

Vishwanath Son of Bhika Kolase and Raghunath Son of Bhika Kolase Vs. Kisan Mahadeo Bahadure, Sukhdeo Son of Kisan Bahadure, Kailash Son of Kisan Bahadure and Anusayabai Bhika Kolase

Vishwanath Son of Bhika Kolase and Raghunath Son of Bhika Kolase Vs. Kisan Mahadeo Bahadure, Sukhdeo Son of Kisan Bahadure, Kailash Son of Kisan Bahadure and Anusayabai Bhika Kolase

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Court : Mumbai

Decided On : Apr-04-2003

Reported in : 2003(4)ALLMR1093; 2004(2)BomCR399

Judge : V.M. Kanade, J.

Acts : [Hindu Minority and Guardianship Act, 1956](#) - Sections 2, 6, 8, 11 and 12; Indian Contract Act, 1972 - Sections 64 and 65; [Guardians and Wards Act, 1890](#) - Sections 4A, 29, 29(2), 31(2), 31(3) and 31(4); [Indian Majority Act, 1875](#); [Child Marriage Restraint Act, 1929](#); [Code of Civil Procedure \(CPC\) , 1908](#); The Pondicherry (Extension of Laws) Act, 1968

Appeal No. : Second Appeal No. 241 of 1990

Appellant : Vishwanath Son of Bhika Kolase and Raghunath Son of Bhika Kolase

Respondent : Kisan Mahadeo Bahadure, Sukhdeo Son of Kisan Bahadure, Kailash Son of Kisan Bahadure and Anusayabai

Advocate for Def. : R.L. Khapre, Adv. for the respondent nos. 1 to 3 and ;P.B. Patil, Adv. for the respondent no. 4

Advocate for Pet/Ap. : N.S. Badhe, Adv.

Disposition : Appeal dismissed

Judgement :

V.M.Kanade, J.

1.The appellants are the original plaintiffs and the respondents are the original defendants.

FACTS

2.The appellants-original plaintiffs filed a suit for cancellation of the sale deed and for restoration of possession of the suit field bearing survey no.92/1, Gat No.217, admeasuring 4 hectares and 82 acres of mouja Antri, Taluka - Malkapur. It is the case of the plaintiffs that the said property was ancestral property of deceased Bhika Motiram, who died on 15th February, 1977 leaving behind his heirs plaintiff nos.1 and 2, appellant nos.1 and 2 herein, (hereinafter referred to as 'plaintiffs' and 'defendants' for the sake of convenience), his wife defendant no.4 and mother of Bhika Bajabai. After the death of Bhika, the plaintiff nos.1 and 2 widow of Bhika i.e. defendant no.4 and Bajabai became the owner of the suit property and they each have 1/4th share in it. Bajabai died in the year 1980. Prior to her death on 30th November, 1977, the defendant no.1 got the sale deed executed from deceased Bajabai, the grandmother of plaintiff nos.1 and 2 and defendant no.4 mother that the sale deed was without any consideration and at that time plaintiff nos.1 and 2 were minors. It was alleged in the suit that this sale deed was executed without the permission of the District Judge and it was without legal necessity, therefore, the said sale deed was not binding on them. The plaintiffs, therefore, filed the suit against the defendants for cancellation of the sale deed, dated 30th November, 1977 and partition and possession of half share of the suit property.

3.The defendant no.1 filed his written statement and denied the claim of the plaintiffs and it was his contention that he purchased the suit field from the grandmother of plaintiff nos.1 and 2, namely Bajabai and mother defendant no.4 Anusayabai for a sum of Rs.3,500/- by registered sale deed and the alleged sale of the suit field was for the legal necessity. It was the case of the defendant no.1

that he had paid all the encumbrances over the suit field to the extent of Rs.4,370.92 which were more than the price agreed between the parties.

4.The defendant no.4 Anusayabai filed her written statement and she admitted the entire claim of the plaintiffs and in the additional written statement she alleged that the defendant no.1 had told her that there is encumbrance in the suit field and if the amount was not paid, then all the three fields belonging to deceased Bhika would be auctioned and under that pretext the defendant no.1 took undue advantage and got the sale deed executed without consideration.

5.The trial court framed the issues and came to the conclusion that the plaintiffs had not proved the case and, therefore, the suit was dismissed. The appeal which was filed by the plaintiffs challenging the judgment and order passed by the trial court also dismissed. The second appeal has been filed by the original plaintiff nos.1 and 2. The appeal was admitted on 29th August, 1991 and at the time of admission, the following substantial question of law was framed :

'Admit as the substantial question of law which arises for consideration is whether the defendant no.4 Anusayabai was competent to alienate the property of the plaintiffs by the sale deed dated 30.11.1977 as according to the plaintiffs she was not their natural guardian.'

6.It is submitted by the learned counsel appearing on behalf of the plaintiffs that the defendant no.4 was their step-mother and she was not a natural guardian within the meaning of Section 6 of the [Hindu Minority and Guardianship Act, 1956](#) and since the permission having been not taken the said transaction was illegal. He further submitted that since the defendant no.4, the step-mother was a de facto guardian, section 11 of the said act made it clear that the de facto guardian could not be deal with the property of minor. It was, therefore, submitted that the said transaction itself was void. In support of the said submission, the learned counsel appearing on behalf of the plaintiffs relied on a judgment reported in the case of Limbaji Ravji Hajare ..vrs.. Rahi Ravji Hajare and others, Indian Law Reports (Vol.XLIX) page 675. The Division Bench of this Court had held that the sale by a step-mother on behalf of her minor son was a sale by an unauthorised person and the minor was entitled to have it set aside. It was further held that the sale by the

step-mother was not voidable but was void ab initio and, therefore, Section 64 and 65 of the Indian Contract Act, 1972 was not applicable.

7.The learned counsel appearing on behalf of the appellants submitted that the defendant no.1 had stated in his cross examination that the defendant no.4 was a step-mother of the plaintiffs and that on the date on which the sale deed was executed she had already married again and, therefore, she was neither a de facto guardian nor had any authority to sell the minors property on their behalf as natural guardian. He submitted that defendant no.4 had signed the sale deed for herself and on behalf of the plaintiffs as their natural guardian. He submitted that therefore the sale was void and both the lower courts had not taken into consideration this aspect of the said matter.

8.The learned counsel appearing on behalf of the defendant nos.1 to 3 submitted that firstly the plaintiffs had not pleaded in the plaint that the defendant no.4 was their step-mother. It was averred all along in the plaint that the defendant no.4 was their mother. He submitted that the present suit was a collusive suit filed by the plaintiffs and the defendant no.4 and the findings to that effect had been given by the lower courts. He further submitted that under the [Hindu Minority and Guardianship Act, 1956](#), Section 6 of the said Act was not applicable in respect of a minors undivided interest in joint family property. He relied on Section 12 of the [Hindu Minority and Guardianship Act, 1956](#), in which it was specifically mentioned that in respect of the minor who had an undivided interest in joint family property, appointment of guardian for minors in respect of such undivided interest was not necessary when the property was under the management of an adult member of the family. He submitted that therefore the question of taking permission of the court was not necessary in respect of the minors undivided interest in the joint family property and that the adult members of the family would sale the share if legal necessity is proved. He submitted that both the courts below had held that the property was sold for legal necessity.

9.I have perused the judgment and order of the trial court as well as the appellate court. In order to decide the said question, it will be necessary to take into consideration the provision of [Hindu Minority and Guardianship Act, 1956](#). The

said act was an act which was supplemental to act 8 of 1890 i.e. the [Guardians and Wards Act, 1890](#). It would be profitable to peruse the statement of objection which are reproduced herein below :

STATEMENT OF OBJECTS AND REASONS

1.This is another instalment of the Hindu Code and it deals with the law relating to minority and guardianship.

2.Under the [Indian Majority Act, 1875](#), a person attains majority on his completing the age of 18 years but if before the completion of that age he has a guardian appointed by the Court, he attains majority on completing the age of 21 years. That Act applies to all persons including Hindus but an exception is made with respect to the capacity of any person to act in the matter of marriage, dower, divorce and adoption. Marriage and divorce have already been dealt with so far as Hindus are concerned and the definition of minor in the Bill will ensure that the age of majority is 18 for all practical purposes.

3.Guardians may be divided into three classes, namely , -

(1)natural guardians,

(2)testamentary guardians, and

(3)guardians appointed under the [Guardians and Wards Act, 1890](#), and the present Bill is supplemental to the [Guardians and Wards Act, 1890](#), and deals with natural guardian and testamentary guardians incidentally abolishing de facto guardians,

(4)the notes on clauses explain, wherever necessary, the various provisions contained in the Bill.

Act No.32 of 1956. [Hindu Minority and Guardianship Act, 1956](#) (32 of 1956) received the assent of the President on 25th August, 1956 after being passed by both the Houses of Parliament.

The [Hindu Minority and Guardianship Act, 1956](#) is supplemental to the following Acts :-

(i) [Indian Majority Act, 1875](#) (9 of 1875).

(ii) [Guardians and Wards Act, 1890](#) (8 of 1890).

(iii) [Child Marriage Restraint Act, 1929](#) (19 of 1929).

(iv) Hindu Marriage Act, 1955 (25 of 1955) and

(v) Code of Civil Procedure, 1908 (5 of 1908).

AMENDING ACT.

The Pondicherry (Extension of Laws) Act, 1968 (26 of 1968).

10.c Section 2 of the [Hindu Minority and Guardianship Act, 1956](#) also expressly states that the provisions of the Act would be in addition to the Guardian and Wards Act, 1890. Section 2 reads as under:

Sec.2 : Act to be supplemental to Act 8 of 1890 : The provision of this Act shall be in addition to, and not save as hereinafter expressly provided, in derogation of, the Guardian and Wards Act, 1890.

11. In the present case the learned counsel appearing on behalf of the appellants has relied on the provisions of Section 6 and 8 which are reproduced as below :

Sec.6 : Natural guardians of a Hindu minor-

The natural guardian of a Hindu minor, in respect of the minors person as well as in respect of the minors 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 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 expression 'father' and 'mother' do not include a step-father and a step-mother.

Sec.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 realisation, protection or benefit of the minors 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 by 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 the case of necessity or for an evident

advantage to the minor.

(5)The [Guardians and Wards Act, 1890](#), shall apply to and in respect of an application for obtaining permission to the Court under sub-section (2) in all respects as if it were an application for obtaining the permission of the Court under Section 29 of that Act, and in particular -

(a)proceedings in connection with the application shall be deemed to be proceedings under that Act within the meaning of Section 4A thereof;

(b)the Court shall observe the procedure and have the powers specified in sub-sections (2) and (3) and (4) of section 31 of that Act; and

(c)an appeal shall lie from an order of the Court refusing permission to the natural guardian to do any of the acts mentioned in sub-section (2) of this section to the Court to which appeals ordinarily lie from the decisions of that Court.

(6)In this section 'court' means the city civil court or a district court or a court empowered under section 4A of the Guardian and Wards Act, 1890, within the local limits of whose jurisdiction the immovable property in respect of which the application is made is situate, and where the immovable property is situate within the jurisdiction of more than one such court, means the Court within the local limits of whose jurisdiction any portion of the property is situate.

12.Learned counsel appearing on behalf of the defendant nos.1 to 3 has relied on Section 12 which is reproduced herein below :

Sec.12 : Guardian not to be appointed for minors undivided interest in joint family property - Where a minor has an undivided interest in joint family property and the property is under the management of an adult member of the family, no guardian shall be appointed for the minor in respect of such undivided interest :

Provided that nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such interest.

From the perusal of the said sections it is clear that so far as Section 6 is concerned, it speaks about the natural guardian of a Hindu minor. However, it

specifically excludes a minors undivided interest in joint family property. Thus, the natural guardian father and, thereafter, the mother cannot be considered as natural guardian in respect of his undivided interest in joint family property. Section 8 lays down the powers of natural guardian. Since section 6 excludes the minors undivided interest in joint family property, section 8 also, in my view, would not be applicable to the minors share in the undivided interest in the joint family property. Thus, the provisions of obtaining prior permission by the natural guardian as envisaged under section 8 sub-clause (2) would not arise in respect of a minors undivided interest in the joint family property. In my view, Section 12 of the Act carves out an exception in respect of a minors undivided interest in the joint family property when it states that the guardian is not to be appointed in respect of his undivided interest in joint family property. It further states that if a minor has an adult member and the property is under the management of the joint family property, no guardian should be appointed for the minor. In my view, thus, an exception is carved out in respect of minors interest in an undivided joint family property. Thus, in my view, in view of the said provision an adult member can sale the minor share if it is for legal necessity.

13. In the present case after the death of father of plaintiff nos.1 and 2, their grandmother was the adult member who was admittedly managing the affairs of the property. It is an admitted position that the land was heavily encumbered. Both the courts below have given a concurrent finding that there were number of encumbrances of the said land and it has come in evidence that though the agreed price for the said loan for Rs.3500/- the defendant no.1 had paid an amount excess in the said amount for the purpose of discharging the liabilities. Thus, the said suit land was sold for a legal necessity otherwise the entire property of the family, namely three fields were liable to be auctioned for non payment of the said encumbrances. The grandmother of the plaintiff nos.1 and 2 has signed the said sale deed, so also defendant no.4 has signed the sale deed on behalf of herself and on behalf of plaintiff nos.1 and 2 as natural guardian. In my view, even assuming for a moment that defendant no.4 Anusayabai would not have signed as natural guardian, she being a step mother, even then since the grandmother of plaintiff nos.1 and 2 has signed the sale deed, she being an adult member of the joint family, she was entitled to sell it on behalf of plaintiff nos.1 and 2 who were

minors on account of legal necessity. Both the courts below have given a finding that there was legal necessity for the sale of the said plot. In my view, after the death of Bajabai in 1980 defendant no.4 the step mother of plaintiff nos.1 and 2 in collusion with them filed the said suit. Both the courts have given a finding to that effect after taking into consideration various circumstances.

14.I have perused the plaint filed by the plaintiffs and in the said plaint it is nowhere mentioned that the defendant no.4 was their step mother. This fact has been revealed in the cross examination by defendant no.1, who had come out with a specific case in his written statement that the plaintiff in collusion with defendant no.4 had filed this suit.

15.Learned counsel appearing on behalf of the respondents has relied on a judgment of the Apex Court reported in the case of Shri Narayan Bal and others ..vrs.. Sridhar Sutar and others, : [1996]1SCR999 , wherein the Apex Court considered the applicability of Section 8 in respect of Joint Hindu family property in which minor had an undivided share. The Apex Court in the said judgment had held that the disposal of the Joint Hindu family property in which minor had an undivided share was perfectly valid and that the previous permission of the court under section 8 of the said act before disposing of the immovable property was not required. In the said judgment the court has specifically taken into consideration the term adult member of the family as laid down in section 12 of the said Act and has held that the adult member of the family in the management of the Joint Hindu Family property may be a male or a female, not necessarily the Karta. Para 5 and 6 of the said judgment are reproduced herein below :

Para 5 : With regard to the undivided interest of the Hindu minor in joint family property, the provisions afore-culled are beads of the same string and need be viewed in a single glimpse, simultaneously in conjunction with each other. Each provision, and in particular Section 8, cannot be viewed in isolation. If read together the intent of the legislature in this beneficial legislation becomes manifest. Ordinarily the law does not envisage a natural guardian of the undivided interest of a Hindu minor in joint family property. The natural guardian of the property of a Hindu minor, other than the undivided interest in joint family property, is alone

contemplated under Section 8, whereunder his powers and duties are defined. Section 12 carves out an exception to the rule that should there be no adult member of the joint family in management of the joint family property in which the minor has an undivided interest, a guardian may be appointed; but ordinarily no guardian shall be appointed for such undivided interest of the minor. The adult member of the family in the management of the Joint Hindu Family property may be a male or a female, not necessarily the Karta. The power of the High Court otherwise to appoint a guardian, in situations justifying, has been preserved. This is the legislative scheme on the subject. Under section 8 a natural guardian of the property of the Hindu minor, before he disposes of any immovable property of the minor, must seek permission of the Court. But since there need be no natural guardian for the minors undivided interest in the joint family property, as provided under sections 6 and 12 of the Act, the previous permission of the Court under section 8 for disposing of the undivided interest of the minor in the joint family property is not required. The joint Hindu family by itself is a legal entity capable of acting through its Karta and other adult members of the family in management of the joint Hindu family property. Thus section 8 in view of the express terms of sections 6 and 12, would not be applicable where a joint Hindu family property is sold/disposed of by the Karta involving an undivided interest of the minor in the said joint Hindu family property. The question posed at the outset therefore is so answered.

Para 6 : In the instant case the finding recorded by the Courts below is that Jagabandhu, the eldest male member in the family acted as a Karta in executing the sale and had joined with him the two widows for themselves and as guardians of the minor members of joint Hindu family, as supporting executants. That act by itself is not indicative of the minors having a divided interest in the joint Hindu family property commencing before or at the time of the sale. In this view of the matter, Section 8 of the Act can be of no avail to the appellants claim to nullify the sale.

16. In my view the ratio of the said judgment would be squarely applicable to the facts of the present case. Thus, there is no merit in the submission made by the learned counsel appearing on behalf of the appellants. Second Appeal is,

therefore, dismissed. Under the circumstances, there shall be no order as to costs.

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