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IN THE HIGH COURT OF PUNJAB AND HARYANA  
AT CHANDIGARH

CR-3501-2024  
Date of decision : 20.09.2024

NEELAM ....Petitioner

Versus

ER. RAKESH SINGH ....Respondent

**CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN**

Present : Mr. Aditya Jain, Advocate and  
Mr. Rahul Vohra, Advocate for the petitioner.

Mr. Parmod Kumar, Advocate, Legal Aid Counsel HCLSC  
for the respondent.

**PANKAJ JAIN, J. (ORAL)**

Challenge is to the order dated 6<sup>th</sup> of May, 2024 passed by District Judge, Family Court, Gurugram whereby application filed by the petitioner for setting aside order dated 8<sup>th</sup> of October, 2021 vide which she was ordered to be proceeded *ex parte*, stands rejected.

2. Petitioner has been arraigned as the respondent in the petition filed under Section 10 of Guardian and Wards Act, 1890 read with Section 13 of the Hindu Minority and Guardianship Act, 1956 whereby the husband claims his right to be appointed as guardian of minor children namely Samaira Singh and Arinjay Kumar Singh. On notice, wife appeared. The matter was fixed for PWs when on 8<sup>th</sup> of October, 2021 wife was proceeded



*ex parte* owing to her absence. Wife filed application on 25<sup>th</sup> of November, 2021 claiming that absence of the wife was owing to circumstances beyond her control. Minor daughter of the respondent suddenly fell ill and was to be nebulized. Necessary pleadings as raised in Para 2 of the application read as under :

“2. As per the order sheet, on 8/10/21, it was listed for Respondent's Reply to the present petition. However, owing to circumstances as stated below the Respondent was unable to attend the hearing. The minor daughter of respondent namely Samira Singh who is aged 10 years of age suddenly was suffering from high fever and severe wheezing to the extent that she had to be nebulized every hour. She is a patient of Allergic Bronchitis. Owing to these reasons the respondent could not come to the court as she was completely occupied in taking care of the ailing child. The respondent is single handedly taking care of the child because of which she could not come to the court. The respondent daughter was given medicines which were repurchased on October 17, 2021 (bill of the chemist is attached) and was also taken for consultation on October 19<sup>th</sup>, 2021 (medical prescription is attached). In fact, the respondent daughter had been continuously sick ever since then and has been under nebulization upto 28<sup>th</sup> October, 2021.”

3. The application was opposed. Family Court vide order dated 6<sup>th</sup> of May, 2024 dismissed the application primarily on the following two grounds:

- (i) It was held by the Court that the application moved under Order IX Rule 13 CPC was defective as the same ought to have been moved under Order IX Rule 7 CPC as the *ex parte* decree has not yet been pronounced.



- (ii) It was further held that the application was filed beyond prescribed period of limitation i.e. 30 days and the same was not accompanied by an application seeking condonation of delay.

4. Counsel for the petitioner while assailing the impugned order submits that the application moved by the petitioner/wife has been dismissed taking a hyper-technical view. He thus submits that so far as mentioning of wrong provision is concerned, the same was merely wrong nomenclature and the application ought not have been dismissed on that ground. He further submits that so far as the delay is concerned, the same was fully explained in the application and relies upon Order VII Rule 6 CPC to submit that where sufficient explanation is given in the main pleadings, the same can be considered by the Courts.

5. Per contra, counsel representing the respondent/husband relies upon the judgment passed by this Court in the case of **Daya Nand vs. Sarishti Pal Singh – CR No.7876 of 2014** *decided on 21<sup>st</sup> of November, 2014* whereby the revision petition filed by an unsuccessful defendant was dismissed for not following the proper course by filing application Under Order 9 Rule 7 CPC.

6. I have heard counsel for the parties and have gone through records of the case.



7. In the considered opinion of this Court, since the issue relates to appointment of guardian of minor children, Family Court was required to be more considerate and sensitive. Interest of the children being a paramount consideration and the litigation at least for the Court not being adversarial, the mother ought not have been denied the opportunity of participating in the proceedings on the hyper-technical grounds. Trite it is that the nomenclature of the application is really not material and it is the substance that needs to be seen. Even if the Court was of the view that the mentioning of wrong nomenclature is fatal to the cause of the applicant, the proper course would have been to permit the applicant to withdraw the application with liberty to file a fresh. Application ought not have been dismissed merely for the reason that the same was filed under wrong provision. The Court should have assumed the role of a Family Court dealing with a *lis* wherein interest of the child is of paramount consideration. From the contents of the application, this Court is satisfied that the mother/petitioner made sufficient ground for condonation of delay which was on account of the fact that the child was not well and was continuously suffering on account of Asthma wherein the petitioner/mother was required by her bed-side continuously.

8. In view of above, present revision petition is allowed. Impugned order dated 6<sup>th</sup> of May, 2024 is hereby set aside. The petitioner is allowed to join proceedings from the stage she was proceeded *ex parte*. The



parties shall appear before the Family Court on the next date fixed before it  
i.e. on **18<sup>th</sup> of October, 2024.**

- 9. Counsel for the petitioner undertakes that the petitioner shall not be a cause of delay in the proceedings.
- 10. This Court is sanguine that the petitioner shall abide by the undertaking furnished by her through her counsel as recorded herein above.
- 11. Ordered accordingly.

|                           |                           |   |  |                      |
|---------------------------|---------------------------|---|--|----------------------|
| <b>September 20, 2024</b> |                           |   |  | <b>(Pankaj Jain)</b> |
| <b>Dpr</b>                |                           |   |  | <b>Judge</b>         |
|                           | Whether speaking/reasoned | : |  | Yes/No               |
|                           | Whether reportable        | : |  | Yes/No               |