IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 3RD DAY OF OCTOBER 2023 / 11TH ASWINA, 1945

RSA NO. 733 OF 2018

AGAINST THE ORDER/JUDGMENT AS 129/2009 OF ADDITIONAL DISTRICT COURT, TIRUR

OS 142/2006 OF MUNSIFF COURT, PARAPPANANGADI

APPELLANTS/APPELLANTS/PLAINTIFFS:

1 KAKKOVIL MULIYARAKKAL KRISHNAN CHILDREN;
[redacted]

2 SULOCHANA,
[redacted]

3 PREMAVALLI,
[redacted]

4 HARIDAS,
[redacted]

5 SUBHADRA,
[redacted]

6 AGHILESH,
[redacted]

7 DINESH 48 YEARS,
[redacted]

8 SURESH,
[redacted]

9 KAKKOVIL MULIYARAKKAL KRISHNAN'S WIFE AMMALU
[redacted]
MALAPPURAM. 84 YEARS, MOTHER OF APPELLANTS 1 TO 8.

BY ADVS.
SRI.P.S.SREEDHARAN PILLAI
SRI.ARJUN SREEDHAR
SRI.ARUN KRISHNA DHAN
SRI.ALEX ABRAHAM
SRI.T.K.SANDEEP

RESPONDENTS/RESPONDENTS/DEFENDANTS:

1 KAKKOVIL MULIYARAKKAL VILASINI(DIED)*
AGED 62 YEARS.
[redacted]

2 KAKKOVIL MULIYARAKKAL APPUTTY,
AGED 67 YEARS
[redacted]

3 AJITHAKUMARI C.B,
[redacted]

4 ANITHAKUMARI C.B,
[redacted]

5 SABARINATH C.B,
AGED 45 YEARS S/O CHIRAKKAL BALAN
[redacted]

6 C.B.BALASUBRAMANIAN,
[redacted]

7 C.B.AJAIKUMAR,
[redacted]

(*ADDITIONAL RESPONDENTS 3 TO 7 ARE IMPLEADED AS THE LEGAL REPRESENTATIVES OF DECEASED FIRST RESPONDENT AS PER ORDER DATED 01.03.2021 IN IA.NO.1/2021 IN RSA.733/2018.)

BY ADVS.
T.SETHUMADHAVAN (SR.)
SMT.DEEPA NARAYANAN
SMT.PREETHI. P.V.
M.V.BALAGOPAL

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 03.10.2023, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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JUDGMENT

Dated this the 3rd day of October, 2023

The appellants in this Regular Second Appeal filed under Section 100 r/w Order XLII of the Civil Procedure Code, 1908 (hereinafter referred to as 'CPC' for short) are the plaintiffs in O.S.No.142/2006 on the files of the Munsiff's Court, Parappanangadi. They assail the preliminary decree and judgment of partition dated 30.09.2009 passed by the Munsiff Court in the above suit and the decree and judgment in AS No.129/2009 dated 21.10.2017 passed by the Additional District Court, Tirur, confirming the decree and judgment of the trial court. The respondents herein are the defendants in the above suit.

2. Heard the learned counsel appearing for the appellants as well as the learned senior counsel appearing for respondents 1 and 2, who are the defendants in the above suit.

3. I shall refer the parties in this Regular Second Appeal as 'plaintiffs' and 'defendants' for convenience.

4. At the time of admission, my predecessor, as per order dated 13.07.2022, formulated the following questions of law:-

> "1. Whether the 9th plaintiff is entitled to act as the natural guardian of the minor children under Ext.A3 release deed No.35/1966 in view of the provisions of Section 6 of the Hindu Minority and Guardianship Act, 1956, particularly in the light of the fact that the father himself is the transferee under the document and the further fact that the rights of the minor children obtained by them under assignment deed No.290/1952 (Ext.B2) was also held by the 9th plaintiff mother as the natural guardian of the minor children?
>
> 2. Whether the fact that Ext.A3 release deed is not shown to be for the welfare of minors would make the document only as voidable?
>
> 3. Whether the challenge of release deed executed in the year 1996 is barred by limitation in view of the fact that the defendants attained majority in 1974 and 1971 and their father died in the year 1982?"

5. In this matter, the plaintiffs filed suit with prayer to partition the plaint B schedule property, asserting that originally the property was owned and possessed by one Krishnan, who is the husband of the 9th plaintiff and the father of the other plaintiffs and defendants, on the basis of kanam theeradharam No.3698/1960 marked as Ext.A2. So, according to the plaintiffs, the entire property is liable to be partitioned since Krishnan died intestate in the year 1984. Thereafter, the plaint was amended and contention raised to the effect that as per document No.2907/1953, marked as Ext.A1, Krishnan transferred his right in favour of the plaintiffs and defendants 1 and 2. But Krishnan, subsequently obtained right over the entire plaint B schedule property on the basis of Ext.A3 kanam theeradharam deed No.35/1966 and the said document would recite that Krishnan was in possession and enjoyment of the plaint B schedule property till his death. It is also contended that though Krishnan transferred his right over the property as per Ext.A1, the same got re-conveyed as per Ext.A3 and in such view of the matter

also, Krishnan was the owner of the plaint B schedule property till his death. Therefore, the property is liable to be partitioned among the plaintiffs and the defendants equally.

6. The defendants resisted the suit, raising specific contention that originally Krishnan obtained kanam right over the plaint B schedule property on the basis of document No.2952/1949, marked as Ext.B1 and at the time when Krishnan was possessing plaint B schedule property, he transferred his entire right in favour of the first plaintiff - Smt.Chandramathi and defendants 1 and 2 - Smt.Vilasini and Sri.Apputty. It was contended further in the additional written statement that Krishnan not obtained absolute right over the plaint B schedule property on the basis of Ext.A3 and the 1/3rd right obtained by the first plaintiff as per Ext.A1, alone was transferred in the name of Krishnan, since at the time of execution of Ext.A3, the first plaintiff was major. However, Ext.A3, executed for and on behalf of defendants 1 and 2, who were minors, by the mother as natural guardian, is a void document. Therefore, Ext.A3 did not

confer any right on Krishnan.

7. The trial court ventured the matter. PW1 was examined and Exts.A1 to A5 were marked on the side of the plaintiffs. DW1 and DW2 were examined and Exts.B1 to B5 were marked on the side of the defendants. Ext.C1 and C1(a) also were marked.

8. On appreciation of evidence, the trial court accepted the contention raised by the defendants and found that Ext.A3 did not confer absolute title upon Krishnan and Krishnan obtained title only to 1/3rd right transferred by Smt.Chandramathi, as per Ext.A3. Accordingly, the prayer to partition the property by 1/11th share was negatived and consequently, 1/3rd of the plaint 'B' schedule property was allowed to be partitioned and thereby, 1/11th equal shares out of 1/3rd were found as the shares of the parties.

9. Even though the plaintiffs challenged the decree and judgment of the trial court dated 30.09.2009, the Appellate Court also dismissed the appeal and found that since the execution of

document No.35/1966 i.e., Ext.A3, was not for the benefit of the minors, the same shall not bind the minors and as such, their share covered by the said deed to be retained as such, as found by the trial court.

10. While assailing the concurrent verdicts, in answer to the substantial question of law raised herein above**,** the learned counsel for the plaintiffs placed the decision of the Apex Court in **Gita Hariharan (Ms) and Another Vs. Reserve Bank of Indian and Another,** (**1999) 2 SCC 228** and argued that the Apex Court, after interpreting Section 6(a) of the Hindu Minority and Guardianship Act ('HMG Act', for short hereinafter), held that '*the father can be considered to be absent and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of a harmonious construction of Section 4 and Section 6 of the HMG Act, without causing any violence to the language of Section 6(a) (Supra)'*.

11. The learned counsel for the plaintiffs also submitted

that in a latest decision of the Apex Court in **Akella Lalitha** v. **Sri.Konda Janumantha Rao, 2022 KHC 6746 SC,** the Apex Court in paragraph No.9, affirmed the view in **Githa Hariharan's** case (*Supra*) and held as under:

> "In the case of Githa Hariharan and Others v. Reserve Bank of India and Others (MANU/SC/0117/1999) this court elevated the mother to an equal position as the father, bolstering her right as a natural guardian of the minor child under Section 6 of the Hindu Minority and Adoption Act, 1956."

12. In **Githa Hariharan's** case (*Supra*), the Apex Court interpreted Section 6(a) of HMG Act and held as under:

> "The definitions of 'guardian' in Section 4(b) and 'natural guardian' in Section 4(c) of the Hindu Minority and Guardianship Act do not make any discrimination against the mother and she being one of the guardians mentioned in Section 6 would *undoubtedly* be *a natural guardian* as defined in Section 4(c). The expression "*the* father and after him, the mother" in Section 6(a) does give an impression that the mother can be considered to be the natural guardian of the minor only offer the lifetime of the father. But it is not disputed and otherwise well settled also that the welfare of the minor in the widest sense is the paramount consideration and even during the lifetime of the father, if necessary, he can be replaced by the mother or any other suitable person by an order of the court, where to do so would be in the interest of the welfare of the minor. Question however arises when

the mother acts as the guardian of the minor during the lifetime of the father, without the matter going to the court, and the validity of such an action is questioned on the ground that she is not the legal guardian of the minor in view of Section 6(a). It is then maintained that she could function as a guardian only after the lifetime of the father and not during his lifetime despite his concurrence. However such an interpretation violates gender equality, one of the basic principles of our Constitution.

(Paras 7 to 9)

Where two interpretations are possible the Count will lean in favour of constitutionality of the provision since legislature is presumed to have acted in accordance with the Constitution

(Para 9)

Now Section 6(a) is capable of such construction as would retain it within the constitutional limits. The word "after" need not necessarily mean "after the lifetime". In the context in which it appears in Section 6(a), it meant "in the absence of", the word "absence" therein referring to the father's absence from the care of the minor's property or person for any reason whatever. If the father is wholly indifferent to the matters of the minor even if he is living with the mother or if by virtue of mutual understanding between the father and the mother, the latter is put exclusively in charge of the minor, or if the father is physically unable to take care of the minor either because of his staying away from the place where the mother and the minor are living or because of his physical or mental incapacity, in all such like situations, the father can be considered to be *absent* and the mother being a recognized natural guardian, can act validly on behalf of the minor as the guardian. Such an interpretation will be the natural outcome of a harmonious construction of Section 4 and Section 6 of the HMG Act, without causing any violence to the language of Section 6(a).

(Para 10)

Jijabai Vithalrao Gajre v. Parhanthits) (1970) 2 SCC 717, followed Panni Lal v. Rajinder Singh, (1993) 4 SCC 38, explained and distinguished

Moreover the above interpretation gives effect to the principles contained in CEDAW and the Beijing Declaration which directs all State parties to take appropriate measures to prevent discrimination of all forms against women. The domestic courts are under an obligation to give due regard to international conventions and norms for construing domestic laws when there is no inconsistency between them.

(Para 14)

Apparel Export Promotion Council v. A.K Chopra, (1999) I SCC 759, followed

Section 19(6) of the GW Act would also have to be construed in the same manner in which Section 6(a) has been construed.

(Para 15)

In conclusion, while both the parents are duty-bound to take care of the person and property of their minor child and act in the best interest of his welfare, in all situations where the father is not in actual charge of the affairs of the minor either because of his indifference or because of an agreement between him and the mother of the minor (oral or written) and the minor is in the exclusive care and custody of the mother or the father for any other reason is unable to take care of the minor because of his physical and/or mental incapacity, the mother can act as *natural guardian* of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be “absent” for the purposes of Section 6(a) of the HMG Act and Section 19(b) of the GW Act.

(Para 16)”

13. Thus, it appears that as per the ratio in **Githa Hariharan's** case (*Supra*), affirmed in **Akella Lalitha**'s case (*Supra*), the legal position is that Section 6(a) does not give an impression that the mother can be considered to be the natural guardian of the minor only after the lifetime of the father. When the mother acts as the guardian of the minor during the lifetime of the father without the matter going to the court, and the validity of such an action is questioned on the ground that the mother is not the legal guardian of the minor, in view of Section 6(a) of the HMG Act, the mother could function as guardian only after the lifetime of the father and not during his lifetime. Such an interpretation would violate gender equality, one of the basic principles of our Constitution. Therefore, the mother can act as the natural guardian of the minor and all her actions would be valid even during the lifetime of the father, who would be deemed to be 'absent' for the purpose of Section 6(a) of the HMG Act and Section 19(b) of the Guardians and Wards Act, 1890.

14. It is in tune with the above legal position, it is held that the execution of Ext.A3 by the mother as natural guardian for and on behalf of defendants 1 and 2, who were minors at the time of execution, would not make Ext.A3 as void and contra finding entered into by the trial court as well as the appellate court is wrong. The nature and legal effect of Ext.A3 can be decided after addressing the second and third substantial questions of law.

15. The second and third substantial questions of law raised are '*Whether the fact that Ext.A3 release deed is not shown to be for the welfare of minors would make the document only as voidable' and Whether the challenge of release deed executed in the year 1996 is barred by limitation in view of the fact that the defendants attained majority in 1974 and 1971 and their father died in the year 1982?'.* In support of this contention, the learned counsel appearing for the plaintiffs placed the decision of this court in **K.P. Mani and Others** v. **Malu Amma and Others,** reported in **2012 KHC 2531** and argued that a

deed executed by a natural guardian representing the minor/minors is not void but is voidable at the option of the minors. In paragraph No.6 of the judgment, this Court, after referring the Full Bench decision of this court in **Ramdas Menon v. Sreedevi,** reported in **2004 (1) KLT 323** relying on the decision of the Supreme Court in **Viswambhar and others** v. **Laxminarayan,** reported in **2001 (6) SCC 163** held that *an alienation of immovable property by the natural guardian without obtaining permission of the Court is only voidable (and not void) and that there should be a prayer to set aside such alienation within three years of their attaining majority and having not been done the same, the document could not be held as void.* The relevant observations of this court in paragraph Nos. 4 and 6 are as under:-

> "4. Turning to the claim of appellants 2 and 3/2nd plaintiff and 6th defendant, first appellate court held that even if it is assumed that release of their share in the suit property as per Ext.B7 was not for their welfare or on account of any family necessity,

appellants 2 and 3/ 2nd plaintiff and 6th defendants are not entitled to challenge that release deed to the extent it concerned their share for the reason that the suit is time barred. First appellate court pointed out that the 2nd appellant / 2nd plaintiff and 3rd appellant / 6th defendant ought to have filed the suit to set aside Ext.B7 to the extent it concerned them within three years of their attaining majority and that having not been done appellants 2 and 3 are not entitled to make any claim over the property.

5. xxxx

6. Though there was some cleavage of opinion in this Court as to whether a transaction in violation of S.8(3) of the Hindu Minority and Guardianship Act, 1956 (for short, "the Act") is void or voidable, that controversy is settled by the Full Bench in Ramadas Menon v. Sreedevi 2004 (1) KLT 323 relying on the decision of the Supreme Court in Viswambhar & others v. Laxminarayan 2001 (6) SCC 163. It is held that an alienation of immovable property by the natural guardian without obtaining permission of the Court is only voidable (and not void) and that there should be a prayer to set aside such alienation".

16. Whereas the learned Senior counsel appearing for defendants 1 and 2 submitted that Ext.A3 is *void ab initio* not

only for the reason that it was executed by the mother as natural guardian but also for other reasons.

17. It is also submitted by the learned senior counsel appearing for defendants 1 and 2 that originally, Krishnan obtained kanam right as per Ext.B1 document No.2952/1949. It was thereafter, by executing Ext.A1, Krishnan transferred the kanam right in favour of the first plaintiff and defendants 1 and 2. Thereafter, Krishnan again approached the landlord and obtained another kanam right as per document No.3698/1960 i.e., Ext.A2, in order to avoid the legal consequences of Ext.A1. It is also argued that, going by Ext.B1, the right obtained by Krishnan is only kanam right and as per Ext.A1, he assigned the same in favour of the first plaintiff and defendants 1 and 2. While continuing so, as per the Malabar Tenancy Act, 1929, the first plaintiff and defendants 1 and 2 obtained fixity of tenure, as provided under Section 21 of the Act. Therefore, Ext.A3, releasing the right of kanam, is of no significance and the same is liable to be held as void for the said reason, even though the

same to be found as one validly executed by the mother as the natural guardian representing defendants 1 and 2.

18. Coming to the crux of this matter, initially, plaintiffs claimed right in favour of Krishnan, relying on document No.3698/1960 i.e., Ext.A2. Thereafter, they amended the plaint and contended that even though as per document No.2909/1953, i.e., Ext.A1, Krishnan transferred his right over the property in favour of the plaintiffs and defendants 1 and 2, as per document No.35/1966 - Ext.A3, the same was re-transferred in the name of Krishnan and therefore, Krishnan is the absolute owner of the property at the time of his death. Therefore, the entire property left by Krishnan is liable to be partitioned among the plaintiffs and defendants equally.

19. In reply to the amendment put forth in the plaint, defendants 1 and 2 filed joint additional written statement and raised contention that Krishnan did not obtain any right based on document No.3698/1960, Ext.A2. Further it was contended that the right of the first plaintiff and defendants 1 and 2 in the B schedule property on the strength of Ext.A1, though transferred

by them, as per Ext.A3, the transfer at the instance of the first plaintiff, who was major, at the time of execution of Ext.A3, in relation to the first plaintiff's 1/3rd share alone is valid. But the right of defendants 1 and 2 (who were minors, at the time of execution of Ext.A3) over the plaint B schedule item transferred by the mother as natural guardian, is illegal and in such view of the matter, defendants 1 and 2 have 2/3rd right over B schedule item based on Ext.A1 document and Krishnan had only the remaining 1/3rd right.

20. On evaluation of the materials available, it is discernible that the defendants herein resisted the suit, mainly contending that Krishnan obtained kanam right over the plaint B schedule property on the basis of Ext.B1 document of the year 1949. Thereafter, Krishnan transferred his right in the name of the first plaintiff and defendants 1 and 2 as per Ext.A1. The further contention was that even though Ext.A3 was executed by the first plaintiff and defendants 1 and 2, represented by the mother as natural guardian, since the mother is not the natural guardian as provided under Section 6(a) of t he HMG Act, the

said transfer is void even though the transfer effected by the first plaintiff conferred 1/3rd right to Krishnan in the plaint B schedule property. The trial court as well as the appellate court addressed the said plea and found that in view of Ext.A3 Krishnan obtained 1/3rd right in the plaint B schedule property and the same alone is partible. The trial court as well as the appellate court concurrently found that Ext.A3 is void in so far as defendants 1 and 2 are concerned, since the document was executed by the mother. In fact, as per the law settled, as discussed in detail herein above, mother also is a natural guardian and therefore, Ext.A3 executed by the mother, representing defendants 1 and 2, as the natural guardian, is not a void document but the same is a voidable document at the option of the minors. Since the minors did not challenge Ext.A3 within three years after their attaining majority, following the ratio in **K.P. Mani'**s case (*Supra*), in continuation of the Full Bench decision in **Ramdas Menon'**s case (*Supra*), after the expiry of three years from the date of attaining majority by the minors, Ext.A3 became a valid

document. The second and third substantial questions of law answered thus.

21. However, the learned senior counsel appearing for defendants 1 and 2 put up a new case during hearing of this matter, raising a contention that Ext.A3 is *void ab initio*. In fact, no specific contention was raised to the effect that Ext.A3 is a document *void ab initio* as contended now before this Court in the written statement or in the additional written statement. According to the learned counsel for defendants 1 and 2, Ext.A3 is only a release deed and not an assignment deed, assigning kanam right in the name of Krishnan by the first plaintiff and defendants 1 and 2. It is submitted by the learned senior counsel appearing for the defendants further that, no tenancy could be created after 01.04.1964 as provided under Section 74 of the Kerala Land Reforms Act,1963 and as such, Ext.A3 release deed of the year 1966, in respect of the right obtained by defendants 1 and 2 and the first plaintiff, cannot be transferred. It is interesting to note that though the trial court as well as the

appellate court granted decree of partition in respect of 1/3rd right obtained by Krishnan in view of Ext.A3, the defendants herein did not challenge the decree of the trial court or the appellate court. No cross appeal or cross objection also filed before the first appellate court or before this Court. Keeping the factual scenario as such, on perusal of Ext.A3, there is recital to the effect that the right obtained by the first plaintiff as well as defendants 1 and 2 as per Ext.A1 was given back to Krishnan and for which they have received Rs.200/- as consideration. Thus, it appears that even though Ext.A3 is styled as a release deed, the same to be treated as an assignment of the right obtained by defendants 1 and 2 through their natural guardian and the first plaintiff and the same is not a creation of tenancy dealt under Section 74 of the Kerala Land Reforms Act. Since it is found that Ext.A3 is a valid document owing to the reasoning that the minors did not challenge the voidable nature of the document within three years of attaining their majority, as held herein above, the legal consequence is that at the time of death

of Krishnan, the plaint 'B' schedule property was held by Krishnan as the absolute owner and as such, the plaintiffs and the defendants succeeded him. Therefore, the entire property is liable to be partitioned among the plaintiffs and the defendants. For the above reasons, the decree and judgment impugned are liable to be set aside, holding that the plaintiffs and defendants are equally entitled for 1/11th share in the plaint 'B' schedule property.

22. In the result, this appeal stands allowed and the respective decree and judgment of the trial court as well as the appellate court, under challenge are set aside and the suit decreed as under:

1. The entire plaint 'B' schedule property shall be divided by 11 equal shares by metes and bounds.
2. The plaintiffs and defendants are equally entitled to get 1/11th share each in the plaint 'B' schedule property.
3. Equities and reservations, if any, shall be considered at the final decree stage.

4. The matter adjourned *sine die* with liberty to the parties to file final decree application in accordance with law.

Cost of the proceedings shall come out of the estate.

Sd/-

A. BADHARUDEEN
JUDGE

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