

Amirtha Kudumban Vs. Sornam Kudumban

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Court : Chennai

Decided On : Jul-29-1976

Reported in : AIR1977Mad127

Judge : Kailasam, C.J., ;Ramanujam and ;Balasubramanyam, JJ.

Acts : [Hindu Minority and Guardianship Act, 1956](#) - Sections 2, 5, 6, 8, 8(2) and 8(3); [Guardians and Wards Act, 1890](#); [Transfer of Property Act, 1882](#) - Sections 6 and 6(3); Indian Limitation Act, 1908 - Sections 6(3) - Schedule - Article 44; [Limitation Act, 1963](#) - Schedule - Article 60; Hindu law

Appeal No. : Second Appeal No. 89 of 1972

Appellant : Amirtha Kudumban

Respondent : Sornam Kudumban

Judgement :

1. This second appeal comes by way of reference from Gokulakrishnan J. The question referred to this Full Bench is: "Whether a transferee from a minor, after he attained majority, can file a suit to set aside the alienation made by the minor's guardian or the said right is one to be exercised only by the minor?"
2. The facts of the case on which the question falls for determination may be briefly set out. The suit property, a piece of land of an extent of 1 acre 12 cents in the village of Vettivayal, Thanjavur Dist., originally belonged to one Veerammal, who purchased the same in the year 1948. Veerammal had a daughter by name

Kaliammal. Veerammal died a few months after the purchase of the suit property leaving behind her surviving her minor daughter Kaliammal and her husband, Kandayya. Subsequent to Veerammal's death, Kandayya married again. Kaliammal was then a minor. She left her father's house to reside with her material grandfather which was protecting and maintaining her during her minority. Meanwhile, on 29-5-1958, Kandayya executed an othi on the suit property in favour of one Jamalula Maracayar. The othi was subsequently discharged. On 21-10-1959 Kandayya sold the property to one Jainulavudeen, purporting to do so for himself and on behalf of his minor daughter, Kaliammal. Jainulavudeen, in turn, sold the suit property to one Amirtham on 23-4-1966. In time, Kaliammal attained majority. She regarded the sake deed executed by her father in favour of Jainulavudeen as not binding on her. She ignored it, and proceeded to sell the property herself to one Sornam under sale deed dated 26-5-1966. Thereafter, Sornam filed the suit, O. S. 491 of 1968, on the file of the court of the District Munsif, Pattukottai, against Amirtham to set aside the sale of Kandayya dated 21-10-1959 and for recovery of possession. Amirtham resisted the suit on many grounds. The trial court held against him on all the issues. The suit was decreed in favour of Sornam as prayed for. Amirtham appealed to the court of the Subordinate Judge of Thanjavur. But the appeal was dismissed. Thereupon, Amirtham filed S. A. No. 89 of 1972, which has now come before this Full Bench on reference by Gokulakrishnan, J.

3. The principal question raised before Gokulakrishnan, J., and now before us, is whether the plaintiff Sornam, as purchaser from Kaliammal, is entitled to file the suit to set aside the sale made by her father and guardian Kandayya on 21-10-1959 in favour of Jainalavudeen from whom the defendant Amirtham subsequently purchased the suit property? While raising this question in this form, Mr. Martin, learned counsel for the appellant, could not dispute the following findings of the courts below; (i) The suit property belonged absolutely to Veerammal, and, after her death, it devolved on her heir and minor daughter, Kaliammal, as her absolute property; (ii) After the death of Veerammal, minor Kaliammal was not living with her father Kandayya or under his protection; (iii) The mortgage executed by Kandayya as well as the sale of the property made by him in favour of Jainulavudeen were not for the benefit of the minor or for legal necessity; (iv) At

the time Kandayya sold the property to Jainalavudeen, Kaliasammal was minor; (v) The plaintiff Sornam purchased the suit property for valuable consideration from Kaliasammal after she had attained majority; and (vi) Under the sale deed in favour of Sornam, what was purported to be transferred by Kaliasammal was the entire fee simple in the property.

4. On these concurrent findings of fact by the courts below, Mr. Martin nevertheless contends that the plaintiff Sornam has not derived any right under the sale deed from Kaliasammal which entitles him to file the suit against the defendant to set aside the alienation made by Kandayya, as father and guardian. Learned counsel does not dispute the position that Kaliasammal herself, after attaining majority, could have filed a suit seeking to set aside the alienations made by her guardian during her minority on the ground that the alienations were not for her benefit or for legal necessity and has been filed in this case, of by Kaliasammal, but by Sornam, who is only an alienee, although for consideration. This, according to Mr. Martin, makes all the difference in the legal position.

5. The question before us, therefore, lies in a very narrow compass. We have earlier set out of the facts which provide the background for the case. One further fact may be mentioned here, Before selling the property to Jainulavudeen, Kandayya, as guardian of his minor daughter, did not obtain the previous permission of the court within whose jurisdiction the suit property was situate. This is a relevant circumstance. For the right of the plaintiff Sornam to sue for setting aside the guardian's alienation has to be determined on the basis of the relevant provisions of the [Hindu Minority and Guardianship Act, 1956](#)--Central Act No. 32 of 1956,--which had come into force on 25-8-1956. The Act applied to the alienations now in question. The alienation was on 21-10-1959, after the Act came into force.

6. The Legislature had avowed brought this measure with a view to amend and codify certain part of the law relating to minority and guardianship among Hindus. Under Section 2 of the Act, it is provided that the provisions of that Act shall be in addition to and not in derogation of, the [Guardians and Wards Act, 1890](#). Under Section 6, the natural guardian of a Hindu minor in respect of the minor's person as well as in respect of the minor's property, in the case of a boy or an unmarried

girl, is the father, and after him, the mother. Section 8 is relevant to the present discussion. It defines the powers of the natural guardian of a Hindu minor. Sub-section (1) states that the natural guardian has power, subject to the provisions of the section, to do all acts which are necessary, reasonable and proper for the benefit of the minor or for the realisation, protection or benefit of the minor's estate. It is, however, clearly enacted that the guardian can, in no case, bind the minor by a personal covenant. Sub-section (2) of Section 8 provides that 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. Sub-section (3) of the same section is an important provision, in the context of the questions arising in this second appeal. It declares that 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 any person claiming under him.

7. The provisions of Sec. 8 are simple. Their meaning can hardly be misunderstood, especially that of sub-section (2) and sub-section (3). Sub-section (3) insists that a guardian cannot mortgage, charge, sell, gift, exchange or otherwise transfer any immovable property of his ward, unless he had obtained the previous permission of the court. As earlier mentioned, Kandayya did not obtain the sanction of the court before selling the property as guardian of his minor daughter, Kaliammal. Nor, as the courts have found, was the sale for the minor's benefit or for legal necessity or for benefit of the estate. It follows that the sale is hit by sub-section (2) of Section 8. From this, it is but a step to conclude, in terms of sub-section (3), that the sale is voidable either at the instance of Kaliammal or at the instance of the plaintiff Sornam who claims under the sale executed by Kaliammal in his favour.

8. Mr. Martin, nevertheless, argues that the plaintiff Sornam could not be regarded as a person 'claiming under the minor' within the meaning of Sec. 8(3) of the Act. We have not been shown any direct authority on the meaning of the words 'any person claiming under the minor' occurring in Section 8(3) of the Act. The matter

has therefore, to be decided as one of first impression. In our view, the words seem to apply to any person who derives from the minor the right to avoid the guardian's alienations. He might derive the right by inheritance, under testamentary disposition, by transfer inter vivos or by devolution by law. In all cases, he would be a person 'claiming under the minor'. On this construction of the subsection, the plaintiff Sornam must be held to be a person claiming under the minor Kaliasammal. It is plain that he does not claim under any one else. The cause of action for his suit is founded entirely on the sale deed executed by Kaliasammal in his favour.

9. We did not understand Mr. Martin to argue that the words of Section 8(3) cannot, in their natural meaning, apply to the plaintiff Sornam. His attempt, rather, was to show that the sale deed dated 26-5-1966 executed by Kaliasammal in favour of Sornam, after she attained majority, did not, in law, convey in the plaintiff's favour any right to the property such as would enable him to maintain the suit for setting aside the prior alienation by the guardian. Mr. Martin contended that at the time Kaliasammal purported to sell the property to the plaintiff, all that she herself had was no more than a right to sue for avoiding her guardian's alienations during her minority. But this right, it was argued, was purely personal to Kaliasammal, whereby it was meant that Kaliasammal herself could have exercised that right by suing through a next friend during her minority, or by filing a suit herself after attaining majority. Being a personal right to sue, in the sense aforesaid, Mr. Martin maintained, it could not be the subject matter of a valid transfer by Kaliasammal. Reference was made, in this connection, to Section 6(a) of the [Transfer of Property Act, 1882](#) which provided that a mere right to sue cannot be transferred. Learned counsel submitted that Kaliasammal's sale deed dated 26-5-1966 in favour of the plaintiff being merely the transfer of a personal right to sue was within the mischief of Section 6(e) of the Transfer of Property Act, and, therefore, it could not clothe the transferee with any rights. Thus, even with this sale deed in his favour, the plaintiff Sornam cannot be held to be a person claiming 'under the minor', within the meaning of Section 8(3) of the Act.

10. We cannot subscribe to the basic arguments of Mr. Martin that the right of a ward after attaining majority to avoid or set aside the guardian's alienations during

minority is merely a personal right to sue which is incapable of transfer by the minor. Under the plain terms of Section 8(3) of the Act, it is difficult to see how we can exclude a transferee from the minor from the ambit of this provision. When the sub-section refers to 'any person claiming under the minor' it is assumptive of the position that the right to avoid the guardian's transfer can be a derivative right, claimed as such, by any one else from the minor. If the Legislature had accepted the position that a Hindu minor's right to avoid the guardian's alienations is merely a personal right to sue, these words would not have been found enacted in the sub-section.

11. There is a theory that the mistakes and assumptions of those who draw up Acts of Parliament do not constitute the law. But we are satisfied that Section 8(3) of the Act has been enacted on firm foundations. Even under the general law, relating to transfers of property, courts have recognised a well-merited distinction between the transfer of a mere right to sue, as such, on the one hand, and the transfer of property which carries with it an incidental right related to the remedy for its recovery, on the other. Section 6(e) of the Transfer of Property Act, on which reliance was placed by Mr. Martin does not brush aside this distinction. It is applicable, in terms, only to the former kind of transfer of a mere right to sue. The section in the Transfer of Property Act would seem to have been inspired by ancient English rules of law which frowned against any transfer of a mere right to sue. The objection was based on the doctrine that the law would not recognise any transaction savouring of maintenance or champerty. However, even in England, exceptions are recognised to this rule. One such is that there is nothing unlawful in the purchase of property which the purchaser can only enjoy by defeating existing adverse claims. The position is succinctly set out in Halsbury Volume 6, paragraph 87 at page 50--

"In every case it is a question whether the purchaser's real object was to acquire an interest in the property, or merely to acquire a right to bring an action, either alone or jointly with the vendor."

In this sense, it becomes a matter of enquiry in every case as to whether the subject of the conveyance is the property, including the right of action in respect of

the property, or whether it is a mere right of litigation. If the assignment or transfer of the right to sue is only incidental and subsidiary to the conveyance of the property, there could be no question that the same may be transferred along with the property, under an effective conveyance.

12. In India, the position seems to have been not so well settled. On the question whether the conveyance by a ward of property alienated by his guardians is the assignment of a mere right to sue or something more, there has been some conflict of authority in our courts. There are cases on both sides of the line. There are decisions of courts which have held that the minor's right to avoid the transfer by his guardian or to set it aside is available right attached to the property. They have further held that it is given to the minor under the law to render an effective conveyance to his alliance of the property along with the incidental remedy for its recovery. The latter view finds forcible expression in a judgment of Viswanatha Sastri, J. in *Palaniappa Goundan v. Nallappa Goundan*, . After

referring to some of the earlier authorities in which a contrary opinion had been expressed, the learned Judge observed at page 272--

"I am unable to accept these decisions as embodying a correct statement of the law. There was here a sale of property by the ex-minor and not an assignment of a mere right to sue. No doubt, the evidence from the minor had to sue the previous purchaser from the guardian for recovery of possession of the property, but in my opinion, that did not render the sale by the minor a transfer of a mere right to sue..... It is a right annexed to the ownership of property or an interest in property and is available by the legal representatives of a minor who dies without avoiding a transfer. Where an ex-minor transfers property unauthorisedly sold by his guardian during his minority, he transfers not a mere right to sue, but his interest in the property, though a suit may be necessary to avoid the transfer by the guardian and possession of his property from the alienee."

13. One of the authorities which came in for criticism at the hands of Viswanatha Sastri, J. was an early decision of a Division Bench of this court consisting of Sadasiva Aiyar and Spencer, JJ. in *Muthukumara Chetti v. Anthony Udyan*, ILR 38 Mad 867 = (AIR 1915 Mad 296). In that case, Sadasiva Aiyar, J. stated the

proposition of law, as a theoretical question, with reference to the facts of that case, in the following terms.

"If Rajagopalan, after attaining majority, should wish to repudiate the lease, there can be no doubt he can do so without a suit. But can any one else do so? The right to avoid is a personal privilege." See 22 American Encyclopedia, p. 547.

In *Alamelu Ammal v. Krishna Chetti*, , Satyanarayana Rao and Balakrishna Iyer, JJ. had to consider a case where, on the death of a minor. the reversionary heirs of the minor had brought a suit for setting aside the alienation effected by the guardian of the minor. The suit was filed by the reversioners within 12 years of the date of the alienation, but after the expiry of three years from the minor's death. The lower courts held that the suit was barred by limitation, because under Section 6(3) of the Indian Limitation Act, 1908, limitation had to be counted from the date of the death of the minor. The learned Judges held that Art. 44 applied to the case, but in computing the limitation. Sec. 6(3) cannot be invoked. According to them, the three year period must be counted from the date when the minor would have attained majority had he not died. The reasoning of the learned Judges was that a transferee by or a legal representative of the minor acquired title to the property subject to the right of the minor's option being exercised within three years from the date of the minor attaining majority. After referring to certain earlier decisions, the learned Judges observed--

"In our opinion, the right which is being exercised by the legal representatives is the right of the minor to avoid the transfer....."

According to the learned Judges, this manner of applying Art. 44 to the case of a minor's legal representative was in consonance with the policy behind that article. Their reasoning was that the same disability that affects the minor must also apply to the minor's legal representatives or a transferee from the minor; for, according to the learned Judges, they were 'persons claiming throughout the minor'. The learned Judges also observed that the right to set aside an alienation, for which Art. 44 provided the period of limitation, was not 'a personal privilege conferred upon the minor under Section 6(3) of the Limitation Act'. The learned Judges expressed their disagreement with the decision in *v. Brahmiah*, 59 Mad LJ 196,

198 = (AIR 1930 Mad 821 at p. 823) which had relied on Section 6(3) of the Limitation Act and had held that limitation has to be computed from the date of death of the minor. Incidentally, this conflict in judicial decisions touching the computation of limitation had been resolved in the new [Limitation Act, 1963](#) in Art. 60 of the schedule.

14. The aforesaid views of Satyanarayana Rao and Balakrishna Iyer, JJ. on the nature of the minor's right to set aside the guardian's alienations were not accepted as correct in a later decision of a Bench of this court consisting of Govinda Menon and P. N. Ramaswami, JJ. in *Palani Gounder v. Vanjikkal*, ILR (1956) Mad 1062 = (AIR 1956 Mad 476). This Division Bench thought that the learned Judges who decided *Alamelu Ammal v. Krishna Chetti*, had merely assumed, without a detailed examination of the legal position, that a minor's right to set aside the guardian's alienation is heritable and alienable, and that the learned Judges were only dealing with a matter of limitation. We may say that this observation may not be apposite, at the present moment, as applied to Art. 60 of the [Limitation Act, 1963](#). For, this Article now clearly provides for suit to set aside a transfer of property effected earlier by the guardian of a ward not only by the ward himself after attaining majority, but also by the ward's legal representative in a case where a ward dies before attaining majority and also in a case where he dies within three years from the date of attaining majority. Art. 60 of the schedule to the [Limitation Act, 1963](#), clearly and unequivocally proceeds on the footing that the said right is heritable, if not alienable.

15. Be that as it may, Govinda Menon and Ramaswami, JJ. preferred not to accept the decision in *Alamelu Ammal v. Krishna Chetti*, . They accepted as correct the decision of Sadasiva

Aiyar and Spencer, JJ. in *Muthukumara Chetti v. Anthony Udyan*, ILR 38 Mad 867 = (AIR 1915 Mad 296). They expressed their dissent from the opinion expressed by Viswanatha Sastri J. in *Palaniappa Gounden v. Mallappa Gounden*, .

16. Apart from the above decisions of our High Court, reference was made to a decision of the Calcutta High Court in *Manmohan v. Bidhu Bhusan*, AIR 1939 Cal 460. It was held in that case that the interest which the minor possessed in the

property transferred by the guardian is a mere right to sue to have the sale set aside, and the transfer by the minor of such a right is clearly prohibited under Section 6(e) of the Transfer of Property Act.

17. It is unnecessary to refer in detail to the other cases cited at the Bar. A fairly long list of decisions may be found in the judgment of Viswanatha Sastri J. in *Palaniappa Gounden v. Mallappa Gounden*, . To render the list up-to-date, we may cite the

judgment of Ramamurti, J. in *Gunnama v. Bolachi*, ILR (1965) 2 Mad 114, in which the learned Judge merely followed without discussion, the judgment of Govinda Menon and Ramaswami, JJ. in *Palani v. Vanjikkal*, ILR (1956) Mad 1062 = (AIR 1956 Mad 476).

18. On a review of the cases cited at the Bar, we find that the questions at issue in the present case had not directly arisen in any of those cases excepting, incidentally, in connection with the application of S. 6(3) of the Indian Limitation Act, 1908, or Art. 44 of the Schedule I to the said Act. At all events, all those cases had only dealt with the law that subsisted before the coming into force of the [Hindu Minority and Guardianship Act, 1956](#) and they cannot be regarded as authorities on the true construction of Sec. 6 of that Act.

19. Gokulakrishnan, J. in making the reference to the Full Bench, had pin-pointed on the apparent conflict between the decisions in *Muthukumara Chetti v. Anthony Udayar*, ILR 38 Mad 867 = (AIR 1915 Mad 296) and *Palani v. Vanjikkal*, ILR (1956) Mad 1062 = (AIR 1956 Mad 476), on the one side, and *Palaniappa Gounden v. Maliappa Gounden*, and *Alamelu Ammal v. Krishna Chetti*,

, on the other. This conflict in Bench decisions

provided the main impulse for the learned Judge to refer the matter to the Full Bench. For purposes of the present case, however, we do not think it is really necessary to resolve the conflict, although we are inclined to think that the opinion expressed by Viswanatha Sastri, J. in *Palaniappa Gounden v. Mallappa Gounden*, is the sounder view, on principle of the law obtaining on the subject, both before

and after the commencement of the [Hindu Minority and Guardianship Act, 1956](#).

20. At this stage, we may refer to Section 5 of the [Hindu Minority and Guardianship Act, 1956](#), which clearly lays down that any text, rule or interpretation of Hindu law or any custom or usage as part of that law in force immediately before the commencement of the Act, shall cease to have effect with respect to any matter for which provision is made in this Act. In our view, the overriding effect of the Act under this provision would encompass even earlier court rulings on the subjects which are now dealt with by the Act. At all events, in so far as the instant question before us is concerned, we have no doubt that it has got to be decided only in terms of Section 8(3) and not by reference to the judicial precedents in regard to the law as it existed before the commencement of the Act.

21. Gokulakrishnan, J. in his referring judgment apparently thought that Sec. 8(3) can only refer to persons who obtained the minor's property by devolution of law, such as heirs-at-law or reversioners. We do not find any justification for giving to the words 'any one claiming under him' this restricted meaning. The reason suggested for this restricted interpretation was that Sec. 8(3) of the [Hindu Minority and Guardianship Act, 1956](#) must be construed in harmony with Sec. 6(c) of the Transfer of Property Act. We doubt whether there exists any canon of 'harmonious' construction, which extends the scope of the court's inquiry beyond the confines of the particular statute which the court has to construe. Nor can we accept as sound the notion that the court can ignore the plain terms of a statute by reference to the provisions in a different enactment. In any case, we do not see the relevance of reading Sec. 6(e) of the Transfer of Property Act into Sec. 8(3) of the [Hindu Minority and Guardianship Act, 1956](#). Sec. 8(3), on its plain terms applies to the transferees as well as the legal representatives of the minor, and it cannot have the intention behind the words 'any person claiming under the minor' that a transferee from the minor should stand excluded from the description.

22. Gokulakrishnan, J. however, was prepared to concede that the words 'any person claiming under the minor' could be applied to persons to whom the minor's interest has developed under inheritance. We are unable to see how this result could flow if Sec. 6(3) of the Transfer of Property Act were thought to control the

scope of Sec. 8(3) of the Hindu Minority and Guardianship Act. If the theory is that a minor's right to set aside the guardian's alienation is a mere right of litigation and is only personal to the minor, then, on the minor's death, the right also must die with him; it cannot devolve on his heirs or. But the view adumbrated by Gokulakrishnan, J. would seem to suggest that Sec. 6(e) of the Transfer of Property Act would only have the effect of excluding from the ambit of Sec. 8(3) of the Hindu Minority and Guardianship Act 1956, transfers inter vivos of the minor's right in the property alienated by the guardian. We do not see any validity, in principle, for this understanding of the sections. We have earlier referred to Sec. 5 of the [Hindu Minority and Guardianship Act, 1956](#) with particular reference to clause (a). That sub-section dealt with the overriding effect of the Act as respects any rule of Hindu law, usage, custom, etc., in force immediately before the commencement of this Act. Clause (b) enacts similarly, that "any other law in force immediately before the commencement of this Act shall cease to have effect in so far as it is inconsistent with any of the provisions contained in the Act." This being the avowed intention of the Legislature, when it comes to a question of "which is to be master, Sec. 6(e) of the Transfer of Property Act or Sec. 8(3) of the [Hindu Minority and Guardianship Act, 1956](#)?"--the former must necessarily yield to the latter under the compulsive rule of interpretation declared by Sec. 8(3) the full force and effect of the words in their natural and ordinary meaning carry.

23. In the result, our formal answer to the question referred to us is that the right to set aside the alienations of a minor's property by the guardian is available under Sec. 8(3) of the [Hindu Minority and Guardianship Act, 1956](#), not only to the minor himself, but also to any person claiming under him, which latter expression includes a transferee of the minor.

24. On this construction of Section 8(3) of the Hindu Minority and Guardianship Act 1956, the plaintiff Sornam had to be regarded as a person claiming under the minor Kaliammal, and this being so, the previous alienation of the suit property dated 21-10-1959 made by Kandayya as guardian of Kaliammal is open to avoidance by the plaintiff. It follows that the suit filed by him for setting aside that alienation and for possession must be held to have been properly laid.

25. The second appeal is dismissed. But in the circumstances, there will be no order as to costs.

26. Appeal dismissed.

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