

R.Sethumadhavan Vs. Ratheesh

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SooperKanoon Citation : sooperkanoon.com/1131737

Court : Kerala

Decided On : Feb-14-2014

Judge : Honourable Mr.Justice P.Bhavadasan

Appellant : R.Sethumadhavan

Respondent : Ratheesh

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE
HONOURABLE MR.JUSTICE P.BHAVADASAN FRIDAY,THE14H DAY OF
FEBRUARY201425TH MAGHA, 1935 RSA.No. 1523 of 2012 (F)
----- [AGAINST THE

JUDGMENT

AND DECREE IN A.S. NO.22/2007 OF THE SUB COURT, OTTAPPALAM,
DATED1709/2012 AND THE

JUDGMENT

AND DECREE IN O.S. NO.125/2002 OF THE MUNSIF MAGISTRATE COURT,
MANNARKKAD, DATED0101/2007] APPELLANT/APPELLANT/2ND
DEFENDANT: -----

R.SETHUMADHAVAN, AGED54YEARS, SON OF LATE RACKI MUTHALIYAR,
ARUKURUSSI AMSOM AND DESOM, MANNARKKAD TALUK- 678 582. BY
ADVS.SRI.P.B.SAHASRANAMAN, SRI.T.S.HARIKUMAR, SRI.K.JAGADEESH.

RESPONDENTS/RESPONDENTS/PLAINTIFFS & 1ST DEFENDANT:

----- 1.
RATHEESH, AGED 32 YEARS, SON OF SUBRAMANIAN, PUTHUR AMSOM AND
DESOM, MANNARKKAD TALUK - 678 582.

2. RAJESH, AGED 30 YEARS, SON OF SUBRAMANIAN, PUTHUR AMSOM AND
DESOM, MANNARKKAD TALUK - 678 582.

3. SUBRAMANIAN, AGED 67 YEARS, SON OF VELLA MUTHALI,
PUTHUKUDYIL, ARAKKURUSSI AMSOM, MANNARKKAD TALUK - 678 582. R1
& R2 BY ADVS. SRI.SANTHEEP ANKARATH, SRI.ARUN MATHEW VADAKKAN,
R3 BY ADV. SMT.V.RENJU. THIS REGULAR SECOND APPEAL HAVING BEEN
FINALLY HEARD ON 1402-2014, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING: Prv. P.BHAVADASAN, J.

----- R.S.A. No. 1523 of 2012 -----
----- Dated this the 14th day of February, 2014

JUDGMENT

The second defendant in O.S.No.125/2002, who suffered a preliminary decree for partition is the appellant. The parties are hereinafter referred to as they are arrayed before the trial court.

2. The plaintiffs, who are the children of one late Baby and the first defendant, claimed 2/3rd share of the plaint schedule property on the basis that their mother, to whom the property belonged, had executed Ext.A1 settlement deed in their favour assigning her rights in favour of them as well as the first defendant. At the relevant time, plaintiffs were minors. The first defendant caused the death of his wife Baby. After attaining majority, when the plaintiffs verified the encumbrance certificate etc., they found that the property has been assigned in favour of the second defendant by the first defendant. It was also found that the R.S.A. No.1523/2012 -2- assignment deed so executed by the first defendant was for on his own behalf and on behalf of the plaintiffs as their guardian. It was alleged in the plaint that in a suit instituted by the second defendant against Baby for specific

performance. After the death of Baby, the first defendant, the plaintiffs and plaintiffs' maternal grandmother were entered as legal heirs. It was also alleged that the first defendant was appointed as the natural guardian. The objection taken is that the first defendant had interest adverse to that of the minors and going by the provisions of the C.P.C., he could not have been appointed as their natural guardian. The suit went uncontested and a decree was passed for specific performance. It is alleged that the first defendant over enthusiastically executed a sale deed without even waiting for an execution petition being filed by the plaintiffs. Contending that in the light of Ext.A1 document, late Baby had no subsisting interest on the alleged date of execution of Ext.B1 agreement and they R.S.A. No.1523/2012 -3- contended that no rights could have accrued to the second defendant. They also stated that they are entitled to ignore the decree in O.S.No.116/1996. Thus the suit was laid.

3. The first defendant filed a written statement assailing the gift deed and almost supporting the second defendant.

4. The second defendant, who was the real contesting party, pointed out that he was unaware of any documents said to have been executed by Baby, which is produced as Ext.A1, and it was concealing the said fact, that Ext.B1 agreement was entered into by Baby undertaking to assign plaint schedule property for a total consideration of 90, 000/-. Out of the sum of 90,000/-, 75,000/- was paid on the date of agreement itself and since Baby did not honour the agreement for sale, a suit was laid as O.S.116/1996 before the Munsiff Court, Mannarkkad. In that suit, consequent on the death of Baby, her legal heirs namely the plaintiffs herein, the first defendant and the R.S.A. No.1523/2012 -4- maternal grandmother of the plaintiffs were impleaded. The first defendant was appointed as the natural guardian of the minors and accordingly, it is contended that a decree was passed in the said suit granting specific performance. In pursuance to the decree so granted, Ext.A5 document was executed by the first defendant in favour of the second defendant for his own behalf and on behalf of minor children also as they had inherited the rights of Baby and they were bound by the agreement executed by Baby which was found in favour of the plaintiffs in the said suit. It is contended that even assuming that Ext.A1 document is not genuine, it is necessary for the

plaintiffs to have the decree in O.S.NO.116/1996 set aside and so also pray for a declaration that the sale deed executed in favour of the second defendant is null and void. It is also contended that the plaintiffs being out of possession, the court fee paid is not sufficient. R.S.A. No.1523/2012 -5- 5. On the basis of the above pleadings, the trial court raised necessary issues for consideration. The parties adduced evidence with regard to their respective cases. The evidence consists of the testimony of PWs 1 and 2 and documents marked as Exts.A1 to A16 on the side of the plaintiffs. The second defendant examined himself as DW1 and had Exts. B1 to B3(a) marked.

6. The trial court, on an appreciation of the evidence, found that Ext.A1 had taken effect and therefore, late Baby had no subsisting interest in the property at the time of execution of Ext.B1 agreement and also went on to hold that the decree in O.S.No.116/1996 is not binding on the plaintiffs because their interest were not protected by the natural guardian who had interest adverse to that of minors. The court also held that the plaintiffs could ignore the decree and also the consequent sale deed which were not valid in law. Accordingly, the suit was decreed granting 2/3rd share of the plaint schedule property to the plaintiffs. R.S.A. No.1523/2012 - 6- 7. The disappointed second defendant carried the matter in appeal as A.S.No.22 of 2007 before the Sub Court, Ottapalam. The appellate court dismissed the suit on the sole ground that since Ext.A1 settlement deed or gift deed as the case may be has taken effect and the properties have devolved on the beneficiaries under that document. Late Baby did not retain any manner of right over the plaint schedule property to be assigned to the second defendant and therefore, agreement for sale has no validity. Holding so, it found unnecessary to go into other questions regarding the validity of the decree and the validity of the sale deed and dismissed the appeal. The second defendant in the suit has thus come up before this Court.

8. At the time of admission, the following substantial questions of law were formulated: i. Whether a suit for partition simplicitor be maintainable with respect to the property in possession of a third party of which he had obtained title and possession on the basis of a R.S.A. No.1523/2012 -7- valid sale deed executed by the plaintiffs also without a prayer for setting aside the sale deed? ii. Whether it

could be legal and proper to discard the judgment and decree of a competent civil, without a prayer for declaration that the earlier judgment is not binding on the plaintiff only on the reason of their minority at the time decreeing the earlier suit?

iii. Whether the minors in a suit can just neglect the decree of a civil court in the absence of any evidence to prove the adverse interest of the natural guardian as against the minors and the absence of proof of negligence or fraud on the part of the natural guardian in protecting their interest in that suit?

iv. Whether the courts below are justified in passing a preliminary decree in a suit for partition without ascertaining the possession and title of the 3rd party over that property and the legality of that title and possession especially when he had purchased the property for valuable consideration?

9. The learned counsel appearing for the appellant contended that he was totally unaware of the so called settlement deed and he was made to believe that at the time of execution of Ext.B1 agreement, Baby had subsisting R.S.A. No.1523/2012 -8- right over the property. He had agreed to purchase the property for a total consideration of 90,000/- and had in fact paid 75,000/- to Baby. The learned counsel pointed out that the suit was necessitated because Baby did not honour the agreement. After the suit was filed, Baby died and her legal heirs were brought on the party array. Since the plaintiffs were minors then, and since the first defendant was their natural guardian, he had him appointed as their guardian for the purpose of the case. A decree was passed in the suit in favour of the plaintiff, that is, the appellant herein. In pursuance to the decree, it is contended that the first defendant executed a document Ext.A5 in favour of the second defendant (appellant) honouring the so called decree. Even assuming that Ext.A1 is valid and genuine, the learned counsel went on to point out that unless the decree is set aside in appropriate proceedings and a declaration is sought for in respect of the sale deed said to have been executed by the first defendant in favour of the second R.S.A. No.1523/2012 -9- defendant, plaintiffs cannot succeed. In support of his contention, he relied on the decision reported in Ramadas Menon v. Sreedevi [2004 (1) KLT323, Vishwambhar and others v. Laxminarayana (Dead) through L.Rs. And another [2001 AIR SCW2616, Pankajaksha Kurup v. Fathima [1998 (1) KLT668.

10. The learned counsel appearing for the respondents on the other hand contended that once it is found that Ext.A1 is the valid document under which title

of Baby has passed on to the beneficiary under the document, nothing remained with Baby to be assigned in favour of the appellant. If that be so, the so called agreement for sale, Ext.B1 can be of no help. It is also contended that from the evidence, it is quite clear that the interest of the first defendant in this suit, who was the natural guardian appointed as the guardian of the minors in the suit against Baby i.e. O.S.No.116/1996, was adverse to the interest of the minors as would be evident from the subsequent R.S.A. No.1523/2012 -10- conduct of the first defendant and if that be so, their interest having not been protected, the decree is not binding on them. If the decree is null and void as far as the plaintiffs are concerned, all consequent action taken on the basis of a decree also falls to ground. For the above proposition, the learned counsel relied on the decision reported in Ismail Ebrahim v. Mathai Cheriyan [1955 KLT849, Jayasingh v. Gangadharan & Ors. [1973 KLT818 and Ram Chandra Arya v. Man Singh and Another [AIR 1968 SC954.

11. After having heard the learned counsel for the appellant and the respondent, the following substantial questions arise for consideration: i. Whether Ext.A1 is a valid document and whether it has taken effect? ii. Is it necessary to get the decree in O.S.No.116/1996 set aside? iii. Is the declaration that the sale deed R.S.A. No.1523/2012 -11- executed by the first defendant in favour of the second defendant in pursuance to the decree in O.S.No.116/1996 has to be set aside? 12. Ext.A1 is nomenclatured as a settlement deed. Both the courts below have concurrently found that Ext.A1 is executed by late Baby, the mother of the plaintiffs and the wife of the first defendant. Both the courts below have also found that it has come into effect. The courts below were inclined to hold that the gift has been accepted in the light of the fact that two minor children were residing with her and going by the various decisions, it will be presumed that unless shown otherwise, the gift has been accepted. The courts below have found no reason to take a different view, found that Ext.A1 document has in fact, taken effect by which plaintiffs have acquired right over the property which belonged to Baby. Being essentially a question of fact and conclusion has been arrived at on an appreciation of the R.S.A. No.1523/2012 -12- evidence on record and since it is not shown that the findings are either perverse or contrary to the evidence on record, no interference is called for in the said finding.

13. What next arises for consideration is the question whether the decree has to be set aside so as to close the plaintiffs with absolute right of seeking partition.

14. O.S.No.116/1996 before the Munsiff Court, Mannarkad was filed by the second defendant as against late Baby for specific performance of an agreement namely Ext.B1, document. It is significant to notice that late Baby had entered appearance in the said suit and filed a written statement in which she had disputed the execution of the agreement and also had pointed out that she had already executed a settlement deed in favour of her children and her husband and she had no subsisting right as on the date of agreement for sale. Several other contentions were also taken by the late Baby which are not very relevant for the present purpose. It so happened that during the pendency R.S.A. No.1523/2012 -13- of the suit, the first defendant, who is none other than the husband of Baby caused her murder and therefore plaintiffs in O.S.No.116/1996 was driven to the necessity to implead the legal heirs of late Baby to the suit. He therefore had the plaintiffs herein and the first defendant in the present suit and also the maternal grandmother of the plaintiffs impleaded as additional legal heirs in O.S.No.116/1996. The plaintiffs in O.S.No.116/1996 also had the first defendant herein, who is the natural guardian of plaintiffs, appointed as guardian for the purpose of the suit.

15. It appears that the suit was decreed. Without even waiting for an execution proceedings to be taken out, within ten days of the decree, it is seen that Ext.A5 document was executed by the first defendant in favour of the second defendant.

16. The contention now taken is that unless the decree is sought to be set aside by due process of law, the present suit could not have been maintained. It is pointed R.S.A. No.1523/2012 -14- out by the learned counsel for the respondent that once it is shown that the interest of minors in the suit in which they were represented by the first defendant was the adverse interest of the first defendant himself, he could not have been appointed as a guardian and since the interest of the minors were not safeguarded or protected or as sought to be agitated in the said suit, the decree is not binding on them. In such cases, according to the learned counsel, it is not necessary to have the decree set aside and a minor can

avoid the decree.

17. The question is whether the above submission can be accepted. It may be useful at this juncture to refer to the provisions of C.P.C. in this regard. It is no doubt true that the first defendant is the natural guardian of the plaintiffs who were minors at the relevant time. But Order XXXII Rule 3 deals with the appointment of a guardian which reads as follows: R.S.A. No.1523/2012 -15- "3. Guardian for the suit to be appointed by Court for minor defendant.- (1) Where the defendant is a minor the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for such minor. (2) An order for the appointment of a guardian for the suit may be obtained upon application in the name and on behalf of the minor or by the plaintiff. (3) Such application shall be supported by an affidavit verifying the fact that the proposed guardian has no interest in the matters in controversy in the suit adverse to that of the minor and that he is a fit person to be so appointed. (4) No order shall be made on any application under this rule except upon notice to any guardian of the minor appointed or declared by an authority competent in that behalf, or, where there is no such guardian, upon notice to the father or where there is no father, to the mother, or where there is no father or mother, to other natural guardian of the minor, or, where there is no father, mother or other natural guardian, to the person in whose care the minor is, and after R.S.A. No.1523/2012 -16- hearing any objection which may be urged on behalf of any person served with notice under this sub-rule. (4A) The Court, may, in any case, if it thinks fit, issue notice under sub-rule (4) to the minor also. (5) A person appointed under sub-rule (1) to be guardian for the suit for a minor shall, unless his appointment is terminated by retirement or removal or death, continue as such throughout all proceedings arising out of the suit including proceedings in any Appellate or Revisional Court and any proceedings in the execution of a decree." 18. A reading of the above provision shows that certain conditions have to be satisfied before a person is appointed as guardian by virtue of the said provision. One of the conditions is that the court should ensure that the proposed guardian has no interest adverse to that of minors and the other condition is that the consent of the person who is sought to be appointed as guardian has to be obtained. R.S.A. No.1523/2012 -17- 19. In the case on hand, there is nothing to show that there was any enquiry by the court in O.S.No.116/1996 as to the nature

of interest which the first defendant had as against him and the plaintiffs in this suit nor is there anything to show that his consent was obtained before he was appointed as a guardian. It is significant to notice that he was appointed as a guardian at a point of time when he was facing investigation for the murder of his wife. It is seen from the records that plaintiffs had given statement against him. Apart from the above fact, it will be also useful to refer to Order XXXII Rule 3A of C.P.C. which reads as follows: "3A. Decree against minor not to be set aside unless prejudice has been caused to his interest.-- (1) No decree passed against a minor shall be set aside merely on the ground that the next friend or guardian for the suit of the minor had an interest in the subject-matter of the suit adverse to that of the minor, but the fact that by reason of such adverse interest of the next friend or guardian for the suit, prejudice has been caused to the interests R.S.A. No.1523/2012 -18- of the minor, shall be a ground for setting aside the decree. (2) Nothing in this rule shall preclude the minor from obtaining any relief available under any law by reason of the misconduct or gross negligence on the part of the next friend or guardian for the suit resulting in prejudice to the interests of the minor." 20. The said rule consist of two parts, namely, sub clause 1 and 2. Sub clause 1 of the above provision deals with the case where grounds are provided for setting aside a decree. Based on that provision, it is contended that it is necessary to have a decree set aside. However, one cannot omit to note sub clause 2 which is independent of sub clause 1 and that provision does not deal with setting aside of a decree at all. It only makes mention of a right to the minor to obtain any relief under any law by the reason of misconduct or gross negligence on the part of the guardian or next friend as the case may be. R.S.A. No.1523/2012 -19- 21. The learned counsel for the respondent has relied on the decision reported in Ismail Ebrahim v. Mathai Cheriyan [1955 KLT849. The said decision dealt with a situation wherein the consequences of a guardian who had interest adverse to that of minors being appointed as a guardian of the minor was considered. It was held as follows:

12. The provision contained in Order 32, Rule 4(1) that no person whose interest is adverse to that of the minor should be appointed his guardian for the suit is a mandatory provision, and if such a person is appointed guardian it cannot be said that the appointment was made according to law. It is clear that in this case the

plaintiff's father was incompetent to act as his guardian for the suit in O.S.No.166 of 1105 and that his appointment as guardian was against the express provision of law. It has, therefore, to be taken that the minor was not properly represented in the suit. If there was no proper guardian for the suit for the minor the minor must be deemed to have been no party to the suit as was held by the Privy Council in 31 All R.S.A. No.1523/2012 -20- 572. The decree must, therefore, be regarded as a nullity so far as the minor is concerned.

22. The same question was considered in Jayasingh v. Gangadharan & Ors. [1973 KLT818. It was held as follows: "9. This necessarily takes us to the question whether a decree obtained against a minor represented by a guardian-ad-litem who had an interest adverse to the minor is a void or voidable decree. In the latter event it has to be avoided by the minor within the time limited by law. If the decree is void, there is no question of avoiding the decree. This is a question on which the High Courts in India have expressed different views. But we think that as early as in Rashid-Un-Nisa v. Muhammad Ismail Khan (ILR. 31 All. 522) the Privy Council had expressed clearly on this question. The question that arose before the Privy Council was whether the plaintiff in a suit was properly represented by a guardian-ad-litem who was a married woman. On the facts it was found that the interests of the guardian were adverse to the plaintiff. Dealing with the effect of the representation by such a guardian, the Privy Council said thus: R.S.A. No.1523/2012 -21- "S. 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term. Her sister; Ulfat-ua-nissa, was a married woman, and therefore was disqualified under S.457 of the Code from being appointed guardian for the suit, and Mauladad's interest was obviously adverse to that of the minor". The Courts in India have applied the dictum of this decision to several cases to hold that a decree obtained against a minor represented by a guardian-ad-litem who had an interest adverse to the minor was void so far as the minor was concerned. We refer only to some of these decisions on this point as the decisions appear to be numerous. There seems to have been some difference of opinion on this question

in the High Court of Madras though later the Madras High Court seems to have read the decision of the Privy Council as holding that in such a case the guardian who has interests adverse to the minor does not represent the minor at all. In *Sellappa Goundan v. Musa Naiken* (ILR. 47 Mad. 79) Odgers J.

said thus: "However a decision as to this may be R.S.A. No.1523/2012 -22- unnecessary as I held that the law goes to this length that a minor represented by a guardian whose interest is adverse is not legally represented at all. This is I think the result of the decision in *Rashid-un-nisa v. Muhammad Ismail Khan* (ILR. 31 All. 572) as followed in Second Appeal No. 1092 of 1918 in this Court". Hidayatullah C. J.

and Kotval J.

in the decision in *Ramprasad v. Dagdulal* (AIR. 1956 Nag. 215) dealt with a case of representation of a minor by a next friend having adverse interest and the learned Judges said "In our opinion, the order of compromise was obtained against a minor who was for all intents and purposes unrepresented in the suit. It was therefore a nullity as against him and did not bind him. Once this position is reached, it follows that the minor was not represented by reason of the next friend having carved out an interest for herself, and the compromise and the decree upon it must be treated as nullities:" A Division Bench of the High Court of Travancore-Cochin had reviewed exhaustively the decisions of the various High Courts on this question and though apparently some of the decisions took a view contrary to the view taken by the Madras High Court which we have referred to here, the learned Judge explained those decisions as not really laying down a view different from that adopted by the Madras High Court. We are referring to the decision in *Ebrahim v. M. Cheriyan* (AIR. 1956 Trav.-Co. R.S.A. No.1523/2012 - 23- 70). The court said thus: "The provision contained in O.32 R.4(l) that no person whose interest is adverse to that of the minor should be appointed his guardian for the suit is a mandatory provisions and if such a person is appointed guardian it cannot be said that the appointment was made according to law." The court added "It has therefore to be taken that the minor was not properly represented in the suit. If there was not proper guardian for the suit for the minor

the minor must be deemed to have been no party to the suit as was held by the Privy Council in 31 All. 572 (PC). The decree must therefore be regarded a nullity so far as the minor is concerned." 11. In the decision of a Single Judge of the Patna High Court in Ram Kripal v. Munabati Kumri (AIR. 1958 Patna 477) the Court observed that when a decree has been passed in contravention of proviso to O.32 R.4 (1) of the Code of Civil Procedure, the minor alone may attack the validity of a decree passed against him in a manner contrary to the provisions laid down in the proviso to R4(1) of O.32, The contravention, if any, according to the learned Judge, is not to make the decree void ab initio or nullity but only voidable. The decision of the Privy Council 'in Rashid-un-nisa v. Muhammed Ismail Khan (ILR. 31 All. 572) was cited before the learned Judge R.S.A. No.1523/2012 -24- and the learned Judge has taken the view that the decision does not lay down the rule that the decree would be void. We think, as we have earlier observed, we would follow the view taken by the Madras High Court and other High Courts holding that the decree would, in such a case, be a nullity as far as the minor is concerned.

23. Here, one aspect has to be noticed. The learned counsel for the appellant pointed out that in the decision reported in Jayasingh's case (cited supra), this Court had occasion to hold that the decree has to be set aside in appropriate proceedings. This contention is met by the learned counsel for the respondents by pointing out that as long as it is found that the Baby had no subsisting interest in the property as per Ext.B1, the question of setting aside the decree does not arise.

24. There seems to be considerable force in the above submission. The issue dealt with in Jayasingh's case (cited supra) is a case where there was subsisting right with the parties, viewed in that context, it was held that it is R.S.A. No.1523/2012 -25- necessary to have the decree set aside. In the case on hand, as already noticed, by virtue of Ext.A1 document, whatever right the late Baby had, had passed on to the plaintiffs and the first defendant and Baby had no subsisting interest over the suit property as on the alleged date of agreement evidenced by Ext.B1. If that be so, it is idle for the appellant to contend that Ext.A1 decree has to be set aside.

25. What now remains to be considered is the contention raised by the learned counsel for the appellant that unless there is declaration regarding the invalidity of the sale deed and unless it is got set aside, the plaintiff cannot succeed, has to be considered.

26. Considerable reliance was placed by the learned counsel for the appellant on the decision reported in *Ramadas Menon v. Sreedevi* [2004 (1) KLT323. That was a case where the natural guardian alienated the property belonging to the minors without following the R.S.A. No.1523/2012 -26- procedures contemplated in law, or in other words, it was without obtaining sanction of the court concerned that sale was effected. While assailing a case in such a nature, the court had occasion to hold that a declaration for setting aside the decree is absolutely necessary for the plaintiffs to succeed. It was held as follows:

8. It is seen that the reference was answered in the decision reported in *Madhukar Viswanath v. Madhao & Ors.*, (1999) 9 SCC4456 The Supreme Court took the view that it was not necessary to decide the question in the particular facts of the case. Subsequently, the Supreme Court in another decision reported in *Viswambhar & Ors. v. Laxminarayan*, (2001) 6 SCC163 considered S. 8 of the Act and held as follows: "The question is, in such circumstances, are the alienations void or voidable? In S.8(2) of the Hindu Minority and Guardianship Act, 1956, it is laid down, inter alia, that the natural guardian shall not, without previous permission of the court, transfer by sale any part of the immovable property of the minor. In sub- s. (3) of the said section, it is specifically provided that any disposal of immovable property by a natural guardian, in contravention of sub-s. (2) is voidable at the instance of the minor or any person claiming under him. There is, therefore, R.S.A. No.1523/2012 -27- little scope for doubt that the alienations made by Laxmibai which are under challenge in the suit were voidable at the instance of the plaintiffs and the plaintiffs were required to get the alienations set aside if they wanted to avoid the transfers and regain the properties from the purchasers". In view of the above decision, it is now clear that the alienations have to be challenged and without setting aside the alienation, no relief can be obtained.

9. In the above view of the matter, we hold that there should be a prayer to set aside the alienation effected by the natural guardian without the court's sanction. The Plaintiff cannot merely ignore the sale deed." 27. One has to at once notice the facts of the said case. It was a case where the natural guardian had assigned the property belonging to the minors and it is not a case where there was want of title for the assignment at all. Further, it is only a voidable transaction unlike in the case of a alienation by a de facto guardian which is void in law or a in a case of alienation by a guardian who had interest adverse to that of the minors. Under those circumstances, this Court had occasion to hold that setting of the sale deed R.S.A. No.1523/2012 -28- is absolutely necessary and declaration for that purpose is also essential for the persons concerned to avoid sale deed.

28. The decision reported in Vishwambhar and others v. Laxminarayana (Dead) through L.Rs. And another [2001 AIR SCW2616 was relied on by the learned counsel for the appellant and also in Ramadas Menon v. Sreedevi [2004 (1) KLT323 and pointed out that it was almost on similar facts. The issue seen considered is whether the alienation by a natural guardian was void or voidable and the Apex Court held that it is only voidable and therefore there has to be a declaration to have the sale deed set aside.

29. The principles laid down in the above decisions cannot have application to the facts of the present case. First of all, there was no alienable rights in pursuance to the decree obtained in O.S.No.116/1996, since late Baby had already parted with her rights as per Ext.A1 which is prior in point of time to Ext.B1. The other ground is that the decree R.S.A. No.1523/2012 -29- in O.S.No.116/1996 cannot be deemed in binding on the minors because it is clear from the evidence that the interest of the father was adverse to that of minors and therefore going by the provisions already referred to, he could not have been appointed as their guardian for the purpose of the court nor can he be acted in that capacity.

30. Here, one may notice the decision relied on by the learned counsel for the respondents reported in Ram Chandra Arya v. Man Singh and Another [AIR 1968 SC954. That was a case where the property of a lunatic was the subject matter of the suit and a decree was passed without appointment of a next guardian or next

person to represent the lunatic. It appears that the lunatic continued to be in possession and that at a later point of time, rights on his behalf were asserted. The Apex Court, while considering the claim that the decree has to be set aside, held that since the lunatic was unrepresented by anybody in the earlier suit, the decree passed is null and void and if that R.S.A. No.1523/2012 -30- be so, all further proceedings in pursuance to the decree is also non est.

31. The learned counsel appearing for the appellant try to distinguish the above decision by pointing out that that was the case where no next friend or guardian was appointed to represent the interest of the lunatic and it was in that context, the above decision was rendered. It can have no application to the facts of this case for the simple reason that in O.S.No.116/1996, a guardian was in fact appointed to represent the interest of the minors.

32. The distinction does not appear to be capable of acceptance in this case. In the case on hand, it is found that the appointment of the guardian is improper and illegal and that the interest of the minors was not safeguarded or protected. If that be so, it could not be said that the decree is binding or that the decree is valid as far as the they are concerned. The appointment of a guardian being inconsistent with the provisions of the C.P.C., the R.S.A. No.1523/2012 -31- appointment will have to be treated as non est. If that be so, as in the decision referred to by the learned counsel for the respondent, the decree will have only to be treated as null and void. If that be the position, all subsequent proceedings in pursuance to the decree in O.S.No.116/1996 has to fall to the ground.

33. Under these circumstances, the contention that the decree will have to be set aside and the decree will have to be declared invalid, does not merit consideration at all.

34. The courts below have now granted a preliminary decree for partition allotting 2/3rd shares to the plaintiffs. The learned counsel for the appellant contended that whatever may be the consequences of the decree, at any rate, he is entitled to 1/3rd share that has been acquired by the first defendant as per Ext.A1 document.

35. It is felt that there is considerable force in the above submission. It is claimed by the appellant that he has put in possession in pursuance to Ext.A5, sale deed. He R.S.A. No.1523/2012 -32- therefore contend that the plaintiffs were out of possession and the court fee paid is not sufficient. However, the said claim does not appear to be seriously agitated before the court below and therefore that need not detain this Court. It follows that there is no merit in this appeal and is only to be dismissed. I do so, however clarifying the position that 1/3rd share which is left out and is to be given to the first defendant will go to the second defendant. Sd/- P.BHAVADASAN JUDGE ds //True Copy// P.A. To Judge

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