

APPELLATE CIVIL.

Before Bishan Narain, J.

KARTAR SINGH ALIAS MANGTU,—Plaintiff-
Appellant

versus

SURAIN SINGH AND OTHERS,—Defendants-Respondents.

Regular Second Appeal No. 875 of 1951

Code of Civil Procedure (V of 1908)—Order 2 rule 2—Applicability—Minor—Part of Property omitted by guardian of the minor in a suit for possession filed on the death of the widow—Suit by the minor on attaining majority for the part of the property so omitted—No allegation that property omitted because of the negligence of the guardian in the previous suit—Whether omission of part of property per se tantamount to negligence or gross negligence—Causes of action in two suits whether different—Second suit whether barred under Order 2 rule 2, Civil Procedure Code.

1955

March, 1st

Held, that it cannot be said that Order 2 rule 2, Civil Procedure Code, has no application to a suit in which the plaintiff is a minor. The acts of a guardian in the conduct of a suit must be upheld unless it is shown that his acts were unreasonable or improper. Therefore the minor is bound by the acts of his next friend unless he can show that his next friend was guilty of gross negligence. It was never alleged that the next friend was thus guilty in omitting to include the property in the first suit. Mere omission to include a piece of property in a suit by next friend is not *per se* negligence nor it can be considered to be gross negligence. Thus the second suit was barred by Order 2 rule 2 of Civil Procedure Code.

Held also, that as both the suits were filed after the death of the widow and on the basis of the title to the property as heir of the last male holder, therefore the cause of action in the two suits is the same, and Order 2 rule 2 will bar the second suit.

Gopal Rao v. Narsinga Rao and others (1), followed; *Iftikhar Hussain Khan v. Beant Singh* (2), relied upon; *Vyankat Awachit Patil and another v. Onkar Nathu Chawdhari and others* (3), *Buta v. Faiz Bakhsh* (4), and *Darbari Lal v. Gobind Saran* (5), considered.

Second Appeal from the decree of *Shri G. C. Bahl*, District Judge, Gurdaspur, dated the 1st August, 1951, affirming that of *Shri Sheo Parshad*, Senior Sub-Judge, Gurdaspur, dated the 4th June, 1951, dismissing the suit with costs throughout.

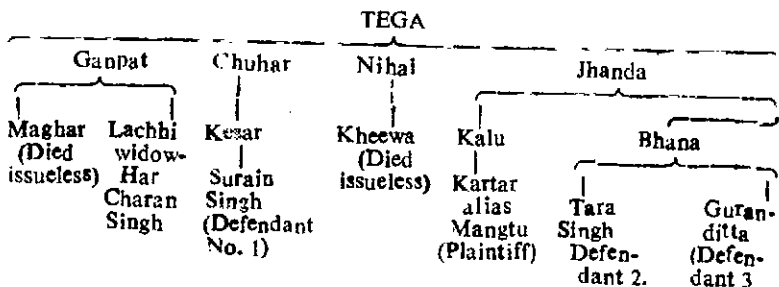
C. L. AGGARWAL, for Appellant.

Y. P. GANDHI, for Respondents.

JUDGMENT

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BISHAN NARAIN, J. The pedigree table of the parties to this litigation is—



The present dispute relates to the succession to the property left by Harcharan Singh. He owned considerable properties including the property now in dispute. On his death his widow succeeded to the property. She gifted a portion of her husband's estate to Surain Singh on the 28th October 1935 and the remaining portion was

- (1) I.L.R. 22 Mad. 309
- (2) A.I.R. 1946 Lah. 233
- (3) 61 I.C. 278
- (4) 76 P.R. 1893
- (5) I.L.R. 46 All. 822

donated to Surain Singh on 25th September, 1944. Mst. Lachhi, widow of Harcharan Singh, died on 29th April, 1945, and on 6th August, 1945, Tara Singh, Guranditta and Kartar minor through his next friend Tara Singh filed a suit against Surain Singh for possession of the entire property left by Harcharan Singh excluding the property now in dispute. It will be noticed that the interests of these three plaintiffs in that suit were identical. The parties to that suit compromised on 7th December, 1945, after obtaining the permission of the Court under Order XXXII rule 7. Civil Procedure Code, and under that compromise portion of the property then in dispute as well as the property now in dispute was left with Surain Singh and the remaining property was taken by the then plaintiffs including Kartar. As regards the property which was gifted to Surain Singh in 1935, the compromise deed recited that the suit did not relate to it and that Surain Singh will continue its owner as before. Kartar then filed the present suit on 17th August, 1950 for possession of his one-fourth share in the property which was given to Surain Singh in 1935 on the ground that under custom he is entitled to possession of one-fourth share in that property as reversioner of Harcharan Singh. It was also mentioned in the plaint that the defendant alleged that he was a donee from Mst. Lachhi, but Mst. Lachhi had no right to gift away the property. It was also alleged in the plaint that even if the property was given to Surain Singh under the compromise mentioned above, the next friend had no right to give up his share in the property as at that time Kartar was a major and not a minor and the plaintiff also alleged that in any case his next friend did not look after his interests properly when he compromised the matter, The defendant Surain Singh raised various pleas in

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defence including the plea that Kartar was minor in 1945 and as the plaintiff omitted in the previous suit to claim this property he cannot do so now under Order II rule 2, Civil Procedure Code. The trial Court held that the plaintiff was entitled to succeed to one-fourth share in the property and the widow had no right to make a gift thereof, but the suit was dismissed on the findings that at the time of the previous suit Kartar was a minor and the suit was barred under Order II rule 2, Civil Procedure Code. On plaintiff's appeal the District Judge upheld all the findings of the trial Court and dismissed the appeal. The plaintiff has come to this Court in second appeal.

The finding of both the lower Courts that Kartar was a minor at the time of the previous suit is a finding of fact and cannot be interfered with in second appeal. Therefore the only point that requires consideration is whether a suit by a next friend of a minor omitting part of the property will debar the minor from suing for the omitted property subsequently.

The present suit is for possession of the property as heir of Harcharan Singh and according to the plaint the cause of action accrued to the plaintiff on the death of Mst. Lachhi in 1945. The plaint, however, proceeds to say that the defendant is alleging that in a previous suit by the plaintiff's next friend rights to this property were relinquished by the plaintiff's next friend but this relinquishment is not binding on the plaintiff as at the time of the suit he was not a minor and that in any case his next friend did not protect his interests properly. It is to be noticed that the plaintiff did not allege that the omission by his next friend to include this property in the previous suit was due to negligence or gross negligence. It is for this reason that no issue in the

present case has been framed regarding negligence of the next friend nor has any evidence been led on this point. The trial Court framed the following issues on this matter :—

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- “5. Whether at the time of the previous suit brought by defendants 2 and 3 and the plaintiff against defendant I, the plaintiff was major and, if so, what is its effect on the present suit ?
6. Whether the suit is barred under Order II, rule 2 and section 11 of the Civil Procedure Code ?”

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It is clear therefore that in the trial Court the plaintiff's case was that he was major at the time of the previous suit and therefore the proceedings in the previous suit as well as the compromise were not binding on him, but the lower Courts have found against him and have held that he was minor at that time.

The first argument of the learned counsel is that Order II, rule 2 of the Civil Procedure Code does not apply to minors. There is, however, no force in this argument. There is nothing in Order II, rule 2 which makes any exception in favour of the minors. Mulla has stated the legal position to be as follows :—

“The provisions of this rule apply to adults as well as minors. Thus, a suit by a minor by his guardian and next friend for rent due for 1903 and 1904 will bar a subsequent suit by the minor on attaining majority, for the rent due for 1901 and 1902. The acts of a guardian in the conduct of a suit must be upheld, unless it is shown that they were unreasonable or improper, or that the minor's interests were not properly safeguarded.”

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Therefore it cannot be said that Order II, rule 2, Civil Procedure Code, has no application to a suit in which the plaintiff is a minor. The acts of a guardian in the conduct of a suit must be upheld unless it is shown that his acts were unreasonable or improper (vide *Gopal Rao v. Narsinga Rao and others*, (1)). Therefore the minor is bound by the acts of his next friend unless he can show that his next friend was guilty of gross negligence (vide *Iftikhar Hussain Khan v. Beant Singh* (2)). As I have already said above in the present suit the plaintiff never alleged that his next friend was guilty of gross negligence in omitting to include this property in the first suit. The argument of the learned counsel that this plea is implicit in the plaint has no force as no issue regarding gross negligence was framed by the trial Court and no objection to its omission to frame an issue was raised before the lower appellate Court or in the grounds of appeal before this Court. It is now too late to raise this issue of fact in second appeal. Mere omission to include a piece of property in a suit by a next friend is not *per se* negligence nor can it be considered to be gross negligence. The next friend may have good reasons for omitting to sue for possession of this piece of property in the previous suit and in this connection there is the circumstance that the interests of Tara Singh and Guranditta were the same as those of Kartar. The decision in *Vyankat Awachit Patil and another v. Onkar Nathu Chawdhari and others* (3), to the effect that when a suit is brought on behalf of a minor by his next friend and the next friend omits by mistake to include in the suit a portion of the property to which the minor is entitled, then the minor can recover that property in a

(1) I.L.R. 22 Mad. 309

(2) A.I.R. 1946 Lah. 233 (F.B.)

(3) 61 I.C. 276

subsequent suit, is of no assistance to the appellant. There are neither pleading nor evidence in this case to the effect that the omission to include this property in the previous suit was due to a mistake committed by the next friend. I am, therefore, of the opinion that the lower appellate Court was correct in holding that the present suit was barred by Order II, rule 2, Civil Procedure Code.

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The main argument advanced by the learned counsel was that the cause of action in the two suits was different and therefore Order II, rule 2, Civil Procedure Code, has no application to this case, but this argument is devoid of any force. If two separate suits had been filed during the lifetime of the widow challenging the widow's gifts, then it may have been said that each gift furnishes separate cause of action and therefore Order II rule 2, Civil Procedure Code, would not be applicable to the second suit. In the present case, however, both the suits were filed after the death of the widow and on the basis of title to the property as heir of last male holder. Therefore, the cause of action in the two suits is the same (vide *Buta v. Faiz Bakhsh*, (1), and *Darbari Lal v. Gobind Saran* (2)).

It was then finally urged that the terms of the previous compromise are not binding on the plaintiff on the ground that the next friend did not protect his ward's interests. The compromise included the entire property left by Harcharan Singh part of which was retained by the donee and the rest was received by the reversioners of Harcharan Singh. The next friend was interested equally with the plaintiff in securing the entire property

(1) 76 P.R. 1893

(2) I.L.R. 46 All. 822

Kartar Singh, left by the last male holder. A compromise effected in such circumstances cannot be declared to be not binding on the minor in the absence of any issue or evidence as to whether the next friend was guilty of gross negligence or not. It is, however, not necessary to decide this matter in this suit as it must fail on the simple ground that the property in dispute was not included in the previous suit and, therefore, Order II, rule 2, Civil Procedure Code, bars the plaintiff from claiming this property in the present suit.

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For the reasons given above, I see no force in this appeal and I dismiss it with costs.