor in a manner prescribed by law. As pointed out earlier, an application was in fact filed by the petitioners-herein/plaintiffs under Order XXXII, Rule 3 of the Code in I.A No.981 of 2013. The said application was closed by the trial Court by an Order passed on 23.03.2014, which we have extracted elsewhere. The manner in which the trial Court disposed of the application under Order XXXII, Rule 3, is without doubt, improper and cannot at all be sustained, especially in the teeth of the Madras Amendment.

15. Order XXXII, Rule 3, is found in the First Schedule to the Code. Under Section 121 of the Code, the Rules in the First Schedule shall have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions of Part-X, which comprises of Sections 121 to 131. The High Courts are empowered under Section 122 of the Code to annul/alter or add to all or any of the Rules in the First Schedule, for regulating the procedure of the civil courts subject to their superintendence.

16. In exercise of such a power, the High Court of Judicature at Madras has made Rule 3 of Order XXXII of the Code, much more elaborate than how the Rule was originally framed.

17. In the impugned order, the learned Judge has extracted Order XXXII, Rule 3 of the Code in its original form. But in its application to civil courts subject to the superintendence of the Madras High Court Order XXXII, Rule 31 actually reads as follows:-

`"3. Qualifications to be a next friend or guardian. – (1) Any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian for the suit:

Provided that the interest of that person is not adverse to that of the minor and that he is not in the case of a next friend, defendant, or in the case of a guardian for the suit, a plaintiff.

(2) Appointed or declared guardians to be preferred and to be superseded only for reasons recorded. – Where a minor has a guardian appointed or declared by competent authority no person other than the guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the Court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.

(3) Guardians to be appointed by Court.- Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the minor.

1 The amendment was made by a Notification in P. Dis. No.256 of 1938 Vide St. George Gazette, dated 13-3-1938. Unfortunately most of the Bare Acts published in recent times and even the 19 th Edition of Mulla on the Code of Civil Procedure does not make a mention of the Notification number and date in so far as the Madras Amendment is concerned.

(3A) A person appointed under sub-rule (3) to be guardian for the suit for a minor shall unless his appointment is terminated by retirement, removal or death continue as such throughout all proceedings arising out of the suit including proceedings in any appellate or revisional Court and any proceeding in execution of a decree.

(4) Appointment to be on application and where necessary after notice to proposed guardian.- An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the Plaintiff. The application, where it is by the plaintiff, shall set forth, in the order of their suitability, a list of persons (with their full addresses for service of notice in Form No. 11A set forth in Appendix

H. Hereto) who are competent and qualified to act as guardian for the suit for the minor defendant. The Court may, for reasons to be recorded in any particular case, exempt the applicant from furnishing the list referred to above.

(5) Contents of affidavit in support of the application for appointment of guardian.- The application referred to in the above sub-rule whether made by the plaintiff or on behalf of the minor defendant shall be supported by an affidavit verifying the fact that the proposed guardian has not or that no one of the proposed guardians has any interest in the matters in controversy in the suit adverse to that of the minor and that the proposed guardian or guardians are fit persons to be so appointed. The affidavit shall further state according to the circumstances of each case (a) particulars of any existing guardian appointed or declared by competent authority, (b) the name and address of the person, if any, who is the de facto guardian of the minor, (c) the names and addresses of persons, if any, who in the event of either the natural or the de facto guardian or the guardian appointed or declared by competent authority, not being permitted to act, are by reason of relationship or interest or otherwise, suitable persons to act as guardians for the minor for the suit.

(6) Application for appointment of guardian to be separate from application for bringing on record the legal representatives of a deceased party. – An Application for the appointment of a guardian for the suit of a minor shall not be combined with an application for bringing on record the legal representatives of a deceased plaintiff or defendant. The applications shall be by separate petitions.

(7) Notice of application to be given to persons interested in the minor defendant other than the proposed guardian.– No order shall be made on any application under sub-rule (4) above except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf or where there is no guardian, upon notice to the father or other natural guardian of the minor, or where there is no father or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. The notice required by this sub-rule shall be served six clear days before the day named in the notice for the hearing of the application and may be in Form No. 11 set forth in Appendix H hereto.

(8) Special provision to shorten delay in getting a guardian appointed.-Where the application is by the plaintiff, he shall, along with his application and affidavit referred to in sub-rules (4) and (5) above, produce the necessary forms in duplicate filled in to the extent that is possible at that stage, for the issue simultaneous of notices to two at least of the proposed guardians for the suit to be selected by the Court from the list referred to in sub-rule (4) above together

with a duly stamped voucher indicating that the fees prescribed for service have been paid.

If one or more of the proposed guardians signify his or their consent to act, the Court shall appoint one of them and intimate the fact of such appointment to the person appointed by registered post. If no one of the persons served signifies his consent to act, the Court shall proceed to serve simultaneously another selected two, if so many there be, of the persons named in the

list referred to in sub-rule (4) above but no fresh application under sub-rule (4) shall be deemed necessary. The applicant shall within three days of intimation of unwillingness by the first set of proposed guardians, pay the prescribed fee for service and produce the necessary forms duly filled in.

(9) No personal shall be appointed guardian without his consent.- No person shall without his consent, be appointed guardian for the suit. Whenever an application is made proposing the name of a person as guardian for the suit a notice in Form No.11 A set forth in Appendix H hereto shall be served on the proposed guardian, unless the applicant himself be the proposed guardian or the proposed guardian consents.

(10) Court guardian.- When to be appointed-How he is to be placed in funds.- Where the Court finds no person fit and willing to act as guardian for the suit, the Court may appoint any of its officers or a pleader of the Court to be the guardian and may direct that the costs to be incurred by that officer in the performance of the duties as guardian shall be borne either by the parties or by any one or more of the parties to the suit or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require.

(11) Funds for a guardian other than Court guardian to defend.- When a guardian for the suit of a minor defendant is appointed and it is made to appear to the Court that the guardian is not in possession of any or sufficient funds for the conduct of the suit on behalf of the defendant and that the defendant will be prejudiced in his defence thereby, the Court may, from time to time, order the plaintiff to advance monies to the guardian for purpose of his defence and all monies so advanced shall form part of the costs of the plaintiff in the suit. The order shall direct that the guardians, as and when directed, shall file in Court an account of the monies so received by him."

18. There is a great deal of difference between the Rules of Procedure laid down in Rule 3 of Order XXXII by the Central Act and Rule 3 as applicable to civil courts subject to the superintendence of Madras High Court. Order XXXII, Rule 3 in its original form reads as follows:-

"3. Guardian for the suit to be appointed by court for minor defendant.- (1) Where the defendant is a minor, the court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

(2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff.

(3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed.

(4) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father, or where there is no father, to the mother, or where there is no father or mother, to other natural guardian of the minor, or, where there is no father, mother, or other natural guardian, to the person in whose care the minor is, and after hearing any objection which may be urged on behalf of any person served with notice under this sub-rule.

(4A) The Court may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also.

(5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement, removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any Appellate or Revisional Court and any proceedings in the execution of a decree."

19. A comparison of the two sets of Rules show that the rules applicable to Courts subject to the superintendence of the Madras High Court are more elaborate and also rigorous. We may immediately note (i) that sub-rules (1) and (2) of Rule 3 of the Rules applicable to Courts subject to the superintendence of the Madras High Court (hereinafter referred to as "applicable rules" for the purpose of convenience), are additional requirements; (ii) that sub- rule (3) of Rule 3 of the 'applicable rules' is a reproduction of sub- rule (1) of Rule 3 of the original Code; (iii) that sub-rule (3-A) of Rule 3 of the 'applicable rules' is a reproduction of sub-rule (5) of

the Central Act; (iv) sub-rule (7) of Rule 3 of the 'applicable rules' is an improved version of sub-rule (4) of Rule 3 of the Central Act.

20. More importantly sub-rules (4), (5), (6) and a part of sub-rule

(7) of Rule 3 of Order XXXII of the 'applicable rules' prescribe certain additional requirements which are as follows:- (i) when an

application for the appointment of a guardian is by the plaintiff, it shall set forth in the order of their suitability, a list of persons with their full addresses for service of notice in Form No.11-A set forth in Appendix H, who are competent and qualified to act as guardian for

the minor defendant; (ii) the application for appointment of a guardian should be supported by an affidavit, not merely verifying (as in the Central Act) the fact that the proposed guardian has no interest in the matters in controversy adverse to that of the minor, but also stating additional particulars including the name and address of the de-facto guardian and the names and addresses of other suitable persons, whenever a natural or de-facto guardian is not permitted to act.

21. Admittedly, the learned Judge summoned the records from the trial Court after entertaining a doubt about the procedure followed by the trial Court in this case and found as a matter of fact that the trial Court failed to appoint a guardian for the third defendant as required by Order XXXII, Rule 3. The power of the learned Judge to call for the records and examine the same, in a revision under Section 115(1) of the Code is not and cannot be doubted or

questioned by the petitioners. It is true that the learned Judge was dealing only with a revision petition arising out of an Order dismissing a petition under Section

5 of the Limitation Act, 1963. But it does not take away or curtail the jurisdiction of the High Court to look into the records with particular reference to an important rule of procedure, especially when the same relates to something concerning persons under disability. The rigorous nature of the Madras amendment to Rule 3 of Order XXXII, is perhaps to be attributed to the wider jurisdiction that the High Court exercised on its original side, under Clause-17 of the Letters Patent and the parens patriae jurisdiction that a Court normally exercises while dealing with cases of minors. Therefore, we find no illegality in the action of the High Court in summoning the original records in the suit and finding out whether or not a guardian of a minor defendant was appointed properly in accordance with the procedure prescribed in Order XXXII, Rule 3, even in the absence of a specific contention being raised by the petitioners.

22. The contention that in a revision arising out of the dismissal of a petition under Section 5 of the Limitation Act, 1963, the High

Court cannot set aside the ex-parte decree itself, by invoking the power under Article 227, does not appeal to us. It is too well settled that the powers of the High Court under Article 227 are in addition to and wider than the powers under Section 115 of the Code. In

Surya Dev Rai vs. Ram Chander Rai and Others2, this Court went as far as to hold that even certiorari under Article 226 can be issued for correcting gross errors of jurisdiction of a subordinate Court. But the correctness of the said view in so far as it related to Article 226, was doubted by another Bench, which resulted in a reference to a three member Bench. In Radhey Shyam & Anr. vs.

Chhabi Nath & Others3, the three member Bench, even while overruling Surya Dev Rai (supra) on the question of jurisdiction under Article 226, pointed out that the jurisdiction under Article

227 is distinguishable. Therefore, we do not agree with the

contention that the High Court committed an error of jurisdiction in invoking Article 227 and setting aside the ex-parte decree.

23. In fact the learned Judge also went into the question whether

a decree passed against a minor without proper appointment of a

2 (2003) 6 SCC 675

3 (2015) 5 SCC 423

guardian, is a nullity ipso facto or whether the same would depend upon prejudice against the minor being established. The learned Judge found that in this case, the minor was prejudiced.

24. It may be of interest to note that Rule 3-A was inserted in Order XXXII by CPC Amendment Act 104 of 1976. It is this Rule that introduced for the first time into the Code, the question of prejudice to the minor. But this Rule 3-A applies only to cases where the next friend or guardian for the suit of the minor had an interest in the subject matter of the suit adverse to that of the minor. This amendment was a sequel to certain conflicting opinions on the question as to whether a decree passed in cases where the minor was represented by a guardian who had an interest in the subject matter of the suit adverse to that of the minor, was void or voidable.

25. In other words the Parliament chose to introduce the element of prejudice, specifically in relation to one category of cases under Order XXXII, Rule 3A. The case on hand does not fall under that category. In any case, we need not go into that question in this case, as the learned Judge found that the minor was prejudiced.

26. A valiant attempt was made during the hearing, to show that the 3rd Respondent/defendant was not a minor at all. Such a contention was sought to be raised on the basis of the long cause title in the execution application E.A.No.65 of 2017 where the 3rd Respondent was described as a person aged about 24 years in the year 2017. Therefore, it was sought to be contended that he should have attained majority long before the ex parte decree and that therefore the question of appointment of a guardian and the decree becoming a nullity did not arise.

27. The said contention is to be stated only to be rejected. It was the petitioners herein who filed the suit in the year 2013 describing the 3rd defendant as a minor and seeking the appointment of a guardian. Therefore, there is no place for any innovative arguments contrary to one’s own pleadings.

28. Another contention was raised that in any event, the decree could have been set aside only as against the 3rd Respondent and not against all the others. But the said logic does not apply to something that is a nullity in law.

29. The reliance placed by the learned counsel for the petitioners upon the judgment of a Division Bench of the Madras High Court in Lanka Sanyasi vs. Lanka Yerran Naidu4 is misplaced. The question in Lanka Sanyasi (supra) was whether a person who had become a major on the date on which a compromise decree was

passed in a suit, was entitled to challenge the compromise decree in

a subsequent suit. The subsequent suit was decreed by the First Appellate Court and while dealing with the Second Appeal, the High Court held in Lanka Sanyasi that a mere circumstance that a minor defendant had attained majority during the pendency of the

suit, but not elected to continue the defence himself and to have his

guardian ad litem discharged, is not sufficient to enable him to have the judgment passed in the suit declared as not binding on him. Nothing turned on the provisions of Order XXXII, Rule 3 in the said case.

30. The decision of the Travancore Cochin High Court in Ouseph Joseph vs. Thoma Eathamma5, relied upon by the petitioners,

4 1929 Law Weekly 455

5 AIR 1956 TC 26

more than helping the petitioners, confirms that the view taken in the impugned order is correct.

31. The decision in Divya Dip Singh and others vs. Ram Bachan Mishra and others6, concerned the question whether the appointment of a guardian for a minor under Order XXXII, Rule 3

will take away the right of the natural guardian. The answer was too obvious and the same has nothing to do with the issue on hand.

32. The decision of the Rajasthan High Court in Anandram and another vs. Madholal and others7 relied upon by the petitioners, dealt with the question of prejudice to the minor, specially in the context of the father filing a written statement on behalf of the minors and admitting receipt of part consideration. In Rangammal vs. Minor Appasami8 there was a finding on fact that the minor's interests were sufficiently safeguarded in the suit. Therefore, none of these decisions relied upon by the petitioners, advance their cause.

6 (1997) 1 SCC 504

7 AIR 1960 Raj 189

8 85 Law Weekly 574

33. Therefore, we find no illegality in the order of the High Court warranting our interference under Article 136. Hence, this Special Leave Petition is dismissed.

……..J. (INDIRA BANERJEE)

New Delhi July 16, 2021

……..J. (V. RAMASUBRAMANIAN)