

Ganesh Prasad Dash Vs. Tilottama Dash and Narayan Prasad Dash and anr.

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Court : Orissa

Decided On : Nov-19-2003

Reported in : 2004(I)OLR4

Judge : P.K. Tripathy, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 32, Rule 15

Appeal No. : W.P. (C) No. 10075 of 2003

Appellant : Ganesh Prasad Dash

Respondent : Tilottama Dash and Narayan Prasad Dash and anr.

Advocate for Def. : P.K. Parida, B. Muduli, S.K. Pradhan for Op. 1 and 2

Advocate for Pet/Ap. : Susanta Ku. Dash, S.K. Mishra, B. Mohapatra, S.K. Dash and A. Dhalasamant

Disposition : Petition allowed

Judgement :

ORDER

P.K. Tripathy, J.

1. Heard.

2. On consent of the parties, this writ petition stands disposed at the stage of admission.

3. Order passed on 28.8.2002 by the Civil Judge (Sr. Division), First Court, Cuttack in Title Suit No. 290 of 2001 is under challenge. It appears from that order that an application filed by the plaintiffs/opp. parties for appointing a Guardian Ad-litem (in short, 'G.A.L.') for defendant Nos. 2 and 3 in accordance with the provisions in Order 32, Rule 15 of the Code of Civil Procedure, 1908 (in short, 'C. P.C.') was resisted by the Defendant No. 1/the present petitioner with the claim that he should be appointed as guardian for the said defendant Nos. 2 and 3. Learned Civil Judge rejected that contention of the petitioner and allowed the application for appointment of Court Guardian on the grounds that in an earlier suit for partition, i.e., Title Suit No. 92 of 1998 filed by the petitioner, defendant Nos. 2 and 3 of the present suit were added as defendant Nos. 3 and 4, and under such circumstance petitioner has a conflicting claim of interest against the said two defendants and therefore, he cannot be appointed as G.A.L. to represent their interest.

4. Learned counsel for the petitioner states that admitted fact on record is that Defendant Nos. 2 and 3 are persons of unsound mind, they are his elder brothers as well as the elder brothers of the plaintiffs/opp.party members, they are residing with defendant No. 1/petitioner under the same roof and under his care and protection. When the matter stands thus, the approach of the Court below to the provision of law under Order 32, Rule 15 read with Rules 3 and 4, C.P.C. is not only erroneous, illegal and unjust but also detrimental to the interest of defendant Nos. 2 and 3.

5. Mr. Dash, learned counsel for the petitioner, does not dispute that petitioner had filed Title Suit No. 92 of 1998. He states that in that suit he claimed for partition claiming shares for each of the co-sharers including defendant Nos. 3 and 4. According to him, when the suit was disposed of as withdrawn and when nothing is reflected in that pleading about having any conflicting claim against his brothers, therefore, his contention should have been considered for appointing him as the guardian of defendant Nos. 2 and 3. In support of such contention, he relies on the

ratios in the cases of Ramchandrar Singh and Anr. v. B. Gopi Krishna Dass and Ors., AIR 1957 Patna 260; Sankaran Govindan v. Lakshmi Bharathi and Ors., AIR 1964 Kerala 244; and Begum Para Nasir Khem v. Luiza Maitilda Fernandes, (1984) 2 SCC 595.

6. On the other hand, Mr. P. K. Parida, learned counsel appearing for the plaintiffs/opp. parties advances argument supporting the impugned order and reiterating the conduct of the defendant No. 1 in instituting the earlier suit for partition as his disqualification to disentitle him from being appointed as the guardian.

7. In course of argument, when the judgments in the above noted citations from Patna and Kerala were placed, this Court found that the ratios laid down therein are not applicable because of distinguishable facts and circumstances of the case at hand.

8. In course of argument, learned counsel for the opposite parties produced for perusal certified copies of plaint and the application under Order 32 Rule 15 read with Rule 3, C.P.C. filed by the present petitioner in Title Suit No. 92 of 1998 so also certified copy of the orders passed on 21.6.1999 and 10.9.1999 in that suit. Such documents help this Court much to assess the situation and correctness of the impugned order in view of the ratio in the case of Begum Para (supra).

9. It appears from the plaint of Title Suit No. 92 of 1998 that without having a dispute with any of the defendants in that suit, petitioner as the plaintiff sought for an amicable partition of the family properties. In that suit their father and mother respectively appeared as defendant Nos. 1 and 2. Defendant Nos. 2 and 3 in this suit were defendant Nos. 3 and 4 in that suit. Therefore, defendant Nos. 3 and 4 being persons of unsound mind, were sought to be represented through natural guardian, i.e., the father. They could not have been added as plaintiffs along with the petitioner unless there would have been consent of the parents. Therefore, application under Order 32, Rule 15, C.P.C. filed in that case does not stand against the contention of the petitioner to make out from that circumstance alone, as it was viewed by the Court below and obviously incorrectly, that petitioner has an adverse interest against his two elder brothers of unsound mind. Plaintiffs in the

present suit are the sisters of the defendants and they also claim for partition. In the case of Begum Para (supra) the Apex Court observed that representations by a Court Guardian should be purposeful and should not be as a matter of rituals, i.e., for the sake of observing formalities of the law. In that context while commenting that 'The static soulless adherence to rules brings law into dispute' Their Lordships observed that-

'The Court in this country being the guardian of all minors a mere detached observance of law brings it into disrepute and the Court as guardian should have made all efforts for effective participation by minors in the proceedings.'

10. Rule 3 (1) of Orders 32 C.P.C. provides that where the defendant is a minor, on being satisfied of the fact of his minority, Court shall appoint a proper person to act as guardian for such minor defendant in that suit. Sub-rule (4) of that rule provides that when an application is made in accordance with the provision in Sub-rules (2) and (3), then no order shall be made on such application except upon notice to any guardian if appointed or declared by an authority competent in that behalf and in the absence of any such guardian upon notice to the father, mother, or other natural guardian by giving due preference respectively subject to availability of such natural guardian and in the absence of any such natural guardian upon notice to the person in whose care the minor is. Rule 4, inter alia, provides as to who may be appointed as guardian for such minor defendant. In that context, referring to the above noted categories of preferential guardians in Sub-rule (2) of Rule 4 the provision of law authorises the Court to appoint any other person as the guardian if it is of the opinion that another guardian should be appointed for the welfare of the minor to protect his interest. Of the several embargoes put disentitling a person to act as guardian, one of the important consideration left to the decision of the Court that the person appointed as the guardian for the minor should not have adverse interest or conflicting claim vis-a-vis the minor defendant. Rule 15 provides that the matter relating to appointment of guardian for a minor as per Rules 1 to 14, except Rule 2-A. shall apply relating to appointment of a guardian for a person of unsound mind.

11. It thus appears from the statutory provision that law provides the absolute authority with the Court to protect the interest of a person under disability like a minor and a person of unsound mind by appointing competent person as guardian, so as to protect the interest of such persons under disability. The Law makers have considered it prudent to enjoin that duty and responsibility in a safe hand like the Court, so that the Court unbioundedly and diligently take care of the interest of a minor or a person of unsound mind. When the philosophy behind conferring such a power in the Court is that, therefore, the Apex Court in the above quoted passage (in the preceding paragraphs) have expressed disappointment as against a mechanical act by a Court and reminding the Courts of their duties and responsibilities in such matter.

12. Contention of learned counsel for the petitioner is not disputed by the opposite party that defendant Nos. 2 and 3 being of unsound mind are remaining under the same roof with the defendant No. 1 under his care, nourishment and protection and that there is no other natural guardian available after the death of the parents. As already indicated the factum of institution of the earlier suit by the petitioner cannot, under the given facts and circumstances be regarded as disqualification for the petitioner to act as the guardian when nothing substantial has been brought on record to disqualify the petitioner to act as their guardian. This Court thus finds that learned Civil Judge failed to exercise the jurisdiction vested on him to consider the matter in accordance with law and in that process passed the impugned erroneous and illegal order in rejecting the contention of the petitioner. Accordingly the impugned order is set aside. However, the trial Court at the stage of filing of the written statement, settlement of issues and hearing of the suit, see that defendant No. 1, who by virtue of this order, be directed to act as guardian, does not advance any claim or contention conflicting to the interest of defendant Nos. 2 and 3. At any such stages of the proceeding if the Court finds any such conduct with the defendant No. 1, then suo motu or on being pointed out by the plaintiff, he may pass appropriate order removing the defendant No. 1 from the guardianship and appointing any other appropriate persons as the G.A.L.

The writ petition is accordingly allowed.

