



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 16 OF 2023

1. Shivansh Mohit Salunkhe,
Age : 2 years, Occ. : Nil,
Through his next friend
Sachin Nanasaheb Anarthe,
Age : 29 years, Occ. : Service,
R/o. : Chandrapur, Tq. Rahata,
Dist. Ahmednagar

... APPLICANT

(Ori. Plaintiff)

VERSUS

1. Laxman Rangnath Salunkhe,
Age : 60 years, Occ. : Agriculture,
2. Meena Laxman Salunkhe,
Age : 55 years, Occ. : Agriculture & Household,
3. Mohit Laxman Salunkhe,
Age : 30 years, Occ. : Agriculture & Service,

All R/o. : Chitali, Tq. Rahata, Dist. Ahmednagar
4. Nita Nilesh Deshmukh,
Age : 32 years, Occ. : Agriculture & Household,
R/o. : Sangamner, Tq. Sangamner,
Dist. Ahmednagar

... RESPONDENTS

(Ori. Defendants)

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Mr. A.D. Sonkawade h/f. Mr. Rajesh H. Mewara – Advocate for Applicant

Mr. Sandip P. Rathod – Advocate for Respondents

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CORAM : SANDIPKUMAR C. MORE, J.

DATE : 29th February, 2024

ORDER :

1. The applicant i.e. original plaintiff in Regular Civil Suit No.224 of 2021 has challenged the order dated 30.11.2022 below Exh.17 passed by the learned Trial Court i.e. 2nd Joint Civil Judge Junior Division, Rahta, Dist. Ahmednagar. By the impugned order the learned Trial Court has partly allowed the application and contrary to the prayer of return of plaint rejected the plaint itself under Order VII Rule 11 (d) of Civil Procedure Code (*"C.P.C." for short*).

2. Background facts of the case are as under :

The respondent No.3 is father of Shivansh i.e. minor on whose behalf the aforesaid suit is filed. It was alleged that respondent No.3 was ill-treating his wife by name Jyoti and out of such ill-treatment she committed suicide and, therefore, Shrirampur Taluka Police Station lodged F.I.R. against the present respondents under Section 306, 498-A, 323, 504 and 506 of Indian Penal Code. It is further alleged by applicant that, after death of mother of Shivansh, the respondents on the same day abandoned Shivansh by keeping him at the neighbours place and then avoided to maintain him. Thereafter, the maternal uncle of

Shivansh who on behalf of Shivansh has filed the present suit, took Shivansh with him and now maintaining him. Then the maternal uncle – Sachin Nanasaheb Anarthe filed the aforesaid suit for partition, separate possession and perpetual injunction against the present respondents for securing share of the Shivansh in the ancestral property of the respondents. However, by filing application at Exhibit-17 respondents Nos.1 to 3 challenged the appointment of Sachin Nanasaheb Anarthe as guardian of Shivansh for filing suit and same was allowed and the plaint was rejected. Hence, this application.

3. Learned Counsel for applicant submits that, the present suit is filed on behalf of minor by his maternal uncle – Sachin Nanasaheb Anarthe being in the capacity of next friend as per Order XXXII of C.P.C., but the learned Trial Court erroneously held that, no such next friend or guardian can be appointed for filing such suit when the natural guardian i.e. present respondent No.3 is alive. He pointed out that, the concept of guardian as mentioned in Section 12 in Hindu Minority and Guardianship Act, 1956 is totally different than the concept of guardian in order XXXII of C.P.C. He pointed out that, the next friend can be appointed for

seeking partition on behalf of minor in his ancestral property and it has only to be seen that, the interest of such next friend should not be adverse to the interest of minor. He further argued that, the respondents did not challenged the order whereby the maternal uncle – Sachin Nanasaheb Anarthe was appointed as guardian of minor Shivansh at the time of filing suit. As such, he prayed for setting aside the order of rejection of plaint passed by the learned Trial Court. In addition to his submissions he also relied on the following judgments :

(a) Hon'ble Apex Court in the case of **Nagaiah and another Vs. Chowdamma (dead) by legal representatives and another** in Civil Appeal No.22969 of 2017 reported in *(2018) 2 SCC 504*

(b) Hon'ble Apex Court in the case of **Kakumanu Pedasubhayya and another Vs. Kakumanu Akkamma and another** in Civil Appeal No.326 of 1955 reported in *AIR 1958 SC 1042*

(c) **Aryan Kamal Wadhwa Vs. Biharilal Wadhwa (HUF) and Others** in Notice of Motion No.3461 in Suit No.3076 of 2005 reported in *AIR BOM R 608*

4. On the contrary, learned Counsel for the respondents supported the judgment of learned Trial Court. He relied upon the

Section 12 of the Hindu Minority and Guardianship Act, 1956 and submitted that, as per this section no guardian of minor can be appointed when the property is under management of an adult member of the family of the minor. According to him, natural guardian i.e. father of minor Mohit Laxman Salunkhe who is present respondent No.3 is still alive and as per Section 12 of the Hindu Minority and Guardianship Act, 1956m only this Court is having power to appoint a guardian in respect of management of joint family property of a minor.

5. Heard rival submissions and also perused the documents on record.

6. On going through the impugned order it appears that, the learned Trial Court against the prayer of return of plaint of the present respondents rejected the plaint under Order VII Rule 11 (d) of C.P.C. for the reason that it is barred by law. It appears that, the learned Trial Court has observed such bar relying upon Section 12 of the Hindu Minority and Guardianship Act, 1956, which is reproduced herein below for quick reference.

“12. Guardian not to be appointed for minors undivided interest in joint family property — Where a

minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest :

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.”

7. As against this the learned Counsel for applicant submits that, the said bar under Section 12 of the Hindu Minority and Guardianship Act, 1956, will not come in picture since the concept of guardian in the said section is entirely different from the guardian or the next friend appointed under Order XXXII of C.P.C. It is not in dispute that, the property in respect of which the partition suit filed by the present applicant being the next friend or natural guardian of minor Shivansh, is ancestral and a joint family property of the respondents and minor Shivansh. Only disputed fact is that, whether during the lifetime of natural guardian i.e. respondent No.3 any other guardian can be appointed on behalf of minor Shivansh.

8. This Court in the case of **Aryan Kamal Wadhwa** (*supra*) has observed that, the suit by a minor through his next friend i.e. his mother for partition of HUF property is maintainable and the only

requirement of Court for granting partition to see that, the partition is for benefit of the minor. If it is not shown by the defendants that such suit is against the benefit of minor then the partition has to be granted. In the aforesaid judgment it is further observed in paragraph Nos.9, 14 and 15 as follows :

“9. The judgment in the case of Bammangouda Shankargouda Patil & anr. Shankargouda Rangangouda Patil, AIR 1944 Bombay 67 has considered the application of a minor to partition the HUF to which he belongs. The only requirement for the Court to see is that the partition is for the benefit of the minor. It is observed at page 69 that that is a wholesome rule of law as the property which would be in the hands of the adult coparceners in the family should not be divided and handed over to a minor at the instance of unscrupulous persons when the minor's share, if partitioned, would be in danger of being applied to purposes adverse to the minor's interest. Consequently, it would be for the Defendants to show that the application on behalf of the minor made by the mother in this case is vitiated by unscrupulousness such as to endanger the minor's share for an adverse interest. Once that is seen, it is held, that the principle of Hindu law which governs separation of estate is the same for minors as well adults.

14. *Further in the case of Puttorangamma vs. Rangamma,*

AIR 1968 SC 1018 it is held that a member of HUF can bring about separation in status by a declaration of such an intention to separate from the family and enjoy his share in severalty even without filing a Suit. In view of the aforesaid two judgments of the Supreme Court, the Bombay High Court in the case of Narayan Ramchandra Katkar & ors. vs. Arjun Bhimrao Gore & ors., AIR 1986 Bombay 122 held that a minor can sue for partition. The decision in the case of Araj N. Kulkarni (supra) has been held to be not good law. In that case the question of bar of limitation also had to be considered in view of certain major children in the HUF but with which this case is not concerned.

15. *Consequently, it is seen that the minor can sue for partition or be maintained out of HUF whilst it remains joint. Of course, the option exercised by the Plaintiff and the bonafide offer made to have his share deposited in the Court would not entitle the Plaintiff to be further maintained out of the HUF funds. His claim for maintenance gets crystallized in the 1/6th share. This share is required to be determined.*

Thus, from the observations made in the aforesaid judgment it is settled that, the minor can sue for his share in the joint Family property through his next friend.

9. Further, the Hon'ble Apex Court in the judgment of case of **Nagaiah and another** (*supra*) has explained the concept of next friend. It has been observed in paragraph No. 10 as follows :

“A bare reading of Order 32 Rule 1 of the Code makes it amply clear that every suit by a minor shall be instituted in his name by a person who in such suit shall be called the “next friend” of the minor. The next friend need not necessarily be a duly appointed guardian as specified under clause (b) of Section 4 of the Hindu Guardianship Act. “Next friend” acts for the benefit of the “minor” or other person who is unable to look after his or her own interests or manage his or her own law suit (person not sui juris) without being a regularly appointed guardian as per the Hindu Guardianship Act. He acts as an officer of the court, especially appearing to look after the interests of a minor or a disabled person whom he represents in a particular matter. The aforesaid provision authorises filing of the suit on behalf of the minor by a next friend. If a suit by minor is instituted without the next friend, the plaint would be taken off the file as per Rule 2 of Order 32 of the Code.”

Such next friend can also be termed as “guardian *ad litem*” if such person is appointed to defend the suit against the minor. From the aforesaid observation it appears that, such “next friend” or “guardian *ad litem*” necessarily should not be a natural guardian of the minor but it is only to be seen that, such “next

friend” should not act contrary to the interest of the minor. Moreover, it also appears that, if the suit is filed on behalf of minor, no permission or leave of the Court is necessary for the next friend to institute the suit. It is also observed in paragraph Nos.15 and 16 as follows :

“15. “Guardian” as defined under the Hindu Guardianship Act is a different concept from the concept of “next friend” or the “guardian ad litem”. Representation by “next friend” of minor plaintiff or by “guardian ad litem” of minor defendant is purely temporary, that too for the purposes of that particular law suit.

16. There is no hurdle for a natural guardian or duly constituted guardian as defined under the Hindu Guardianship Act to represent minor plaintiff or defendant in a law suit. But such guardian should not have adverse interest against minor. If the natural guardian or the duly constituted guardian has adverse interest against the minor in the law suit, then a next friend or guardian ad litem, as the case may be, would represent the minor in the civil litigation.”

10. From the aforesaid observation and going through the Order XXXII of C.P.C., it is evident that, any person who is of sound mind and has attained majority and who can represent and protect the interest of minor, can be appointed as next friend of minor to

represent the minor. In the suit filed for the benefit of that minor his duty is only to safeguard the interest of minor. Further, as per aforesaid observations the concept of guardian under Hindu Minority and Guardianship Act, 1956 is different than the concept of guardian *ad litem* in Order XXXII of C.P.C. and such appointment of a person as a next friend of minor is purely temporary, that too for the purposes of that particular law suit.

11. Here in this case, though the respondent No.3 has filed proceeding for getting custody of minor Shivansh, but it is not decided finally. Moreover, he is also facing trial under the penal sections of I.P.C. as mentioned above for abatement to commit suicide by mother of Shivansh i.e. his own wife. However, the learned Court before which such custody proceeding in respect of Shivansh is pending will be at liberty to dispose the said proceeding on its own merit.

12. So far as the Section 12 of the Hindu Minority and Guardianship Act, 1956 is concerned it appears that, it is in respect of management of undivided interest of the minor in joint family property and no guardian shall be appointed for minor in respect of undivided interest in joint family property if the property

is under the management of an adult member of the family of minor. However, in the instant case, the question of management of undivided interest of minor in joint family property is not in existence. On the contrary, the minor has claimed partition of his share in the joint family property. Moreover it appears that, the appointment of maternal uncle – Sachin Nanasaheb Anarthe of minor Shivansh is as per Order XXXII of C.P.C. being a next friend of minor though it is mentioned in Marathi language as “अज्ञान पालन करणार”. Moreover, the said maternal uncle is not having any personal interest in the property of the minor. Therefore, considering the difference between the term “guardian” as defined under Hindu Minority and Guardianship Act, 1956 and “next friend” or the “guardian *ad litem*” in Order XXXII of C.P.C. it appears that, the learned Trial Court appears to have mixed those two concepts and erroneously rejected the plaint by observing the bar under Section 12 of the said Act. Therefore, considering all these aspects, the order passed by the learned Trial Court of rejecting the plaint appears perverse in nature and liable to be set aside.

13. Accordingly the Civil Revision Application stands allowed and

the impugned order dated 30.11.2022 below Exhibit – 17 passed by the learned Trial Court is hereby set aside.

14. The learned Trial Court is directed to restore the suit bearing Regular Civil Suit No.224 of 2021 and proceed with the same, according to law.

15. Parties are directed to appear before the learned Trial Court on or before 28th March, 2024.

16. The Civil Revision Application is accordingly disposed of.

[SANDIPKUMAR C. MORE]
JUDGE