

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

**APPEAL FROM ORDER NO. 331 OF 2018
WITH
CIVIL APPLICATION NO. 436 OF 2018**

Farhad Ginwalla & Ors. ... Appellants
V/s.
Mrs.Zenobia R. Poonawala (Nee Ginawalla) ... Respondent

- Mr.Viraj Tulzapurkar a/w. Mr.Sameer Pandit & Ms.Sarrah Khambati i/b. Wadia Ghandy & Co. for the Appellants.
- Mr.Anjal Amin i/b. M/s.B.Amin & Co. for the Respondent.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 21st JANUARY, 2019.

P.C. :

- 1] Not on board. Upon mentioning taken on production board.
- 2] Heard learned counsel for the Appellants and learned counsel for the Respondent.
- 3] This Appeal takes an exception to the order dated 22/02/2018 passed by the City Civil Court, Mumbai, thereby allowing Notice of Motion No.76 of 2018 filed in Mental Health Petition No.13 of 2016.

4] By the said order, the trial Court has allowed the Notice of Motion partly and in view of the order passed on 11/11/2016, directed that Respondent No.1 who is alleged to be a “mentally ill person” be produced before it on the next date for judicial inquisition, as laid down by the law.

5] The submission of learned counsel for the Appellants is that this order is totally unsustainable, as in the order dated 11/11/2016, it is nowhere stated that the Respondent No.1 should be produced in-person before the Court. It is urged that, before passing such an order, a detailed inquiry is required to be made by the Court as to the substance in the allegations and in the counter allegations made by the respective parties. The impugned order passed by the Court calling Respondent No.1 to appear in-person for judicial inquisition before it, is affecting the Respondent No.1's right to life; especially right to live with dignity as enshrined in Article 21 of the Constitution of India. Such order is having drastic effect on the dignity, reputation and the life of a person. Hence, according to him, such order cannot be passed without making the detail and proper inquiry and at-least without considering the written reply filed by

alleged mentally ill person and by his other children. According to him, therefore, the said order suffers from the basic defect and hence, it is liable to be quashed and set-aside.

6] Per contra, learned counsel for the Respondent - Original Petitioner has supported the said order by submitting that on 11/11/2016 itself, the notice was issued to the Respondent No.1 and to his other three children. In response to the said notice, the Respondent No.1 has appeared and also filed written reply and now as per the provisions of Section 50(2) of the Mental Health Act, 1987, the production of the Respondent No.1 in-person was necessary before the Court for being examined and also for the judicial inquisition. According to him, therefore, no fault can be found in the impugned order passed by the trial Court.

7] In order to appreciate the submissions advanced at bar by learned counsel for both the parties, it would be necessary to reproduce the detailed order dated 11/11/2016 passed by the trial Court on the basis of which impugned order is passed. It reads as follows:

“Adv. Mr.A.S. Pal for petitioner present. Read application. Heard Advocate. It is submitted that

other children of the Mentally ill person are taking disadvantage of the mental state of mentally ill person so it requires to issue notice to mentally ill person to appear before Court. According to him, there is no necessity to issue notice to three other children of mentally ill person. It appears that there are certain allegations against three other children of mentally ill person, so considering the allegations, it requires to issue notice to them and also notice to the Mentally ill person. Hence, following order is passed-ORDER- Issue notice to Mentally ill person as well as his three other children Ms.Cherie Ginwalla, Mr.Rustom Ginwalla and Ms.Rashna Ginwalla. Applicant shall provide address of all the concern to serve notices. Adj'd. to 16.12.2016."

8] Perusal of this order therefore makes it clear that though a specific request was made before the trial Court that the notice be issued to the Respondent No.1 alleged to be mentally ill person, to appear before the Court in-person, the said prayer was not granted. Conversely, it was directed that the notice be issued to him, along with notice to other three children of the said person. There is no specific order passed that Respondent No.1 be produced before the Court in-person. It was a regular notice in the nature of summons issued to the

Respondent No.1. In response thereto, he has appeared and thereafter the time was sought and reply was filed. Some of the children of Respondent No.1 had also filed the reply. Thereafter this Notice of Motion was preferred by the Petitioner seeking the production of the Respondent No.1 before the Court for judicial inquisition in pursuance of the order dated 11/11/2016 and the trial Court has passed the order directing that Respondent No.1 be produced before it in-person for judicial inquisition.

9] In my considered opinion, as rightly submitted by learned counsel for the Respondent, calling upon the alleged mentally ill person to remain present in-person before the Court for judicial inquisition requires detailed enquiry and satisfaction of the concerned Court as to whether the presence in-person of such person alleged to be mentally ill is required or not. However, the entire order passed by the trial Court does not disclose that any such inquiry was made.

10] As a matter of fact, this Notice of Motion was also filed only in-pursuance of the order dated 11/11/2016. However, the order dated 11/11/2016, as stated above, nowhere shows that such application of mind was there. Conversely, it is pertinent to note that despite the

request made by the Petitioner therein, the notice was not issued for production of the Respondent No.1 in-person before the Court. Only a regular notice was issued thereby giving an opportunity to him to controvert the allegations made in the said petition. Accordingly, Respondent No.1 in-person has appeared and filed the reply. His other three children had also appeared and filed the reply resisting the petition. They have produced on record substantial material for consideration before the Court before passing of any such order directing the production of the Respondent No.1 before it.

11] The trial Court has however not considered the said material or heard the parties on this aspect as to whether notice is required to be issued or not before ordering production of the person. As a result, whatever reply or material on which both the parties were relying upon or whatever notice was issued in the first instance has lost its purpose, as without consideration of the said material and even before application of mind by the trial Court as to whether the presence of the mentally ill person was necessary for judicial inquisition, the trial Court has passed the impugned order. No doubt the trial Court under Section 50(2) of the Mental Health Act, 1987 can seek the production of the person alleged to be mentally ill person; but

for that the trial Court should be satisfied that his presence is necessary for judicial inquisition. Perusal of the impugned order passed by the trial Court does not reflect such satisfaction arrived at by the trial Court. Having regard to the various litigations pending between the parties, the relations inter-se strained between the Petitioner who is daughter of Respondent No.1 and having regard to the fact that the other three children had seriously controverted the allegations made in the petition, in considered opinion of this Court, the trial Court should have satisfied itself before calling upon the production of Respondent No.1, who is alleged to be mentally ill for the judicial inquisition. As the trial Court has not done so, the impugned order passed by the trial Court cannot be sustainable in law.

12] In view of the above, the Appeal is allowed. The impugned order passed by the trial Court is quashed and set-aside.

[DR.SHALINI PHANSALKAR-JOSHI, J.]