
(2001) 04 MAD CK 0021
In the Madras High Court

A. Sarabanu

APPELLANT

Vs

A.M.A. Asmathullah (died) by his L.Rs. and Others

RESPONDENT

Date of Decision : 24-04-2001

Acts Referred:

Contract Act, 1872 — Section 23

Citation : (2001) 2 LW 387 : (2001) 3 MLJ 408

Hon'ble Judges : F.M. Ibrahim Kalifulla, J

Bench : Division Bench

Judgement

F.M. Ibrahim Kalifulla, J.—The second plaintiff is the appellant. The appellant and the 12th respondent failed O.S. No. 100 of 1978 on the

file of the Subordinate Judge. Tirunelveli on 25.3.1978 for partition and separate possession of the plaintiffs 13/24th share in the suit schedule

properties and for directing the first respondent herein to pay the plaintiffs 13/24th share on the future mesne profits from the date of plaint till the

date of partition of their share.

2. As per the plant averments, the suit properties comprising of two houses, originally belonged to one Hameeda who was the first wife of the first

defendant and who left two daughters namely the appellant herein and one other daughter by name Firoz Banu. The first plaintiff/12th respondent

herein is one of the sisters of late Hameeda. Smt.Hameeda had one other sister by name Lateefa who died in 1972. The respondents 5 to 9 are the

heirs of Lateefa. On the death of late Smt. Hameeda, the suit properties devolved upon the first respondent herein to an extent of 1/24th share, the

sister Lateefa to an extent of 1/24th share, the first plaintiff/12th respondent herein to an extent of 1/24th share, the appellant, the second plaintiff to

an extent of 1/3rd share and her sister Firoz Banu for another 1/3rd share. According to the appellant, her sister Firoz Banu executed a registered

release deed on 19.2.1968 relinquishing her share in the suit schedule property in favour of the appellant and the first respondent herein. Therefore,

according to the appellant, her share got increased from 1/3rd to 1/2 and the first respondents share also increased from 1/4th to 5/12th.

3. It is alleged that after the death of Hameeda Bi, the mother of the appellant and the first wife of the first respondent, the first respondent married

a second wife, that the first respondent sold away the entire suit properties under Ex.A-4 to the fourth respondent who is none other than the sister

of his second wife. Subsequently, the fourth respondent is stated to have sold away the suit properties in favour of the second and third

respondents herein on 18.1.1978 as per Ex.A-6. According to the appellant, Exs.A-4 and A-6 are sham and nominal documents and the

transactions were void.

4. Respondents 1 to 4 who were the defendants in the suit resisted the claim of the appellant and the 12th respondent contending that the alienation

under Exs.A-4 and A-6 were valid and that the suit by the appellant was barred by limitation. It was also contended on behalf of the respondents

1 to 4 that the first plaintiff and the other sister of Hameeda namely Lateefa relinquished their rights in favour of the first respondent, appellant and

Firoz Banu daughter of Hameeda.

5. On the basis of the abovesaid pleadings, the trial Court framed five issues for consideration. On the first issue namely whether the alleged oral

relinquishment made by first plaintiff in favour of Firoz Banu and the second plaintiff, the appellant herein was true. The trial Court held that the

release relied on would amount to transfer of right in immovable property should have been in writing and registered one. Since it was not done so,

the same was not valid. On the next issue namely, whether sale by the first respondent herein in favour of the 4th respondent herein and in turn by

the fourth defendant/ fourth respondent in favour of respondents 2 and 3 defendants 2 and 3 were sham and nominal, the trial Court found that as

the evidence would disclose the title and possession passed on to defendants 2 and 3. Under valid consideration and therefore they are not sham

and nominal documents and they were valid. On the third issue, namely, whether

the sale by the first defendant is void one or voidable one, the trial Court found that Ex. A-4 as far as the transfer of shares of the appellant was concerned was a voidable one and not void document. On the fourth issue namely, whether the suit was not maintainable without a prayer for setting aside the sale and the question whether the suit was barred by time, the trial Court found that the suit was barred by time in so far as the second plaintiff was concerned namely the appellant. Ultimately, the trial Court passed a preliminary decree for partition of first plaintiff/12th respondents share to an extent of 1/24th share and in other respects, the suit was dismissed.

6. Aggrieved against the judgment and decree of the trial Court in dismissing in toto the appellant's claim, the appellant preferred A.S.No. 1033 of 1980. By judgment and decree dated 3.2.1988, the learned single Judge of this Court held that the whole controversy was only related to issue Nos. 2 to 5 namely: whether the sale under Exs.A-4 and A-6 were sham and nominal. Whether said sale was void or voidable one: whether the suit was maintainable without a prayer for setting aside the sale and whether the suit was barred by limitation.

7. On the contention, namely Ex.A-4 should be held to be sham and nominal, the learned Judge held that having regard to the endorsement on the original of Ex.A-4 to the effect that the vendor received a sum of Rs. 5,000 before the Registrar at the time of registration of the document that a sum of Rs. 1,000 was paid earlier as advance as recited in the document. There was no scope to hold that there was lack of consideration in order to hold that Ex.A-4 was sham and nominal. The learned Judge, therefore proceeded to hold that Ex.A-4 cannot be held to be a void document and therefore the only question that remained to be considered was whether it was voidable one. Since as the appellant/second plaintiff herein was minor at the time of the transaction. The learned Judge also held that failure to effect mutation in the municipal records cannot be taken to mean that title under the original of Ex.A-4 did not pass on to the fourth respondent herein. On the question of possession, the learned Judge found that subsequent to Ex.A-6. the defendants 2 and 3 were put in possession, having regard to the fact that rents were being collected by them from defendants 10 and 11. On the question relating to limitation, the learned Judge

found that the date of birth of the appellant was 28.1.1954.

Therefore the suit which was filed on 18.4.1978 was beyond the period of limitation. The appeal was ultimately dismissed by the learned Judge.

8. Sri Sankara Subramanian learned Counsel for the appellant in this L.P.A. contended that in the event of the transaction under Ex.A-4 being held

to be a void one by virtue of Article 60 of the Limitation Act the appellant would be entitled to lay the suit within a period of 12 years in which

event the suit would be well within time. The learned Counsel contended that the sale under Ex.A-4 was sham and nominal that the sale deed never

came into force. That in any case, the sale was void. Elaborating on that, the learned Counsel contended that fourth defendant who is the purchaser

under Ex.A-4 was not examined, that when admittedly first defendant was a teacher and the mother of defendants 5 to 9 was also a teacher, there

was absolutely no necessity for executing Ex.A-4. The learned Counsel further contended that indisputably no mutation of municipal records took

place after Ex.A-4 and that the name of the first defendant continue to remain on records and he only paid the municipal taxes. The learned

Counsel further contended that with regard to the income of the father there was a definite finding by the trial Court and that the assumption of the

trial Court that maintenance would include marriage expenses also was not proper. The learned Counsel by relying on Section 23 of the Contract

Act and also Section 6 of the Transfer of Property Act contended that the suit transaction under Ex.A-4 was a void one and in the circumstances

the suit laid by the appellant falling within Article 60 of the Limitation Act was well within time. The learned Counsel relied upon the Full Bench

judgment of this Court reported in P. Gopirathnam and four Ors. v. Feerodous Estate (Pvt) Ltd., represented by its Power of Attorney Holder, Sri

V. John Arthur (1999) 3 L.W. 249 and Shoba Viswanathan v. D.P. Kingsley (1996) 2 M.L.J. 96 : (1996) 1 L.W. 721 in support of his

contention that Ex.A-4 was a void document. The learned Counsel further sought to distinguish Mohamed Naziruddin Vs. Govindarajulu Appah

and Others, and Janab Haji Abdul Hamid Rowther and Another Vs. Samsunnissa Begum, by contending that in those cases, reliance was placed

upon Section 30 of the Guardian and Wards Act which expressly states that alienations by Guardian appointed by Court without its permission are

only voidable. The learned Counsel also relied upon page 332 of Pollock and Miller on Law of Contract for the proposition that agreements and transactions defeating the provisions of Hindu or Mohamedan Law are void.

9. The learned Counsel for the appellant by relying upon the principles set out in Mohamedan Law by Ameer Ali contended that the sale by a

guardian except in the circumstances stated therein would be void. The learned Counsel would contend that as per the principles set out at page

547 of the said book, with reference to the real or immovable property of a ward, the powers of the guardians are more limited and circumscribed.

While discussing the powers of guardians in handling the immovable property of the ward, the learned author has listed out the circumstances as

under:

With reference to the real or immovable property of the ward, the powers or guardians are more limited and circumscribed.

(a) A guardian may not sell his wards real property into his own hands or into the hands of any one connected with him under any circumstance.

(b) He may sell it to a stranger for double its value, or where it is to the manifest advantage of the ward.

(Section 31 of the Act III of 1990 uses the words evident advantage")

(c) He may also sell it when there are some general provisions in the Wasiyet (Will) of the testator which cannot be carried into effect without the

sale of the property.

(d) when the property is required to be sold for the purpose of paying off the debts of the testator, which cannot be liquidated in any other way.

(e) when the income accruing from the estate is not sufficient to defray the expenditure incurred in its management and the payment of the Khara

(land-revenue)

(f) When it is in imminent danger of being destroyed or lost by decay.

(g) when the minor has no other property, and the sale of it is absolutely necessary for his maintenance.

(h) when it is in the hands of a usurper, and the guardian has reason to fear there is no chance of restitution.

10. The learned Counsel also relied upon Hasha alias Abdul Rahim v. Muthan 70 L. W. 706 and Nutan Kumar and others Vs. IInd Additional

District Judge, Banda and others, , In the judgment reported in Hasha alias Abdul Rahim and Anr. v. Muthan and Ors. 70 L. W. 706, the learned

Judge after setting out the seven conditions that are the exceptions under which a legal guardian namely, the father could dispose of the immovable

property of a minor, has observed as under:

The net result of this analysis is that firstly, the alienation by a legal guardian must be for absolute necessity binding on the minor ward: and

secondly, the alienation must fall under one or more of the seven conditions set out above to give an illustration, the mere fact that the sale of the

property of a minor can fetch twice its original value would not justify the sale because the sale itself can only be made when there is absolute

necessity to alienate the minors property. To hold otherwise would completely nullify the liberal protection even to the interest of minor and there

can be no limit to alienation by an unscrupulous legal guardian so long as he takes care to see that the original value and the rule value are in the

ratio of 1:2 and which when prices have risen and the rupee value has gone down would sanctify practically all alienations? Therefore to use the

language of the logicians, necessity should be a cause and the seven circumstances will be the condition of the alienation. This is the deduction

made in Tyabji's Mohamedan Law on a consideration of the P.C. decisions at pages 300-302 (3rd Edn.).

Bearing these principles in mind if we examine the facts of this case we find that the sale of the minor plaintiffs share in the suit properties was not

for absolute necessity though the sale might have fetched double its original value.

11. As against the above submissions of the learned Counsel for the appellant, Sri A. Shanmugavel, learned Counsel for respondents 2 (died) 3,

28, 21 and 22, after referring to the scope of Article 60 of the Limitation Act contended that in respect of a Muslim. Article 359 would apply and

on that basis, the conclusion of the trial Court as well as learned Judge that the suit was barred by time is fully justified. The learned Counsel

contended that defendants 2 and 3 having been found to be in actual possession, the judgment of the trial Court declining to grant the relief to the

appellant/second plaintiff was fully justified. The learned Counsel relied upon Janab Haji Abdul Hamid Rowther and Another Vs. Samsunnissa

Begum, in support of his submissions.

12. In the Full Bench judgment of Allahabad reported in Nutan Kumar and others Vs. IInd Additional District Judge, Banda and others, the

learned Judges, while defining the term void in relation to a juristic act, to mean without legal force, effect or consequences: not binding: invalid: null:

worthless: cipher: useless: and in effectual etc. have stated thus in paragraphs 22 and 23:

An agreement offending a Statute or public policy or forbidden by law is not merely void but it is invalid from nativity, it cannot become valid even

if the parties thereto agree to it.

The concept that an agreement may be void in relation to a specified person and may be valid or voidable between the parties thereto is not

applicable to an agreement the very formation whereof the law interdicts; or which is of such a character that, if permitted, it would frustrate the

provisions of any law; or is fraudulent or involve or implies injury to the person or property or another: on the Court regards it as immoral or

opposed to public policy. Neither party can enforce the said agreement. No legal relations come into being from an agreement offending a Statute

or public policy.

[Italics is ours]

13. In another Full Bench judgment reported in P. Gopirathnam and four Ors. v. Feerodous Estate (Pvt.) Ltd. represented by its Power of

Attorney Holder Sri V. John Arthur (1999) 31. W. 249 (F.B.), their Lordships following the decision of the Hon''ble Supreme Court reported in

Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain and Others, wherein it has been held that a sale which was opposed to public

policy was void u/s 23 of the Contract Act, 1872, and that consequently, the respondents therein acquired no right, title or interest either under the

sale deeds or agreements entered into by them with the erstwhile owner, held that the principles set out therein were applicable to the case dealt

with by the Hon''ble Full Bench.

14. In the Division Bench judgment of this Court reported in Shoba Viswanathan v. D.P. Kingsley (1996) 1 L.W. 721, in paragraph 43, the

learned Judges have stated the legal position as under:

The position of law is clear that when the enforcement of the contract is against any provision of law, that will amount to enforcement of an illegal

contract. The contract per se may not be illegal. But its enforcement requires compliance of statutory conditions, failure of which will amount to

statutory violation. A Court which is expected to enforce the law, cannot be a party to such a decree.

15. In the judgment reported in Mohamed Naziruddin Vs. Govindarajulu Appah and Others, the Division Bench of this Court affirmed the finding

of the trial Court that the sale deed executed by the legal guardian of the minors was not for a necessary or binding purpose and therefore, it was

invalid. Nevertheless, the learned judges, went on to hold that the same would not make the transactions a void one, but would only be voidable.

The earlier Division Bench judgment of Lahore High Court reported in Khusia v. Faiz Muhammad Khah and Anr. AIR 1928 Lah. 115, is also to

the very same effect, wherein their Lordships have held that

An alienation by a natural guardian of the minor's property is a voidable and not a void transaction: and the fact that it was not for necessity does

not alter the nature of the transaction. It is an unauthorized transfer by an authorized guardian and the limitation to set aside such a transfer is

prescribed by Article 44....

16. In the case on hand, according to the appellant, Ex.A-4 was a fraudulent one and not given effect to at all. It is the contention of the appellant

that the sale under Ex.A-4 by the First defendant in favour of the sister of his second wife was not for absolute necessity and the said sale deed

under Ex.A-4 being in violation of the restrictions in respect of disposal of minors property by the legal guardian, the same was forbidden by law

and consequently void by virtue of application of Section 6(b) of the Transfer of Property Act read with Section 23 of the Indian Contract Act.

17. The violations pointed out by the appellant are that the first defendant sold the minors property under Ex.A-4 to his own sister-in-law and

therefore it was contrary to the very first restriction - a guardian may not sell his wards real property into his own hands and into anyone connected

with whom under any circumstance. The other violation pointed out was that the sale, was not to the manifest advantage of the ward or that the

sale was absolutely necessary for the maintenance of the minor. On the basis of

the evidence let in before the trial Court, it is proved beyond doubt that Ex.A-4 was executed for valid consideration, that the consideration of Rs. 6,000 was also received in full. It is significant to note that the husband of the appellant was an identifying witness for the registration of Ex.A-4 and the factum of receipt of sale consideration was never disputed by the appellants husband who is stated to have conducted the case on behalf of the appellant before the trial Court. A suggestion was put to the first defendant that the sale consideration was in fact paid in the presence of the Registrar, though it was suggested later that the same was taken back. Thus when the execution of the sale deed under Ex.A-4 was found to be for valid consideration, the other question that remained to be considered was whether the consideration was inadequate and whether the same was not to the advantage of the minor. On that aspect, a perusal of the very document Ex.A-4 would disclose that the disposal of the property was for the purpose of discharging the family debts and to meet the marriage expenses of the appellant herein. The learned Counsel for the appellant would contend that the marriage of the appellant took place two years after the execution of the said sale deed and that too she was given in marriage to the son of the first defendant's sister and therefore the alleged plea that the sale was effected for performing the marriage of the appellant was not true. We re of the view that merely because the marriage had taken place two years later, it cannot be concluded that on that basis it could be held that the sale itself was not out of necessity. Equally, simply because, the appellant was given in marriage to the son of first defendant's sister, it cannot be concluded that there was no necessity for expending any amount for the marriage of the appellant.

18. The only other aspect to be considered is whether it could be held that the first respondent committed any violation be executing the sale deed Ex.A-4 in favour of the sister of his second wife. It is brought out in evidence and as per the evidence of D. W. 1 himself, the property still stood in the name of the first defendant, in the Municipal records. It was also shown that under Ex.A-11, water charges were paid in the name of the first defendant. Under Ex.A-9 the first defendant continued to receive the rents of suit schedule property. In the above stated back ground, going by the principles or Mohamedan Law, set out by Ameer Ali, when there is a

prohibition for the legal guardian to sell his wards real property into his own hands or into the hands of any one connected with him under any circumstance, the present sale under Ex.A-4 by the first defendant in favour of the sister of his second wife was in total violation of the said principle set out therein. Even if the violation of any other principle could be satisfactorily explained so as to hold that such a violation need not stand in the way of setting aside the sale. For instance, if it is stated that the sale was not for the manifest advantage of the ward, it could still be explained by establishing that the sale was highly advantageous, inasmuch as the consideration was so very enormous that the property would not have fetched so much even if the minor wanted to sell it on his own after attaining majority. But so far as the violation now found established in this case namely, the guardian sold the wards property into the hands of a person connected with him was concerned there is no scope for explaining it away by stating that the same was done for the benefit of the minor. The said violation being one which is wholly unprincipled and would lead to the conclusion that the first respondent committed a distrustful act against the interest of the minor which would never be condoned. The said violation having been established and when could be characterised as a fraudulent one, that would strike at the very root of the transaction carried out under Ex.A-4. In such a situation, there can be no two opinion that the sale would become a void ab initio.

19. Applying the principles set out in the Full Bench decision of Allahabad High Court reported in *Nutan Kumar and others Vs. IInd Additional*

District Judge, Banda and others, while defining the term void in relation to a juristic act to mean, without legal force, invalid etc. it will have to be

held that the sale under Ex.A-4 in the case on hand, having been made against the principles of Mohamedan Law relating to the sale of immovable

property of a minor, we are constrained to hold that the same was void ab initio. We are unable to apply the decisions rendered in *Mohamed*

Naziruddin Vs. Govindarajulu Appah and Others, as well as *Janab Haji Abdul Hamid Rowther and Another Vs. Samsunnissa Begum*, In the

judgment reported in *Janab Haji Abdul Hamid Rowther and Another Vs. Samsunnissa Begum*, the learned Judge posed himself a question for

consideration as to whether an alienation by a legal guardian beyond his powers

that is an authorised alienation by an unauthorised person is void

or voidable? while discussing various case laws on the above question, applying the decision of a full Bench of our High Court reported in Mir

Ghulam Hussain Sahib Vs. Ayesha Bibi and Others, wherein it was held that a sale by a guardian of properties of a Mohamedan minor appointed

under the Guardians and Wards Act without obtaining Courts permission to sell was not void, but only voidable, the learned judge held that the suit

by the quondam minor to set aside such a sale after three years of attaining majority was barred by the Article 44 of the Indian Limitation Act.

Therefore the only violation which was pointed out and discussed by the learned Judge was that the property was not sold for double its value. The

Full Bench judgment referred to by the learned Judge related to a case where a Guardian of a minor appointed under the Guardians and Wards

Act, when sold away the minors property without obtaining Courts permission. It was held that the sale was only voidable one and not void.

20. In fact in the Full Bench judgment relied upon by the learned Judge, a distinction was sought to be made between an unlawful sale made by a

de facto guardian, as against such a sale made by a guardian appointed by the Court under the Guardians and Wards Act and the sale having been

made without the sanction of the Court. The Full Bench was pleased to hold that an unlawful sale by a de facto guardian would not bind the minor,

while such a sale by a guardian appointed by the Court under the Guardians and Wards Act, even if he had conveyed the property without the

sanction of the Court, the same would at best be voidable one and not void ab initio. Inasmuch, as the whole question involved in this case was

whether the sale by the first defendant herein under Ex.A-4 in favour of the sister of his own second wife being opposed to the very principle

relating to the sale of a minors property by a guardian, even, by applying the Full Bench judgment reported in Mir Ghulam Hussain Sahib Vs.

Ayesha Bibi and Others, it could be equated to the rating that an unlawful sale by a de facto guardian, would not bind the minor. It can be held that

Ex.A-4 will not bind the appellant as held by the Full Bench. Therefore by applying the principles set out by the Full Bench of this Court, the

transaction made under Ex.A-4 becomes a void transaction. Consequently, it will have to be held that the appellant having filed the suit within 12

yeas period, the suit was very much maintainable in law. Consequently, the appellant is entitled to claim for her 1/2 share in the suit properties by way of partition and a decree to that extent is granted in her favour. We are therefore obliged to set aside the decree that has been held against the appellant and remand the matter back to the trial Court for taking necessary final decree proceedings in favour of the appellant in respect of the shares to be allotted to her.