

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On:23.01.2017

Pronounced On: 30.01.2017

CORAM

THE HON'BLE DR.JUSTICE G.JAYACHANDRAN

SECOND APPEAL No.1338 of 1996

1.Dhanalakshmi Ammal (Deceased)

2.G.Krishnamurthi Padayachi

3.K.Venkatesan

4.K.Vijayaraghavan

5.K.Balaraman

6.K.Ethiraj

7.K.Parasuraman

8.Pachiammal

(Appellants 2 to 8 brought on record as legal representatives of the deceased sole appellant vide order of the Court dated 11.4.2007 made in C.M.P.No. 8881 of 2004)

.. Appellants

/versus/

1.Varadarajan

2.Kannan

3.Senthamarai @ Govindan(deceased)

4.Chinnammal

5.Ilavarasi

6.Ponnurangan

(RR4 to 6 brought on record as LR's of the deceased R3 vide order of Court dated 13.08.2014 made in C.M.P.Nos.3285 to 3287 of 2007 in S.A.No.1338 of 1996)

.. Respondents

Prayer: Second Appeal filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 25.04.1996 in A.S.No.20 of 1994 on the

file of the Additional Sub Court, Cuddalore preferred against the judgment and the decree dated 13.12.1993 in O.S.No.932/1991 before the Additional District Munsif's Court, Cuddalore.

For Appellants :M/s A.Nilaphar formulated
Mr.R.Subramanian

For Respondents :Mr.V.Bhiman for
M/s Sampathkumar and Asso.
For R1,2,4,5 and 6
R3-died

J U D G M E N T

The legal heirs of the plaintiff is the appellants before this Court. Suit filed for declaration and permanent injunction was allowed by the trial Court and the same was reversed by the first appellate Court, resulting in dismissal of the suit. Aggrieved by the judgment of the first appellate Court, the present Second Appeal is preferred. Pending appeal, the plaintiff/1st appellant died. Therefore, her legal heirs were brought on record.

2. For the sake of convenience, the parties are described as per their rank and status shown the original suit.

3. The brief facts leading to the second appeal are as under:-

The suit property is situated at Survey No.200/5 measuring to an extent

of 42 cents at Vilangalpattu village, Cuddalore Taluk. It is admitted by both the parties that one Kuppusamy Padaiyachi was the owner of the property. He, on 21.03.1964, settled the property in favour of his minor son Veerappan appointing his wife Vedavalli Ammal as his guardian. On 16.05.1968, Vedavalli Ammal sold the minor's property on behalf the minor to one Narayanasamy, who is the father of the plaintiff.

4. The case of the plaintiff is that by virtue of the sale dated 16.05.1968, the suit property was transferred in the name of Narayanasamy and from that day onwards, he had been enjoying the property absolutely without any hindrance. On 19.11.1973, Narayanasamy executed the Will in favour of the plaintiff in a good state of mental disposition. Thereafter, in the year 1983, Narayanasamy died. After his death, the plaintiff is in enjoyment of the property continuously. While so, the defendants, by force tried to trespass into the suit property. Hence, the suit for declaration and permanent injunction sought against the defendants.

5. The first defendant filed written statement, which was adopted by defendants 2 and 3 contesting the suit on the ground that the settlement deed dated 14.05.1968 in favour of his minor son Veerappan is true. But, Vedavalli Ammal appointed as defacto guardian is not legally correct and as a consequence, the alleged sale deed executed by Vedavalli Ammal as defacto guardian of minor Veerappan is void. Therefore, Narayanasamy, who is the

father of the plaintiff, has no right over the suit property. As a consequence, the Will executed by Narayanasamy has no force in law and the plaintiff cannot claim any right over the suit property through the Will executed by Narayanasamy, who himself had no valid title over the property.

6. The trial Court, after appreciating the evidences let in by the respective parties, has held that based on the settlement deed-Ex.A1 dated 21.03.1964, Vedavalli Ammal has sold the property to Narayanasamy on 14.05.1968 through Ex.A2. Since Vedavalli Ammal has sold the minor's property, it is a voidable document and steps should have been taken to declare it as a voidable document within the period of limitation, which the minor has not resorted to. Any right available with the minor has got extinguished under Section 27 of the Limitation Act. Further, the trial Court, considering the admission of the first defendant regarding the enjoyment of the suit property by Narayanasamy, held that Exs.B1 and B2-sale deeds executed by Veerappan in favour of the defendants 1 and 2 on 24.10.1990 are non est in law, since Veerappan, who born on 10.12.1950, as per Ex.A7, on attaining majority, has not taken any steps to declare Ex.A2 as a voidable document and without resorting to that procedure, he has sold the property to the defendants vide Exs.B1 and B2 in the year 1990. The execution of the sale deed by the mother on behalf of the minor, never questioned within 3 years, after attaining majority (or) within 12 years from the sale. Therefore, the trial Court accepted the plea of the plaintiff and granted decree of declaration and injunction.

7. Aggrieved by that, the plaintiff preferred appeal and the first appellate Court, after re-appreciating of evidences has held that Vedavalli Ammal cannot be the natural guardian, as per Section 8 of the Hindu Minority and Guardianship Act, 1956 and she cannot sell the minor's property, without leave of the Court and therefore, held Ex.A2 is a void document and it has no legal force.

8. Aggrieved by the reversing judgment of the first appellate Court, the plaintiff has preferred the Second Appeal. At the time of admission, this Court has formulated the following ***Substantial Questions of Law for consideration:-***

(1)Whether the lower Appellate Court has erred in holding that Ex.A2 is a void document and not a voidable document?

(2)Whether the lower appellate Court has omitted to see whether the minor did not seek to set aside the sale within three years from the date of attaining majority and consequently, the purchaser's right under Ex.A2 stands unaffected?

(3)Whether the lower appellate Court has erred in overlooking the evidence on the plaintiff's side to prove the adverse possession?

9. The learned counsel appearing for the appellants submitted that the first appellate Court failed to appreciate Exs.A1 and A2 in a proper perspective, while considering the nature of settlement deed executed by Kuppusamy Padaiyachi in favour of his minor son appointing his wife as guardian of the minor son. It was urged by the learned counsel appearing for the appellants that by holding the settlement deed as a void document, the first appellate Court has not only gone against the intention of the settler, but also, against the principles of gender equality by wrong application of law as well as judgments, which are not relevant to the facts of the case. The first appellate Court has arrived at an erroneous conclusion causing grave injustice to the plaintiff, who is the bona fide purchaser from the lawful owner.

10. It is pointed out by the learned counsel appearing for the appellants that no suit was filed by the minor challenging the action of his father appointing his mother as natural guardian (or) challenging the action of his mother alienating his property to Narayanasamy Padaiyachi. It is the sham and nominal purchasers, who are the defendants interfering the possession with frivolous claim, which the first appellate Court failed to properly appreciate.

11. In support of his submission, the judgment of the Hon'ble Supreme Court in ***Githa hariharan and another v. Reserve Bank of India and another*** reported in ***[1999 (1) CTC 481]***, wherein paras 10 reads 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 Constitution limits. The word 'after' need not necessarily mean 'after the life time'. 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 recognized 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 Section 4 and Section 6 of HMG Act, without causing any violence to the language of Section 6(a) (supra)."

12. Per contra, the learned counsel appearing for the respondents submitted that Section 6 of the Hindu Minority and Guardianship Act, 1956 mandates that in case of a Hindu minor, the mother only can be the natural guardian in the absence of the father. The father is the natural guardian of the Hindu minor child and the mother will become the natural guardian, only after the death of the father (or) it must be proven incapacity of father, in the absence of such pleadings and evidence, the father cannot be denuded from being the natural guardian of the minor son. Further, even if the mother is appointed under testamentary document, she can only be a defacto guardian and under Section 11 of the Hindu Minority and Guardianship Act, 1956, the power of the defacto guardian to deal with the property of the minor is subject

to restrictions and more particularly the mother even as a defacto guardian, cannot alienate the property of the minor, without leave of the Court. Therefore, the first appellate Court has rightly held Ex.A2 is a void document, since Vedavalli Ammal had no right to alienate the property of the minor.

13. In support of his submission, the judgment of this Court in ***Ranganatha Gounder and another v. Kuppuswami Naidu and others*** reported in **1976 2 MLJ 128**, wherein the relevant portion reads as under:

"8..... Section 11 of the Act, which I have already extracted abrogates the power of the defacto guardian to deal with any property of a minor, whether it is an undivided interest in a joint family property or not. Unlike Sections 6 and 9, which while referring to the "minor's property" expressly state "excluding his or her undivided interest in joint family property" and "other than the undivided interest referred to in Section 12", respectively, Section 11 does not exclude any such undivided interest of a minor in the joint family property from its scope and therefore the incompetency of a defacto guardian to deal with a minor's property extends to all the properties of a minor without any exception. Therefore, this argument is not of any avail to the appellants herein."

14. Further, in support of his submission, in the judgment of this Court in ***Sri Aurobindo Society, Pondicherry v. Ramadoss Naidu and others*** reported in **AIR 1980 Madras 216**, wherein the relevant portion reads as follows:-

"This Court held that during the father's lifetime,

the mother could not act as the minor's legal guardian and hence, the sale by her of the minor's share in the land was altogether void and not merely voidable; and the subsequent alienee from the ex-minor could ignore the mother's transaction and ask for partition and separate possession. AIR 1951 Mad. 817, Rel.on(Para 8,11)

8.I must uphold this stand as correct. I, however, feel that the position of Lakshmi Ammal has not been accurately described in the discussion of the question so far. She was referred to by almost every one as the defacto guardian. This expression is employed in law in contradistinction to 'de jure guardian'. But both the expressions, in my judgment, imply a relationship to the ward which is regular and continuous, and not casual or one which acts by fits and starts, in other words, what the defacto guardian lacks, as compared to a de jure guardian, is legal authority to act for the minor. In other respects, there is practically little or no difference between them. A de facto guardian however is not one who acts for the nonce. He is a factual guardian who acts in the regular course, over a period of time. If it were otherwise, a minor can have as many defcto guardians as there are transactions to be done on his behalf.

12. In this case, the learned Judge held that in the case of a sale of minor's property by a defacto guardian, without necessity or benefit to the minor, the setting aside of the transaction is not a condition precedent to the minor recovering the property from the alienee and the minor can straightway sue for possession. According to the learned Judge, an alienation by a defacto guardian is an

alienation to which the minor, strictly, is not a party in the sense that he is validly represented by a legally authorised representatives.

13. In Arumuga Chetti v. Duraisinga Thevar (1914) ILR 37 Mad 38: (AIR 1914 Mad 848), it has been held that where a de facto guardian alienated the property from a minor for whom a guardian under the Guardians and Wards Act had been appointed, the transaction was null and void.

14. The position of a void transaction is that in the eye of the law, it does not exist and no title passes. The document of transfer under such a transaction is altogether a dead letter at the very start and no rights flow thereunder. If in this case the transaction is void, then there can be no question at all of an option being left to the minor whose property has been so dealt with, either to affirm the transaction or to avoid it. For, where the transaction does not exist, but is non est in law, it is not amenable either for ratification or for avoidance. Even if a minor should affirm the transaction, nothing would flow from such affirmance."

15. The point involved in this case is about the legality of the Ex.A2 sale deed executed by the mother of the minor son without leave of the Court. A peculiar fact in this case, which should not be lost sight is that the property was settled in favour of the minor child by name Veerappan by his father Kuppusamy Padaiyachi. He has appointed his wife Vedavalli Ammal as the guardian of the minor son under Ex.A2. While the father himself has thought fit that his wife,

who is the mother of the minor boy, will be a better guardian than himself, there is no necessity for anybody else to come and say that there must be a disqualification for the father to be guardian of the minor. The judgment and the interruption of Sections 6, 8 and 11 of the Hindu Minority and Guardianship Act, 1956 has to be read harmoniously in the light of the above fact.

16. For better understanding in this case, it is appropriate to extract the following Sections 6, 8 and 11 of the Hindu Minority and Guardianship Act, 1956:

"Section 6:- Natural Guardians of a Hindu Minor-

The natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property(excluding his or her undivided interest in joint family property),

(a)In the case of a boy or an unmarried girl-the father and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b)in the case of an illegitimate boy or an illegitimate unmarried girl- the mother, and after her, the father;

(c)in the case of a married girl-the husband:

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

(a)if he has ceased to be a Hindu, or

(b)if he has completely and finally renounced the world becoming a hermit(vanaprastha) or an ascetic(yati or sanyasi).

Explanation:-In this section, the expressions "father"

and mother” do not include a step-father and a step-mother.

Section 8-Power of natural guardian:- (1)The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2)The natural guardian shall not, without the previous permission of the Court,-

(a)mortgage or charge, or transfer by sale, gift, exchange or otherwise, any part of the immovable property of the minor; or

(b)lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3)Any disposal of immovable property by a natural guardian, in contravention of sub-section(1) or sub-section(2), is voidable at the instance of the minor or any person claiming under him.

(4)No Court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section(2) except in case of necessity or for an evident advantage to the minor.

(5)The Guardians and Wards Act, 1890, shall apply to and in respect of an application for obtaining the permission of the Court under sub-section(2) in all respects as if it were an application for obtaining the permission of the Court under Section 29 of that act, and in particular-

(a) proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of Section4-A thereof;

(b) the Court shall observe the procedure and have the powers specified in sub-sections (2),(3) and (4) of Section 31 of that Act; and

(c) an appeal shall lie from an order of the Court refusing permission to the natural guardian to do any of the acts mentioned in sub-section(2) of this Section to the Court to which appeals ordinarily lie from the decisions of that Court.

(6) In this section, "Court" means the City Civil Court or a District Court or a Court empowered under Section 4-A of the Guardians and Wards Act, 1890 within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such Court, means the Court within the local limits of whose jurisdiction any portion of the property is situate.

Section 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 defacto guardian of the minor."

17. This Court is conscious of the fact that in the normal course of transaction, if the mother as the defacto guardian, when father is alive, alienate the minor's property, without the permission of the Court, such alienation is void, as held by this Court in ***T.M.Krishnamoorthy Pillai v. Mangalam [1998 (1)CTC 306]***. In this case, it is not that the mother has alienated the property given to the minor by somebody else. It is the father, who has settled the property and appointed the mother as guardian and unless there is a specific plea by the beneficiary before the Court that the said transaction was against his interest and non est in law and the challenged within 12 years from the date of alienation by the mother, no suit by the third parties, questioning the transaction is sustainable.

18. Ex.A1-Settlement deed executed by the father in favour of his minor son Veerappan, who was five years old at that point of time, is dated 21.03.1964. During his lifetime itself, Vedavalli ammal has sold the property in favour of Narayanasamy Padaiyachi vide Ex.A2 dated 14.05.1968. The best person, who could have challenged this transaction is Narayanasamy Padaiyachi, but he did not opt to do so. The property being sold during the minority of Veerappan, that should have been challenged by Veerappan within three years, after attaining majority. In this case, Ex.A7 indicates that Veerappan was born on 10.12.1954. He never opted to challenge the action either of his father appointing his mother as guardian (or) the action of his mother, who sold the property of Narayanasamy Padaiyachi, while he was minor. The sham and nominal purchasers are before this Court and that transaction is only in the year 1990, long after Veerappan attained majority. It is evident through Exs.A4, 5, 6 and 8 that after Ex.A1 sale deed the possession of the property, the title of the property has been transferred to Narayanasamy Padaiyachi and being enjoyed by Narayanasamy Padaiyachi and his daughter the plaintiff.

19. Further, the social change and the march of law towards an egalitarian society sans gender discrimination render the judgments referred by the learned counsel appearing for the respondents, is of no avail.

20. It is suffice for the Court to quote the following passage of the Hon'ble Supreme Court judgment in ***Githa hariharan and another v. Reserve Bank of India and another*** reported in ***[1999 (1) CTC 481]***, which will put the lid on the legal issue raised in the case.

"45. Be it noted further, that gender equality is one of the basic principles of our Constitution and in the event the word 'alter' is to be read to mean a disqualification of a mother to act as a guardian during the lifetime of the father, the same would definitely run counter to the basic requirement of the constitutional mandate and would lead to a differentiation between male and female. Normal rules of interpretation shall have to bow down to the requirement of the Constitution since the Constitution is supreme and the statue shall have to be in accordance therewith and not de hors the same. The father by reason of a dominant personality cannot be ascribed to have a preferential right over the mother in the matter of guardianship since both fall within the same category and in that view of the matter the word 'after' shall have to be interpreted in terms of the constitutional safe-guard and guarantee so as to give a proper and effective meaning to the words used."

21. It is nobody case that the mother has acted against the interest of the minor boy, nor the case of the minor that his mother has alienated the property, without any right to do so. The peculiar facts and circumstances of the case makes the sale deed Ex.A2 a valid document.

22. Therefore, the finding of the first appellate Court is against law and

also against the gender equality contrary to the spirit envisaged through the judgment of the Hon'ble Supreme Court in ***Githa Hariharan case*** cited supra. Hence, ***the Second Appeal is allowed*** and the judgment and decree of the first appellate Court in A.S.No.20 of 1994, dated 25.04.1996 is set aside and the judgment and decree of the trial Court in O.S.No.932 of 1991, dated 13.12.1993 is restored. No costs.

30.01.2017

Index:Yes/No

Internet:Yes/No

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To

1.The Additional Sub Court, Cuddalore.

2.The Additional District Munsif Court, Cuddalore.

Dr.G.Jayachandran, J.

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Judgment made in
S.A.No.1338 of 1996

30.01.2017