

(1989) 02 KL CK 0058
In the High Court Of Kerala
Case No : A.S. No. 10 of 1983

Mudavan Thurutitiyil Mammad and Others	APPELLANT
Vs	
Ottumarakkattil Parkkum Vettilla Chandayil Nabeesa and Another	RESPONDENT

Date of Decision : 09-02-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 3

Citation : (1989) 02 KL CK 0058

Hon'ble Judges : Varghese Kalliath, J; Pareed Pillay, J

Bench : Division Bench

Advocate : Pulikool Aboobacker, for the Appellant; N.L. Krishnamoorthy and Mohan C. Menon, for the Respondent

Final Decision : Dismissed

Judgement

Pareed Pillay, J.—Appellants are Defendants 1 and 2 in O.S. 138 of 1980 of the Sub Court, Badagara. First Respondent (Plaintiff) filed the suit for recovery of possession of the plaint schedule building with mesne profits. Learned Sub Judge decreed the suit and granted recovery of possession of the plaint schedule building, with direction to the first Defendant to pay Rs. 90 per month from 5th March 1979 till the date of surrender less the amounts deposited by him in the Court after the suit. Second Defendant is ordered to pay Rs. 50 per month from 5th March 1979 till the date of surrender less the amounts deposited.

2. Plaintiff filed the suit for recovery of the building from the Defendants contending that the lease granted in their favour by her mother at the time when she was a minor is invalid. Admittedly Defendants 1 and 2 have, executed separate lease deeds in respect of the two rooms in their possession. They contended that the Plaintiff having attained majority has consented to the tenancy as evidenced by the registered notice sent by her and therefore even if the lease is void being granted by an incompetent person she cannot evict them. Another contention is that the Plaintiff cannot have recourse to civil proceedings

as she can proceed only under the Kerala Buildings (Lease and Rent Control) Act, 1965. Still Anr. contention is that the suit is bad for multifariousness.

3. Admittedly the lease was granted in favour of Defendants 1 and 2 by Plaintiff's mother when she was a minor. Plaintiff's mother did not have the status of a legal guardian. Under Mohammedan Law the following persons are entitled in the order mentioned below to be guardians of the property of a minor.

(1) the father;

(2) the executor appointed by the father's Will;

(3) the father's father;

(4) the executor appointed by the Will of the father's father.

Counsel for Defendants 1 and 2 submitted that Plaintiff's father was not in India at the time of lease and therefore her mother was perfectly competent to grant the lease. Such a contention was not taken before the lower Court and there, is also no evidence to that effect. If there is no legal guardian the court may appoint any other person as guardian of the property of a minor. In such a case the Court has always to guard the interest of the minor. The Court of course can appoint the mother as a guardian of the property of a minor child. In a particular case a person may neither be a legal guardian nor a guardian appointed by the Court, but may have voluntarily placed himself in charge of the person and property of a minor. Such a person is known as de facto guardian. As held in *Saidu v. Amina* 1970 KLT 430. Mohammedan Law does not recognise a de facto guardian and views such a person as a rank outsider with no authority to deal with the minor's property under any circumstance whatsoever. He is merely a custodian of the person and property of the minor.

4. At best Plaintiff's mother was only a de facto guardian. The de facto guardian cannot alienate or lease the property of the minor. Even a legal guardian has no power to sell the immovable property of the minor except in a case where he can obtain double its value or where the minor has no other property and the sale is necessary for his maintenance or where there are debts of the deceased and there is no other means of paying them or where there are legacies to be paid, and there is no other means of paying them or where the expenses exceed the income of the property or where the property is falling into decay or the property has been usurped and the guardian has reason to fear that there is no chance of fair restitution. Mother as a de facto guardian has no power to alienate or lease the immovable property of a minor. It is useful to refer to *Jaina Beevi v. Govindaswami* AIR 1967 Mad 369. where it is held thus:

Whether an agreement entered into by a Muslim minor by his de facto guardian relating to his immovable property is a sale or a mortgage or a lease, it suffers from the same defect or want of due capacity and the rule rendering such a transaction void applies with as much force to a lease of immovable property as to a regular conveyance by a sale or a transfer of interest as in a mortgage.

In *Imambandi v. Haji Mustaddi* 45 Ind App 73. Privy Council had occasion to consider certain alienations made by the mother of the minor who was neither the legal guardian nor had been appointed as the guardian under Guardian and Wards Act. Contention that minor was benefited by the alienation was negated by the Privy Council. The Privy Council held that under the Mohammedan Law a person who has charge of the person or property of minor without being his legal guardian, and who may, therefore, be conveniently called a "de facto guardian" has no power to convey to another any right or interest in immovable property which the transferee can enforce against the minor. In *Mohd. Amin and Others Vs. Vakil Ahmed and Others*, the Supreme Court held thus:

A deed of family settlement to which a Mohammedan minor is a party represented by his brother as de facto guardian is void and not binding on the minor, irrespective of the considerations that it benefited him or the arrangement was followed for a long period.

Thus the settled legal position is that a legal guardian of the minor alone, is competent to deal with the immovable properties of the minor and, that power does not vest in a de facto guardian. Any lease granted by a de facto guardian is not merely voidable but void. As the mother of the Plaintiff was not the legal guardian the lease granted by her of the property belonging to the minor is null and void. Hence the suit filed by the Plaintiff was rightly decreed by the Trial Court.

5. Another contention is that the suit is not maintainable as the only course open to the Plaintiff is to have filed a rent control petition under the Kerala Buildings (Lease and Rent Control) Act. As the Plaintiff has claimed recovery of possession from Defendants 1 and 2 who are in occupation of the property under an incompetent lease executed by Plaintiff's mother when she was a minor it cannot at all be said that there is any landlord-tenant relationship between her and Defendants 1 and 2. Contention that Plaintiff has accepted Defendants 1 and 2 as tenants is not tenable as there is no evidence to that effect. Merely because in Ext. A-4 notice the Plaintiff has stated that if the Court finds that Defendants 1 and 2 have tenancy right in the property they should be ordered to surrender the building with arrears of rent, it cannot be said that the Plaintiff has accepted the tenancy in their favour. The learned Sub Judge has rightly held that the Kerala (Buildings Lease and Rent Control) Act has no application and the suit is not barred by that Act.

6. It is next contended that the suit is bad for multifariousness. It is the definite case of the Plaintiff that though the Defendants are different and the tenanted properties are also different the tenancies created by separate documents by the illegal act of her mother who is not a legal guardian can be challenged by a common cause of action and so the suit is maintainable. Order 1, Rule 3 CPC is the main rule governing the joinder of Defendants. The object of the rule is to avoid multiplicity of suits and needless expenses. In order that the rule may be attracted two elements have to be established. Firstly, the relief claimed should

be in respect of the same act or transaction or series of acts or transaction. Secondly, a common question of law or facts must be there to obviate separate trials. As the cause of Plaintiff against the Defendants is one and entire and cannot be affected by the incompetent leases set up by them the Plaintiff is entitled to claim possession of her property as a whole and not in fragments. Hence the Plaintiff can file a single suit against the persons who oppose her in the enforcement of her right and the suit cannot be challenged on the ground of multifariousness. As the lease in favour of Defendants 1 and 2 by the Plaintiff's mother is challenged being not by a competent legal guardian the suit filed against the Defendants is maintainable especially in view of the fact that common question of law or fact would arise if separate suits were filed.

The Court below was justified in decreeing the suit. We find hardly any reason to interfere. The appeal is dismissed with costs.