

HIGH COURT OF ORISSA, CUTTACK

F.A.O. NO. 371 OF 2013

A N D

F.A.O. NO. 328 OF 2014

(From the judgment dated 20.07.2013 passed by the learned District Judge, Nayagarh in Guardian Misc. Case No. 3 of 2011.

F.A.O. NO. 371 of 2013

Bimala Sahoo & another Appellants

Versus.

Binayak Sahoo Respondent

For Appellants : M/s. P.K.Mohanty, P.Mohanty,
P.Behera, D.K.Swain, A.Kar,
S.Biswal, S.K.Tripathy, advocates.

For Respondent : M/s. A.Tripathy, B.Sahoo,
B.Mohanty, advocates.

A N D

F.A.O. NO. 328 OF 2014

Binayak Sahoo Appellant

Versus.

Bimala Sahoo & another Respondents

For Appellant : M/s. A.Tripathy, B.Sahoo
advocates.

For Respondent : Mr. P.K.Mohanty, advocates.
.....

PRESENT :

THE HON'BLE MR. JUSTICE D.DASH

Date of hearing : 19.03.2015 : Date of judgment: 30.04.2015

Both these appeals arise out of the judgment dated 20.07.2013 passed by the learned District Judge, Nayagarh in Guardian Misc. Case No. 3 of 2011. Therefore, these having been heard together have been taken up for their disposal by this common order.

The appellant of F.A.O No. 328 of 2014 is the petitioner in the above noted Guardian Misc. Case, wherein the respondents were the opposite parties and they are now the appellants in F.A.O. No. 371 of 2013

2. For the sake of convenience to bring in clarity and avoid confusion, the parties hereinafter have been referred to as they have been arrayed in the court below.

3. The petitioner Binayak Sahoo now nearing 60 years of age filed a petition for his appointment as the guardian of the person and the properties of the minors, namely, Manali and Suman, her granddaughters (daughter's daughters).

The petitioner's daughter Gitanjali had married to one Markanda, who was working as a driver in the office of the Commissioner, Regional Provident Fund, Bhubaneswar. They were

leading happy conjugal life. The first daughter was born during the life time of Markanda, who unfortunately died prior to the birth of Suman, when she was in the womb of Gitanjali. Gitanjali in the year 2007 got a job in the same office under the Rehabilitation Assistance Scheme i.e. about three years after the death of her husband. She stayed in the quarter provided by the employer and lived with her minor daughters taking all their care. As ill luck would have it, Gitanjali met her death in a road accident and the two minor daughters then lost all their supports. At this juncture, the petitioner being the maternal grandfather brought and kept them with him in his house providing all those facilities required for their living up to his capability. They were also put in the school for pursuing education.

The opposite parties are the parent-in-laws of Gitanjali i.e. paternal grandparents of minors. . It is said that after the death of their son Markanda, when Gitanjali was going to their house, she was always facing caustic comments that she was ominous and responsible for death of her husband, which was putting her under tremendous mental torture. Towards last part being not able to bear such torture any more, she had severed all her relationship with the opposite parties.. So when the opposite parties did not come forward to take care of the minor daughters, the petitioner had to step on.

In view of all these, the petitioner prayed before the competent court for being appointed as the guardian of the person and property of the minors.

The opposite parties then came out to contest the proceeding by projecting the case that such move of the petitioner was only to grab their family properties while denying the allegations of cruelty and torture to have been meted out at Gitanjali at any point of time. They further stated to have been looking after Gitanjali and her children with utmost care giving love and affection. At this stage, the opposite parties also pleaded that it was only because of their according consent, Gitanjali had got the employment under the Rehabilitation Assistance Scheme. It is stated that this petitioner has polluted the minds of the children after the death of Gitanjali and that ultimately prevailed upon the mind of the children not to come to their paternal house when the opposite parties were and are always ready and willing to keep them and provide all basic amenities. With such pleadings, they resisted the prayer of the petitioner for his appointment as the guardian of the person and the properties of the minors.

4. In course of the proceeding, the petitioner when examined four witnesses, the opposite parties also examined the equal numbers of witnesses.

The learned District Judge finally considering the welfare of the minors as the paramount consideration and viewing the fact

and circumstances as also the evidence on record, appointed the petitioner as the guardian for the person of the minors, namely, Manali and Suman, the daughters of late Markanda and Gitanjali. So by this order, the learned District Judge remained silent with regard to the appointment of the petitioner as the guardian in respect of the properties of the minors. In other words that amounted to refusal of the prayer of appointment of the petitioner as the guardian in respect of the properties of minors.

So, the application was filed under Section 151 of the Code of Civil Procedure for necessary correction in the order viewing it to be an inadvertent omission in view of the discussion and reasons assigned in the order itself. However said prayer has also been rejected. Therefore, now the petitioner has approached this Court in appeal for his appointment as the guardian of the minors also in respect of their property.

The opposite parties being aggrieved by the order of appointment of the petitioner as the guardian of the person of the minors have also filed the other appeal.

5. The learned counsel for the appellant (petitioner in the court below) submits that when the petitioner has been appointed as the guardian of the person of the minors, considering the facts that the welfare of the minors would be best taken care of, guarded and protected by the petitioner, there was no justification on the part of the learned District Judge to remain silent in his order as regards

appointment of the petitioner as the guardian of the properties of the minors, thereby indirectly refusing the said prayer without indicating the same in clear term and assigning the reason thereof. It is his next submission that now the petitioner is aged about sixty plus and for the education of minors and other needs in view of advancement of age, funds are absolutely necessary when it is not possible at this age on the part of the petitioner to do some other work and earn for the purpose of having more funds in his hand than those coming from the existing sources and hence there may be lack of proper provision for education and to meet other growing need of the minors. He contends that when the court below has arrived at the conclusion that the petitioner is taking care of the two minors after the death of Gitanjali since the year 2010 and the conduct of the petitioner is free from blemish rather have always been above board and as the allegations by the opposite parties against him thereby get completely repelled, in that circumstance, non appointment of the petitioner as the guardian of the minors in respect of their properties rather stands in opposition to the welfare of the minors which is the primary objective sought to be achieved in such eventuality.

Learned counsel for the respondent (opposite parties in the court below) submits that the learned District Judge, Nayagarh without properly appreciating the facts and circumstances of the case as also the evidence on record ought not to have appointed the petitioner as the guardian of the person of the minors when that

prayer is with a view to grab their properties. He contends that appointment of petitioner as the guardian of minor's property would not at all serve the interest of minors and rather the opposite parties being appointed as such would be in a better position to look to their welfare.

6. Keeping the above submission in mind when the order passed by the learned District Judge is perused, in my opinion not only that it is found to be cryptic but also it appears to have been passed in a cavalier fashion and is thus not appreciated. The matter has been dealt in a slipsord manner throwing the legal position to the winds without due application of mind on all those required facts. The evidence laid by the parties have not been discussed and in a generalized manner it having just been indicated, the order finally runs as under :-

“Therefore, on totality of facts and circumstances of the case, it is found that it is the petitioner who is taking care of the two orphan minors after the death of their mother since 2010. Section 13 of Hindu Minority and Guardianship Act, 1956 reads thus:

Section 13. Welfare of minor to be paramount consideration – (1) In the appointment or declaration of any person as guardian of a Hindu minor by a court the welfare of the minor shall be the paramount consideration.

6. Under the above premises and the factual background of the case the welfare of the minors being the paramount consideration and by giving due weightage

to the provisions of Section 17 of the Guardians & Wards Act, 1890, this Court orders as below :

ORDER

7. The Guardian Misc. Case be and the same is partly allowed on contest against the O.Ps. The petitioner Shri Binayak Sahoo is hereby appointed as Guardian for the person of minors namely Manali Sahoo and Suman Sahoo, daughters of late Markanda Sahoo and late Gitanjali Sahoo, till they attain majority.”

7. However, considering the importance and sensitivity of the matter concerning the welfare of the minors, this Court refrains to adopt the usual course as it ordinarily would have been done by remanding the matter to the court below with the observation as above for disposal afresh keeping the settled position of law in mind and applying the same to the case in hand upon due appreciation of evidence. Thus this court is constrained to take up the said exercise in the interest of justice.

8. It is the settled position of law that in the matter of appointment of guardian of the minors in respect of the person and the properties, the court has to always look to the welfare of the minor and that is the paramount consideration. In this case of appointment of guardian of both the person and properties of the minors, the court in view of the competing claims is under legal obligation probably being placed in the position of superior guardian under the special legislation to consider as to in whose hands the welfare of the minors would be best served. For the purpose, let me begin the exercise in

approaching the evidence on record viewing the fact and other circumstances including the conduct of the parties although to decide the fate of the rival prayers.

The petitioner has examined himself as P.W.1 and has stated in clear terms to have no adverse interest to those of the minors. It is his evidence that the opposite parties did not spend a single pie for the minor after the death of Gitanjali. He has further stated that these minors are to get the family pension under the death benefit scheme and also the deposits lying in different Banks and Life Insurance Company when they may also receive the award amount if passed by the Motor Accident Claims Tribunal who is in seisin of the claim application filed on account of death of Gitanjali in motor accident. He has been cross-examined at length. But nothing has been elicited to discard his version and no material has surfaced in his evidence indicative of the fact that his prayer is backed by mala fides. The wife of the petitioner has been examined as P.W.2 and she has stated in the same vein that the minors are residing with them and they are taking all their care including their education. Her evidence on this score has remained unshaken. Interestingly the minor Manali has come to the dock and in her evidence she has expressed her whole hearted willingness to stay with the maternal grand parents.

Support has come from the evidence of P.W.4 who is none other than a person being a frequent visitor to the house of the

petitioner. His evidence reveals that in view of the dispute between the parties, there were attempts to resolve the same, but those failed for the stubborn attitude of the opposite parties. Despite of scathing cross-examination, he has remained firm and no such materials either indicating his over interestedness or showing his evidence to be tainted with falsehood have emanated.

9. Next, let us straight way proceed to examine the evidence of the opposite parties i.e, O.P.W.1. On a bare reading of his evidence, it is seen as if after the death of his son, it was because of him and his magnanimity that Gitanjali had the job under the Rehabilitation Assistance Scheme which exposes his mind set and attitude. He has not stated that he had at all attempted to bring the minors. However, in a casual manner he has gone to state that the petitioner is not leaving them. The greed of this old gentle man is well apparent when the move of his wife who is under one roof with him to get the legal heir certificate after the death of Gitanjali indicating her name as such is viewed. It stands as a conduct which tend to show the adverse interest against the minor and thus is a conduct for disentitlement of the relief. The purpose standing or staking claim as one of the legal heirs of Gitanjali can be well said to advance a claim over all the properties of Gitanjali which is but adverse to the interest of minors.

Even this when was sought to be corrected, there was resistance and to strike off the name of the opposite party no.2 from the list of the legal heirs of Gitanjali an appeal had to be carried which

of course succeeded providing shy of relief to the minors. These conducts lead to show their mind set in the negative and thus leads to well visualise that their show of jeal and coming forward to act as guardians of minors person and properties is nothing but pretention shedding crocodile tears. In the entire evidence, no allegation has been levelled against the petitioner that he has not acted adverse in the interest of the minors at any point of time till now nor any such instance even is shown when minor Manali has expressed her satisfaction.

In the above premises, when both minor daughters have been living with the petitioner and his wife in their house for quite few years by now since the death of Gitanjali having no grievance against the petitioner and in the absence of any such evidence forthcoming that any such act to have been committed by the petitioner running against or tending to injure the interest of the minors as also when minors wish to so reside, this Court is led to hold the petitioner to be the fittest person to act as the guardian of his two minor granddaughters, namely Manali and Suman in respect of their person as well as the properties while concluding that in his hands only their welfare would be best taken care of and served. Therefore, the order of the earned District Judge, Nayagarh refusing to appoint the petitioner as the guardian in respect of their properties is liable to be set at naught. The prayer of the opposite parties for the same purpose in view of the aforesaid discussion and reasons merits no consideration.

10. In the result, the FAO No. 328 of 2014 stands allowed to the extent as indicated above and the FAO No. 371 of 2013 stands dismissed. In the facts and circumstances of the case, no cost is awarded.

The petitioner (appellant of F.A.O. No. 328 of 2014) is hereby appointed as the guardian in respect of person and property of minors Manali and Suman and as such by this appointment he is ordained to discharge the said role keeping the welfare of the minors in view and as the top agenda in every matter of decision or action concerning them. The petitioners shall in view of above appointment submit half yearly report to the District Judge, Nayagarh apprising the developments concerning the minors, their health and education and also to place accounts of all their properties coming to be dealt by the petitioners giving details of income and utilization thereof for the court to further monitor the matter in the best interest and welfare of minors if so felt the need at any future time.

.....
D. Dash, J.