

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

CR No.6309 of 2018
Date of Decision : 28.11.2018

Suman

...Petitioner

VERSUS

Raj Kumar

....Respondent

CORAM : HON'BLE MR. JUSTICE B.S.WALIA

Present: Mr. Kul Bhushan Sharma, Advocate for the petitioner.

Mr. Nipun Vashist, Advocate for the respondent.

B.S.WALIA, J. (Oral)

1. Challenge in this revision petition under Article 227 of the Constitution of India is to order dated 05.09.2018 (Annexure P-1), passed by the learned Civil Judge (Junior Division), Rewari, dismissing the application filed by the petitioner for permission to sue as next friend of the plaintiff of unsound mind.

2. Brief facts of the case leading to the filing of the instant revision petition are that an application was moved by the petitioner (mother of the plaintiff) during the pendency of the suit seeking permission to sue as next friend of the plaintiff of unsound mind in the light of certificate Ex.P-1 as also on the ground that being mother of the plaintiff, the petitioner had no adverse interest against the plaintiff.

3. The application was opposed on the ground tht the same was not maintainable at the final stage and permission, if any, had to be sought at the time of filing of the suit.

4. The learned trial Court dismissed the application on the ground that permission, if any, had to be sought at the time of institution of the suit and not at the time of conclusion of the trial. At the time of preliminary hearing, it was contended that application filed under Order 32 Rule 1 CPC was not required to be filed as the suit had already been instituted by the petitioner on behalf of plaintiff as next friend, therefore, the only relief which the petitioner prayed was for being allowed to withdraw the application under Order 32 Rule 1 CPC, which had led to the passing of the impugned order.

5. Per contra, learned counsel for the respondent stated that reading of Order 32 Rule 15 CPC makes it clear that Rules 1 to 14 except 2-A of Order 32 were applicable to persons adjudged, before or during the pendency of the suit, to be of unsound mind as also to persons, who though not so adjudged were found by the Court on enquiry to be incapable, by reasons of any material infirmity, of protecting their interest. Learned counsel contends that in the circumstances the permission to sue as next friend of plaintiff of unsound mind in terms of Order 32 Rule 1 was required to be obtained from the Court by establishing that the plaintiff was a person who had been adjudged before or during the pendency of the suit to be of unsound mind or if not so adjudged, had been found by the Court

on enquiry to be incapable, by reasons of any material infirmity of protecting his interest while instituting the suit.

6. I have heard and considered the submission of learned counsel for the parties.

7. The matter is no longer res-integra as this issue has already been considered by a Co-ordinate bench of this Court in CR No.4776 of 2017 decided on 26.06.2018, in case titled as Lilu Ram vs. Kapur Singh and others, by placing reliance on the decision of this Court in Jarnail Singh and others vs. Smt. Naranjan Kaur and others, 2011 (2) RCR (Civil) 2015. Relevant extract of the decision in Jarnail Singh case (supra) is reproduced as under:-

“10. I have carefully considered the rival contentions. In so far as appointment of next friend of minor plaintiff or plaintiff of unsound mind is concerned, Order 32 Rule 1 Civil Procedure Code does not envisage any order of the court for this purpose. On the contrary, Order 32 Rule 1 Civil Procedure Code lays down that 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. Same provision applies to plaintiff of unsound mind by virtue of Order 32 Rule 15 Civil Procedure Code. Consequently, appointment of next friend of minor plaintiff or of plaintiff of unsound mind is not to be made by the Court under Order 32 Rule 1 and 15 civil Procedure code. On the other hand, Order 32 Rule 3 Civil Procedure Code provides for appointment of guardian or a minor defendant by the court and the same provision shall apply to defendant of unsound mind. Thus, where a plaintiff is minor or of unsound mind, suit in his name can be filed by next friend without any order

from the court regarding appointment of next friend, but where defendant is minor or of unsound mind, then appointment of guardian of such defendant is required to be made by the court. In the instance case, the plaintiff was alleged to be of unsound mind and therefore, no order for appointment of next friend of the plaintiff was required to be made by the Court. Judgment of this Court in the case of Harjinder Singh (supra) pertains to defendant and not to plaintiff. Judgment in the case of Raj Kumar (supra) of course pertains to landlord petitioner, who filed eviction petition, but in that case, already there was order by the Rent Control Authority regarding appointment of guardian and therefore, it cannot be said on the basis of this judgment that even appointment of next friend of a plaintiff, who is minor or of unsound mind, is required to be made by the Court. There is distinction between a plaintiff, who is minor or of unsound mind and a defendant, who is minor or of unsound mind. In the case of such plaintiff, no order of the court is required for appointment of next friend, whereas in the case of such defendant, order of appointment of guardian ad litem is required to be made by the court. Since in the instant case, it was plaintiff, who was of unsound mind, no formal order for appointment of his next friend for institution of the suit, was required to be made. Consequently, judgment of the lower appellate court, non-suiting the plaintiff on the ground that next friend of plaintiff was not appointed by the court, cannot be sustained.”

8. A perusal thereof reveals that in so far as appointment of next friend of plaintiff of unsound mind is concerned, Order 32 Rule 1 CPC does not envisage any order of the Court for this purpose and instead lays down that every suit by a person of unsound mind shall be instituted in his

name by a person who in such suit shall be called as his next friend in terms of Order 32 Rule 15 CPC. Consequently, appointment of next friend of plaintiff of unsound mind is not to be made by the Court under Order 32 Rule 1 and 15 CPC and it is only Order 32 (3) CPC which provides for appointment of guardian for a minor defendant by the Court and the same provision is applicable to a defendant of unsound mind and that in the circumstances a suit by a plaintiff of a unsound mind can be filed by the next friend without any order from the Court regarding appointment of next friend and it is only where the defendant is minor or of unsound mind that appointment of guardian of such defendant is required to be made by the Court. Since the plaintiff was alleged to be of unsound mind, therefore, no order for appointment of next friend of plaintiff was required to be made by the Court.

9. In the circumstances, once the petitioner filed a suit on behalf of plaintiff being his next friend while claiming the plaintiff to be of unsound mind, no formal order for appointment of the petitioner as next friend of plaintiff for institution of the suit was required to be made or any leave or permission in respect thereto sought. Accordingly, the impugned order is set aside and prayer of the petitioner to withdraw the application which led to the passing of the impugned order is allowed.

10. Revision petition allowed in aforementioned terms.

(B.S.WALIA)
JUDGE

28.11.2018

rajesh.k.khurana

Whether speaking/reasoned

: Yes/No

Whether reportable

: Yes/No