

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No. 59 of 2014

- Smt. Babita Gupta W/o Dinesh Gupta Aged About 36 Years
R/o M.I.G. C/2336, Industrial Area, Housing Board Bhilai,
Tahsil and District Durg, Chhattisgarh

---- Petitioner

Versus

- Dinesh Gupta S/o Harishchand Gupta Aged About 39 Years
R/o Mahalakshmi Nagar- 48, Ratlam, Distt. Ratlam, Madhya
Pradesh

---- Respondent

For Appellant Shri Jitendra Gupta, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Chandra Bhushan Bajpai

Order On Board By

Prashant Kumar Mishra, J.

08/09/2016

1. This appeal is directed against the decree of judicial separation passed by the Family Court, Durg on 21.01.2014.
2. The appellant preferred an application under Section 13 of the Hindu Marriage Act, 1955 (henceforth 'the Act, 1955') on the pleadings that her marriage was solemnized with the respondent on 09.06.2003. After one and half years of

marriage, the respondent lost his speech and thereafter other organs including the sexual organ became ineffective. At the time of moving the application, the appellant had information that the respondent has become insane. Since they are residing separately for about 8 years prior to the application, decree was sought on the ground of desertion.

3. The respondent was *ex parte* before the trial Court, therefore, the impugned *ex parte* decree has been passed only on the basis of statement of the appellant.
4. When notice on this appeal was sent to the respondent, his father made endorsement on the summons that his son has become insane and is presently admitted in the Mental Asylum at Ratlam. The appellant thereafter moved an application under Order 32 Rule 15 CPC for appointment of next friend before proceeding further in the appeal. The respondent's father received the notice, however, he did not respond to the notice.
5. Considering the averment made by the appellant in para 3 of her application under Section 13 of the Act, 1955 and the endorsement made by the respondent's father in the summons issued from this Court, it appears *prima facie* that the respondent has become insane, however, it is not the appellant's case that the respondent was of unsound mind at the time of marriage so as to raise a ground for declaring

the marriage to be void or voidable.

6. Be that as it may, since it is prima facie apparent that the respondent has become insane after the marriage and such averment has been made in the application itself, but yet neither the appellant moved any application for appointment of next friend or guardian before the trial Court nor the Court itself desired the appellant to move such application, the impugned decree appears to have been passed against a person of unsound mind, who is treated in law to be a minor.
7. Rule 32 of the CPC deals with suits by or against minors and persons of unsound mind. Rule 3 of Order 32 Provides that where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. Sub-rule (5) provides that a person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement or removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any Appellate or Revisional Court and any proceedings in the execution of a decree. Sub-rule (15) of Order 32 provides that Rule 1 to 14 (except Rule 2-A) shall apply to persons of unsound mind. Thus, the provisions contained in sub-rule (1) and sub-rule (5), mentioned above, would apply in the case in hand also.

8. The issue as to the legality of a decree passed against a person of unsound mind without appointing a proper person to be guardian for the suit has been considered by different High Courts as also by the Supreme Court in 'n' number of judgments.
9. In the matter of **Asha Rani v. Amrat Lal**¹, it has been held that where the record of the case did not show that an enquiry of preliminary nature into unsoundness of mind of the party was made or the procedure contained in Rule 3 and 15 of the Code was complied with, the decree passed against person of unsound mind would be void. The case before the Punjab and Haryana High Courts was a proceeding under Section 13 of the Hindu Marriage Act, 1955.
10. In the matter of **Maikoo v. Uma Shankar Bajpai**², the Allahabad High Court held that as in the case of minors, it is the duty of the court to ensure that a proper person is appointed as a guardian for a person of unsound mind who may be a party to a cause before it. It is to ensure appointment of a proper person as guardian for an insane person and the procedure prescribed under O. XXXII of the Civil P.C. for such appointment is to be strictly followed by the court. The lower appellate court ought, in my opinion, to

1 AIR 1977 Punjab & Haryana 28

2 AIR 1978 Allahabad 551

have gone into the question as to whether the trial court adopted proper procedure to ensure the appointment of a fit person as guardian for the appellant or not. It has, admittedly not done so. The case, therefore, deserves to be remanded back to the lower appellate court for considering this question. The Allahabad High Court set aside the decree and remanded the matter back to the trial Court for deciding afresh in accordance with law.

11. Way back a Division Bench of Calcutta High Court in the matter of **Samaresh Chakravarti and another v. Jalpaiguri Banking and Trading Corporation Ltd.**³ held that executability of a decree passed against a lunatic without appointing a guardian for him in the suit, can be raised at the stage of execution. Similar proposition has been settled by Division Bench of Allahabad High Court in the matter of **Bhondur Mal v. Thomas Skinner**⁴. In the said case it is held that in the case of a minor the decree passed against him without the appointment of a guardian is nullity and not binding on him. Hence by analogy the decree passed against a lunatic without the appointment of a guardian is equally a nullity.
12. In the matter of **Ram Chandra Arya v. Man Singh and another**⁵, the Supreme Court has held that decree against

3 AIR 1931 Calcutta 168

4 AIR 1937 Allahabad 29

5 AIR 1968 SC 954

lunatic without appointment of guardian is nullity and sale held in execution of that decree is *void ab initio*.

13. Despite the provisions and despite averment in para 3, the trial Court has not made any effort to appoint next friend, therefore, in our considered opinion, the impugned decree deserves to be set aside having been passed against a minor/person of unsound mind without following the procedure prescribed under Order 32 CPC.
14. The impugned decree is, therefore, set aside and the matter is remitted back to the trial Court for deciding the matter afresh after requiring the appellant to move application under Order 32 Rule 15 CPC, make enquiry about the respondent's mental state, appoint next friend/guardian and thereafter decide the suit in accordance with law. The appellant shall appear before the trial Court on 17.10.2016.
15. Record of the trial Court be sent back forthwith.

Sd/-

Judge

Prashant Kumar Mishra

Sd/-

Judge

Chandra Bhushan Bajpai