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Court : Kerala

Decided On : Dec-14-1990

Reported in : I(1991)DMC591

Judge : Padmanabhan, J.

Acts : Hindu Minority and Guardianship Act, 1956 - Sections 18(1) and 18(2); Contract Act - Sections 64

Appeal No. : S.A. No. 708 of 1984

Appellant : Chacko

Respondent : Sreeja

Advocate for Def. : E.V. Nayanar, Adv.

Advocate for Pet/Ap. : T. Karunakaran Nambiar and; Johnson Lukose, Advs.

Disposition : Appeal dismissed

Judgement :

Padmanabhan, J.

1. In O.P. No. 61 of 1975, District Judge, Thalasserry appointed Kamalakshy Nettyar (for short, Nettyar) as guardian of her minor daughter, Sreeja. First defendant, Balakrishnan Nair, is the husband of Nettyar and father of Sreeja and

as such, her natural guardian. Fearing that Balakrishnan Nair, said to be a spend-thrift and drunkard, may compel her to sell all her assets and deprive the minor of the future benefits of the properties, Nettyar gifted the four plaint schedule items, which belonged to her, to Sreeja under Ext. A1. Thereafter, acting as natural guardian of the minor, Balakrishnan Nair sold all the plaint items. Item No. 4 was sold to Vellan, predecessor of defendants 3 to 6, under Ext. B7 and Item Nos. 1 to 3 to the second defendant under Ext. B1. It Was thereafter that Nettyar got her appointed as guardian and filed the suit for cancellation of Exts. B1 and 7 and recover the properties, the grounds being that the sale deeds are in violation of Section 8(2) of the Hindu Minority and Guardianship Act (for short, the Act) and not to the benefit of the minor.

2. Appellants are defendants 2 to 6. They said that the sale deeds are only voidable at the option of the minor and the option could be exercised only by the minor on attaining majority and not by the guardian appointed by court. The original petition and this suit were said to be fraudulent and collusive. It was also contended that the sale deeds were beneficial to the minor. Item No. 4 was said to be sold respecting Ext. B5 agreement for sale executed by Nettyar. But both the courts below found that Ext. B5 is not a genuine document and there was no agreement for sale. It is said that with Ext. B1 sale consideration, Ext. B2 property was purchased in the name of the minor and when that property was also sold, Ext B3 sale deed was taken in the name of minor with that consideration. The further claim is that if Ext. B1 is set aside, Ext. B3 property must be given to the second defendant.

3. Trial court repelled the contentions and decreed the suit. The claim for return of Ext. B3 property was rejected on the basis of the decision in Chinnaswami Reddi v, Krishnaswami Reddi and others, (1918 (35) MLJ 652), which held that where a guardian sells his ward's property not binding on the ward and the sale price is utilised for the purchase of lands for the ward, not contemplated at the time of the sale, the lands so purchased for the ward do not constitute 'the benefit' within the meaning of Section 64 of the Contract Act and need not be conveyed to the vendee from the guardian, when the ward avoids the sale by the guardian. The appeal was also dismissed.

4. Main contention was regarding maintainability of the suit by the guardian. The natural guardian of a Hindu minor, under Section 8(1) of the Act, has power to do all acts necessary or reasonable and proper for the benefit of the minor, or for the realisation, protection or benefit of the minor's estate. But that power is subject to Section 8(2), which says that the documents specified therein shall not be executed by the natural guardian without previous permission of the court. There is thus a prohibitory injunction. The consequence of violation of Sub-sections (1) and (2) is that the transaction shall be voidable at the instance of the minor or any person claiming under him. Therefore, the argument was that only the minor is having the personal right either to ratify or avoid the transaction, which could be exercised by him alone on attaining majority and that right cannot be allowed to be meddled by a guardian intervening and avoiding the transaction, thereby depriving the minor of the option to ratify the transaction when he becomes a major. The argument may, at first blush, find appealing, but it is not actually so.

5. Argument pre-supposes the exercise of the volition personally by the minor on attaining majority and by the guardian or next friend during his minority on his behalf as two independent exercises. If that argument is accepted, no minor or other person of disability could file a suit during the period of his disability to protect his interests through a guardian or next friend. That may seriously prejudice him Many of the benefits available by an immediate relief may be lost to the minor by lapse of time. In fact, in the suit, the real plaintiff is the minor. The gurdian or next friend is not a party to the suit in the proper sense of the term. He only represents the minor's interest and acts for him as if the minor himself is acting. Because of the disability, he cannot act by himself and he could do so only through some other competent person. The action of that person is treated as that of the minor himself and is binding on him subject to vitiating factors' like fraud, collusion, negligence, etc. The court is there to protect the rights of all concerned, including the minor, to decide whether the actions of the guardian are devoid of any vitiating factors and they are of such nature, which the minor himself would have resorted to if he was not incapacitated. Thus, for all factual and legal purposes, exercise of the volition by the guardian is exercise by the minor himself and permission of such exercise is necessary, in the interest of the minor or other persons of disability. That is why the statutory provisions, like those contained in

Order XXXII of the Code of Civil Procedure, are introduced to safeguard the interests of persons of disability. From the pleadings, evidence and circumstances, it is not possible to infer that there is the possibility of any vitiating factor, including fraud or collusion between the guardian appointed by the court and the natural guardian.

6. Documents were admittedly executed in violation of the provisions of Section 8(2) of the Act. The decision in Santha v. Cherukutty and others, (1972 KLT 1051) said that in order to exercise the option of ratifying or avoiding the transaction under Section 8(3) of the Act, the aid of the process of court itself is unnecessary except in some cases where possession has passed and recovery of possession may be necessary. In other cases, where the transaction itself is voidable for contravention of Section 8(2), it could merely be avoided by conduct because on the exercise of the option itself, the transaction becomes a nullity. The natural guardian under the Act is in the same position as that of a guardian under the Guardian and Wards Act, 1 was told that a different note was struck in the decision in Chathu Chettiar v. Kanaran (1983 KLT 888). I do not think so. All the decisions only said that the transaction is voidable. We are not concerned with the question whether a suit is necessary or not, because here a suit has already been filed.

7. No decision directly on the point was cited before me holding that the option is only with the minor personally and it cannot be exercised on his behalf by a guardian. The decision in Saidu v. Amina and Ors., 1970 KLT 430 only said that a voidable transaction is one which a person affected thereby can, at his option, either affirm or avoid, and if he chooses to affirm or ratify, he is thereafter precluded from avoiding or repudiating it. But that decision itself said that the question of affirmation or avoidance is subject to having, of course, the competency to do so, and in awareness of the facts, with open eyes, and is often expressly put. A minor is a person of incapacity who is not by himself competent to exercise the option unless somebody else represents him and acts on his behalf. If that exercise on behalf of the minor is found by the court to be as good exercise as it was or would have been exercised by the minor himself if he was not disabled, that is an end of the matter and it could be treated as option exercised by the minor himself. A person appointed by the court to represent the minor is having

the authority to exercise the option on behalf of the minor. Genuineness of the action is a matter for scrutiny by the court. The observation of a Full Bench of the Punjab and Haryana High Court in Surta Singh v. Pritam Singh, AIR 1983 P & H 114 that in such cases the minor, on attaining majority, may choose either to ratify or repudiate the action cannot be taken to mean that the option could be exercised only by the minor on attaining majority and not by a guardian during his period of incapacity. Even after the option being exercised by the guardian, it may be open to the minor on attaining majority, if he wants, to give up the benefits and ratify the action of his natural guardian, which is to his disadvantage. Therefore, I am of the opinion that the suit is maintainable. The documents are evidently not to the advantage of the minor and they could be and must be avoided.

8. Then the only question is whether the courts below went wrong in not allowing Ext. B3 property to be returned. Contention of the first respondent-plaintiff is that Ext. B3 property was not acquired with the sale proceeds of any property of the minor even though the document says so. It is further said that the mother, in whose favour the document was executed on behalf of the minor, is unaware of any such property and herself or the mother did not get possession also. It is true that the sale deed of Ext. B2 property was not produced. But Ext. B3 says that it was taken in the name of the minor for the sale consideration under the document, by which Ext. B2 property was sold. Though Ext. B3 is contended to be a fraudulent or fictitious document, under which no title or possession passed to the minor; the guardian rightly and fairly expressed willingness to reconvey whatever rights the minor could be deemed to have obtained in law under that document without being liable for consequences on the question of title or possession. But second defendant insisted on actual title and possession being conveyed as a condition precedent to avoidance of his document. I do not think that his claim is justified by the evidence on record. By the re-conveyance, he may or may not get title and possession, if he does not, his remedy will be only against the first defendant. I said so because there is no evidence to show that Ext. B3 was accepted on behalf of the minor.

9. Under Section 41 of the Specific Relief Act, on adjudging the cancellation of an instrument, the court may require the party, to whom such relief is granted, to

make any compensation to the other which justice may require. Section 35 of the Transfer of Property Act says that where a person professes to transfer immovable property, which he has no right to transfer, and as part of the same transaction confers any benefit on the owner of the property, such owner must elect either to confirm such transfer or to dissent from it; and in the latter case, he shall relinquish the benefit so conferred, and the benefit so relinquished shall revert to the transferor. Section 64 of the Contract Act provides that the party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit so far as he may be, to the person for whom it was received. A combined reading of these provisions, as held in Cheriathu Varkey v. Meenakshi Amma, 1964 KLT 952, only shows that in cancelling the documents, the plaintiff need only surrender benefits received as justice may require. Such benefit required by the justice is the actual benefit received under the impugned transaction, which is avoided. It may not be conducive to justice to allow the minor to have double advantage by avoiding the transaction and at the same time retaining its benefits. As held in Chinnaswami Reddi's case 1918 (35) MLJ 652 and Chundrasekhara Pillai and Ors. v. Kochu Koshi, 1961 KLT 1018, 'benefit' mentioned in Section 64 of the Contract Act is only benefit received under the impugned transaction directly contemplated by it and not any future benefits by any speculative or non-speculative investment of that benefit. 'Benefit' or 'advantage', referred to in Sections 64 and 65 of the Contract Act, do not relate to profit derived from the investment of the benefit. Sometimes the investment may result in loss also. In a given case, the benefit may be only the actual consideration and its interest. But, where the consideration for the impugned transaction itself is the purchase of another property in the name of the minor, that property must be taken as the benefit derived by the minor and it must be directed to be returned. Value of properties might have gone up and return of the consideration in money alone may work out injustice to the defeated purchaser and undue gain to the minor. Here, there is no case that any particular amount was received. The benefit received by the minor is another property, which was also sold and another item was purchased. As matters now stand, Ext. B3 represents the consideration for Ext. B1. There is no case for anybody that any other benefit was derived by the minor. Ext. B3 itself is not owned by the minor,

but the document shows that it is the consideration. Therefore, the right under Ext. B3 will have to be re-conveyed, subject to what is stated above.

Second appeal is, therefore, dismissed without costs, subject to the modification that if, within three months of the filing of the first effective execution petition for executing the decree, the second defendant moves for re-conveyance of Ext. 153 property, execution should be allowed to proceed only after the plaintiff or the guardian, as the case may be, executes a conveyance (subject to what is stated above) at the expense of the second defendant. If the second defendant does not move for getting the sale or refuses to co-operate in the matter, within the above period, execution can proceed even without a re-conveyance.

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