

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**Civil Revision No.4185 of 2014 (O&M)
Date of Decision: 27.09.2016**

Anil Kumar Ahuja

.....Petitioner

Vs

Arun Kumar Ahuja and another

.....Respondents

CORAM: *HON'BLE MR. JUSTICE RAJ MOHAN SINGH*

Present: Mr. Pandit Vinod Sharma, Advocate
for the petitioner.

Mr. R.K. Dogra, Advocate
for respondent No.2.

RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed order dated 13.02.2014 passed by Civil Judge (Sr. Divn.) Chandigarh in Civil Misc. No.10 of 16.10.2003 whereby application filed by the petitioner under Order 23 Rule 3 CPC read with Section 151 CPC for recalling of order dated 23.08.2003 passed in Civil Suit No.281 of 1991 titled as Arun Kumar Ahuja vs. Smt. Padmawati Ahuja and Anr. was dismissed being not maintainable.

[2]. Brief facts of the case are that petitioner alleged that respondents are his siblings being sons and daughter of late Dr. J.R.D. Ahuja, who died on 03.05.1996. Mother of the parties

Smt. Padmawati Ahuja died on 19.02.2009. Respondent No.1 is the eldest son and petitioner is the youngest son of late Dr. J.R.D. Ahuja. Respondent No.2 is the daughter in between petitioner and respondent No.1. Respondent No.1 filed Civil Suit No.281 of 1991 against his mother Smt. Padmawati Ahuja and father Dr. J.R.D. Ahuja for declaration by challenging the judgment and decree dated 22.01.1987 passed by the SJIC, Chandigarh in Civil Suit No.142 of 1986 titled as Mrs. Padmawati Ahuja vs. Arun Kumar Ahuja and Anr. vide which Smt. Padmawati Ahuja was declared to be absolute owner in possession of the property mentioned in the suit. Respondent No.1 herein was restrained from alienating and creating any encumbrance over the suit property. In the said suit i.e. Civil Suit No.281 of 1991, neither the petitioner, nor respondent No.2 were impleaded as party-defendants. Respondent No.2 got herself impleaded in the said suit on 23.08.2003. Trial Court decided the said suit on the basis of compromise, whereby 70% share in the property was taken by respondent No.1 and remaining 30% share was taken by the respondent No.2.

[3]. On coming to know about the aforesaid decision in the said suit, petitioner filed Civil Misc. No.10 of 16.10.2003 under Order 23 Rule 3/3-A CPC for recalling of the order dated 23.08.2003 and for restoration of the suit on the ground that

Smt. Padmawati Ahuja was totally incapacitated and was confined to bed being patient suffering from 'Multi-Infract Dementia' i.e. mental disorder having impairment of loss of intellectual capacity and personality integrity marked by memory failure, personality changes, impaired reasoning and mental deterioration due to dead and dying of large multitude of brain cells. Smt. Padmawati Ahuja became totally deaf and incoherent in vital faculties of body and mind. She was being treated in Government Medical College and Hospital, Sector 32 Chandigarh and Chhutani Medical Centre, Sector 17, Chandigarh.

[4]. Petitioner further alleged that the application was filed promptly on 16.10.2003 on coming to know about the alleged compromise and the application was accompanied by medical records and certificates showing incapacity of Smt. Padmawati Ahuja on account of severe 'Multi-Infract Dementia'. Another application of even date was also moved under Order 32 Rules 3 and 15 read with Section 151 CPC for appointment of guardian *ad-litem* of Smt. Padmawati Ahuja. A prayer was also made before the trial Court by moving an application under Section 151 CPC on 19.03.2004 for constitution of a medical board for assessing the mental and physical condition of Smt. Padmawati Ahuja after thorough examination. It was also

alleged by the petitioner that notice of Civil Misc.No.10 of 16.10.2003 was duly served upon respondent Nos.1 and 2 and also on Smt. Padmawati Ahuja. Respondent No.1 had appeared in the said application, who asserted that Smt. Padmawati Ahuja was mentally fit. Smt. Padmawati Ahuja did not appear in the trial Court, nor filed any reply to the applications filed by the petitioner. However the respondents brought Smt. Padmawati Ahuja before the trial Court on 19.03.2004 on a wheelchair against all medical advice and they sought to get the statement of Smt. Padmawati Ahuja recorded in their favour.

[5]. The Presiding Officer in order to satisfy himself about the mental condition of Smt. Padmawati Ahuja put certain questions to her in his Chamber. The inventory of questions and answers were to the following effect:-

“Arun Kumar vs. Padmawati”

Statement of Mrs. Padmawati Ahuja.

Q: *What is your name?*

A: *My name is Mrs. Padmawati Ahuja.*

Q: *What is name of your husband?*

A: *Dr. Jai Ram Dass Ahuja was my husband.*

Q: *In which Department you were working?*

A: *I was working in Education Department Haryana as I opted for Haryana. I was working in head office.*

Q: *When you were retired from service?*

A: *I do not remember when I retired from service. But I retired many years ago.*

Q: *Do you know with whom you have property dispute?*

A: *At present there is no property dispute pending. I do not remember whether there was any property dispute between me and any other person.*

Q: *For what purpose have you come today?*

A: *I do not know for what purpose I have come here today.*

Q: *Have you ever come to Court at earlier date?*

A: *I have never come to the Court earlier.*

Q: *Have you entered into any compromise with anyone regarding the house in which you are living?*

A: *No I have not entered into any compromise with anyone.*

RO & AC

Sd/-
(P.J.R.D. Ahuja)
19.3.2004

Sd/-
(C.J. Sr. Div.)
Chd. 19.3.2004”

[6]. After putting the aforesaid questions and receiving the answers from Smt. Padmawati Ahuja, the Presiding Officer passed the following order on 19.03.2004 itself:-

“Today Smt. Padmawati has been brought by Dr. Arun Kumar for recording her statement. In the presence of Naveen Malik and in the presence of Jagvir Sharma, learned counsel for the parties certain questions have been asked to Smt. Padmawati but she has not given proper reply. As such, from the reply given by Smt. Padmawati to

the questions put to her it can be concluded that she is not in a proper condition to record her statement as desired by Dr. Arun Kumar Ahuja. Moreover, Sh. Anil Kumar Ahuja, another son of Smt. Padmawati moved application under Section 151 CPC for constitution of medical Board for reporting on the complete physical and mental condition of Smt. Padmawati. Copy of said application supplied. Now for filing reply and consideration to come up on 30.4.2004.”

[7]. Petitioner asserted that subsequently i.e. after the petitioner had left the Court after culmination of proceedings, respondents compelled Smt. Padmawati Ahuja to give another statement in their favour in the open Court. At the back of the petitioner and on account of inducement of withdrawing criminal cases pending against her, the following statement was procured from Smt. Padmawati Ahuja on 19.03.2004:-

“At this stage, Smt. Padmawati orally stated that she has entered into a compromise with her sweet will and a criminal case be withdrawn. To come upon 30.4.2004 for reply and consideration.”

The recital of the aforementioned statement was to the effect that Smt. Padmawati Ahuja had entered into a compromise with a rider that criminal cases be withdrawn.

[8]. The trial Court did not decide the application under Order 23 Rule 3/3-A CPC, application under Order 32 Rules 3 and 15 read with Section 151 CPC and application under

Section 151 CPC during lifetime of Smt. Padmawati Ahuja, who ultimately died on 19.02.2009. After the death of Smt. Padmawati Ahuja, an application under Order 22 Rules 4 and 10 CPC was filed by the petitioner on 18.12.2009 on the basis of registered holographic Will and codicil dated 17.04.1996.

[9]. Learned counsel for the petitioner submitted that neither any reply to application under Order 32 Rules 3 and 15 CPC was filed, nor reply to the application under Section 151 CPC for constitution of medical board for examination of Smt. Padmawati Ahuja was filed by the respondents. These applications were not decided by the trial Court. Impugned order was passed by the trial Court on 13.02.2014 on the point of maintainability of an application under Order 23 Rule 3/3-A read with Section 151 CPC. Trial Court decided the point of maintainability against the petitioner on the premise that the application can only be maintained by a party to the compromise in view of bar created under Order 23 Rule 3/3-A CPC. A bar against filing of fresh suit was applicable only against the party to the compromise and was not against the person, who was not party to the compromise. Since Smt. Padmawati Ahuja herself did not come forward to challenge the compromise dated 24.07.2003 and compromise decree dated 23.08.2003, therefore, trial Court dismissed the application being not

maintainable. Trial Court also observed that the petitioner could not place on record any order to show that he was ever appointed as guardian/next friend of Smt. Padmawati Ahuja to watch her interests, nor the petitioner could demonstrate that she was ever adjudged to be of unsound mind. Taking note of the aforesaid facts, the application was held to be not maintainable.

[10]. Learned counsel for the petitioner vehemently submitted that application for the appointment of guardian/next friend of Smt. Padmawati Ahuja was filed before the trial Court on the same day i.e. 16.10.2003, when application under Order 23 Rule 3/3-A CPC was filed before the trial Court. Vide application dated 19.03.2004, a prayer was also made before the trial Court for examination of Smt. Padmawati Ahuja by the medical board comprising of expert Physician, Psychiatrist, Cardiologist, Orthopedist and by any other expert which the medical board might have recommended. No orders were passed by the trial Court during lifetime of Smt. Padmawati Ahuja. Under order 32 Rules 3 and 15 read with Section 151 CPC, the issue of unsoundness of mind was primarily between the court and the party. The aforementioned issue was not the part of *lis* between the parties. Under Order 32 Rule 15 CPC, the onerous duty was upon the trial Court to hold an inquiry in

order to reach at a definite conclusion that the allegations of unsoundness of mind of Smt. Padmawati Ahuja were well founded or not? The trial Court should have satisfied itself on the basis of any material including the examination of Smt. Padmawati Ahuja alleged to be of unsound mind. The trial Court should have taken assistance from the medical board or experts for determination of allegations of unsoundness of mind of Smt. Padmawati Ahuja.

[11]. Learned counsel for the petitioner further contended that the trial Court proceeded on the presumption that Smt. Padmawati Ahuja was not of unsound mind despite recording positive satisfaction in the order dated 19.03.2004. It was obligatory on the part of the trial Court to decided the said application i.e. under Order 32 Rules 3 and 15 read with Section 151 CPC. Learned counsel placed reliance upon **Sunil Sardana vs. Renu Rawal, 2008(2) Civil Court Cases 179** to supplement his arguments.

[12]. Learned counsel for the petitioner further argued that once the factum of unsoundness of mind of Smt. Padmawati Ahuja was brought to the notice of the trial Court, it was the duty of the trial Court to decide whether the appointment of guardian was necessary in the facts and circumstances of the case. The

trial Court was mandatorily required to give findings on the said aspect i.e. whether the person alleged to be incapable of protecting his or her interest was required to be represented by a guardian in the litigation or not? The lapse on the part of the trial Court to discharge its bounden duty would amount to non-compliance of mandatory provision as enshrined under Order 31 Rule 15 CPC. By relying upon **L. Hemalatha vs. N.P. Jayakumar, 2008(3) Civil Court Cases 495 (Madras) (DB)**, learned counsel emphasized that the issue of maintainability of application under Order 23 Rule 3/3-A should not have been decided without adverting to the application moved by the petitioner under Order 32 Rules 3 and 15 CPC.

[13]. On the other hand, learned counsel for the respondent No.2 submitted that the petitioner was not party to the *lis*, and, therefore petitioner cannot maintain the application under Order 23 Rule 3/3-A CPC. Though all issues are to be decided in the same suit, but at the instance of the party to the *lis*. If, the petitioner alleges fraud and mis-representation, he could have maintained an independent suit based on fraud. The power to challenge the compromise decree in an independent suit is applicable to the party to the *lis*. This bar does not apply to a person, who was not party to the suit. Learned counsel relied upon **Suresh vs. Smt. Mariyah and another, AIR 2009 P&H**

182; Ramkrishna Shridhar Choube vs. Court Receiver and others, 2011(2) Civil Court Cases 201 (Bombay) and Smt. Suraj Kumari vs. District Judge, Mirzapur and ors., AIR 1999 Allahabad 75 to supplement his arguments.

[14]. I have given thoughtful consideration to the present controversy before this Court.

[15]. Both the parties have tried to argue the case on merits beyond the scope of litigation involved herein. I refrain myself from considering any *lis* which is beyond the scope of consideration in the present revision petition. In the present case, the trial Court has held that the application under Order 23 Rule 3/3-A CPC was not maintainable at the instance of the petitioner. Apparently, an application under Order 32 Rules 3 and 15 read with Section 151 CPC was filed before the trial Court on 16.10.2003 itself. Another application under Section 151 CPC for constitution of medical board for the purposes of assessing incapacity of Smt. Padmawati Ahuja was also moved before the trial Court. Both the applications remained undecided despite issuance of notices of the same. Had the trial Court decided those applications, the entitlement of the parties in both the eventualities would have come to fore. The application under Order 23 Rule 3/3-A CPC was submitted by the petitioner

accompanied by medical records of Smt. Padmawati Ahuja. At one point of time, even the trial Court showed indulgence by extracting answers from Smt. Padmawati Ahuja by putting questions. Despite material on record, the trial Court did not proceed to decide the application during lifetime of Smt. Padmawati Ahuja, nor the application under Order 22 Rules 4 and 10 CPC was decided by the trial Court which was filed by the petitioner on the basis of registered holographic Will and codicil dated 17.04.1996.

[16]. In my considered view, trial Court should have decided the aforesaid applications before adverting to hold that the application under Order 23 Rule 3/3-A CPC was not maintainable. At this stage, I am not in a position to subscribe the view taken by the trial Court in respect of maintainability of the application in question. The trial Court was duty bound to decide the application under Order 32 Rules 3 and 15 read with Section 151 CPC before deciding the application in question. While deciding the question of incapacity of Smt. Padmawati Ahuja to act in judicial proceedings, the trial Court could have resorted to any expert opinion based on medical record of Smt. Padmawati Ahuja and she could have been examined further by the trial Court in addition to the examination on 19.03.2004.

[17]. After the death of Smt. Padmawati Ahuja, the trial Court was also bound to decide the application under Order 22 Rules 4 and 10 CPC. By not doing so, the trial Court virtually allowed the inheritance based on same documents to be remained in abeyance as per the case of the petitioner. In entirety, it can be observed that the order dated 13.02.2014 passed by the trial Court, holding the application under Order 23 Rule 3/3-A CPC to be not maintainable, is not legally sustainable. The issue of non-maintainability of application should have been deferred till the decision of application under Order 32 Rules 3 and 15 read with Section 151 CPC and application under Order 22 Rules 4 and 10 CPC on merits.

[18]. In view of aforesaid, the impugned order is set aside. Trial Court is directed to decide the application under Order 32 Rules 3 and 15 read with Section 151 CPC and application under Order 22 Rules 4 and 10 CPC before deciding the application under Order 23 Rule 3/3-A CPC afresh on merits. The revision petition is accordingly disposed of. The case is remanded back to the trial Court in the light of observations made hereinabove.

[19]. Since Smt. Padmawati Ahuja has already been expired, it may not be feasible for the trial Court to examine her in

person, nor it would be feasible to appoint any guardian/next friend at this stage, but the trial Court can certainly express its opinion with regard to existence of grounds for appointing guardian at the relevant time and legal entitlement of the petitioner to be impleaded as legal representative.

September 27, 2016
Atik

(RAJ MOHAN SINGH)
JUDGE

Whether speaking/reasoned	Yes / No
Whether reportable	Yes / No