

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 26.02.2015

CORAM:

THE HON'BLE MS. JUSTICE K.B.K.VASUKI

Second Appeal No.1112 of 2002

1.Janaki
2.Pappammal

.. Appellants/Respondents
1 &2/plaintiffs

Vs

1.Kuppa Kounder
2.Bagyalakshmi
3.Munia Kounder
4.Panjalai Ammal (died)
5.Munia Kounder
6.Chinnaponnu
7.Lakshmi Ammal

..1st Respondent/Appellants/4th Defendant

.. Respondents

Second Appeal is filed under Section 100 of the Code of Civil Procedure against the judgment and decree dated 01.10.2001 made in A.S.No.24 of 1997 on the file of the Sub Court, Kallakurichi partly reversing and partly modifying the Judgment and Decree dated 06.01.1997 made in O.S.No.539 of 1989 on the file of the I Additional District Munsif Court, Kallakurichi.

For Appellants : M/s.Mukunth for Sarvabhauman Associates.

For Respondents : M/s.K.A.Ramakrishnan.

J U D G M E N T

The plaintiffs are the appellants herein.

2.They filed the suit for partition of 2/3 shares of the plaintiffs in items 1 to 4 of "A" schedule immovable property and for consequential relief of mesne profits and for delivery of possession.

3.The plaintiffs and the first defendant/Bagyalakshmi are the children of one Iyyasamy and the suit item 1 to 4 are settled in their favour under Ex.A1 sale deed dated 17.11.1976 executed by the father. While the father was alive, the first defendant alienated the entire A schedule items 1, 2 and 4 of the suit properties including 2/3 share of the minors and executed sale deeds in favour of the defendants 2 to 4 under Ex.B1 sale deed dated 01.04.1977 and Ex.B2 sale deed dated 29.12.1977. The minor brother and sister ignoring the sale transaction filed the suit in OS.No.465 of 1997 for partition of their 2/3share in the suit items. The plaintiffs claimed the relief of partition by treating the sale transaction

effected by the major sister as void transaction and not binding on them.

4.The suit relief was seriously opposed by the defendants 1 and 2, pending suit the third defendant died and his legal representatives were brought on record as the defendants 5 to 8. The defendants 1, 2, 5, 7 and 8 remained exparte and not contested the suit and the suit was contested by the defendants 4 & 6. According to the contesting defendants, the sale transaction was for legal necessity of discharging the family debts incurred by the father.

5.The parties in support of their respective contentions adduced oral and documentary evidence during trial. The trial Court having arrived at conclusion that the sale transaction in respect of the minors shares by the major sister is void transaction and is not binding on the plaintiffs upheld the claim of the plaintiffs for partition of their 2/3 share in respect of suit A schedule item 1 to 4. Aggrieved against the same, the fourth defendant preferred an appeal in AS.No.24 of 1997. The lower appellate court arrived at the conclusion that Ex.B1 sale deed in respect of suit item 4 having been true and valid and binding on the plaintiffs 1 and 2 and the first defendant, the 4th defendant does have the right of equity in respect of 4th item of suit properties and in the event of passing final decree, the lower court shall order separate possession in respect of 4th item of suit properties purchased by the 4th defendant and allowed the appeal accordingly. The lower appellate court arrived at such conclusion by holding that the plaintiffs and the first defendant are universal donee who are obliged to settle the debts incurred by the father/Ayyasamy Gounder and such sale transaction effected to discharge the debt is valid and binding on the parties. Hence, this second appeal by the plaintiffs in respect of item 4 of the suit property.

6.The Second Appeal is admitted on the following substantial questions of law :

(i)When as per provisions of Sections 6, 8 & 11 of the Hindu Minority & Guardianship Act, 1956 the 2nd respondent is not the natural guardian entitled to deal with the properties of the appellants without the sanction of the Court, whether the sale effected by her under Ex.B1 sale deed dated 01.04.1977 in favour of the 1st respondent without obtaining sanction of the Court, is valid in law?

(ii)Whether the lower appellate court is justified in law in holding the provisions of Sections 127 and 128 of the Transfer of Property Act, 1882 dealing with Universal Donee are attracted to the facts of the instant case especially when the 2nd respondent as the testamentary guardian has no authority under law to alienate the share of the appellants during their minority?

(iii) When the 1st respondent is estopped from questioning the validity of Ex.A1 settlement deed dated 17.11.1976 in favour of the appellants in view of his attestation to the said document, whether the lower appellate court is justified in law in holding that Ex.B1 sale deed dated 01.04.1977 was executed by the 2nd respondent to settle the debts under Ex.B5 Promissory Note dated 06.06.1976?

(iv) Whether the lower appellate court is justified in law in reversing the judgment and decree of the trial court with respect to the 4th item of the suit property without setting aside the findings rendered by the Trial Court in that regard?

(v) When the question of fraudulent transfer contemplated under Section 53 of the Transfer of Property Act 1882 does not arise in the present case in view of the attestation made by the 1st respondent to Ex.A1 settlement deed, whether the lower appellate court is justified in law in holding that Section 53 of the Transfer of Property Act is attracted?

7. Heard the rival submissions made on both sides and perused the records.

8. The only issue to be considered herein is regarding the validity of the sale transaction effected under Exs.B1 and B2 sale deeds by the major sister in respect of her share and the shares of the minor brother and sister that too during the lifetime of the father.

9. The learned counsel for the appellants have elaborately argued the issue regarding the permission to be obtained from the Court under Section 8 of the Hindu Minority and Guardianship Act, 1956 by resorting to the provisions of Section 8 and 11 of the Hindu Minority and Guardianship Act, 1956.

10. The learned counsel for the appellants in support of his contention that the major sister/defacto guardian is not entitled to dispose of or deal with the property of Hindu minor and disposal of immovable property by the defacto guardian without previous permission of the Court is void transaction under Section 11 of Hindu Minority and Guardianship Act and any disposal of the immovable property by the natural guardian without previous permission by the Court is voidable at the instance of the minor under Section 8(3) of the Act and mere attestation by the father in the sale transaction as effected by the major sister who is neither the defacto guardian or the natural guardian will not cure the defect or illegality attached to the impugned sale transaction, cited the following decisions :

(i) (2002) 1 SCC 178 - Madhegowda (dead) by LRs V. Ankegowda (dead) by LRs and others
(ii) 1980 (1) MLJ 240 - Angammal and others V. Balasubramaniam and another
(iii) 1981 (2) MLJ 276 - Sundaramoorthy and another V. Shanmugha Nadar and others
(iv) 2007 (3) CTC 718 - Brammagiri V. Minor Sivasubramaniam and another
(v) 2010 (2) CTC 198 - Natarajan V. Paramasivam and
(vi) 2013 (2) CTC 626 - Selvam and others V. Mangayarkarasi

11. Per contra, the learned counsel for the respondent/D4 would attempt to justify the validity of the sale transaction in his favour solely on the ground that the sale transaction having been effected by the major sister to discharge the legal debts of the father, the same is binding on the parties. This Court is not inclined to accept the contention so raised on the side of the respondent/D4.

12. As rightly argued by the learned counsel for the appellants, the trial court after detailed analysis of facts and circumstances and after due appreciation of evidence adduced before the same, rightly held the sale transaction to be not legal and valid and not binding on the minors. The trial court also held both Exs. B1 and B2 sale transactions to be void. Whereas, the lower appellate court by erroneous approach to the factual and legal aspects involved in the present case, reversed the findings regarding item 4, which is the subject matter of the sale transaction effected in favour of fourth defendant, with liberty given to the 4th defendant to claim the right of equity at the time of final decree proceedings in respect of item 4 sold in his favour. Such approach, in my considered view is totally erroneous and on misconception of facts and law and is unsustainable both legally and factually. The transaction having been effected by the major sister during the lifetime of the father neither in her capacity as defacto guardian or natural guardian, is absolutely void and no right is conveyed to the fourth defendant under such void transaction in respect of 2/3 share belonging to the minor brother and sister. The contention so raised on the side of the appellants regarding the void nature of the transaction is well fortified by the Hon'ble Supreme Court and learned brother and sister judges of our High Court in the judgments above cited on the side of the appellants.

13. The Hon'ble Apex Court has in the judgment reported in (2002) 1 SCC 178 - Madhegowda (dead) by lrs. V. Ankegowda (dead) by lrs. and others held that Section 11 of Hindu Minority and Guardianship Act, 1956 has done away with the authority of any person to deal with or dispose of any property of Hindu Minor on the ground of his being the defacto guardian of such minor. Any alienation by a defacto guardian

will be governed by the provisions of Section 11 of the Act and the alienation being against the statutory prohibition, would be void abinitio and the alienee would not acquire any title to the property. The Hon'ble Apex Court in para 20 of the same judgment referred to the view of the Federal Court as to who is defacto guardian. The Federal Court in case of Kondamudi Sroramulu V. Myneni Pundarikakshayya AIR 1949 FC 218 : 1949 FCR 65 took the view that in law, there is nothing like a defacto guardian. There can only be a defacto manager, although the expression defacto guardian has been used in text books and some judgments of Courts. That is the correct description of a person generally managing the estate of a minor without having any legal title to do so. The Federal Court has in para 115 of its judgment above cited held that "the phrase 'defacto guardian' is a loose phraseology for the expression 'defacto manager' employed in Hunoomanpersaud Panday case and their Lordships in different parts of the judgment used the words 'guardian', 'curator' and 'defacto manager'. This phrase is certainly not known to any text of Hindu law, but it describes the relations and friends who are interested in the minor and who for love and affection to him assume superintendence over his estate."

14.The Hon'ble Supreme Court in para 16 further explains as to who is 'defacto guardian'. It is observed therein that although the expression "defacto guardian" is often used in judgments, there is in law nothing like a defacto 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 "defacto manger". The Apex Court has in para 25 considered the question whether the provisions under Section 11 is applicable in the case of transfer of minors interest in the joint family and answered that Section 11 includes all types of properties of the minor and no exception is provided in the section.

15.The Hon'ble Supreme Court has while holding so in para 24 of its judgment referred to the Division Bench judgment of the Madras High Court in the case of Dhanasekaran V. Manoranjithammal - AIR 1992 Mad 214 : (1991) 2 LW 635 wherein the Division Bench while construing Section 11 of the Act, held interalia, that the property of a Hindu minor referred to in Section 11 will include all his properties including his undivided interest in the joint famiy property and consequently that the sale by the defacto guardian of the minor's interest in the joint family property was void abinitio.

16.When that being the definition of the phrase defacto guardian, the sister is covered under the phraseology as such the sister is defacto guardian or defacto manager totally prohibited from

making any alienation and any alienation in respect of minor's interest made by her would be void abinitio.

17.The Hon'ble Supreme Court has categorically held in para 25 that the existence or otherwise of legal necessity is not relevant in the case of such invalid transfer. A transferee of such an alienation does not acquire any interest in the property. Such an invalid transaction is not required to be set aside by filing a suit or judicial proceedings. The minor, on attaining majority, can repudiate the transfer in any manner as and when occasion for it arises. After attaining majority if he/she transfers his/her interest in the property in a lawful manner asserting his/her title to the same that is sufficient to show that the minor has repudiated the transfer made by the "defacto guardian/manger".

18.The same view that the alienation by defacto guardian either for legal necessity or otherwise is void abinitio was followed by the learned single judge of this court in the judgment reported in 1980 1 MLJ 242 - Angammal and others V. Balasubramaniam and others wherein the learned single judge has also referred to the judgment of the Orissa High Court in AIR 1967 Orissa 68 - D.Gurumurthy V. Raghu Podhan wherein the position of an alienee from such a defacto guardian has been held to be that of a trespasser.

19.In yet another judgment reported in 1981 (2) MLJ 276 - Sundaramoorthy and another V. Shanmugha Nadar and others it is held by the learned single judge that when the father is alive he is the only person who can deal with the properties and when he had not participated in the transaction as their guardian to exercise the legal rights that flow out of it, there is no scope for holding that by implication because he was an attessor, it is only the father who had acted as the guardian of the minors. The learned single judge has negatived the contention raised therein that the active participation of the father in the sale transaction by attesting the document, it could mean that it was a sale effected by him and the attestation would operate as estoppel. It is observed by the learned brother judge when the law requires that a particular person alone can act as a guardian and if he is to deal with the properties of a minor after obtaining permission of Court and no useful purpose can be achieved by Courts in interpreting the law otherwise, to hold that it is not the form that is material, but it is the substance of the transaction that should be gone into.

20.The learned single judge of this Court in the judgment reported in 2010 (2) CTC 198 - Natarjan V. Paramasivam has in para 26 while dealing with the validity of the sale transaction effected by the eldest brother of the shares of two minor brothers, held that the

sale is void and not voidable document and void document need not be set aside.

21. In the other judgment reported in 2013 (2) CTC 626 - Selvam and others V. Mangaiyarkarasi the learned single judge also referred to other judgments of our High Court wherein the transfer in violation of Section 11 of the Hindu minority and guardian ship act is held to be void abinitio.

22. Our High Court has as early as in 1989 (1) MLJ 54 - T.N. Panchayats Development Officers Association V. Government of Tamil Nadu expressed a view under the personal law of the parties, the mother of the first plaintiff though appointed as guardian in respect of the property-settled on the first plaintiff would only be in the nature of a defacto guardian in the presence of the father of the first plaintiff who would be the de jure guardian. Our High Court has in the judgment dealt with the validity of deed of exchange entered into by the mother having the father as one of the attestors, our High Court held that the mere attestation of the document by the father of the first plaintiff, the validity of the transaction cannot be held to be valid.

23. In view of the above stated legal position, the transaction effected by the major sister in respect of the shares of the minor brother and sister is void abinitio and no right is conveyed to the transferee under such void transaction and the same is not binding on the plaintiffs and the plaintiffs are hence without filing any separate suit and without asking for cancellation of sale in this suit entitled to seek partition of their share in respect of the suit properties when the trial court has rightly granted the suit reliefs the judgment and decree of the lower appellate court in reversing such findings of the trial court is contrary to law and warrants interference by this Court. The substantial questions of law are hence answered in favour of the plaintiffs.

24. However, as the fourth defendant has purchased the share of minors as well as major sister, he is at liberty to work out his remedy if any for allotment of the suit property towards his share by way of equity in the final decree proceedings with liberty given to the minors to contest it on merits.

25.With such liberty given to the parties, the second appeal is allowed by setting aside the judgment and decree of the lower appellate court and by restoring the judgment and decree of the trial Court. No costs.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1. The Sub Court, Kallakurichi.
2. The I Additional District Munsif, Kallakurichi.
3. The Record keeper V.R.section, High Court Madras.

+1cc to M/s.sarvabhaman Asso, Advocate Sr.10752
+1cc to M/sK.A.Ramakrishnan, Advocate, SR.10719

S.A.No.1112 of 2002

gp[co]
srg 29.09.2015



WEB COPY