

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

SECOND APPEAL NO. 650 OF 2003

Rameshwar S/o. Babasaheb Paul,
Age: 25 years, Occu. Student,
R/o. DigrasJahagir,
At Present atKirtinagar, Parli Vaijnath,
District Beed.

....Appellant
(Orig. Plaintiff)

Versus

1. Shivaji S/o. Eknathrao Paul,
Age : 40 years, Occu. Agril.,
R/o. Digras Jahagir, Tq. Selu (Old Pathri),
District : Parbhani.
2. Kushavartabai w/o. Babasaheb Paul,
Age : 45 years, Occu. Agril.,
R/o. Kirtinagar, Parli Vaijnath, Dist. Beed.
3. Bhagirathibai W/o.Deorao Paul,
Age : 80 years, Occu. and R/o. As above.
4. Kavita Pralhadrao Poul,
Age : 30 years, Occu. Household,
R/o. Digras Jahagir, Tq. Selu (Old Pathri),
District : Parbhani.
5. Karbhari S/o. Deorao Paul,
Age : 25 years, Occu. Agril.,
R/o. As above.

....Respondents

.....
Ms Priyanka N. Matlane, Advocate for the appellant
Mr A. S. Deshmukh, Advocate for respondents No. 1, 4 & 5
.....

CORAM : A. M. DHAVALA, J.

DATE OF RESERVING THE JUDGMENT : 17.12.2018
DATE OF PRONOUNCINGTHE JUDGMENT : 21.01.2019

JUDGMENT :-

1. A minor plaintiff's suit filed through his father as next friend for declaration that the sale of his share by his mother was void & illegal, was decreed with costs by the trial Court. The first Appellate Court allowed the appeal and reversed the judgment. Hence, the plaintiff has filed this Second Appeal.

2. The appellant-original plaintiff was aged 12 years when his father as next friend filed Reg. Civil Suit No. 56/89 in the court of Civil Judge Jr. Division, Selu, Dist. Parbhani. As per the plaint, land adm. 2H 90R at Gut No. 254 at Digras was belonging to the plaintiff. Kushavartabai / defendant No. 1 (his mother) had no title or right or interest. Defendant Nos. 2 and 3 by use of undue influence, coercion and force got a sale deed of the suit land executed in their name without any consideration. That time, defendant No. 1 as mother acted as a guardian when his father was alive. She had no authority to act as guardian and to execute the sale deed. No permission of the court was obtained for sale of minor's property. Initially, the suit was for declaration that the sale deed was void and for perpetual injunction but in 1990, the plaintiff claimed that he was forcibly dispossessed and by amending the plaint he claimed possession of the suit land. Defendant No. 2 – Shivaji alone contested the suit. He

claimed that, there was partition between the plaintiff, his father and his mother before execution of the sale deed and the suit land was allotted to defendant No. 1 and the plaintiff. The suit land was sold for legal necessity and for the benefit of the minor. The sale is legal and binding on the plaintiff. There was no coercion or undue influence or force. The suit proceeded without written statement of defendants No. 1 and 3.

3. The learned trial Judge framed issues and after recording the evidence he came to the conclusion that the plaintiff was exclusive owner of the suit land. The sale deed was obtained by undue influence and without consideration. It was not for legal necessity or benefit of the minor. With these findings, he granted a decree of declaration that the sale deed was null and void and not binding on the plaintiff and for possession.

4. Defendant No. 2 challenged the judgment and decree by way of Reg. Civil Appeal No. 177/1994 before the District Judge, Parbhani. The learned District Judge held that, the said sale deed could not be challenged during the minority of the plaintiff. The plaintiff alone can challenge it after attaining majority. Hence she allowed the appeal and dismissed the suit. Hence, this appeal.

5. By order dt. 25.07.2005, the appeal was admitted on grounds No. 2 and 3 as substantial questions of law, which read as under:

- (i) Whether the property of the minor can be alienated without the permission of the court?
- (ii) Whether the sale of a property in the name of minor can be sold (valid) without there being any legal necessity and whether property of the minor can be sold for the necessity of the other family members?

6. Ms Priyanka Matlane, learned counsel for the appellant argued that, the property was belonging to the plaintiff/minor. At the time of sale, his father was alive and his mother could not be his natural guardian. The sale effected by the plaintiff's mother was void and not voidable. In this regard, she relied on Narain Singh Vs. Sapurna Kaur and Ors. reported in 1968 (16) BLJ R898. In this case, it is held that, when the father was alive but he refused to act as natural guardian, the disposal of the property of the minor by the mother is not valid as she has not legally obtained the permission to dispose of the property. She could have taken recourse to the legal proceedings to act as minor's guardian.

7. Per contra, Mr V. D. Hon, learned Sr. Counsel for respondent No. 1 submitted that, learned first appellate Court has

rightly relied on the judgment of the Apex Court in Narayan Laxman Gilankar v. Udaykumar Kashinath Kaushik reported in AIR 1994 BOMBAY 152, to hold that the suit filed by the father of a minor during his minority was not maintainable. He submitted that, respondent No. 5 has purchased the suit property after the judgment of the first appellate court. The appeal was admitted after condonation of delay. Respondent No. 5 is a *bona fide* purchaser. In this situation, the doctrine of *lis pendens* will not be applicable. In this regard, he relied on the judgment Amrit Lal Jain v. Haryana Urban Development Authority and others reported in AIR 1995 Punjab & Haryana 1417. He also argued that, though sale transaction was executed by the mother of the plaintiff, the plaintiff's father was a witness to it. It was sold for the benefit of the minor. No substantial question of law is involved and therefore the appeal be dismissed.

8. The substantial questions of law with my findings are as follows:

- (i) Whether the property of the minor can be alienated without the permission of the court?
.... Not by mother, who is not natural guardian.
- (ii) Whether the sale of a property in the name of minor can be sold (valid) without there being any legal necessity and whether property of the minor can be sold for the necessity of the other family members?
....When sale is not by natural guardian, legal necessary is immaterial – In the negative.

(iii) What order? The appeal is allowed. The judgment and decree of the first appellate court are set aside and the judgment and decree of the trial Court is restored.

9. In view of argument of learned Advocate Mr. Hon, following additional substantial question of law is framed.

(i) Whether the decree would be binding on respondent No. 5 or not ? Decree would be binding.

REASONS

10. From the pleadings and evidence on record, it is not disputed that the suit land was belonging to the plaintiff, aged 12 years. In fact, the defendant has purchased the land assuming that it is belonging to the plaintiff and through his mother.

11. Admittedly, defendant No. 1-mother of the plaintiff during his minority on 17.02.1989 executed sale deed of the suit land adm. 1H 1R in favour of defendant No. 2 – Shivaji, for Rs. 30,000/-. The same is signed on behalf of the plaintiff by defendant No. 1 – Kushavartabai. It is attested by the plaintiff's father. Sale deed was executed on 17.02.1989 and the suit is filed on 16.03.1989. The sale deed is in favour of defendant No. 2 alone. Defendant No. 3 is not concerned. It was contention that, the sale was without consideration however it is a registered sale deed. There is evidence of the defendant about payment of consideration. There is nothing

suspicious to suggest that the sale deed executed was without payment of consideration. The ld. trial Judge held that, the sale was without consideration but he overlooked the fact that there was a registered sale deed which has presumptive value. In this regard, I rely on Vimal Chand Ghevarchand Jain & Ors. Versus Ramakant Eknath Jajoo reported in 2009 (5) Mh.L.J. 597. There is no material to suggest that defendant No. 1 – Kushavartabai was under any pressure and she could have executed the sale deed without consideration. The plaintiff has not examined Kushavartabai. In the light of these facts, the learned first appellate Court rightly set aside the finding that the sale was without consideration.

12. The learned trial Judge held that, when the plaintiff's father was alive, his mother was not a natural guardian and was not entitled to execute the sale deed on behalf of the minor. He also held that, there was no legal necessity.

13. The first appellate Court relied on Narayan Gilankar's case (supra), wherein it is held that when sale transaction is without permission of the court it is not *void ab initio* but is voidable at the option of the minor and challenge to the sale can be made by the minor only after attaining majority and not during his minority through next friend. It was observed by the first appellate Court that

the plaintiff filed application dt. 04.12.99 during the pendency of the appeal to remove the natural guardian and sought permission to contest the suit of his own. This was made after he had completed three years after attaining majority (aged 22 years). Therefore, his claim was barred by limitation.

14. In Narayan's case (supra), one Kashinath Kaushik was the common ancestor. He died in 1951 leaving behind a widow and two minor sons. Half portion of the property was sold in court auction in November – 1952 in execution of decree passed against deceased -Kashinath. On 04.10.1962, Rukhminibai sold the remaining $\frac{1}{2}$ part on behalf of heirs and natural guardian. In the year 1968, Udaykumar the elder son filed a suit for himself and as next friend of minor brother Babulal, against the purchaser Narayan Gilankar and mother Rukminibai for a declaration that the transaction of sale was void and for partition and separate possession of $\frac{2}{3}$ rd share. There was no dispute that the mother was the natural guardian and the property was not divided by metes and bounds and the minors had only undivided unspecified shares in the same. It was held that, essence of coparcenary property under Mitakshara is the unity of ownership in the whole body of coparcenary. Relying on sub-clause 2 & 3 of Section 8 of the Hindu Minority and Guardianship Act, 1956, it was held that, sale transaction without permission of the Court is

not *void ab initio*, but is voidable at the option of the minor or any person claiming under him and the said option can be exercised by him only after attaining the majority and not during minority through next friend.

15. The learned first appellate Court erred in not considering the peculiar facts and circumstances of the case which are quite distinct from the case of *Narayan Gilankar's* (supra). In that case, the brother was not natural guardian and father was dead. In the present case, father was alive and mother has executed the sale deed of the property of the minor and father was attesting witness.

16. In *Panni Lal Versus Rajinder Singh and another* reported in *(1993) 4 SCC 38*. Mother Gurkirpal sold the land owned by her minor sons Rajendra & Baldeo during their minority by registered sale deed dt. 30.07.1964. The respondents, upon attaining majority, sued the appellant for possession of the said land on the ground that the sale thereof, having been made without the permission of the court, was void. The appellants heavily relied on the fact that sale deed had been attested by the father of the respondents and that the sale must be deemed to have been a sale by the legal guardian. It was also contended that the sale had been for legal necessity and for the benefit of the respondents. In the light of these facts, the apex

Court observed as follows:

6. In this behalf our attention was invited to this Court's judgment in Jijabai Vithalrao Gajre vs. Pathankhan and ors., AIR 1971 SC 315. This 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 nonexistent 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.

7. 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.

17. The present case is squarely covered by the above judgment in the facts of the present case.

18. In Vishwambhar and others v. Laxminarayana AIR 2001 SC 2607, there was alienation of minors property by mother as guardian and the suit was filed by minor for recovery of possession from the purchaser. It was held that, the sales made by guardian

were ab initio void and liable to be ignored. It was held that, the suit should have been for setting aside the sales. There was no such prayer initially and the plaint was amended but the amendment was barred by limitation of three years from the date of sale deed. In this case also, the father Dattatraya died and the minors were in care and custody of their widowed mother. She was managing the properties left by Dattatraya as guardians of the minors. She executed sale deeds in 1967. The declaration for setting aside the sale deed would be necessary if the sale deed is executed by natural guardian which would be voidable u/s 8. Such prayer will not be necessary if the sale is effected by *de facto* guardian. It is governed by Section 11 which declares the sale as void.

19. In this regard, I rely on *Madhegowda v. Ankegowda* AIR 2002 SC 215. In this case, the original owner Ninjegowda died leaving behind two daughters Sakamma and Madamma. While Sakamma was minor, Madamma acting as guardian sold her share by registered sale deed to Madhegowda on 24.04.1961. It was sold for collecting funds for marriage of Sakamma. The appellant was also put in possession of the property. Sakamma after attaining majority sold her share of the property to Ankegowda, predecessor of respondent nos.1 to 9 therein, by a registered Sale Deed dated 1.7.1967. In the light of these facts, relying on Section 11 prohibiting

de facto guardian from alienating the property of minor, it was held that,

“Section 11 had done away with the authority of any person to deal with or dispose of any property of a Hindu minor on the ground of his being the *de facto* guardian of such minor. Any alienation by a de facto guardian will be governed by the provisions in Section 11 of the Act. The alienation, being against the statutory prohibition, would be *void ab initio* and the alienee would not acquire any title to the property.

The apex Court observed, “it is to be kept in mind that this is not a case of alienation of minor's interest in a joint family property. As noted earlier, Ninge Gowda died leaving his two daughters, namely Smt. Sakamma and Smt. Madamma. It is not the case of any of the parties that the suit property was a joint family property in the hands of Ninge Gowda or that the alienation by Smt. Madamma, who is the sister of the minor, was a transfer of the minors interest in the joint family property. Therefore, the question whether the provision in Section 11 is applicable in the case of transfer of minors interest in a joint family does not arise for consideration here. Section 11 includes all types of properties of a minor. No exception is provided in the Section. Undoubtedly Smt. Madamma, sister of the minor, is not a guardian as defined in Section 4(b) of the Act. Therefore, she can only be taken to be a de facto guardian or more appropriately de facto manager. To a transfer in such a case Section 11 of the Act squarely applies. Therefore, there is little scope for doubt that the transfer of the minors interest by a de facto guardian/manager having been made in violation of the express bar provided under the Section is per se invalid. The existence or otherwise of legal necessity is not relevant in the case of such invalid transfer. A transferee of such an alienation does not acquire any interest in the property. Such an invalid transaction is not required to be set aside by filing a suit or judicial proceeding. The minor, on attaining majority, can repudiate the transfer in any manner as and when occasion for it arises. After attaining majority if he/she transfers his/her interest in the property in a lawful manner asserting his/her title to the same that is sufficient to show

that the minor has repudiated the transfer made by the de facto guardian/manager.”

20. In the light of these facts, it is crystal clear that when the property inherited and owned by the plaintiff which is not a Hindu Joint Family property or interest in the joint Hindu Family and when father was not shown to be not taking care of the minor, mother is not natural guardian. She as a *de facto* guardian has no right to alienate the property of her minor son.

21. When the transaction is voidable, it is voidable at the option of the minor. Minor's father or natural guardian cannot exercise the option which a minor alone can exercise. Obviously, the minor can exercise it after attaining the majority. Therefore, when the sale is voidable, the ruling in Narayan Gilankar's (supra) would be applicable but when the sale is void and there was threat of dispossession or there was actual dispossession, it was not necessary for minor to wait for attaining majority. His natural guardian could have filed suit to protect his interest and his civil rights in the property. Thus, the suit filed by the plaintiff during his minority through his father a natural guardian as next friend is certainly maintainable. The period of limitation in such matters will be 12 years and not 3 years as there is no necessity of claiming any declaration. The question of legal necessity as held in Vishwambhar's case (supra) is irrelevant. The sale is void and the transfer can be

repudiated on attaining majority. I therefore find that the learned first appellate Court committed error in not properly appreciating the above facts and did not follow the settled principles of law as laid down in the above rulings. The sale could have been voidable only if father was neglecting the child and was in care, custody and maintenance of the mother. In this regard, reliance can be placed on the judgment of the Apex Court in Githa Hariharan (Ms) Vs. Reserve Bank of India reported in (1999) 2 SCC 228.

46. *In our opinion, the word 'after' shall have to be given a meaning which would subserve the need of the situation, viz., the welfare of the minor and having due regard to the factum that law courts endeavour to retain the legislation rather than declare it to be void, we do feel it expedient to record that the word "after" does not necessarily mean after the death of the father, on the contrary, it depicts an intent so as to ascribe the meaning thereto as "in the absence of" - be it temporary or otherwise or total apathy of the father towards the child or even inability of the father by reason of ailment or otherwise and it is only in the event of such a meaning being ascribed to the word "after" as used in Section 6 then and in that event, the same would be in accordance with the intent of the legislation, viz., the welfare of the child.*

47. *In that view of the matter, the question of ascribing the literal meaning to the word "after" in the context does not and cannot arise having due regard to the object of the statute, read with the constitutional guarantee of gender equality and to give a full play to the legislative intent, since any other interpretation would render the statute void and which situation, in our view, ought to be avoided.*

22. There are neither pleadings nor evidence to make out these situations which could have made the mother as natural guardian. Hence, the sale effected by mother is void and the suit filed for challenging the same and for claiming perpetual injunction and later on for possession was perfectly maintainable.

23. As far as the arguments of learned Advocate Shri. Hon for respondent No. 5 are concerned, he claims to be a bona fide purchaser after the First Appeal was dismissed before it was restored. He claims that the lis pendens would not be applicable and the decree would not be binding on him.

24. In the light of the above discussion, it is apparent that defendant No. 2 got no rights by virtue of sale deed executed by defendant No. 1 as the same was void. When defendant No. 2 had no rights, defendant No. 5 - Karbhani would have got no rights of title or interest by virtue of sale deed executed in his favour by defendant No.2. The issue of lis pendens applies when the rights or interests are in question. In the present case, respondent No. 5 is only in possession through respondent No. 1 - Shivaji (defendant No.2). The issue of lis pendens is not involved when there is no transfer of any rights as defendant No. 2 - Shivaji himself was having no right. As far as possession is concerned, decree passed against defendant No.2 - Shivaji would be binding on the persons claiming through him. The

facts in *Amrutlal Jain's* case were quite different. In that case, the subsequent purchaser was not made a party and there was allotment of the disputed plot in his favour. The said ruling is not applicable to the facts of the present case. Therefore, the judgment and decree of the first appellate Court will have to be set aside and the judgment and decree of the trial court will have to be restored. Since there is a registered Sale Deed, copy of this judgment and decree needs to be sent to Sub-Registrar before whom the sale deed was executed. Hence, I allow the appeal as follows:

ORDER

- (i) The Second Appeal is allowed with costs.
- (ii) The judgment and decree of the first appellate Court is set aside.
- (iii) The judgment and decree of the trial Court is restored.
- (iv) The trial Court is directed to forward the copy of this judgment and decree of the trial Court as well as this Court to the concerned Sub-Registrar before whom the sale deed declared as void was executed.

[A. M. DHAVAL]
JUDGE

Punde