

Amirtham Kudumbah

Vs

Sarnam Kudumban

Civil Appeal No. 951 of 1977

(T. K. Thommen, R. M. Sahai JJ)

16.04.1991

JUDGEMENT

THOMMEN, J.:-

1. The appellant is the defendant in a suit instituted by the respondent to set aside a transfer of property made by the guardian of a minor and for recovery of possession of the property. The suit was decreed, and the decree was confirmed by the first appellate court as well as by the High Court.

2. The plaintiff-respondent purchased the suit property from an ex-minor within three years after the minor attained majority. During his minority, the property was sold by his father as his natural guardian to a person from whom the present appellant purchased the property. All the courts found that the guardian had not obtained the permission of the Court for the sale of the property, as required by S. 8 of the Hindu Minority & Guardianship Act, 1956 ("the Guardianship Act") and that the sale of the property was not for legal necessity.

3. Dismissing the second appeal, the High Court held that the suit was rightly instituted by the respondent as a transferee from the ex-minor within three years after the minor attained majority and that the contention of the defendant that the suit by a transferee from the ex-minor was hit by S. 6(c) of the Transfer of Property Act, 1882 was unsustainable.

4. The only question which arises in the present appeal, as it did before the High Court, is (to quote the words of the High Court)

"Whether a transferee from a minor after he attained majority, can file a suit to set aside the alienation made by the minor's guardian or the said right is one to be exercised only by the minor?".

5. The relevant facts are that the suit property belonged to one Veerammal. She had a daughter by name Kaliammal. Veerammal died shortly after she purchased the property in 1948. She left behind her husband Kandayya and their daughter Kaliammal. Subsequently, Kandayya married a second time when his daughter Kaliammal was a minor. She thereupon left her father's house and resided with her maternal grand-father who protected and maintained her. During her minority, Kandayya sold the property on 29-10-1959 to Jainulavudeen. On 25-4-1966, Jainulavudeen in turn sold the property to the defendant-appellant. Subsequently, on 26-5-1966 the plaintiff obtained a deed of sale of the suit, property in his favour from Kaliammal who had by then attained majority. The plaintiff thereafter instituted the present suit (O.S. No. 491 of 1968) against the appellant to set aside the transfer of property made by Kandayya and for recovery of its possession.

6. The question is whether the respondent in his capacity as a transferee from the ex-minor was competent to bring a suit to set aside the sale effected by the minor's guardian. It is no longer disputed that the suit was brought within three years after the minor attained majority. Nor is it any longer contended that the father of the minor, as her natural guardian, had obtained the permission of the Court or that the sale effected by him was one for legal necessity. These two vital points have been concurrently found against the appellant. The only contention which Mr. Sampath, appearing for the appellant, is in a position to urge is as regards the question whether the suit is hit by S. 6(e) of the T.P. Act. Counsel says that all that the ex-minor was in a position to transfer, and did transfer, was her mere right to sue to set aside the sale and recover possession of the property transferred by his (her?) father as his (her?) natural guardian. The property itself had been transferred by the father prior to its sale by the ex-minor. The minor had, therefore, no property to sell, except a right to set aside the sale. Accordingly, whatever transfer that was effected by the minor in favour of the plaintiff was nothing more than a mere right to sue and such transfer was invalid by reason of S. 6(e) of the T. P. Act.

7. Mr. Balakrishna, appearing for the respondent plaintiff, contends that the ex-minor was fully competent to bring a suit to set aside the sale within a period of three years after attaining majority and any person claiming under her is equally competent to institute action for the same purpose. He refers to the provisions of S. 8(3) of the Guardianship Act. He contends that a suit to set aside a sale is not for the enforcement of any personal right, but a right in property, and is, therefore, not hit by S. 6(e) of the T. P. Act. In any view, counsel says, S. 8(3) of the Guardianship Act specifically allows such a suit to be brought by a person claiming under a minor and, therefore, such a statutory right specially granted by an enactment dealing with the protection of the minor cannot be defeated by the general provisions of an earlier enactment. The two provisions, counsel says, can be read harmoniously so as to avoid an artificial conflict. What the Guardianship Act intends to protect is the right of a person claiming under a minor to sue for setting aside the sale of property sold otherwise than as permitted by S. 8 of that Act. On the other hand, the T. P. Act only prohibits suits in the nature of champerty and maintenance based on bare or naked right of litigation. The general provision contained in S. 6(c) of the T. P. Act does not derogate from the special protection of the minor's interest and the interest of a person claiming under him, as afforded by the Guardianship Act, which is addressed to a specific problem. In any view, counsel says, a sale by the guardian otherwise than as permitted by S. 8 is void and is, therefore, incapable of passing a title. For all these reasons, Mr. Balakrishna submits that the suit was competent and was rightly decreed on the facts found and the appeal by the defendant has no merits.

8. As concurrently found by the courts below, the sale effected by the guardian during the minority of his daughter was not in compliance with the provisions of S. 8(1) of the Guardianship Act. The property was transferred by him without obtaining the previous permission of the court and the transfer was not for the benefit of the minor. Such a sale by the minor's father who is his natural guardian is, unlike in the case of transfer by a de facto guardian (section 11), not a void sale, but only a voidable sale. Such a sale until set aside is sufficiently effective to pass title, but being a voidable sale, what the buyer has obtained is a defensible title which is liable to be set aside at the instance of the person entitled to impeach it. Section 8(3) of the Guardianship Act says:

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

" (Emphasis supplied)

9. The effect of this subsection, is that any disposal of immovable property by a natural guardian otherwise than for the benefit of the minor or without obtaining the previous permission of the Court is voidable. A person entitled to avoid such a sale is either the minor or any person claiming under him. This means that either the minor, or his legal representative in the event of his death, or his successor-in-interest claiming under him by reason of transfer inter vivos, must bring action within the period prescribed for such a suit, i.e. three years from the date on which the minor died or attained majority, as the case may be. In the present case, the suit was brought, as found by the Courts below, within three years after the minor attained majority.

10. Mr. Sampath, however, contends that a person claiming under a minor, referred to in S. 8(3), can only be a legal representative of a deceased minor and not a person succeeding to the interests of the minor by reason of transfer inter vivos. He refers to the decisions in *Jhaverbhai Hathibhai v. Kabhai Bechar*, AIR 1933 Born 42, *Mon Mohan Bhattacharjee v. Bidhu Bhusan Dutta*, AIR 1939 Cal 460, *Palani Goundan v. Vanjiakkal*, ILR (1956) Mad 1062 : (AIR 1956 Mad 476), *Premprakash Surajmal v. Maharashtra Revenue Tribunal, Nagpur*, AIR 1969 Born 361, *Ghanshyam Dass v. Dr. Shiva Shankar Lal*, 1980 All LJ 130 and other cases in which certain High Courts have taken the view that the right of the minor is a personal right and it cannot be transferred otherwise than by inheritance. The "person claiming under him" mentioned under S. 8(3) of the Guardianship Act, counsel says, can only be a legal representative and not a purchaser or transferee inter vivos. He refers to Art. 60 of the Limitation Act, 1963 and submits that that provision refers only to a legal representative and not any other successor.

11. In *Jhaverbhai Hathibhai v. Kabhai Bechar*, AIR 1933 Born 42, it was held:

"what was assigned by the minor to the plaintiff in that suit was not the property in question but his right to sue for it, and if he could establish his allegation, to have the sale avoided, this I think was no more than a right of suit, and if I am correct such a transfer is forbidden by S. 6, Cl. (e), T. P. Act."

Similar reasoning was adopted in the other decisions cited by Mr. Sampath on the point. The rationale of these decisions is that the right to impeach a sale effected by the guardian is a personal right vested in the minor and it is not transferable inter vivos. The expression "person claiming under him", according to this line of reasoning, must, therefore, be understood as a legal representative and not an assignee.

12. On the other hand, a Division Bench of the Madras High Court in *P. Kamaraju v. C. Gunnayya*, AIR 1924 Mad 322, held that the right of the minor was not a bare right to sue and it was an assignable right. The High Court held:

"..... By selling the property to the plaintiff on the footing that the sale by the mother was not binding on him he has chosen to avoid it, and the result of it is that from his point of view he has got a complete title. The title no doubt will only be effective if the Court ultimately finds that the sale by the mother is not binding on him. But contingent on that event he has got a complete title and this title is not a bare right to sue and is, therefore, assignable♦♦."

In *Palanjappa Goundan v. Nallappa Goundan*, AIR 1951 Mad 817, *Viswanatha Sastri, J.* observed (at p. 821) :

"Where an ex-minor transfers property unauthorisedly sold by his guardian during his minority he transfers not a mere right to sue but his interest in the property, though a suit may be necessary to avoid the transfer by the guardian & recover possession of the property from his alienee. Conversely, the liability of the transferee from the guardian is not a liability to pay damages for the unauthorised act of the guardian, but is a liability to restore the property to the rightful owner or his transferee"

Similar view was expressed in *Karnam Nagabhushana Rao v. Karnam Gowamma*, (1968) 2 Andh WR 57. These decisions on which reliance was placed by the Madras High Court in the impugned judgment are to the effect that the right of the minor is not a bare or naked right to sue but a right in property which is assignable.

13. In *Halsbury's Laws of England*, 4th Edn., Vol. 6, paragraphs 86-87 at pages 49-50, this is what is stated-

"A bare right of litigation, such as a mere right to damages for a wrongful act, is not assignable, on the principle that the law will not recognise any transaction savouring of maintenance or champerty. By way of exception to the rule stated in the previous paragraph there is nothing unlawful in the purchase of 'Property which the purchaser can only enjoy by defeating existing adverse claims, or in the assignment (for example by mortgage) of property, being the fruits . of litigation. In every case it is a question whether the purchaser's real object was to acquire an interest in the property, or merely to acquire a right to bring an action, either alone or jointly with the vendor.

14. In the instant case, on the facts found, the transfer of the property made by the guardian was a voidable transaction and it was, therefore, open to the minor to challenge it and seek recovery of possession. Such a right of the minor is a right or interest in property which he himself or "any person claiming under him" may enforce by instituting a suit (Section 8(3) of the Guardianship Act). "Any person claiming under him" must necessarily include a purchaser.

15. Section 8(3) confers a right of suit in the special circumstances postulated in that provision. The object of the Act being the protection of the minor, the legislature has thought it fit to confer a right of suit in certain circumstances not only on the minor, but also on a person to whom the minor has transferred his rights. The right transferred is an interest in property which is capable of enforcement at the instance of the transferee as it was at the instance of the ex-minor prior to the transfer. Such a provision, intended specially for the protection of the interests of the minor, must be read in harmony and consistently with the general provisions contained in S. 6 of the T. P. Act. (See *The J. K. Cotton Spinning & Weaving Mills Co. Ltd. v. State of Uttar Pradesh*, (1961) 3 SCR 185 at p 194 : (AIR 1961 SC 1170 at p 1174) and *Ashoka Marketing Ltd. v. Punjab National Bank*, (1990) 3 JT SC 417, 439).

16. The transfer made by the father during his son's minority was voidable at the instance of his son who was the real owner, and any person purchasing such property from the natural guardian obtained only a defensible title. The minor retained a right in the property to defeat existing adverse claims, and such right is an assignable right. We are in complete agreement with what has 'been stated on the point in *Palaniappa Goundan v. Nallappa Goundan*, AIR 1951 Mad 817 and in *P. Kamaraju v. C. Gunnayya*, AIR 1924 Mad 322. We do not agree with the contrary view expressed on the point in *Jhaverbhai Hathibhai v. Kabhai Bechar*, AIR 1933 Born 42, *Mon Mohan Battacharjee v. Bidhu Bhusan Dutta*, AIR 1939 Cal 460, and *Palani Goundan v. Vanjiakkal*, ILR

(1956) Mad 1062: (AIR 1956 Mad 476).

17. A construction which is unduly restrictive of the statutory provisions intended for the protection of the interests of the minor must be avoided. This is all the more so in view of S. 5(b) of the Guardianship Act which says-

"5. Save as otherwise expressly provided in this Act-

(a).....

(b) any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in this Act".

18. For the reasons stated by us, we see no merit in the challenge against the judgment under appeal. The appeal accordingly dismissed. We do not, however, make any order as to costs.

Appeal dismissed.

</html