

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

FAO-2705-2020(O&M)

Date of decision: 22.12.2021

Dalsher Kundu

....Appellant

V/s.

Kamlesh and another

.....Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

HON'BLE MRS. JUSTICE MEENAKSHI I. MEHTA

Present: Mr. Shalender Mohan, Advocate for the appellant.

Mr. Amit Kohar, Advocate for the respondents.

Ritu Bahri, J.

CM-7082-CII-2020

For the reasons mentioned in the application, the same is allowed and the delay of 14 days in filing the appeal is condoned.

FAO-2705-2020 (O&M)

The appellant Dalsher Kundu has come up in appeal against the judgment dated 31.01.2020 passed by the Additional District & Sessions Judge as Principal Judge, Family Court Jind whereby a petition under Section 8 of the Hindu Minority and Guardianship Act (hereinafter referred to as 'the Act') has been allowed giving permission to the petitioner-Smt. Kamlesh to mortgage or lease the share of the minor Dishant Kundu (D.O.B. 19.08.2009) son of Dalsher Kundu, resident of village Pillukhera, Sub Tehsil Safidon, Tehsil and District Jind, in agricultural land situated at village Pillukhera, Sub Tehsil Safidon, Tehsil and District Jind.

Brief facts of the case are that the minor son Dishant Kundu was born on 19.08.2009 and the petitioner being mother-cum-natural guardian and next friend of the minor was meeting all the educational and

other expenses of the minor from her own pocket. As per the details given in para 2 of the order dated 31.01.2020, Dishant Kundu is owner in possession of the agricultural land as per the jamabandi for the year 2017-18 as transferred to him by his father and mutation No. 3890 dated 21/22.09.2018 was sanctioned on 03.10.2018 in this regard. The minor was in possession of suit land through his mother Smt. Kamlesh-petitioner. The petitioner was not getting proper income by producing agricultural crop from the suit land being small chunk. The petitioner was running a school for the livelihood of her family. She wanted to mortgage/lease out share of the minor in the suit land in favour of Educational Society, managed by her being Director so that she could get good income for their livelihood and for the bright future of the minor. In this backdrop, she filed a petition before the Family Court. After notice to respondent-General Public through publication in newspaper, no public person came forward to contest the petition. The respondent-General Public was proceeded ex parte and thereafter the Family Court proceeded to record the statements of PW1 Smt. Kamlesh who tendered her affidavit as Ex.PW1/A and placed on record copy of Aadhar Card of minor Dishant Kundu as Ex.P1, copy of her Aadhar Card as Ex.P2 and copy of jamabandi for the year 2017-18 as Ex.P3 in evidence. PW2 Meenu Hooda tendered her affidavit as Ex.PW2/A supporting the version of PW1.

The Family Court referred to Section 6 of the Act and keeping in view the fact that the petitioner wanted to earn income from the suit land taking it to be a case of necessity for the advantage of the minor as per Sub Section (2) of Section 8, proceeded on the presumption that petitioner's husband and minor's father had died and allowed the petition and she was

given permission to lease out the share of the minor in the suit property clarifying that 50% lease money shall be deposited as FDR in the name of minor which shall be paid to him at the time of attaining majority or as and when required by him after majority and rest of 50% lease money shall be utilized by her for his benefit only. The petitioner was further directed to produce copy of lease deed alongwith copy of FDR in the name of minor on record within one month from the date of execution of lease deed.

Learned counsel for the appellant who is representing the father has argued that the appellant was a necessary party in the petition as he is alive but the petitioner impleaded only respondent-General Public in a clever manner so that the appellant could not contest the petition. The Family Court has observed in para 7 that the respondent-wife was a widow and father of the minor had died. The appellant came to know about the said judgment when partition application had been filed by brother of the appellant namely Shamsher against the appellant and third brother namely Virender, then respondent No.1-wife had moved an application on 12.03.2020 stating therein that pursuant to judgment dated 31.01.2020 passed by the Family Court, she has been made guardian of her minor son and the land had become *gair mumkin* and Court had no jurisdiction to partition the said land. A copy of the application dated 12.03.2020 is attached as Annexure A/2. Thereafter the fact that petitioner's husband and minor's father is alive, was brought to the notice of the Family Court and vide order dated 18.03.2020, the Family Court *suo moto* corrected the original judgment by deleting the aforesaid lines regarding death of the appellant by making red ink entry in the same. Copy of order dated 18.03.2020 is attached as Annexure A/4.

Learned counsel for the appellant has argued that though the correction with respect to death of the appellant was made in the order dated 31.01.2020, but the impugned order is still liable to be set aside. He refers to Section 6(a) of the Act as per which with respect to a boy or an unmarried girl, the father is the natural guardian and custody of a minor, who has not completed the age of five years, shall ordinarily be with the mother. As per Section 8(4) of the Act, permission to the mother could not be granted for mortgaging/leasing out land of the minor. He further argued that the respondent-wife by virtue of the above said lease deed has extended undue financial benefit to her own relatives/known persons. The land has been leased out to her own school i.e. Global Delivery Model Public School, Pillukhera (Jind) of which she is the Director/Principal. The other family members and relatives of respondent No.1-wife are also the members in the above said school. As per the lease deed dated 31.01.2020, the lease is for the period of 10 years till 30.01.2030. However, the minor shall attain majority much prior to the expiry of lease deed as his date of birth is 19.08.2009. He has placed on record copy of lease deed dated 31.01.2020 as Annexure A/5 whereby land has been leased out for an amount of Rs.60,000/- annually on behalf of minor Dishant Kundu and the lease is to expire on 30.01.2030. By way of CM-11505-CII-2021 under Order 41 Rule 27, learned counsel for the appellant has placed on record lease deed dated 04.03.2020 (Annexure A/6). As per this lease deed, the lease amount has been reduced to Rs.10,000/- annually and the lease is to expire on 03.03.2040 i.e. for the period of 20 years. He has argued that the main ground for getting permission to lease out the land of the minor was that she did not have income to support herself and her child. There is no

justification to show as to how in the same year i.e. 2020, once the lease deed dated 31.01.2020 (Annexure A/5) was made for a period of 10 years for an amount of Rs.60,000/- annually, then again the lease deed dated 04.03.2020 (Annexure A/6) was made for a period of 20 years reducing the amount to Rs.10,000/- annually. The interest of the minor has been sacrificed.

By way of CM-13384-CII-2021, reply to CM-11505-CII-2021 has been filed. The respondents have placed on record copy of petition under Section 125 Cr.P.C. dated 24.11.2020 for maintenance allowance as Annexure RX/1 filed by the respondent-wife.

Learned counsel for the appellant has referred to Supreme Court judgment passed in ***Roxan Sharma vs. Arun Sharma 2015(2) Law Herald (SC) 1153***. He has further referred to judgments passed in ***M. Venkata Mani Kanthu and another 2005(4) R.C.R.(Civil) 697, Ram Pal vs. Om Prakash and others 2011(6) R.C.R.(Civil) 113, Baidnath Mahto and others vs. Jadu Mahto @ Jadunandan Mahto and others 2004(3) J.C.R. 274 and S. Mallika vs. R. Krishnaveni 2019(4) LW 927*** on the proposition that as per the Hindu Minority and Guardianship Act, it is the father who is the custodian of the property of the minor as long as he is alive and the property cannot be sold by the mother unless the relationship between parents is no longer existing or he has given his permission to the wife to sell/lease out the property of the minor.

In the present case, the father is alive and he has never been made party in the petition for seeking permission to lease out the land of the minor. After getting knowledge in the partition proceedings, application for correction in the order dated 31.01.2020 was made. However, the Family

Court, instead of modifying the order, made correction with respect to the factum of the death of the appellant.

Learned counsel for the respondents has placed on record petition filed under Section 125 Cr.P.C. for maintenance allowance as Annexure RX/1. In the petition, respondent-wife stated that she is the natural guardian of the petitioners No. 2 and 3 namely Bhoomi (minor daughter) and Dishant Kundu (minor son) and she is not in a position to maintain herself and the children. A perusal of this petition shows that FIR No. 500 of 2008 was lodged with Police under Section 498-A/406/506 IPC and the petition under Section 12 of the PWDV Act was filed against the respondent-husband. He has argued that Global Delivery Model Public School, Pillukhera (Jind) of which she is the Director/Principal was built upon the land of the minor and the land is being utilized for the benefit of the minor. He has referred to the Supreme Court judgment passed in ***Githa Hariharan vs. Reserve Bank of India 1999(2) R.C.R. (Civil) 59***, wherein Sections 4 and 6(a) of the Hindu Minority and Guardianship Act, 1956 have been interpreted to the fact that mother can also be recognized as a natural guardian and can act validly on behalf of the minor as the guardian. The paramount consideration is the welfare of the minor in the widest sense and if necessary the father can be replaced by the mother or any other suitable person by an order of the Court. He has further referred to Supreme Court judgment passed in ***Jijabai Vithalrao Gajre vs. Pathankhan and others 1971 AIR (SC) 315***. In this case, the Supreme Court while examining the provisions of Section 6 of the Act, has held that even if the father is alive and is not taking any interest in the affairs of the minor, it would be considered as if he was not existing and the mother who was taking care of

the minor, has to be treated as guardian of the minor daughter. He has referred to judgment passed by this Court in ***Rajni Chopra vs. General Public 2013(37) R.C.R. (Civil) 539*** on the proposition that if mother and minor children need money to meet their present, future day to day maintenance and educational expenditures of the minors, then the permission to the sell the land of the minors cannot be denied.

Heard learned counsel for the parties and perused the case file.

In the present case, the mother had not made father, who is alive, as party at the time of filing her petition under Section 8 of the Act before the Family Court. The minor in the present case is Dishant Kundu whose date of birth is 19.08.2009 and at present, he is only 13 years of age and the appellant was contesting petition under Section 125 Cr.P.C. whereby respondent No.1-mother had sought maintenance. If the mother could file a petition for maintenance against the appellant-husband, she ought to have impleaded him as a party in petition under Section 8 of the Act. At the same, she filed an application alongwith judgment of the Family Court before the Civil Court where the partition application was pending. In that application, she stated that the land cannot be partitioned as it has become *gair mumkin*. On the other hand, in the order dated 31.01.2020 passed by the Family Court, it was mentioned that she was a widow. However, the father was alive and as per Section 6 of the Act, he, being the guardian of the minor, approached the Family Court for correction of the order dated 31.01.2020. The correction was done with respect to the fact that he was alive. However, the Court ought to have given him an opportunity of hearing to examine the matrimonial dispute between the parties and as to whether the minor child was not being maintained by the

father. The respondent-wife has placed on record copy of petition under Section 125 Cr.P.C. dated 24.11.2020 (Annexure RX/1) for maintenance allowance. In this petition, it is further mentioned that FIR No. 500 of 2008 was lodged with Police under Section 498-A/406/506 IPC and petition under Section 12 of the PWDV Act is also pending between the parties. Two lease deeds (Annexure A/5 and A/6), were executed in the same year. The first lease deed was executed on 31.01.2020 whereby land has been leased out for an amount of Rs.60,000/- annually and the lease is to expire on 30.01.2030 and as per another lease deed dated 04.03.2020, the land was leased out for an amount of Rs.10,000/- annually and the lease is for 20 years meaning thereby lease amount was reduced from Rs.60,000/-annually to Rs.10,000/- annually. The interest of the minor is being sacrificed.

Keeping in view above observations, instant appeal is disposed of and order dated 31.01.2020 is set aside. The matter is remanded back to the Family Court to give an opportunity of hearing to the appellant after impleading him as a party in the petition and thereafter, pass a fresh order in accordance with law after recording evidence as may be adduced by the appellant.

Pending application, if any, stands disposed of.

(RITU BAHRI)
JUDGE

22.12.2021
Divyanshi

(MEENAKSHI I. MEHTA)
JUDGE

Whether speaking/reasoned:
Whether reportable:

Yes/No
Yes/No