

CALCUTTA HIGH COURT

Banku Behary Mondal

Vs

Banku Behary Hazra

(Pal ,J.)

08.01.1943

JUDGMENT

Pal, J.

1. This is an appeal by the defendant in a suit for declaration of the plaintiffs' title to an eight annas share in the disputed land and for joint possession to the extent of that share, as also for mesne profits. Admittedly the lands in suit belonged to the plaintiffs' father Hari Charan Hazra who died in 1915, leaving behind him his widow, a daughter and four sons, namely the plaintiffs and their two brothers - Fakir and Khanda. The plaintiffs were mere infants at the date of their father's death. Their case is that plaintiff 1 was aged about three years, having been born on 13th Baisack 1819 B.S., and that plaintiff 2 was between one and two years, having been born on 7th Falgoon 1321 B.S. Their mother also died shortly after their father.

2. The plaintiffs' case is that during their minority, Fakir and Khanda sold the disputed lands to the defendant by two sale deeds, namely Ex. A, dated 24th September 1926, and Ex. A i) dated 21st October 1927; that neither Fakir nor Khanda was their guardian - either de jure or de facto; that they were brought up by their sister; and that these sales were for no legal necessity. The case of the defendant is that Fakir was the de facto guardian of the plaintiffs during their minority and was also their natural guardian; and that he as such guardian sold the shares of the plaintiffs also by the two sale deeds; that the sales were for legal necessity, and were thus binding on the plaintiffs unless and until these were set aside; that as the plaintiffs did not seek to set aside the kowalas in this suit, their claim for recovery of possession was not maintainable; and that the plaintiffs having attained majority more than three years before the institution of the present suit, their claim for setting aside the transactions would be barred by limitation under Article 44, Limitation Act.

3. The Court of first instance found that the four brothers constituted a joint family of which Fakir was the karta and that Fakir as such karta and as natural guardian of the minors after their parents' death brought them up; that he purported to sell the shares of the plaintiffs also as their guardian, but that there was no legal necessity for the sale. The learned Subordinate Judge, however, dismissed the suit on the ground (1) that the transactions were binding on the plaintiffs till these were set aside by a properly framed suit, and (2) that the present suit was not maintainable as there was no prayer for cancellation of the sale deeds; further, so far as plaintiff 1

was concerned, it was barred by limitation under Article 44, Limitation Act, he having attained majority in 1930, more than three years before the institution of the present suit on 2nd October 1936.

4. On appeal by the plaintiffs, the learned Additional District Judge held (1) that Fakir was not de facto guardian of the plaintiffs, and also was not their natural guardian;(2) that the plaintiffs were brought up by their sister as alleged by them; (3) that the kowalas were executed by Fakir only in his personal capacity and not on behalf of the plaintiffs; and (4) that, in any case, there was no legal necessity for selling the property, and, therefore, the sale was not binding on the plaintiffs. On these findings, he set aside the decree of the learned Subordinate Judge, and decreed the plaintiffs' suit.

5. The learned advocate appearing in support of the present appeal before us contends as follows:

- (1) That the Court of appeal below went wrong in saying that the sales were not made by Fakir as guardian of the minors and on behalf of them; that on a proper construction of the two sale deeds (Exs. A and A-1) the learned Additional District Judge should have held that the sales were (a) by Fakir as guardian of the minors or (b) by the minors represented by Fakir as their guardian;
- (2) that Fakir was the natural guardian of the minors under the Hindu law, and as such was entitled to make a binding transfer of the minors' shares;
- (3) that consequently, the present claim of the plaintiffs would be governed by Article 44, Limitation Act, and the suit having been instituted more than three years after the plaintiffs attained majority, it would be barred by limitation;
- (4) that on their own case as made in the plaint, both the plaintiffs attained majority more than three years before the date of the institution of the present suit;
- (5) that in any case, the finding arrived at by the Court of first instance that the four brothers constituted a joint Hindu family of which Fakir was the karta, not having been reversed by the Court of appeal below, the latter Court should have held that the sales were by Fakir as karta of the joint family and consequently binding on the plaintiffs;
- (6) that the evidence on the record was sufficient to establish legal necessity for these sales.

6. The last point urged by the learned advocate for the appellant does not raise any question of law at all. The entire evidence on the point was considered in minute details by the Courts below and both the Courts arrived at the conclusion that there was no legal necessity for the sales. The necessities recited in the sale deeds were minutely scrutinized and both the Courts found that these never existed. This is a concurrent finding of fact based on a consideration of the evidence on the record. Nothing could be placed before us which would entitle us to interfere with this finding. It cannot be, and it is not, disputed that the power of Fakir to make a binding disposal of the property - binding on the minors - was a limited and qualified one, and could be exercised only in the case of need, or for the benefit of the estate, whether he acted as guardian of the minors or as karta of the joint family. No case of benefit of the estate was made here. The case made was one of need only, and it was found that there was none. In view of the finding that there was no legal necessity, the transactions failed validly to take away the minors' right, title and interest in the property. The question is what relief these minors are entitled to, and whether their remedy is barred.

7. If the sales be taken as having been made by Fakir as karta of the joint family, then the plaintiffs are entitled to recover possession of their share of the property from the alleged

purchaser on establishing the defect due to want of legal necessity. Article 44, Limitation Act, would have no application to such a case. It would be either Article 142 or Article 144, Limitation Act, that would apply. In this case the plaintiffs were within 12 years from the dates of the transactions. Consequently, the question when they attained majority would be immaterial for this purpose. There is thus no substance in the fifth ground urged by the learned advocate for the appellant. Coming now to the first four points raised in this appeal, it cannot be disputed that if Article 44, Limitation Act, apply to this case then the plaintiffs must fail, as according to the case made in the plaint both of them attained majority more than three years before the date of the suit. The suit was instituted on 2nd October 1936. Plaintiff 1 was born on 13th Baisakh 1319, i.e., in April 1912. He therefore attained majority in 1930. The other plaintiff was born on 7th Falgoon 1321 B.S., i.e., in February 1915. He thus attained majority in February 1933. The question whether or not Article 44, Limitation Act, shall apply depends upon whether the transactions were by the guardian of the minors and whether these require setting aside.

8. The learned Additional District Judge found that the transactions were not by the guardian of the minors at all because, (1) Fakir was not their guardian either de facto or de jure; (2) Fakir executed the documents in his personal capacity and not in his capacity as guardian of the minors, nor as representing the minors as their guardian. The juristic principle underlying the conception of de facto guardianship is not easily discernible. Ex facto jus oritur. It may be easy to trace the basis of obligation of such an inter-meddler. But perhaps it is not equally easy to find out the basis of any right available against the minor derived from such inter-meddler by a third person.

9. We are, however, not troubled with this question here. It has been found by the learned Additional District Judge that Fakir was not a de facto guardian of the minors. The minors were looked after not by Fakir, but by their sister. Fakir had no concern with his minor brothers. The question whether Fakir was the de facto guardian of the minors is one of fact, and the finding of the final Court of fact is that he was not. No error of law or procedure vitiating this finding could be pointed out to us. The learned advocate for the appellant contended that Fakir was the natural guardian of the minors under the Hindu law. The Hindu law vests the guardianship of the minor in the Sovereign as *parens patrie*. Some of the original texts in support of this proposition were cited in *Budbkaran Chowkhani v. Thakur Prosad Saha*¹. Necessarily, this duty is delegated to the minor's relations. According to Narada, of such relations the father is the fittest for such guardianship. Next to him comes the mother. Narada names the elder brothers after her. But it has uniformly been held that relations other than the parents of the minors must derive their authority from the Courts : *Kristo Kissore Neoghy v. Kadermoyee Dossee*² *Mt. Bhikuo Koer v. Mt. Ghamala Koer*³ and *Budbkaran Chowkhani v. Thakur Prosad Saha*⁴ In *Kristo Kissore Neoghy v. Kadermoyee Dossee*⁵ Garth C.J. on the authorities cited at p. 586 and specially on the authority of a passage in Jagannath's Digest cited there, summarised the law on the point thus: The passages...support the view that in the absence of the father or mother, or the guardian appointed by the father, the selection of the guardian is to be made by the Court, which, of course, represents the ruling power.

10. No doubt the case in *Kristo Kissore Neoghy v. Kadermoyee Dossee*⁶ related to the guardianship of the person of a minor. But so far as Hindu law is concerned, the authorities relied on by the learned Chief Justice equally apply to the guardianship of property. The texts really relate to the guardianship of property. Admittedly in this case Fakir was not appointed by the

father of the minors to be their guardian. Nor was he appointed by the Court. In our opinion he was not the guardian of the minors either natural or de facto or de jure. In this particular case it has been found by the Court of Appeal below that the minors were brought up by their sister, and their brother Fakir had nothing to do with them after the death of their parents. In my opinion therefore the learned Additional District Judge was correct in saying that Fakir was neither the natural guardian of the minors, nor was he their de facto guardian. This being so, any transfer by him of the minors' property would be a transfer by an unauthorized person, and would not affect the minors' interest in the property at all. As the minors have come to Court within 12 years from the dates of the transactions, no question of limitation would arise. Article 4A, Limitation Act, has no application to cases of transfer by wholly unauthorized persons.

11. The documents by which the sale was transacted have also been placed before us. According to the recitals in them, the minors themselves, represented by their guardian, purported to join in the conveyance, but these minors never joined in the execution of the deed. The document was executed only by Fakir and Khanda, to all appearance, in their individual capacities. It was not signed by Fakir, either in his capacity as guardian of the minors, nor by the minors represented by this guardian. In my opinion, the learned Additional District Judge was correct in saying that these documents were executed only by Fakir and Khanda in their personal capacities and not as guardians of the minors nor on behalf of the minors. In this view again, the transfer did not at all affect the interests of the minors in the property and it is not at all necessary for them to set aside the transactions. They are entitled to recover possession of their share from the defendant treating him as a mere trespasser so far as their shares are concerned. In my opinion, therefore, all the grounds urged by the appellant fail and there is no substance in this appeal. The appeal is accordingly dismissed with costs.

Mohamad Akram, J.

12. I agree.

Cases Referred.

1('42) 29 A.I.R. 1942 Cal. 311

2('78) 2 C.L.R. 583

3('98) 2 C.W.N. 191

4('42) 29 A.I.R. 1942 Cal. 311 at p. 76

5('78) 2 C.L.R. 583