

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.6989 OF 2016

Sushma w/o Umesh Kanpathak,
Age-30 years, Occu-Household,
R/o- C/o Vasantrao B.Chandajkar,
Gurudev Niwas, Adarsha Nagar,
Partur, Tq.Partur, Dist.Jalna

-- PETITIONER

VERSUS

Umesh s/o Vijayrao Kanpathak,
Age-32 years, Occu-Service,
R/o Mankeshwar Niwas,
Bramhan Galli, Selu,
Dist.Parbhani

-- RESPONDENT

Mr.M.D.Narwadkar, Advocate for the petitioner.
Mr.S.S.Naik, Advocate for the respondent.

(CORAM : Ravindra V.Ghuge, J.)
DATE : 15/06/2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.

2. Issue raised in this petition is as regards the scope of the powers and the jurisdiction of the Court in directing the appointment of a 'next friend' under Order XXXII Rule 15(3).

3. The petitioner is aggrieved by the order dated 13/06/2016

passed by the Trial Court, suo-motu, directing the petitioner to comply with Order 32 Rule 15(3) of the CPC and appoint a proper person as a “next friend” as the Trial Court feels that the petitioner is of an unsound mind.

4. By order dated 05/07/2016, this Court has granted interim relief to the petitioner in terms of prayer clause “D” thereby staying HMP NO.183/2014.

5. I have considered the submissions of the learned Advocates for the respective sides.

6. Order XXXII Rule 15 reads as under :-

“15. Rules 1 to 14 (except rule 2-A) to apply to persons of unsound mind - Rules 1 to 14 (except Rule 2-A) 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.”

7. It is, therefore, obvious that either a litigant has to be adjudged as being mentally challenged and incapable of conducting the matter or the Court must find on enquiry that such person would be incapable of protecting his/her interest in the matter.

8. The Hon'ble Supreme Court in the matter of Kasturi Bai and others Vs. Anguri Chaudhary [2003 AIR (SC) 1773] has observed in paragraph Nos.10, 11 and 12 as under :-

“10. 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.

11. 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.

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

9. In the Kasturi Bai case (supra), the Trial Court had not conducted an enquiry so as to assess as to whether the litigant was incapable of conducting the proceedings. It, therefore, means that the Court has to assess not the capability of a litigant, but has to conclude that the said litigant is incapable of protecting his/her interest, owing to being of an unsound mind or suffering from mental infirmity which would render the litigant incapable. As like in this case, merely because the petitioner is taking some treatment and counseling, would not *ipso-facto* mean that she is of an unsound mind or suffers from a mental infirmity. Even if she may be undergoing some treatment, the Court has to conclude that she is incapable of protecting her interest on account of a mental infirmity.

10. The Hon'ble Supreme Court in the case of Sharda Vs.Dharmpal [AIR 2003 SC 3450] has observed in paragraph Nos.10 and 12 as under :-

“10. It is trite law that for the purpose of grant of a decree of divorce what is necessary is that the petitioner must establish that unsoundness of mind of the respondent is incurable or his/her mental disorder is of such a kind and to such an extent

that he cannot reasonably be expected to live with his/her spouse. Medical testimony for arriving at such finding although may not be imperative but undoubtedly would be of considerable assistance to the court. We may, however, hasten to add that such medical testimony being the evidence of experts would not leave the court from the obligation of satisfying itself on the point in issue beyond reasonable doubt. Relevance of a medical evidence, therefore, cannot be disputed.

12. The decision rendered by various courts of this country including this Court lead to a conclusion that a decree for divorce in terms of [Section 13\(1\)\(iii\)](#) of the Act can be granted in the event the unsoundness of mind is held to be not curable. A party may behave strangely or oddly inappropriate and progressive in deterioration in the level of work may lead to a conclusion that he or she suffers from an illness of slow growing developing over years. The disease, however, must be of such a kind that the other spouse cannot reasonably be expected to live with him or her. A few strong instances indicating a short temper and somewhat erratic behavior on the part of the spouse may not amount to his/her suffering continuously or intermittently from mental disorder.”

11. Learned Advocate for the respondent submits that there are certain prescriptions on record. I find from the said prescriptions that the petitioner had complained of a feeling of suspicion or getting worried and lack of concentration. *Ex-facie*, I do not find that putting

forth such complaints or taking medicines would mean that the petitioner is covered by Order 32 Rule 15.

12. Learned Advocate for the petitioner submits that the petitioner is agreeable to interact with the learned Judge so as to enable him to consider whether the petitioner would be incapable of protecting her interest in the matter. Learned Advocate for the respondent submits that he has no objection if this exercise is undertaken.

13. In the light of the above, the impugned order dated 13/06/2016 is quashed and set aside. This petition is allowed.

14. The petitioner shall communicate through an application to the learned Trial Court as regards the date and time when she can interact with the learned Judge so as to enable him to make a personal assessment as to whether she would be incapable of protecting her interest or not.

15. Rule is made partly absolute in the above terms.

(Ravindra V.Ghuge, J.)