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KASTURI BAI AND ORS.

v.

ANGURI CHAUDHARY

FEBRUARY 5, 2003

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[S.B. SINHA AND AR. LAKSHMANAN, JJ.]

Code of Civil Procedure, 1908:

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Order 32, Rule 15—Appointment of guardian—Suit for partition—Plaintiff filing application for appointment of guardian to defend one of defendant aged 87 years—Application rejected by trial court—Revision—Allowed by Single Judge of High Court—Application for recalling order of Single Judge—Treated as appeal by Division Bench and rejected—Held, High Court, while setting aside order of trial court, could only issue a direction to trial court to hold an inquiry so as to enable it to arrive at a finding as to whether defendant was incapable of protecting her interest by reason of any mental infirmity or not—As no such inquiry was held, Single Judge committed a jurisdictional error in passing the order which the Division Bench upheld—Matter remitted to trial court for consideration strictly in terms of Order 32, rule 15.

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S.115—Order passed by Single Judge of High Court in revision—Application for recalling the order—Treated by Division Bench as appeal and rejected—Held, Division Bench of High Court committed a manifest error in treating the application as an appeal—No intra court appeal lay before a Division Bench as the order was passed by Single Judge in exercise of revisional jurisdiction—Appeal—Intra court appeal.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 818 of 2001.

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From the Judgment and Order dated 11.08.2000 in MCC 482/99 of the High Court of M.P. at Jabalpur.

Gaurav Jain and Ms. Abha Jain, for the Appellants.

B.S. Banthia, for the Respondent.

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The following Order of the Court was delivered

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This appeal is directed against a judgment and order dated 11.8.2000 passed by a Division Bench of the Madhya Pradesh High Court at Jabalpur in MCC. No. 482 of 1999 whereby and whereunder it refused to entertain an application filed by the appellants herein purporting to be under Section 151 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for recalling of an order passed by a learned Single Judge of the said Court dated 5.5.1999 passed in Civil Revision No. 2761 of 1998 which in turn arose out of an order dated 3.11.1998 passed by the Additional District Judge, Shahdol, Madhya Pradesh in Civil Suit No. 2-A of 1993 dismissing an application filed by the respondent herein under Order 32 Rule 15, C.P.C.

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The plaintiff-respondent filed a suit against the appellant herein for partition of certain immovable properties. The appellant No. 1 herein at the relevant point of time was aged 87. Alleging *inter alia* that she had lost her ability to understand and further is not capable to give instructions to her lawyer or anybody else relating to the said suit, a prayer was made by the respondent herein that she be summoned in the Court so as to enable the court to inquire about her state of mind and upon medical examination. If necessary, a guardian be appointed for defending her in the suit.

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The learned trial Judge by reason of the order dated 3.11.1998 dismissed the said application stating

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".... But in the verification para of her affidavit Anguri Chaudhary has verified para 1-3 and 4 of the affidavit on the basis of her personal knowledge and para 2 on the basis of knowledge received from her relations and known persons. But Anguri Chaudhary has neither mentioned the names of her relations and known persons nor disclosed the time and place of receiving the knowledge from them. No explanation has been given for inordinate delay of 49 months in bringing the fact of forged signature of Kasturibai on her written statement filed on 31.8.94. In this case Kasturibai is defendant No. 1 but in I.A. No. 17 and affidavit in support she has been referred as "defendant No.3" and "defendant No. 3 Kasturibai". The affidavit of Anguribai filed in support of IA. No.17 is not reliable in these circumstances. Therefore IA. No. 17 is dismissed."

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A Questioning the said order, the respondent herein filed a revision application in terms of Section 115 of C.P.C. before the High Court. The said application was marked as Civil Revision No.2761 of 1998. The High Court by reason of its order dated 5.5.1999 allowed the revision application directing

B “..... The applicant/plaintiff has filed the instant Civil Suit against the non-applicants/defendants for partition, possession and rendition of accounts. The non-applicant No. 1 is old lady of 87 years of age and she has developed forgetfulness. Therefore, the applicant had made an application under Order 32 Rule 15. CPC, for appointment of a guardian for defending her in the suit. The appointment of guardian would not cause any prejudice to either parties. The trial Court acted with material irregularity in rejecting the application of the applicant under Order 32, Rule 15 CPC. The impugned order, therefore cannot be sustained. Accordingly it is set aside and in the result, the revision succeeds and is allowed.”

D The appellants herein filed an application for recalling of the said order, *inter alia*, on the ground that notices upon them were not served. Curiously enough, the said application, instead of being placed before the learned Single Judge who had disposed of the civil revision application, was placed before a Division Bench. The Division Bench considered said application to be an appeal against the order of the learned Single Judge and dismissed the same by reason of the impugned order.

F Shri Gaurav Jain, the learned counsel appearing on behalf of the appellants has raised a short question in support of this appeal . The learned counsel would urge that having regard to the provisions contained in Order 32 Rule 15, C.P.C., the learned Single Judge could not have directed that a guardian be appointed for the respondent herein although the learned trial court did not make an inquiry in that behalf as is required in terms of Order 32 Rule 15, C.P.C.

G Shri B.S. Banthia, the learned counsel appearing on behalf of the respondent, on the other hand, would contend that as the appellants herein had not questioned in this appeal the aforementioned Order dated 5.5.1999, this appeal is not maintainable.

H Having heard the learned counsel for the parties, we are of the opinion

that the Division Bench of the High Court committed a manifest error in treating the application for recalling, as an appeal against the order passed by the learned Single Judge. No intra court appeal lay before a Division Bench against the order dated 5.5.1999 as the same was passed by the High Court in exercise of its revisional jurisdiction. A

Shri Jain, therefore, has rightly submitted that the order of the learned Single judge must be held to have merged with the order of the Division Bench. B

Order 32 Rule 15, C.P.C. reads thus:

“15. Rules 1 to 14 (except rule 2A) to apply to persons of unsound mind - Rules 1 to 14 (except rule 2A) shall, so far as may be apply to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interest when suing or being sued.” C D

On a bare perusal of the said provision, it is evident that the Court is empowered to appoint a guardian in the event a person is adjudged to be of unsound mind. It further provides that even if a person is not so adjudged but is found by court on inquiry to be incapable of protecting his or her interest when suing or being sued by reason of any mental infirmity, an appropriate order thereunder can be passed. The respondent did not contend that appellant No. 1 herein is of unsound mind. As noticed hereinbefore, the respondent herself had filed an application before the trial court for holding an inquiry to the effect that she suffers from mental infirmity. E F

The learned trial court refused to do the same and in that view of the matter the High Court, in our opinion, while setting aside the said order could only issue a direction directing the learned trial Judge to hold an inquiry so as to enable it to arrive at a finding as to whether the respondent herein was incapable of protecting her interest by reason of any mental infirmity or not. As no such inquiry was held, there cannot be any doubt whatsoever that the learned Single Judge committed a jurisdictional error in passing the impugned judgment which, the Division Bench as noticed hereinbefore upheld. G

For the reasons aforementioned, the impugned judgments are set aside and the matter is directed to be remitted to the learned trial Judge for H

A consideration of the matter afresh strictly in terms of Order 32 Rule 15 of the Code of Civil Procedure as also in the light of the observations made hereinbefore.

This appeal is, thus, allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

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R.P.

Appeal allowed.