

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

WEDNESDAY, THE 19TH DAY OF AUGUST 2015/28TH SRAVANA, 1937

SA.No. 56 of 1998 (F)

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AGAINST THE JUDGMENT IN AS 28/1992 of SUB COURT, OTTAPPALAM
DATED 27-06-1997**

**AGAINST THE JUDGMENT IN OS 147/1986 of MUNSIFF MAGISTRATE COURT,
MANNARGHAT DATED 18-01-1992**

APPELLANTS (APPELLANTS/PLAINTIFFS):

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1. KANNADASAN.
 2. SYAMALADEVI.

**THE APPELLANTS ARE THE CHILDREN OF POOTHRAMANNA
PADINHARE VARIYATH THANKAMANI VARASSIAR,
RESIDING AT CHEMBRASSERI AMSOM AND DESOM,
ERNAD TALUK.**

**BY ADVS.SRI.C.P.DAMODARAN NAYAR
SRI.D.KRISHNA PRASAD
SRI.JOJI VARGHESE
SRI.T.PELDHOSE
SRI.D.NARENDRANATH
SRI.M.HARISHARMA**

RESPONDENT(S) (RESPONDENTS/DEFENDANTS):

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1. THANKAMANI.
 2. ANNAPOORNESWARI.
 3. RAMACHANDRAN.
 4. MUKUNDAN.
 5. HARINARAYANAN.
 6. SANKARA VARRIER.
 7. ACHUTHA VARRIER.
 8. HARIDAS VARRIER.

9. **CHERIYA PARAMESWARAN NAMBOODIRI,
S/O. PAZHEDATH MANAKKAL PARAMESWARAN NAMBOODIRI.**

RESPONDENTS 1 TO 4 ARE THE CHILDREN OF ITTICHIRI VARASSIAR, THE 5TH RESPONDENT IS THE SON OF THE 2ND RESPONDENT, RESPONDENTS 6 TO 8 ARE THE CHILDREN OF ACHUTHA VARRIER AND THE 9TH RESPONDENT IS THE SON OF PAZHEDATH MANAKKAL PARAMESWARAN NAMBOODIRI. RESPONDENTS 1 TO 5 ARE RESIDING AT CHERMBRASSERI AMSOM AND DESOM, ERNAD TALUK, RESPONDENTS 6 AND 8 ARE RESIDING AT KARULAYI AMSOM AND DESOM, ERANAD TALUK, THE 7TH RESPONDENT IS RESIDING AT MUTTAM, THODUPUZHA, IDUKKI DISTRICT AND THE 9TH RESPONDENT IS RESIDING AT KARKITAMKUNNU AMSOM AND DESOM, MANNARKKAD TALUK.

**R9 BY ADV. SRI.T.SETHUMADHAVAN (SR.)
R9 BY ADV. SRI.PUSHPARAJAN KODOTH
R9 BY ADV. SRI.K.JAYESH MOHANKUMAR**

**THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 19-08-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

ds

P.BHAVADASAN, J.

S.A. No. 56 of 1998

Dated this the 19th day of August, 2015

J U D G M E N T

The plaintiffs in O.S.No.147 of 1986 before the Munsiff Magistrate Court, Mannarghat are the appellants. The suit was one for partition.

2. Admittedly, the property belonged to the Tarawad which consisted of Ittichiri Warrassiar and Achutha Warriar who died in 1964 and 1971 respectively. The plaintiffs say that their grandfather namely Achutha Warriar, who is the husband of Ittichiri Warrassiar, executed Ext.B1 document dated 22.01.1966 along with Achutha Warriar, who was the brother of Ittichiri Warrassiar, assigning the plaint schedule property to the 9th defendant.

3. The claim of the plaintiffs is that they obtained a right by birth in the Tarawad property and even assuming that the property was assigned prior to their birth, the act committed by the husband of Ittichiri Warrassiar was

fraudulent and was with the intention of defeating the rights of the then minor children of the Tarawad. Claiming that Ext.B1 is invalid in law, they sued for partition.

4. The suit was resisted by the 9th defendant by pointing out that at the time of execution of Ext.B1, the plaintiffs were not even born and so their claim of right by birth has no legs to stand. After the death of Ittichiri Warrassiar, her husband Achutha Warriar left to his warriam along with the children namely defendants 1 to 4. The brother of Ittichiri Warrassiar found it difficult to continue in the Tarawad house and therefore, the two Achutha Warriars decided to sell the property. That is how, Ext.B1 came into existence. The defendants contended that defendants 1 to 4, even assuming, who were minors at the time of execution of Ext.B1, did not challenge the assignment within the time stipulated under law after attaining majority and they have therefore accepted that document or acquiescence with the transaction. It that be so, it was contended that the

plaintiffs derive no right and the suit is only to be dismissed.

5. Issues were raised by the trial court. The evidence consists of the testimony of PW1 and documents marked as Ext.A1 from the side of the plaintiffs. The defendants examined DW1 and had Exts. B1 to B8 marked. Exts. C1 and C2 are the Commissioner's report and plan.

6. The trial court found an easy way out. Without going into the substantial questions that arouse for consideration in the suit, dismissed the suit on a very frivolous ground, holding that on the allegations, the 9th defendant was in possession of property and the suit is not properly framed and the court fee paid is not proper.

7. The matter was carried in appeal as A.S.No. 28 of 1992 before the Sub Court, Ottapalam. The Sub Court found the reason given by the trial court in dismissing the suit to be erroneous, but on merits, found that the plaintiffs have no right to claim partition and dismissed the suit.

8. Notice was issued on the following substantial questions of law formulated in the memorandum of appeal:

“1. Is not an assignment made by a person acting as guardian of the minors, in respect to their share in the tarawad property, without obtaining the permission of the Court, as required under Section 8 of the Hindu Minority and Guardianship Act, invalid in the eye of law.

2. Whether a document executed by a person purporting to act as guardian of minors and thereby assigning the share of the minors in the tarawad property affect the rights of minors in such property.

3. When the plaintiffs are entitled to a share in the tarawad property by birth, whether such rights are affected by reason of a document executed by a person who had no authority under law to execute such a document.

4. Does not the tarawad or joint family property over which the plaintiffs have a share, continue to be so, notwithstanding execution of any document in respect of the same, which is not valid and binding on them.

5. It is not the property a joint family property of the plaintiffs and whether Ext.B1

affects the share of the plaintiffs in respect of the said property.”

9. The learned counsel appearing for the appellants contended that the lower appellate court, in all fairness, should have remanded the matter to the trial court for consideration of the core issue since that has not been considered by the trial court. The learned counsel went on point out that the lower appellate court should not have taken upon itself the burden of deciding the issue at the first instance without the trial court deciding the issues. Then again, it was contended that the finding of the lower appellate court that Ext.B1 is valid in law also cannot be supported. Going by Section 8 of the Hindu Minority and Guardianship Act, even assuming a natural guardian assigns the property of the minor, unless the sanction of the Court is obtained, it is not valid in law. If that be so, the assignment by Achutha Warriar, the husband of Ittichiri Warrassiar cannot have legal sanction.

10. The learned counsel appearing for the respondents on the other hand pointed out that there is absolutely no merit in the appeal at all. It is not in dispute that Achutha Warriar, who joined the brother of Ittichiri Warrassiar to assign plaint schedule property as per Ext.B1, is the natural guardian of the Children the couple had. An assignment by the natural guardian of a minor is only voidable at the instance of the minor. In the case on hand, the mother of the plaintiffs and the sisters of their mother did not challenge the assignment within the time stipulated. They therefore will be deemed to have accepted the transactions. If that be so, the plaintiffs derive no manner of right over the suit property and the lower appellate court was justified in dismissing the suit.

11. After having heard the learned counsel on both sides, it is felt that the contention raised by the learned counsel for the respondents is fully justified. Ext.B1 dated 21.01.1966 is the document by which the property was

assigned by the two Achutha Warriors namely, the husband of Ittichiri Warrassiar, who is the grand mother of the plaintiffs, and the brother of Ittichiri Warrassiar.

12. It is not in dispute that the plaintiffs were born long after the transaction was effected. It was pointed out by the learned counsel for the respondents that the mother of the plaintiffs is still alive.

13. Reliance placed on Section 8(2) of the Hindu Minority and Guardianship Act is misconceived. Unlike Section 11 of the Hindu Minority and Guardianship Act where the transaction by a *de facto* guardian is treated as void, under Section 8(2) of the Hindu Minority and Guardianship Act, the alienation by a natural guardian of the minor's property is only voidable. That means that unless the document is assailed by the interested persons, it stands. The period available to the minor for assailing such a transaction is to be computed with reference to the Limitation Act.

14. True, that the four children of Ittichiri Warrassiar and Achutha Warriar were minors at the time of execution of Ext.B1 document. But none of them, on attaining majority, within the period stipulated in the Limitation Act chose to challenge the assignment in favour of the 9th defendant evidenced by Ext.B1. That means, they accepted the transaction. It may be worth here to note that Achutha Warriar the grand father of the plaintiffs had assigned the land standing in his name as per Ext.B2 in favour of the four minor children whose property was sold under Ext.B1. So, it could not be said that there was fraud played by the grandfather of the plaintiffs.

15. Under the above circumstances, the lower appellate court was justified in coming to the conclusion that plaintiffs neither had a right by birth in the suit property nor could they assail Ext.B1 document as fraudulent or invalid in law. No grounds are made out to interfere with the judgment and decree of the lower appellate court.

This appeal is without merits and it is accordingly dismissed.

Sd/-
P.BHAVADASAN
JUDGE

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P.A. to Judge