1972 KHC 233
Kerala High Court
V. R. Krishna Iyer, J.
SANTHA v. CHERUKUTTY AND OTHERS
S. A. No. 572, 573 of 1970
20 August, 1971

Hindu Minority and Guardianship Act, 1956, S.8 - Mother, acting as the guardian of a minor, alienating his share -- No sanction of the Court taken for the alienation -- Violative of S.8(2) -- Minor can avoid the transaction by his conduct -- There is no need to file a suit for avoiding the transfer. (Para 7, 8)

1940 (I) MLJ 32; 1962 KLJ 177; 1959 KLT 468; 1962 KLT 484; 1968 KLT 616; 1971 KLT (SN) 32; 1968 (2) An. WR 57; Referred to
1956 (II) MLJ 411; 1964 Mad. 353; Referred to

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JUDGMENT

1 A short question of law, riddled with difficulties and conflicting precedents, falls for decision is these second appeals. I must express right at the outset my deep appreciation of the thoroughness with which counsel for the respondent, Shri. T. P. Kelu Nambiar, argued the case, of course, doing his duty to the court by bringing to my notice rulings, reported and unreported, speaking for and against his standpoint.

2 A decree for partition was passed in O.S. No. 138 of 1952 whereby the C schedule properties thereto were allotted to the widow and minor daughter of the 2nd defendant who died pending the suit and was represented thereafter by his widow and only daughter. Thereafter, on 12-4-1957 the mother, i. e. the widow of the deceased 2nd defendant, transferred the property so allotted to the plaintiff, Kannan, acting for herself and as guardian of her minor daughter. It may be mentioned right away that the mother and daughter were entitled to equal shares in the C schedule property. The minor thereafter married and her husband took a different view of the situation. For, he felt that the assignment was wrongful and injurious to his wife's interests and, ignoring the transfer to the plaintiff, proceeded to execute the partition decree acting as the guardian of his minor wife. The respondent, i.e. the plaintiff, raised the plea that the minor daughter could not execute the decree without setting aside the transfer effected on her behalf and as her guardian by her mother. If the transfer was void or had been avoided validly without the intervention of the court, there was no need to set aside the sale as such by suing in that behalf. But if the transfer had to be get rid of only by a decree setting it aside, the execution petition could not be sustained since the minor had lost her property by Exts. P1 and P2 and could not regain it until a decree had been passed setting them aside. It must be assumed for the purpose of this discussion that the mother when she executed Exts. P1 and P2 on 12-4-1957 was the natural guardian of the minor. The key question is as to whether a minor, whose property had been transferred by her natural guardian, can avoid it or should get it set aside by

a decree even if the sale be in contravention of S.8 of the Hindu Minority and Guardianship Act, 1956, it being admitted that the parties are Hindus governed by that Act.

3 A manager of a Joint Hindu family alienating family property has only limited powers. So also a Hindu widow vis a vis the reversioners to the estate of her husband. A guardian of a minor or a trustee of a temple stands more or less on the same footing. It has been laid down more than a century ago in Hanuman Prasad's case that the power of the manager of an infant heir to charge an estate, not his own, is, under the Hindu Law, a limited and qualified power. The question in that case was as to the extent of the power of the mother as manager of the estate of her minor son to alienate the estate, but the principles laid down in that case have been held to apply to alienations by the managers of joint families, of religious endowments, of the estates of lunatics and by Hindu widows. Supposing an alienation were made by a person authorised, only under circumstances in their nature variable, to dispose immovable property and transfers such property in excess of his powers, how can such an alienation be got rid of? Can it be done by a unilateral repudiation by the affected party or can it be said that even that is not necessary, the transaction being void or a nullity? Is there force in the other extreme contention that a transaction so entered into is neither void nor can be avoided by the affected party by a unilateral act, but could be got rid of only by a suit to set aside the transaction? The basic decision which throws considerable light on the controversy highlighted by me now is the one reported in Ramaswami Aiyangar v. Rangachariar (1940 (1) MLJ 32) where Leach, C. J., discussed these precise problems and held that such transactions in excess of the limited authority of the manager or guardian or widow did not require to be cancelled or set aside through court. In cases where minors are involved, the property may be owned by the joint family and although a junior member's presence or junction may be unnecessary, be may be joined in the transaction and got represented by the Kartha or some other person as his guardian. It may also be that where the property belongs to the minor and not to a joint family, a guardian may act on his behalf and that way it may be stated that the minor is eo nomine a party to the transaction. Leach, C. J., took the view that where decrees have been passed in suits to which junior members or guardians have been made eo nomine a party, "such decrees bind him until set aside, and therefore he cannot seek to obtain a decision on the footing that his interest in the joint family property is not affected by them". However, where transactions had not ripened into decrees, the learned Judge held that there was a substantial difference in the substantive law. His Lordship continued to deal with it and observed:
"The other transactions of the first defendant, whether the plaintiff is made a party thereto or not, stand on a different footing. He is not bound under the substantive law by which he is governed, to sue for a declaration or cancellation in respect of any of them. The legal position has been correctly explained in Unni v. Kunchi Amma (ILR 1890 (14) Mad. 26 at 28), in the following words which were taken from an unreported decision of this Court: --
'If a person not having authority to execute a deed, or having such authority under certain circumstances which did not exist, executes a deed, it is not necessary for persons who are not bound by it to sue to set it aside, for it cannot be used against them. They may treat it as non existent and sue for their right as if it did not exist.'

The same principle has been distinctly laid down by the Privy Council in Bijoy Gopal Mukerji v. Krishna Mahishi Debi (1907 (17) MLJ 154) where their Lordships point out the jural basis underlying such transactions. In that case the reversioner sued for a declaration that a lease granted by the widow of the last male owner was not binding on him and for khas possession. It was objected that the omission to set aside the lease by a suit instituted within the time limited by Art.91 of the Indian Limitation Act was fatal to the suit. The following observations which are equally applicable to a father or manager of a joint family are apposite:-

'A Hindu widow is not a tenant for life but is owner of her husband's property Subject to certain restrictions on alienation and subject to its devolving upon her husband's heirs upon her death. But she may alienate it subject to certain conditions being complied with. Her alienation is not, therefore, absolutely void, but it is prima facie voidable at the election of the reversionary heir. He may think fit to affirm it or he may at his pleasure treat it as a nullity without the intervention of any Courts, and he shows his election to do the latter by commencing an action to recover possession of the property. There is, in fact nothing for the Court either to set aside or cancel as a condition precedent to the right of action of the reversionary heir. It is true that the appellants prayed by their plaint a declaration that the ijara was inoperative as against them as leading up to their prayer for delivery to them of khas possession. But it was not necessary for them to do so, and they might have merely claimed possession leaving it to the defendants to plead and (if they could) prove the circumstances which they relied on for showing that the ijara or any derivative dealings with the property were not in fact voidable but were binding on the reversionary heirs.'

In such cases even if the plaint contains a prayer for a declaration or cancellation, there is good reason for holding it to be one for a purely incidental, but unnecessary relief.
Although that particular case related to court fee and to a junior member's suit regarding alienations by a Kartha the substantive law has been thoroughly discussed there and, 1 think, holds good even for minors and the acts of guardians.

4 The Kerala High Court had occasion to consider this question in numerous cases, but obviously the most important is the Full Bench ruling reported in Mathew v. Ayyappankutty (1962 KLT 61) But, before going in some detail into the law laid down there I may as well advert to certain observations of Mr. Justice Varadaraja Iyengar in Raman Velayudhan v. Velayudhan Sreedharan (1959 KLT 468). The learned Judge was considering the question of the bar of limitation for a suit by a minor brought more than three years after he became a major impugning a transaction by a de facto guardian. The learned Judge observed:

"*Now Art.44 applies to suits to set aside a transfer of property by a guardian and instituted by a ward who has attained majority. The period fixed is 3 years from when the ward attained majority. The question is does this expression 'guardian' comprises 'de facto' guardian in the position of the 3rd defendant. In my opinion it does not. No doubt such de facto guardians are recognised by Hindu Law as capable of transferring the minor's property for valid necessity and transfers by such guardians without necessity are not void but only voidable. But this only means that these defective transfers are capable of ratification by the minor on attaining majority and not that they are binding on the minor until set aside."*

The case in 1956 (2) MLJ 411 (Sankaranarayana Pillai v. Kandasamia Pillai) is a pronouncement of the Madras High Court, and, speaking for the Full Bench Govinda Menon J. reviewed the case law and took the view that:

"*There is no doubt whatever that a transaction entered into by a guardian relating to the minor's properties is not void and if the minor does not sue to set it aside within three years of his attaining majority it becomes valid under Art.14 of the Limitation Act. In such a case the minor is deemed to be a party to the transaction. But whether the document is executed by a manager of the family and it is not binding on the family, the minor or any other member can ignore the transaction and recover possession of the property."*

The Full Bench answered the question referred to it by stating that if the minor is eo nomine a party to a sale deed or other alienation, he must sue for cancellation of the deed, that is, that he must get it set aside. However, this Full Bench decision was considered later by a Division Bench of that court in Eachan Neelakantan v. Kumarasami Nadar (AIR 1964 Mad. 353) and in that case the view was expressed that if the minor's separate property was sold, the transaction would not cease to be one by the minor's guardian and Art.44 would apply, but if in a conveyance of joint family property by the manager the minor was made eo nomine a party, the transaction could never be regarded as one entered into by the manager himself and Art.144 alone would apply. Thus, if the separate property of a minor were alienated by a guardian, the view in Madras expressed in the two rulings now mentioned is that it requires to be set aside. The view taken by Iyengar J. in the Kerala High Court does not appear to be quite in accord with the Madras view expounded in the two decisions now mentioned unless the law differs, as it may, in cases of acts of de facto guardians. The Andhra Pradesh High Court in Karnam Nagabhushana Rao v. Karnam Gowramma (1968 (2) Andhra Weekly Reporter 57) took the view that if a de facto guardian alienated a minor's property it was open to the latter to treat it as a nullity, the expression 'voidable' being used only in this limited sense.

5 Coming back to 1962 KLT 61 where Madhavan Nair J. made an exhaustive survey of all the precedents in the High Courts of Madras, Travancore, Cochin and Kerala, and stated the law thus:

"It is not always necessary that a party entitled to avoid a transaction not binding on him should sue for its rescission. He can himself avoid it by an unequivocal act repudiating it."

His Lordship referred to junior members of joint families and expressed himself thus:

"*The question arose pointedly in regard to S.21 of the Travancore Ezhava Act in Krishna Pillai v. Habeeb (21 TLJ 1001). The deed concerned was one of sale executed by a karnavan alone. The Munsiff held that the executant 'was incompetent to execute the sale deed as there were several members in the executant's family whose written can sent was necessary under S 21 of the Ezhava Act (III of 1100) for its validity. As the execution ..... was in contravention of a statutory provision ..... the sale was a nullity and did not pass any interest to the vendee*.' But on appeal it was held by the High Court:

'No doubt under S.21 of the Ezhava Act (Act III of 1100) as between the members or the tarwad a sale deed executed by a karnavan without the written consent of the other major members of the tarwad would not be valid. It cannot however be said that the sale deed would be invalid for all purposes. Supposing, for instance that in spite of the absence of the written consent of the adult junior members of the tarwad, junior members do not question the deed, or choose to ratify it subsequently, it could not possibly be argued that the document is invalid or void ab initio on account of the absence of the written consent of the other members of the tarwad. S.21 of the Act does not say that a sale deed executed by a karnavan or other managing member without the written consent of all the major members shall be void in law. All that the section can reasonably mean is that such sale deeds mortgage deeds, or lease deeds as are specified in the section cannot be valid or operative as against the tarwad if the junior members choose to question their validity.'

Dealing with alienations by guardians of minors, the learned Judge observed:

"*Again, in Abdul Rahman v. Sukhdayal Singh (ILR 28 All. 30) a minor who has sold the property which his guardian had leased out to the defendant was held to have validly repudiated the transfer by his act. Richards J. observed that it is not necessary that a suit should be instituted to set aside the lease which was executed by the guardian of the minor. To the same effect are Jagadamba Prasad Laila v. Anadi Nath Roy (AIR 1938 Patna 337) and Sivanmalai Goundan v. Arunachala Goundan (AIR 1938 Mad. 822). Trevellyan in his well known book on Minors 5tb Edn., at page 202 states'*

'A transaction which is voidable at the instance of the minor may be repudiated by any act or omission of the late minor, by which he intends to communicate the repudiation, or which has the effect of repudiating it, for instance, a transfer of land by him avoids a transfer of the same land made by his guardian before he attained the age of majority. It is not necessary that he should bring a suit; but a suit to set aside the acts of his guardian during his minority amounts of course to an express repudiation.' "

Considering the case of a Hindu widow, Madhavan Nair J. quoted from Mulla's Hindu Law, 12th Edn., page 276, the following observation:

"An alienation made by a Hindu widow ..... without legal necessity and without the consent of the next reversioners is ..... voidable at their option. They may affirm it, or treat it as a nullity without the intervention of a court and they show their election to do the latter by commencing an action to recover possession of the property."

6 Certain statutes have stated that a transaction is voidable at the instance of certain persons or is void as against certain persons. The learned Judge considered the expressions 'void' and 'voidable' in this context and came to the conclusion that "void as against A" can mean only that A can treat it as void or, in other words, A can avoid it. It is, strictly speaking, voidable at the option of A. It a transaction is voidable at the instance of a person, he can either affirm or avoid it.

7 Of course, the trend, therefore, of the decision is that when a transaction has been entered into by a person with limited powers and the law states that it is voidable at the instance of another, that other can avoid the transaction or affirm it and the aid of the process of court is unnecessary. However, in certain transactions, which may be thus rendered void or invalid by the act of an individual, the assistance of the court may be required where, for instance, possession is with the alienee; and in such cases, according to the Full Bench, the party cannot come at his own leisure but must seek the aid of the court within the period prescribed by the law of limitation for actions.

8 Madhavan Nair J. takes the further view that in such cases the cause of action is not the transfer of possession. It is the alienation that passed the possession and, therefore, the suit must be to set aside the alienation itself with a prayer for possession as a consequential or accessory relief. This view was reiterated by his Lordship in Govindan Kurup v. Bhaskara Pillai (1962 KLT 484) where certain observations in the Full Bench ruling were sought to be explained away. If possession accompanied the alienation, a suit to set aside the alienation and recover the land was necessary; avoidance by the party himself would not do, according to the view expressed by his Lordship in this later decision. But, then, that very case was the subject matter of consideration in appeal by a Full Bench in A.S. A. No. 8 of 1968 and certain observations there are pertinent and instructive. The transaction there was one by a karanavan and some major members of a tarwad governed by the Travancore Ezhava Act, but in

contravention of S.21 of the Act which required the consent of all the major members for its validity. Dealing with the effect of S.21, the Court observed:

"The sale was undoubtedly bad, but, it is now well settled -- see Mathew v. Ayyappankutty not void in the strict sense of that term. It was only voidable and; even so, only at the option of those members of the tarwad who did not join in it, not at the instance of those who did or of an outsider. Title passed under the sale although it was liable to recall at the instance of the members entitled to avoid the sale."

The Full Bench went on to consider the later decision of Madhavan Nair J. in Karthikeyan v. Kunjamma (1968 KLT 616) with special reference to the view that an avoidance of the sale could only be by a suit brought for the purpose by those entitled to avoid it. The Court observed thus:

"Regarding the second ground, the view explicitly taken by the learned single Judge and implicit in the decision in Sivaramakumar v. Thiruvadinatha Pillai (1956 KLT 880) and certain observations in Mathew v. Ayyappan Kutty (1962 KLT 61) that a member of a tarwad can avoid an invalid sale made by the karnavan only by instituting a suit for the purpose seems open to question. It is open to a member who is not a party to such a sale either to affirm it or to repudiate it. If he affirms it, he will not thereafter be allowed to go back on the affirmance; but; we are by no means certain that repudiation can only be by a suit.

It must be stated in support of the view of Mr. Justice Madhavan Nair that there is an earlier ruling reported in 1962 KLT 484 where a learned single Judge of this court took the view that if the transaction was one by a legal guardian it was only a voidable transaction and not void ab initio and further that the transaction had to be avoided within the time prescribed by Art.44 of the Limitation Act. Of course, there are passages in the judgment which strike a different dote. But I have indicated the conclusion reached by his Lordship Mr. Justice Raghavan there.

9 In the present case, however, we are concerned with a specific statute namely, S.8 of the Hindu Minority and Guardianship Act, 1956 It is indisputable that no sanction of the court was taken for the alienation in the present case by the mother acting as the guardian of the minor and, therefore, there is a plain violation of S.8(2) of the Act. Consequently, S.8(3) is attracted and the disposal of the property, even though by a natural guardian becomes voidable at the instance of the minor. Should this process of avoidance be effected by a suit to set aside the alienation, or is it enough if the minor repudiates the transaction by his own act. I have considered, this question in an unreported decision in S. A. No. 683 of 1969 and the view (1971 KLT Short Notes, p. 32) expressed by me there, which after all the arguments pa both side. I am not inclined to change, is that when a minor is entitled to avoid a transfer effected by his guardian on the ground of absence of permission of the court it becomes a nullity on his unilateral act. He can merely avoid it by his conduct and there is no need to file a suit for avoiding the transfer S.8 (2) and (3) read:

"8(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-s.(1) or sub-s.(2), is voidable at the instance of the minor or any person claiming under him". claiming under him."

From the language of this provision, read in the light of 1962 KLT 61, it follows that the alienation in question is voidable at the minor's instance rather he can treat it as void without the assistance of the court.

10 Once the obligation to institute a suit to set aside the transfer is not there, the decree can be executed by the minor and so, in the present case, the view taken by the courts below the execution proceedings cannot be instituted by the minor without first getting the sale set aside is untenable. In a sense the, larger question which I have dealt with In the earlier stages of this judgment may not even be necessary to dispose of the short point that arises in this case, covered as it is by the statute, namely, S.8 of the Hindu Minority and 'Guardianship Act. I agree that while an alienation by a de facto guardian may be treated by the minor as a nullity the legal position may be different if the alienation is by a legal guardian going by Madras precedents, particularly although had it been res integra. I might have equated the position with a Kartha's or Hindu widow's alienation. The cases which take the view that a natural guardian's alienation is good until set aside by court have not considered the impact of S.8 of the Hindu Minority and Guardianship Act. That statutory provision enables the minor to affirm or disaffirm the transaction without suit. In this view, I allow the appeals and direct that the execution proceedings do continue at the instance of the minor. The parties will bear their costs.

Leave granted.
