

pmw

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2021 OF 2018

Catherine Paul D'mello

... Petitioner

Vs.

The Secretary,
D.N. Nagar Sitladevi Co-operative
Housing Society Ltd. And Anr.

... Respondents

Ms. Urvi Patel I/b. M.M. Patel and Co. for the Petitioner.
Mr. Sukanta Karmakar, AGP for the Respondent No.2.

CORAM : A.S.OKA AND
M.S. SANKLECHA, JJ.

DATE : 12th MARCH 2019.

P.C. :

1 Heard the learned counsel appearing for the petitioner. The petitioner is the wife of one Paul whose age is 68 years. According to the case made out in the petition, the petitioner's husband is the owner of a residential flat. According to the case made out in the petition, the petitioner is suffering from Dementia. The petitioner is relying upon a certificate dated 16th May 2018 issued by Dr. R.N. Cooper Municipal General Hospital which records that the petitioner's husband is suffering from Dementia and he is under treatment. The first prayer in this petition under Article 226 of the Constitution of India is for declaring that the petitioner's husband suffers from Dementia and that the petitioner is his

guardian. The second prayer is for a declaration that the petitioner has a right to enter into sale transactions in respect of the flat held by the petitioner's husband. Another prayer is sought which virtually seeks a declaration that the petitioner has a right to receive money on behalf of her husband. A prayer is made for issuing a writ of mandamus against the co-operative society in which the flat is situated enjoining the society to transfer the flat.

2 The learned counsel appearing for the petitioner relies upon the judgment and order dated 12th October 2017 in Writ Petition No.9712 of 2017 (Santosh Rohidas Deshmukh Vs. The State of Maharashtra & Ors.). She also relied upon another decision of a Division Bench of this Court dated 26th April 2018 in Writ Petition (L) No.371 of 2018 (Sameer Pyarali Firasta & Anr. Vs. Union of India & Anr.). Her submission is that in the said cases, Writ Court has exercised jurisdiction under Article 226 of the Constitution of India and has appointed the petitioner therein as a guardian to deal with the property of a person who was suffering from a mental disease. Her submission is that the writ Court has abundant powers to grant reliefs which are claimed in this petition as done by the coordinate Benches in the aforesaid cases.

3 We have considered the submissions. We may note here that in clause (j) of paragraph 4 of the petition, the petitioner has accepted that normal remedy for the petitioner is to invoke the jurisdiction of regular civil Court.

4 The petitioner is seeking a declaration which will operate in *rem*. The declaration claimed in the petition is that the petitioner's husband suffers from Dementia which will operate in *rem*. Grant of such declarations will mean that the writ Court has recorded a finding that the petitioner's husband is not capable of dealing with his own affairs. The petitioner wants a writ Court to appoint her as a guardian of her husband which will enable her not only to deal with but to dispose of immovable property of her husband. The petitioner is relying upon a certificate issued by a Municipal Hospital which records that the petitioner's husband is suffering from Dementia. Only because a person is suffering from Dementia, one cannot come to the conclusion that he is incapable of looking after his own affairs. It all depends upon the nature of Dementia and the degree of Dementia. These are the matters which are to be decided after considering the evidence of the experts/doctors.

5 Now, we refer to the judgment of the co-ordinate Bench in the case of Santosh Rohidas Deshmukh. Firstly, the said judgment does not lay down any law and it was decided purely in the facts of the case. The judgment relies upon a decision of the Madras High Court which is referred in paragraph 6. From what is quoted in paragraph 6, it appears that the Madras High Court was dealing with a case where the fact situation was undisputed and the petitioner's husband was in coma. Therefore, the said decision cannot be read as a binding precedent.

6 Now, coming to the other judgment in the case of Samir Pyarali Firasta and Anr. (*supra*), it appears from the judgment that the minutes of the order were tendered by the petitioners therein and on the

basis of the minutes of order, the petition was disposed of. Even the said judgment does not lay down any law and the judgment is rendered purely in the facts of the case.

7 This petition involves several disputed questions of fact. First is whether the petitioner's husband is suffering from Dementia. The second is the nature and extent of Dementia and the third is whether he is incapable of looking after his own affairs.

8 In the circumstances, we decline to entertain this petition under Article 226 of the Constitution of India. The petition is accordingly disposed of. However, remedies of the petitioner are kept open.

(M.S. SANKLECHA, J.)

(A.S.OKA, J.)