

case. It has been held here that the word 'perfume' has now acquired an extended meaning so as to include anything sweet from smoking incense to fragrance of flowers. The Hon'ble Supreme Court held further as under :

"We are accordingly of the opinion that the word "perfume" in Item No. 37 of the Government notification should be construed in its ordinary sense, i.e. any substance natural or prepared which emits or is capable of emitting an agreeable odour either when burned or by the application of some foreign matter to induce any chemical reaction which results in fragrant odours being released from that substance. If we are right in taking this view dhoop and dhoopbattis manufactured by the respondent fall within the category of "perfume" under item 37 of the Government notification and are liable to tax imposed therein

Entry No. 37 mentioned above was in the following terms "scents and perfums (in English) and Itra tatha sugandhian (in Hindi)". It is, therefore, clear that Dhoop and Aggarbattis would now qualify to be assessed to tax at the enhanced rate of 10 per cent.

(6) In view of the facts stated above, the letters patent appeals are allowed and the judgment of the learned Single Judge is set aside and it is held that the dealers would be liable to payment of sales-tax at the rate of 10 per cent. As a consequence of the letters patent appeal having been allowed, civil Writ Petition No. 821 of 1981 is dismissed, but with no order as to costs.

J.S.T.

Before G. C. Mital, A.C.J. & H. S. Bedi, J.

GURPREET SINGH (MINOR),—Appellant.

versus

CHATTERBHUI GOEL,—Respondent.

Letters Patent Appeal No. 734 of 1983.

29th April, 1991.

Code of Civil Procedure, 1908—O. 32 rls. 3 & 4(3) (as amended in Punjab) & 3A—Suit for specific performance of agreement to sell against minor—Plaintiff did not make application under rl. 3 for appointment of guardian—Person acting on behalf of minor

acts without authority—Prejudice is presumed—Presumption of consent under rl. 4(3) as amended in Punjab cannot arise—Decree passed in suit not maintainable.

Held, that it will be seen from the provisions of O. 32, rl. 3, Civil Procedure Code, that the legislature has advisedly provided special protection for minors and persons of unsound mind as they being unable to look after their own interest, require special care. The inflexible rule therefore is that it is incumbent on the plaintiff suing a minor defendant to file an application in Court for the appointment of a guardian and the subsequent steps that are to be taken are within the purview or province of the Court. We are of the view that if an application is not made as provided by Order 32, rule 3, any guardian who may have acted for the minor, would not be clothed with the requisite authority to act as such. The consent that can be presumed is only if an application has been made, and notice issued to the proposed guardian. (Para 8)

Held further, that non-compliance with the mandatory provisions of O. 32, rls. 3 and 4 of the Code make the decree void and must also presume to have caused prejudice to the appellant. The finding of the learned single Judge on this point is, therefore, reversed. (Para 11)

Appeal under clause X of the Letters Patent against the judgement dated 5th of August, 1983 of Hon'ble Mr. Justice J. M. Tandon, by which his Lordship allowed the appeal of the respondent against the decree dated 18th of January, 1982 by which the trial court had dismissed the suit of the respondent herein.

C. M. No. 12236 of 1988.

Application u/s 151 C.P.C. praying that this Hon'ble Court may be pleased to permit the applicant to let out the premises to some other person so that the applicant does not continue to suffer any further financial loss.

R. S. Bindra, Sr. Advocate with Gurpreet Singh, Advocate, for the Appellants.

H. L. Sarin, Sr. Advocate, for the Respondent.

JUDGMENT

Harjit Singh Bedi, J.

(1) On December 18, 1978, Col. Sukhdev Singh, father of the then minor Gurpreet Singh, moved a petition under section 8 of the Hindu Minority and Guardianship Act, 1956, for the grant of permission for the sale of H. No. 1577, Sector 18-D, Chandigarh,

belonging to the appellant. *Vide* order dated April 11, 1979, this petition was allowed by the Senior Subordinate Judge, Chandigarh and permission was granted to Col. Sukhdev Singh, acting on behalf of the minor to sell the property in question. As a sequel to the permission having been granted, Col. Sukhdev Singh, as guardian of the appellant, entered into an agreement with the respondent on June 4, 1979 for the sale of the house for Rs. 2,85,000. The agreement of sale fixed the schedule of payment as also the date by which the sale deed was to be executed. It appears from the evidence on record that the respondent in order to comply with the conditions of the agreement made arrangements for the payment of the sale price and was willing to have the sale deed executed. It has also come in evidence that Col. Sukhdev Singh, on the other hand seems to have developed some reservation with regard to the proposed sale, with the result that that it could not be executed within the stipulated period.

On July 18, 1979, the respondent filed a suit for permanent injunction against the appellant to restrain him from alienating the house in dispute to a third party as also a criminal complaint for an offence under section 420, Indian Penal Code, against Col. Sukhdev Singh. The trial court, however,—*vide* order dated 31st October, 1979, discharged Col. Sukhdev Singh in the criminal complaint. Against the order of discharge, the respondent filed Criminal Revision No. 1495 of 1979 and during the pendency of the revision petition, the parties on 4th February, 1980 agreed to compromise the dispute. The respondent agreed to pay a sum of Rs. 2,45,000 plus interest on Rs. 1,35,000 as also certain payments toward rent. Col. Sukhdev Singh was also required to obtain the sanction from the Estate Office and to execute the sale deed. Thereafter, the criminal complaint as also the civil suit were agreed to be withdrawn. It appears that once again Col. Sukhdev Singh did not faithfully abide by the terms of the compromise with the result that Crl. Revision No. 1495 of 1979 was ultimately accepted by the High Court,—*vide* order dated February 11, 1980, and the order of the trial court discharging Col. Sukhdev Singh was set aside. Against the order of the High Court, Col. Sukhdev Singh filed Crl. Appeal No. 595 of 1980 before the Supreme Court, which was decided on 2nd September, 1980, and the order of the High Court was set aside and that of the trial Magistrate restored. The respondent was also given the opportunity to file a suit for specific performance of the agreement dated June 4, 1979. The Supreme Court,—*vide* its aforesaid order also directed that the appellant i.e., Gurpreet Singh would return a sum of Rs. 40,000 being the amount of earnest money, which he had received from the respondent.

(2) In response to the suit filed by the respondent pursuant to the order of the Supreme Court, Col. Sukhdev Singh, as guardian of the minor appellant, filed a written statement controverting the allegations made in the plaint. On facts it was stated that the appellant had always been ready and willing to perform his part of the contract and the default had been committed by the respondent Shri C. B. Goel. It was also mentioned that the compromise entered into between the parties during the pendency of Criminal Revision No. 1495 of 1979 could not be adhered to because the income tax clearance certificate was not granted. It was also urged that the agreement to sell dated 4th June, 1979, stood rescinded in view of the compromise arrived at between the parties on 4th February, 1980 and by the order of the Supreme Court dated 2nd September, 1980. Objection as to the maintainability of the suit due to the non-compliance with the provisions of Order 32, Rule 3 of the Code of Civil Procedure was taken. The trial Court, after examining the evidence on record, came to the conclusion that the default in execution of the sale deed had been committed by the appellant and that there had been no novation of the contract as the statement in Court were in the nature of a settlement proposed in the Court at the time of the hearing of the case. The learned trial Court, however, declined to grant the decree to the plaintiff-respondent on the ground that the relief in a suit of a specific performance being discretionary in view of the provisions of section 20 of the Specific Relief Act, it was not incumbent on the Court to grant such a decree. The court held that while granting a decree for specific performance, the interest of the minor was to be kept in view as the primary consideration. It was held that as more than two years had elapsed since the signing of the agreement dated 4th June, 1979, and as the prices of real estate in Delhi had arisen substantially during this period. It was not possible for the minor to purchase any property in Delhi with the amount that he was to receive from the respondent. This finding was based on the fact that while securing the permission to sell the property under section 8 of the Hindu Minority and Guardianship Act, 1959 the court had ordered that some property be purchased for the minor from the sale proceeds.

(3) An additional factor which weighed with the Court while declining the relief of specific performance, was that Col. Sukhdev Singh had not been appointed the guardian for the minor appellant in terms of Order 32, rule 3, Civil Procedure Code, and, as such, Col. Sukhdev Singh was not competent to defend the suit on behalf of the defendant/appellant. On the reasoning adopted by the learned trial Court it was held that the plaintiff-respondent was not

entitled to the decree for specific performance. Dissatisfied with the decree of the trial Court, the respondent preferred an appeal to this Court. The learned single Judge endorsed the findings of the trial Court that the default in complying with the agreement dated 4th June, 1979 had been committed by the appellant-defendant. On the question of the non-compliance with the provisions of Order 32, rule 3, C.P.C. the learned single Judge held that Col. Sukhdev Singh, though not formally appointed as the guardian, had conducted the cases for the appellant effectively and fought the litigation to the best of his ability and with tenacity. It was held that the non-compliance with the aforesaid provisions of the Civil Procedure Code was an irregularity and, as such, was required to be ignored in terms of Order 32, rule 3-A, C.P.C. as no prejudice has been suffered by the appellant. The learned Single Judge also held that the reasons recorded by the trial Court in denying the relief of specific performance were not germane. The learned single Judge allowed the appeal and decreed the suit. Against the decree of the learned single Judge, the present letters patent appeal has been filed.

(4) Mr. R. S. Bindra, learned senior Advocate for the appellant has reiterated the various arguments raised before the learned single Judge. He has argued that on a reading of the evidence, it is clear that the default in execution of the sale-deed lay on the respondent. We have examined this argument and perused the evidence on the record and find that the view taken by the trial Court as also by the learned single Judge on this point is correct and no interference is called for in an appeal under the letters patent.

(5) Mr. Bindra then argued that the original contract stood novated in view of the agreement arrived at in the High Court on 4th February, 1980, and, thereafter in the Supreme Court on 2nd October, 1980. He has also pointed out that during the pendency of the present letters patent appeal yet another compromise had been arrived at between the parties. It appears that the hearing of this LPA first commenced before a Division Bench on January 14, 1987, and continued for a number of days. On January 16, 1987, the counsel for the respondent had not concluded the arguments and the hearing was adjourned to January 28, 1987. On that day the parties took time to explore the possibility of a compromise and the compromise was, in fact, arrived at between the parties. A statement was recorded by Col. Sukhdev Singh agreeing to pay Rs. 2,25,000 to Shri C. B. Goel towards the full and final settlement of the dispute and this statement was duly endorsed by Shri V. K.

Sharma, counsel for the appellant Gurpreet Singh. On this statement having been made, the offer was accepted by Shri C. B. Goel when he made the following statement :

“I accept the offer made by Col. Sukhdev Singh and Shri V. K. Sharma, counsel for the appellant Gurpreet Singh.”

On this the case was adjourned to March 17, 1987, on which date, payment of Rs. 2,25,000 was to be made. It appears however that during this interregnum the respondent changed his mind and decided to resile from the agreement taking advantage of the fact that the compromise had not been recorded in terms of Order 23, rule 3, Civil Procedure Code, which required the compromise to be in writing and signed by the parties. As the compromise had fallen through, the learned Judges constituting the DB directed the matter to be listed for hearing before another Bench. The appellant herein however approached the Supreme Court by way of Civil Appeal No. 2035 of 1987 praying that the statements recorded constituted a valid compromise. The Supreme Court however dismissed the appeal holding that the compromise recorded before the High Court was not valid as it had not been recorded in terms of the mandatory provisions of Order 23, rule 3, Civil Procedure Code.

(6) It will be seen from the above narration of facts that the argument raised by Mr. Bindra has no force as the agreements arrived at on 4th February, 1980, and the subsequent one dated 2nd September, 1980, did not constitute a novation of the contract as these were proposed settlements between the parties in order to settle the dispute and there was no intention of the parties to change or modify any part of the agreement dated 4th June, 1979. This reasoning is also to be applied with regard to the third settlement arrived at before the Letters Patent Bench on 28th January, 1987. The trial court and the learned single Judge have also held that the action of the parties in respect of the earlier two agreements (the third one had not yet come into existence) does not constitute a novation of the contract dated 4th June, 1979. We are in agreement with the trial Court as also with the learned single Judge on this score as well.

(7) Mr. Bindra has additionally contended that the plaint in a suit for specific performance must conform to the *pro formas* set out in Form Nos. 47 and 48 of Appendix 'A' to the Civil Procedure Code, and it has to be specifically pleaded that the plaintiff was ready and willing to perform his part of the contract. He has argued that these averments were lacking in the plaint. We have

gone through the plaint and find that necessary averments have been made in the plaint and, as such, this argument too is misplaced.

(8) The primary attack on behalf of the appellant to the judgment of the learned single Judge however is that as Col. Sukhdev Singh, guardian of the minor appellant, had not been appointed to act as such by complying with the procedure laid down under Order 32, rules 3 and 4, Civil Procedure Code, the suit was therefore not competent and should have been dismissed on that short ground. This argument had been considered and accepted by the trial Court, but the learned single Judge, in appeal upset this finding holding that the appellant was effectively represented in the suit by his father and guardian Col. Sukhdev Singh and the omission of the note to make a formal order of appointment of Col. Sukhdev Singh as *guardian ad litem* had not caused any prejudice to the minor and, as such, the suit was competent. The matter has to be examined in the light of the provisions of Order 32, rules 3 and 4 of the Code of Civil Procedure, which read as under :—

- (1) Where the defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a person to be guardian of 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."

Sub-rule (3) of Rule 4 reads as under :

"No person shall without his consent (in writing) be appointed guardian for the suit, but the Court may presume such consent to have been given unless it is expressly refused".

appellant and, as such, a valid decree could be passed in favour of the plaintiff-respondent. He has placed primary reliance on the Full Bench judgment of this Court reported as *Amrik Singh and another v. Karnail Singh and others* (1). He has also relied upon *Walian v. Banke Behari Pershad Singh* (2), *Bhagabat Sahu v. Parbati Samal* (3) and *Anandram v. Madholal* (4).

(10) We are however of the view that all these authorities are distinguishable on facts and do not support the case of the respondent. In *Amrik Singh's case* (supra) the facts were that Amrik Singh and Vir Singh minor defendants were sued through their real brother Satnam Singh as their guardian. An application was made under Order 32, rule 3, CPC, praying that Satnam Singh aforementioned be appointed as guardian of the minors. It was also mentioned that Ajit Singh brother, Mangal Singh father, Tirath Kaur mother and an officer of the Court were liable to be appointed as guardian of the minors. Satnam Singh refused to act as guardian and thereafter the Court appointed one Madan Gopal Advocate as guardian of the minor defendants. It was in this situation that the Full Bench came to the conclusion that the minors had been effectively represented and no prejudice had been caused to them. The Full Bench observed as under :

“The crux of the matter is that it has to be whether the minor was effectively represented in the litigation. If he was, then the non-compliance with the provisions of Order 32, rule 3, which are mandatory, would not render the decision void. But if the non-compliance has caused prejudice to the minor or he was not effectively represented, the decision will be void, i.e., the minor can either ignore it or avoid it. This approach is in consonance with justice because where the matter had been properly contested and no prejudice has been caused to the minor, it will be sheer injustice to the other side to re-open the matter again. Litigation is a very expensive affair and the general principle of law is that it should not be encouraged. In this view of the matter, so far as the facts of the present case are concerned, there can be no two opinions that the minors were effectively represented and no prejudice has been caused to them. Their

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- (1) AIR 1974 P & H 315.
 - (2) ILR 1903 (Calcutta) 1021.
 - (3) AIR 1982 Orissa 186.
 - (4) AIR 1960 Rajasthan 189.

interests were effectively safeguarded by their brothers, who were co-defendants with them and whose interests were identical."

The reliance placed on *Anandram's case* (supra) is also misplaced. In this case, the minor defendant was effectively represented by his father, who was also one of the defendants and the Court held that no prejudice had been suffered by the minor in the defence of his case. Moreover, in this case the plaintiff had in fact presented an application in the trial Court for the appointment of a guardian *ad litem* and it was the Court which committed the default in not passing a formal order. On this promise it was held that the mere fact that no formal order of appointment of the guardian having been made, would not invalidate the suit.

(11) Mr. Bindra has relied upon a decision of the Calcutta High Court reported as *Nirmal Chandra v. Khandu Ghose* (5), which, in our opinion is similar on facts to the present one. In this case the minors filed a suit seeking a declaration that an *ex parte* rent decree which had been obtained against them was not binding on them as they had not been properly represented in that rent matter. It was argued by the other side that no prejudice had been caused to the minors as they had been represented by their brother. Reliance was also placed by that party on *Mt. Bibi Walian's case* (supra). The Calcutta High Court however held that as no application had been made, as required under Order 32, rule 3 of the Code, no notice issued to the proposed guardian as required by sub-rule 4 of Rule 3 nor the consent in writing taken from the proposed guardian under sub-rule (3) of Rule 4, the mandatory provisions of Order 32, had not been complied with and, as such, the decree in the earlier suit was vitiated. It was also held that *Walian's case* (supra) had interpreted section 443 of the Civil Procedure Code (Act XIV of 1882) and the wording of that section was substantially different from the wording of Order 32, rules 3 and 4. We too, are of the view that the non-compliance with the mandatory provisions of Order 32, rules 3 and 4 of the Code make the decree void and must also presume to have caused prejudice to the appellant. The finding of the learned single Judge on this point is therefore, reversed. On the above premises ordinarily the case would have to be remanded to the trial Court for a fresh decision; but for the reasons recorded in the succeeding paragraphs, we feel that this would not be the appropriate step in the facts and circumstances of this case.

(12) We are of the view that the discretionary relief by way of a decree for specific performance is not liable to be given to the respondent. Reliance in this behalf can be placed on *Ranganayakamma v. Govil Narayan* (6), wherein it has been held that a decree for specific performance will not be given merely because it is lawful to do so, and where there is hardship to the defendant, and no such hardship to the plaintiff, the decree will not follow. The trial Court had given various reasons for declining the decree of specific performance and we reiterate those reasons. Additionally, we find that the respondent had agreed to enter into a compromise before the Letters Patent Bench and had recorded his statement to that effect. However, taking advantage of the fact that the formal compromise had not been recorded in terms of the provisions of Order 23, rule 3 of the Code, the respondent resiled from the proposed compromise. Although the Supreme Court has held that the compromise could not be enforced in view of the non-compliance with the provisions of Order 23, Rule 3 we are of the view that this fact can be taken into account in deciding as to whether a decree for specific performance should in the discretion of the Court be granted to the plaintiff-respondent. We feel that the respondent has forfeited the right to this relief, as he, having agreed to enter into a compromise before the Court had subsequently resiled from it. It is also to be noted that the plaintiff-respondent had prayed for a decree for Rs. 2,50,000 the alternative, in case his suit for specific performance was not decreed. We are also not unmindful of the fact that the conduct of Col. Sukhdev Singh too has not been entirely fair or without blemish.

(13) In the result and for the reasons stated above, we allow the present appeal; set aside the judgment and decree of the learned single Judge and dismiss the suit for grant of decree of specific performance. However, we grant a decree for recovery of Rs. 2,25,000 as damages, with the stipulated that the appellant shall deposit the same with the Register of this Court within a period of six months from the date of this judgment for payment to the respondent. In case the aforesaid amount is not deposited within the time stipulated, the plaintiff-respondent will be entitled to interest at the rate of 6 per cent per annum from the date of filing of the suit till payment. There will, however, be no order as to costs.

(6) AIR 1982 Karnataka 264.

J.S.T.