

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3686 OF 2019

Ganesh Ramdas Zambre,

Age: 34 years, Occu. Agriculturist,

R/o. : Holkarwadi, Uruli Devachi,

Tal. Haveli, Dist. Pune.

...Petitioner

Vs.

1 Dnyanoba Parasram Kamthe,

Age : 51 years. Occu. Agriculturist,

R/o : Fursungi, Tal. Haveli,

Dist. Pune.

2 Vitthal Prasram Kamthe,

Age : 53 years, Occu. Agriculturist,

R/o : Fursungi, Tal. Haveli,

Dist. Pune.

3 Ku. Sakshi Pandurang Kamthe,

Age: 14 years. Occu. Education,

Through Ad-litem Guardian -

The Nazir, Civil Judge, Senior Division,

Pune, Dist. Pune.

4 Rupali @ Seema Pandurang Kamthe,

Age : 32 years, Occu. : Household,

R/o. : Holkarwadi, Uruli Devachi,

Tal. Haveli, Dist. Pune.

...Respondents

Mr. Rahul Kadam, Advocate for the Petitioner.

Mr. T.S. Shendge, Advocate for Respondent Nos.1 and 2.

CORAM : A.S. GADKARI, J.
DATE : 11th MARCH, 2020.

PC. :-

By the present Petition under Article 227 of the Constitution of India, the Petitioner has taken exception to the Order dated 5th January, 2019 passed below Exh.23 in Civil Miscellaneous Application No.369 of 2017, by the learned 8th Ad-hoc District Judge, Pune, rejecting the Application for his appointment as ad-litem guardian/next friend of minor girl namely Ms. Sakshi Pandurang Kamthe in place of 'Nazir' appointed by the said Court for execution of the decree dated 19th October, 2011.

2 Heard Mr. Kadam, learned counsel for the Petitioner and Mr. Shendge, learned counsel for the Respondent Nos.1 and 2. Perused the record annexed to the Petition.

3 The record reveals that, the Suit filed by Respondent Nos.1 and 2 bearing Special Civil Suit No. 2258 of 2010 for specific performance of contract on the basis of an agreement of sale dated 9th June, 2009 executed by the Respondent No. 4 for herself and on behalf of

her minor daughter i.e. the Respondent No.3 herein in favour of Respondent Nos.1 and 2 and for other consequential reliefs, was decreed by the 3rd Joint Civil Judge, Senior Division, Pune, by its Judgment and Order dated 19th October, 2011.

The Trial Court was pleased to decree the Suit for specific performance of contract to the extent of share of Defendant No.1 i.e. Respondent No.4 herein, with cost. The operative part of Order/Decree dated 19th October, 2011 passed by the Trial Court reads as under:-

“ORDER

- 1 Plaintiff's suit for specific performance of contract to the extent of share of defendant no.1 is decreed with cost.*
- 2 The plaintiff's suit for specific performance of contract to the extent of share of defendant no.2 is decreed subject to permission u/s 8 of the Hindu Minority and Guardianship Act.*
- 3 The Plaintiffs shall deposit amount Rs.10,00,000/- (half amount of the balance consideration Rs.20,00,000/- of the share of defendant no.1) in the Court within a month.*
- 4 The defendant no.1 shall execute the sale deed to the extent of her share in suit property in favour of plaintiffs within two months.*
- 5 If the defendant no.1 failed to execute the sale deed of suit property to the extent of her share in favour of the*

plaintiff then the plaintiff may get execute the sale deed through the process of the Court by appointing commissioner on behalf of Court.

6 The defendants No. 1 shall apply for bringing permission to sell the property of minor defendant no.2 before competent court u/s 8 of the Hindu Minority and Guardianship Act, 1956.

7 If the permission is granted to sell the property of minor u/s 8 to defendant no.1, then the plaintiff shall deposit the remaining amount of the share of defendant no.2 in Court within a month after permission and then the defendant no.1 shall execute the sale deed of suit property on behalf of minor defendant no.2 in favour of plaintiff nos. 1 and 2.

8 On bringing the permission if defendant no.1 failed to execute the sale deed of the suit property in favour of plaintiffs then the plaintiffs shall obtain the sale deed through the process of the Court by appointing Court Commissioner.

9 If the permission u/s 8 of Hindu Minority and Guardianship Act, 1956 to sell the property of minor defendant no.2 is rejected then the defendant no.1 shall refund the amount Rs.5,00,000/- (out of total earnest amount Rs.10,00,000/- i.e. of the share of defendant no.2) to plaintiffs.

10 Defendant no.1 is permanently restrained from creating

any third party interest in the suit property of the share of defendant no.1 and further for the share of defendant no.2 subject to permission u/s 8 of the Hindu Minority and Guardianship Act, 1956.

11 Decree be drawn up accordingly.”

4 It is an admitted fact on record that, on the date of passing of the said decree, the Defendant No.2/Respondent No.3 Ms. Sakshi Pandurang Kamthe was a minor, aged about 7 years.

5 The record further indicates that, the Petitioner Nos.1 and 2 being decree holders filed Special Darkhast No.54 of 2012 for execution of decree dated 19th October, 2011 passed in Special Civil Suit No.2258 of 2010. That, the Respondent No.4/Original Defendant No.1 had executed sale-deed on 18th September, 2014 of her share of property in furtherance of the said decree. The Respondent Nos.1 and 2 thereafter filed an Application below Exh.38 on 18th November, 2014 in Special Darkhast No.54 of 2012 for direction to the Respondent No.4 to execute decree of the Suit property with respect to the share of Respondent No.3 (Original Defendant No.2) and if the Respondent No.4 fails to file an Application under Section 8 of the said Act, to appoint an officer of the Court namely ‘Nazir’ as next friend of Respondent No.3 and the said ‘Nazir’ may be

permitted to execute the sale-deed on behalf of Respondent No.3.

6 That, on 6th January, 2015, the Respondent No.4 filed an Application under Order 32 Rule 11 of the Code of Civil Procedure, requesting the Court to permit her to retire as guardian of Respondent No.3 on the ground of personal reasons and that, she was unable to perform her duty as guardian of Respondent No.3. The Executing Court, by its Order dated 31st January, 2015 directed that, both the Applications below Exh. 38 and 40 be heard and decided together. The Respondent Nos.1 and 2 opposed the said Application by filing the reply dated 30th January, 2015 and prayed to the Court to reject the Application filed by the Respondent No.4 below Exh.40. The Executing Court decided both the said Applications below Exhs. 38 and 40 by its common Order dated 30th March, 2015. The learned Judge of the Executing Court by its said Order, allowed Application below Exh.38 and appointed 'Nazir' of the said Court to comply with the decree in respect of Respondent No.3. The learned Judge allowed Application filed below Exh.40 by the Respondent No.4 and permitted her to retire as guardian of the Respondent No.3.

7 The Respondent Nos.1 and 2 being decree holders, thereafter filed Civil Miscellaneous Application No.369 of 2017 in the Court of District Judge, Pune, under Section 8 of the Hindu Minority and

Guardianship Act, 1956 praying for execution of decree in Special Civil Suit No.2258 of 2010 pertaining to the share of Respondent No.3, and that the 'Nazir' may be permitted to execute the document on behalf of Respondent No.3 in favour of the Respondent Nos.1 and 2.

The Petitioner thereafter filed an Application below Exh.45 in Special Darkhast No.54 of 2012 praying that the appointment of 'Nazir' (below Exh. 38) as next friend of Respondent No.3 may be set aside and cancelled and the Petitioner may be appointed as ad-litem guardian for the Respondent No.3, to enable him to protect the interest of the said minor by defending the said proceedings. The Respondent Nos.1 and 2 filed a detailed reply dated 5th October, 2017 below Exh. 49, to the said Application below Exh.45 filed by the Petitioner.

8 The record further indicates that, the Petitioner also filed an Application below Exh.23 in Civil Miscellaneous Application No.369 of 2017 pending on the file of District Judge, Pune, praying that, the further hearing of the said proceedings may be stayed and/or suspended till final Orders are passed in Application below Exh.45 in Special Darkhast No.54 of 2012 pending on the file of Civil Judge, Senior Division, Pune i.e. the Executing Court or otherwise, the Petitioner being maternal uncle of Respondent No.3 may be appointed as ad-litem guardian/next friend of

the said minor, Ms. Sakshi, to protect her interest by removing the appointment of 'Nazir' of the Civil Court in the proceedings.

It is the case of the Petitioner in the said Application below Exh.23 that, he is the maternal uncle of Respondent No.3. That, the interest of the Respondent No.3 in the suit property is required to be protected. That, till the date of filing of the said Application below Exh.23, the interest of Respondent No.3 in Original Suit No.2258 of 2010 and in Special Darkhast No.54 of 2012 was not at all properly represented by appointing an ad-litem guardian by the Court. In the present proceeding i.e. Civil Miscellaneous Application No.369 of 2017, the legal interest of the said minor i.e. Respondent No.3 in the suit property is required to be protected. That, the mother of the Respondent No.3 i.e. the Respondent No.4 in Original Suit and also in execution proceedings has communicated to the concerned Court that she is unable to represent the Respondent No.3, and therefore, in the said Darkhast proceedings i.e. in Special Darkhast No.54 of 2012, the learned Civil Judge, Senior Division, Pune has passed a common Order below Exhs.38 and 40, allowed the retirement of Respondent No.4 and appointed 'Nazir' of the said Court as next friend of Respondent No.3 for complying with the decree in respect of the share of Respondent No.3. That, the Petitioner has

preferred an Application below Exh.45 in Special Darkhast No.54 of 2012 for setting aside/ cancelling Order passed below Exhs.38 and 40 and also praying for his appointment as ad-litem guardian to protect the interest of Ms. Sakshi i.e. Respondent No.3 herein, being her maternal uncle. That, the said Application filed below Exh.45 in Special Darkhast No.54 of 2012 is pending for passing Orders by the concerned Court. It is further stated that, the 'Nazir' appointed by the Executing Court in Special Darkhast No.54 of 2012 by an Order passed below Exh.38 will not be in a position to oppose the Application filed under Section 8 of the said Act by the Respondent Nos. 1 and 2 and also to oppose the execution of decree passed in Special Civil Suit No.2258 of 2010. The Respondent Nos. 1 and 2 opposed the said Application by filing a detailed reply dated 5th October, 2017. The learned Trial Court by its impugned Order dated 5th January, 2019 has rejected the said Application.

9 Mr. Kadam, learned counsel for the Petitioner submitted that, the Respondent No.3 herein is the niece of the Petitioner and to protect her interest, he had filed the said Application below Exh.23 in Civil Miscellaneous Application No.369 of 2017 for stay of the said proceedings till the final orders are passed below Exh.45 in Special Darkhast No.54 of 2012. He submitted that, the said Application below Exh.45 was filed for

setting aside the Order of appointment of 'Nazir' passed below Exh.38 and for the appointment of the Petitioner as ad-litem guardian of the Respondent No.3. That, the Respondent No.4 has communicated to the Civil Court in Execution proceedings that she is unable to represent the Respondent No.3 and in view of Order passed below Exh.40 in Special Darkhast No.54 of 2012 the Respondent No.4 is permitted to be retired as next friend of Respondent No.3. He submitted that, the Nazir is not in a position to oppose the Application filed under Section 8 of the said Act and to oppose the execution of decree passed in Special Civil Suit No.2258 of 2010. He submitted that, the Trial Court has failed to take into consideration these aspects while passing the impugned Orders. He therefore, prayed that the impugned Order passed below Exh.23 in Civil Miscellaneous Application No.369 of 2017 may be set aside.

10 At the outset, it is to be noted here that, during the course of arguments, this Court repeatedly asked the learned counsel for the Petitioner as to what is the 'exact' interest, the Petitioner is having in the litigation, particularly in view of the fact that the biological mother of the minor Ms. Sakshi, i.e. the Respondent No.3 is alive and is capable to take care of her daughter and to further protect interest of her, the Trial Court in the said Darkhast Proceedings No.54 of 2012 has appointed Nazir of

the said Court as her next friend/guardian. No plausible explanation is being offered by the Petitioner about his alleged interest in the present litigation except repeatedly submitting that, he intends to protect the interest of the said minor child. With a view to prove his bonafide in protecting the alleged 'interest' of the said minor i.e. Respondent No.3, this Court suggested the Petitioner to deposit substantial amount in the account of Respondent No.3, to which the Petitioner flatly refused.

11 It is to be noted here that, the Judgment and Decree dated 19th October, 2011 passed in Special Civil Suit No.2258 of 2010 has attained finality and the Respondent Nos.3 and 4 have accepted the same. As noted earlier, though the Respondent No.4, biological mother of Respondent No.3 has withdrawn herself from the litigation, the concerned Court is taking care of the interest of Respondent No.3 with respect to her rights arising out of the decree passed in the said Special Civil Suit No.2258 of 2010. The scope of the proceedings pending before the Trial Court in Civil Miscellaneous Application No.369 of 2017 is restricted only to safeguard the interest of Respondent No.3 pertaining to the sale or transfer of the immovable property which had come to her share thereof. That, the purpose of filing of the said Application No.369 of 2017 under Section 8 of the said Act, by the Respondent Nos. 1 and 2 is with a view

to comply with the decree passed in Special Civil Suit No.2258 of 2010 as well as to execute the said Judgment and decree in Special Darkhast No.54 of 2012. It is important to note here that, the Respondent No.4 being biological mother of Respondent No.3 had filed Application below Exh.40 for her retirement as the guardian of Respondent No.3 and has not challenged the appointment of Nazir, by an Order passed below Exh. 38.

It is to be further noted here that, the Petitioner in his Application below Exh.23, has made several vague and general allegations which are devoid of any material in that behalf. The Trial Court has observed that, the concerned Nazir is safeguarding the interest of the minor and the Respondent No.4 i.e. the mother of the Respondent No.3 is also actively involved in the matter and is also having close watch over the proceedings. The said observation is self eloquent.

12 From the perusal of the entire record, it appears to this Court that, as the afore-stated decree passed against the Respondent Nos.3 and 4, involves substantial monitory consideration in their favour and it is the only reason for the Applicant to come forward belatedly with a specious plea that, he wants to protect the 'interest' of the said minor child. It further clearly indicates from the record that, during the pendency of the

said Special Civil Suit No.2258 of 2010, the Petitioner did not extend any help to his niece and it is only after the decree is passed in favour of the Respondent Nos. 1 and 2, the Petitioner has got up from deep slumber. It clearly appears to this Court that, the intention of the Petitioner in filing the said Application for appointing himself as ad-litem guardian/ next friend of Respondent No.3 is malafide and is not genuine. The Application filed by the Petitioner below Exh.23 is a frivolous and vexatious Application.

13 In view thereof, this Court finds that, the Trial Court has rightly rejected the said Application below Exh.23. There is no error either in law or on facts, committed by the Trial Court, while rejecting the said Application.

The Petition being de hors of merits is accordingly dismissed.

Sanjiv S.
Mashalkar

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[A.S. GADKARI, J.]