

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.07.2020

Delivered on : 24.08.2020

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.No.1201 of 2020

in

C.S.No.552 of 2019

Manohari

... Applicant

Vs

1.Sugunathalakshmi

2.Satheeswari

3.Indrani

4.C.L.Mohan Raj

5.C.L.Prabhu

6.C.L.Udayakumar

7.K.Dillibabu

... Respondents

Prayer: Judges Summons filed under Order XIV Rule 8 of the Original Side Rules read with Section 151 of the Code of Civil Procedure to set

aside order passed in Application No.9502 of 2019 in C.S.No.552 of 2019 and to restore the above application on file and dispose the same on merits.

For Applicant : Mr.G.Nanmaran

For Respondents 1 to 6 : Mr.T.N.Rajagopalan

For Respondent 7 : Mr.A.Prabhakaran

ORDER

The above application has been filed for setting aside the order dated 21.01.2020 in and by which this Court has permitted N.Dillibabu to act as a next friend of K.Dillibabu, the 2nd defendant in the above suit. It is necessary to briefly touch upon the facts which have preceded the filing of this application.

2. The respondents 1 to 6 herein had filed the suit C.S.No.552 of 2019 against the applicant and the 2nd defendant who though not described as a person of unsound mind either in short or long cause title, is in the body of the plaint described as a person suffering from severe intellectual disability. The suit is filed for a partition and separate possession of the

plaint schedule properties by allotting 1/6th share each to the plaintiffs 1 to 3 and a 1/18th share each to the plaintiffs 4 to 6.

3. The suit has been filed on 06.09.2019 and thereafter an application in A.No.9502 of 2019 has been filed by the named guardian of the 2nd defendant for permitting him to act as a next friend of the 2nd defendant for contesting the suit. The applicant herein would contend that the application in A.No.9502 of 2019 has been allowed by this Court without hearing her and that too on the basis of no objection given by the respondents 1 to 6 herein. The applicant would contend that there is a collusion between the plaintiffs, namely, the respondents 1 to 6 herein and the proposed next friend of the 2nd defendant, the 7th defendant herein. A reading of the order would show that the applicant herein was neither heard nor was the counter of the applicant on file. Along with the application for setting aside this *ex parte* order the applicant has filed the counter.

4. The applicant would contend that the procedure as contemplated under law for appointing the next friend and Guardian of the 2nd defendant, a person of an unsound mind / intellectual disability has not been followed. During the course of the arguments, the learned counsel for the applicant would further submit that the suit itself has been filed showing the 2nd defendant as being represented by the next friend and it is only after the suit was numbered and notice had been gone to the parties that the application has been moved by the very same person who is described as the next friend to permit him to act as a next friend of the 2nd defendant for contesting the suit. He would therefore contend that the procedure contemplated for appointment of the guardian for the mentally challenged defendant has been thrown to the winds.

5. The respondents 1 to 6 alone have filed their counter in which the 1st ground of objection is that the applicant having failed to appear before this Court on the date of hearing cannot be re-heard by way of an application to set aside the order. They would also contend that the next friend has been appointed in keeping with procedure contemplated under

Rule 111 of the Civil Rules of Practice. The learned counsel for the respondents 1 to 6 would only reiterate the contents of their counter affidavit and state that since Rule 111 of the Civil Rules of Practice contemplates that only a person who is not a party opposing the interest of the mentally challenged person can be appointed as a guardian the 7th respondent has been appointed as guardian of the 2nd defendant.

6. Heard the learned counsels and perused the papers.

7. Considering the fact that the 2nd defendant is stated to be a person of an unsound mind / suffering an intellectual disability, this Court being *parens patriae* of the person is bound to ensure that his interest are fully protected. The onus is moreso because the 2nd defendant is not described as a person of unsound mind but only as a person suffering from an intellectual disability. The applicant herein however describes the 2nd defendant as a person of unsound mind. The Court has to exercise extreme caution since by declaring a person to be of an unsound mind in effect his liberty is taken away. The Code of Civil Procedure, hereinafter called the

Code, prescribes the procedure for appointing a Guardian for mentally challenged person. Reference is being made to the Code since the Rules of the High Court, Madras (Original Side), 1994, herein after called the Rules does not provide for a similar procedure. Order I Rule 3 of the Rules contemplates that where the Rules are silent on a procedure the provision of the Code would apply. Order XXXII of the Code contemplates the procedure for minors / unsound mind being sued or for suing. Rule 15 therein would provide that Rule 1 to 14 barring Rule 2 A would apply to person of unsound mind. The Rule further provides that where a person has not been *adjudged* to be an unsound mind then unless the Court on enquiry finds that he is incapable, by reason of any mental infirmity of protecting his interest only then can a next friend be appointed to represent him. The Madras High Court by an amendment had deleted Rule 3 and 4 of Order XXXII and in lieu thereof substituted a new rule 3.

8. Before proceeding to discuss the point in issue in the instant application it is necessary to first consider the procedure contemplated under Order XXXII of the Code with particular reference to Rule 3

introduced by the Madras High Court Amendments.

9. Rule 3 of Order XXXII deals with the qualifications and appointment of a Guardian in the case of a minor. Rule 3 (3) deals with appointment of a guardian for a minor defendant and Rule 3 (4) deals with who may act as next friend or Guardian for the suit.

10. Rule 3 (4) states as follows:

“(4) Appointment to be on application and where necessary after notice to proposed guardian.— An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. The application, where it is by the plaintiff, shall set forth, in the order of their suitability a list of persons (with their full addresses for service of notice in Form No. 11-A set forth in Appendix H hereto) who are competent and qualified to act as guardian for the suit for the minor defendant. The Court may, for reasons to be recorded in any

particular case, exempt the applicant from furnishing the list referred to above.”

11. A reading of this Rule would clearly indicate that where a Guardian is sought to be appointed for a minor defendant **(to be read as person of unsound mind in the instant case)** then the plaint shall be accompanied by an application in which the plaintiff is required to set out the list of persons with their full address for service as contemplated under form 11 - A of appendix H, who are competent and qualified to act as a Guardian. Such a list can be exempted by the Court only for given reasons in any particular case.

12. Rule 3 (5) talks about the details that should be contained in an affidavit which is filed in support of the application for appointment of a Guardian. Rule 3 (7) contemplates notice to be given to all persons who are interested in the person of unsound mind therein, but not the proposed Guardian. The Court is bound to hear the objections if any before appointing the Guardian. The Rules also provided that a person cannot be

appointed as a Guardian without his consent. Rule 3 (10) further provides that if the Court finds that none of the proposed guardian are fit and willing to act as a Guardian then the Court could appoint a fit person as guardian of the person of an unsound mind.

13. Therefore on a reading of the above Rules, it is clear that before a person of an unsound mind, who has been arrayed as the defendant, is sought to be represented by a next friend or Guardian the provisions contemplated under Order XXXII Rule 3 (as amended by the Madras High Court Amendments) should be strictly followed.

14. Unfortunately, in the instant case this procedure does not appear to have been followed. On the contrary, the plaintiffs have filed the suit showing the 2nd defendant as being represented by a named Guardian. After the suit is numbered the Guardian takes out an application seeking the permission of the Court to represent the 2nd defendant as the Guardian which is not a procedure contemplated under the Code. Rule 3(4) contemplates that such an application for appointing a Guardian should be

filed by the plaintiff in the case of the person of unsound mind being the defendant. Since there has been a procedural lapse and a person who is sought to be declared as a person of unsound / intellectually disabled this Court in its position as *parens patriae* is bound to protect the interest of the person so sought to be declared. Further, Rule 15 also spells out that the Court has to hold an enquiry before appointing a Guardian in the case of person who has not been already adjudged a person of unsound mind.

15. Admittedly in the instant case the 2nd defendant has not been adjudged the person of unsound mind or mental incapacity by the authorities so qualified. The 1st defendant / applicant has in the counter highlighted that procedure contemplated has not been followed though she has not spelt out which of the provision has been violated. From the records, it appears that the said application, namely, A.No.9502 of 2019 was filed on 08.11.2019 and had come up for hearing on 09.12.2019 before this Court. Thereafter, the matter was adjourned and was posted on 03.01.2020 and once again the matter was adjourned to 21.01.2020. On

21.01.2020, the application has been allowed ***only on account of the no objection given by respondents 1 to 6, namely, the plaintiffs in the suit.***

16. It is but natural that the respondents 1 to 6 herein would give their no objection since they have filed the suit showing the said N.Dillibabu as the next friend / Guardian of K.Dillibabu. It is no doubt true that the applicant had not appeared on the said date. In the normal circumstances the application ought to be rejected, however considering the fact that the mandatory procedure contemplated under the Code appears to have not been followed and the 2nd defendant has now been declared as a person of unsound mind without there being an enquiry, it is just necessary for the order dated 21.01.2020 to be set aside. As stated earlier it is all the more necessary since the respondents 1 to 6 have not described the 2nd defendant as a person of unsound mind but only as a person suffering from an intellectual disability.

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17. In a Judgement of the Honourable Supreme Court reported in ***2003 (3) SCC 225 – Kasthuribai and others Vs. Anguri Chaudhary*** the

learned Judges was considering the correctness of orders passed in an application filed by a defendant to appoint a guardian as she had lost her ability to understand and give instructions to her lawyer. She had requested that she be examined in this connection by the Court. The Trial Court dismissed the petition and the High Court in revision set aside the said order. Thereafter, an application was filed by the plaintiff before the Division Bench for recalling this order, the Bench dismissed the said petition treating the same to be an appeal. This order was challenged before the Hon'ble Supreme Court. While passing orders allowing the appeal, the Hon'ble Supreme Court has after extracting the provision of Order XXXII Rule 15 of the Code held as follows:

“11. On a bare perusal of the said provision, it is evident that the Court is empowered to appoint a guardian in the event a person is adjudged to be of unsound mind. It further provides that even if a person is not so adjudged but is found by court on inquiry to be incapable of protecting his or her interest when suing or being sued by reason of any

mental infirmity, an appropriate order thereunder can be passed. The respondent did not contend that appellant No. 1 herein is of unsound mind. As noticed hereinbefore, the respondent herself had filed an application before the trial court for holding an inquiry to the effect that she suffers from mental infirmity.

12. The learned trial court refused to do the same and in that view of the matter the High Court, in our opinion, while setting aside the said order could only issue a direction directing the learned trial Judge to hold an inquiry so as to enable it to arrive at a finding as to whether the respondent herein was incapable of protecting her interest by reason of any mental infirmity or not. As no such inquiry was held, there cannot be any doubt whatsoever that, the learned Single Judge committed a jurisdictional error in passing the impugned judgment which, the Division Bench as noticed hereinbefore upheld.

13. For the reasons aforementioned, the impugned

judgments are set aside and the matter is directed to be remitted to the learned trial Judge for consideration of the matter afresh strictly in terms of Order 32 Rule 15 of the Code of Civil Procedure as also in the light of the observations made hereinbefore.”

18. A Division Bench of this Court in the Judgement of ***A.Manonmani Vs. A.Sivasubramanian – 2004-(4)-L.W.131*** holds as follows:

“12.3. The words employed in the legislature, namely persons who are found by the Court on enquiry to be incapable of protecting their interest when suing or being sued, found in Order 32 Rule 15 of the Code of Civil Procedure make it clear that a duty is cast on the Court to arrive at the finding whether on the pleadings or even in the absence of any pleading when it is brought to the notice of the Court by the evidence on record whether any persons is found by the Court, on enquiry to be incapable of protecting

his or her interest, when suing or being sued, and such duty, in our considered opinion, is mandatory but not discretionary. Any deviation from the above rule would render Order 32 Rule 1 to 14 of the Code of Civil Procedure redundant, inasmuch as the Court is expected to be a guardian of interest of the minors and persons of unsound mind who are incapable of protecting their interest.

12.4. If the Court is satisfied that the defendant is either a minor or a person of unsound mind or a person incapable of protecting his or her interest when suing or being sued, a further duty is cast on the Court itself to decide who could be a proper person to be appointed as a guardian ad litem for an effective representation of the case on behalf of the a minor or a person of unsound mind.

13. As the above burdened obligation of the Court was not discharged and a specific finding with regard to the allegations about the unsound mind of one of the defendants by name Kamala has not been rendered by the learned single

Judge, without going into the various other contentions urged by the learned counsel for the appellant, we are inclined to set aside the judgment and decree of the learned Judge.

19. In yet another Judgement of this Court reported in **2006 (4) CTC 657 – C.S.Navamani Vs. C.K.Sivasubramanian**, the learned Judge after examining dicta laid down by various earlier Judgements including **Kasturibai Vs. Anguri Chaudhary** on the scope and extent of Judicial enquiry to be conducted by the Courts to determine the unsoundness of mind or mental infirmity observed as follows:

“24. The enquiry contemplated under Order 32 Rule 15 is mandatory, to ascertain the mental state of mind of a person, before he is adjudged as unsound or mentally infirm, The word enquiry used in the provision means, to make an examination, to adjudge a person judicially as a lunatic or mentally infirm. Adjudge" means, to decide or to determine judicially, which means that there must be adequate materials to come to such conclusion, that a person has to be

represented by a guardian.

25. When there is an allegation of unsound mind or mental infirmity, it is the duty of the Court to examine the individual and if necessary, seek the assistance of an expert to adjudge as to whether the individual is having a sound mind and capable of managing the affairs. As a precaution, the evidence of expert in the Medical profession will be useful in understanding the meaning and the symptoms of any disease dealing with mental deterioration.

26. In the present case, such a course has not been followed and therefore, there is no doubt that the court below has failed to adjudge the respondent as mentally infirm, necessitating the appointment of a guardian. Equally while removing the Court guardian the lower Court has simply observed that the respondent had appeared before the Court and shown his mental faculties and is capable of defending himself. Not even questions were posed to the respondent to ascertain as to whether he can understand and answer the

same. Mental faculty is a broad term and it is beyond comprehension as to how the Court below can come to any conclusion by mere observation, particularly when the respondent had suffered from loss of memory, etc.,”

20. In the light of the procedure contemplated and the Judicial pronouncement supra A.No.1201 of 2020 is allowed and the order dated 21.01.2020 is set aside and parties are directed to address their arguments in A.No.9502 of 2019 on the basis of the procedure contemplated. Post A.No.9502 of 2019 on 01.10.2020.

24.08.2020

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