

(1935) 10 MAD CK 0083
In the Madras High Court

Daiva Ammal and Others

APPELLANT

Vs

Selvaramanuja Nayakar and Others

RESPONDENT

Date of Decision : 18-10-1935

Acts Referred:

Citation : AIR 1936 Mad 479

Hon'ble Judges : Madhavan Nair, J

Bench : Division Bench

Judgement

Madhavan Nair, J.—Defendant 1 is the appellant. The appeal arises out of a suit instituted by the plaintiff for a declaration that the decree in O.S. No. 55 -of 1922 on the file of the Additional Sub-Court of Tinnevely and execution proceedings therein, the decree in O.S. No. 48 of 1915 on the file of the Sub-Court of Tuticorin and the decree in O.S. No. 35 of 1916 on the file of the Tinnevely Sub-Court are not binding on him and his half share of the suit properties and for partition of the said half share by metes and bounds and for delivery of the same to him with future profits and coats. The lower Court gave the plaintiff a declaration that the decree in O.S. No. 55 of 1922 was not valid and binding on him and his half share in the plaint first and third schedule properties and in item 15 of the 2nd schedule. In this appeal we are concerned only with the first and third schedule properties. The result of the decree is, in the words of the learned Judge, the parties will be relegated to the position which they occupied before the decree in O.S. No. 55 of 1922 was passed. No special declaration was made with respect to the decrees in O.S. No. 48 of 1915 and O.S. No. 35 of 1916 as the declaration made with respect to O.S. No. 55 of 1922 renders reliefs as will appear from the facts with respect to them unnecessary. The present appeal has been filed by defendant 1 and since she died during the course of the appeal her legal representatives are the appellants before us.

2. The facts are these: The plaintiff and defendant 8 are the sons of one Veerappa Naick who died on 3rd November 1912. At the time of his death defendant 8 was about 14 years old and the plaintiff was aged nearly 4 years.

Two days before his death, on 1st November 1912, Veerappa executed a will Ex. 4. In it he appointed Krishnaswami Naicker, alleged to be either a son-in-law of the deceased or his nephew, as their guardian. Under the will one share of the properties was given to him and the other two shares to his minor sons. Krishnaswami Naicker was also asked to conduct as he likes "the cotton business which we are conducting in our family in common and other kinds of business which could be done in future for this family and all other affairs" and to add "the amounts of loss and profit derived therefrom to the family common properties." He was also empowered to "collect the outstandings due in connection with family and due according to his discretion if any sales have to be made for the dues of the family." It may be mentioned here that the trade referred to in the will is a partnership business carried on by Veerappa (the father of plaintiff and defendant 8) and Krishnaswami Naicker (the guardian under the will) along with two strangers Ramaswami Naicker and Muthukrishna Naicker under the vilasam of T.K.B.M. This appears from Exs. 20 and 20-A, books of the South Indian Bank Ltd., Tuticorin branch. From the recitals in Ex. 3, a promissory note, which will be referred to later executed after the death of Veerappa, it would appear that the firm consisted of Krishnaswami Naicker, the sons of Veerappa, and T. Ramaswami Naicker. The names of Veerappa and Muthukrishna Naicker have dropped out. There is no evidence as to whether his business was started by the deceased Veerappa himself or whether it was the family business which was being continued by him.

3. The main declaration asked for in the suit is, as already stated, a declaration that O.S. No. 55 of 1922 is not valid and binding on the plaintiff's half share of the suit properties. That suit arose out of Ex. IT, a hypothecation bond executed by Krishnaswami Naicker over the plaintiff first and third schedule properties for himself and as guardian of his son and the plaintiff in favour of one Kuppu Reddiar on 4th February 1917 for Rs. 22,000. The amount under this document was borrowed to discharge four debts: (1) Rs. 5,350, a decree-debt due to Lakshmana Chettiar, the plaintiff in O.S. No. 35 of 1916 (2), Rs 3,150, a promissory note debt due to one Manickavachaka Adanar, the debt having been incurred to discharge the decree in O.S. No. 48 of 1915 on the file of the Subordinate Judge's Court of Tuticorin; (3) Rs. 13,490 under a promissory note executed for Rs. 10,000 on 24th February 1914 by Krishnaswami Naicker in his individual capacity and as guardian of the plaintiff and defendant 8 who were then minors; and (4) a sum of Rs. 10 received in cash on several occasions. Item 2 and 3 of consideration were left with the mortgagee for discharging those debts and it has been proved that those debts have been discharged by him. The first item of Rs. 5,350 was received from the mortgagee by Krishnaswami Naicker and the debt raised to pay off the decree amount in O.S. No. 35 of 1916 has been discharged with that sum. All these facts are admitted.

4. How the debts the payment of which formed the consideration for Ex. F, came into existence may be mentioned before we take up for consideration the plaintiff's case, (1) One Lakshmanan Chettiar instituted O.S. No. 35 of 1916

against Krishnaswami Naicker (defendant 1), the present plaintiff (defendant 3,) the present defendant 8 (defendant 2) and some other defendants on a promissory note executed by Krishnaswami Naicker on behalf of defendant 3 therein (the present plaintiff) and others. The money was found to have been borrowed for the purposes of the joint family of defendants 1 to 5 and 7 in that suit and for its trade. The plaintiff and his brother are said to have enjoyed the benefit of this debt. A decree was passed in the suit which made the family property of the present plaintiff and defendant 8 liable for the amounts. The decree debt was discharged by borrowing the sum of Rs. 5,350 from Kuppu Reddiar under two promissory notes Exs. 6 and 6-A executed by the present defendant 8 and Krishnaswami Naicker in their individual capacities. The present plaintiff was represented in that suit by Krishnasawmi Naicker and it is not proved that he did not represent him properly. (2) The present plaintiff, his brother and their deceased father Veerappa had subscribed for one chit in a chit fund concern conducted by one Perumal Naicker and drew the prize money, Krishnaswami Naicker standing as surety. O.S. No. 48 of 1915 on the file of the Subordinate Judge's Court of Tuticorin was instituted by Perumal Naicker against Krishnaswami Naicker, the present plaintiff and defendant 8 for the recovery of the instalments due to the chit fund concern and a decree was passed in favour of the plaintiff in the suit. The present plaintiff was represented in that suit by his brother defendant 8 as the guardian-ad-litem. The decree debt was discharged by money raised under the promissory note Ex. 5 executed by Krishnaswami Naicker and defendant 8. The plaintiff has not adduced any evidence to prove that he was not properly represented in this suit and it is not disputed that the debt under this promissory note is binding on the family as has been found by the lower Court. (3) On 24th February 1914 a promissory note Ex. 3 was executed by Krishnaswami Naicker for himself and as guardian of the plaintiff and defendant 8 by three others for Rupees 10,000. From its recitals we find that it was executed for the principal sum of a prior note executed by the abovesaid Krishnaswami : Naicker and one Rama-swami Naicker on 2nd March 1913 for the purposes of a joint cotton trade conducted by them and by the minor sons of Veerappa under the style of T.K.E.M. at Tuticorin. (4) This item consists of a small sum of Rs. 10 received in cash on various occasions. As there is no evidence regarding the purpose for which this amount was borrowed, the learned Subordinate Judge has found that the debt is not binding on the plaintiff.

5. It was for the payment of the above-mentioned debts that Ex. F was executed by Krishnaswami Naicker on behalf of the plaintiff who was at that time a minor. himself, and his own son. The document was executed in favour of Kuppu Reddiar who assigned it to one Ganesamuthu Pillai. He instituted the suit, O.S. No. 55 of 1922 on the file of the Additional Sub-Court of Tinnevely. The plaintiff's mother was appointed as his guardian in the suit and a decree for the sale of the hypotheca was passed in it. The decree-holder assigned the decree to defendant 1 in the present suit. She executed it and purchased the properties in Court auction in March 1926 and took delivery of the same.

6. The plaintiff who was a minor at the time this decree was passed attacks it as not binding on him on the ground that the guardian who conducted the suit on his behalf was grossly negligent and that if she had conducted it properly the decree would not have been passed against his share of the properties. His attack has proceeded on various lines.

7. He argues that Krishnaswami Naicker had no power to execute the bond Ex. F on his behalf either as testamentary guardian or as his guardian de facto, that there was no necessity to execute it, that the items of consideration mentioned in the bond are not binding on him and that he was not properly represented in suit Nos. 48 of 1915 and 35 of 1916 and also in O.S. 55 of 1922. The learned Judge found that Veerappa had no power to appoint Krishnaswami Naicker as testamentary guardian, the properties dealt with in the "Will" being ancestral, see *Chindambara Pillai v. Rangaswami Naicken* 1919 41 Mad 561, that Krishnaswami Naicker acted as de facto guardian only until December 1916 and not at the date of Ex. F (4th February 1917), that assuming he was a de facto guardian on that date he had no power to conduct the trade on behalf of the family as the trade must be considered to be a new one subsequent to the death of Veerappa, that as such the first and third items of consideration in Ex. F are not binding on the minor that it was not proved for what purpose item 4 though a small sum was received, and that only item 2 of consideration was binding on him. His further findings are that the plaintiff has not produced any evidence to show that he was not properly represented in O.S. Nos. 48 of 1915 and 35 of 1916 and that his guardian was grossly negligent in conducting them. As regards O.S. No. 55 of 1922 the learned Judge found that though the plaintiff was represented by his mother, his guardian did not defend the suit properly and was negligent in not putting forward the pleas available to her and in not preferring an appeal against the decree. In the opinion of the learned Judge the minor might have succeeded in getting his share exonerated from liability if his guardian had adduced all the evidence available to her or if she had appealed against the decree contained in Ex. 1.

8. In appeal the question we have to consider is how far is the above conclusion justified by the evidence. Veerappa and his two sons formed members of a joint Hindu family. Admittedly, Krishnaswami Naicker was not a member of the family; he was only a relation of Veerappa. The properties being ancestral Veerappa had no power to dispose of them by will or to give a share of them to Krishnaswami Naicker. The position that Krishnaswami Naicker was not a properly appointed testamentary guardian may be accepted as correct in accordance with the decisions of this Court. Though not a properly appointed guardian it cannot be disputed that he was acting as the de facto guardian of the minors, The learned Judge himself has found that up till the end of December 1916 he acted as the de facto guardian. The evidence does not make it clear whether he did not act as such subsequent to this date also. The lower Court has dealt with the case on the assumption that Krishnaswami Naicker may be considered to have been the de facto guardian even at the time of Ex. F and the case before us has been argued

also on that basis, In considering whether a proper defence was put up in O. S No. 55 of 1922 or not it is argued that one of the relevant questions would be whether Krishnaswami Naicker as the guardian of the minor plaintiff had power to incur debts items 1 and 3 in connexion with the carrying on of the trade, and if he had not whether that defence was put up in the case.

9. There was a good deal of general discussion at the bar as to whether a "father," a "manager," a guardian" had power to start a new trade for the family or to continue a trade already in existence. For the purposes of this appeal it is not necessary to discuss the cases relating to the powers of a father or those of a manager as we are here concerned only with the powers of Krishnaswami Naicker as a de facto guardian. In *Sokkanadha Vanni Mundar v. Sokkanadha Vanni Mundar* (1905) 28 Mad 344 (followed in *Ramanathan Chetty v. Yegappa Chetty* 1917 30 MLJ 241 this Court has held that where the manager of a joint Hindu family is a member of a trading partnership, the family as a whole does not become a member of the partnership firm and the partnership terminates at his death. In the present case it may be held therefore that after the death of Veerappa the partnership of which he was a member terminated and a new partnership commenced. Evidence shows that the original partnership subsequently consisted of only Krishnaswami Naicker and Rama-swami Naicker : see the recitals in Ex. 3. Muthukrishna Naicker seems to have dropped out. The partnership was still carried on under the vilasam of T.K.R.M. Ex. Q is a promissory note executed on 22nd February 1913 by Krishnaswami Naicker and Ramaswami Naicker for the cotton business which they have been conducting jointly under the vilasam of T.K.R.M. Ex. R is a certified extract of the Suit Register for O.S. No. 1.39 of 1918 on the file of the District Munsif's Court of Tuticorin in which T.K.R.M. firm by Krishnaswami Naicker is the plaintiff and defendant 4 is Ramaswami Naicker. In stating the particulars of claim it is stated that:

The plaintiff and defendant i were trading jointly under the vilasam of T.K.R.M. Defendant 4 did not join the plaintiff, hence he is made a pro forma defendant.

10. The claim was for Rs. 1,264 on a promissory note executed by defendant 1 to defendant 4. Ex. N is a certified copy of the written statement filed by defendants 2 and 3 in that suit. Defendants 1 and 2 are Krishnaswami Naicker and Ramaswami Naicker. Para. 7 of the written statement says:

As the T.K.R.M. shop jointly conducted by defendants 1 and 2 incurred heavy loss and as the partners did not like each other the suit shop could not be conducted further.

11. The recitals of Ex. 3 already referred to (item 3 of consideration for Ex. F) show that it was renewal of a prior note executed by Krishnaswami Naicker and Ramaswami Naicker on 2nd March 1913 for the purpose of the joint cotton trade conducted by them and by the minor sons of Veerappa (plaintiff and defendant 8) under the vilasam of T.K.R.M. According to this evidence the position is this,

that by the death of Veerappa the partnership which he conducted along with two strangers (it is not clear whether it was ancestral or whether it was commenced by himself) came to an end and the guardian appointed by him thereafter carried on the same business for the family in partnership with Ramaswami Naicker alone. Both in law and in fact the partnership after the death of Veerappa was a new one. In *Kakumanu Venkatasuryanarayana Vs. Akuthota Ramayya and Akuthota Venkatasubramanayam, Minor by Guardian*, it was held that a guardian of minors cannot enter into an agreement with a third person which can give the wards the status of partners with that third person and the carrying on a trade is not an act which a guardian of Hindu minors is authorised by law to do, as by its very nature a trade or business might result in a loss and thereby the family properties of the minors might be jeopardised. In this connexion it may be mentioned that the Privy Council decision in *Ramakrishna Muraji v. Ratan Chand* 1931 53 All 190 may support the suggestion that even after the death of the father a partnership that was being carried on by him with another person on behalf of the family may be considered to be the same business and not a new business and that the succeeding manager may carry it on though the point in this form did not arise for decision in that case. However that may be, the position may be accepted that according to strict law Krishnaswami Naicker had no power to continue the cotton trade on behalf of the minors after the death of Veerappa and that they cannot form partners of the firm of T. K.R.M. nor can any debt be borrowed by the said firm so as to bind the minor's properties. If this plea had been put forward it may well be that two of the debts mentioned in Ex. F, that is items 1 and 3, might have been held not binding on the plaintiff and to that extent the suit O.S. No. 55 of 1922 might not have been decreed against his share of the properties. But in this connexion we must not overlook the fact that with respect to O.S. No. 35 of 1916 which relates to one of those items the plaintiff has not been able to show that he was not properly represented in that suit and that his guardian was grossly negligent in defending it.

12. We will now proceed to consider the main question in the appeal, whether in O.S. No. 55 of 1922 the plaintiff was properly represented by the guardian and how far the above conclusion will affect the decision on the point. In support of his allegations that he was not properly represented in the suit the plaintiff has examined his mother P.W. 5 and his junior paternal uncle P.W. 1. That P.W. 5 was appointed guardian of the minor cannot be disputed. Exs. 13 and 13-A are copies of the petition and affidavit presented by her consenting to her being appointed guardian ad-litem of defendant 4 therein, the present plaintiff. Ex. 13 also shows that she was appointed guardian. She says now that she did not give any vakalath in the above suit to Mr. Ganapathi Pillai of Tuticorin or to Mr. M.R. Subbier of Vannarpet who appeared in the case, and denies having "filed any written statement and defended the suit. Her statements are absolutely false. A written statement has been filed in the case and this is signed by vakil Mr. M.R. Subbier. Evidence shows that this vakil appeared at the settlement of issues and

defended the suit. P.W. 1 admits that P.W. 5 represented the plaintiff and engaged a vakil but states that she did not properly defend the suit or prefer an appeal when her vakil advised her to do so. The evidence of those two witnesses is interested. The allegations of P.W. 5 are clearly false. Her own evidence makes it clear. So it cannot be said that the plaintiff was not represented in the suit.

13. The learned Subordinate Judge has also arrived at the same conclusion. To show that the guardian had been negligent in the conduct of the suit two arguments are now advanced : (1) that the guardian did not place all the necessary materials for the conduct of the suit before the lawyer, and (2) that the lawyer did not put forward the defence that the guardian of a minor has no power to embark upon a new trade and incur debts for carrying it on, making them binding on the minor. As regards the first point there cannot be any doubt that if it is satisfactorily proved that all the materials available for the defence were not put before the lawyer the guardian's conduct must be considered to be grossly negligent. In this case it was argued by Mr. Srinivasa Gopalachari for the respondents that three documents Exs. Q, R and M which have been filed for the first time in this case, were not produced in O.S. No. 55 of 1922, that these show that the trade which was being carried on by Krishnaswami Naicker must be considered to be a new one, that if these had been shown to the lawyer he would have raised the contention that a guardian has no power to incur debts in connexion with the trade, it being a new one, and that if that had been done the minor would have been exempted from liability at least with respect to two items of consideration mentioned in Ex. E. We have already referred to the contents of these documents. It is true that these were not produced in the previous suit on behalf of the minor, but that omission in our opinion could not have materially affected the raising of the proper pleas in the defence of the suit.

14. So far as Ex. Q is concerned, the guardian cannot be blamed for not producing it because it was a promissory note executed in favour of a third person and there is nothing to show that she knew of the existence of it. Ex. R and M may be said to stand on a different footing, the one being an extract from a suit register and the other being a written statement. But what could be gathered from them with regard to the nature of the trade that was being conducted by the guardian, could well have been gathered from Ex. 3 which was produced in the previous suit. This relates to item 3 of consideration and the recitals in it, as already stated, show that trade to carry on which the debt was incurred was a new partnership of which the members were Krishnaswami Naicker, Ramaswami Naicker and the two minor sons of Veerappa and not the old partnership in which Muthukrishna Naicker was also a partner. With this fact before him, and with the knowledge that Veerappa had died, the lawyer engaged in the case even without Exs. R and M may well have raised the question how far the partnership after the death of Veerappa be considered to be a new one in law as well as in fact and how far the debts incurred in connexion with the partnership in the altered circumstances will be binding on the minor.

15. The omission to produce these two documents in the previous suit cannot therefore be said to constitute negligence on the part of the guardian as she had already furnished Ex. 3 which was by itself sufficient to enable the pleader to raise the point which it is now suggested he should have raised. The next question is : Would the failure on the part of the lawyer to whom the case had been entrusted by the guardian to raise what appears to be a good point in defending the suit constitute negligence in the conduct of the suit by the guardian ? Ex. 2 is a copy of the written statement filed by the guardian on behalf of the present plaintiff, the minor defendant 4, in that suit, and this is signed by Mr. Subbier. In it he raises the general plea in para. 2:

This defendant and defendants 1 (Krishnaswami Naicker) and 2 do not form members of an undivided family, nor is defendant 1 the guardian of this defendant. Hence defendant 1 had no right to conduct any proceedings so as to be binding upon this defendant.

16. Then it is stated in para. 3:

While so the suit mortgage-deed alleged to have been executed by defendant 1 as the guardian of this defendant is in no way binding upon this defendant.

17. In this paragraph the broad plea is taken that defendant 1's acts, he not being a guardian of the minor, will not be binding upon him. This broad plea may "well be taken to include the ground of non-liability urged before us "which is only a special aspect of it. It is true that this special aspect has not been mentioned in the written statement nor does it appear from the evidence of P.W. 1, the paternal uncle, the only witness examined on behalf of the minor defendant in the previous case, that this special plea was urged. "We are prepared to assume that the special aspect of the question of non-liability now presented before us escaped the notice of the lawyer who conducted the case. But the question is whether the guardian who has taken all the necessary steps to conduct the case properly and has entrusted the case to a lawyer can be said to be grossly negligent on account of the lawyer's failure to raise a legal point in defence which may well have been raised by him. It is not denied that the lawyer engaged was sufficiently competent to conduct the case. It is not attested that there was any collusion between the lawyer and the plaintiff or that he was in any other way remiss in conducting the case. It is not proved that the lawyer was not provided with sufficient funds to conduct the case. In these circumstances, is it reasonable to hold that the guardian has been grossly negligent in the conduct of the case if the lawyer fails to raise a point of law which may well have been raised by him? We think not. It was observed in *In re Speight* *Speight v. Gaunt* (1883) 22 Ch D 727 that a trustee is bound to conduct the business of trust in the same way as an ordinary prudent man of business conducts his own and has no further obligation. In *In re Weall Andrews v. Weall* (1889) 42 Ch D 674 it was pointed out that a trustee may select solicitors and agents and so long as he selects persons properly qualified he cannot be made responsible for their intelligence and honesty. "We think the same may be said about the guardian of

a minor also. In the circumstances of this case we think the guardian has done what could reasonably be expected of her, that she has defended J the case with due care and that it will be improper to ascribe negligence to her in conducting it. In *Punnayyah v. Viranna* 1922 45 Mad 425, the guardian suffered a mortgage decree to be passed against the minors ex parte, the minors having prima facie a good ground of defence to the suit; that case is clearly distinguishable from the case before us.

18. The next question is whether the guardian could be said to have grossly neglected the interests of the minor plaintiff in not preferring an appeal against the decree with a view to get it set aside. P.W. 1 says that the vakil told him that the case was not properly defended and that the minor would succeed if an appeal were preferred, that the guardian would not do so and she was guided by the words of Krishna-swami Naicker in not preferring an appeal. P.W. 5, the guardian, herself says that after hearing that the suit had been decreed she went to the vakil and told him that:

I had been ruined. He told me that I will succeed if I took up the matter to the High Court. But Krishnaswami Naicker told me that he would get back the property. He was telling me that he would prefer an appeal.

19. It is argued from this evidence that the guardian's vakil asked her to prefer an appeal and told her that if she did so she would succeed and that on account of her being misled by Krishnaswami Naicker she did not file an appeal, that the plaintiff has therefore lost a valuable right and that therefore her omission to prefer the appeal should be taken as an element in considering the question of her negligence. We have already stated that the evidence of these two witnesses is interested. A perusal of the guardian's evidence is enough to show that she has spoken falsehood from beginning to end. She said that she did not engage any vakil at all; but it being necessary to support her case that she was advised to prefer an appeal and did not file it she has to say that she took advice from the vakil, that he advised that an appeal should be filed and that she did not do so. The evidence of P.W. 1 who is equally interested must be accepted with caution. We are not satisfied on the interested testimony of P.Ws. 1 and 5 who," are the only witnesses in the case on this point that the lawyer engaged by the guardian recommended to her that an appeal should be filed and that she wilfully abstained from doing so. On the evidence it is difficult to say whether the vakil was consulted or not with regard to the filing of an appeal. It may even be that the vakil told her that an appeal would be useless. We must take it that an appeal was not filed because the guardian judged from the circumstances that the appeal if filed would not be successful. Can a guardian who after defending the suit bona fide and conducting it to the best of his ability elect to abide by the decision given by the Court without preferring an appeal against it holding it to be correct and that an appeal would be useless, be said to have acted negligently in not preferring the appeal? No express decisions of any High Court bearing on the point have been brought to our notice. In the circumstances we cannot

consider the failure to prefer an appeal as negligence on the part of the guardian in defending O. S No. 55 of 1922, assuming that that conduct can rightly be taken into consideration in deciding whether the guardian had properly defended the suit, which strictly speaking is the only question we are called upon to decide in this case.

20. For the above reasons we set aside the decree of the lower Court so far as it affects Schedules 1 and 3 property. In this view the question whether the suit is barred by limitation does not arise for consideration. In the result the plaintiff's suit is dismissed with costs here and in the Court below. The appeal is dismissed as against Respondent 3. No costs. The memo of objections is dismissed. No costs. The court-fee payable on the memo is only Rs. 100.