(1980) 01 MAD CK 0050

In the Madras High Court

Case No : S.A. 1596 of 1975

Sundaramoorthy and another — APPELLANT

Vs

Shanmugha Nadar and other — RESPONDENT

Date of Decision : 03-01-1980

Acts Referred:

Hindu Minority and Guardianship Act, 1956 — Section 11, 5, 8, 9(5)
Succession Act, 1925 — Section 111

Citation : (1980) 01 MAD CK 0050

Hon'ble Judges : Sathiadev, J

Bench : Single Bench

Advocate : T.R. Ramachandran for M/s. T.R. Rajagopalan and T.R. Rajaraman, for the Appellant; K. Subramanian and S. Navaneetha krishnan, for the Respondent

Final Decision : Allowed

Judgement

Sathiadev, J.—The plaintiffs are the appellants. They filed the suit in forma pauperis for partition and separate possession of their half share

in A schedule properties and for recovery of past and future profits. In the plaint, they claim that the properties mentioned in A schedule originally

belonged to Subbammal, maternal grandmother of plaintiffs 1 and 2 and defendants 7 and 9 and she executed a registered Will on 13th May,

1948. Bequeathing the properties to her grandsons and appointing their mother as guardian and therefore each one of them secured one-fourth

share in the suit properties. The first plaintiff attained majority in May, 1965 feed the second plaintiff is still a minor. It is on attaining majority, the

first plaintiff realized that the suit properties are in the possession of defendants 1 to 6 and therefore, the suit has been laid for the reliefs prayed for

therein. Fifth defendant filed a written statement adopted by defendants 6 and 8, claiming that they have purchased items 6 and 7 in a schedule for

Rs. 5,000/- from defendants 7 and 9, and plaintiffs 1 and 2 represented by their mother and guardian Bagiammal under sale deed dated 27th July.

1960, and all the debts mentioned in the sale deed have been discharged. A sum of Rs. 1,400/- was reserved for being paid to plaintiffs 1 and 2

on their attaining majority. The first plaintiff received his share of Rs. 700/- on 30th March, 1966 and handed over a receipt, but in spite of it, he

had filed the present suit on 6th April, 1966 challenging the alienation made on his behalf. Subbammal died in 1950 within two years of the

execution of the registered Will. Second plaintiff was born several years after her death and therefore he is not entitled to any properties as a

legatee under the Will. As for the first plaintiff, he having received his share of Rs. 700/- on 30th March, 1966 has also ratified the sale and hence

he cannot file a suit for partition of his share. So far as items 1 to 5 of plaint A schedule is concerned, a preliminary decree was pasted in respect of

one-third share of plaintiff No. 1, whereas the claim of the second plaintiff was dismissed. Regarding items 6 and 7 with which defendants 5, 6 and

8 are concerned, the suit claim was dismissed. Defendants 1 to 4 had remained ex parte in the proceedings.

2. The lower appellate Court confirmed the findings of the trial Court which has resulted in the filing of the present second appeal in so far as the

reliefs claimed by plaintiffs 1 and 2 had not been acceded to by the Courts below.

3. Mr. T.R. Ramachandran, learned counsel for the appellants contends that (1) under Ex. B1 registered Will dated 13th May. 1948. the

properties belonging to the grandmother of plaintiffs 1 and 2 and defendants 7 and 9 were bequeathed to a class of persons, who would come

within the ambit of explanation to S. 111of the Succession Act, and that (2) the vendees under Ex. B2 cannot challenge the right of the second

plaintiff to the properties when they have taken the sale deed from him as well; that (3) if it is held that the second plaintiff had not acquired any

rights in the property pursuant to Ex. B1, when under Ex. B2, each one of the sharers had claimed to have conveyed their share, the residual one-

fourth share is yet to be conveyed by the other three sharers; that (4) in view of S. 11of the Hindu Minority and Guardianship Act of 1956 (Act 32

of 1956) the plaintiffs'' mother cannot sell immovable properties when the father is alive, that (5) merely, because first plaintiff has received a sum

of Rs. 700/- under Ex. B5, dated 30th March, 1966 it cannot constitute a ratification of a non est. transaction or a void sale under Ex. B2 of his

share of the properties, and that (6) facts and circumstances of this case do not enable respondents herein to plead the doctrine of election,

estoppels approbation and reprobation and the plaintiffs are entitled to have the relief of partition for their one half share in the properties.

4. Mr. Parasaran, learned counsel for the respondents, contends that Explanation to S. 111of the Succession Act is not applicable to this case and

there is no question of keeping the rights in the properties in abeyance till the last of the minors attains majority, and that they Will under Ex. B1

becomes operative on the date of the death of Subbammal in 1950 and therefore eo instanti whoever was entitled to the property on that date, will

alone acquire interests in the property. Therefore the second plaintiff, who was not born by that date, cannot acquire any interest in the property,

and hence he cannot file the present suit for partition. As for the first plaintiff, having accepted his share of the amount under Ex. B5, be has ratified

a voidable transaction and he is estopped from pleading otherwise. So far as the mother of the plaintiffs is concerned, she was the testamentary

guardian and the father having admittedly partaken in the transaction taking keen interest therein and he had also attested not only this document

but also other mortgage deeds and sale deeds under Exs. A 1 to A 4, in the eye of law the sale effected was done only by him though in the name

of his wife styling herself as guardian, and hence S. 11of the Act 32 of 1956 will not be a bar to such a transaction. An attestation with full

knowledge of the transaction has been held to be binding upon the attester and in this view, he had actively participated in the transfer of interests

in immovable property belonging to his minor sons, and hence the transaction is a voidable one at the instance of the plaintiffs, for failure to secure

the permission of Court. When the first plaintiff attained majority, he had not only ratified the transaction, but also received his share of the

amounts.

5. Courts below have concurrently held that the second plaintiff has not acquired any interest in the suit properties under Ex. B1, since he was not

born on the date of the death of the testatrix Subbammal. The first point that requires to be considered is whether the second plaintiff who is still a

minor can maintain the suit for partition based on rights acquired under the Will Ex. B1. Mr. T.R. Ramachandran, learned counsel for the

appellants, contends that in view of the decision rendered in T.B. Sri Rangi Vs. Asia Bai, . The determinative date would be the date on which

distribution can take place under S. 111of the Succession Act. He refers to the recitals in the Will to the effect that Subbammal''s daughter

Bagyammal is to function as the guardian of the minors who have been already born, they being defendants 7 and 9 and the first plaintiff, and that

the properties are to be taken by them absolutely on attaining majority. Subsequently, she had stated that in case her daughter Bagyammal was to

have other male issues, they will also get a share in the property and all of them together, on attaining majority, will secure interest in the properties.

Bagyammal was allowed to enjoy the properties for and on behalf of the grandchildren of the testatrix. In the said decision, it has been held that in

fixing the time of distribution, the earliest of the dates fixed will be taken as the date of distribution and if it is stated that the members of the class

are to take as and when they attained particular age, the time when the eldest of them reached that age would be the earliest date of vesting and

that should be the date of distribution. Therefore, all those of the designated class born within that time would be entitled to a share in the legacy.

But it will be seen that in A. Narayanan and Another Vs. Commissioner of Income Tax, a Division Bench of this Court in dealing with the scope of

S. 111of the Succession Act, held that the normal rule is that the date of death of the testator crystallizes the class of legatees and those who come

within the class and are capable of taking on that date, obtain the benefit. The subsequent extension of the class cannot diminish that benefit. What

is required is the construction to be put on the terms of the Will and it was held that on a proper construction of the Will therein, (sic) as to those

who became members of a class, after the right crystallized in certain legatees alive on the date of death of the testator their rights (sic) cannot be

usurped by those who are born subsequent to that date. If there is postponement of possession of property bequeathed beyond the testator''s

death either by reason of a prior bequest in favour of another legatee not belonging to the class or otherwise, the period of distribution for the purpose of ascertaining the class is not the death of the testator, but the date on which possession is to be taken.

6. Therefore, unless it be shown that on the date of the death of the testator, the rights have vested and only taking of possession is postponed, a

different date of the death of the testator would be irrelevant. In this case, if it is to be held that the properties would vest only after the second

plaintiff attains majority, between 1952 and up to the date when the second plaintiff becomes a major, the right to the property will be kept in

abeyance and such a concept being unknown to law and against the law of perpetuity, the contention of Mr. Ramachandran based on T.B. Sri

Rangi Vs. Asia Bai, Is unacceptable. This is not a case where Explanation to S. 111of the Succession Act can be invoked. The matter decided in

A. Narayanan and Another Vs. Commissioner of Income Tax, was taken up to the Supreme Court and in A. Narayanan and Another Vs.

Commissioner of Income Tax, Madras, it held that there has been no prior bequest in favour of any other person and legal possession of the

property on the death of the testator was not vested in or reserved for any other person and there being no postponement of vesting of legal

possession in the grandsons in existence on the date of the testator''s death, only such of them who were born on the date of the death of the

testator would be entitled to the property, and not those who were born subsequently even though such a provision was contemplated in the Will.

When the law on this aspect has been so laid down by the Supreme Court, Mr. Ramachandran''s contention that the Supreme Court was

conscious of the decision rendered in T.B. Sri Rangi Vs. Asia Bai, and having not specifically overruled it because the Division Bench of this Court

has referred to that decision in paragraph 5 of the judgment and that it will continue to be applicable to cases which would come within the

Explanation to S. 111of the Succession Act, is without any force. Hence, on the first point the second plaintiff cannot claim any interests in the suit

properties by virtue of the Registered Will dated 13th May, 1948, he having been born subsequent to the death of the testatrix, and in this case, it

was not a gift to a class of persons but to the persons who have been mentioned in the Will and who were alive on the date of the death of the

testatrix. In this view, the concurrent findings of the Court below regarding the disentitlement of the second plaintiff of the suit properties, is hereby confirmed.

7. The next point that requires to be considered is whether Bagyammal, the mother of the first plaintiff, acting as his guardian, could have conveyed

valid title under Ex. B2 in favour of defendants 5, 6 and 8, in respect of items 6 and 7. Mr. Ramachandran relies upon S. 11of Act 32 of 1956 to

contend that de facto guardians cannot dispose or deal with the property of a Hindu minor after the commencement of the Act except by the

natural guardian under S. 8and that too when the father is alive, such a sale deed is a void transaction.

8. To advance this contention, he refers to the Full Bench decision of this Court in Amirtham Kudumban Vs. Sornam Kudumban, wherein it was

held that overriding effect of Act 32 of 1956 is to encompass even earlier Court rulings on the subject which are now dealt with under the Act, and

that any right to be decided on aspects contemplated under the said Act can be only by reference to the provisions of the Act and not by reference

to the judicial precedents in regard to the law as it existed before the commencement of the Act. When the provision of the Act alone will be

applicable, can it still be contended that a testamentary guardian can continue to exercise the powers on the basis of what is provided under Ex.

B1, Will? Here again, he would refer to the decision rendered in T.V. Duraiswamy Naicker and Others Vs. E. Balasubramanian and Another,

wherein it has been held that S. 28of the Guardians and Wards Act in so far as it authorised testamentary guardian appointed by a Hindu mother

and as unlimited power of sate is inconsistent with the provisions of S. 9 (5) read with S. 5of the Act, S. 22of the Act will cease to have effect in

so far as the powers of the guardian to dispose of the minor''s property were concerned without the prior sanction of the Court. It was therefore

held that the provisions of Act 32 of 1956 will prevail over the right of a testamentary guardian to deal with the properties, after the coming into

force of Act 32 of 1956. Incidentally, he would also refer to the decision rendered in Kavuru Venkatappayya Vs. Kavuru Raghavayya, wherein it

was held that the maxim that a man shall not derogate from his own grant, would have no application to a case in which the personal law of the

parties rendered altogether void a grant by him, which must therefore be treated in the eye of law as non-est. When no right is created by void transaction, there is no question of estoppels or any other kind of personal bar akin thereto which could preclude the party from ascertaining his

right to recover the property.

9. Mr. Parasaran contends that the right of the mother to Act as a guardian having been enshrined in the Will and which right was exercised by her

with the acquiescence and active participation of the father of the minors and who had attested the document, Cannot be equated to a case where

without the knowledge of the natural guardian, the property had been sold by a de facto guardian. To support this contention he relies on the

decision rendered in Mayilswami Chettiar Vs. Kaliammal and Others, (a decision rendered subsequent to Act 32 of 1956). But it will be seen that

no reliance had been placed in the said decision on S. 11of the Act or any other provisions of the Act. It was held that the right of a de-facto

guardian to deal with the property of a Hindu minor had been recognised by our Courts, ever since the decision in the so-called ''Hanuman

Persad''s case'' and it would be valid, provided the alienation was for necessity. As already pointed out, when a Full-Bench of this Court had

clearly laid down that all the earlier precedents would have no application subsequent to the enactment of Act 32 of 1956 the decision re-lid upon

by Mr. Parasaran cannot be made applicable to the facts and circumstances of this case. When the father is alive, he is the only person who can

deal with the property of a minor from whichever source the minor would have got the properties. Hence, in this case, the mother of the first

plaintiff could not have functioned as his guardian and lawfully conveyed any of his interests in the suit properties.

10. The next contention is the effect that when the transaction itself is void, in the eye of law, the plea that the father had acquiesced in the

transaction and that he had taken active part or that the other two brothers, defendants 7 and 9, have also participated in the transaction and that it

was for family necessity, cannot in any manner validate a void transaction.

11. The main point taken on this part of the case is of the first plaintiff on attaining majority receiving a sum of Rs. 700/-representing his share of the

sale consideration by executing Ex. B5, receipt dated 30th March, 1966. Mr. Ramachandran contends that mere execution of the receipt under

Ex. B5 will not result in a ratification of a void transaction, because there is nothing known to law of anybody ratifying a transaction which was

non-est. He refers to the decision rendered in Talari Erappa v. Muthyalappa AIR 1972 Mys. 31 wherein it was held by reference to Act 32 of

1956 that any alienation of a de-facto guardian cannot be ratified by a minor on attaining majority. The proposition that there could be no validation

of a void transaction is not in dispute. But what is contended is that the transaction is a voidable one, because the prior permission of the Court had

not been obtained by the father who had in effect brought about the transaction in this case, and hence Ex. B5 will be binding on the first plaintiff.

12. The contention that a void transaction cannot be ratified is sought to be supported by relying on the decisions in Hindustan Construction Co.

Vs. State of Bihar, and Sudhansu Kanta Vs. Manindra Nath, and it is not necessary to deal any further with this aspect, because when the

transaction under Ex. B2 is a void one, whatever be the subsequent conduct of the first plaintiff in receiving a sum of Rs. 700/ it cannot result in the

sale having been ratified by him. Hence, on this point, it has to be held that the share of the first plaintiff was not validly conveyed by his mother

acting as his guardian, when it could have been done only by his father who was alive, and that too after obtaining permission of Court.

13. The next aspect is, whether the active participation of the father in the sale transaction and of his attesting Ex. B2, apart from the attestation he

had done in respect of Ex, A 1 to A 4 could mean that it was a sale effected by him though purported to be done by the mother of the first plaintiff.

Reliance is placed on the decisions in Ramaswamy Gaundar v. Anantapadmanabha Iyer, 197 M M.LJ. 392=84 L.W. 176. M.S. Ibrahim Labbai

v. M.N.P. Mohamed Abdulla 1972 l M.L.J. 35 (S.N.) and A.S. Muthia v. Peter Nadar 1974 T N L J 2. to contend that attestation would

operate as estoppel It a fact that it was not only the father, but the other two elder brothers, defendants 7 and 9, who had participated in the

transaction and they have also executed the sale deed along with plaintiffs 1 and 2 represented by their mother as guardian. When the law requires

that a particular person alone can act as a guardian and if he it to deal with the properties of a minor after obtaining permission of Court he shall do

so only after securing permission of Court and no useful purpose can be achieved by Courts in interpreting the law otherwise, to hold that it is not the form that is material, but it is the substance of the transaction that should be gone into. I am not for entertaining such contentions when the law is

so clear that it is only natural guardian who can deal with the property of a minor and not the de-facto guardian, and when the father is alive, he is

the only person who can deal with the properties, when he had not participated in the transactions as their guardian to exercise the legal rights that

flow out of it, there is no scope for holding that by implication because he was an attestor it is only the father who had acted as the guardian of the

minors and not their mother. In this view, the sale effected under Ex. B2 is not a voidable one, but a void transaction, and hence Ex. B5 cannot be

relied upon to hold that the first plaintiff has ratified the sale.

14. Thus it will be seen that mother of plaintiffs 1 and 2 could not have acted as their guardian and conveyed any interests in the suit properties

under Ex. B2. So far as the second plaintiff is concerned, he acquired no interests whatsoever under Ex. B1. The first plaintiff and defendants 7

and 9 are the only three persons, who have acquired rights under Ex. B1. Defendants 7 and 9 having executed the sale deed under Ex. B2, they

would be bound by the transaction. As for the first plaintiff, his one-third share having not been validly conveyed and the receipt passed by him

under Ex. B5 cannot in the eye if law constitute a ratification, it is only to the extent of one-third share the first plaintiff can ask for the relief of

partition and separate possession. The contention of Mr. Ramachandran that under Ex. B2, one-fourth shares representing each one of the

beneficiaries under. Ex. B1, had been sold cannot be upheld though representing the share of plaintiffs 1 and 2, a sum of Rs. 1,400/- had been

reserved, because in the document, it is claimed that the rights acquired under Will dated 13th May, 1943 was being conveyed by the vendors. It

is not a case where each one had come forward to admit that they are entitled to only one-fourth share which was being conveyed by them, in

which event it may well be open to him to contend that a residual of one-fourth share is yet to be conveyed. From what had been stated above,

taking into account the nature of recitals in Ex. B2 and of the fact that on right had been acquired by the second plaintiff under Ex.B1, merely

because wrongly the amount payable to the two plaintiff, on attaining majority had been determined at Rs. 1,400/- it cannot be held that the first plaintiff was entitled to a one-fourth share and not the one-third share which he had already acquired under Will dated 13th April, 1948. The entire

interests acquired under Ex. B1 having been conveyed under Ex. B2 by all parties who have rights there is no residual of one-fourth share still

remaining to be bought under it. Hence for all the reasons above stated this appeal is allowed to the extent of one-third share to which the first

plaintiff alone is entitled in respect of items 6 and 7, which had been rejected by the Courts below. The claim made by the second plaintiff for any

share in the properties had been rejected by the Courts below, and that finding is confirmed. No costs.

