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Court : Karnataka

Decided On : Aug-16-1967

Reported in : AIR1968Kant178; AIR1968Mys178; (1967)2MysLJ342

Judge : A.R. Somnath Iyer and ;B.M. Kalagate, JJ.

Acts : [Hindu Minority and Guardianship Act, 1956](#) - Sections 8(6), 12 and 52; [Constitution of India](#) - Article 225; [Guardians and Wards Act, 1890](#) - Sections 3, 7 and 9(2); States Reorganisation Act - Sections 54

Appeal No. : Civil Petn. Nos. 89, 90 to 95 of 1966

Appellant : P. Govindappa and ors.

Respondent : Doddathayappa and ors.

Judgement :

Somnath Iyer, J.

(1) These cases which are referred by Narayana Pai J. to a Bench of two Judges, pose the question whether this Court has the power to appoint a guardian for a minor in respect of his undivided interest in Hindu joint family property in the area of the former State of Mysore, which, is under the management of an adult member of the family. Section 12 of the [Hindu Minority and Guardianship Act, 1956](#) (Central Act 32 of 1956) forbids such appointment save in the exercise of

jurisdiction to which the proviso to is refers. That Section is:

'12. Where a minor has an undivided interest in joint family property and the property is under the Guardian not to be appointed for minor's undivided interest in joint family property 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."

(2) The petitioners who are the managers of their families have agreed to sell family property in this State to a company in Bombay and seek their appointment as guardians of their minor children in respect of their undivided interest in family property situate in the area of the former State of Mysore, and our sanction to such alienation. This Court which does not exercise in that area any original jurisdiction not expressly conferred by a statute, could, it was submitted by Mr. Desai, make the appointment in the exercise of jurisdiction flowing from the proviso to this section. But Mr. Advocate-General to whom we are beholden for his assistance argued that the proviso does no more than to preserve existing jurisdiction.

(3) Article 225 of the Constitution which continued the old jurisdiction of the High Courts, created no embargo on the enlargement of such jurisdiction and so, in the field of the 5th and 46th entries in the concurrent list, Parliament could bestow on a High Court which did not already possess it, jurisdiction to appoint a guardian for a minor in respect of his undivided interest in family property managed by an adult member of the family.

(4) The status of such Parliamentary legislation was claimed for proviso to Section 12 of the Hindu Minority and Guardianship Act, which commenced to operate on August 25, 1956. If this proviso can be equated with such legislation this court can grant these applications. If not, it cannot and no appeal can be made to the States Reorganisation Act which merely empowers this Court to exercise in the area of the family resides and its property is situate, the jurisdiction does not include the original jurisdiction now invoked.

(5) The postulate that the proviso to Section 12 is the source of new jurisdiction confided to every High Court established under the Constitution, was founded on the words 'a High Court' occurring in it, and on a contrast instituted between the language of the proviso and that of Section 3 of the Guardians and Wards Act (Central Act 8 of 1890) which expressly preserved existing powers of the High Courts.

(6) The proviso which is not as clear as Section 3 of the Guardians and Wards Act wears the garment of obscurity. The promiscuity of its language shrouds its true meaning and produces some ground for the ratiocination that the proviso is not in truth a proviso, but, part of the main structure of Section 12 whose real purpose was to confer a jurisdiction on the High Courts which was refused for the inferior courts referred to in Section 8(6) of the Act. The creation of a prohibition by the first paragraph of Section 12 and the removal of the High Court from the area of the prohibition by the second paragraph, which is the proviso, constitute according to the argument, the process, though devious, by which a High Court was clothed with jurisdiction to do what the inferior courts were prohibited from doing.

(7) Speaking generally, if the performance of an Act by A is prohibited and it is declared that that prohibition shall have no application to B, it may be possible to think that what A cannot do, B can. But we should not overlook the distinction between the power to perform a judicial act which is acquired by conferment of jurisdiction and an impediment to its exercise. The impediment arrests the exercise of power where it exists, but its removal does not vest power where it did not reside.

(8) I lean to the construction that the purpose of the proviso was to preserve the existing power of the High Court to which the prohibition of the first paragraph was subordinated by the proviso. Its language, which could have clearer, does not constitute it the source of a new jurisdiction not already possessed, and assists the view that it speaks only of the antecedent jurisdiction of certain High Courts whose source in the case of the High Courts of Calcutta, Bombay and Madras, was the appropriate clause of their Letters Patent. So, it becomes necessary to discuss the cases in which there was an exercise of power by those courts.

(9) The Words 'nothing in this section shall be deemed to affect the jurisdiction of a High Court,' I think, suggestive. They display the intent to exclude the impairment of an available and existing power. The word 'affect' in this phrase would be inapposite if there was no such power, for, in that event, there would be nothing to be affected.

(10) The jurisdiction exercised by the former High Court of Mysore when the Hindu Minority and Guardianship Act commenced to operate, did not empower the appointment in the exercise of any original jurisdiction, of a guardian for a Hindu minor, in respect of his undivided interest in joint family property, in the management of an adult member of the family. This Court which is now the repository of that jurisdiction in the area of the former State of Mysore can have therefore no such power, and, the proviso to section 12 of that Act which saved only existing power has no relevance.

(11) We dismiss these petitions. No costs.

Kalagate, J.

(11-A) I agree that these petitions should be dismissed, and I wish to add my own reasons therefore.

(12) These Civil Petitions have come before us on a reference made to a bench of two Judges, since they raise a common question as to the jurisdiction of this Court relating to the appointment of a guardian of the undivided interest of a minor in a Joint Hindu family property. These petitions are stated to have been made in the matter of the general and inherent jurisdiction and under section 12 of the [Hindu Minority and Guardianship Act, 1956](#).

(13) Since the facts in all these petitions are more or less the same, I will state the facts of Civil petition No. 89 of 1966. It states that the petitioner T. Govindappa is the Karta of a joint Hindu family consisting of himself and his minor children, four of whom are sons, and the other a daughter. The property described in the schedule to the plaint is the joint family property in which the four sons will have a 4/5 the share, the daughter having no share. The schedule property is a dry land

which yields very little income to the family and the same is hardly sufficient to maintain the family and to educate the children. It further states that it is prudent and beneficial to the joint family that the property should be sold if it fetches a good price.

Kamani Metals and Alloys Ltd., Bombay have offered to purchase the schedule land at the rate of Rs. 9,000 per acre. An agreement to that effect has been entered into and the same is annexed to the petition. It then states that the price offered by Kamani Metals and Alloys Ltd, is very attractive and it would be in the interest of the family that it should be accepted. The transaction is of evident advantage of the minors and is beneficial to the family. However, the purchaser, Kamani Metals and Alloys Ltd., requires that the sanction of this Court be obtained authorising the sale on behalf of the minors before the sale transaction is completed. The petitioner, therefore, prays that this Court may be pleased (1) to appoint him as the guardian of the undivided interest of the minor children in the scheduled property and (2) grant permission to him to sell the schedule property to Messers. Kamani Metals and Alloys Ltd., Bombay, on the terms and conditions set out in the agreement annexed to the petition.

(14) The second prayer as to the permission to sell the property was not pressed before us and, therefore, only the first prayer seeking appointment of the petitioner as guardian of the undivided interest of the minor sons, requires our consideration.

(15) The substantial questions that arise are (1) whether this Court has an inherent jurisdiction or power to appoint a guardian for the minor's undivided interest in the joint Hindu family property; (2) whether this Court has the jurisdiction to appoint a guardian for the minor's undivided interest in the joint Hindu family property under section 12 of the [Hindu Minority and Guardianship Act, 1956](#); and (3) whether this Court can entertain these petitions.

(16) The questions raised in these petitions are of some importance, and we are indebted to the learned Advocate General who has been good enough to appear as amicus curiae and assist the Court in its decision.

(17) I shall now proceed to consider the first question. The principal and relevant enactment on the subject is the [Guardians and Wards Act, 1890](#), hereinafter to be referred to as the Act of 1890, which is a consolidating and amending enactment intended to be a complete Code relating to the rights and remedies of the guardians and wards. An examination of the said Act shows that it relates only to the individual property of a minor and the appointment of a guardian for such property and there is no provision for the appointment of a guardian of the undivided interest of a minor in a joint Hindu family property. That is so, is clear from the decision of the Privy Council in *Gharib Ulla v. Khalak Singh*, (1903) 30 Ind App 165 (PC). This is what it relates at page 170:

'It has been well settled by a long series of decisions in India that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara family. And in their Lordships' opinion those decisions are clearly right on the plain ground that the interest of a member of such a family is not individual property at all, and that therefore a guardian, if appointed, would have nothing to do with the family property.'

However, Section 3 of Act of 1890 saves the jurisdiction or authority of a Court of Wards or power possessed by a High Court. It states: Thus the Act of 1890 is made subject to every enactment made prior or to be made subsequent, to it. It further states that nothing in the Act shall be construed to affect the jurisdiction or authority of any Court of Wards or to take away any power possessed by any High Court. The words 'any High Court' were substituted for the original words 'any High Court established in British India by Letters Patent.' But it is curious to note that the marginal words of section 3 'chartered High Courts' still remain. We have, therefore, to see what are the powers possessed by the High Courts in relation to the appointment of a guardian of a minor's undivided interest in a joint Hindu family property. This takes us back to see what are the earlier enactments which conferred power on a High Court to appoint a guardian for the minor's undivided interest in a joint Hindu family property.

(18) The Letters patent or charter for the High Courts of Calcutta, Madras and Bombay are mutatis mutandis in almost the same terms. I would therefore refer to

the relevant clauses in the Letters Patent for the High Court of Calcutta. Under the amended Letters patent of 1865, Cl. 17, it is ordained that the High Court of Judicature at Calcutta shall have the like power and authority with respect to persons and estates of infants, idiots and lunatics within the Bengal Divn. of the Presidency of Ft. William as that which was vested in the said High Court immediately before the publication of these Letters Patent.

When we turn to the earlier Letters Patent of the year 1862, which were in force at the time when the amended Letters Patent was granted, we find that clause 16 of those Letters Patent ordained that the High Court of Judicature at Calcutta shall have the like power and authority with respect to persons and estates of infants, idiots, and lunatics whether within or without the Presidency of Ft. William as that which is now vested in the said Supreme Court at Calcutta. What was then the power vested in the Supreme Court? I find that clause 37 of the Supreme Court Charter of 1823 conferred equitable jurisdiction upon the Supreme Court of Judicature at Calcutta and it was authorised to appoint guardians and keepers for infants and their estates according to the Order and course observed in England.

(19) The reference to the jurisdiction exercised in England, as pointed out by Sir John Beaumont C. J. in *re: Ratanji Ramaji* AIR 1941 Bom 397 was 'to show that the jurisdiction which was intended to confer on the Supreme Court, was jurisdiction to exercise powers of the Crown as *parens patriae*, those powers being exercised in England at first by the Lord Chancellor, afterwards by the Court of Chancery, and at the present time, by the Judges of the Chancery Division, 'Clause 37 thus conferred similar powers on the Supreme Court, and if that is so, the chartered High Courts at Calcutta, Madras and Bombay inherited these powers which were being exercised by the Supreme Court, by virtue of the Letters patent or Charter of the years 1862 and 1865, and the power possessed by those chartered high Courts was being exercised apart from the Guardians and Wards Act of 1890, in appointing guardians of the minors' undivided interest in a joint Hindu family property. : AIR1932 Cal502 and : AIR1928 All709 .Although the High Court of Allahabad states that it had jurisdiction by virtue of clause 12 of the Letters patent in respect of the person and property of minors, it refused to exercise that jurisdiction in that particular case on the ground of inexpediency and

want of precedent. It is this power which was possessed by the chartered High Courts that has been saved by section 3 of the Act of 1890.

(20) It may also be noted that there are Letters Patent for the High Courts of Patna, Lahore and Nagpur, and clause 12 of the Letters Patent confers on them the power and authority with respect to the person and estate of infants, idiots and lunatics, But on none of them was conferred the ordinary original civil jurisdiction and, therefore, it was held by the High Court of Bagpur in *Hira Moti Saheba v. Deputy Commissioner, Nagpur*, Air 1952 Nag 554 that: 'Clause 12 of the Letters Patent of the Nagpur High Court only preserves to the High Court the power and authority with respect to the persons and estates of infants. The Nagpur High Court does not, therefore, possess the special jurisdiction in respect of infants, idiots and lunatics vested in the Chartered high Courts at Madras, Calcutta..... which has descended to them from the Supreme Courts at those places.' To the same effect is the decision of the High Court of Punjab in *Sathir Singh v. Rajbir Singh*, , where it was held that since that Court did not possess the ordinary original civil jurisdiction, it refused to entertain the petition presented to it for the appointment of a guardian.

(21) Thus it is clear from a survey of the relevant clauses in the Letters Patent and the decisions that the chartered High Courts possessed the power and authority with respect to the persons and estates of infants, and in exercise of that power and authority, the High Courts in Calcutta, Madras and Bombay were appointing a guardian of the undivided interest of a minor in a joint Hindu family property, and it is that power which is saved by Section 3 of the Act of 1890.

The substitution of the words 'any High Court' in section 3 for the words 'any High Court established in British India by Letters patent', thus omitting the words established in British India by Letters Patent' does not, in my opinion, made any difference as to the exercise of the power by those High Courts, though they now constitute High Courts under the Constitution. But, so far as this Court is concerned it has neither the original civil jurisdiction nor it possesses any power such as conferred by clause 17 of the Letters Patent of 1865.

(22) The new State of Mysore which is formed in accordance with the provisions of the States Reorganisation Act, 1956, comprises the territories of the former State of Mysore, parts of the territories of the erstwhile State of Bombay (nor Maharashtra) Hyderabad (now Andhra) and Madras, and the State of Coorg. Section 52 of the said Act which relates to the jurisdiction of High Courts for new States, provides that-

'The High Court for a new State shall have, in respect of any part of the territories included in that new State, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of that part of the said territories by any High Court or Judicial Commissioner's Court for an existing State.'

(23) The property in respect of which the petitioner seeks his appointment as the guardian of the undivided interest of his minor sons in the joint Hindu family property is situate in the territory of the former State of Mysore, and by virtue of section 54 of the States Reorganisation Act which deals with the practice and procedure, the new State of Mysore has to follow the practice and procedure in respect of this matter which was in vogue in the former High Court of Mysore before the appointed day. The High Court of former State of Mysore was formed by Mysore Act I of 1884, and that Act did not confer such power as was conferred on the chartered High Courts by clause 17 of the Letters Patent with respect to the persons and estates of infants. Further, the high Court was essentially a High Court having appellate jurisdiction. The fact that the High Court has no original civil jurisdiction is not disputed before us. And that is so, is clear from the decision in *Raja Soap Factory v. S. P. Shantharaj*, : [1965]2SCR800 . Thus there is no conferment of the power or authority on the former High Court of Mysore, in exercise of which it can appoint a guardian of the undivided interest of a minor in a joint Hindu family property, nor it is a High Court having original civil jurisdiction. Therefore, in my view, this court has no jurisdiction, much less an inherent jurisdiction, to appoint a guardian of the undivided interest of a minor in a joint Hindu family property.

(24) This then leads me to the consideration of the second question as to whether this Court has jurisdiction to appoint a guardian of the minor's undivided interest in a joint Hindu family property under section 12 of the Hindu minority and Guardianship Act, 1956, which shall hereafter be referred as the Act of 1956.

(25) The Act of 1956 was enacted to amend and codify certain parts of the law relating to minority and guardianship among Hindus, and by Section 2 of the said Act, it is provided that the provisions of the Act of 1956 are 'in addition to, and not, save as hereinafter expressly provided, in derogation of the [Guardians and Wards Act, 1890](#).' Thus the provisions of Act of 1956 are in addition to and not in derogation of the Act of 1890 except where there is an express provision made to the contrary. We have seen that there is no provision in the Act of 1890 relating to the appointment of a guardian of the undivided interest of a minor in a joint Hindu family property. Then is there any express provision made in the Act of 1956 in respect of the appointment of a guardian of a minor's undivided interest in a joint Hindu family property? I do not find there is any such express provision. However, it is contended for the petitioner that the proviso to section 12 of the Act confers jurisdiction on this Court to appoint a guardian of the minor's undivided interest in the joint family property. Section 12, with the proviso, reads as follows:

'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.'

Thus Section 12 clearly states that no guardian shall be appointed for minor's undivided interest in the joint family property where the property is under the management of an adult member of the family. But it is contended that the proviso to the section confers jurisdiction on a High Court and, therefore, on this High Court, to appoint a guardian of the minor's undivided interest in a joint family property. The words 'shall be deemed to affect the jurisdiction of a High Court to appoint a guardian', it is contended are intended to confer jurisdiction in very High Court in India and this High Court being one of such High Courts, gets the

jurisdiction to appoint a guardian of the minor's undivided interest in the joint family property, and therefore, this Court, in exercise of that power, should appoint the petitioner as a guardian for the minor's undivided interest in the joint family property. The question is whether this Court can do it.

(26) The words that 'nothing in this section shall be deemed to affect the jurisdiction of a High Court to appoint a guardian in respect of such (i.e. 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. Even then, is it to be understood that the Legislature, in spite of what is has stated in the main section, intended to confer jurisdiction on a High Court to appoint a guardian for a minor in respect of such interest. Such a contention would be as stated by the learned Advocate General, plainly against the intendment of the main section, and it would be unreasonable to suppose that the Legislature intended by means of a proviso to bring about such a result. Further, the suggested interpretation would be unacceptable, as it could make the proviso redundant to the extent that it seeks to confer power on the High Courts, such as of Calcutta, Madras and Bombay, who were already exercising that power. It will not, therefore, be right to suggest that though some of the High Courts were exercising such power, nonetheless the Legislature intended to confer on them the same power. It is settled rule of construction that a construction which would lead to absurd result must be rejected in favour of a construction which would avoid it. The legislature must be presumed to know the existing laws while enacting an Act and a need for a change, if any. In my view, the words 'nothing in the section shall be deemed to affect' suggest that anything contained in the main section 12, cannot be held to affect the jurisdiction possessed by a High Court in such matters, which jurisdiction has been expressly saved by Section 3 of the Act of 1890. We have already seen that the chartered high Courts in India had the power to appoint a guardian of a minor's undivided interest in a joint Hindu family property. Therefore, the words 'deemed to affect the jurisdiction of a High Court' must be understood to mean that the jurisdiction which a High Court possessed, is not to be affected. Thus the legislature, instead of taking away the jurisdiction of these chartered High Courts, has expressly saved these powers by stating that 'nothing contained in the section shall be deemed to affect the

jurisdiction of High Court'. It is difficult to read the words 'deemed to affect the jurisdiction of a high Court' to mean, every High Court shall have jurisdiction.

(27) It is not suggested, and it cannot be suggested, that the legislature cannot confer a jurisdiction or a power on a High Court in view of the provisions of Article 225 of the [Constitution of India](#). But, I am unable to read in the proviso that there is any such conferment of jurisdiction on a High Court and, therefore, on this High Court, to appoint a guardian of a minor's undivided interest in a joint family property.

(28) Our attention was drawn to the statement in Broom's Legal Maxims relating to the jurisdiction of a superior court which appears at page 746, 10th edition, that 'the old rule for jurisdiction is that nothing shall be intended to be out of the jurisdiction of the superior court, but that which specially appear to be so'; but this principle can have no application here, because none of the High Courts in India, except some chartered high Courts, had the jurisdiction to appoint a guardian of a minor's undivided interest in a joint Hindu family property. Therefore, there is no question of taking anything out of the jurisdiction of a High Court.

(29) Therefore, it will be reasonable to hold that the legislature did not intend to confer jurisdiction on a High Court by adding the proviso to the section, but it intended to state that the contents of the section do not affect the existing jurisdiction of a High Court in the exercise of which some of the chartered High Courts were appointing a guardian for a minor's undivided interest in a joint Hindu family property, thus preserving the existing jurisdiction of the High Court, saved by section 3 of the Act of 1890. The conclusion that the proviso to section 12, preserves the existing jurisdiction of a High Court, receives support from somewhat similar language employed by the legislature in section 3 of the Act of 189, whereby it has saved the jurisdiction or authority of any Court of wards or any power possessed by a High Court, Section 3 is stated to be a saving section and the Legislature by the said section saved the existing jurisdiction by stating that 'nothing in this Act shall be construed to affect..... the jurisdiction or authority' whereas the language employed in the proviso to section 12 is 'nothing in this section shall be deemed to affect the jurisdiction.' Therefore the contention of the

learned counsel that the proviso to section 12 of the Act of 1956 confers power on this Court to appoint a guardian of the minor's undivided interest in the joint family property, must fail.

(30) The third questions as to whether this Court can entertain these petitions. Under Section 9(2) of the Act of 1890, an application for the appointment of a guardian of the property of the minor has to be made to the District Court having jurisdiction. Section 7 of the Act of 1890 empowers a court to appoint a guardian. The word 'court' has been defined to mean a district court having jurisdiction to entertain an application under the Act for an order appointing or declaring a person to be a guardian; the expression 'District Court' is defined in sub-section (4) of section 4 viz.,

' 'District Court' has the meaning assigned to that expression in the Code of Civil Procedure, and includes a High Court in the exercise of its ordinary original civil jurisdiction'.

There is no express provision made for an application to be made for the appointment of a guardian in the Act of 1956; and unless it is assumed that by implication the legislature must be deemed to have amended the definition of 'District Court' by omitting the words 'in the exercise of its original civil jurisdiction', such an application cannot be entertained by a High Court not having original civil jurisdiction, but such an assumption would be contrary to section 2 of the Act of 1956. Therefore, the procedural provision in the Act of 1890 as to be followed. So, the application, if any, has got to be made to a High Court having original civil jurisdiction. But this Court has no original civil jurisdiction. Therefore, this court cannot entertain any application made for the appointment of a guardian.

(31) However, it may be argued that section 12 confers jurisdiction on a High Court to appoint the guardian and therefore it has a jurisdiction to entertain an application for that purpose and if it is held that it cannot entertain such an application then the conferment of a jurisdiction would become useless. A similar argument was advanced before the Punjab High Court, and the High Court negated the contention as can be seen from the decision to which a reference has already been made where it has been pointed out that-

'There is nothing in the Guardians and Wards Act which gives ordinary original jurisdiction to the Lahore High Court to deal with the petition filed under the Act and there is nothing in the various Acts relating to the Chief Court of Punjab or in the Letters Patent of the Lahore High Court which gives that Court ordinary original Civil jurisdiction in these matters. The petition can only be entertained in the High Court of Punjab in the exercise of its extraordinary civil jurisdiction that is, the petition must first be instituted in the District Court where it lies and then if that court is subordinate to the High Court it can, if the Court so thinks fit, be withdrawn from that Court and decided in the High Court.'

(32) Thus the Punjab High Court, though it had jurisdiction to appoint a guardian for the minor's undivided interest in a joint family property, refused to entertain that application on the ground that such application could not be entertained by it since it had no original civil jurisdiction in respect of those matters. Therefore, this court having no original jurisdiction cannot entertain these petitions.

(33) Petitions dismissed.