

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

OW104 No. 48/2013
IA No. 54/2013

Pronounced on: 25.06.2020

Arti Sharma Petitioner(s)

Through:- Mr. Sandeep Singh, Advocate

V/s

Deepak Kumar & anotherRespondent(s)

Through:- Mr. R. K. S. Thakur, Advocate

Coram : HON'BLE MRS. JUSTICE SINDHU SHARMA, JUDGE

JUDGMENT

01. Petitioner seeks quashing of the order dated 24.04.2013 passed by the learned District Judge, Reasi in File No. 13/Civil Misc. titled *Deepak Kumar vs. Tripta Devi and another* vide which the application of the petitioner to personally prosecute the case has been dismissed with costs of Rs.10,000/-.

02. Briefly stated the relevant facts for consideration of this petition are;

Deepak Kumar/Respondent No.1 filed a civil suit against the petitioner and respondent No. 2, her mother, seeking declaration, that respondent No. 2 is not his wife and the petitioner is not his daughter and, therefore, they are not entitled to any maintenance from him or his father, thus, the order of maintenance passed by the Sub-Judge, Reasi in a petition under Section 488 Cr.P.C. is a nullity. As the petitioner was a minor, therefore, she was represented by her mother in this suit.

03. During the pendency of the suit, an application was filed by respondent No. 2 for conducting DNA test to ascertain the paternity of her daughter, i.e., petitioner herein, but the same was dismissed on 06.12.2012. This order was challenged by way of a petition bearing No. 03/2013 under section 104 of the Constitution of J&K and the same was too dismissed vide order dated 29.01.2013.

04. The petitioner, thereafter, filed another application seeking leave of the Court to personally prosecute the case and to produce all the witnesses, on the ground that since she was minor at the time of institution of the suit and now after attaining the age of majority, she is able to take care of her interest, which was prejudiced due to the evidence led by defendant No. 1, her mother. The only ground pleaded before the trial Court for prosecuting the case was that the Court was under an obligation to appoint a guardian and since the same was not appointed, therefore, she has a right to produce her own defence.

05. Respondent No. 1 objected to the application, as the same was only a tactic to delay the adjudication of the suit. The petitioner and her mother-respondent No.2 are living in one house and her mother all along has been pursuing the suit on her behalf also, their interest is not adversial and she has also failed to show how her interest has been prejudiced by her mother. This apart, the date of birth of the petitioner is 13.05.1992 and she attained the age of majority on 12.05.2010 and even thereafter the suit was continued on her behalf by her mother, till the filing of the application for leave to defend which was dismissed on

24.04.2013. During this entire period, it was never brought to the notice of the Court that her interest has been prejudiced in any manner.

06. It appears that as many as 32 opportunities were sought by the petitioner's mother for producing evidence and her right to produce evidence was closed on 09.03.2012. Another application was filed by her mother on the ground that she was not granted ample opportunities to produce evidence which was also dismissed on 21.11.2012, thereafter this application was filed only to delay the proceedings

07. The petitioner was represented by her mother throughout the proceedings, who prosecuted the suit on their behalf. There is nothing on record to show how the interest of the petitioner is at variance with her mother and also how the same has been prejudiced by the mother, who, being her natural guardian is defending the suit for last 10 years on her behalf also. The petitioner has also failed to show that there was any failure to safeguard interest of the petitioner.

08. Similar question was considered by this Court in **Mushtaq Ahmad Mashki vs. Mohd. Shafi Bhat & ors. AIR 1983 JK 44**, in which it was held as under: -

“Provisions of Order 32 have been understandably enacted to protect the interest of the minor who is unable to protect it himself. What the court is, therefore, enjoined upon to do is to ensure that the person whom it proposes to appoint as his guardian to defend the suit on his behalf, is capable of doing it. To achieve this object, the procedure laid down in Rules 3 and 4 provides some important safeguards, e. g_ issuing notice to the natural or certified guardian of the minor, in case there is any, who is supposed to look after his interest more than any one else can; refraining from

appointing that person as a guardian, whose interest in the subject matter of the suit is adverse to that of the minor; and obtaining the consent of the proposed guardian, as an unwilling guardian is hardly expected to deliver the goods. But, the fact still remains that the emphasis is not as such on the devout observance of the procedure provided, for the appointment of the guardian, as it is on to ensure that the proposed guardian adequately protects the interest of the minor. Therefore, so long as it can be safely said that the guardian has done all that he could do to protect his interest, the decision given in the suit against the minor will not be open to question on the mere ground that the procedure prescribed for the appointment of the guardian was not adhered to.

..... Making an application for appointment of a guardian, therein the fact that the interest of the proposed guardian is not adverse to that of the minor, issuing a notice to the natural or certified guardian of the minor, obtaining consent of the minor or his proposed guardian, are matters which undoubtedly belong to the realm of procedure, a non-observance whereof may or may not cause prejudice to the minor, and have nothing to do with the inherent jurisdiction of the court that tries the suit.....”

09. Similarly in **Habib Teli & ors. Vs. Ali Teli & anr. AIR 1968 (J&K) 9**, this Court has observed as follows:-

“where also a decree against a minor defendant was challenged on the grounds; firstly, that the father of the minor who had been shown in the plaint to represent him as his guardian had not expressly given his consent to act as such: secondly, that no application for his appointment as guardian had been made by the plaintiff; and thirdly,

that he had not been appointed as the guardian by a formal order. All these contentions were negated by the court and it was held that consent included even an implied consent. It was further held that failure to make a formal application for appointment of a guardian-ad-litem and failure to pass a formal order of the appointment of guardian, are merely irregularities of procedure, which cannot vitiate the decree against the minor, in the absence of proof of any prejudice to him. It was further held failure to state in such an application the fact that the interest of the proposed guardian, is not adverse to that of the minor is also a similar irregularity of procedure.”

10. In view of the aforesaid judgments, the application of the petitioner was rightly dismissed by the Trial Court. Since the petitioner has failed to show that the suit was not properly contested, her interest is adverse to respondent No. 2, or any prejudice has been caused to her. This apart, the right of the defendants qua the evidence having been closed on 09.03.2012, the petitioner apparently moved the said application only to delay the proceedings and not for any other purpose.

11. This Court in **Mohd. Yousuf Shah and others V. Akber Ganai and others, 2017(3) JKJ (HC) 542**, while considering the scope, supervisory jurisdiction of this Court has held as under:

“14. In view of the settled legal position, it is abundantly clear that the powers of this Court under Article 104 of the Constitution of Jammu and Kashmir are extra ordinary power of superintendence and are, therefore, required to be exercised in the rarest of rare cases.

15. Viewed from the settled position of law, the case in hand does not fall in any of aforesaid parameters laid down by the Supreme Court and as such, does not call for any

interference. It is reiterated that the powers vested in this Court under Section 104 of the Constitution of J&K is not a substitute for the revisional powers vested in the Civil Court under Section 115 of CPC. Once the revision petition against the order passed by the Civil Court is barred, this Court would be loath to exercise jurisdiction under Section 104 of the Constitution of the Jammu and Kashmir unless it is demonstrated that the order impugned is perverse and has occasioned serious miscarriage of justice.”

12. In view of the aforesaid discussion, the trial court has rightly rejected the application of the petitioner, as there was no substance in the same. Therefore, the petitioner having failed to show that learned trial court has either acted without jurisdiction or exceeded its jurisdiction, the impugned order does not call for any interference.

13. There is no merit in this petition and the same, is accordingly, **dismissed** alongwith connected IA.

(Sindhu Sharma)
Judge

JAMMU

25 .06.2020

Ram Murti

Whether the order is speaking	:	Yes.
Whether the order is reportable	:	Yes/No.