

PETITIONER:

SMT. KAMESHWARI DEVI @ KALESHWARI DEVI & ORS.

Vs.

RESPONDENT:

SMT. BARHANI (DEAD) BY LRS. & ORS.

DATE OF JUDGMENT: 20/02/1997

BENCH:

K. RAMASWAMY, S. SAGHIR AHAMD

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

This appeal by special leave arises from the judgment of the Patna High Court, made on February 25, 1986 in Appeal from Appellate Decree No.17 of 1977.

The admitted facts are that one Hulash Kumhar the common ancestor, had two sons, Jitram Kumhar and Gudar Kumhar. The appellants represent the branch of Jetram Kumhar. Bigan was the father of the appellant and his mother was Anandi Kauri. Bigan died in 1957 leaving behind him the original plaintiff. Arujun Mahato and his sisters, defendant Nos. 8-11 and brothers defendant Nos. 13 and 14. One Bajani Kumari, defendant No.1 in the present suit, representing the branch of Gudar Kumhar, filed suit No.178 of 1957 for partition impleading Bigan and five others. The suit for partition was filed on September 20, 1957 and Bigan died before summons were served on him on September 27, 1957. Subsequently, his widow, Anandi Kauri was brought on record as defendant No.1. The appellant was impleaded therein as 4th defendant. Summons ultimately, were taken to this mother as natural guardian. Since she refused to receive the notice, an application was taken out to appoint a court guardian, which accordingly came to be ordered. The court guardian represented the appellant in O.S. No.178/57. The suit was decreed confirming grant of 1/42nd share of each of the branches of Bigan. The appellant, after attaining majority, filed the present suit for setting aside the earlier partition decree in suit No.178/57 did not bind him. The trial Court granted a preliminary decree. But, on appeal, the District Judge reversed that decree and dismissed the suit and in the second appeal the High Court confirmed the same. Thus, this appeal by special leave.

The only controversy in this appeal is : whether the appellant is bound by the decree passed in suit No.178/57. the findings recorded by all the courts are that there was no written statement filed on behalf of the appellant in suit No.178/57. The thrust of the case set up by the appellant is that the Phatbandi, Ex.C, does not bind him and the parties and the interest of the estate of the appellant as a minor was not properly safeguarded in that behalf in suit No.178/57. It is an undisputed fact that Phatbandi was

a registered document of the year 1920 by which time even the plaintiff was not born. It is the common case of the parties of the branch of Bigan in the suit No.178/57 that it was a nominal document with a view to defraud the creditors and was not acted upon. The controversy was gone into upto the High Court in the earlier litigation in details and ultimately the finding recorded was that it was a valid document in the nature of a partition and was acted upon. that finding had become final. The question is: whether the estate of the minor was properly represented in suit No.178/57?

It is true, as rightly contended by Dr. Shankar Ghosh, learned senior counsel that in a case where the estate of the minor is involved in an action for partition or any other suit, the estate of the minor is required to be properly represented taking all diligent steps by either guardian ad litem or the court guardian. If the interest of the estate of the minor are not protected, necessarily, the minor on his attaining majority or within three years thereafter is entitled to file the suit under Section 7 of the Limitation Act, after cessation of the disability to question the correctness of a decree which is sought to be made binding on him. But in that case, the limited defence that could be open to him is that either the decree in the earlier suit was obtained by fraud/collusion or by negligence by the court guardian or that the guardian ad litem did not safeguard the interest of the estate of the minor. On proof of those facts, necessarily, the decree does not bind him and it is open to the court to go behind the decree and consider the right of the minor de hors the decree. But, in this case, whether that question arises for decision is to be seen. It is true, as found by all the court, that the document, Ex. C, Phatbandi was a document marked as D/2 in suit No.178/57. The sheet anchor, in that suit, the defence open to all the parties on the document was that it was not a genuine document and was brought into existence only to defraud the creditors. that question was common to the interest of all the person including the minor. The parties had hotly contested the suit and the matter was carried upto the High Court and the High Court had considered it and recorded the finding that it was true, valid and binding deed being registered partition deed and was acted upon; and it bound the parties. Under these circumstances, though the court guardian had not filed any separate written statement, it makes little difference on the facts in this case for the reason that the defence on Ex.C was common to all and the estate of the minor was sufficiently represented by appointment of the court guardian and that court had, in fact, gone into that question. It binds the appellant and operates as res judicata. If it were a case de hors the document and any other independent right was available and not set up nor considered in the earlier suit, necessarily that question could be gone into in the present suit since that was not pleaded by filing any written statement or contested by the court guardian in that behalf. No other plea was raised in this suit. Under these circumstance, the finding that Phatbandi, Ex.C binds the parties including the appellant is a finding validly recorded.

Equally, the finding recorded by the appellate Court and confirmed by the High Court that the court guardian had acted neither negligently nor fraudulently also is well justified on the facts and circumstances in this case. Ex.C.2 operates as res judicata and binds the appellant. The 'appeal, therefore, warrants nor interference.

The appeal is accordingly dismissed. No costs.

JUDIS