

(1984) 09 BOM CK 0043

In the Bombay High Court

Case No : Second Appeal No. 74 of 1973

Kisan Ganpat Nimbale

APPELLANT

Vs

Pandurang Nathu Wankhade and others

RESPONDENT

Date of Decision : 14-09-1984

Acts Referred:

Hindu Minority and Guardianship Act, 1956 — Section 11, 6, 8

Citation : (1985) MhLj 256

Hon'ble Judges : A.A. Ginwala, J

Bench : Single Bench

Advocate : J.N. Chandurkar, for the Appellant; T.R. Kankale, For respondents Nos. 1 to 3, for the Respondent

Final Decision : Allowed

Judgement

A.A. Ginwala, J.—This is plaintiffs second appeal against the judgment and decree of the first appellate Court reversing the decree of the trial Court and dismissing his suit for possession of the suit land.

2. The subject matter of this suit consists of an agricultural land admeasuring 2 acres and bearing S.No. 9/5. The appellant plaintiff claimed that he was the absolute owner of this land and during his minority it was sold by his mother as a de facto guardian on 2-2-1959 to one Chaptya, without obtaining permission from the District Judge u/s 8 of the Hindu Minority and Guardianship Act, 1956 (hereinafter referred to as "the Act"). Chaptya sold the land to defendants nos. 1 and 2 on 6-4-1963 and during the pendency of the suit defendants nos. 1 and 2 sold the same to defendants nos. 3 to 5. The plaintiff alleged that the sale of the land by his mother to Chaptya was null and void and no title passed to the defendants who were in illegal possession thereof. On these allegations the plaintiff sought possession of the suit land from the defendants.

3. The defendants resisted the suit and denied that the land belongs to the plaintiff. They also denied that the sale was effected during his minority. They

contended that the land belonged to the joint family and it was sold by mother of the plaintiff for legal necessity to meet the expenses for the illness of her husband. They also contended that the suit was barred by limitation as, according to them, the suit would be governed by Article 60 of the Limitation Act, 1963 and not Article 65 thereof. According to them, the suit not having been brought by the plaintiff within three years of his attaining majority, it was barred under Article 60.

4. The trial Court rejected all the contentions of the defendants and held that the sale by the mother of the plaintiff was not binding upon him and that it was null and void. The trial Court also rejected the contention of the defendants that the suit was barred by limitation. It, therefore, decreed the suit for possession.

5. In appeal the appellate Court upheld the contention of the appellant defendants nos. 3 to 5 that the suit was barred by limitation as provided in Art. 60 of the Limitation Act. The correctness of this finding of the first appellate Court is under challenge in this second appeal.

6. In the tower appellate Court it was conceded on behalf of the appellants, i.e. the present respondents nos.1 to 3, that the birth date of the plaintiff was 7-3-1941 and that he attained majority on 7-3-1959. Obviously, therefore, on 2-2-1959, when the mother of the plaintiff sold the land to Chaptya, he was a minor.

7. The lower appellate Court has taken the view that Tanibai, the mother of the plaintiff, had executed a sale-deed on 2-2-1959 acting as a natural guardian of the plaintiff and since she had done so without obtaining the permission of the District Judge as provided in sub section (2) of Section 8 of the Act, the transaction would at the most be voidable at the instance of the plaintiff but could not be said to be void as provided in sub-section (3) of section 8. In this view of the matter, the appellate Court held that the transaction was not void ab initio but only voidable and the plaintiff was not entitled to claim possession of the suit land without getting the sale-deed set aside. The first appellate Court, therefore, held that the suit was governed by Article 60 of the Limitation Act and since it was instituted within twelve years from the date of sale, it was within time. It, therefore, reversed the decree of the trial Court on this count alone and dismissed the suit.

8. The view of the first appellate Court that the mother of the plaintiff acted as his natural guardian while selling the land of plaintiff is, on the face of it, erroneous and contrary to law. Section 6 of the Act provides that natural guardian of a Hindu minor in respect of his person as well as property, in the case of a boy, would be the father and after him the mother. It is, therefore, abundantly clear that if the father is alive, he would be the natural guardian and not the mother, during his life time. However, as held by the Supreme Court in Jijabai Vithalrao Gajre Vs. Pathankhan and Others, , in peculiar circumstances the father can be treat as if non-existent and the mother could be considered as

natural guardian of the minor even during the lifetime of the father. Now the circumstance that the father had fallen out with the mother of the minor and was living separately for several years without taking any interest in the affairs of the minor who was in the keeping and care of the mother, was held to be such peculiar circumstance.

9. In the present case, relying on the evidence of Chindhu (P.W. 2) and Chaptya (D.W.1), the lower appellate Court has held that at the time of the sale transaction the father of the plaintiff "was ill and as such being disabled, Tanibai was acting as the natural guardian". Now this finding is not at all borne out from the evidence on record much less from the evidence of the above said two witnesses. What Chindhu has said in his cross-examination is that the plaintiff's father was suffering from Asthma before his death. However, at the same time he deposed that the family of the plaintiff consisted of his father, mother and himself and that at the time of the transaction the father and mother of the plaintiff worked as labourers. His evidence, therefore, clearly shows that the father of the plaintiff was residing with the mother and was working as a labourer. The only thing which emerges from Chindhu's evidence is that the father was suffering from Asthma. Chindhu nowhere says that the father of the plaintiff was disabled and was, therefore, unable to look after property of the plaintiff during his minority. Chaptya has merely said that Tani, the mother of the plaintiff, had told him that she was selling the land as her husband was ill and the land was sold to meet his expenses. He has not uttered a word to say that the father was in such bad condition of health as not to be able to look after the property of the son. It is, therefore, very difficult to trace the source from where the lower appellate Court got the idea that the father was disabled and that is why the mother was acting as the natural guardian of plaintiff. There is not a word to this effect in the evidence. Obviously the lower appellate Court has misread the evidence in this behalf. The position, therefore, is that the mother acted as the guardian of the plaintiff even though the father, who was a natural guardian, was alive and was not shown to be incapable of discharging his duties as a guardian. For all intents and purposes, therefore, the mother acted as de facto guardian.

10. Let us now see what is the effect of disposal of Hindu minor's property by a de facto guardian. Section 11 of the Act lays down that after its commencement no person shall be entitled to dispose of, or deal with, the property of a Hindu minor merely on the ground of his or her being de facto guardian of the minor. It is therefore, clear that if a de facto guardian disposes of the property of a Hindu minor, it would be in contravention of Section 11 of the Act and such a transaction would be illegal and void. I am supported in my view by the judgment of Division Bench of this Court (to which I was party) in Suganchand Vs. Dinakar (First Appeal No. 132 of 1973 decided on 6-2-1984) wherein it has been held that if any person purporting to act as a de facto guardian of a minor under the Hindu Minority and Guardianship Act, disposes of his property, it would be in clear contravention of the prohibition contained in Section 11 of the Act and

would, therefore, be void and illegal and as such the transaction would not be voidable but void.

11. Now the alienation by the mother being totally void, it was not incumbent upon the plaintiff to get it set aside. Article 60 of the Limitation Act, 1963 or the corresponding Article 44 of the Limitation Act, 1908 which governs suits filed by the plaintiff to set aside the transfer of property made by his guardian during his minority, would not apply to a suit filed by a plaintiff, on attaining majority, for possession of his property alienated by a de fact guardian on the ground that the alienation is void ab-initio. The first appellate Court, therefore, had obviously fallen into an error in holding that the suit was governed by Article 60 of the Limitation Act. On the face of the facts and circumstances of the case the suit was governed by Article 65 of the Limitation Act which prescribes limitation of twelve years. The suit has obviously been filed within such period and, therefore, cannot be said to be barred by limitation. In this view of the matter the judgment and decree of the first appellate Court has to be set aside and the judgment and decree of the trial Court has to be restored.

12. In the result the appeal is allowed and the judgment and decree of the lower appellate Court is hereby set aside and the judgment and decree of the trial Court are restored. Respondents nos. 1 to 3 shall pay costs of the appellant in this Court as well as in the lower appellate Court.