
(1996) 08 AP CK 0033
In the Andhra Pradesh High Court
Case No : A.S. No. 2133 of 1983

Punyamanthula Satyanarayana	Vs	APPELLANT
Punyamanthula Lakshmanaswamy and Others		RESPONDENT

Date of Decision : 23-08-1996

Acts Referred:

Evidence Act, 1872 — Section 35
Hindu Minority and Guardianship Act, 1956 — Section 11, 8(2), 8(3)
Limitation Act, 1963 — Article 60

Citation : (1996) 4 ALT 49

Hon'ble Judges : S. Parvatha Rao, J

Bench : Single Bench

Advocate : Challa Poornaiah and V.L.N.G.K. Murthy, for the Appellant; M.S.R. Subrahmanyam, for Respondent Nos. 3 and 4 and K.V. Subrahmanya Narsu, for the Respondent

Final Decision : Dismissed

Judgement

S. Parvatha Rao, J.—The unsuccessful plaintiff has preferred this appeal questioning the judgment and decree dated 30-6-1982 of the learned II Additional Subordinate Judge at Kakinada dismissing O.S.No. 252 of 1978. The said suit was originally instituted on 12-6-1978 in O.P.No. 165 of 1978 seeking leave to sue as an indigent person. The O.P. was allowed on 8-11-1978 and the suit was numbered on 18-11-1978. Therefore, for limitation purposes the suit must be treated as laid on 12-6-1978 by the appellant herein.

2. The main reliefs sought in the suit are;

(a) to grant possession of plaint "A to C schedule properties of the plaintiff and the second defendant after ejecting therefrom defendants 3 to 7;

(b) to grant relief of accounting by defendants 3 to 7 to the plaintiff and the second defendant in respect of plaint" A to C schedule properties from 11-11-1963 till date of delivery of possession of the said properties to the

plaintiff and the second defendant.

The second defendant is the younger brother of the plaintiff. The first defendant was their father. He died in 1979. The plaintiff has also a sister by name Gopinandanamba. The case of the plaintiff is that he was born on 10-6-1957. During his and the second defendant's minority, as his father was addicted to bad ways, a registered partition deed was got executed on 11-11-1963 (Ex. A-2 is the registration extract of the said partition deed) whereunder plaintiff "A to C schedule properties fell to the joint share of the plaintiff and his brother, 2nd defendant. The debts owed by the joint family were allotted to the first defendant as he undertook to discharge them at the time of partition. The first defendant and Gopinandanamba were also allotted properties under Ex.A-2 partition, but that is not in issue in the present suit. It is alleged in the plaint that defendants 3 and 4 trespassed into plaintiff "A to C schedule properties and had been in possession of the same ever since Ex. A-2 partition deed with the full knowledge that the said properties belonged to the plaintiff and the second defendant and, therefore they are liable to be evicted and they are also liable to account for the past profits from 11-11-1963. Defendant No. 4 was the natural brother of the first defendant and was given in adoption to Naganna, the paternal uncle of the first defendant. The plaintiff and the second defendant got issued registered notice, dated 28-6-1977 to their father and defendants 3 and 4 (Ex. A-3). The suit was originally against defendants 1 to 4: Subsequent to the filing of the suit, the plaintiff found that the 5th defendant got into possession of items 1,2 and 4 of plaintiff "A" schedule properties; that the 6th defendant got into possession of item 3 of plaintiff "A" schedule properties, and that the 7th defendant got into possession of items 1 and 2 of plaintiff "B" schedule properties. Therefore, they were impleaded as per orders of the learned Subordinate Judge dated 26-9-1981 in I. A.No. 228 of 1981. Defendants 2 and 7 remained ex parte in the suit. Defendants 2 to 7 are respectively respondents 1 to 6 in the present appeal.

3. In his written statement, the third defendant denies that the first defendant was addicted to bad ways and because of that, his joint family properties were partitioned under partition deed dated 11-11-1963. He also denies that he trespassed into the plaintiff "A" schedule properties on 11-11-1963 and that he had full knowledge that the said properties were allotted to the plaintiff and his brother the 2nd defendant. He states that his father filed a suit for recovery of debt against the plaintiff and the first and second defendants and that the suit was decreed against all of them, and that subsequently his father died and thereafter the first defendant, his wife Lakshmi Tulasamma and his daughter Gopinandanamba and his sons-the plaintiff and the second defendant-represented by their mother as guardian sold under registered sale deed dated 7-6-1966 (the correct date is 7-2-1966 and the said document is marked as Ex. B-I in the suit) part of items 1 and 2 and item 4 of the plaintiff "A" schedule properties to the third defendant and his minor four brothers represented by him as guardian. They also sold the remaining portion in items 1 and 2 of the plaintiff

"A" schedule under registered sale deed dated 29-9-1967 (marked as Ex. B-2) to the four minor brothers of the third defendant represented by him as guardian. He contends that the said sales were effected for family necessity and for the benefit of the minors. He further contends that he and his brothers are in possession of the said plaint "A" schedule properties as rightful owners and not as trespassers. He also states that in the said sale deeds it was mentioned that the partition deed dated 11-11-1963 was only a nominal one and that the first defendant and his sons were continuing as joint family. The third defendant also disputes the age of the plaintiff and contends that by the date of the suit he was more than 21 years and that the suit was barred by time.

4. The fourth defendant also denies that the first defendant was addicted to bad ways and because of that his family properties were divided under Ex. A-2 partition deed. He states that the father-in-law of the first defendant insisted that the property should be divided and that, therefore, the registered partition deed was executed. He denies that he trespassed into any of the plaint "A to C" schedule properties. He states that the first defendant, the plaintiff, the second defendant and Gopinandanamba executed an agreement of sale dated 1-9-1963 agreeing to sell items 1 and 2 of plaint "B" schedule properties to his father and that his father filed O.S.No. 145 of 1963 on the file of the learned Subordinate Judge's Court at Kakinada for specific performance of the said agreement and that the suit was decreed and that the said decree was got executed by his father and the Court executed registered sale deed dated 18-11-1965 (marked as Ex. B-6) conveying items land 2 of the plaint "B" schedule to his father. The fourth defendant also states that the mother of the plaintiff as guardian of the plaintiff and the second defendant sold the plaint "C" schedule property to him under registered sale deed dated 12-8-1968 (marked as Ex. B-7) for the purpose of maintenance of her two sons and daughter Gopinandanamba and for their education. Similarly, she sold as guardian of the plaintiff and the second defendant item No. 3 of "B" schedule property to him under registered sale deed dated 25-9-1968 (marked as Ex. B-8) for their maintenance and education and to pay some debts of the joint family. He submits that the said sales were supported by adequate consideration and that the alienations cannot be questioned by the plaintiff. He, therefore, contends that he is not a trespasser in respect of properties acquired by his father. He also disputes that the plaintiff was born on 10-6-1957.

5. In his written statement, the fifth defendant took a plea that he was not a necessary party to the suit and denied that he was in possession of items 1,2 and 4 of plaint "A" Schedule. He denied that he purchased them.

6. The sixth defendant in his written statement states that he purchased item No. 3 of plaint "A" schedule from the first defendant, the plaintiff and the second defendant under registered sale deed dated 27-12-1978 after the plaintiff attained majority and that he is in possession of the said properties in his own right and that the suit against him is not maintainable.

7. The learned Subordinate Judge framed the following six issues:

1. Whether the partition dated 11-11-1963 is true, valid and acted upon ?
 2. Whether 3rd defendant is a trespasser in plaint A schedule property on 11-11-1963 with the knowledge that it was allotted to the plaintiff ?
 3. Whether the suit is in time ?
 4. Whether 4th defendant is a trespasser in plaint B schedule property ?
- Additional issue framed on 8-12-1981:

Whether D5 is a necessary party to the suit ?

Additional issue framed on 19-1-1982 :

Whether the plaintiff was a manager on 27-2-1978 when he executed sale deed in favour of 6th defendant and consequently the suit is not maintainable against 6th defendant?

The plaintiff examined himself as P.W.1 and a relative of his mother as P.W.2. Defendants 3,4 and 5 got themselves examined as D.Ws.2,4 and 1 respectively. D.W.3 is the attestor of Exs. B-1 and B-2. D.W.5 was the Head Master of a Panchayat Samithi Upper Primary School where the plaintiff studied. Ex. A-1 is a copy of the school transfer certificate of the plaintiff showing his date of birth as 10-6-1957.

8. The learned Subordinate Judge held that the partition deed dated 11-11-1963 was true, valid and acted upon. He held that Ex. A-1 purported to be only a true copy of the transfer certificate and therefore could not be received as secondary evidence. No other evidence was adduced by the plaintiff to prove his date of birth. Therefore the learned Subordinate Judge held that the plaintiff could not establish his date of birth as 10-6-1957 and that the suit was within three years from the date he attained majority and that, therefore, he did not discharge the burden on him that the suit was within time.

9. The plaintiff as P. W. 1 stated that he was not asking for a decree against the sixth defendant. Therefore, the suit was dismissed against him.

10. The learned Subordinate Judge held that the sales under Exs. B-1 and B-2 were voidable sales having been made by the guardian without obtaining the permission of the District Court. Following the decision of learned single Judge of this Court in Kanumuri Sundara Rami Reddy v. Bathuk Seshiah and others, Judgment dated 28-1-1977 in S.A. No. 912 of 1974. Judgment dated 28-1-1977 in S.A.No. 912 of 1974, he held that Exs. B-1 and B-2 sales were valid till set aside at the instance of the minor within three years after he attained majority. The learned Subordinate Judge held that the minor could not ignore the sales and treat them as non-existent and that he should have filed a suit for cancellation of sales within three years from the date he attained majority. As the plaintiff in the present suit did not ask for the relief of cancellation of Exs. B-1 and

B-2 sale deeds and simply sought for possession without referring to the said sale deeds, the plaintiff could not have a declaration that the possession of the third defendant of the plaint schedule properties was as a trespasser; on the other hand the third defendant was entitled to continue in possession as legal owner of the plaint "A" schedule properties till Exs. B-1 and B-2 were set aside. The learned Subordinate Judge found that items 1,2 and 4 of plaint "A" schedule lands were delivered to the fifth defendant and that he was in possession of the said properties and that he could not be said to be a trespasser as he claimed possession through the third defendant who had title and right to continue in possession of the said lands under Exs. B-1 and B-2 sale deeds. The learned Subordinate Judge also held that it was not open to the plaintiff to contend that he was not bound by Ex. B-6 sale deed which was executed in execution of the decree in O.S.No. 145 of 1963. The learned Subordinate Judge also held that Exs. B-7 and B-8 sales were also voidable and not void because permission of the District Court was not obtained u/s 8 of Hindu Minority and Guardianship Act, 1956 ("the Act" for short). He held that the plaintiff had not asked for setting aside the sale deeds Exs. B-7 and B-8 which relate to plaint "C" schedule and item 3 of plaint "B" schedule properties and that so long as Exs. B-7 and B-8 sales were not set aside, the fourth defendant's possession of the said property was not unlawful. In the result, he dismissed the suit.

11. Mr. V.L.N.G.K. Murthy appearing for the appellant has not pressed the appeal against the fifth respondent/sixth defendant because the plaintiff in his evidence admitted that he himself conveyed item No. 3 of the plaint "A." schedule property to him and he did not want the sixth defendant be evicted from the said item. The learned counsel also does not press the appeal against the sixth respondent/seventh defendant who was in possession of items 1 and 2 of "B" schedule properties in view of the fact that the said items were sold by the Court under Ex. B-6 in execution of the decree in O.S.No. 145 of 1963 on the file of the learned Subordinate Judge's Court at Kakinada in favour of the father of the third respondent/fourth defendant. The appeal is, therefore, dismissed against the fifth and sixth respondents.

12. So far as the fourth respondent/fifth defendant is concerned, it is his case that he did not purchase any of the plaint schedule properties from the second respondent/third defendant and that he has not been in possession of any of the suit properties. The second respondent/third defendant in his evidence as D.W.2 no doubt stated in his examination-in-chief that he and his brothers sold the plaint schedule properties covered by Exs. B-1 and B-2 to "Yella people prior to the filing of the suit", but in his cross-examination he categorically stated that he did not sell any part of the plaint schedule land to the fifth defendant/fourth respondent and that the fourth respondent was not in possession of any item in the plaint schedule lands. The appellant had not adduced any evidence to establish that the fourth respondent purchased any of the plaint schedule properties from the second respondent. In view of this, the learned counsel for the appellant Mr. V.L.N.G.K. Murthy has not pressed the appeal against the fourth

respondent. The appeal is, therefore, dismissed against the fourth respondent also.

13. So far as the Exs. B-7 and B-8 sales are concerned, Mr. V.L.N.G.K. Murthy submits that they were admittedly executed on 12-8-1968 and 25-9-1968 at the time when the plaintiff and the second defendant were minors, and that the documents show that the minors were represented by their mother, Lakshmi Tulasamma. He further submits that Ex. B-7 sale deed purported to convey the plaint "C" schedule property to the third respondent/fourth defendant. In his written statement, the third respondent states that "the mother of the plaintiff sold away the plaint "C" schedule property.....". The third respondent also claims to have purchased item 3 of the plaint "B" schedule property under Ex. B-8 sale deed. In his written statement he states that "the plaintiff, second defendant and their sister, Gopinandanamba represented by their mother Lakshmi Tulasamma together with the first defendant sold away item 3 of the "B" schedule property, which is a house.....". Ex. B-8 also conveys certain other properties not covered by the plaint schedules. Mr. V.L.N.G.K. Murthy contends that the learned Subordinate Judge failed to see that when the father was alive, the mother was not competent to act as a guardian in the absence of any special circumstances as indicated by the Supreme Court in Jijabai Vithalrao Gajre Vs. Pathankhan and Others, . He relies on the decision of the Supreme Court in Panni Lal Vs. Rajinder Singh and Another, . He submits that the father in fact was executing documents on behalf of the minors as their guardian as evidenced by Exs. B -1 and B-2 sale deeds which were of 1966 and 1967. He also points out that Exs. B-7 and B-8 were also signed by the father in his individual capacity and nothing prevented him from signing them as the guardian of the plaintiff and the second defendant. He submits that in view of the decision of the Supreme Court in Panni Lal's case³, Exs. B-7 and B-8 are void to the extent they purported to convey to the third respondent/fourth defendant the land in plaint "C schedule and item No. 3 of the plaint "B" schedule which undisputedly fell to the share of the appellant/plaintiff and the first respondent/second defendant under Ex. A-2 partition deed. Mr. M.S.R. Subrahmanyam appearing for the third respondent firstly submits that Ex. A-2 partition deed was never given effect and that the family continued to be joint even after 11-11-1963. He next submits that as the father also signed Exs. B-7 and B-8, it must be deemed that he consented to the alienations in question.

14. The learned Subordinate Judge observed that the third respondent/ fourth defendant, natural brother of the first defendant (father of the plaintiff and the second defendant), did not dispute the factum of partition under Ex. A-2. He also observed that when the registered partition deed was filed which clearly showed the intention to effect the partition on the part of the first defendant, there was no need for further oral evidence; and in that view upheld the partition and held that the properties in plaint "A to C "schedules became the separate properties of the plaintiff and the second defendant. In his written statement, the third respondent/fourth defendant clearly stated that "the father-in-law of the first defendant insisted upon that the property should be divided and therefore the

said registered partition deed dated 11-11-1963 was executed". As already stated earlier, he admitted that Exs. B-7 and B-8 were signed by the mother of the plaintiff and the second defendant as their guardian. In Panni Lal's case (3 supra), the sale deed in question was executed by the mother as guardian and the father attested the same. The contention advanced was that as the sale deed had been attested by the father, it should be taken to have been entered into by the natural guardian for legal necessity and the benefit of the minors. The Supreme Court rejected that contention distinguishing Jijabai's case (2 supra) in the following manner:

"This (Jijabai) was a case in which it was held that the position in Hindu law was that when the father was alive he was the natural guardian and it was only after him that the mother became the natural guardian. Where the father was alive but had fallen out with the mother of the minor child 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, it was held that, in the peculiar circumstances, the father should be treated as if non-existent and, therefore, the mother could be considered as the natural guardian of the minor's person as well as property, having power to bind the minor by dealing with her immovable property.

In the present case, there is no evidence to show that the father of the respondents was not taking any interest in their affairs or that they were in keeping and care of the mother to the exclusion of the father. In fact, his attestation of the sale deed shows that he was very much existent and in the picture. If he was, then the sale by the mother, notwithstanding the fact that the father attested it, cannot be held to be a sale by the father and natural guardian satisfying the requirements of Section 8"

The Supreme Court then dealt with the scope and object of Section 8 of the Act and observed as follows:

"Section 8 of the Hindu Minority and Guardianship Act sets out the powers of the natural guardian of a Hindu minor. The natural guardian of a Hindu minor has power, subject to the provisions of Section 8, to do all acts which are necessary or reasonable and proper for the benefit of the minor or his estate. The natural guardian, however, may not without the previous permission of the Court sell any part of the immovable property of the minor. Any disposal of immovable property which is not necessary or reasonable and proper for the benefit of the minor or is without the previous permission of the Court is voidable at the instance of the minor,

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The provisions of Section 8 are devised to fully protect the property of a minor, even from the depredations of his parents. Section 8 empowers only the legal guardian to alienate a minor's immovable property provided it is for the necessity or benefit of the minor or his estate and it further requires that such

(sic) shall be effected after the permission of the Court has been obtained."

The Supreme Court in that case held that it was difficult "to hold that the sale was voidable, not void, by reason of the fact that the mother of the minor signed the sale deed and the father attested it".

15. Even before the judgment of the Supreme Court in Panni Lal (3 supra), a Division Bench of this Court took a similar view in Ramender Reddy v. Satyanarayana Reddy 1986 (1) ALT 240. After referring to the definitions of "guardian" and "natural guardian" respectively under clauses (b) and (c) of Section 4 and Sections 6, 8 and 9 of the Act, Kodandaramayya, J., speaking for the Division Bench held as follows:

"These provisions reveal that though father and mother both are natural guardians the father takes precedence over mother and the mother cannot act as a guardian in the presence of the father. The words "after him" occurring in Section 6(a) are significant. It is enough if we notice the judgment of the Supreme Court in jijabai v. Pathankhan (2 supra) which notice the exceptional circumstances in which the mother can act as a guardian even though father is alive. It was held by the Supreme Court that "the father and mother of the appellant had fallen out and that the mother was living separately for over 20 years and it; was the mother who was actually managing the affairs of her minor who was under her care and protection but the father 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" and in such circumstances the lease granted by the minor was held to be valid. In Devineni Suseela v. N. V. Sivaramaiah 1976 (1) An.W.R. 423 Ramachandra Rao, J., held that the alienation made by the mother representing the minor son when the father is alive is void. It was ruled that it is only when the father is not alive or when the father is only incapacitated or when he has totally neglected to look after the minor's estate the mother can act as guardian and not otherwise.

.....The father cannot give his consent to others to act as a guardian or delegate his powers and he cannot act concurrently with others. Such right of guardianship is a valuable right of the father which can be exercised only by himself during his life time and can appoint a guardian in respect of minor's property or person only by his testament. An appointment made under a testament shall have no effect if the father pre- deceased the mother but shall revive if the mother dies without appointing by will any person as a guardian. Hence the mother could not act as guardian in the presence of the father except in the special circumstances which the law presumes as if he was non-existent as far as the minor was concerned. Thus the right of the mother to act as a guardian during the life time of the father comes into play only when the father was disabled physically or mentally or abandoned or neglected his duties and in the absence of such exceptional circumstances the mother cannot act as a guardian.

A distinction is sought to be made that alienation alone is prohibited under the provisions of the Act either requiring the prior permission for an alienation u/s 8 or completely prohibiting the de facto guardian to make an alienation u/s 11. We must remember that no person shall be entitled to act as a guardian unless he satisfies the requisite capacity as defined under law. Further in the presence of a natural guardian no other can act as a guardian. Among natural guardians the father takes precedence over mother and the mother shall be treated as not a guardian at all in the presence of the father and any representation made by her in respect of the person or property of the minor is wholly void and inoperative....."

In view of the decision of the Supreme Court in Panni Lal (3 supra), I have to hold that the following observations of Parthasarathi, J., speaking for another Division Bench in Kasturi Lakshmibayamma Vs. Sabnivis Venkoba Rao and Others, are no longer good law:

"These alienations made by a de facto guardian are on a par with those made by a de jure guardian. If they lack justification, they are in both cases voidable. And, when they are voidable, the application of Article 44 is an inescapable corollary. To hold that the alienations made by a de facto guardian are voidable but at the same time they are outside the purview of Article 44, is to take up an inconsistent position. This incongruity was not justified in the above cases by reference to any provision of law or principle."

The law in this regard has been succinctly clarified by Kodandaramayya, J., in Ramender Reddy's case (4 supra) referred to above, I may also refer to the judgment of Jeevan Reddy, J., (as the learned Judge was then) in M. Peethambaram v. N. Lakshminarayana 1978 (1) An.W.R. 512. The learned Judge held that the Act made a departure from the earlier law by enacting Section 11. Interpreting Section 11 of the Act, he held as follows:

"The language of Section 11 is unqualified, unlike the language employed in Section 6 (and therefore in Section 8) and in Section 9. In those sections, wherever the words "the property of a minor" occur, they are immediately qualified by saying that the said property does not include the undivided share of a minor in a joint family property. Construed in its natural meaning, Section 11 would take in not only the separate property of a minor, but also his undivided share."

The learned Judge rejected the contention advanced before him that "even where a joint family consists of two or more minors, the interest of each of the minors would be an undivided interest in the joint family property and since the Act does not deal with the undivided interest of a minor in a joint family property altogether, Section 11 must also be construed as not precluding the de facto guardian from alienating such undivided interest of a minor". The learned Judge finally held as follows:

"I have emphasized herein before the distinction and difference between the

language employed in Sections 6 - 9 on the one hand, and Section 11 on the other. There are absolutely no reasons to cut down and restrict the scope and natural meaning of the words occurring in Section 11 because of the fact that the preceding provisions govern a limited field. Moreover, the preceding provisions deal with the natural and testamentary guardians and their powers, and not with the de facto guardian or their powers. There is therefore, no reason to, nor is it possible to confine the operation of Section 11 to the field covered by preceding provisions. While on the subject of guardianship of Hindu minors, the Act obviously wanted to curtail the powers of "de facto guardians" altogether. Section 11 read with the definition of the expression "guardian" in clause (b) in Section 4 shows that the Parliament did not choose to recognize the "de facto guardian", as one of the guardians in respect of the property of a Hindu minor, and made it clear, that no person shall be entitled to dispose of or deal with the property of a minor (whether an undivided share, or otherwise) merely because he purports to or acts as his de facto guardian. : I am thus of the opinion that Section 11 disentitled a de facto guardian not only from alienating the separate property of a minor (separate property, in the sense, not including his undivided share in a joint family property), but also his undivided share in a joint family property."

I have also to hold that in view of the judgment of the Supreme Court in Panni Lal (3 supra), the decision of Alagiriswami, J, (as the learned Judge was then) in Baiambal Vs. Devasenathipathi, wherein he held 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", is no longer good law.

16. In Shaik Khasitn Saheb v. V.R. Babu 1988 (2) ALT 504 K. Ramaswamy, J., (as the learned Judge was then) was considering the case of the mother acting as a guardian on behalf of the minor even though the father was alive and the father and the mother were living together the father was a Sarpanch of the Grama Panchayat and he was looking after the affairs of the family. K. Ramaswamy, J., purported to follow jijabai's case (2 supra) in holding as follows:

"In view of the aforesaid legal position and in view of the admitted facts, I have no hesitation to conclude that though the father Narsimharao is alive and was Sarpanch of the Gram Panchayat for considerable period, so far as the management of the interest of the minor's estate is concerned, he acquiesced to the management by his wife Lakshminarasamma. She purchased the property on behalf of the minor and she also alienated the property. The alienation is supported by consideration and it is in the interests of the estate of the minor. In those circumstances, so far as the management of the estate of the minor is concerned, the father must be construed to be non-existent to that extent though they are living together. Accordingly, though the father is alive, the mother being a natural de facto guardian next to him she is entitled to represent the estate of the minor and the sale thereby, is accordingly valid."

In view of the judgment of the Supreme Court in Panni Lal's case (3 supra), I am inclined to take the view that the learned judge overstretched the ration of

Jijabai's case (2 supra). Ramachandra Rao, J., on the other hand, held in Devineni Suseela v. Nelapati Venkata Sivaramaiah (5 supra) as follows:

"The question, whether the mother acted as the natural guardian or de facto guardian, has to be determined with reference to the facts and circumstances of each case. u/s 6 of the Act, the mother can act as the natural guardian only after the father. In other words, so long as the father is alive and is capable of looking after the affairs of his family, he alone can act as the natural guardian. It is only where the father is not alive or where the father is wholly incapacitated or where he has totally neglected to look after his minors' estate, that the mother can perhaps act as the natural guardian, in the present case, it is not established that the father is incapable of looking after the affairs of the minors. Both the Courts below found that the version of the defendant that the plaintiffs' father was of unsound mind or was mentally unfit to act as the guardian of his children, was not established".

This view has been accepted by the Division Bench in Ramender Reddy's case (4 supra) referred to above. I may also note that Kodandaramayya, J., held in Smt. D. Radha Devi v. T. Satyanarayana, 1988(2)ALT 509 that Section 11 put an end to the institution of de facto guardian altogether.

17. I am of the view that the decision of the Supreme Court in Panni Lal (3 supra) clearly applies to the facts of the present case so far as Exs. B-7 and B-8 purport to effect the sale of the properties covered by the plaint "C schedule and item No. 3 of the plain!: "13" schedule. In the present case also, the father was alive and was participating in the conduct of the affairs of the plaintiff and the second defendant during their minority as evidenced by Exs.B-1 and B-2 sale deeds which he executed as their guardian. There is no reason at all for the mother to sign in Exs. B-7 and B-8 as their guardian. There is no reliable evidence to establish that the father was addicted to bad ways. I, therefore, hold that Ex. B-7 is void and that Ex. B-8 to the extent it purports to effect sale of item No. 3 of the plaint "B" schedule property is also void. In the circumstances, the plaintiff need not have specifically asked for setting aside of the said documents. He rightly ignored Exs. 13-7 and B-8 sale deeds in favour of the third respondent/fourth defendant who admitted that he acquired title to plaint "C schedule property under Ex. B-7 and to item No. 3 of plaint "B" schedule under Ex. B-8. In the view I have taken as regards Exs. B-7 and B-8, the plaintiff is entitled to a decree of possession and accounts as against the third respondent in respect of plaint "C schedule land and item No. 3 of plaint "B" schedule.

18. Exs. B-1 and B-2 remain to be considered. It is not in dispute that the plaintiff and the second defendant were shown in those sale deeds as vendors represented by their father Who was their natural guardian, the first defendant in the suit. Exs. B-1 and B-2 sale deeds purport to effect the sale of lands in items 1, 2 and 4 of the plaint "A" schedule in favour of the third defendant and his brothers. The first defendant however did not obtain the previous permission of the Court as required under sub-section (2) of Section 8 of the Act. Sub- section

(3) of Section 8 makes it very clear that any disposal of immovable property by a natural guardian in contravention of sub-sections (1) and (2) is voidable at the instance of the minor or any person claiming under him.

19. Chennakesav Reddy, J., held in Kanumuri Sundam Rami Reddy's case (1 supra) that such a sale in contravention of sub-sections (1) and (2) of Section 8 of the Act was valid unless and until it was set aside, at the instance of the minor, within the period of limitation under Article 44 of the Limitation Act 1908, which is similar to Article 60 of the Limitation Act, 1963 i.e., within 3 years from the date when the minor attained majority. In holding so, he relied on the Full Bench decision of the Madras High Court in Mir Ghulam Hussain Sahib Vs. Ayesha Bibi and Others, wherein it was held that a transfer by the guardian appointed by the Court under the Guardians and Wards Act, 1890 without the Court's sanction u/s 29 of that Act was voidable (under Section 30 of that Act) but not void and was valid unless set aside at the instance of the minor or minors concerned within the period of limitation. The learned Judge also relied on another Full Bench decision of the Madras High Court in Sankaranarayana Pillai and Another Vs. Kandasamia Pillai, wherein it was held that a minor who had been made nomine a party to sale deed or other document of alienation by the guardian had to pray for the cancellation of the sale deed expressly or impliedly and had to pay the necessary Court fee for that purpose and that the minor could not ignore and by-pass such alienation and pray for mere possession of the lands paying Court fee only for that relief. The learned Judge relied on the following passage in Sankara Narayana Pillai's case (11 supra);

"There is no doubt whatever that a transaction entered into by a guardian relating to the minor's properties not void and if the minor does not sue to set aside within three years of his attaining majority becomes valid under Article 44, Limitation Act (1908). In such a case the minor is deemed to be a party to the transaction. But where the document is executed by a manager of the family, the minor or any other member can ignore the transaction and recover possession of the property."

Earlier Viswanatha Sastri, J., in Palaniappa Goundan Vs. Nallappa Goundan and Others, held that Article 44 could not be evaded by omitting to sue for setting aside and by professing to sue for possession or redemption and observed that numerous decisions of Madras and other High Courts took that view. He observed as follows:

"The law regards a dealing with the minor's estate by his legal guardian as, in effect, an act of the minor himself through his guardian and prescribes a short period of three years after attainment of majority for setting aside an improper alienation by the guardian. As Article 44 (of 1908 Act) is drastic in its operation it should be strictly construed and confined in its application to cases properly falling within its scope i.e., to transfers of a minor's property by his legal guardian"

In Raja Ramaswami (dead) and Others Vs. Govindammal and Others, a Division Bench of the Madras High Court held as follows:

".....it has been well-settled by several decisions of their Lordships of the Privy Council that it is not the form of the relief claimed which determines the real character of the suit for the purpose of ascertaining under which article of the Limitation Act the suit falls. Though the relief claimed in the suit is possession of immovable property, yet if the property sued for is held by the contesting defendant under a sale or other transfer which is not void, but only voidable, and he cannot obtain possession without the transfer being set aside, the suit must be regarded as one brought to set aside the transfer though no relief in those terms is prayed for, but the prayer is only for possession of the property"

The Division Bench also held in that case as follows:

"It is now well-settled that this article (Article 44 of the 1908 Act) applies not only to setting aside the transfer of property made by the guardian appointed by a Court or by will but also to suits for setting aside a transfer of property made by a natural guardian."

20. In the present case, the plaintiff /appellant did not seek the setting aside of the sales covered by Exs. B-1 and B-2, in the plaint; there was not even a reference to those sales. He merely alleged that the third defendant/second respondent and his brothers trespassed into items 1,2 and 4 of the plaint "A" schedule lands and sought possession of the said lands. In the light of the legal position stated above, I have to hold that the plaintiff's suit will have to be treated as one for setting aside the sale deed covered by Exs. B-1 and B-2 which are voidable u/s 8(3) of the Act and to such a suit Article 60 of the Limitation Act 1963 is attracted (which corresponds to Article 44 of 1908 , Limitation Act) and the suit has to be laid within three years from the date the minor attains majority. The reliefs in the suit have to be valued as such.

21. The next question, therefore, is whether the preset suit was within three years from the date the plaintiff attained majority. According to the plaintiff, his date of birth is 10-6-1957 and he attained majority on 10-6-1975. Within three years from that date, he should have filed the suit i.e., by 10-6- 1978. The suit was instituted on 12-6-1978 i.e., beyond three years. The learned Subordinate Judge however found that the plaintiff had not established his date of birth. The plaintiff only sought to rely on Ex. A-1 which purported to be the transfer certificate issued by the P.R. Government High School, Kakinada wherein his date of birth was shown as 10-6-1957. The learned Subordinate Judge observed that the marking of Ex. A-1 was objected by the defendants on the ground that it was not the original transfer certificate issued by the high school but only true copy of the original. In his judgment he upheld the said objection on the ground that Ex. A-1 could not be received "as secondary evidence to prove the existence, the condition and the contents of original transfer certificate of which Ex. A-1 was said to be a copy". He also held that Ex. A-1 was not proved. Even otherwise I

have to hold that Ex. A-I cannot have any evidentiary value for establishing the date of birth of the plaintiff. In *Birad Mal Singhvi v. Anand Purohit* AIR 1998 SC 1796 the Supreme Court held as follows:

"The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value".

The Supreme Court also held that mere proof of such documents in which the date of birth was mentioned did not mean that the contents of the documents were also proved and that it would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents, and that it could be proved only by admissible evidence i.e., by the evidence of those persons who could vouchsafe for the truth of the facts in issue. The Supreme Court further clarified as follows:

"Section 35 of the Indian Evidence Act lays down that entry in any public, Official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible u/s 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible u/s 35 of the Act but the entry regarding to the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded. In *Raja Janaki Nath Roy and Others Vs. Jyotish Chandra Acharya Chowdhury and Others*, a Division Bench of the Calcutta High Court discarded the entry in school register about the age of a party to the suit on the ground that there was no evidence to show on what material the entry in the register about the age of the plaintiff was made. The principle so laid down has been accepted by almost all the High Courts in the country. See *Jagan Nath v. Moti Ram* AIR 1951 P&h 377, *Sakhi Ram and Others Vs. Presiding Officer, Labour Court and Others*, , *Ghanchi Vora Samsuddin Isabhai Vs. State of Gujarat*, and *Radha Kishan Tickoo v. Bhushan Lal Tickoo* AIR 1971 J&K 62. In addition to these decisions the High Courts of Allahabad, Bombay, Madras have considered the question of probative value of an entry regarding the date of birth made in

scholar's register or in school certificate in election cases. The Courts have consistently held that the date of birth mentioned in the scholar's register of secondary school certificate has no probative value unless either the parents are examined or the person on whose information the entry may have been made, is examined. See Jagadamba Prasad v. Sri Jagannath Prasad (1969) ELR All 465, K. Paramalali v. L.M. Alangaram (1967) ELR (Mad) 401 ., Krishna Rao Maharv Patil v. Onkar Narayan Wagh (1958) ELR (Bom) 386 .

In view of this dear pronouncement of the Supreme Court, I have to uphold the finding of the learned Subordinate Judge that Ex. A-I cannot be given any credence for proving the date of birth of the plaintiff. In the absence of any other evidence, I have to hold that the plaintiff has not established that the suit for setting aside the Exs. B-I and B-2 sales was within time.

22. In the result, the appeal is allowed only as against the third respondent to the extent of decreeing the suit for possession and accounts from the dates of Exs. B-8 and B-7 sale deeds respectively in respect of item No. 3 of the plaint "B" schedule and plaint "C schedule land and the judgment and decree of the lower Court is set aside to that extent only. The appeal is dismissed in respect of other plaint schedule properties. No costs.