

(2003) 07 MAD CK 0197

In the Madras High Court

Case No : L.P.A. No. 67 of 1997 and C.M.P. No. 5970 of 1997

A.R. Deivasigamani Mudaliar

APPELLANT

Vs

T.N. Somasundara Nadar (died) and Others

RESPONDENT

Date of Decision : 09-07-2003

Acts Referred:

Guardians and Wards Act, 1890 — Section 19, 27, 29
Hindu Minority and Guardianship Act, 1956 — Section 6
Limitation Act, 1963 — Section 21

Citation : (2003) 3 LW 510 : (2003) 91 MLJ 3 : (2003) 4 RCR(Civil) 510

Hon'ble Judges : R. Jayasimha Babu, J;N.V. Balasubramanian, J

Bench : Division Bench

Advocate : V. Santhanam, for the Appellant; N.S. Varadachari, for R2 to R5, for the Respondent

Final Decision : Dismissed

Judgement

N.V. Balasubramanian, J.—This Letters Patent Appeal is preferred against the judgment and decree passed by a learned Single Judge of this Court in A.S. No. 732 of 1981 dated 11.3.1997 dismissing the appeal and confirming the judgment and decree passed by the First Assistant City Civil Judge, Chennai dismissing the suit in O.S. No. 3614 of 1971 on his file.

2. The plaintiff who lost his case before the trial Court as well as the learned Single Judge of this Court is the appellant herein. The first respondent herein is the first defendant in the suit and he is the purchaser of the suit property by a sale deed dated 11.6.1956 and the suit has been filed for the cancellation of the said sale deed and for declaring the sale deed to be collusive, fraudulent, mala fide and not binding on the plaintiff and for other incidental reliefs.

3. The purchaser of the suit property, viz., the first defendant died during the pendency of the appeal and his legal representatives have been impleaded as respondents 2 to 5 by order dated 25.2.2003. Apart from the first defendant, who is the purchaser of the suit property, the other parties to the suit are the

second defendant who is the father of the plaintiff and the third defendant who is his mother.

4. The short facts that are necessary for the disposal of the appeal are that the plaintiff, who is the appellant herein, has filed a suit for cancellation of the deed of sale dated 11.6.1956, inter alia, on the ground that the suit property was sold by his mother when he was a minor and she was not competent during the lifetime of father to act as the guardian of the plaintiff and the debts for the discharge of which the property was sold were avyaviharika debts and not binding on the plaintiff. He also raised a plea that the deed of sale was executed in a collusive and fraudulent manner between the purchaser of the property and the defendants 2 and 3 and the property was sold at much below the market price of the property. Hence, the suit has been filed for cancellation of the sale deed dated 11.6.1956.

5. In our view, it is not necessary to set out the details of the objections raised by the defendants in the written statement as well as the oral evidence in extenso as they have been considerably dealt with by the trial Court in two instances and by learned Judges of this Court twice.

6. The suit was originally dismissed by the City Civil Court, Chennai, by judgment dated 3.1.1973 against which an appeal was preferred before this Court in A.S.No. 741 of 1974 and a learned Judge of this Court remitted the matter to the trial Court to find out whether the sale in favour of the first defendant would be binding on the plaintiff and if so, to what extent and also to consider the question whether the suit property is a self-acquired property or joint family property. After the remand, the plaintiff has examined himself apart from examining another witness on his side, P.W.2 and the first defendant has examined himself as D.W.1 and on behalf of the plaintiff, Exs.A-4 to A-6 were marked and on behalf of the first defendant, Exs.B-27 to B-32 were marked. Learned First Assistant Judge, City Civil Court, Chennai held that the suit property is a joint family property and there was no collusion between the purchaser of the property and the defendants 2 and 3. He held that the plaintiff has failed to establish that the sale in favour of the first defendant was vitiated by fraud and collusion. He also held that the plaintiff is not entitled to question the sale deed after accepting the benefits conferred upon him by the sale deed. Learned First Assistant Judge held that the debts referred to in the deed of sale are not avyaviharika in nature and the plaintiff is not entitled to the relief of cancellation of the sale deed. In this view of the matter, learned First Assistant Judge dismissed the suit. As against the judgment and decree, an appeal was preferred.

7. A learned Judge of this Court has considered the matter in great detail and held that the father himself has ratified the action of the mother acting as guardian and the claim of the appellant/plaintiff that the sale was illegal for want of permission from the Court could not be accepted. Learned Judge considered the evidence on record and held that the father has permitted the mother to act as the guardian on all occasions and hence, it is not open to the appellant to

contend that the mother could not act as a guardian. He also found that the appellant has not examined his mother and it is not the case of the appellant that the mother has acted against his interest. He also found that the father was a party in all the documents which were relied upon and he has not stated anything against his wife acting as the guardian of the minor. Learned Judge rejected the contention raised on behalf of the appellant that the mother cannot act as a guardian when the father was alive taking into consideration the fact that the alienation was made by the mother under the provisions of the Guardians and Wards Act, 1890 as the sale deed was executed prior to the Hindu Minority and Guardianship Act, 1956 came into force. He also held that it cannot be stated that the property was sold for inadequate consideration. He held that there is nothing to show that the first defendant has acted dishonestly with a view to get the sale deed in his favour. He ultimately held that it cannot be stated that the plaintiff had no obligation to discharge the debts and the sale deed contains the details of payments of money and the payments have been proved by Exs.B-18 to B-21 and the part of the sale consideration was utilised for the benefit of the plaintiff and having enjoyed the benefits, the plaintiff cannot be allowed to say that the sale deed is not a valid one at a later stage. Learned Single Judge anguished that this is one of the usual litigations filed by a party challenging the sale made by the parents with the encouragement and active support of the parents. In this view of the matter, learned Judge accepted the findings of the trial Court and dismissed the appeal. It is against the judgment and decree of the learned Judge, the present appeal has been preferred.

8. Since it is a case of cancellation of the deed of sale dated 11.6.1956, it is necessary to refer to the terms of the deed of sale. The sale deed was executed on 11.6.1956 by the plaintiff's father, V.A. Rathinam alias V.A. Rajarathnam Mudaliar (1), his mother Kuppammal (2) and the plaintiff represented by his mother and guardian Kamalammal (3). The recitals in the deed of sale show that the plaintiff's grandfather, V. Arumuga Mudaliar along with his son executed a simple mortgage deed in favour of the first defendant, the purchaser of the property on 5.5.1953 for a sum of Rs. 1,500/- carrying interest at 12% per annum. One G. Venkanna Chowdhry, another creditor of Arumuga Mudaliar, filed a suit in O.S. No. 1667 of 1950 on the file of the City Civil Court, Madras for recovery of the amount due on a promissory note executed by Arumuga Mudaliar and his son and the said Venkanna Chowdhry obtained a decree against them for a sum of Rs. 1540/- with interest at 6% on 24.8.1951. The first defendant, the purchaser of the property, got assignment of the decree. Thereafter, the purchaser took steps to bring the property for sale in execution of the decree in O.S.No. 1667 of 1950 and brought the property for sale through Court thrice. Finally, the City Civil Court, Madras ordered the sale of the property with the reserve price reduced to Rs. 5500/- subject to the mortgage debt. Apart from the above debts, Arumuga Mudaliar was also heavily indebted to others as he had borrowed loans from other third parties also. He mortgaged the property in

favour of one Ramanatha Iyer on 3.11.1949 and also obtained loans from Mambalam Co-operative Society of various sums and the loans were finally discharged. The said Ramanatha Iyer also brought the property for sale as evident from Ex.A-2. Apart from that, the property was brought to sale in public auction sale thrice in execution of the decree in O.S. No. 1667 of 1950 and the City Civil Court ordered sale of the property with the reserve price reduced to Rs. 5500/-. It is relevant to mention here that on three occasions the sale did not fructify and hence the City Civil Court fixed the reserve price as low as Rs. 5500/-. In the circumstances, the suit property was sold by the plaintiff's father, the plaintiff's grandmother and by the plaintiff represented by his mother. The circumstances clearly establish that there was a clear legal necessity on the parties and the property was sold to discharge the debts of the family and to discharge the debts of Arumuga Mudaliar.

9. There is no dispute that the recitals in the deed of sale dated 11.6.1956 are correct and true. The first defendant has also established by relevant documentary evidence the existence of the debts on the property and the personal debts of Arumuga Mudaliar for which proceedings were taken to bring the property for sale. As a matter of fact, the plaintiff has not let in any evidence to show that the recitals found in the sale deed dated 11.6.1956 are not true. Therefore, it must be held that the property was sold for legal necessity. There is also no dispute about the fact that the suit property was a joint family property of Arumuga Mudaliar and the finding of the City Civil Court rendered after the remand has not been seriously challenged before the learned Judge and also before this Court. Therefore, it must be held that the guardian of the minor has acted in a reasonable manner in selling the property and she has taken reasonable and proper care for the protection of the property of the minor and if the property had not been sold, the property would have been brought to sale in public auction and the property would have been sold for a lesser price.

10. One of the submissions of Mr. V. Santhanam, learned counsel for the appellant is that Arumuga Mudaliar, plaintiff's grandfather was declared as an insolvent in I.P. No. 104 of 1952 by order of this Court dated 2.2.1953 and his property was ordered to vest with the Official Assignee and the sale of his interest in the suit property by the plaintiff's father, the plaintiff's grandmother and the plaintiff represented by his mother is invalid as there is nothing to be sold. He referred to paragraph-9 of the plaint wherein an averment regarding the insolvency proceedings has been made. We find that though the plaintiff has raised a point regarding the insolvency proceedings in the plaint, there is no evidence let in by him to show that Arumuga Mudaliar was declared insolvent and during the period when he was insolvent, the suit property was sold. Apart from the lack of evidence, we find no such arguments have been advanced before the trial Court or before this Court when the matter was considered by the learned Judges of this Court twice.

11. Though this argument is liable to be rejected on the ground of lack of

evidence, however, we have perused the original records in I.P.No. 104 of 1952 on the file of this Court. It is, no doubt, true that proceedings were taken against Arumuga Mudaliar by the petitioning creditor, Raval & Co., by its partner P.M.Raval in I.P.No. 104 of 1952 and Arumuga Mudaliar was set ex parte and declared insolvent by order of this Court dated 2.2.1953. Moreover, that ex parte order was set aside by this Court, by order dated 24.3.1953 and ultimately we find from the original records that the amount due to the petitioning creditor was paid and accordingly, by order dated 27.4.1953, the insolvency proceeding in I.P.No. 104 of 1952 was dismissed. Therefore, on 11.6.1956 when the sale deed was executed, no insolvency proceeding was pending against Arumuga Mudaliar, nor he was a declared insolvent. Apart from that, Arumuga Mudaliar himself died on 2.8.1953 as seen from the sale deed. Therefore the proceedings in I.P. No. 104 of 1952 has no relevance. Further, the plaintiff has not raised any such argument before the trial Court as well as the learned Judge of this Court. The proceedings in I.P.No. 104 of 1952 would show that Arumuga Mudaliar was heavily indebted and the family was liable to pay the debts of Arumuga Mudaliar.

12. The submission of Mr. V. Santhanam, learned counsel for the appellant is that the mother of the plaintiff cannot act as a guardian when the father was alive and therefore the sale by the mother is invalid. This contention was rejected both by the trial Court and the learned Judge. We find from the sale deed dated 11.6.1956 that the father of the plaintiff, Rajarathnam Mudaliar was a party to the sale deed and he was a consenting party. We hold that when the father was a party to the same sale deed, it must be taken to mean that he was aware that his wife was acting as natural guardian of the minor and it must be presumed, in the absence of any contra evidence in this case, that he has permitted his wife to act as the natural guardian of his minor son.

13. Apart from the deed of sale, there are several documentary evidence to show that the plaintiff's mother has acted as natural guardian of the plaintiff in several transactions. In the release deed dated 5.9.1953 the plaintiff's father has released his interest in the suit property in favour of the plaintiff and in the deed, he has stated that the plaintiff's mother should act as guardian of the minor son. Apart from the deed of release, there are several documents where the mother of the plaintiff has acted as guardian on so many occasions. As rightly observed by the learned Judge, no single occasion has cited before the Court to show that the father of the plaintiff has acted as guardian of the minor. The notice issued on behalf of the minor, Ex.B-10 and the claim petition filed before the Court, Ex.B-12 show that the mother has acted as guardian of the minor. These were all proceedings before the Court in which the father of the plaintiff was a party apart from the deed of release in Ex.A-1 where the father has appointed the mother as guardian. Learned Judge referred to Exs.B-13 and B-19 to B-22 wherein the mother has acted as guardian of the plaintiff. As rightly observed by the learned Judge, it is not the case of the plaintiff that the mother has acted against his interest, but his only case is that his mother is an illiterate and she had no capacity to understand the nature and scope of the transaction, but the plaintiff

has not established his case that his mother is an illiterate as he has not examined his mother or his father on his side. Therefore, on the facts of the case, it is clear that the mother of the plaintiff has acted as guardian in all the transactions dealing with the property and his father has not acted as a guardian even in a single instance.

14. Apart from the factual position, the Supreme Court in *Jijabai Vithalrao Gajre Vs. Pathankhan and Others*, held that mother can act as natural guardian and the Supreme Court held as under:-

" We have already referred to the fact that the father and mother of the appellant had fallen out and that the mother was living separately for over 20 years. It was the mother who was actually managing the affairs of her minor daughter, who was under her care and protection. From 1951 onwards the mother in the usual course of management had been leasing out the properties of the appellant to the tenant. Though from 1951 to 1956 the leases were oral, for the year 1956-57 a written lease was executed by the tenant in favour of the appellant represented by her mother. It is no doubt true that the father was alive but he was not taking any interest in the affairs of the minor and it was as good as if he was non-existent so far as the minor appellant was concerned. We are inclined to agree with the view of the High Court that in the particular circumstances of this case, the mother can be considered to be the natural guardian of her minor daughter. It is needless to state that even before the passing of the Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956) the mother is the natural guardian after the father. The above Act came into force on August 25, 1956 and u/s 6 the natural guardians of a Hindu minor in respect of the minor's person as well as the minor's property are the father and after him the mother. The position in the Hindu Law before this enactment was also the same."

15. The Supreme Court in *Ms. Githa Hariharan and Another Vs. Reserve Bank of India and Another*, considered the expression, "guardian" as well as "natural guardian" and section 6 of the Hindu Minority and Guardianship Act, 1956 and held as under (paras 7 to 10 and 16):-

"7. The expression "natural guardian is defined in section 4(c) of HMG Act as any of the guardians mentioned in section 6 (supra). The term "guardian" is defined in section 4(b) of HMG Act as a person having the care of the person of a minor or of his property or of both, his person and property, and includes a natural guardian among others. Thus, it is seen that the definitions of "guardian" and "natural guardian" do not make any discrimination against mother and she being one of the guardians mentioned in section 6 would undoubtedly be a natural guardian as defined in section 4(c). The only provision to which exception is taken is found in section 6(a) which reads "the father, and after him, the mother" (underlining ours). That phrase, on a cursory reading, does give an impression that the mother can be considered to be natural guardian of the minor only after the lifetime of the father. In fact that appears to be the basis of

the stand taken by the Reserve Bank of India also. It is not in dispute and is otherwise well settled also that welfare of the minor in the widest sense is the paramount consideration and even during the lifetime of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of Court, where to do so would be in the interest of the welfare of the minor.

8. Whenever a dispute concerning the guardianship of a minor, between the father and mother of the minor is raised in a Court of law, the word "after" in the section would have no significance, as the Court is primarily concerned with the best interests of the minor and his welfare in the widest sense while determining the question as regards custody and guardianship of the minor. The question, however, assumes importance only when the mother acts as guardian of the minor during the lifetime of the father, without the matter going to Court, and the validity of such an action is challenged on the ground that she is not the legal guardian of the minor in view of section 6(a). In the present case, the Reserve Bank of India has questioned the authority of the mother, even when she had acted with the concurrence of the father, because in its opinion she could function as a guardian only after the lifetime of the father and not during his lifetime.

9. Is that the correct way of understanding the section and does the word "after" in the section mean only "after the lifetime"? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender-equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e., six years after the Constitution. Did the Parliament intend to transgress the constitutional limits or ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on grounds of sex? In our opinion - No. It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction, which may be open, the statute remains within the constitutional limits, the Court will prefer the latter on the ground that the Legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions.

10. We are of the view that the section 6(a) (supra) is capable of such construction as would retain it within the Constitutional limits. The word, "after" need not necessarily mean "after the lifetime". In the context in which it appears in section 6(a) (supra), it means "in the absence of", the word "absence" therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognised

natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of harmonious construction of sections 4 and 6 of HMG Act, without causing any violence to the language of section 6(a).

16. While both the parents are duly bound to take care of the person and property of their minor child and act in the best interest of his welfare, we hold that in all situations whether the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother, can act as natural guardian of the minor and all her actions would be valid even during the life time of the father, who would be deemed to be "absent" for the purpose of section 6(a) of HMG Act and section 19(b) of GW Act."

16. Mr. Justice A. Alagiriswami, J. (as His Lordship then was) in Mayilswami Chettiar Vs. Kaliammal and Others, held that the mother can be the natural guardian and His Lordship held as under:-

" Therefore the question is whether even where there is a father for the minors alive, the mother can acting as de facto guardian of the minors, alienate their property for necessity. Authorities seem to favour the view that she can. The earliest case is the one reported in Arunachala Reddi v. Chidambara Reddi 1902) 13 MLJ 223. In that case there was a testamentary guardian appointed for the minor. But the minor's mother alienated the minor's property. It was held that the alienation of minor's estate made by the natural and de facto guardian will be valid if for necessity, notwithstanding that there was a testamentary guardian in existence (especially where such testamentary guardian had acquiesced in the alienation). In this case also the father has attested the mortgage deed and the management of the property having all along been with the mother, the father should also be deemed to have acquiesced in the mortgage. In Kundal Lal v. Beni Prasad (1931) 137 I.C. 115, the mother of the minors was alive. But for some reason or other she did not function as a guardian and their estate was managed by their uncle. An alienation made by him was held valid. Reliance was placed, on behalf of the appellant, on the decision reported in Nalannad alias Palliprom alias Thattukkasseri Manakkal Narayanan Nambudri and Another Vs. Kanhirampare Ravunni Nair and Another, . In that case it was held that a step-mother who was managing the household and looking after the minors had no right to mortgage the properties of the family for family necessity. In fact, at page 689, it is mentioned that it was not contended that the de facto guardianship of the step-mother gave her any right to mortgage the estate. This decision has been criticised and differed from by a Bench of this Court in the decision reported in Vermulapalli Seetharamamma and Others Vs. Maganti Appiah and Another, . Referring to the decision in Nalannad alias Palliprom alias Thattukkasseri Manakkal Narayanan Nambudri and Another Vs. Kanhirampare

Ravunni Nair and Another, , it was said as follows:

"I would take leave to say that if the parties were governed by the Hindu law, I should have thought it might have been well contended that the mortgage, if for necessity, could be upheld".

At page 776, it is mentioned that:

"Alienations by de facto guardians of Hindu minors have come up very frequently before Courts, and our attention has not been directed to any decided case in which it has been held that such an alienation was per se void, apart from any question as to whether it was for legal necessity or not".

In that judgment the decision in B. Tirapayya Minor by guardian T. Ganjayya Vs. Mallidi Ramaswami, , where it was held that the natural mother was a "lawful guardian" for the purpose of section 21 of the Limitation Act, even though there was a testamentary guardian named in the will of the adoptive father who was unwilling to act, was also noticed. This decision in B. Tirapayya Minor by guardian T. Ganjayya Vs. Mallidi Ramaswami, , may well be compared with the decision already referred to and reported in Arunachala Reddi v. Chidambara Reddi 1902) 13 MLJ 223. It has been finally held that Seetharamamma's case (1925) 50 MLJ 689: ILR 49 Mad.768).

"..... the right of a de facto guardian to deal with the property of a Hindu minor has been recognised by our Courts ever since the decision of the Privy Council in Hanuman Persaud Panday v. Mst. Babooee Munraj Kunweree (1856) 6 MIA 393), provided the alienation was for necessity."

This it is amply clear that even when there is a legal guardian in existence, any alienation of minor's property by a de facto guardian would be valid if it is for necessity."

17. The above decisions are all authorities for the proposition that even when a legal guardian is in existence, any alienation of property by a de facto guardian is valid, if it is for necessity. We hold that there was necessity to sell the property and the mother has acted as guardian of the minor and the father has relinquished his interest in the property in favour of the minor son and hence, the alienation by the mother acting as natural guardian of the minor is valid.

18. A Division Bench of this Court in JAGANNATHAN, K. v. A.M.VASUDEVAN CHETTIAR 2001 (2) CTC 641 held that mother can act as guardian in the absence of father and where the father is not in charge of affairs of minor either because of his indifference or because of agreement between the father and the mother. In that case, the father was a party to the suit for partition and he did not file any written statement, nor did depose before the Court and there were facts pointing out that the mother could act as guardian. The facts of that case are almost similar to the case on hand. Here also, the father was a party in the deed of sale. He was a party to the transaction and he was a party to the suit and there are evidence to show that the mother has acted as a guardian of the

plaintiff when he was a minor and his father authorised the mother to act as guardian of his minor son and he has not filed any written statement before the Court and he did not depose before the Court. In view of all the facts, there is nothing illegal on the part of the mother having acted as guardian of the minor.

19. Learned counsel for the appellant relied upon the decision in SUNDARAMOORTHY v. SHANMUGHA NADAR 1980) 1 MLJ 486 where a learned Single Judge of this Court held that under the Hindu Minority and Guardianship Act, 1956, if father is alive, he is the only person who can deal with the property of the minor from whichever source the minor gets the property. Learned counsel also referred to the decision of this Court in T.M.KRISHNAMOORTHY PILLAI v. MANGALAM 1998 (1) HLR 418 wherein it is held that sale of the property belonging to the minor by the mother is void and the attestation by the father could not make the sale as valid. We are of the view that the above decisions are distinguishable, in view of the decision of the Supreme Court in Ms. Githa Hariharan and Another Vs. Reserve Bank of India and Another, where the Supreme Court held that mother can act as natural guardian as both the parents are bound to take care of the person and property of the minor and where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as natural guardian of the minor and all her actions would be valid even during the lifetime of the father.

20. We have already found on the facts of the case that the father was highly indifferent and the mother took care of the plaintiff and she was in charge of the affairs of the minor son and his property and the father also permitted the mother to act as guardian of the minor and the fact that he has not raised any protest either at the time of sale deed or at the time of suit clearly shows that the mother was acting as a natural guardian of the plaintiff who was a minor. Hence, the abovesaid two decisions relied upon by the learned counsel for the appellant are not applicable.

21. Learned counsel also relied upon the decision of this Court in CHINNA ALAGUMPERUMAL KARAYALAR v. VINAYAGATHAMMAL 55 MLJ 861 and submitted that the mother cannot be regarded as de facto guardian. This decision is not applicable as it is not the case of an isolated instance where the mother has acted as guardian of the minor. On the other hand, there is a continuous course of action by the mother acting as the guardian of the minor and the father was indifferent and he consented for the mother acting as guardian and hence, the decision in Chinna Alagumperumal Karayalar's case 55 MLJ 861 is not applicable to the facts of the case.

22. Learned counsel for the appellant submitted that the sale of the joint family property by the mother is invalid as permission of the Court was not obtained prior to the sale of the property. Learned counsel referred to the decision of the

Supreme Court in the case of PANNI LAL v. RAJINDER SINGH & ANOTHER 1994 1 L.W.40 and the decisions of this Court in Dhanasekaran Vs. Manoranjithammal and others, and GOVIND DAS PURUSHOTHAM DAS v. SHAW WALLACE & CO.,LTD. 2001 (1) CTC 601 (in which one of us was a party). We find from the plaint that the plaintiff has not raised any such contention that prior permission of the Court was not obtained for the sale of the property, nor there is any evidence on this aspect. It was also not brought to the notice of the trial Court that the prior permission of the Court was not obtained for the sale of the property. The contention raised that the sale deed is void as prior permission of the Court was not obtained is liable to be rejected on this short ground as the plaintiff has not raised the point in the plaint. We however find that the learned Judge proceeded on the basis that it is an admitted case that no prior permission of the Court was obtained before the sale of the property. Even assuming that the plaintiff is entitled to raise the point, we find that the deed of sale was executed on 11.6.1956 and during the relevant period, the provisions of the Guardians and Wards Act, 1890 would apply. The expression, "guardian" is defined in section 4(2) of the said Act to mean a person having the care of the person of a minor or of his property, or of both his person and property. Section 27 of the said Act provides that it is the duty of the guardian of the property of a minor to deal with the property as carefully as a man of ordinary prudence would deal with it if it were his own and the guardian is empowered to do all reasonable acts which are proper for the realisation, protection or benefit of the property. Section 28 deals with the powers of testamentary guardian and we are not concerned with the same. Section 29 deals with the limitation of powers of guardian of property appointed or declared by the Court and the section reads as under:-

" 29. Limitation of powers of guardian of property appointed or declared by the Court - 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."

23. A careful reading of section 29 of the Guardians and Wards Act shows that the section applies to a guardian appointed by will or other instrument and it deals with the person appointed and declared by the Court to be guardian of the property of a ward and such a guardian without the prior permission of the Court shall not transfer by way of sale or exchange any part of the immovable property of the minor. In other words, Section 29 deals with the disposal of the immovable property by the guardian appointed by the Court. As far as natural guardians are concerned, they derive the power of alienation under the personal law and

therefore Section 29 which deals with the guardians appointed and declared by the Court, whether permanent or temporary, has no application to the case of sale of property of minor by natural guardian.

24. As far as Section 27 of the Guardians and Wards Act is concerned, the guardian is expected to act as carefully as a man of ordinary prudence would deal with it if it were his own and that is the parameter to judge his conduct or act in dealing with the minor's property. We are of the view that the natural guardian should satisfy the test that he has acted as a reasonable and prudent man in dealing with the minor's property.

25. In Nagammal and Others Vs. Varada Kandar and Others, this Court held that the validity of the alienation by a guardian of a minor must be judged on the circumstances obtaining on the date of transaction and not on events which subsequently happened. This Court also held that the only question that has to be considered is whether in the circumstances that existed at the time of alienation, the act would be regarded as a proper one by men of ordinary prudence and in dealing with the property of a ward, considerable latitude should be allowed for the exercise of the guardian's discretion. The Court also held that it is not necessary to prove that the creditors were actually making demands before it could be found that there was a pressure on the estate and it would be sufficient to show that there existed at the time of alienation debts which were binding on the minor which could not be discharged from the surplus income of the property.

26. The same view was reiterated by this Court in S.V.GOPALAKRISHNAN v. VENUGOPAL (1976) 2 MLJ 134 and A. Pattammal alias Pachaiyammal Vs. Nagarajan and Others, . This Court in the latter case held as under:-

"One purpose of the sale was to avoid paying interest and secondly there were in the instant case no other means by which the mortgage debt could be paid off. In such circumstances it could not be said that there was no legal necessity to sell the entirety of the property. It was an indivisible property subject to a mortgage and in the absence of other means by which the mortgage could be paid off the only way in which such a debt could be discharged was by the sale of the property. Therefore the sale could not be questioned by the sons."

27. This Court in SITHALINGA v. ARDHANARI CHETTY AIR 1939 Mad 645 held that the guardian although occupies a position which is fiduciary in character he cannot be held to be debarred from acquiring immovable property on behalf of his ward and the only standard by which he has to be judged is that of a prudent man acting carefully with his own money and if a guardian is found to have acted according to this standard he must be held to have done all that was required of him. Applying the tests, we find that the mother has acted as a normal and prudent man would be, and if the property had not been sold, it would have been sold in the public auction. There was an existence of family debt and to discharge the debt the property was sold. We hold that the conduct exhibited by the

mother is that of a normal and prudent man.

28. Learned counsel for the appellant also referred to the decision of the Supreme Court in *Kartar Singh (Dead) by Lrs. and Others Vs. Harbans Kaur (Smt)*, and submitted that under the Guardians and Wards Act the estate of the minor cannot be transferred without prior permission of the District Court. This case has no application as the sale had taken place on 11.6.1956 before the Hindu Minority and Guardianship Act, 1956 came into force on 25.8.1956.

29. Learned counsel also relied upon the decision of the Supreme Court in *Sri Chandre Prabhuji Jain Temple and Others Vs. Harikrishna and Another*, . This decision has no application at all as the Supreme Court was dealing with the case of appointment of a guardian appointed in a testamentary instrument and sanction was obtained without disclosing the existence of the will. The Supreme Court held that where the guardian was appointed by way of a will, the powers of the guardian are expressly restricted by the will and the Court must be apprised 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. This case has no application at all as there is no fraud was played on the court by not disclosing the existence of any will.

30. Since it is not a case of testamentary guardian section 28 does not apply and it is also not a case falling u/s 29 of the Guardians and Wards Act as it deals with the guardians appointed by the Court. Hence, prior permission of the Court is not necessary, because on the facts of the case section 27 of the Guardians and Wards Act alone would apply. We have already held that there were joint family debts existing and there was pressure from the creditors on the estate and the property was about to be sold in public auction sale at a low price and in the circumstances the sale was effected. The recitals of the deed show that there were no other means to discharge the debts. Hence, it must be held that the guardian has acted in a manner which a normal and prudent man would have done in selling the property. It is also relevant to notice that the plaintiff has not questioned the act of the mother that she has acted against his interest. As far as the decisions relied upon by the learned counsel for the appellant are concerned, they are not applicable as they deal with the powers of the guardian under the provisions of the Hindu Minority and Guardianship Act, 1956 which came into force on 25.8.1956 and before that date the sale in question had taken place and hence, the decisions relied upon by the learned counsel for the appellant, rendered under the provisions of the Hindu Minority and Guardianship Act are not applicable on the facts of the case.

31. We have also noticed the decision of this Court in *SEETHA v. NARASIMHA* ILR 1945 Mad 568 wherein this Court held that the Court has the power to appoint a guardian for the joint family properties of the minor members. A similar view was taken by the Bombay High Court in *Rakhmabai Kachu Ghadge Vs. Sitabai Kachu Ghadge*, and the Bombay High Court held that there is nothing to prevent the Court from appointing an officer of the court as guardian of the property of the

minor and the mere fact that that the widow has an interest in the joint family property gives her no right to say that in such a case a guardian cannot be appointed of the property of the minor. These decisions are not applicable as they deal with the powers of the Court to appoint a guardian of the minor. It is axiomatic that it is not open to a third party to approach the Court seeking appointment of a guardian of the minor's property. We have already held that under the Hindu Law, the mother of the minor son can be natural guardian and in the instant case, the mother has acted as natural guardian of the plaintiff when he was a minor. The mother of the plaintiff has acted as guardian of the minor particularly in the execution of the sale deed in question in which the father was a party and he has not questioned the capacity of the mother to act as guardian of his minor son either before or at the time or after the sale deed and also during the pendency of the suit before the Court.

32. Learned counsel for the appellant next contended that under the deed of release the father has released only his interest in the joint family property and therefore the mother could have acted as guardian of the minor only respect of a half share in the property and not for the entire property. We find that the plaintiff has not raised any such contention in the plaint and no evidence has been let in and no arguments have been addressed before the Court at any point of time. Hence, we are unable to entertain the submission of the learned counsel for the appellant. Even assuming that the counsel for the appellant is entitled to raise the same, the argument has no substance as the father was a party to the deed of sale.

33. Learned counsel further submitted that the property was sold for inadequate price. This contention is also not acceptable as the plaintiff has not established by evidence that the property was sold for inadequate consideration.

34. Learned counsel for the appellant also referred to the deed of sale and submitted that apart from the payments made to the creditors, a sum of Rs. 4,500/- was retained in the hands of the purchaser/first defendant and the said sum along with interest should be paid to the minor on his attaining majority. He submitted that the sum has not been paid. Though this point was not raised earlier and the plaintiff did not let in any evidence to show that the sum of Rs. 4,500/- with interest was not paid to him, counsel for the respondents has made a fair offer stating that under the deed of sale a sum of Rs. 4,500/- is payable to the plaintiff on his attaining majority and the date of birth of the plaintiff as seen from his evidence is 16.9.1950 and the amount is payable from 16.9.1968. Counsel submitted that the respondents are willing to pay the amount with interest at 24% p.a. from 16.9.1968 till 16.3.2003 and the amount comes to Rs. 42,830/- and the respondents are prepared to pay a sum of Rs. 50,000/- in toto. We find that the offer made by the learned counsel for the respondents is fair. Accordingly, the respondents 2 to 5 are directed to deposit a sum of Rs. 50,000/- to the credit of O.S. No. 3614 of 1971 on the file of First Assistant City Civil Judge, Chennai within a period of three months from the date of receipt of a

copy of the judgment. If the respondents fail to deposit the sum of Rs. 50,000/-, the plaintiff will be entitled only to the sum of Rs. 50,000/- along with interest thereon at 24% p.a. from this date till the date of payment.

35. There is another hurdle also for for the appellant which disentitles the plaintiff/appellant to claim the relief sought for. The suit property was sold and at that time, a sum of Rs. 1655/- was agreed to be deposited for the construction of a building on the land purchased in the name of the plaintiff who was then a minor. It is stated that a major portion of the consideration was utilised for the acquisition of a house site in the name of the plaintiff and also for the construction of the building on the site. The Supreme Court in the case of Sri Chandre Prabhuji Jain Temple and Others Vs. Harikrishna and Another, held that it is a condition for setting aside a disposal of immovable property made in contravention of section 28 or section 29 which is voidable u/s 30 of the Guardians and Wards Act that there must be restitution of the benefits received. The plaintiff here have elected to enjoy the benefits conferred under the sale deed and hence, it is not open to him to question the deed of sale.

36. We have carefully gone through the judgment of the learned Judge. We do not find any justifiable reason to differ from the judgment of the learned Single Judge. Accordingly, we dismiss the Letters Patent Appeal subject to the direction that the respondents 2 to 5 shall deposit a sum of Rs. 50,000/- to the credit of O.S. No. 3614 of 1971 on the file of the City Civil Court, Chennai within a period of three months from the date of receipt of a copy of the judgment. No costs. Consequently, C.M.P. No. 5970 of 1997 is closed.