

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

MONDAY, THE 13TH DAY OF JULY 2015/22ND ASHADHA, 1937

RSA.No. 758 of 2006 (F)

AGAINST THE JUDGMENT IN AS 119/1996 of ADDL. DISTRICT COURT-II ,
MAVELIKARA DATED 28.02.2006

AGAINST THE JUDGMENT IN OS 331/1993 of MUNSIFF COURT,CHENGANNUR
DATED 28.06.1996

APPELLANTS:-APPELLANTS/DEFENDANTS 1 TO 3:

1. THOMAS PUTHENKANDATHIL,
PADINJATTU MURI, PANDANADU, PANDANADU VILLAGE.
2. LILLYKUTTY THOMAS,
W/O.THOMAS, DO. DO.
3. T.E.SAMUEL, THEVERIVADAKKATHIL,
KURATTIKATTU MURI, MANNAR VILLAGE
(APPELLANTS 1 AND 2 ARE REP. BY THE 3RD APPELANT
HOLDER OF POWER-OF-ATTORNEY).

BY ADV. SRI.G.S.REGHUNATH

RESPONDENTS:- (RESPONDENTS/PLAINTIFF & 4TH DEFENDANT):

1. KAVITHA R.PILLAI
PULIVELIL, (KOTTAKKAL PULIVELIL), KURATTIKKADU MURI,
MANNAR VILLAGE.
2. CHANDINI PILLAI,
KOTTACKAL PULIVELIL, KURATTIKKADU MURI,
MANNAR VILLAGE.

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON
13-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.BHAVADASAN, J.

Regular Second Appeal No.758 OF 2006

Dated this the 13th day of July, 2015.

J U D G M E N T

Defendants 1 to 3 who suffered a decree at the hands of the Munsiff Court, Chengannur which was confirmed in appeal are the appellants.

2. The facts absolutely necessary for the purpose of disposal of this appeal are as follows:

According to the plaintiff, 50 cents of property comprised in survey No.15/7 belonged jointly to one Sarojani Pillai and her children Chandini Pillai, Ranjan, Ranjini and plaintiff in this case, Kavitha R. Pillai who is none other than the daughter of the above Chandini Pillai. In the partition deed executed on 17.08.1978 the plaintiff was represented by her mother. The plaintiff's share was taken possession of by her mother. The allegation is that the mother, without any manner of right, sold

the property belonging to the plaintiff who was a minor at the relevant time and on the same day another deed was also executed. It is claimed that the sale deed No.288/90 executed in favour of the plaintiff never came into effect and the vendor continued to be in possession. Since the father of the plaintiff was alive, her mother could not act as guardian for assigning the property. She characterised the sale deed executed by her mother as a void document and sought recovery of possession on the strength of title.

3. Defendants 1 to 3 resisted the suit. They admitted the partition deed made mention of in the plaint. According to them, father of the minor child namely, plaintiff was not looking after her affairs and she was being brought up and her affairs were being looked after by her mother Chandini Pillai. It was contended that it was utilising the consideration obtained as per Ext.A1 that Ext.B2 document was executed. It is further contended that the property so obtained by the plaintiff is in her enjoyment and possession and she along with her mother and Sasidharan was residing in the property. It was also contended

that no prejudice has been caused to the plaintiff by the execution of document in question by her mother as guardian since her father was not looking after her and he deserted them and was living with another wife. It is further contended that the document was entered into in good faith and it was executed for valuable consideration. Pointing out that the plaintiff is not entitled to any relief, defendants prayed that the suit may be dismissed.

4. On the above pleadings, issues were raised and the parties went to trial. Evidence consists of the testimony of PW1 and the document marked as Ext.A1 on the side of the plaintiff. Defendants had examined DW1 and marked Exts.B1 to B3. Exts.C1 to C3 series are the commission reports and plans.

5. Both the courts below, finding that while the father was alive mother could not be the natural guardian and she could only act as a de facto guardian, held that Ext.A1 document executed by the mother on behalf of the plaintiff is void and therefore decreed the suit. That decree of the trial court was accepted by the lower appellate court.

6. Notice was issued on the following questions of law:

- "1) Were not the courts below bound to frame an issue regarding the specific contention taken in the written statement that the suit was not maintainable since the plaintiff had not disgorged the benefit derived by her with regard to item No.2 of Exhibit A1 by either offering the sale consideration received for the same or offering item No.3 of Exhibit A1 which was acquired utilising the sale consideration for item No.2 of Exhibit A1?
- 2) Are not the courts below wrong in setting aside Exhibit A1 in its entirety, when the prayer in the plaint is only with regard to item No.2 of Exhibit A1?"

7. Sri.G.S.Raghunath, learned counsel appearing for the appellants contended that both the courts below have misdirected themselves both on facts and in law. The courts below have omitted to note that there is ample evidence in the case to show that the father had deserted the plaintiff and her mother and the affairs of the plaintiff from her early age were being looked after by her mother and she was being maintained and taken care of by her mother. Under such circumstance, relying on the decision in **Ms.Githa Hariharan and another vs. Reserve Bank of India and another** (AIR 1999 Supreme Court 1149), learned

counsel contended that the mother could not be treated as de facto guardian and for all practical purposes she is in fact the natural guardian. It is then contended that if that be so, the document in question becomes only a voidable document and it is absolutely necessary for the plaintiff to pray for having the document set aside. Learned counsel relied on the provisions under the Hindu Minority and Guardianship Act and fairly conceded that if the document is executed by a de facto guardian, it is a void document and if it is executed by a natural guardian, it is only a voidable document. If it is a voidable document, learned counsel re-iterated that it has to be set aside. In the case on hand, the father having deserted the mother and the child has to be treated as if the document was executed by the natural guardian i.e. the mother. If that be so, according to the learned counsel, going by the decisions in **Viswambhar & Ors. vs. Laxminarayan & Anr.** ((2001) 6 Supreme Court Cases 163), **Gopalakrishnan vs. Rajamma** (2006 (4) KLT 377), **Ramadas Menon vs. Sreedevi** (2004 (1) KLT 323(F.B)) and in **Nangaliamma Bhavani Amma vs. Gopalakrishnan Nair &**

Ors. ((2004) 8 Supreme Court Cases 785), without a prayer for setting aside Ext.A1 document, the plaintiff cannot succeed.

8. There was no representation on behalf of the respondents even though notice was served on them.

9. After having heard the learned counsel for the appellants and also after having perused the records, there seems to be considerable force in the submission made by the learned counsel for the appellants. The solitary ground based on which suit was decreed by the trial court which was confirmed in appeal was that it was the mother of the plaintiff who during her minority had executed Ext.A1 document. The courts below further found that at the relevant time when Ext.A1 document was executed, her father was alive. Relying on the provisions of Hindu Minority and Guardianship Act, the courts below concluded that Ext.A1 being a document executed by the de facto guardian is void in law.

10. The courts below omitted to note one crucial aspect in this case. No doubt true, the evidence suggests or indicates that the father of the plaintiff is still alive. But, however, the evidence

of PW1 will clearly show that her father had deserted her mother and her long ago and since then she has been in the absolute care and custody of her mother. She in no less terms admitted that her father had not looked after her and she was being brought up and maintained by her mother. She also admitted that her father is somewhere in North India and married to another lady. Under this circumstance the question arises for consideration is whether the mother can be treated as natural guardian.

11. Before going into that aspect, it is necessary to consider whether the document evidenced by Ext.A1 is to be treated as one executed by the de facto guardian. As per Section 11 of the Hindu Minority and Guardianship Act, the document executed by a de facto guardian will have to be treated as void. If that be so, it is unnecessary for the plaintiff to seek a decree to have the document set aside.

12. On the other hand, if mother is to be treated as natural guardian, in the facts and circumstance of the case, then the position is different. Then the transaction squarely falls within

Section 8 of Hindu Minority and Guardianship Act. If she is the natural guardian, then the document executed by natural guardian of a minor is only voidable. If that be so, necessarily and surely the person concerned will have to seek a decree to have the document set aside as not binding on him.

13. As already noticed, it is quite clear from the evidence of PW1 that her father had deserted her long ago and she was under the care and custody of her mother. She in no less terms says that the whereabouts of her father is not known to the family and even before and after the execution of Ext.A1 she was being maintained and being taken care of by her mother. She has never been looked after by her father or paid any maintenance. Her father had never taken any interest in her affairs. They are now residing with Sasidharan.

14. The question that arises for consideration is under such circumstances whether the mother continues as the de facto guardian though for all purposes the burden of looking after the minor child and maintaining her has been borne by the mother. The position seems to be covered by the decision in **Ms.Githa**

Hariharan and another vs. Reserve Bank of India and another (AIR 1999 Supreme Court 1149). Therein, in almost on identical facts, it was held in paragraphs 10, 44 and 47 as follows:

“10. We are of the view that the Section 6(a) (supra) is capable of such construction as would retain it within the Constitutional limits. The word 'after' need not necessarily mean 'after the lifetime'. In the context in which it appears in Section 6(a) (supra), it means 'in the absence of', the word 'absence' therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognised natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of harmonious construction of S. 4

and S. 6 of HMG Act, without causing any violence to the language of S. 6(a) (supra).

.....

44. The expression 'natural guardian' has been defined in S. 4(c) as noticed above to mean any of the guardians as mentioned in S. 6 of the Act of 1956. This section refers to three classes of guardians viz., father, mother and in the case of a married girl the husband. The father and mother therefore, are natural guardians in terms of the provisions of S. 6 read with S. 4(c). Incidentally it is to be noted that in the matter of interpretation of statute the same meaning ought to be attributed to the same word used by the statute as per the definition section. In the event, the word 'guardian' in the definition section means and implies both the parents, the same meaning ought to be attributed to the word appearing in section 6(a) and in that perspective mother's right to act as the guardian does not stand obliterated during the lifetime of the father and to read the same on the statute otherwise would tantamount to a violent departure from the legislative intent. Section 6(a) itself recognises that both the father and the mother ought to be treated as natural guardians and the expression 'after' therefore shall have to be read and interpreted in a manner so as not to defeat the true intent of the legislature.

.....

47. In that view of the matter question of ascribing the literal meaning to the word 'after' in the context does not and cannot arise having due regard to the object of the statute, read with the constitutional guarantee of gender equality and to give a full play to the legislative intent, since any other interpretation would render the statute void and which situation in our view ought to be avoided”.

15. The dictum laid down in the above decision applies to the facts of the present case. Here too like in the case dealt with by the Apex Court, the natural guardian/father was totally indifferent to the affairs of the minor and in fact his whereabouts were not even known to the minor and the mother. If that be the position, going by the above decision, it could not be said that the mother has still to be treated as de facto guardian merely because the father is alive. In the facts and circumstances of the case, it has necessarily to be held that for all practical and legal purposes, mother was the natural guardian of the minor at the relevant time.

16. If that be so, the next question arises for consideration

is whether it is necessary to incorporate the prayer for setting aside the sale deed executed by the mother or minor daughter in favour of the defendants. It has already been found that in the case on hand it could not be said that the mother is a *de facto* guardian. She occupies the status of a natural guardian. Going by Section 8(3) of Hindu Minority and Guardianship Act, any document executed by a natural guardian in contravention of sub section (1) or (2) of Section 8 becomes voidable. If the document is only voidable, necessarily it has to be set aside.

17. In the decision in **Gopalakrishnan** vs. **Rajamma** (2006 (4) KLT 377), it was held as follows:

"20. The position regarding the need for setting aside of a voidable alienation can be best illustrated by taking the case of a Hindu minor. The case of a Hindu minor would be an extreme case as it pertains to the property of a person under disability. S.11 of the Hindu Minority and Guardianship Act, 1956 ("HMG Act" for short) imposes a total ban on a *de facto* guardian of a Hindu minor to deal with the minor's property. The said provision reads as follows:

"De facto guardian not to deal with minor's property-- After the commencement of this Act, no person shall be entitled to dispose of, or deal with,

the property of a Hindu minor merely on the ground of his or her being the *de facto* guardian of the minor.”

It is only the minor's natural guardian, if alive and not incapacitated, who can deal with the property of such minor. The question as to who is the natural guardian of the minor has to be decided with reference to S.6 of the HMG Act under which in the case of a legitimately born minor, ordinarily it is the father who is the natural guardian and the turn of the mother comes only after the father. In a case where the father of the minor is alive and not disqualified, it is incompetent for the mother to interpose herself as the guardian of the minor. Any alienation or disposal of the property of the minor by the mother acting as the guardian of the minor is unauthorised and totally devoid of any effect. Hence an alienation of the minor's property either by the mother or by a *de facto* guardian in contravention of S.11 of the HMG Act will have to be treated as void. This statement of the law in the decisions reported in *Ayyappan v. Antony* (1978 KLT 532), *Danayi Gurumurthy v. Raghu Podhan & Anr.* (AIR 1967 Ori. 68), *Devineni Suseela v. Sivaramaiah* (1976 (1) Andh. W.R. 423) and *Chathu Chettiar v. Kanaran* (1983 KLT 888) stands approved by the decision of the Apex Court in *Madhegowda v. Ankegowda* (AIR 2002 SC 215). So, it is the natural guardian who is clothed with the

power to deal with the property of such minor. S.8 of the HMG Act sets out the power of the natural guardian of a Hindu minor. Such natural guardian, subject to the provisions of S.8, has the power to do all acts which are necessary or reasonable or proper for the benefit of the minor or his estate. The natural guardian, however, cannot, without the previous permission of the court, sell any part of the immovable property of the minor. Any disposal of immovable property which is not necessary or reasonable or proper for the benefit of the minor or is without the previous permission of the court is voidable at the instance of the minor. The provisions of S.8 are so devised as to protect the property of the minor completely even from the depredations of his parents (see *Pannilal v. Rajender Singh* ((1993) 4 SCC 3)). Thus, the power of the natural guardian of a Hindu minor is hedged in by certain statutory limitations as stated in S.8 of the HMG Act and those limitations are incorporated therein for the protection and benefit of the minor. There was a sharp cleavage of judicial opinion on the question as to whether the alienation of the minor's property by the natural guardian without the previous permission of the court under S.8 (2) of the HMG Act is only voidable at the option of the minor or is void. There was also a divergence of judicial opinion on the question as to whether if such alienation was only voidable, then

whether the minor could simply repudiate the transfer by some overt act without recourse to the civil court. But now, after the authoritative pronouncement of the Apex Court in *Viswambhar & Ors. v. Laxminarayan & Anr.* ((2001) 6 SCC 163) and *Nangaliamma Bhavani Amma v. Gopalakrishnan Nair & Ors.* ((2004) 8 SCC 785) and that of a Full Bench of this Court in *Ramadas Menon v. Sreedevi* (2004 (1) KLT 323), such an alienation by the natural guardian is only voidable at the option of the minor and this act of avoidance by the minor can only be by means of a regular suit for which the period of limitation is three years from the date on which the minor attains majority as provided under Art.60 of the Limitation Act, 1963”.

18. In the decision in **Ramadas Menon** vs. **Sreedevi** (2004 (1) KLT 323(F.B)), it was held as follows:

“8. It is seen that the reference was answered in the decision reported in *Madhukar Viswanath v. Madhao & Ors.*, (1999) 9 SCC 4456. The Supreme Court took the view that it was not necessary to decide the question in the particular facts of the case. Subsequently, the Supreme Court in another decision reported in *Viswambhar & Ors. v. Laxminarayan*, (2001) 6 SCC 163, considered S. 8 of the Act and held as follows:

"The question is, in such circumstances, are the alienations void or voidable? In S.8(2) of the Hindu Minority and Guardianship Act, 1956, it is laid down, *inter alia*, that the natural guardian shall not, without previous permission of the court, transfer by sale any part of the immovable property of the minor. In sub-s. (3) of the said section, it is specifically provided that any disposal of immovable property by a natural guardian, in contravention of sub-s. (2) is voidable at the instance of the minor or any person claiming under him. There is, therefore, little scope for doubt that the alienations made by Laxmibai which are under challenge in the suit were voidable at the instance of the plaintiffs and the plaintiffs were required to get the alienations set aside if they wanted to avoid the transfers and regain the properties from the purchasers".

In view of the above decision, it is now clear that the alienations have to be challenged and without setting aside the alienation, no relief can be obtained.

9. In the above view of the matter, we hold that there should be a prayer to set aside the alienation effected by the natural guardian without the court's sanction. The Plaintiff cannot merely ignore the sale deed".

19. On facts, the plaintiff is not entitled to any relief. It

has come out in evidence and by the document that what is sold by the mother of the minor is a narrow strip of land to defendants 1 and 3 who had acquired the properties on either side of that narrow strip of land. It is significant to notice that Sasidharan who is also a party to Ext.A1 has executed a document namely, Ext.B2 in favour of the minor taking care of the minor's welfare. It is significant to notice that the plaintiff has no grievance regarding the partition deed where also she was represented by her mother. She stands by the deed.

20. However, going by the above decisions, it was absolutely necessary for the plaintiff to have sought a prayer for setting aside the sale in respect of item No.2 as per Ext.A1 document. If the mother is to be treated as the natural guardian, as already stated, necessarily decrees of the courts below will have to be interfered with and there is no reason as to why in the facts and circumstances of this case, mother should not be treated as the natural guardian especially when it is shown that the sale covered by Ext.A1 causes no prejudice to the minor.

For the above reasons, this appeal is allowed. The impugned judgment and decree are set aside and the suit namely, O.S.No.331/1993 shall stand dismissed. There will be no order as to costs.

Sd/-

**P.BHAVADASAN
JUDGE**

smp

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P.A. to Judge.