CIVIL RULE.

Before Mr. Justice Mitra and Mr. Justice Caspersz.

1908
March 27.

HARIHAR PERSHAD SINGH
v.
MATHURA LAL.*

Civil Procedure Code (Act XIV of 1882) s. 461—Joint Mitakshara family—Minor—Next friend—Minor's money in Court—Managing member of Mitakshara family—Withdrawal of money from Court.

The managing member of a joint Hindu family governed by the Mitakshara school, who is also appointed guardian *ad litem* of his minor brother for the purpose of a rent suit, in which both the brothers obtained a decree for arrears of rent against their tenant, is exempt from the restrictions imposed by s. 461 of the Civil Procedure Code.

Sham Kuar v. *Mohanunda Sahoy*(1), *Appovier* v. *Rama Subba Aiyan*(2), *Garib-ulla* v. *Khalak Singh*(3) and *Kathusheri Pisharath* v. *Vallotil Manakel Narayanan*(4), referred to.

RULE granted to the plaintiffs, Harihar Pershad Singh and another.

Harihar Pershad Singh, who with his minor brother, Bhaskar Persad Singh, formed a joint family governed by the Mitakshara system of Hindu Law, instituted a suit for rent in the Court of the Munsif at Arrah; Bhaskar Pershad was represented in this suit by his said brother, as next friend.

A decree for rent was made and the tenant-defendant deposited the decretal amount in Court. An application for the withdrawal of the money was made, which was refused by the Munsif, on the ground that no order for payment could be made, until the next friend of the minor had complied with the provisions of s. 461 of the Civil Procedure Code. An appeal was

* Civil Rule No. 2 of 1908.

(1) (1891) I. L. R. 19 Calc. 301.
(2) (1866) 11 Moo. I. A. 75.
(3) (1903) I. L. R. 25 All. 407; L. R. 30 I. A. 165.
(4) (1881) I. L. R. 3 Mad. 234.

1908

HARIHAR PERSHAD SINGH v. MATHURA LAL.

preferred to the District Judge of Shahabad, but no appeal lay to him and he referred the matter to the High Court in its administrative capacity for directions in the following terms:—

"The appellant is the managing member of a joint Hindu family, under the Mitakshara law. As such he obtained a rent decree, and the amount due under the decree was deposited in Court by the judgment-debtor and the appellant applied to withdraw the money. The appellant has a minor brother, joint with himself. The Court held that under section 461 of the Civil Procedure Code the appellant must give security for the minor's share of the money. The appellant contends that this view is wrong.

The question has arisen between the Court and the appellant. I do not think any appeal lies, neither does section 617 of the Civil Procedure Code apply, as I am not now hearing a suit or appeal nor is the executive proceeding judicially before me.

But the question raised is of very great practical importance, and is a question as to the proper way of conducting office business, rather than one, in which a judicial decision between parties is involved. The Court has money in deposit due to a joint Hindoo family, and the question is, whether it should take security, before making over the money, if there are minors in the family. In my opinion it is clear that the money should be made over to the managing member of the family, without security being taken. The money belongs to the family, as a corporation. No part of it belongs specially to a particular member, whether a minor or not. Technically, therefore, section 461 does not apply. At the same time, as a practical matter, its application is open to most serious objections. In the great majority of Hindu joint families there are some minors, often many, and the utmost inconvenience would be caused if, whenever there were any minors in the family, the *Karta* were obliged to give security before being allowed to withdraw from Court the decretal amounts of rent decrees, etc.

Legal and practical considerations require that the *Karta* should not be required to give security. The matter is practically one for the conduct of Government office business.

In my opinion there should be an authoritative decision, such as the orders in the High Court rules, that section 461 does not require a Court to take security from the managing member of a joint Hindu family, though the member of the family be not all majors."

The High Court declined to determine in its administrative capacity the correctness or otherwise of a judicial order, and suggested that the party aggrieved by the order of the Munsif should be informed that he, if so advised, should move the High Court under s. 622 of the Civil Procedure Code or such other law as might be applicable.

The plaintiff thereupon moved the High Court and obtained this Rule.

1908

HARIHAR PERSHAD SINGH v. MATHURA LAL.

Babu Jogendra Nath Ghose, for the petitioners.

No one appeared to show cause.

MITRA J. Harihar Persad Singh and Bhaskar Persad Singh are brothers, members of a joint family governed by the Mitakshara system of Hindu law. Harihar Persad is an adult and is the managing member; Bhaskar Persad is a minor. The brothers instituted a suit for rent against one of their tenants in the Court of the Munsif at Arrah, Bhaskar Persad being represented in the suit by his brother as next friend. They obtained a decree for rent and the tenant defendant deposited the amount of the decree in court to their credit. Thereafter, they applied for the withdrawal of the amount, but the Munsif declined to make an order for payment, on the ground that no order for payment could be made, until the next friend of the minor plaintiff had complied with the provisions of section 461 of the Code of Civil Procedure by obtaining leave of the Court to receive the money and by filing a security-bond for the protection of the minor's interest.

The order of the Munsif was appealed from to the District Judge of Shahabad; but no appeal lay to him and he referred the matter to this Court in its administrative capacity for directions in this case and in similar cases, which are of constant occurrence. The Court, however, declined in its administrative capacity to determine the correctness or otherwise of a judicial order and to give any general directions.

The present application was made under section 622 of the Code for revision of the order of the Munsif and a rule was issued. No cause has been shown.

Harihar Persad is the managing member of the joint family, and he represents it; and though, according to the rules of procedure in this Province, his minor brother is a necessary party in suits for rent, and was properly added as a co-plaintiff in the present suit, his absence from it as a party would not, according to the well established principle of Hindu law regarding joint families, detract from the right of the managing member, the

1908

HARIHAR PERSHAD SINGH v. MATHURA LAL.

MITRA J.

accredited agent of the family, to do all acts beneficial to and necessary for the family, including the withdrawal of money deposited in Court to its credit. The introduction of the infant member of the family, under the representation of the managing member as a next friend, was merely formal, a matter of procedure and was not necessary so far as substantive rights were concerned.

The legal constitution under Hindu Law of a joint family governed by the Mitakshara system is such that a co-parcener has no defined share in the family property; the co-parceners are in the nature of a body corporate with joint rights, followed on the death of a member by survivorship. The interest of a co-parcener is not capable of definition, it being under constant liability to variation on the birth of a new member or the death of an existing member. In the case of the birth of a male member, he acquires an interest at once by birth, and supposing money were deposited in Court to the credit of the family represented at the date of the decree in a suit by the then living members, the new member would at once acquire an interest in it, thus decreasing the definable shares of the other co-parceners. On the other hand, the death of a co-parcener increases the definable shares. Such variations, however, are not due to legal representation in the sense that these words are ordinarily used, but owing to the rule of survivorship.

The fact that a minor member has no defined share, that it cannot be said at any time before partition what is the precise interest of a minor plaintiff in money deposited in Court, when he has sued with the adult managing member, takes the case out of the purview of section 461. That section was not framed with an eye to the peculiar constitution of joint Hindu families. The minor plaintiff's share in the amount deposited in Court being undetermined, the bond would have to be, if any were, executed, for an indefinite amount; but such a contingency, as also, the execution of the bond itself for the benefit of a co-parcener, are opposed to the spirit and language of section 461. It would appear that in framing section 461, attention was not given to the peculiar constitution of joint Hindu families governed by the Mitakshara school.

In *Sham Kuar* v. *Mohanunda Sahoy*(1) the Court held that a guardian under Act VIII of 1890 cannot be appointed of the property of a minor, who is a member of a joint Hindu family governed by the Mitakshara law and possessed of no separate estate, the reason of the decision being that the introduction of a guardian of a share, which is unascertained and unspecified, would tend to disorganise the family and bring about a separation without a partition. The foundations, on which families governed by the Mitakshara system rest, as laid down in *Appovier* v. *Rama Subba Aiyan*(2), would be competely shaken, if the rules of procedure and practice intended to apply to persons and their rights and liabilities of an altogether different character, were made applicable to the co-parceners of such families. The same principle was applied in *Garib-ullah* v. *Khalak Singh*(3) by the Judicial Committee of the Privy Council to a mortgage executed by the *karta* of a joint family governed by the Mitakshara system of Hindu Law for himself and a minor co-parcener, notwithstanding that a guardian of the minor had been appointed by the Court. The Privy Council ignored the status of the guardian appointed by Court and upheld a mortgage executed without the permission of the Court.

We, therefore, make the Rule absolute and set aside the order of the Munsif and direct him to pass a payment order as asked for by the petitioners.

CASPERSZ J. The question for our decision in this Rule is, whether the managing member of a joint Hindu family, governed by the Mitakshara, who was appointed the guardian *ad litem* of his minor brother for the purpose of a rent suit, in which both the brothers obtained a decree for arrears of rent against their tenant, is exempt from the restrictions imposed by section 461 of the Code of Civil Procedure.

Section 461 (2) of the Code runs thus:—"Where the next friend or guardian for the suit has not been appointed or declared by competent authority to be guardian of the property of the minor, or, having been so appointed or declared, is under any

(1) (1891) I. L. R. 19 Calc. 301.
(2) (1866) 11 Moo. I. A. 75.
(3) (1903) I. L. R. 25 All. 407; L. R. 30 I. A. 165.

1908

HARIHAR PERSHAD SINGH v. MATHURA LAL

CASPERSZ J.

disability known to the Court to receive the money or other moveable property, the Court shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application."

The object of the section is to protect property received by guardians *ad litem* on behalf of the minors they represent. There is nothing in the words of the section from which any exception may be deduced. The language used is general and applicable to every case where property is received by a mere guardian *ad litem* on behalf of a minor. To read an exemption into the section must, therefore, be justified only by the clearest necessity.

Now, the facts, upon which this Rule has to be decided, are such as are contemplated by the section. The adult plaintiff, who was the manager of the joint family, was never appointed or declared to be the guardian of his minor brother's property under the Guardians and Wards Act, VIII of 1890. But he could not be so appointed, because, as is now settled law, the interest of the minor co-plaintiff is not *individual* property at all. It may be said that, if the adult plaintiff represented the joint family, the addition of his minor brother, as a co-plaintiff, was either unnecessary or intended to imply that the minor had some separate interest in the arrears of rent to recover which was the object of the suit. It is, however, too late to contend that, according to strict principles of Hindu Law, the managing member of a Mitakshara family can sue without joining the other members as parties to the suit: see *Kathusheri Pisharath* v. *Vallotil Manakel Narayanan*(1). There may be cases in which a manager alone can sue to recover rent; for example, if he has given a lease in his own name, and the suit is for rent due in terms of the lease. This is not the case here, nor is there anything to indicate that the minor co-plaintiff is possessed of any separate property, which might be the subject of proceedings under Act VIII of 1890.

On principle, also, joint brothers cannot be sureties, one of another, in a Mitakshara family; therefore, the adult plaintiff

(1) (1881) I. L. R. 3 Mad. 234.

1908

HARIHAR PERSHAD SINGH v. MATHURA LAL.

CASPERSZ J.

cannot be called upon to furnish security in respect of money to be received by him on behalf of his minor brother, who was made a co-plaintiff in order to obtain a joint decree for rent. The adult plaintiff represents the joint family, including the minor co-plaintiff: the decretal amount belongs just as much to the joint family as to the minor brother.

It is not necessary to consider the case of mortgage suits or other cases where minor plaintiffs are represented by guardians *ad litem* who are managing members under the Mitakshara system.

For these reasons, I agree that this Rule must be made absolute.

Rule absolute.

S. C. B.