

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 4 OF 2022
AND
CIVIL APPLICATION NO. 737 OF 2022

1] Prashant S/o Kashinath Nannaware,
Age 45 years, Occu : Business,

2] Nilesh S/o Kashinath Nannaware,
Age 41 years, Occu : Service,

Both R/o. H.No. 70, Jai Vishwabharti Colony,
Near Jawahar Colony, Aurangabad,
Dist. Aurangabad

.. Appellants
(Orig. Petitioners)

VERSUS

State of Maharashtra,
Through Collector, Aurangabad

.. Respondent

...
Mr. Girish K. Naik Thigle, Advocate for the appellants
Mr. N.B. Bhagat, AGP for the respondent
...

CORAM : MANGESH S. PATIL, J.

DATE : 15 MARCH 2022

ORDER :

The appellants – original applicants are aggrieved by the rejection of their application seeking permission under sections 28 and 29 of the Guardians and Wards Act, 1890 (for short, “**the Act**”).

2. The appellants are brothers *inter se*. Their father Kashinath and mother executed a testament expressing their wish as to how the properties standing in their names would be allotted. Appellant no. 2 – Nilesh was appointed as a guardian of appellant no. 1 – Prashant’s son – Satwik to whom plot no. 13 was allotted in that

testament. It was averred that the appellant no. 2 – Nilesh *bona fide* as a guardian of the minor – Satwik, entered into a development agreement with one Gupta Associates to develop that plot no. 13, with an intention to protect the property and interest of the minor. Simultaneously, the developer M/s. Gupta Associates has also planned to develop the adjoining land of one Mrs. Janabai Sonawane and are trying to develop both these plots by erecting an apartment. It was also averred that in such development agreement, the interests of the minor have been taken care of. He would be allotted specific flats in the building to be constructed. They applied for necessary permission under section 28 and 29 of the Act.

3. The learned District Judge by the judgment and order under challenge rejected the application. Even an attempt to seek a review did not bear fruits. Hence this appeal.

4. The learned advocate Mr. Thigle at the outset would submit that though the will was executed jointly by Kashinath and his wife, it was not a joint and mutual will and on the death of either of them it can be enforced to the extent of the deceased testator. He would further submit that nothing has come on record to doubt the *bona fides* of the appellant and particularly to demonstrate as to how the interest of the minor is not being protected. He would also submit that though the words used in section 28 and 29 of the Act, speak about 'previous sanction', the term need not be stretched beyond a certain limit unless there is something to demonstrate that the interests

of the ward are not being protected. In support of his submission, he also placed reliance on the decision in the case of **K.S. Palanisami (dead) through legal representatives Vs. Hindu Community in General and Citizens of Gobichettipalayam and others; (2017) 13 S.C.C. 15.**

5. The lower court refused to grant permission primarily on two counts. Firstly, that it was a joint will where Kashinath and his wife Kishori had expressed desire as to how their properties were to devolve and Kishori was still alive though Kashinath died on 30-03-2016 and there was a specific stipulation in the testament that it would be given effect to only after the death of both the executants. Secondly, the permission sought was contrary to the stipulation in the testament that the property will not be disposed of until the ward attained the age of 18-20 years. It was also noticed that it was specifically mentioned in the testament that since the appellant no. 1 who is the biological father of the ward was in construction business and the executants had no faith in him that he would protect the interests of the ward that he was completely excluded from the bequest and a share was exclusively carved out for the ward. Granting permission would be in violation to the terms of the testament.

6. I have carefully gone through the testament itself. Irrespective of the fact and without going into the aspect as to whether it is a joint will or a joint and mutual will, as has been explained by the Supreme Court in the matter **K.S. Palanisami** (supra), suffice for the

purpose to observe that the testament speaks on behalf of the testator. It expresses their desire and the courts are bound to respect those to the extent possible. It is a registered will.

7. The sum and substance of material recitals are to the following effect :

- (a) The executants are the husband and wife counting their last days and unsure of their future and intend to dispose of their properties.
- (b) They have two sons and a married daughter, namely, the appellants and one Manisha.
- (c) Appellant no. 1 – Prashant is in construction business and there is no certainty of his earning profit or incurring losses and no property was to be allotted to him, as there is every possibility of his disposing it of.
- (d) However, his son – Satwik is 10 years old and is to be allotted the property which his father should not be able to sell.
- (e) For this reason, appellant no. 2 – Nilesh who is the paternal uncle would act as his guardian.
- (f) The property bearing CTS no. 18132/1 was to be equally divided amongst appellant no. 2 – Nilesh and ward – Satwik.

- (g) Appellant no. 2 – Nilesh would transfer the share in that property to ward – Satwik after he attained the age of 18-20 years.
- (h) Testator Kashinath is also owner of house property bearing plot no. 13 (the property in respect of which the permission is being sought) and appellant no. 2 – Nilesh and ward – Satwik would have equal share in it.
- (i) But they shall not sell this house property.
- (j) Testator Kishori owns house property bearing no. 70 corresponding CTS no. 15650. The ground floor portion would go to appellant no. 2 – Nilesh and the first floor and room from the third floor would go to ward – Satwik.
- (k) Appellant no. 1 – Prashant shall not create any obstruction in that respect and shall not sell the property.
- (l) Appellant no. 2 – Nilesh would mutate the name of ward – Satwik after he attained majority.
- (m) It was the right of the testators to deal with the properties as per their desire.
- (n) After demise of both of the testators, appellant no. 2 – Nilesh and ward – Satwik would be entitled to possess the properties and carry out mutation in the property card and corporation record.

- (o) This should happen after the death of both (testators). The property mentioned above cannot be disposed of.

8. Considering the recitals, it is quite apparent that there cannot be any confusion as to the intention expressed by the testators as to the manner in which the bequest is to devolve. They did not intend anything to be allotted to the appellant no. 1 – Prashant precisely for the reason that he was in construction business and there was no certainty as to if he would incur loss or would earn profit. It is only with an intention that the property should remain intact that it was not to be sold. Though such a clause is inconsistent with the principle of doctrine against perpetuity, harmonious construction would lead to the only inference that it would be for the ward – Satwik till he attains majority that the testators intended that the properties should remain intact. It is also quite clear that the effect and operation of the will was deferred till the last surviving testator.

9. The submission of the learned advocate Mr. Thigale that even this stipulation is against the principle of doctrine of perpetuity is not legally tenable. Only the effect of the testament has been deferred to the lifetime of the surviving testator which cannot be said to be contingent upon occurrence of an event which may or may not occur. Rather it would come into effect no sooner the surviving testator would die. If such is the state-of-affairs, no exception can be taken to the observations and the conclusion of the courts below holding that the

permission being claimed by the appellants was clearly inconsistent with the stipulation in the testament for number of reasons mentioned herein-above.

10. There is one more aspect which to my mind dis-entitles the appellants from seeking any permission under section 28 and 29 of the Act, which read thus :

28. Powers of testamentary guardian.—*Where a guardian has been appointed by will or other instrument, his power to mortgage or charge, or transfer by sale, gift, exchange or otherwise, immovable property belonging to his ward is subject to any restriction which may be imposed by the instrument, unless he has under this Act been declared guardian and the Court which made the declaration permits him by an order in writing, notwithstanding the restriction, to dispose of any immovable property specified in the order in a manner permitted by the order.*

29. Limitation of powers of guardian of property appointed or declared by the Court. —*Where a person other than a Collector, or than a guardian appointed by will or other instrument, has been appointed or declared by the Court to be guardian of the property of a ward, he 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 his ward, or

(b) lease any part of that property for a term exceeding five years or for any term extending more than one year beyond the date on which the ward will cease to be a minor.”

11. As can be seen from the wording of section 28, the appellant no. 2 – Nilesh is a guardian appointed by the will and consequently, by virtue of the provisions of section 29 of the Act, the immovable property belonging to the ward would be subject to the restriction imposed in the instrument. It is to be noted that the only exception to this rule could be that he is declared a guardian under the provisions of the Act and the court grants permission to dispose of the property notwithstanding the restriction imposed by the testament. When admittedly, the appellant no. 2 – Nilesh has not been declared as a guardian of ward – Satwik, he is bound by the restrictions imposed by the will on his power to deal with the share in the property belonging to the ward – Satwik.

12. Apart from the fact that even the appellant no. 1 – Prashant has not been appointed or declared as a guardian of ward – Satwik and consequently, *ex facie* even he is not entitled to seek any permission under section 29 of the Act.

13. Further, even section 29 specifically uses the phrase ‘previous permission’ which clearly connotes that there cannot be *ex post facto* permission to deal with the property of the ward. Even without being appointed or declared as guardians, the applicants have applied for permission under these provisions which can certainly be described as an *ex post facto* approval to the steps which they have already undertaken in the form of entering into the development

agreement with the builder. This indeed is another circumstance which clearly demonstrates that the actions of the appellants are not *bona fide*.

14. I find no illegality or infirmity in the order under challenge, refusing to grant permission. There is no substance in the appeal and it is liable to be dismissed. Needless to state that it would always be open for the appellants to take recourse to any other remedy as is available to them in law.

15. Appeal from order is dismissed.

16. Pending civil application is disposed of.

[MANGESH S. PATIL]
JUDGE

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