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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

**SECOND APPEAL NO.358 OF 2013
WITH
CIVIL APPLICATION NO.6656 OF 2013**

Anant s/o Mahadeo Shinde,
Age: 29 years, Occu: Agril.,
R/o Harishchandra Pimpri,
Tq. Wadwani, Dist. Beed

..APPELLANT
(Orig.pltff.)

VERSUS

1. Babasaheb s/o Sahebrao Jogdand,
Age: 64 years, Occu: Agri.
2. Annasaheb s/o Punjaji Rathod,
Age: 41 years, Occu: Agril.
3. Sundar s/o Punjaji Rathod,
Age: 35 years, Occu: Agril.
4. Gorakh s/o Punjaji Rathod,
Age: 37 years, Occu: Agri.,

All R/o Harishchandra Pimpri,
Tq. Wadwani, Dist. Beed

5. Nilabai w/o Mahadeo Shinde,
Age: 54 years, Occu: Household,
R/o as above, at present
Rajegaon, Tq. Georai,
Dist. Beed

..RESPONDENTS
(Orig.defts.)

Mr Prasad B. Kadam, Advocate holding for Mr S. J. Salunke, Advocate for
appellant;
Mr B. S. Kudale, Advocate for respondent No.1;
Mr A. R. Rathod, Advocate for respondent Nos.2 to 4;
Mr S. G. Kawade, Advocate for respondent No.5

CORAM : NITIN W. SAMBRE, J.

DATE : 14th November, 2017

(2)

ORAL ORDER:

Heard Mr P.B. Kadam, learned Counsel appearing on behalf of appellant-original plaintiff; Mr B.S. Kudale, learned Counsel on behalf of respondent no.1; Mr A.R. Rathod, learned Counsel on behalf of respondents no.2 to 4 and Mr S.G. Kawade, learned Counsel on behalf of respondent no.5.

2. The appellant-plaintiff instituted Regular Civil Suit No.4 of 2004 for declaration and possession of the suit properties which were sold by his mother respondent no.5-original defendant no.1 Nilabai to respondents no.1 to 4-original defendants no.2 to 5. It is the case of the appellant-plaintiff that his father was addicted to liquor and bad vices and so as to protect interest of appellant, the suit properties were mutated in his name by his father and his mother was shown to be care taker/guardian. Plaintiff further claimed that he had attained majority on 18th May, 2002 as his date of birth is 18th May, 1984, and thereafter having noted that the suit properties were transferred without obtaining permission under Section 11 of the Hindu Minority and Guardianship Act, 1956 (for short "Act"), accordingly declaration was sought that the sale of the suit properties being bad in law and is not binding on him, and is entitled for possession.

3. The claim of the appellant-plaintiff was resisted by respondents-defendants no.2 to 5 on the ground that as the father of the appellant was taken to bad vices and was alcoholic, the appellant was under the care of his maternal uncle Prabhakar. According to them, in absence of the father

(3)

being natural guardian, mother can always act as a guardian and as such respondent no.5-mother of appellant, pursuant to the provisions of Section 6 of the Act, has transferred the properties. It is claimed that the suit is not maintainable as relief of cancellation of sale deeds is not claimed by the plaintiff.

4. The Trial Court, after having noted that no permission of District Court was obtained for transfer of immovable property of minor, decreed the suit of the appellant-plaintiff vide judgment and decree dated 8th November, 2006.

5. In Regular Civil Appeal No.93 of 2006, preferred by respondents no.1 to 4-original defendants no.2 to 4, learned District Judge, Majalgaon reversed the aforesaid decree by judgment and decree dated 30th October, 2012 on the ground that the suit was not maintainable as the relief for cancellation or setting aside of sale deeds was not claimed in the suit. Thus, the present second appeal by original plaintiff.

6. Learned Counsel appearing on behalf of the appellant would urge that in the instant case the provisions of Section 6 (a) of the Act would not be available to the respondents, particularly for claiming that the mother is natural guardian. So as to substantiate his claim, learned Counsel would draw support from the judgment of the Apex Court, in the matter of **Pannilal vs. Rajinder Singh and another**, reported in **(1993) 4 Supreme Court Cases 38**, particularly from paragraphs 7 and 8. According to him,

(4)

the provisions of Section 8 of the Act provides for a complete protection of the property of a minor and if property of a minor is required to be dealt with, embargo created under Section 11 of the Act has to be over-come.

7. By inviting attention of this Court to the judgment of the Apex Court in the matter of **Madhegowda (D) by L.Rs. vs. Ankegowda (D) by Lrs and others**, reported in **AIR 2002 Supreme Court 215**, learned Counsel would urge that in view of provisions of Order VII, Rule 7 of the Code of Civil Procedure (for short "CPC"), there is no necessity to seek relief of cancellation of the sale deed, once there are supporting pleadings to that effect in the plaint that the sale deeds were illegal. According to him, even if the sale deeds of the suit properties are not challenged in the civil suit by a specific prayer, still it is open for the learned Trial Court to grant such relief pursuant to the provisions of CPC, as deemed necessary in the facts and circumstances and pleadings of the parties. He would then claim that even otherwise it is not mandatory that the sale deeds must be challenged and would draw support from the observations of paragraph 23 of the judgment in the matter of Madhegowda (supra).

8. Learned Counsel for the appellant then would take me through the evidence of the parties so as to claim that the purchasers of the property was having knowledge that the suit property is in the name of a minor and for purchase thereof there has to be permission under Section 11 of the Act from District Court. In the wake of above, he submits that the judgment rendered by the learned lower appellate court is required to be upset. He

(5)

would urge that following substantial questions of law are required to be formulated in the instant appeal :-

- (a) In view of provisions of Section 6 (a) of the Act, in the facts and circumstances of the present case, whether mother can be termed as a natural guardian ?
- (b) In the wake of provisions of section 11 of the Act, whether the sale deeds in question are binding on the present appellant, when fact remains that no permission under Section 8 of the Act was obtained from the competent court for transfer of the minor's property ?
- (c) In absence of challenge to the sale deeds, whether the suit was maintainable ?

9. While responding to the aforesaid submissions, learned Counsel appearing on behalf of the respondents would urge that it is the case of the appellant-plaintiff that he was staying with his maternal uncle since his father was addicted to liquor and bad vices. It is the case of the plaintiff, that upon insistence of his mother, the suit property was given to him so as to meet his day-to-day and education expenses, for which the mother is shown to be a natural guardian and accordingly her name was mutated in the revenue record pertaining to suit properties. He would then urge that Section 6 (a) of the Act cannot be given a restrictive interpretation to mean that as long as father is alive, mother cannot be a natural guardian.

(6)

10. In order to substantiate his submissions, learned Counsel for respondents would draw support from the judgment of the Apex Court in the matter of **Ms. Githa Hariharan & anr. vs. Reserve Bank of India & anr.**, reported in **AIR 1999 Supreme Court 1149**, particularly observations in para 10 of the said judgment. In addition, they would take me through the evidence of plaintiff's witness Prabhakar, maternal uncle of present appellant, to claim that it is case of the appellant himself that he was not in the custody of father but was in the custody of mother and it is mother, who was natural guardian, in the circumstances as are brought on record. In addition, they would urge that there are no specific pleadings and the prayer so as to challenge sale deeds executed in favour of respondents No.1 to 4 by respondent No.5 – defendant No.1, mother of the present appellant. In such an eventuality, according to him, provisions of Order VII Rule 7 of the CPC do not attract.

11. By drawing support from the judgment of this Court in the matter of **Kisan s/o Ramji Khandare vs. Kausalyabai w/o Gangaram Korde & ors.**, reported in **2007 (4) Mh.L.J. 43** and catena of judgments of the Apex Court, such as **Vishwambhar & ors. vs. Laxminarayana & anr.**, reported in **AIR 2001 SC 2607** and **Nagappan vs. Ammasai Gounder & ors.**, reported in **(2004) 13 Supreme Court Cases 480**, learned Counsel for respondents would urge that in absence of challenge to the sale deeds, the suit instituted by the present appellant is not maintainable. According to them, the appeal lacks merit and is liable to be dismissed.

(7)

12. Having dwelt upon rival submissions of the parties and having scanned evidence of the respective parties as also on perusal of the pleadings of the present appellant-plaintiff in the plaint, it is to be noted that the plaintiff has instituted the suit after he attained majority, claiming that the sale as was made by his mother – defendant No.1 was not for legal necessity, his father was addicted to bad vices and as such, the sale deeds are not binding on him and he is entitled for possession of the suit properties. He has laid foundation of the case based on the provisions of Sections 6 (a), 8 and 11 of the Act.

13. The fact remains that in the prayer or in the pleadings of the plaintiff, there is no specific mention that the sale deeds are void and as such are required to be set aside. Even no inference could be drawn from the evidence brought on record by the appellant that he had an intention to challenge the sale deeds in relation to the suit properties, executed in favour of the respondents-defendants no.2 to 5.

14. The fact remains that the sale deeds which are claimed to be not binding on the present appellant are executed by the mother, which fact is not disputed by respondents. In the circumstances as are brought on record, whether the mother was an exclusive guardian of the present appellant or not, particularly having regard to the provisions of Section 6 (a) of the Act, is required to be analyzed.

(8)

15. The evidence of plaintiff's witness Prabhakar, maternal uncle of the appellant and brother of respondent no.5-defendant no.1, in clear terms speaks that the name of the mother was introduced as guardian in the mutation entry in relation to the suit properties when she insisted father of the present appellant that she needs property in the name of the present appellant for his up-bringing and maintenance purpose. He has also stated that the father of the present appellant was an alcoholic and was addicted to bad vices. He has also stated in his evidence that initially the appellant studied by staying with the said witness, which appears to be the case of the appellant. In the wake of above, there is no room to draw inference from the pleadings and evidence brought before the court, that it was father who was alive and he has to be the natural guardian pursuant to the provisions of Section 6 (a) of the Act. The entire conduct of the appellant and particularly case brought by him before this Court, takes this Court to the only conclusion that the mother of the present appellant i.e. defendant no.1 was rightly held to be natural guardian by the learned lower appellate court.

16. In the backdrop of above, the claim of the present appellant that pursuant to the provisions of Section 6 (a) of the Act, the mother was not legally entitled to sell or transfer the properties, being his natural guardian, is liable to be rejected. The fact remains that there is no material on record to infer that the mother of the appellant was residing separately from his father and he was in exclusive custody of the mother.

(9)

17. This takes me to the last submission of the present appellant i.e. whether it was necessary for him to challenge the sale deeds of the suit properties. No doubt, so as to substantiate his claim, the present appellant has relied upon the judgment of the Apex Court, in the matter of Madhegowda (supra), particularly observations in paragraph 23, which read thus :-

“We have carefully considered the principles laid down in the aforementioned decisions so far as relevant for the purpose of adjudication of the issue arising in the present case. It is to be kept in mind that this is not a case of alienation of minors interest in a 'joint family property'. As noted earlier, Ninge Gowda died leaving his two daughters, namely Smt.Sakamma and Smt.Madamma. It is not the case of any of the parties that the suit property was a 'joint family property' in the hands of Ninge Gowda or that the alienation by Smt.Madamma, who is the sister of the minor, was a transfer of the minors interest in the 'joint family property'. Therefore, the question whether the provision in [Section 11](#) is applicable in the case of transfer of minors interest in a 'joint family' does not arise for consideration here. [Section 11](#) includes all types of properties of a minor. No exception is provided in the Section. Undoubtedly Smt.Madamma, sister of the minor, is not a 'guardian' as defined in [Section 4\(b\)](#) of the Act. Therefore, she can only be taken to be a 'de facto guardian' or more appropriately 'de facto manager'. To a transfer in such a case [Section 11](#) of the Act squarely applies. Therefore, there is little scope for doubt that the transfer of the minors interest by a de facto guardian/manager having been made in violation of the express bar provided under the Section is per se invalid. The existence or otherwise of legal necessity is not

(10)

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 proceeding. 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 'de facto guardian'/manager'."

18. The Apex Court, while dealing with similar issue, though made a passing reference that the sale deed might not have been questioned in that case, still the fact remains that the sale of minor's property was held to be not permissible. Though, even the obiter of the Apex Court is binding on this Court, still if those findings are considered in the backdrop of the judgment of the Apex Court, in the matter of Vishwambhar & ors. (supra), particularly paragraphs 9 and 10, which read thus:-

"9. On a fair reading of the plaint, it is clear that the main fulcrum on which the case of the plaintiffs was balanced was that the alienations made by their mother-guardian Laxmibai were void and therefore, liable to be ignored since they were not supported by legal necessity and without permission of the competent court. On that basis the claim was made that the alienations did not affect the interest of the plaintiffs in the suit property. The prayers in the plaint were inter alia to set aside the sale deeds dated 14-11-1967 and 24-10-1974, recover possession of the properties sold from the respective purchasers, partition of the properties carving out separate possession of the share from the suit properties of

(11)

the plaintiffs and deliver the same to them. As noted earlier, the trial court as well as the first appellate court accepted the case of the plaintiffs that the alienations in dispute were not supported by legal necessity. They also held that no prior permission of the court was taken for the said alienations. The question is in such circumstances are the alienations void or voidable? In [Section 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-section (3) of the said section it is specifically provided that any disposal of immovable property by a natural guardian, in contravention of sub-section (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. As noted earlier in the plaint as it stood before the amendment the prayer for setting aside the sale deeds was not there, such a prayer appears to have been introduced by amendment during hearing of the suit and the trial court considered the amended prayer and decided the suit on that basis. If in law the plaintiffs were required to have the sale deeds set aside before making any claim in respect of the properties sold then a suit without such a prayer was of no avail to the plaintiffs. In all probability realising this difficulty the plaintiffs filed the application for amendment of the plaint seeking to introduce the prayer for setting aside the sale deeds. Unfortunately, the realisation came too late. Concededly, plaintiff no.2 Digamber attained majority on 5th August, 1975

(12)

and Vishwambhar, plaintiff no.1 attained majority on 20th July, 1978. Though the suit was filed on 30th November, 1980 the prayer seeking setting aside of the sale deeds was made in December, 1985. [Article 60](#) of the [Limitation Act](#), prescribes a period of three years for setting aside a transfer of property made by the guardian of a ward, by the ward who has attained majority and the period is to be computed from the date when the ward attains majority. Since the limitation started running from the dates when the plaintiffs attained majority the prescribed period had elapsed by the date of presentation of the plaint so far as Digamber is concerned. Therefore, the trial Court rightly dismissed the suit filed by Digamber. The judgment of the trial court dismissing the suit was not challenged by him. Even assuming that as the suit filed by one of the plaintiffs was within time the entire suit could not be dismissed on the ground of limitation, in the absence of challenge against the dismissal of the suit filed by Digambar the first appellate court could not have interfered with that part of the decision of the trial court. Regarding the suit filed by Vishwambhar it was filed within the prescribed period of limitation but without the prayer for setting aside the sale deeds. Since the claim for recovery of possession of the properties alienated could not have been made without setting aside the sale deeds the suit as initially filed was not maintainable. By the date the defect was rectified (December, 1985) by introducing such a prayer by amendment of the plaint the prescribed period of limitation for seeking such a relief had elapsed. In the circumstances the amendment of the plaint could not come to the rescue of the plaintiff.

10. From the averments of the plaint it cannot be said that all the necessary averments for setting aside the sale deeds

(13)

executed by Laxmibai were contained in the plaint, and adding specific prayer for setting aside the sale deeds was a mere formality. As noted earlier, the basis of the suit as it stood before the amendment of the plaint was that the sale transactions made by Laxmibai as guardian of the minors were ab initio void and, therefore, liable to be ignored. By introducing the prayer for setting aside the sale deeds the basis of the suit was changed to one seeking setting aside the alienations of the property by the guardian. In such circumstance the suit for setting aside the transfers could be taken to have been filed on the date the amendment of the plaint was allowed and not earlier than that.”

which was further followed in the judgment in the matter of Nagappan (supra), particularly paragraph 8 of the said judgment reads thus :-

“8. The High Court held that in the absence of a prayer for setting aside of the sale deeds, the suit filed by the appellant for recovery of possession was not maintainable. Placing reliance on the two Division Bench judgments in Sridharan v. Arunmugam and in K. Jagannathan v. A. M. Vasudevan Chettiar and a Full Bench decision in C.R. Ramaswamy Ayyangar v. C.S. Rangachariar of his own High Court, the learned Single Judge held that where the minor is an eo nomine party to a sale deed or other documents related to alienation, he must sue for the cancellation of the documents and it is not enough if he applies for possession without getting the sale deed cancelled. Such a suit would not be maintainable. Since the appellant had failed to seek the relief of setting aside of the sale deed and their cancellation, the suit filed by the appellant was not maintainable.”

(14)

19. I have no hesitation to hold that it was obligatory for the present appellant-plaintiff to seek relief of cancellation or setting aside of the sale deeds and in absence thereof, his suit was not maintainable.

20. The effect of not challenging the sale deeds was looked into by this Court in the matter of Kisan s/o Ramji Khandare (supra). It is held by this Court that when the present appellant is seeking declaration *qua* the sale deeds executed by his mother in favour of respondents no.1 to 4 herein, the least that was expected of the present appellant was to challenge the sale deeds and, therefore, a suit merely for declaration and possession would be of no consequence, as the fact remains that the title remained with respondents no.1 to 4 in whose favour the suit properties stood transferred and vested by virtue of the sale deeds by respondent no.5.

21. In the aforesaid backdrop, in my opinion, the appeal lacks merit. The appeal as such fails and accordingly stands dismissed.

22. In view of dismissal of appeal, pending civil application does not survive and accordingly stands disposed of.

(NITIN W. SAMBRE, J.)

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