

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7314 OF 2017

Pradnya Sunil Deochake & Anr.	...	Petitioners
V/s.		
Baliram Shamrao Kaloke & Ors.	...	Respondents

- Mr.Abhijeet A. Joshi for the Petitioners.
- Mr.Jaydeep Deo for Respondent No.1.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 5th APRIL, 2018.

P.C. :

1] Heard learned counsel for the Petitioners and learned counsel for Respondent No.1.

2] By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioners are challenging the order dated 24th March 2017 passed by the 9th Joint Civil Judge, Senior Division, Pune, below the application at Exhibit-52 in Special Darkhast No.48 of 2012.

3] The application at Exhibit-52 was filed by the present Petitioner No.1-Pradnya Sunil Deochake, seeking to be appointed as

guardian of the Petitioner No.2-Saket Sunil Deochake, who is the original judgment debtor No.4, on the ground that he is suffering from 50% mental disability.

4] The said application was opposed on behalf of Respondent No.1-Baliram Shamrao Kalokhe, herein, who is the decree holder. The Executing Court has, after considering the submissions advanced thereon and after recording the evidence of the relevant witnesses, rejected the said application and hence, the instant Writ Petition is filed.

5] Before advertng to the submissions advanced at bar by learned counsel for both the parties, it would be relevant to take the note of the litigation in the present case.

6] Petitioner No.1-Pradnya is the mother and Respondent No.2-Sunil is the father of Petitioner No.2-Saket. Respondent No.2-Sunil, Respondent No.3-Mrs.Bhagyashri and Respondent No.4-Vijay are the judgment debtor Nos.1 to 3 respectively. Whereas Petitioner No.2-Saket is the judgment debtor No.4.

7] Respondent No.2 to 4 had executed an 'Agreement of Sale' in favour of the present Respondent No.1 on 9th February 2006. The signature of Petitioner No.2-Saket was obtained thereon as a

consenting party. As the judgment debtors failed to execute the sale-deed on the basis of the said Agreement, the suit for specific performance of the contract bearing Special Civil Suit No.1305 of 2009 came to be filed by Respondent No.1 in the Court of Civil Judge Senior Division, Pune; wherein Saket was also implicated as Defendant No.4.

8] During the *pendency* of that suit, compromise came to be arrived at between the parties on 5th August 2010 and as a result thereof, the document came to be executed and the said compromise also came to be recorded before the trial Court. On the compromise pursis also, Saket has signed being party to the said suit. As the judgment debtors failed to act on the said compromise also, the execution proceedings were filed and Saket being the original Defendant No.4, he was also joined as judgment debtor No.4 in the present execution proceeding.

9] The impugned application came to be filed by the mother of Saket, namely, Petitioner No.1-Pradnya Deochake, on 6th August 2013 contending for the first time that she may be permitted to appear on behalf of her son Saket in this execution proceeding and the issue relating to mental disability of Saket may be framed. Accordingly, the Executing Court has framed the necessary issue and in support of the

same, Petitioner No.1-Pradnya has examined herself. The evidence of two doctors, namely, Dr.Krushna Kadam and Dr.Ujjwal Nene was also recorded. The evidence of Medha Marathe, Principal of the Jyoti Special School, where Saket was studying also came to be recorded. All these witnesses are cross-examined on behalf of the Respondent No.1. Petitioner No.1 has also relied upon the 'Medical Certificates' issued by his Dr.Krushna Kadam and Dr.Ujjwal Nene. According to Dr.Krushna Kadam, Saket is not having sufficient understanding of day to day affairs and he takes time to understand the things. He has issued certificate to that effect. However, in my considered opinion, merely on the basis that, he takes time to understand the things, it cannot be said that he is of unsound mind or is unable to protect his interests.

10] Even, Dr.Ujjwal Nene, who has conducted I.Q. test of Saket has stated in her evidence that, the I.Q. of Saket was found to be less than normal and it was 70%, therefore, he was on the border line. According to her, if the I.Q. is below 69%, then such person can be called as mentally challenged. As regards the evidence of Principal Medha Marathe, she has stated that, Saket has passed 10th standard class and he has been taught all the subjects except the mathematics. Hence, it has to be held that, Saket is definitely having some

understanding to protect his interests, otherwise he would not have studied upto 10th standard.

11] In the light of this evidence, consisting of the two doctors and the Principal of the School, in my considered opinion, it can definitely be inferred that Saket is not a mentally challenged person or a person of unsound mind, in the sense that he was understanding though he may be a slow learner. He is an individual with border-line intellectual potential but one thing is certain that he is not treated by his family members to be a person of unsound mind, who needs to be represented by any other person or guardian.

12] It is pertinent to note that through out this entire proceeding from the time the 'Agreement of Sale' was executed in the year 2006, suit filed in the 2009, compromise effected in the year 2010, at no time, it was contended by his father, who was very much party to all these proceedings including the very 'Agreement of Sale', then the suit filed before the trial Court for specific performance and thereafter, the compromise which was arrived at between the parties; that Saket was in any way the person of unsound mind and therefore, his signature should not be obtained on the 'Agreement of Sale' or even on the 'Vakalatnama', when the suit was filed and he was impleaded as Defendant No.4. Not only that, at the time of executing

the compromise also, the father has never stated that Saket was a person of unsound mind, who is required to be represented by the guardian or representative.

13] The reason may be and must be for Saket being never treated as such is that he is not a person of unsound mind and hence, indirectly proving that Saket is very much capable of understanding. Merely, because his I.Q. is on the border line, he cannot be considered as a person of unsound mind, so as to appoint the representative to protect his interest.

14] It is pertinent to note that when the compromise was recorded before the trial Court, at that time also, the trial Court has verified the contents of the compromise pursis with the parties, who were present before it, including Saket, but the trial Court did not find that he was unable to understand the contents of compromise pursis and therefore, the trial Court has on that count, not refused to record the compromise. Even when the trial Court had very much opportunity to observe Saket and verify the contents of the compromise pursis from him, the trial Court did not find that Saket was in any way falling less in understanding. If it was so, then the trial Court would not have recorded the compromise, unless he was represented by some one.

15] It is further to note that, this is not the only litigation in which Saket is a party. His mother has admitted that Suit No.1305 of 2009 is filed by her and in that suit also the guardian *ad-litem* was not appointed for Saket. She has also admitted that there is another suit bearing R.C.S. No.5630 of 2012 which is also filed by Saket, but in that suit also guardian *ad-litem* is not appointed by her for him. The only reason therefore for not appointing such guardian for protecting the interests of Saket by his own parents is that, they never considered Saket as a person of unsound mind requiring some representative to protect his interest, as he was and is not a person of unsound mind, otherwise they would have done so.

16] Now, during the execution proceeding, thus contention is raised for the first time and the only explanation offered is that on the basis of the legal advice, this contention is raised. Now, needless to state that, when throughout the proceeding in Civil Suit No.1305 of 2009, Saket and his father were very much represented through their legal counsel, then it is too late in a day to contend that only in the execution proceeding on the basis of the legal advice given to them, they realised that Saket is of unsound mind.

17] Moreover, the appointment of guardian *ad-litem* is for protection of the interests of the minor or of the person of unsound mind. In this case, the father of Saket is very much party to all these proceedings. His interests are not stated to be adverse to the interests of Saket. Hence, he can very well represent the interest of Saket. However, the appointment of Petitioner No.1, the mother is sought as his guardian, only with an intention to somehow or other protract and delay the execution of the decree.

18] The submission of learned counsel for the Petitioners is that the conduct of the parents cannot be of relevance. According to him, if the law requires that an unsound person should be represented through the guardian, then the conduct of the other parties to the said litigation, even if they may be the parents, will not come in the way. In this respect, learned counsel for the Petitioners has placed reliance on the provisions of Order-32 Rule-4 and 7 of C.P.C. which require that, any person who is of sound mind and has attained majority may act as next friend of a minor or as his guardian *ad-litem* for the suit. It is submitted that, the compromise, executed in the absence of such guardian being appointed, cannot be legal and valid. Learned counsel for the Petitioner has also relied upon the provisions of Section 11 and

12 of the Indian Contracts Act to urge that a person of unsound mind cannot enter into any valid compromise or transaction.

19] According to learned counsel for the Petitioner, here, in the case, the Executing Court should have considered these aspects and appointed Petitioner No.1 as a guardian of Petitioner No.2. However, in my considered opinion, it depends on the facts of each case for the Court to arrive at a finding, whether the person is of unsound mind or otherwise.

20] Here, in the case, it cannot be said that the case of Saket falls under the category of 'unsound mind'. As per the evidence of two experts, he has I.Q. of 70% which falls in the category of borderline intellectual capacity. He has already passed 10th standard examination in all the subjects except mathematics. In view of the evidence of even these two doctors and Principal Medha Marathe also, it would not be proper to consider that Saket is a person of sound mind, who is unable to represent himself or to protect his interest; especially having regard to the backdrop of the litigation in which this application is made and through out all the proceedings of this case and in other Court proceedings also, when the parents had treated Saket as a person of sound mind. In such situation, the trial Court was perfectly justified in rejecting such application.

21] In view of thereof, this Court in writ jurisdiction does not find any reason to interfere in the said order and therefore, this Writ Petition being without merits, stands dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]