

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 24TH DAY OF JUNE 2015/3RD ASHADHA, 1937

R.S.A.No. 711 of 2003

AGAINST THE JUDGMENT IN AS 3/1997 of ADDITIONAL DISTRICT
COURT (ADHOC), WAYANAD, KALPETTA.
AGAINST THE JUDGMENT IN OS 98/1992 of SUB COURT,
SULTHAN BATHERY.

APPELLANT(S)/APPELLANT/1ST DEFENDANT:

MARY, W/O. KURIAKOSE, AGED 42 YEARS,
MULLANMADAKKAL HOUSE,
P.O. CHERUKATTOOR, PANAMARAM VILLAGE,
MANANTHAVADY TALUK, WAYANAD DISTRICT.

BY ADVS.SRI.M.C.SEN (SR.)
SRI.M.P.SREEKRISHNAN
SMT.SHAHNA KARTHIKEYAN

RESPONDENT(S)/RESPONDENTS/PLAINTIFF & 2ND DEFENDANT:

1. VINOOP KUMAR, S/O. VIJAYAKUMAR,
AGED 26 YEARS, OORPILLY HOUSE,
P.O., PAYYAMBALLY, PAYYAMBALLY VILLAGE,
MANANTHAVADY TALUK, WAYANAD DISTRICT.
2. JINACHANDRAN, S/O. VIJAYAKUMAR,
AGED 25 YEARS,
P.O. PAYYAMBALLY OF DO. DO.
3. VIJAYALAKSHMI, W/O. VIJAYAKUMAR,
AGED A45 YERS, OF DO.

R1 & R2 BY ADV. SRI.PHILIP MATHEW
R1 & R2 BY ADV. SRI.G.G.MANOJ
R1 & R2 BY ADV. SRI.JAICE JACOB

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY
HEARD ON 24-06-2015, ALONG WITH CO. 7/2014, THE COURT
ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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R.S.A. No. 711 of 2003 &
Cross Objection 7 of 2014
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Dated this the 24th day of June, 2015.

JUDGMENT

First defendant is the appellant. She suffered a decree at the hands of the trial court for recovery of possession though she was given value of improvements. In the first appellate court she was given half share of the property. She has come before this Court for the entire property.

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

The plaintiffs obtained the plaint schedule property as per Ext.A3 dated 9.11.1973 which is gift deed No. 2683/73 of S.R.O., Mananthavady. That document was executed by their father and others. The gift deed narrated that the mother has to act as guardian for the purpose of the deed. Subsequently the mother assigned the

property in favour of the first defendant.

3. The assignment was later challenged by the plaintiffs as invalid in law.

The first defendant resisted the suit contending that she is a bonafide purchaser for valuable consideration and she is not liable to be dispossessed from the property. The deed was executed by a competent person and no infirmity is attached to the document. In the alternative, she claimed value of improvements to the tune of Rs.4,00,000/-.

4. On the above pleadings, issues were raised by the trial court. The parties went to trial. The evidence consists of the testimony of P.W.1 and documents marked as Exts.A1 to A4 from the side of the plaintiffs. The contesting defendant examined D.W.1. Exts.C1 to C3 are the Commission reports. The trial court, on an appreciation of the materials before it, came to the conclusion that Ext.A4 is ab-initio void and

decreed the suit. The trial court directed the plaintiffs to pay a sum of Rs.94,000/- to the first defendant towards value of improvements.

5. The aggrieved first defendant carried the matter in appeal as A.S. No.3 of 1997. The lower appellate court, applying Sections 6, 7 and 8 of the Limitation Act came to the conclusion that the claim as far as the first plaintiff is concerned is barred by limitation and granted a decree for partition which reads as follows:

"In the result the appeal is allowed in part and the suit as far as the claim of the first plaintiff is dismissed and second plaintiff is given a preliminary decree for partition of the plaint schedule property in following terms:

i) The plaint schedule property shall be divided into two shares by metes and bounds and one share shall be allotted to the second plaintiff. The remaining one share will be allotted to the first defendant on payment of court fee.

ii) The second plaintiff is entitled to

get mesne profits from the first defendant and the quantum of which is relegated to the final decree stage.

iii) Anyone of the parties can apply for appointing a commission to effect division and to pass final decree.

iv) The pump house and the motor in the plaint schedule property shall be set apart to the share of the first defendant without valuing it at the time of effecting partition as far as practicable.

v) The cost of 1st plaintiff and 2nd defendant will born from estate."

6. Aggrieved by the judgment and decree of the appellate court, the first defendant has come up in appeal.

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

1. Whether the courts below were correct in relying on photostat copies of evidence for the purpose of proving dates of birth?

2. Whether the claim of the 2nd plaintiff is also not barred since the plaintiffs have joint right in the property and since the 1st plaintiff has not filed the suit

within time even according to the courts below?

3. Is the suit barred under Sec. 6, 7 and 8 of Limitation Act?

4. Whether the courts below were correct in decreeing for mesne profits and denying the value of improvements to the 1st defendant?

5. Whether the courts below were correct in granting a decree for partition when the suit was for recovery of possession?

8. In this appeal by the first defendant in the suit, the main ground taken is that the suit as a whole is barred by limitation since the first plaintiff after attaining majority had not filed the suit within three years of attaining majority.

9. It is also contended that value of improvements granted by the trial court ought to have been retained by the lower appellate court.

10. A cross-objection has been filed by the first plaintiff assailing that portion of the order of the court below declining him relief in

respect of his half share over the property which was granted by the trial court.

11. Learned counsel for the appellant also contended that there is no reason to hold that Ext.A4 is an invalid document for the simple reason that the mother under special circumstances can act as natural guardian of the minors. Emphasis was also laid on the fact that father is a witness to the document and subsequently surety bond has been executed by the father in relation to the transaction covered by Ext.A4. Further contention is that there is no acceptable proof regarding the age of the plaintiffs before the court below and Exts.A1 and A2 could not have been accepted by the court for want of proper proof. It is therefore contended that the finding of the court below that the first defendant is only entitled to one share over the property cannot be sustained and that she is entitled to the entire property.

12. Learned counsel for the respondents contended that the court below has grievously erred in applying the provisions of the Limitation Act to non-suit the first plaintiff regarding his share of the property based on the plea of discharge. The said question can apply in a case of voidable document where the person who assails the document had an opportunity to get it set aside. In the case on hand, Ext.A4 having been executed by the defacto guardian, the document is void ab-initio. There is no question of ratification of a void document and the provisions of the Limitation Act have no application. Learned counsel contended that there is no justification for reversing the decree of the trial court.

13. The first plaintiff has filed a cross-objection before this Court. So far as the denial of his share by the lower appellate court holding that his claim is barred by limitation is concerned, it is contended that Ext.A4 being void

ab-initio, there is no question of ratification and there is no question of bar of limitation at all. In support of his contention that the document is void ab initio, he relied on the decision reported in **Madhegowda v. Ankegowda** (AIR 2002 SC 215).

14. After having heard learned counsel on both sides, it is felt that it is extremely difficult to sustain the judgment and decree of the lower appellate court. Ext.A3 is a document by which the plaintiffs obtained property involved in the suit. Admittedly at the time of execution of the document, they were minors and they were represented by their mother in the document. Their father was also one of the donors under Ext.A3 along with grandmother of the minors and paternal uncles of the minors. It was under these circumstances, the mother was shown as the guardian for and on behalf of the minors.

15. Ext.A4 is a deed executed by the mother of the minors in favour of the first

defendant. Parties are governed by the Hindu Minority and Guardianship Act.

16. As per the provisions of the Act, if the natural guardian assigns the property without the sanction of the court, the transaction is only a voidable transaction and it is for the person who assails the transaction to get the document set aside. However, Section 11 of the Hindu Minority and Guardianship Act deals with transfer by a defacto guardian. The said provision reads as follows:

"11. 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."

17. The above provision specifies that a defacto guardian cannot deal with the property of the minors. It is clear in its terms that a defacto guardian can neither deal with the property

of a minor nor dispose of the property belongs to a minor. There is a total prohibition imposed by the provision. Any document executed in violation thereof can be treated as void ab initio document only. If any authority is required, that is given by the decision reported in **Madhegowda v. Ankegowda** (AIR 2002 SC 215) wherein it was held as follows:

"16. Section 11 of the Act 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."

This Section brings about a material change in the law relating to de facto guardians or de facto managers of a Hindu minor's estate by enacting in express terms that after the commencement of the Act no person has the right or authority to do any act as a de facto guardian of such minor. Although the expression 'de facto guardian' is often used in judgments, there is in law nothing

like a de facto guardian. The statute recognises a natural guardian or a testamentary guardian or a guardian appointed by the Court. In law a person who is not a guardian as aforementioned who takes interest upon himself, the general management of the estate of a minor can be more appropriately described as 'de facto manager'. Before enforcement of the Act some confusion prevailed over the powers of de facto guardian or manager for alienating the property of his/her ward. It was held by the Privy Council in Hunooman Persaud Pandey's case 6 MIA 393, that a de facto guardian had the same power of alienating the property of his ward as a natural guardian. Section 11 had done away with the authority of any person to deal with or dispose of any property of a Hindu minor on the ground of his being the de facto guardian of such minor. Any alienation by a de facto guardian will be governed by the provisions in Section 11 of the Act. The alienation, being against the statutory prohibition, would be void ab initio and the alienee would not acquire any title to the property.

18. From the statutory provisions noted above, it is clear that with the avowed object of saving the minor's estate being mis-appropriated or squandered by any person, by a relation or a family friend claiming to be a will-wisher of the minor Section 11 was enacted to prohibit any such person from alienating the property of the minor. Even a natural guardian is required to seek permission of the Court before alienating any part of the estate of the minor and the Court is not to grant such permission to the natural guardian except in case of necessity or for an evident advantage to the minor. So far as de facto guardian or de facto manager is concerned, the statute has in no uncertain terms prohibited any transfer of any part of minor's estate by such a person. In view of the clear statutory mandate, there is little scope for doubt that any transfer in violation of the prohibition incorporated in Section 11 of the Act is ab initio void."

The Apex Court had occasion to consider the infirmity attached to a document executed by a

defacto guardian and the Apex Court held that the assignee gets no right.

18. The lower appellate court fell into grave error in treating the document as a voidable one. One fails to understand how the court took such a view. Probably the court below was guided by the fact that the father was a witness to the document and he may be in the know of things. But that cannot validate a document and nor can it be said that it is a voidable document. If the document, as already noticed is ab-initio void, the question of setting it aside does not arise for consideration and recovery of possession can be claimed on the strength of his title. It is not even necessary to have the document set aside.

19. Viewed from any angle, the finding of the lower appellate court that the first plaintiff has lost his remedy against the first defendant cannot be sustained. According to the lower appellate court, the suit has been filed after

three years of the first plaintiff attaining majority and therefore his claim is barred. That can apply in the case of a voidable document where the person concerned had an opportunity to ratify the document. In the case of a void document, that question does not arise. The lower appellate court was clearly in error in passing a preliminary decree for partition giving half share over the property to the first defendant.

20. It is contended on behalf of the appellant that Exts.A1 and A2 ought not to have been considered in accordance with law. The documents have been produced through P.W.1 and no objection seems to have been taken at the time of marking of the documents and there is no contention that it is not properly proved. The said contention therefore does not deserve consideration.

For the above reason, while dismissing this appeal, the cross-objection is allowed and the

R.S.A.711/2003.

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judgment and decree of the lower appellate court is set aside and the decree of the trial court is restored.

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P. BHAVADASAN,
JUDGE