Sri Chandre Prabhuji Jain Temple and Others

Vs

Harikrishna and Another

Civil Appeal No. 1701 of 1967

(K.K.Mathew, M.H. Beg JJ)

22.08.1973

JUDGMENT

MATHEW, J. -

1. One Gopalakrishna Raju (hereinafter called Raju) died in Madras on or about November 13, 1941, leaving behind him his widow Manorama, one minor son and two minor daughters. On March 25, 1941, Raju had executed a will whereby he appointed Manorama the executor of the will and the guardian of his minor son and daughters and bequeathed all his properties to the minor son with directions as regards the maintenance and marriage of his daughters. On June 7, 1948, Manorama mortgaged certain properties to raise a loan of Rs. 7,000/- for the purpose of meeting the marriage expenses of her elder daughter. Thereafter, she filed an application under Sections 7 and 10 of the Guardians and Wards Act, 1890, hereinafter called the Act, on August 26, 1948, before the High Court of Madras to appoint her as the guardian of her minor children. In that petition she did not disclose that Raju died after executing a will, but said that, Raju died leaving two houses Nos. 18 and 18-A in Egmore, Madras and that she was the owner of one half of the houses and that her minor son was the owner of the other half. She also said that no guardian had been appointed of the person or the property of the minors. Along with the petition for appointing her as guardian, she also filed an application seeking permission of the court to raise a loan of Rs. 7,000/- by mortgaging the two houses. On September 9, 1948, the Court passed an order appointing Manorama as the guardian of the person and property of the minor son and daughter and, by another order, granted her permission to raise a loan of Rs. 7,000/- by mortgaging the two houses. On the basis of these orders, she borrowed a sum of Rs. 7,000/- on September 24, 1948, by mortgaging the two houses. Thereafter, she filed another application on January 19, 1950 seeking permission of the High Court to raise a loan of Rs. 40,000/- on the security of the two houses. On January 23, 1950, the application was allowed under Section 29 of the Act permitting her to raise a loan of Rs. 30,000/- on the security of the two houses belonging to the minor. On the strength of this order, Manorama borrowed on March 4, 1950, a sum of Rs. 30,000/- from the trustees of Shri Chandre Prabhuji Jain Temple, the appellants before this Court, by executing a mortgage of the two houses. She again applied on April 24, 1950, to the Court for raising a further loan of Rs. 15,000/- on the security of these two houses but sanction was accorded to raise a loan of only Rs. 10,000/-. On the basis of this order the borrowed a further amount of Rs. 10,000/- from the appellants by executing a mortgage on May 31, 1950, of the same properties. Manorama filed yet another application praying for permission to sell one of the houses with a view to enable her to discharge the amount due to the appellants under the two mortgages. The permission was granted and the Indian Bank Limited purchased one of the house properties for a sum of Rs. 41,500/-. It would appear that subsequent to the execution of the sale, the bank came to know that Raju had executed a will. So the bank applied to the High Court to have the sale set aside. This was done. When the existence of the will executed

by Raju was brought to the notice of the Court, Krishnaswami Nayudu, J., directed the Administrator-General to take immediate possession of the estate of Raju and to apply for Letters of Administration. The Administrator-General obtained Letters of Administration and took possession of the estate. In the course of the Administration, the Administrator-General after obtaining the sanction of the Court, put up for sale one of the house, in question. The Indian Bank purchased it for Rs. 39,200/-. The sale proceeds are being retained by the Administrator-General.

2. The appellant filed the suit on the original side of the High Court out of which this appeal arises, to recover the money due under the two mortgages executed in favour of the appellants by Manorama as guardian.

3. The respondents, namely, the Administrator-General and the minor son, contended that Manorama had no authority to execute the mortgages and that she obtained the sanctions to execute the mortgages by practising fraud upon the court. They also contended that the appellants had not acted with due care, that the sanctions to mortgage given by the Court were only prima facie evidence that the transactions were beneficial to the minors but that they would not cure any inherent defect that existed in the transactions, that the enquiry conducted by a court in granting sanction was of a summary character, and that as the existence of the will has not been brought to the notice of the court, the sanctions to raise the loans were invalid and did not bind the minor.

4. Balakrishna Ayyar, J., who tried the suit held that Manorama deliberately suppressed the execution of the will by Raju and therefore the orders authorising her to raise the amounts by mortgaging the properties of the 2nd respondent were obtained by fraud. The learned Judge, however, held that since the orders were only voidable and as the appellants were not parties to the fraud and as they were not required to go behind the orders, the appellants were entitled to recover the amount from the properties mortgaged and passed a preliminary decree.

5. Against this decree the respondents appealed and the appeal was referred to a Full Bench as there was conflict of opinion on the question whether an order under Section 31(2) of the Act granting leave to a guardian for alienating the property of the ward was conclusive proof that the alienation made in pursuance thereof was supported by necessity or benefit of the minor.

6. The Full Bench held that an order under Section 31(2) of the Act can be relied on by an alienee as a substitute for an honest enquiry to be made by him; but that it will be open to the minor challenging the alienation to show that the alienee was put on notice at the time of the alienation of matters which would show the defects in the transaction or that the alienee did not act bona fide. It also held that where there is no evidence to show that there existed circumstances exciting suspicion as to the way in which an order under Section 31(2) was obtained the alienee would be entitled to rely on it to support his title, but that an order under Section 31(2) cannot be treated always as conclusive as to the existence of necessity or benefit and that even as to the sufficiency of the enquiry to be made by the alienee, it would be competent for the minor to prove that the alienee did have sufficient reason not to rest on the mere order of the court. The court said further that if the minor proves that the alienee knew more or did not himself rely on the order but made independent enquiries - the onus being on the minor to prove it - the order of the court will not afford conclusive evidence on the question of enquiry. However, if the alienee is not a party to any fraud and has not knowledge of any fraud, the mere fact that the guardian was guilty thereof will not disentitle him to rely on the order of the court as proving an honest enquiry by him. The court further found that the orders of sanction were valid even though they were made under Section 31(2) of the Act notwithstanding the fact that Manorama was appointed guardian under the will of her husband. The

further finding of the court was that the mortgages could be enforced only against one-half of the mortgaged properties as Manorama was appointed guardian only in respect of that half. The court was of the view that the sanctions to execute the mortgages in respect of the two properties were only in respect of one-half share therein. The Court, therefore, passed a decree for recovery of the amounts from one-half of the properties mortgaged.

7. It is against this decree that this appeal by certificate has been preferred.

8. The most important point canvassed on behalf of the appellants was that the finding of the High Court that the mortgages were valid only in respect of one-half interest in the properties was not correct. Counsel for the appellants submitted that Manorama was appointed guardian in respect of the person and the properties of her minor son and the fact that Manorama stated in the application to appoint her guardian, that she was entitled to one-half of the properties and the minor to the other half, would not conclude the question that she was appointed guardian only in respect of the half share in the properties. Counsel further submitted that under the Act or under the inherent powers of the Court, a guardian can be appointed only of all the properties of a minor and not in respect of any specific items and that if a guardian is appointed of the properties of a minor in one district, it is not necessary that there should be a fresh appointment for the properties of the minor in another district as under Section 16 of the Act, a certificate from the court appointing the guardian would be conclusive evidence in the other district that he was appointed guardian of the properties in that district also.

9. In the application to appoint her as guardian Manorama stated that only the two houses were inherited by her and the minor son from her husband and that she was entitled to a half share in them with limited rights and that her minor son was entitled to the other half. In the affidavit accompanying that petition she said that she has inherited half of the estate of her husband of the value of Rs. 37,500/-. The order appointing her as guardian stated that she is declared guardian of the person and properties of the minor and that as guardian she shall not, without previous permission of the court, mortgage, charge or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor or lease the same.

10. In the application made by her for permission to execute the mortgage for Rs. 30,000/- as guardian, she has stated that she required the loan to discharge the debts and the demands then existing against the properties belonging to her and her minor son as heirs of her late husband. The order of the court on that application dated February 3, 1950, giving her leave stated that "the applicant, do have permission to raise a loan of Rs. 30,000/- on the security of the two houses Nos. 18 and 18-A". In the reasons given for that order, the court said that "the guardian is permitted to raise a loan of Rs. 30,000/- on the security of two items of property belonging to the minor viz., Nos. 18 and 18-A in Sait Colony, First Street, Egmore, Madras". In the mortgage executed in pursuance to this order of sanction, Manorama described herself as executing the mortgage for herself, and as mother and guardian as per the order of the High Court in O.P. No. 269 of 1948, namely the original petition for appointing her as guardian.

11. The court appointed Manorama as guardian of the properties of the minor. The order does not show that she was appointed guardian in respect of the one-half interest in the properties. A person looking into the order could not have found any limitation in it. A purchaser of the properties of minor could not be expected to go behind the order.

12. The court had no occasion to inquire nor did it make any enquiry an regards the extent of the

interest of the minor in properties. That apart, the orders sanctioning the mortgages fact authorized Manorama as guardian to mortgage the properties, even though in the application on the basis of which the order sanctioning the mortgage for Rs. 30,000/- was passed, Manorama said that she was entitled to one-half interest in the properties and that the minor to the other half (see para 1 of her application dated January 19, 1950 for sanctioning the mortgage for Rs. 30,000/-). We think that the orders sanctioning the mortgages authorized her to mortgage the properties and not any particular interest therein. If her capacity to alienate the properties of the minor is to be judged from the orders of sanction, its extent must be measured by these orders read in the light of the order appointing her guardian.

13. Section 28 of the Act provides :

> "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."

Manorama did not make any application under this section. Nor was the court appraised of the will or the restrictions which it imposed on her powers of alienation. The court, therefore, had no occasion to pass an order in writing as visualised in the section enabling her to dispose of any property of the minor notwithstanding the restriction imposed by the will.

14. Section 29 says that 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. As Manorama was declared by the will to be the executor and also guardian of the minor, she could not have made an application for permission to mortgage under Section 29. Nor could the court have passed any order granting permission under Section 31(2) to mortgage the immovable property of the minor. The order sanctioning the mortgage for Rs. 30,000/- was expressly passed on an application made under Section 29. Though there is no mention in the order sanctioning the execution of the mortgage for Rs. 10,000/- of the section under which it was passed the order appears to have been made under Section 31(2). But as already stated, the orders could not have been passed under Section 31(2) on the basis of the application filed under Section 29 as Manorama was a guardian appointed by the will of Raju.

15. Mr. Tarkunde for the appellants argued that Section 3 of the Act preserves the inherent powers of certain High Courts to appoint a guardian and determine his powers and to sanction any alienation by the guardian of the properties of the ward, apart from the provisions of the Act. He cited In re Mahadev Krishna Rupji (ILR 1937 Bom 432 : AIR 1937 Bom 98.) and The Raja of Vizianagaram v. The Secretary of State for India in Council (ILR 1937 Mad 383 : AIR 1937 Mad 51.) and said that High Court of Madras had inherent jurisdiction to appoint a guardian and determine his powers untrammelled by the provisions of the Act. In the first of the cases above referred to, it was held by the Bombay High Court that though the Act does not sanction the

appointment of a guardian in respect of undivided share of a minor in a Joint Hindu Family, the High Court of Bombay had inherent power to appoint a guardian. In the latter case, the Madras High Court held that the High Court has, under Clause 17 of the Letters Patent, 1865, jurisdiction in regard to minors, though not of British birth, resident outside the limits of the Presidency-town and its jurisdiction to act under that clause is not affected by the Act. The court also said "the jurisdiction of the High Court under Clause 17 of the Letters Patent is not in the exercise of its ordinary original civil jurisdiction and it is saved by Section 3 of the Guardian and Wards Act which says that 'nothing in the Act shall be constructed to take away any power possessed by any High Court established under the Statutes 24 and 25 Vic. 104'." It does not follow from these rulings that the principle underlying Section 28 of the Act should not bind the High Court even while exercising its inherent powers. The principle underlying Section 28 is that when a guardian is appointed under a will and his powers are expressly restricted by that instrument, the court must be apprised of the will and of the restrictions on his powers imposed by the testator in order to exercise its discretion to determine whether those restrictions should be removed or not. The section enacts a salutary principle for the exercise of its parental jurisdiction.

16. Mr. Tarkunde said that Section 28 is applicable only to a guardian of the property of the minor, that the will of Raju declared Manorama only as guardian of the person of the minor and therefore, Section 28 was not attracted.

17. The definition of the word "guardian" in Section 4(2) of the Act says that 'guardian' means a person having the care of the person of a minor or his property, or of both his person and property. In In the matter of Srish Chunder Singh and Others (ILR (1894) 21 Cal 211.) the court said that the question whether a person is appointed guardian of the person of the minor alone but of his property also must be determined on a perusal of the entire document appointing him. If powers of managing the properties of the minor are vested in a guardian and express restrictions are placed on his powers of alienation in the course of the management, that is an indication that the appointment is as guardian of the property also. Manorama was given power under the will to manage the properties of the minor. The fact that restrictions have been imposed by the will on her powers of alienation of the properties of the minor seems to us a rather sure indication that Manorama was appointed guardian of the properties of the minor also. To what purpose were the restrictions imposed unless she was also appointed guardian of the properties ? Section 28 no doubt comes under the heading "Guardian of property". Nut we are not sure that from that fact we can infer that Section 28 contemplates only the case of a guardian of the property of the minor. However, we express no opinion on the question as that is unnecessary. We proceed on the assumption that the section only applies to a guardian of the property of a minor.

18. That apart, as the learned trial Judge rightly held, the orders of sanction were obtained by fraud and that they were, therefore, on that account bad.

19. Mr. Tarkunde said that the respondents cannot raise the objection in this appeal that the orders of sanction were invalid as the respondents did not appeal from the decree of the High Court to recover the mortgage money from the one-half share in properties. His argument was, since the respondents did not file an appeal against that decree, they cannot be allowed to impugn the validity of the orders of sanction, on the basis of which that decree was passed, and, if the orders of sanction are allowed to be impugned here, that would be allowing the respondents to imperil the decree in respect of the half-share in the properties.

20. It is no doubt true that the respondents cannot be allowed to impugn the decree passed by the

High Court in favour of the appellants as they did not file any appeal from that decree. But we think that there is no reason why they should not be allowed to urge the plea that the orders of sanction were invalid when the appellants want not only to maintain the decree passed by the High Court but also to get a decree charging the entire properties. In other words, the bar against urging the plea of the invalidity of the orders of sanction would apply if the respondents seek to impugn the decree already obtained by the appellants but not when the appellants seek to obtain further reliefs in the appeal on the basis of the orders. In such a case we are not aware of any rule of law which would preclude the respondents from urging the plea.

21. In The Management of Itakhoolie Tea Estate v. Its Workmen (AIR 1960 SC 1349 : (1960) 2 Lab LJ 95 : (1960-61) 18 FJR 87.), the question whether in such circumstance, a respondent who has not appealed from the decree can be allowed to urge such a plea in answer to a claim by an appellant for a further decree although the plea might imperil the decree already obtained was left undecided. But the Full Bench decision of the Madras High Court in Venkata Rao v. Satyanarayanamurthy (ILR 1944 Mad 197 : AIR 1943 Mad 698 : (1943) 8 Mad LJ 336.) has held that it is open to a respondent who had not filed cross-objection with respect to the portion of the decree which had gone against him "to urge in opposition to the appeal of the plaintiff, a contention which if accepted by the trial Court would have necessitated the total dismissal of the suit" but that the decree in so far as it was against him would stand. The decree of the High Court here in so far as it held that the mortgage money can be recovered only from the half-share in the properties was also a decree in favour of the respondents as it did not allow the claim of the appellants to recover it from the entire interest in the properties. To that extent, the respondents had a decree in their favour. That decree they could support on any of the grounds decided against them by the court which passed the decree. And when they do this, they are only supporting and not attacking that decree. We think that the rule laid down by the Madras High Court in the above decision is sound. And there is no reason why the respondents should be barred from urging the plea. So even though we hold that the power of Manorama as guardian to mortgage the properties extended to the entire interest in the properties, it would not follow that the appellants would be entitled to a decree charging the entire interest in the properties as the orders of sanction on the basis of which alone Manorama got the power to alienate the properties were invalid.

22. The position that emerges from this discussion is : under the will Manorama had not power to alienate the properties. As the existence of the will and the curb on her powers of alienation were not disclosed to the court when she applied for sanction and as the court did not by order in writing remove the fetters on her power of alienation, the sanctions cannot be regarded as having been obtained under Section 28; nor could the sanctions, as they were given under Section 31(2) on the applications filed under Section 29, be regarded as valid, as Section 29 has no application when there is a will appointing a person as guardian.

23. The question then it whether the appellants are entitled to get the money advanced under the mortgages as a charge on the entire interest in these properties.

24. The appellants advanced the amount bona fide believing that there was necessity on the strength of the orders of sanction and there is no finding that there was no necessity. These orders were not void, even though they were obtained by fraud. That was the view of Balakrishna Ayyar, J., and it was on the basis that the orders were voidable, and that, until set aside, they were valid, that the learned Judge granted a decree. A disposal of property in contravention of the provisions of Section 28 or Section 29 is only voidable (see Section 30). We think that there is no reason why, when in defence to the claim by the appellants for a decree charging the entire interest in the properties, in

the appeal, the respondents should not be allowed to show that the orders of sanction were invalid notwithstanding the fact that they were not set aside in a suit institute by the 2nd respondent. If the court were to refuse to pass a decree allowing the appellants to recover the money on the rest of the minor's interest in the properties, the basis of that refusal would be on a ground destructive of the decree passed by the High Court. In other words, the High Court granted the decree on the basis that the orders of sanction for mortgaging the properties were valid. If we are to refuse to pass a decree for recovery of the mortgage money from the entire interest of the minor in these properties, on the ground that the orders sanctioning the mortgages were invalid, that would be contradictory to the finding of the High Court on the basis of which it passed the decree. Order 41, Rule 33 of the Civil Procedure Code clothes the appellate court with the power to pass any decree or order which the trial Court ought to have passed or made and to pass or make such further or other decree or order as the justice of the case may require.

25. Though the respondents are entitled to avoid the orders of sanction in defence without the necessity of filing a suit, it is just and proper that as a condition for doing so, they must give restitution. The High Courts in this country have taken the view, and we think rightly, that as condition for setting aside a disposal of immovable property made in contravention of Section 28 or Section 29 which is voidable under Section 30, it is just that there must be restitution of the benefits received. (See Parshotam Dass v. Nazir Husain (54 IC 846 : 6 OLJ 668.), Peria Karuppan Chetty v. Kandasawamy Chetty (1933 Mad WN 741.), Abbas Husein v. Kiran Shashi Devi (AIR 1942 Nag 12 : ILR 1942 Nag 161.)).

26. In this view, we do not think it necessary to express any opinion on the correctness or otherwise of the view of the High Court on the nature and effect of an order passed under Section 31(2). Suffice it to say that different views have been expressed by the High Courts.

27. As already state, one item of the properties has been sold by the Administrator-General with the sanction of the Court and the proceeds of the sale are with him. We pass a decree against the respondent-defendants directing them to pay the appellants the principal amount due under the two mortgages together with 6 per cent. interest from June 1, 1950 on the principal amount up to the date of payment or realization. The amount decreed will be a charge on the sale proceeds of one of the properties which are being retained by the Administrator-General and on the entire interest in the other property under the mortgages.

28. The decree of the High Court is set aside and a decree in terms as aforesaid is passed. The appeal is allowed in the manner and to the extent indicated above. The parties will bear their costs here.

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