PATNA HIGH COURT

Jhulan Prasad

Vs

Ram Raj Prasad

A.F.A.D. No. 470 of 1974

(Medini Prasad Singh, J.)

14.03.1978

JUDGEMENT

Medini Prasad Singh, J.

1. This is a Second Appeal by defendant No. 5 Jhulan Prasad from a judgement and decree of the Subordinate Judge, Gopalganj dated 16th March, 1974, who affirmed the judgment of the Additional Munsif, 1st Court, Gopalganj decreeing the suit for redemption in favor of the plaintiffs in respect of certain land and directing mesne profits to be determined in a separate proceeding. The suit land measured 18 kathas 11 dhurs of R.S. Plot No. 789 in village Parsurampur within Gopalganj Police Station. It belonged originally to Bhukhal Mian and Sukhal Mian sons of one Kurkut Mian of the same village. Bhukhal Mian died leaving behind his widow Mst. Chatia and a minor son Shamsuddin.

2. On 16th May, 1949, Sukhal Mian and Mst. Chatia executed a Zarpeshgi deed in favour of respondent No. 4 Jamuna Mahton (defendant No. 2) for a sum of Rs. 1,000 in respect of the suit land and put him in possession. On 5th Nov. 1959, Sukhal Mian and Mst. Chatia for self and as guardian of her son Shamsuddin, executed a registered sale deed (Ext. 2) in respect of the suit land in favour of the plaintiffs who are respondents Nos. 1 and 2 in this appeal. When the zarpeshgidars did not accept the zarpeshgi money tendered to them, the plaintiffs deposited the same in Court under Section 83 of the T.P. Act and brought the present suit for redemption. In the meantime the zarpeshgidars were changing hands, one transferring his Zarpeshgi right to another. The last Zarpeshgidar was the appellant Jhulan Prasad (defendant No. 5). He denied the right of the plaintiffs to redeem the mortgaged property. He contended that Mst. Chatia had no right to sell the right and interest in immovable property of the minor. He further contended that Kurkut Mian the father of Sukhal Mian and Bhukhal Mian died leaving behind his daughter also named Kadirani; that Bhukhal also had a daughter named Hadisan; and that both Kadirani and Hadisan came into possession of their share in the suit land. He pleaded that Kadirani not being a party to the Zarpeshgi deed, her share to the extent of 3 kathas 14 dhurs did not pass to the Zarpeshgidar or to the plaintiffs under the sale deed (Ext. 2 and the same had been sold to him under a registered sale deed (Ext. A/1) dated 2nd June, 1964. He further pleaded that Hadisan the daughter of deceased Bhukhal had sold 6 kathas 16 dhurs in the suit plot to one Chandraman

Bhagat under Ext. A on 2nd November, 1961 when her brother Shamsuddin was already dead. Thus, the appellant (defendant No. 5) claimed 3 kathas 15 dhurs of land as purchaser from Kadiran and the rest as Zarpeshgidar.

3. The two courts below have held : (i) that Mst. Kadirani was not the sister of Bhukhal Mian and Mst. Hadisan was not his daughter and they had no right to execute the sale deeds Exts. A/1 and A respectively, and that these two sale deeds were of Farzi nature; (ii) that the sale deed (Ext. 2) dated 9-11-59 executed by Bhukhal Mian and Mst. Chatia for self and as guardian of her minor son Shamsuddin in favour of the plaintiffs was valid and the plaintiffs were entitled to redeem the property.

4. Mr. S.C. Ghosh, learned counsel, appearing for the appellant has raised three contentions. I will deal with them in seriatim. Contention No. 1 : His first contention is that Mst. Chatia being merely a de facto guardian had no power to sell any immovable property of her minor son and consequently the sale of his interest was absolutely void. In continuation of this limb of argument, it was further urged that the entire transaction was void. Reliance was placed upon the decisions in *Abdul Karim v. Mst. Maniran*[1], and in *M. Zafir v. Sk. Amiruddin*[2], In the first case (AIR 1954 Patna 6) there was a dispute between the members of a Mohammedan family. The dispute was referred to the arbitration of certain persons. One Bibi Maniran had signed the deed of arbitration agreement for self and as guardian of her minor sons and minor daughters in respect of both movable and immovable properties. Relying upon the decision in *Md. Amin v. Vakil Ahmed*[3], and in *Imambandi v. Mutsaddi*[4], it was held that the arbitration agreement was void because a de facto guardian had no power to transfer any right or interest in immovable property of the minors and such a transfer was not merely voidable but void. In view of the fact that the agreement was one and it could not be valid in respect of a part and invalid in respect of the rest, it was further held that the entire reference to the arbitration was invalid. It was observed :

> "...... The mother, as de facto guardian, is not competent to enter on behalf of her minor children into an agreement to refer the dispute to arbitration, the agreement being one which will necessarily, if acted upon involve dealings with the immovable properties of the minors. As the deed of agreement stands, the movable properties cannot be severed from the immovable properties. The agreement to refer the dispute to arbitration was in respect of all the properties, and it is not possible to find it valid in respect of a part and invalid in respect of the rest. If the deed of agreement is void, it cannot be void only *qua* the minors but would be void altogether *qua* all the parties including those who were majors."

From the above it is clear that the agreement was one and it could not be cut up and upheld in part. It was in those circumstances that the entire arbitration agreement was held to be void. In *Mohammad Amin v. Vakil Ahmed*[5], the Supreme Court held that a de facto guardian had no authority to enter into a family settlement in respect of a minor's property even though the settlement might be for his benefit. While holding that the settlement was void as against the minor, it was further observed (at p. 361) :

> "If the deed of settlement was thus void, it could not be void only *qua* the minor plaintiff 3 but would be void altogether, *qua* all the parties including those who were sui juris."

It is clear that the Supreme Court was dealing with a case of family settlement.
In *Pratap Singh v. Sant Kaur*[6], it was held that where the agreement was entered into with two sisters one of whom was represented by a guardian neither appointed by the Court nor could claim to be her guardian under her personal law, the agreement was void not only against the minors but was also unenforceable against her elder sister who was a major. The Privy Council observed :

> "The rule of law is firmly established that a minor is not competent to make a contract, and as Gujar Singh had no authority to enter into a contract on her behalf, the deed of settlement must be held to be a void transaction as against her."

This was also a case relating to an agreement and not a deed of conveyance. In *Md. Zafir v. Sk. Amiruddin*[7], the question was as to whether a deed of partition was valid. In that case the mother of the minors acting as their de facto guardian had declared conveyed and extinguished the rights and interests in immovable property belonging to those minors by a deed of partition and the partition was effected by the deed itself. It was held that the mother as de facto guardian was not competent to act for the minors and divide the property. That was also a case of a partition deed and not a case of sale deed. None of these cases was, thus, concerned with a conveyance of property. These cases, therefore, are of no assistance to the appellant.

5. The question is as to whether a conveyance effected by several persons, of whom one or more is a minor and represented by his de facto guardian, is void *qua* the minor only or against all the co-vendors, major or minor both. The contention of Mr. S.C. Ghosh is that if the sale is void *qua* the minor represented by the de facto guardian it is void as a whole. I do not agree. It cannot be disputed that every Muslim heir is entitled to sell or mortgage or otherwise encumber his share of the property without reference to the other heirs just like any tenant-in-common : *Khatoon Bibi v. Abdul Wahab*[8]. In the case of Md. Zafir, AIR 1963 Patna 108 (supra) also this right of a member of a Mohammedan family was noticed. It was observed that according to the Mohammedan Law each heir of a Mohammedan family has even, when the family remains undivided, a certain definite share in the joint property of which he is the absolute owner; in other words, the property is held in defined shares, though possession is the joint possession of the whole family. In *Matadin v. Ahmad Ali*[9], a Mohammedan executed a mortgage of his immoveable property. He then died leaving a will by which he bequeathed his properties to his four grandsons one of whom was a minor, in equal shares subject to equal obligations in respect of his debts. After his death, three elder grandsons sold the mortgaged property including the minors' share to the mortgagee to satisfy the mortgage debt and other debts of the deceased. The fourth grandson on attaining age of majority instituted a suit for redemption of the mortgage in so far as it related to his share, the claim being based on the ground that his major brothers had no right to act as his guardians and their conveyance on his behalf was void as against him. The Privy Council allowed the claim of the quondam minor to redeem his share. It was held by the Privy Council that the sale though made to satisfy the debts of the deceased, was not binding on the minor and that he was entitled to redeem his 1/4th share of the mortgage property. The implication of this decision is that the quondam minor was allowed to avoid the sale only so far as it related to his

share. If the entire sale has to be regarded as void, the quondam minor would have been entitled as a co-owner to redeem the entirety of the mortgage. It is true that the point did not directly arise in that case but this is the logical result of what the Privy Council held therein.

6. In *Maimunnissa Bibi v. M.S.N.N. Abdul Jabbar*[10], a piece of immoveable property jointly belonging to Maimunnessa Bibi, the mother and her three sons, two of whom were minors, was sold to the respondents for Rs. 500. The mother signed the sale deed on her behalf and as guardian of the minors. The executant of the sale deed sued the vendees to set aside the sale contending that the mother as a de facto guardian of the minor vendors could not legally make the conveyance on behalf of the minors and so the entire transaction was void. The trial court accepted this contention and set aside the sale, directing the plaintiffs to pay Rupees 500 to the vendees as a condition to their getting back the properties. The vendees appealed against this judgement and the lower appellate court held that the conveyance was void *qua* the shares of the minors only and that it was binding on the major vendors as regards their shares. The lower appellate court took this view on the ground that the rule relating to an agreement or a family settlement cannot be extended to the case of a conveyance by persons sui juris in respect of their shares and that the only effect in the incapacity of the mother to represent her minor son and make a conveyance of his share was that the minor was not a party to the conveyance and, therefore, the conveyance should be deemed to be one by the other executants alone, who were competent to execute it in respect to their shares. In other words the lower appellate court in that case considered that the conveyance was good so far as the major executants were concerned and would pass their shares to the purchasers. It was on this view, the lower appellate court passed a preliminary decree for partition of 21/40 shares representing the shares of the major vendors. The aggrieved vendors, therefore, filed the Second Appeal before the Madras High Court.

On the authority of the Privy Council in *Pratap Singh v. Sant Kaur, AIR 1938 PC 181 (supra)* and of the Supreme Court in *Md. Amin v. Vakil Ahmed, AIR 1952 Supreme Court 358 (supra),* it was contended on behalf of the appellant that the entire transaction was void, Mr. Justice Veeraswami rejected this contention by distinguishing a conveyance from a family settlement, which was the subject- matter of the case before the Privy Council and the Supreme Court. It was observed that the Privy Council and the Supreme Court were concerned with a contract which by itself
from the nature could not be cut up and upheld in one part and held to be void in another part. The nature of a conveyance is not identical with that of a contract or an agreement or family settlement. Accordingly, the learned Judge accepting the ratio of the Privy Council case, *Matadin v. Ahmad Ali*[11], affirmed the view of the lower appellate court, that the only effect of the incapacity of the mother to represent her minor son and make a conveyance of his share is that a minor is not a party to the conveyance and, therefore, the conveyance should be deemed to be by other executants alone who were sui juris, and as such they were bound by it. I respectfully agree with this view. Having regard to the principles laid down in this Madras case, I would hold that the sale was void only in so far as it related to the minor and it was good so far as the major executants were concerned and their shares did pass under the sale deed (Ext. 2) to the plaintiffs. It is to be noted that the minor Shamsuddin died before institution of the suit. Hence even if Mst. Chatia had no right to sell his interest, the right and interest of Shamsuddin would obviously devolve upon Chatia and Sukhat who had conveyed their title to the plaintiffs. Under Section 43 of the T.P. Act, 1882, where a person fraudulently or erroneously represents that he is authorised to transfer certain immoveable property and proposes to transfer such property for consideration,

such transfer shall at the option of the transferee, operate on any interest which the transferor may acquire in such property at any time during which the contract of transfer subsists. I am of the view that the principles underlying the provision of this Section will apply to the instant case. There is, therefore, no legal flaw in the title of the plaintiffs even with respect to the interest of Shamsuddin. Moreover, the defendant cannot agitate this point. The title of the plaintiffs has not been challenged either by Mst. Chatia or by Sukhal. The appellant is a mortgagee. In my opinion, the plaintiffs have right to redeem the entire mortgaged property. The contention thus has no force. Contention No. 2 : The second contention of the appellant is that the suit being one for redemption, the plaintiffs had no right to implead Kadirani, Hadisan and the appellant who were claiming paramount title. In my opinion the contention has no merit. This point was not taken in the court below. The trial court framed issue No. 6 as under :-

> "Is Mst. Kadirani daughter of Kurkut Mian and Mstt. Hadisan daughter of Bhukhal Mian ?"

The parties to the suit produced evidence on that issue and invited the court to decide it. In appeal the appellant by filing his petition under Order 41, Rule 27 of the Civil Procedure Code dated 8th Jan. 1973 tried to prove his case by producing additional evidence. In the circumstances, the appellant cannot, now, make any legitimate grievance on that score in second appeal. Contention No. 3 : His third contention is that the court of appeal below wrongly refused to allow additional evidence to be produced by the appellant and this it did on a wrong understanding of the scope of the Patna Amendment of Order 41, Rule 27 of the Civil Procedure Code In my opinion, this argument also has no merit. The appellant filed a petition under Order 41, Rule 27 for producing two documents as additional evidence in support of his case the Kadirani was the daughter of Kurku Mian. One was a Sada Zarpeshgi deed dated 30-12-1947 purporting to have been executed by Sukhal Mian and Mst. Chhathia in favor of one Manager Tiwari, for a sum of Rs. 150. This amount was alleged to have
been borrowed for meeting the marriage expenses. It was said that the appellant had come to know about the existence of the document from Manager Tiwari. Another was the Pariwarik Pustika of village Tarua Pratappur prepared in the year 1960 in which Kadirani's name had been recorded as the daughter of Kurkut. It is clear that these documents were existing at the time when the redemption suit was pending. That suit was brought in the year 1962 and it was disposed of in the year 1968. This fact was noticed by the lower appellate court. In the opinion of the court below these documents were brought into existence only for the purposes of the appeal and they could easily be manufactured. The court below also considered the provisions of Order 41, Rule 27 of the Civil Procedure Code in this connection. The matter has been dealt with in paras 9 to 11 of the judgment of the court below. I do not see any error committed by it. The lower appellate court has exercised its discretion properly and it does not require any interference.

7. In the result I arrive at the conclusion that the appellant must fail in this appeal. The appeal is, consequently, dismissed. No costs.
Appeal dismissed.

Cases Referred.

[1] AIR 1954 Pat 6
[2] AIR 1963 Pat 108
[3] AIR 1952 SC 358
[4] AIR 1918 PC 11 : 45 Ind App 73
[5] AIR 1952 SC 358
[6] AIR 1938 PC 181
[7] AIR 1963 Pat 108
[8] AIR 1939 Mad 306
[9] (1912) 39 Ind App 49: (ILR 34 All 213) (PC)
[10] AIR 1966 Mad 468
[11] (1912) 39 Ind App 49 (PC)