

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

**CR No.8449 of 2015 (O&M)
Date of Decision: 07.11.2017.**

Ashok Kumar Talwar and another

...Petitioner(s)

Versus

Ranjit Talwar and others

...Respondent(s)

CORAM:-HON'BLE MRS. JUSTICE ANITA CHAUDHRY

Present: Mr. M.S Sachdev, Advocate
for the petitioners.

Mr. A.K. Chopra, Sr. Advocate with
Mr. Ankit Midha, Advocate
for respondents No.1 to 3.

Mr. Santosh Sharma, Advocate
for respondent No.4.

ANITA CHAUDHRY, J.

This revision is directed against the order dated 19.09.2015 passed by Civil Judge (Senior Division) (NRI Cases), Jalandhar, vide which the application filed by the petitioners under Section 114 read with Order 47 Rule 1 and Section 151 CPC seeking review of the order dated 03.03.2015 was dismissed. The petitioners have also assailed the order dated 03.03.2015 (Annexure P-2) as the application filed by the plaintiffs was allowed and respondent No.4 was permitted to be sued through the son as the next friend.

The question which has arisen in this petition primarily is whether the provisions of Order 32 Rule 3 of the Code of Civil Procedure are mandatory and whether the requirement thereof has

been complied with.

It would be necessary to give few facts.

A suit was filed by the sons of Krishan Talwar against the brother and some others, seeking a declaration that the plaintiffs were owners and in possession of 1/3rd share each. A prayer for injunction was also made restraining defendants No.1 and 2 from interfering in their possession. One of the defendant namely, Meena Chhabra, was stated to be of unsound mind. She was impleaded as defendant without impleading the guardian or next friend. The contesting defendants namely Ashok Kumar and Dalip Kumar filed an application for taking the plaint off its record and for imposition of special cost upon the plaintiffs, as Meena Chhabra was of unsound mind and had been impleaded in her personal capacity without their being any guardian or next friend. It was pleaded that the plaintiffs had played fraud and had got *ex parte* proceedings against her.

The plaintiffs filed reply pleading that Meena Chhabra was residing under the care and custody of plaintiff No.1. It was pleaded that no fraud had been played upon the Court. It was submitted that Meena Chhabra was living under the care and custody of Ranjit Talwar (plaintiff No.1) and the application should be dismissed.

Thereafter, the plaintiffs filed an application under Order 32 Rule 1 CPC pleading that Meena Chhabra defendant No.4 was living under the care of Ranjit Talwar but in January, 2013 she started living with her son Rohan Chhabra. It was pleaded that she was

having some mental problem for the last 20 years and in terms of Order 32 CPC the son be appointed as a guardian as he had no adverse interest against the mother and she may be allowed to be sued through the son Rohan Chhabra. The address of Rohan Chhabra was given and a note was appended that an affidavit had been attached.

In reply to this application, defendants No.1 and 2 pleaded that the plaintiffs were misusing the process of the Court and they had not come to the Court with clean hands and they had admitted that Meena Chhabra was of unsound mind and earlier they had pleaded that there was no need to appoint any guardian and Ranjit Talwar (plaintiff No.1) had forged and fabricated the signatures on the summons and Meena Chhabra was proceeded *ex parte* and the plaintiffs were claiming rights in the property and depriving Meena Chhabra of her property and fraud was being played with the Court. It was pleaded that Meena Chhabra was married and had children and Ranjit Talwar was not looking after her and she had never remained under his care or custody. It was pleaded that when she had been proceeded *ex parte*, therefore, the question of impleading her next friend did not arise. It was pleaded that Meena Chhabra was living in Delhi from the very beginning along with her son. It was pleaded that Rohan Chhabra, the son had no interest in the property and the son could not be the guardian of the mother and the application should be dismissed.

The trial Court decided both the applications vide a common order dated 03.03.2015 and allowed the application filed by the plaintiffs, permitting defendant No.3 to be sued through the next friend that is her son, Rohan. It noticed the fact that Meena Chhabra was of unsound mind and she could not have been impleaded without her guardian and observed that the plaintiffs should have been sued defendant No.3 through the next friend. It allowed the application filed by the plaintiffs and dismissed the application filed by the defendants. The plaintiffs were asked to file the amended plaint. Defendant No.3 was ordered to be served for the next date. Defendants No.1 and 2, thereafter, filed an application seeking review of the order.

The trial Court adjourned the case and sought reply of the other side and dismissed the application for review on 19.09.2015. The defendants have challenged both the orders pleading that the applicant was required to file an application and it should have been supported with an affidavit and the Court had not given any notice to the guardian before he was appointed and the provisions of Order 32 Rule 1, 2, 5 and 15 were mandatory in nature. It was averred that the plaintiffs had taken contradictory stands, as on one hand, they were stating that Meena Chhabra was living with the plaintiffs but in the application they had mentioned that she was under the care and custody of Rohan Chhabra since January 2013. It was pleaded that the plaintiffs had intentionally given the address of Jalandhar and

summons were stated to have been served there and the person who was of unsound mind, was proceeded *ex parte* and no summons were sent at the Delhi address and the plaintiffs had not approached the Court with clean hands.

I have heard the submissions of both the sides.

The original record was called for to see whether any affidavit was appended along with the application filed under Order 32 Rule 1 to 5 CPC as there was a note appended on the application that the affidavit was attached along with the application. The record shows that an affidavit was given by Ranjit Kumar Talwar, though it is not attested by the notary. The record also reveals that a rejoinder was filed to the reply and along with the rejoinder, an affidavit was filed which is attested by an Oath Commissioner. Copy of both the documents were retained.

The submission on behalf of the petitioner is that the provisions of Order 32 Rule 1 to 14 CPC apply to persons of unsound mind except Rule 2(a) and there is an amendment for the State of Punjab and Haryana. It was urged that the rule is mandatory and not discretionary and the plaintiffs had sued a person who was of unsound mind and they had not filed an application for appointment of a Guardian and Rule 3 mandates that the plaintiffs would file a list of relatives of the minor with their addresses and any order on that application can only be made after notice to the guardian. It was urged that the plaintiffs had nowhere pleaded that

defendant No.3 was living with them when they filed an application for rejection of the plaint as no guardian had been appointed. It was submitted that thereafter, the plaintiffs moved an application stating that defendant No.3 was residing with her son. It was urged that no notice was given before allowing the application and defendant No.3 had been proceeded *ex parte* and the suit was liable to be dismissed and the plaintiffs have played fraud upon the Court and had got *ex parte* proceedings against Meena Chhabra who was of unsound mind. It was urged that it was mandatory for the plaintiffs to file a list of relatives which was not done in this case and the son had not taken any steps to safeguard the interest of defendant No.3 and the Court had failed to discharge its duty. It had also urged that no affidavit was appended along with the application which was mandatory. Reliance was placed upon '**Gurpreet Singh Vs. Chatterbhuji Goel 1991(2) R.R.R. 504**', '**Asharfi Lal Vs. Smt. Koili (died) by L.Rs 1995(3) R.R.R. 53**', '**Baldev Singh and others Vs. Sukhdev Singh and others 2006(3) R.C.R. (Civil) 76**', '**Jarnail Singh and others Vs. Smt. Naranjan Kaur and others 2011(2) ICC 537**', '**Raj Kumar Vs. Rohtash 2010(3) CivCC 566**', and '**Ms. Ram Aasri Vs. Kuldip Singh 2011(3) Civil Court Cases 698(H.P.)**'.

On the other hand the submission on behalf of the respondents is that the object and scope of Order 32 Rule 3 only is that the minor or a person of unsound mind should be represented and in case of non-compliance of the provisions of Order 32 Rule 3

CPC, the Full Bench of this Court had held that the decision would not be rendered void automatically merely for non-compliance but if non-compliance had resulted in prejudice or he was not effectively represented, only then the decision can be void. It was urged that the interest of the son and the mother would be identical and the son has been appointed as guardian and all the mandatory requirements have been made and the judgments referred to by the petitioners mostly relate to cases where the matters had been finally decided or where appeals were pending and in the present case the case was at the initial stage and the examination here would be purely academic. Reliance was placed upon '**Amrik Singh, etc. Vs. Karnail Singh, etc. 1974 PLR 744**'.

It would be necessary to reproduce the relevant provisions of Order 32 Rule 1, 3, 4, 6 & 7 which read as under:-

1. Minor to sue by next friend- Every suit by a minor shall be instituted in his name by a person who in such suit shall be called the next friend of the minor.

[Explanation- In this Order, "minor" means a person who has not attained his majority within the meaning of Section 3 of the Indian Majority Act, 1875 (9 of 1875), where the suit relates to any of the matters mentioned in clauses (a) and (b) of Section 2 of that Act or to any other matter.]

(3) The plaintiff shall file with his plaint a list of relatives of the minor and other persons, with their addresses, who prima facie are most likely to be

capable of acting as guardian for the suit for a minor defendant. The list shall constitute an application by the plaintiff under sub-rule (2), above.

(4) The Court may at any time after institution of the suit call upon the plaintiff to furnish such a list, and, in default of compliance, may reject the plaint.”

“(6) Any application for the appointment of a guardian for the suit and any list furnished under this rule 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 each person proposed is a fit person to be so appointed.

(7) 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 other natural guardian of the minor or, where there is no father 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:

Provided that the Court may, if it seems fit, issue notice to the minor also.”

It is not in dispute that where one of the parties, be it the plaintiffs or the defendant is a minor or of unsound mind the, provisions of Order 32 CPC would apply. The State of Punjab and Haryana had substituted Rule 3 and 4 and added Rule 6 & 7. According to Rule 3 a duty has been cast upon the plaintiffs to file along with his plaint a list of relatives of the minor (which would also

apply to a case of a person of unsound mind) and the list has to be appended along with the application for appointment of the guardian/next friend. Rule 2 provides that if the suit is instituted by or on behalf of the minor/unsound mind then the defendants can approach the Court to have the plaint taken off the file.

It is not in dispute that when the plaintiff had instituted the suit and he had arrayed Meena Chhabra, their sister, as defendant No.3. It is not in dispute that she is of unsound mind. The plaintiffs had failed to sue her through guardian or next friend. It was only when the defendants filed an application for taking the plaint off the record that the same day the application was moved by the plaintiff to implead the major son with whom Meena Chhabra was residing. Admittedly, no separate list of relatives was filed. The trial Court allowed the application permitting the son to act as her guardian. It had considered the fact that the son was major and defendant No.3 was residing with the son. It was averred in the application that the son had no interest adverse to her. No doubt, the provisions are mandatory in nature and should have been followed in the first instance but the plaintiff when put on notice, took the necessary steps and the trial Court had allowed the son to act as her guardian. The application which was filed by the plaintiff was supported by an affidavit. There is no restriction on the son acting as a guardian for the mother. As regards the consent is concerned, there is no objection from the son and it cannot be presumed that the consent

had not been given by him. The son has already appeared on behalf of the mother. The plaint could not have been rejected since the permission has been accorded. I find no infirmity in the order.

There is no merit in the petition and is dismissed.

November 07, 2017
ps-l

(ANITA CHAUDHRY)
JUDGE

Whether Reasoned/Speaking
Whether Reportable

Yes/No
Yes/No