

01.07.2024
(M/L-04)
Ct.-19
(Susanta)

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION**

C.O. 105 of 2024

Sk. Hatem Ali

-Vs-

***Sarif Ahmed Molla @ Sarifa Ahmed Molla
& Anr.***

Mr. Sounak Bhattacharyya,
Mr. Sounak Mondal,
Mr. Abhirup Halder,
Mr. Sandip Das,

... For the Petitioner.

Mr. Abdul Hamid Molla,
Mr. Mukteswar Maity,
Md. Abdul Halim,
Ms. Nupur Chaudhuri,

.... For the Opposite Parties.

The defendant in a suit for declaration is the petitioner of the instant application under Article 227 of the Constitution of India which is directed against order no. 93 dated August 09, 2023 passed by the 1st Additional Court of learned Civil Judge (Junior Division), Diamond Harbour, District 24-Parganas (South).

The connected suit was filed in the name of the plaintiff by his mother claiming that her son is of unsound mind.

On the death of the mother, the elder sister of the plaintiff, Ms. Katunnecha Bibi applied for her appointment as the curator of the plaintiff.

The learned Trial Judge by the order impugned has allowed the said application and has dismissed the defendant's application questioning the maintainability of the suit.

Mr. Sounak Bhattacharyay, learned advocate for the petitioner submits that to file a suit on behalf of a person of

unsound mind, the guardian is required to obtain leave of the Court but such leave in the instant suit was not obtained, as such the suit is liable to be dismissed on the said ground alone.

He refers to the provision of the Section 359 of Mulla on The Principles of Mahomedan Law to contend that neither the mother nor the sister can be appointed as a guardian of a person of unsound mind having Islamic faith, therefore, according to him, the learned Trial Judge has acted with material irregularity in allowing the prayer of the sister to act as the curator of the plaintiff and in dismissing the application of the defendant.

Mr. Maity learned advocate for the opposite party submits that once the plaintiff was directed to appear before the learned Trial Judge to adduce evidence but same could not be done because of his mental condition, besides on behalf of the plaintiff, several medical documents were filed on the basis of which the learned Trial Judge has assessed the mental condition of the plaintiff and has appointed his sister as the curator.

Heard the learned advocate for the parties, perused the materials on record.

Order XXXII of the Code of Civil Procedure prescribes the procedure for suits by or against the minor and person of unsound mind, Rule 3 Sub-Rule (1) thereof prescribes that where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor.

Order XXXII Rule 15 of the Code prescribes that Rules 1 to 14 shall, so far as may be applied to persons adjudged, before or during the pendency of the suit, to be of unsound mind and shall also apply to persons who, though not so adjudged, are found by the Court on enquiry to be incapable, by reason of any mental infirmity, of protecting their interests when suing or being sued.

Therefore, the mandate of Order XXXII Rule 3 Sub-Rule(1) of the Code is applicable in respect of suit filed on behalf of a person of unsound mind.

In the present case, there is nothing on record to suggest that the learned Trial Judge before allowing either the mother or the sister as the curator/ guardian of the plaintiff has recorded his satisfaction regarding the unsoundness of the mind of the plaintiff.

To allow the sister as the curator of the plaintiff, the learned Trial Judge was persuaded by the fact that the plaintiff's hands were shivering when he appeared to depose in the suit and the medicines prescribed to the plaintiff are of the mentally ill patients, these are not sufficient to form an opinion regarding the state of mind of the plaintiff.

Order XXXII Rule 3(1) of the Code demands higher degree of satisfaction regarding unsoundness of the mind of a person to sue or be sued.

The provision of Section 359 of the Mulla on The Principals of Mahomedan Law as follows:-

“359. Legal guardians of property.- The following persons are entitled in the order mentioned below to be guardians of the property of a minor (z):-
(1) the father;

(2) *the executor appointed by the father's will;*
 (3) *the father's father;*
 (4) *the executor appointed by the will of the father's father."*

Therefore, there is hardly any scope for the appointment of the mother or the sister *qua* the guardian of the plaintiff.

The plaintiff in the suit has prayed for a declaration of his right, title and interest over the suit property upon a declaration that the deed of sale executed in favour of the defendant is void, not binding etc.

In order to avoid the said deed, the defendant, is required to seek for cancellation of it as he is a party to such deed. A suit for declaration simplicitor cannot afford the full relief to the plaintiff, consequently affects the maintainability of the suit.

The maintainability of the suit is required to be addressed on the aforesaid points.

The application filed by the defendant questioning such maintainability since is not covering all of the aforementioned points, liberty is granted to the plaintiff to file a fresh application questioning the maintainability of the suit on all of the above points within a week from date, the plaintiff obviously would be entitled to file a written objection to the said application.

The order impugned for the aforesaid reason, so far as it relates to allowing of the application of the sister for her appointment as the curator of the plaintiff, is set aside.

If the said application to determine the maintainability of the suit is filed within the said time, the learned Trial Judge

shall dispose of the same expeditiously and depending upon the outcome of the said application, the learned Trial Judge shall expedite the disposal of the suit.

C.O. 105 of 2024 is disposed of with the above terms without any order as to costs.

Parties to act on the server copy of this order duly downloaded from the official website of this Court.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.

(Biswajit Basu, J.)