In the High Court of Punjab and Haryana, at Chandigarh

Civil Revision No. 21 of 2021

Date of Decision: 04.05.2021

Sarjeet Kaur

... Petitioner(s)

Versus

Harbhajan Singh and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Anil Kshetarpal.

Present: Mr. Rajinder Goyal, Advocate
for the petitioner.

Anil Kshetarpal, J.

Before this Bench proceeds to examine the merits of the case, it is important to note that the Courts are expected to act as *parens patriae*, which means that the Presiding Judges of the Courts are expected to assume the role of a parent in order to protect the interest of the persons, who are legally or otherwise unable to act or defend on their own behalf in the litigation. Whenever the presiding judge(s) of the court observes that one of the party to the litigation is unable to properly prosecute or defend his own case because of legal disability or poverty or illiteracy, the courts are expected to assume the role of a parent to do complete justice. The learned Presiding Judge of the First Appellate Court by a well-reasoned judgment has very ably discharged the aforesaid function.

2. Through this revision petition, filed under Article 227 of the Constitution of India, the petitioner prays for setting aside the order dated 09.12.2020, passed by the learned Additional District Judge, Kaithal. The

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trial Court on 22.09.2020 dismissed the application under Order XXXIX Rule 1 and 2 CPC, however, the First Appellate Court has reversed the same vide the impugned order.

3. Some facts are required to be noticed. Sh. Sahib Singh and Smt. Kesar Kaur were blessed with ten children. Raghbir Singh(Plaintiff No.3), one of their son, is undisputedly mentally retarded to the extent of 75% since birth. The petitioner herein is defendant No.1 in the suit. She was previously married to Jaswant Singh, the brother of Raghbir Singh. During the subsistence of their marriage for 22 years, they are stated to have been blessed with three children and who have got married. Thereafter, the petitioner claims that she divorced Jaswant Singh on 12.07.2013 by way of mutual consent under Section 13-B of the Hindu Marriage Act, 1955 (hereinafter referred to as "the 1955 Act") and then got re-married on 24.07.2013 to Raghbir Singh, plaintiff No.3in a Gurudwara at Sangrur in the State of Punjab i.e. within a period of 12 days of the divorce. Thereafter, she obtained permission to sell the entire agricultural land of plaintiff no.3 measuring 43 Kanals and 7 Marlas by filing a petition under Section 8 of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as "the 1956 Act") The aforesaid petition was filed by Raghbir Singh-plaintiff No.3 through defendant No.1-petitioner herein i.e. Sarjeet Kaur as his next friend. In the petition u/s 8, only the general public was impleaded as a respondent. In order to serve notice of the petition, a notice was published in a newspaper "Ashiana" on 25.02.2016 for appearance before the Court on 26.02.2016 i.e. the very next day. On the basis of the aforesaid publication, the Court proceeded with the trial of the case and the petition was allowed.

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The Court granted permission to sell the entire land subject to the condition that the sale would be on the market rate prevailing in the locality and the amount so realized, would be deposited in the account of Raghbir Singh as a fixed deposit and the same shall not be withdrawn without the permission of the Court.

4. Three plaintiffs, namely Harbhajan Singh, Surat Singh and Raghbir Singh, the brothers, filed a suit for declaration with a consequential relief of permanent injunction against Sarjeet Kaur (the petitioner herein) and Jaswant Singh. It has been pleaded that the proceedings for getting permission of the court to sell the agricultural land is an act of fraud on the court and the Court which granted permission had no jurisdiction. It has been pleaded that Jaswant Singh had stage-managed the divorce. The subsequent petition under Section 8 of the 1956 Act was filed in order to grab/usurp the property of his brother i.e. plaintiff No.3. Along with the suit, an application for grant of temporary injunction was also filed. Only defendant No.1 chose to defend the suit. The learned trial Court did not grant the relief of temporary injunction, however, the learned First Appellate Court reversed the order and granted the relief of temporary injunction against alienation of the suit land and also passed an order restraining the defendants from interfering in the possession of the plaintiffs. That is how this revision petition has been filed.

5. The learned counsel representing the petitioner has been heard at length and with his able assistance, the Bench has perused the paper-book. The learned counsel has also forwarded written synopsis, according to which the petitioner is assailing the order of the learned first Appellate Court on the

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following grounds:-

"1. The appropriate remedy of setting aside of ex parte order dated 26.02.2016 and also ex parte-judgment/order dated 08.07.2019 should have been availed instead of instituting the civil suit, either to file application under order 9 rule 13 CPC or to file appeal.

2. The marriage of petitioner/defendant No.1 with plaintiff No.3 was purposely got performed so that petitioner / defendant No.1 looked after the person and property of plaintiff No.3. Thereafter the marriage was performed on 24.07.2013 according to Sikh rites. Marriage certificate dated 24.07.2013 was eloquent of such facts.

3. The respondents/plaintiffs No.1 & 2 were not the proper parties to seek annulment of marriage and they failed to produce any evidence that mental disorder suffered by Raghbir Singh was of such a degree that it was impossible for him to lead a normal life.

4. Petitioner/defendant No.1 was faced with the need to sell the suit land owned and possessed by her husband, she filed a petition on behalf of plaintiff No.3 (mentally retarded) being his wife and next friend for grant of permission to sell the land so that the sale proceeds could be utilized for the upkeep of Raghbir Singh and investment in profitable avenues.

5. The marriage between the petitioner and plaintiff No.3 is a valid marriage and as such the court below ought not to have

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commented upon the same, until and unless the same is challenged in the competent court of law.

6. After the divorce, Petitioner i.e Sarjeet Kaur started residing in her parental home at Village Banarsi,Tehsil Moonak,Distt. Sangrur along with her brother Amrik Singh. It is relevant to mention here that the Gurdwara is situated at about 2 KM from parental house of petitioner .Even in the marriage certificate the address of petitioner is of her parental house, where she was residing at the time of her marriage with the plaintiff No.3. The petitioner i.e Sarjeet Kaur & Raghbir Singh started residing as wife & husband at Village Shadipur Tehsil Guhla, Distt. Kaithal(Ration card-Voter card-Haryana Family Identity certificate).

7. There is nothing on record to show and prove that even though, plaintiff No. 3 was mentally retarded was incapable of giving a valid consent or has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage.

8. Even otherwise, as per section 12 of the act, 1955, any marriage which is in contravention of condition specified in clause(ii) of section 5 is voidable marriage and may be annulled by a decree of nullity only on the petition filed. In the present case, neither there is any such proof of contravention of conditions specified in section 5 of the Act,1955 and nor, till date, the marriage has been declared to be nullity under section

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12 of the Act, 1955.

9. The conditions imposed, by granting the permission to sell are clear and specific and there is a complete safeguard for protecting the rights of plaintiff No. 3.

10. Even, till date, the land has not been sold, mortgaged and neither there has been creation of 3rd party rights, so as to give any cause of action to the plaintiffs to file the present suit seeking challenge to the valid judgment and decree.

11. The petitioner being the wife of plaintiff No. 3 filed the petition for permission to sell the land of plaintiff No. 3 and as such, there was no necessity of issuance of any notice to any other relative or friend of plaintiff No. 3.

12. The court below has virtually set aside the valid judgment passed by competent court of law, even though, the case is at initial stage of deciding the application for interim injunction.

13. Merely because the surety bonds were only to the extent of Rs.10,000/-is not adverse, particularly, when, the clear and specific conditions were imposed protecting the rights of present plaintiff No. 3. The newspaper, in which the publication was ordered was as per the provision made by this Hon'ble Court.

14. The fact that the petitioner was remarried with plaintiff No. 3 has been prima facie proved by way of documentary evidence in the shape of marriage certificate, ration card, voter card and Adhar Card, on the other hand, there is no other

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documentary evidence to the contrary. As such, the trial court rightly dismissed the application filed by respondents/plaintiffs.

15. Neither there is prima facie case in favour of the respondents/plaintiffs and nor the balance of convenience lies in their favour and there is no question of their suffering an irreparable loss and injury.

16. Even the application filed under order 32 rule 5 CPC for appointment of Guardian by Gurmukh Singh was dismissed as withdrawn. Even the suit filed by respondent No. 1 and 2 and by plaintiff No. 3 through Gurmukh Singh it is not maintainable, particularly, when no application under order 32 rule 5 CPC has been filed along with the suit seeking permission, either for appointment of Guardian of plaintiff No. 3 or for pursuing the suit on behalf of plaintiff No. 3."

6. It is further significant to note that as per Section 5 (ii)(a) of the 1955 Act, a marriage can be performed by a person who is capable of giving a valid consent to it. In other words, at the time of marriage, neither of the parties should be incapable of giving valid consent to it on account of being of unsound mind. Further, the wife of the brother comes within the degrees of prohibited relationship as per Section 3(g) of the 1955 Act, which is extracted as under:

"(g) "degrees of prohibited relationship"-two persons are said to be within the "degrees of prohibited relationship"--

(i) if one is a lineal ascendant of the other; or

(ii) if one was the wife or husband of a lineal

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ascendant or descendant of the other; or

(iii) if one was the wife of the brother or of the father's or mother's brother or, of the grandfather's or grandmother's brother of the other; or

(iv) if the tow are brother and sister, uncle and niece, aunt and nephew, or children of brother and sister or of two brothers or of two sisters;

Explanation:- For the purposes of clauses (f) and (g), relationship includes ---

(i) relationship by half or uterine blood as well as by full blood;

(ii) illegitimate blood relationship as well as legitimate;

(iii) relationship by adoption as well as by blood;

and all terms of relationship in those clauses shall be construed accordingly."

Thus, without expressing the final opinion, *prima-facie*, the alleged marriage of the petitioner with plaintiff No.3 appears to be void in view of Section 5 (iv) read with Section 11 of the 1955 Act.

7. Now, the stage is set to examine the contentions. The first contention of the learned counsel for the petitioner is with respect to the maintainability of the declaratory suit on the ground that an application for setting aside the *ex parte* order passed in the petition under Section 8 of the 1956 Act was maintainable. It would be important to note that plaintiff No.1 and 2 were not party to the aforesaid petition. In fact, the proceedings under

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Section 8 of the 1956 Act were itself not maintainable because the aforesaid proceedings are maintainable only on behalf of a minor and not with respect to a person of unsound mind. In fact, at the relevant time, an application for judicial inquisition, under Section 50 of the Mental Health Act, 1987 (hereinafter referred to as "the 1987 Act"), was maintainable. Although subsequently, the 1987 stands repealed. Further, the suit seeking declaration has been filed claiming that the proceedings under Section 8 of the 1956 Act were the result of fraud. In such a situation, the Court is entitled to set aside such an order/judgment in any proceedings including any collateral proceedings. Hence, there is no substance in the first contention.

8. Next argument of learned counsel is to the effect that the petitioner got married with plaintiff No.3 in order to look after his person and the property. It is important to note here that the case set up by the petitioner (defendant No.1 before the trial Court) is strange and appears to be unpalatable. The petitioner claims that on 12.03.2013 she got divorce from the brother of plaintiff No.3 by mutual consent after 22 years of marriage, when their children had also got married, as she could not continue to live with Jaswant Singh. However, within a period of 12 days, on the request of plaintiff No.1 and 2, she got married with plaintiff No.3. The facts speak for themselves and create a big question mark on the genuineness of the case set up by the petitioner and therefore, need no further deliberations. Further, at the stage of granting a temporary injunction, the Court is only required to examine whether a *prima facie* case has been made out.

9. Next argument of learned counsel representing the petitioner is with reference to the extent of mental disorder. It would be noted here that

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the plaintiffs have produced on record a certificate dated 12.08.2009 issued by the office of the Chief Medical Officer, showing that plaintiff No.3 is mentally retarded to the extent of 75% and his intelligence quotient level is clinically below 50. Still further, the petitioner, while filing the written statement in the suit, has herself admitted that plaintiff No.3 is mentally retarded to the extent of 75%. It is noted here that the extent of mental disorder would be the subject matter of the evidence and at this stage, sufficient material is available to form an opinion that plaintiff No.3 is unable to protect his interest.

10. The fourth contention of the learned counsel for the petitioner is to the effect that the sale of the land is necessary to utilize the same for taking care of Raghbir Singh-plaintiff No.3. The petitioner has not produced any material to prove that Raghbir Singh is not being looked after by his brothers and nephews. Raghbir Singh is stated to be aged about 55 years on the date of filing of the suit. There is no material to show that Raghbir Singh was not taken care of by his relatives in all these years. At this stage, the Court is only to see a *prima facie* case. Hence, there is no force in this contention. In any case, if the petitioner apprehends that plaintiff no.3 is not being looked after properly, she shall be at liberty to file an application before the trial court, which shall be required to be decided by the court by putting the remaining plaintiffs to terms.

11. Next contention of the learned counsel representing the petitioner has already been answered in the foregoing discussion. *Prima facie*, the marriage between the petitioner and plaintiff No.3 is a void marriage. However, this observation is only fro the purpose of deciding the

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application seeking temporary injunction and the Court, after recording the evidence, would proceed to decide the matter uninfluenced by the observations made by the learned First Appellate Court or this Court.

12. Next contention of the learned counsel is only to be noticed and rejected because if the petitioner had gone back to her parental home in district Sangrur after getting divorce from her First husband, then it is not explained as to how plaintiff No.1 and 2 compelled her to marry a 75% mentally retarded person and that also at Sangrur, whereas the plaintiffs No.1 and 2 with plaintiff no.3 are residing in village Shadipur, Tehsil Guhla, District Kaithal (Haryana). Still further, this is again subject to evidence to be led by the parties and appreciated by the Trial Court, while deciding the suit.

13. Next contention of the learned counsel is also without any substance. At this stage, the Court is only required to record its observation *prima facie*. As per the certificate issued by the office of the Chief Medical Officer from a Government Hospital, it is apparent that plaintiff No.3 is mentally retarded to the extent of 75%. Hence, the opinion formed by the learned First Appellate Court needs no interference.

14. Next contention of the learned counsel has already been answered because *prima facie* the marriage of the petitioner with plaintiff No.3 is void, being within the degrees of prohibited relationship in view of Section 5(iv) read with Section 11 of the 1955 Act. Section 5 and 11 of the 1955 Act are extracted as under:-

> ***"5. Conditions for a Hindu marriage.***—*A marriage may be solemnized between any two Hindus, if the following conditions*

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are fulfilled, namely:—

(i) neither party has a spouse living at the time of the marriage;

(ii) at the time of the marriage, neither party—

(a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or

(b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or

(c) has been subject to recurrent attacks of insanity.

(iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;

(iv) the parties are not within the degrees of prohibited relationship unless the custom or usage governing each of them permits of a marriage between the two;

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

Section 6 to 10 XXXX XXXX XXXX XXX

***11. Void marriages**:- Any marriage solemnised after the commencement of this Act shall be null and void and may, on a petition presented by either party thereto, against the other party , be so declared by a decree of nullity if it contravenes*

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any one of the conditions specified in clauses (i), (iv) and (v) of Section 5".

. In view of the aforesaid discussion, the opinion formed by the learned First Appellate Court does not suffer from any error.

15. With respect to the next contention of the learned counsel, it may be noted here that plaintiff No.3 is the owner of a big chunk of land. The Trial Court, while granting the permission to sell the land, did not even consider to grant permission to sell only a part thereof. In any scenario, in the facts of the present case, the opinion formed by the learned first Appellate Court does not suffer from any error.

16. Next contention of the learned counsel is with regard to the cause of action to file the suit. As per the plaintiffs, the suit has been filed when they came to know of the illegal and fraudulent order obtained by the petitioner and on 25.08.2020 when the defendants refused to admit the claim of the plaintiffs. It is not the case of the petitioner that she does not intend to sell the property in view of the permission granted. In such circumstances, the opinion formed by the learned First Appellate Court needs no interference.

17. Next contention of the learned counsel is without substance as the Court, while granting an injunction, does not express any final opinion on the merits of the case. While deciding the injunction applications, the Courts are expected to form *prima facie opinion*. Hence, the judgment passed by the Guardian Judge has not been set aside.

18. The next contention of the learned counsel also does not have any substance because the Guardian Judge, while granting permission, failed

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to apply its mind as to the value of the property permitted to be sold. The amount of surety bond was minuscule when compared to the market value of the property. As regards the publication, it would be noted that *prima facie,* the Court has found that the publication of notice was in a newspaper which had no circulation in the area where the parties used to reside. These are only prima facie observations and therefore, need no interference.

19. As regards contention No.14 of the learned counsel, it would be noted that the validity of the documents, as alleged, would be examined by the Court while deciding the suit. The learned first Appellate Court has *prima facie* formed an opinion which does not appear to be wrong.

20. With regard to contention No.15, it would be noted that the learned first Appellate Court has rightly observed that the plaintiffs have not only a *prima facie* case but even the balance of convenience lies in their favour. It is also apparent that if the petitioner is permitted to sell the entire property of a person who suffers from 75% mental retardation, an irreparable loss and injury is likely to be caused. Hence, there is no scope for interference.

21. Next argument of learned counsel is also to be noticed and rejected, because a suit can be filed by a person of unsound mind through next friend as per Order XXXII Rule 1 read with Rule 15 CPC. The plaintiff is not required to seek any permission from the court to file a suit through his next friend. Order XXXII Rule 5 CPC itself provides that every application to the Court can be filed on behalf of a minor by his next friend or by his guardian in the suit. Order XXXV Rule 5 does not provide that the next friend is first required to be nominated by the court as a guardian. As

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per the scheme of the Code of Civil Procedure,1908, the Court is required to appoint a guardian of a defendant and not of the plaintiff. Order XXXII Rule 3 CPC is applicable to the defendant and not the plaintiff.

22. Keeping in view the aforesaid facts, there is no scope for interference in the detailed order passed by the learned first Appellate Court. However, at the cost of repetition, it is significant to note that the observations made by the learned First Appellate Court as well as by this Court shall not be treated as an expression on the merits of case and the Court, while deciding the suit, will independently appreciate the pleadings and the evidence led.

23. With the observations made above, the revision petition is dismissed.

(Anil Kshetarpal)
Judge

May 04, 2021
"DK"

Whether speaking/reasoned :Yes/No
Whether reportable : Yes/No

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