

(2017) 10 MAD CK 0056
In the Madras High Court
Case No : 1267 of 2016

Vishnapriya

APPELLANT

Vs

Ramesh Krishnan

RESPONDENT

Date of Decision : 04-10-2017

Acts Referred:

[Succession Act, 1925](#), [Section 68](#) -
Witness not disqualified by interest or by being executor.
[Evidence Act, 1872](#), [Section 71](#), [Section 68](#) - Proof when

Citation : (2017) 10 MAD CK 0056

Hon'ble Judges : J.Nisha Banu

Bench : SINGLE BENCH

Advocate : J.Nisha Banu

Final Decision : Allowed

Judgement

1. This Civil Miscellaneous Appeals have been filed under Section 47 of Guardians and Wards Act, 1890, against the dismissal order dated 08.08.2016 in G.O.P.No.47 of 2015 on the file of the Principal District Judge, Dindigul District, Dindigul.

2. The appellant herein is the petitioner in G.O.P.No.47 of 2015 and she is the wife of the respondent herein and before the Court below, she moved an order to permit her to sell the petition mentioned property to third parties for the welfare and benefit of the minors under Sections 8(2), 29(2) & 31 of the Guardian and Wards Act, 1890. The property in question situates at Kodaikanal and it belongs to one Jamuna Krishnan. It is averred in the affidavit that since the respondent addicted for alcohol and drugs and he was not capable for taking care of their children, the said Jamuna Krishnan, the grand-mother of the minors during her life time bequeathed her interest over the said property and other properties to her grand-children through a Will dated 25.09.2011. The said property was mentioned as "f" schedule property in the said Will and in her Will, it is clearly

stated that his son, during intoxication he did not know what he did. She also stated that if she fails to execute a Will, her son would not allow his children to enjoy the properties. Subsequently, the said Jamuna Krishnan died on 01.01.2012 and after her demise, the said minor children inherited the said property through testamentary succession and they have been in possession and enjoyment of the said property as lawful owners and all the revenue records have been mutated in the joint names of the minors and separate patta has been issued in their joint names vide patta No.2212.

3. The matter was admitted on 22.11.2016 and private notice was also permitted and proof of service was also filed on 21.03.2017. However, there was no appearance on behalf of the respondent.

4. Learned counsel for the appellant would submit that the Court below has failed to notice that the intention of the testator/grandmother of the minor children was to safeguard her minor grand children from the clutches of alcoholic father. Further, since there being no male support and she being a handicapped person, the appellant is unable to meet the welfare of the children. Despite the fact that the respondent herein filed a memo stating that he being the husband of the appellant has no objection for allowing the petition, still, the Court below dismissed the claim of the appellant. Hence, the petitioner is before this Court.

5. As earlier pointed out, there is no appearance on behalf of the respondent. Hence, this Court proceeded with the available materials placed before this Court.

6. Now, the moot point to be decided in this case is as follows:-

1) Is it required to prove the genuineness of the Will in the absence of denial of the Will, more particularly, when it is not disputed by the parties concerned?

2) When the parties intend to sell the property for the welfare of the minor children and when the Will itself is not disputed, whether the legal heir certificate is necessary to sell off the properties?

7. The Court below negated the claim of the appellant by referring to Section 68 of the Indian Evidence Act, 1872, which is referred to as follows:-

"68. Proof of execution of document required by law to be attested- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence"

8. At this juncture, while dealing with the scope of Section 63 of I.S. Act and Sections 68 and 71 of Evidence Act, the Supreme Court in the case of J. Naval Kishore vs D. Swarna Bhadrans, reported in 2008 (1) CTC 97, (2007) 5 MLJ 1417, the Supreme Court has held as follows:

"The requirement of due execution of a Will under Section 63(c) of the Succession Act is its attestation by two or more witnesses, which is mandatory....

Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the Will by calling the attesting witnesses, though alive. Section 71 is permissive and an enabling Section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling section. It lays down the necessary requirements, which the Court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of providing due execution by "other evidence" as well.... Section 71 of the Evidence Act can only be requisitioned when the attesting witnesses who have been called failed to prove the execution of the Will by reason of either denying their own signatures or denying the signature of the testator or having no recollection as to the execution of the document.

9. Ofcourse, it is true that any one of the witnesses have to prove the bequeathed Will as per Section 68 of the Indian Succession Act. But, in the case on hand, there is no rival claimant to rebut the Will. The only rival claimant, namely, the respondent herein has given no objection for allowing the petition filed by the petitioner. Therefore, it is deemed that there is no dispute in respect of disposing of the properties in question. Further, the Court below was of the view that the Will should have been registered. However, this Court is of the considered view that it is the option of the parties either to register the Will. There is no compulsion to register the Will. Therefore, the question of producing the legal heir certificate would not arise.

10. Now, whether the property of a minor can be alienated by his guardian? This is the issue dealt with in this Article. Who is a Minor? Section 4 (a) of the Hindu Minority and Guardianship Act, 1956 defines a Minor as "a person who has not completed the age of eighteen years". Under Section-6 of the said Act, the natural guardians of a Hindu minor, in respect of the minor's person as well as in respect of the minor's property (excluding his or her undivided interest in joint family property) are -

"(a) in the case of a boy or an unmarried girl -the father, and after him, the mother:

provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl-the mother, and after her, the father;

(c) in the case of a married girl - the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section-

(a) if he has ceased to be a Hindu, or

(b) if he has completely and finally renounced the world by becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi)

Explanation.-In this section, the expressions "father" and "mother" do not include a stepfather and a step-mother".

Under Section-7 of the said Act, the natural guardianship of an adopted son who is a minor passes, on adoption, to the adoptive father and after him to the adoptive mother. Under Section-8 (2) of the Act, the natural guardian shall not, without the previous permission of the court,-

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority."

It is also relevant to discuss Section 8 of the Hindu Minority and Guardianship Act, 1956 deals with the powers of natural guardian of a Hindu minor and the said section mandates that the natural guardian has power to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate, etc. The provision reads as follows:

"8 . Powers of natural guardian.-

(1) The natural guardian of a Hindu minor has power, subject to the provisions of this section, to do all acts which are necessary or reasonable and proper for the benefit of the minor or for the realization, protection or benefit of the minor's estate; but the guardian can in no case bind the minor by a personal covenant.

(2) The natural guardian shall not, without the previous permission of the court,-

(a) mortgage or charge, or transfer by sale, gift, exchange or otherwise any part of the immovable property of the minor; or

(b) lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date on which the minor will attain majority.

(3) Any disposal of immovable property by a natural guardian, in contravention of sub-section (1) or sub-section (2), is voidable at the instance of the minor or any person claiming under him.

(4) No court shall grant permission to the natural guardian to do any of the acts mentioned in sub-section (2) except in case of necessity or for an evident advantage to the minor.

11. The next question whether the guardian can sell off the property for the welfare of the minor? In the case of Punjab-Haryana High Court in Harpreet

Singh Sekhon vs Rajwant Kaur dated 22.02.2013, the Court has observed as follows:-

"The contention on behalf of the appellant is that in terms of Section 6 of the Hindu Minority and Guardianship Act, 1956, the father is the first natural guardian and the mother comes after that. Therefore, the custody is liable to be given to the appellant. In this regard, it may be noticed that the Hon'ble Supreme Court in Smt. Surinder Kaur Sandhu v. Harbax Singh Sandhu and another, AIR 1984 SC 1224 held that Section 6 of the Hindu Minority and Guardianship Act could not supersede the paramount consideration as to what was conducive to the welfare of the minor. The boy from his own point of view, it was held ought to be in the custody of the mother. In Ms. Githa Hariharan and another v. Reserve Bank of India and another, AIR 1999 SC 1149 it was held that a mother can act as the natural guardian of a minor even when the father is alive. Word "after" in Section 6 (a) of the Hindu Minority and Guardianship Act, it was held, has to be read as meaning "in the absence of father" to make the said Section consistent with constitutional safeguard of gender equality. The word "after" need not necessarily mean "after the lifetime". In the context in which it appears in Section 6 (a), it means "in the absence of", the word "absence" therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If a father is wholly indifferent to the matters of the minor even if he is living with the mother or if by FAO No.6208 of 2011 [28] virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. It was further held that while both the parents are duty-bound to take care of the person and property of their minor child and act in the best interest of his welfare, in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reasons is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as natural guardian of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be "absent" for the purposes of Section 6 (a) of the Hindu Minority and Guardianship Act and Section 19(b) of the Guardians and Wards Act. In Gaytri Bajaj v. Jiten Bhalla, (2012) 12 SCC 471 it was held that the interest and welfare of the minor should be treated as being of paramount importance. It is not the better right of either parent that would require adjudication while deciding their entitlement to custody. The desire of the child coupled with the availability FAO No.6208 of 2011 [29] of a conducive and appropriate environment for proper upbringing together with the ability and

means of the parent concerned to take care of the child are some of the relevant factors that have to be taken in account by the court while deciding the issue of custody of a minor. What must be emphasized is that while all other factors are undoubtedly relevant, it is the desire, interest and welfare of the minor which is the crucial and ultimate consideration that must guide the determination required to be made by the Court. Therefore, what is primarily is to be seen is as to what is the welfare of the minor which is the foremost and paramount consideration. The Courts can supersede the natural rights of a parent and not restore the custody of the child to him/her where on account of inaptitude, the welfare of the child is in danger. The parents' right to have custody of the child is not a right like a right of property but one of trust for the benefit of the child. Therefore, where a parent fails to perform the obligations which contain a trust in his/her favour, he/she foregoes his/her right to have custody of the child. A right of the parents is secondary to the interest of the child. The right will not be enforced where it conflicts with the interest of the child."

12. In *Nil Rantan Kundu v. Abhijit Kundu* reported in 2008 (4) CTC 425, while explaining the scope and power to make orders as to guardianship and the factors to be considered by the Courts in the matter of appointment of mother as guardian, this Court, at Paragraphs 56, 59, 61, 62, 72 and 74, held as follows:

"56. In our judgment, the law relating to custody of a child is fairly wellsettled and it is this. In deciding a difficult and complex question as to custody of minor, a Court of law should keep in mind relevant statutes and the rights flowing therefrom. But such cases cannot be decided solely by interpreting legal provisions. It is a humane problem and is required to be solved with human touch. A Court while dealing with custody cases, is neither bound by statutes nor by strict rules of evidence or procedure nor by precedents. In selecting proper guardian of a minor, the paramount consideration should be the welfare and well-being of the child. In selecting a guardian, the Court is exercising *parens patriae* jurisdiction and is expected, nay bound, to give due weight to a child's ordinary comfort, contentment, health, education, intellectual development and favourable surroundings. But over and above physical comforts, moral and ethical values cannot be ignored. They are equally, or we may say, even more important, essential and indispensable considerations. If the minor is old enough to form an intelligent preference or judgment, the Court must consider such preference as well, though the final decision should rest with the Court as to what is conducive to the welfare of the minor.

13. From the afore-said judgment, it is clear that paramount importance has to be given to the mother of the minor child for the benefit of the minor. In the case on hand, the husband of the appellant is an alcoholic person and the appellant herein wants to sell off her properties for the welfare of her minor child. The one more adding factor in this case is the paternal-grandmother of the minor child herself came forward to bequeath her properties to her grandchildren when her son is alive. It shows that the respondent is incapable of managing the properties

as well as his minor child or else nobody would bequeath the properties to the grandchild leaving her son. Therefore, as already stated earlier, as per Section 6 (a) of the Act, if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. It was further held that while both the parents are duty-bound to take care of the person and property of their minor child and act in the best interest of his welfare, in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reasons is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as natural guardian of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be "absent" for the purposes of Section 6 (a) of the Hindu Minority and Guardianship Act and Section 19(b) of the Guardians and Wards Act. In *Gaytri Bajaj v. Jiten Bhalla*, (2012) 12 SCC 471, it was held that the interest and welfare of the minor should be treated as being of paramount importance.

14. In the result, the order of the Court below stands set aside and this civil miscellaneous appeal stands allowed. No costs. Consequently, connected miscellaneous petition is closed.