
(1980) 01 MAD CK 0030

In the Madras High Court

Case No : Second Appeal No. 1596 of 1975

Sundaramoorthy and Another

APPELLANT

Vs

Shanmugha Nadar and Others

RESPONDENT

Date of Decision : 08-01-1980

Acts Referred:

Hindu Minority and Guardianship Act, 1956 — Section 2
Succession Act, 1925 — Section 3

Citation : AIR 1980 Mad 207 : (1980) 93 LW 268

Hon'ble Judges : Sathiadev, J

Bench : Single Bench

Judgement

1. 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 sch. originally belonged to

Subbammal, maternal grandmother of plaintiffs 1 and 2 and defendants 7 and 9 and she executed a registered Will on 18-5-1948 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 and the second plaintiff is still a minor. It is on attaining majority, the first plaintiff realised that the

suit properties are in the possession of defendants 1 to 6 and 8, and therefore, the suit has been laid for the reliefs prayed for therein.

2. 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.

5000 from defendants 7 and 9, and plaintiffs 1 and 2 represented by their mother and guardian B under sale deed dated 27-7-1960, and all the

debts mentioned in the sale deed have been discharged. A sum of Rs. 1400 was reserved for being paid to plaintiffs 1 and 2 on their attaining major

ity. The first plaintiff received his share of Rs. 700 on 30-3-1966 and handed over a receipt, but in spite of it, he had filed the present suit, on 6-4-

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 30-3-1966 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 plaintiff A schedule is concerned, a preliminary decree was passed 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.

3. 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.

4. Mr. T. R. Ramachandran, learned counsel for the appellants, contends that (1) under Ex. B. 1 registered will dated 13-5-1948, 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. III of the Succession Act and that (2) the vendees under Ex. B. 2 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. B. 1, when under Ex. B. 2, 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. 11 of 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. B. 5, dated 30-3-1966, it cannot constitute a ratification of a non est transaction or a void sale under Ex. B 2 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, estoppel, approbation and reprobation and the plaintiff are entitled to have the relief of partition for their one half share in the properties.

5. Mr. Parasaran, learned counsel for the respondents, contends that Explanation to S. 111 of 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 the Will under Ex. B. 1

becomes operative on the date of the death of Subbammal in 1950 and therefore instant 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. B. 5 he 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 guardian, and hence S. 11 of the Act 39 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 attestor and in this in view, he 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.

6. Courts below have concurrently held that the second plaintiff has not acquired any interest in the suit properties under Ex. B. 1, 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. B. 1. Mr. T. R. Ramachandran, learned counsel for the

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

can take place under S. III of 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 grand-children of the testatrix. In the said decision, it has been held that in the time of

distribution, the earliest of the dates fixed will be taken as a date of distribution and if it is stated that the members of the class are to take when

they attained a particular age, the time when the eldest member 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 AIR INS Mad 179, a Division Bench of this court in dealing with the scope of S. 111 of the Succession Act, held that the normal rule

is that the date of death of the testator crystallises 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 Will therein, 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 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 belong to the class or otherwise, the period of distribution for the purpose of ascertaining the class is not the date possession is to be taken.

7. 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 from the 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. III of 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 legal possession in the

grandsons, in existence on the date of the testator's death, only such of them who 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 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. III of 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 13-5-1948, he having been born subsequent to the death of the testatrix, and 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 Courts below regarding, the disentitlement of the second plaintiff the suit properties, is hereby confirmed.

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

valid title under Ex. B. 2 in favour of defendants 5, 6 and 8, in respect of items 6 and 7. Mr. Ramachandran relies upon S. 11 of Act 32 of 1956 to

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

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

9. To advance this contention, he refers to the Full Bench decision of this court in *Amirtha Kudumban Vs. Sornam Kudumban*, , wherein it was

held that the overriding effect of Act 39 of 1956 is to encompass even earlier court rulings on the subjects 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 provisions 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. B. 1, Will? Here again he would refer to the decision tendered in *Duraiswamy v. Balasubramanian*, *Alt 1977 Mad 804*, wherein it has been

held that Sec. 28 of the guardians and Wards Act in so far as it by a Hindu mother and an unlimited power of sale is inconsistent with the

provisions Section 9(5) read with of Section 5 of the Act Section 22 of the Act will cease to have any affect 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

82 of 1956 will prevail over the right of a testamentary guardian to deal with the properties, after the coming into force of Act 82 of 1956.

Incidentally, he would also refer to the decision rendered in *1950-2 Mad LJ 406: (AM 1951 Mad 818)* 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

estoppel or any other kind of personal bar akin thereto which could preclude the party from ascertaining his right to recover the property.

10. 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 Chetti v. Kalliammal* *1969 1 Mad LJ177* (a decision rendered subsequent to Act 82 of 1956). But it will be seen

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

guardian deal with the property of a Hindu minor to had been recognised by our courts, ever since the decision in the so called Hanuman Parsad'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 82 of 1956 the decision relied 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 at 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.

11. The next contention is to 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.

12. 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. B. 5 receipt dated 30-3-1966. Mr. Ramachandran contends that mere execution of the receipt under Ex. B. 5

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. We

refer to the decision rendered in AIR 1972 Mys 31, wherein it was held by reference to Act 82 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. B. 5 will be binding on the first plaintiff.

13. 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, cause when the

transaction under Ex. B. 2 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.

14. The next aspect is, whether the active participation of the father in the sale transaction and of his attesting EX. B. 2, apart from the attestation

he had done in respect of Exs. 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

plaintiff. Reliance is placed on the decisions in 1971 1gad LJ 392; 1972 1Mad LJ (S N) 35 and 1974 TNLJ 11, to contend that attestation would

operate as estoppel. It is 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 is 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 the 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 attester 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. B 2 is not a voidable one, but a void transaction, and hence Ex. B. 5

cannot be relied upon to hold that the first plaintiff has ratified the sale.

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

properties under Ex. B. 2. So far as the second plaintiff is concerned, he acquired no interests whatsoever under Ex. B. 1. The first plaintiff and defendants 7 and 9 are the only three persons, who have acquired rights under Ex. B. 1. Defendants 7 and having executed the sale deed under Ex. B. 2, 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 him under Ex. B. 5 cannot in the eye 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 posse on. The contention of Mr. Ramachandran that under Ex. B. 2, one fourth share representing each one of the beneficiaries under Ex. 1.1, had been sold cannot being the share of amount and of Rs. 1400 had been reserved, because in the document, it is claimed that the rights acquired under Will dated 13-5-1948 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 convene From what had been stated taking above into account the nature Ex. B. 2 and of the fact that no right had been acquired by the second plaintiff under Ex. B. 1, merely because wrongly the amount payable to the two plaintiffs on attaining majority had been determined at Rs. 1400 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 13-4-1948. The entire interests acquired under Ex. B. 1 having been conveyed under Ex. B. 2 by all parties who have rights there is no residual of one fourth share still remaining to be bought under it.

16. 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 to 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.

17. Order accordingly.