

Andhra High Court

Bench: D Varma, G Rohini

M. Venkata Mani Kanthu v. Unknown

10 August, 2005

JUDGMENT

S.R. Varma, J.

1. Heard the learned counsel appearing for the appellant.
- 2 This appeal is directed against the order, dated 27th June 2005, passed by the III Additional District Judge, Tirupathi, in Guardian and Wards O.P. No. 138 of 2005, dismissing the petition filed under Section 7 of the Guardians and Wards Act, 1890 (for brevity “the GW Act”).
3. The said petition was filed by the minors, represented by their mother, seeking appointment of their mother as their guardian and to permit her to transfer the petition schedule property by way of sale in favour of third parties and to deposit the sale proceeds into a Nationalised Bank or in the alternative to secure alternative properties fetching income for the educational facilities and development of the minors.
4. On behalf of the minor-petitioners, their mother was examined as P.W.1 and the documents Exs.A-1 to A-5 were marked. The court below formulated the point for consideration as “whether the petitioner is entitled for the relief claimed.”
5. Having framed the point for consideration and having gone into the merits of the case and also the evidence on record, both oral and documentary, the court below eventually dismissed the petition holding that the petitioner failed to take steps to bring the necessary material on record and hence not entitled to the relief sought for in the petition. Hence, the present appeal.
6. For the sake of convenience, in this judgment, we would refer the mother of the minors as “the petitioner.”
7. From the impugned order, it appears that the petitioner/mother of the minors purchased certain properties sometime back in favour of the minor children and the present petition was filed by her representing the minors in the interest and for the benefit of the minors seeking permission to sell away the petition schedule properties.
8. Initially, when a doubt had been entertained by the court below as to the maintainability of the petition under Section 7 of the GW Act for the reliefs claimed, it was clarified by the Counsel appearing for the petitioner in the court below that as per Section 2 of the Hindu Minority and Guardianship Act, 1956 (for brevity “HMG Act”), the provisions of HMG Act are in addition to the provisions of GW Act and the present petition is maintainable.

9. However, the important question that falls for our consideration in this appeal is – whether the mother, representing the minors, can file the petition under Section 7 of the GW Act seeking permission to sell away the properties standing in the name of the minors?

10. In this context, it is necessary and useful to notice the provisions of Section 6 of HMG Act, which run thus:

“6. Natural guardians of a Hindu minor:- The natural guardians of a Hindu minor, in respect of the minor’s person as well as in respect of the minor’s property (excluding his or her undivided interest in joint family property), are-

(a) in the case of a boy or an unmarried girl – the father, and after him, the mother; provided that the custody of a minor who has not completed the age of five years shall ordinarily be with the mother;

(b) in the case of an illegitimate boy or an illegitimate unmarried girl – the mother, and after her, the father;

(c) in the case of a married girl – the husband;

Provided that no person shall be entitled to act as the natural guardian of a minor under the provisions of this section –

(a) if he has ceased to be a Hindu; or

(b) if he has completely and finally renounced the world becoming a hermit (vanaprastha) or an ascetic (yati or sanyasi).

Explanation:- In this section the expressions “father” and “mother” do not include a ‘step-father’ and a ‘stepmother’.

11. From the above provision, it is clear that in respect of a Hindu boy or an unmarried girl and in respect of minor’s property (excluding his or her undivided interest in joint family property), natural guardian of such minor is the father, and after father mother will be the guardian.

12. Clauses (a) and (b) of the proviso to Section 6 of the HMG Act are in the nature of exceptions to the general rule contained in Section 6 of the HMG Act

13. Further, as noticed by the court below, as per the provisions of Section 2 of the HMG Act, the provisions of the HMG Act shall be in addition to and not in derogation of the provisions of the GW Act.

14. Sections 2, 6 and 8 of the HMG Act shall be read conjointly and in the light of the provisions contained in Sections 7 and 29 of the GW Act.

15. Section 8 of the HMG Act, which deals with the powers of natural guardian, postulates that natural guardian of a Hindu minor, will primarily be the ‘father’ of the minor, subject to

the limitations contained in Section 6 of the HMG Act. If the natural guardian of the minor is the father, subject to the limitations contained in Section 6 of the HMG Act, the father of the minor shall obtain the previous permission of the Court in case the property of the minor is to be mortgaged, transferred, gifted or leased out etc.

16. Sub-section (4) of Section 8 of the HMG Act further postulates that the Court shall not grant permission to the natural guardian to sell, mortgage, gift, exchange or lease out the property of the minor (as enumerated in Clauses (a) and (b) of Sub-section (2) of Section 8 of the HMG Act except in case of necessity or for an evident advantage to the minor.

17. In our considered view, Sub-section (4) of Section 8 of the HMG Act is vital for the Court to deal with an application filed under Section 7 of the GW Act.

18. In the instant case, the first thing that is to be noticed is that the admitted ages of the minors are — 15 years (girl) and 17 years (boy). In such an event, it is only the father who has to be treated as the natural guardian of the minors for the purpose of filing an application under Section 7 of the GW Act, but not the mother of the minors.

19. Curiously, it is the mother of the minors who filed the petition in the court below representing the minors and sought permission of the court to sell away the property of the minors only on the ground that she purchased the property in the name of the minors in the year 2004.

20. However, from the order under appeal, it could be seen that an affidavit given by the father of the minor children appears to have been filed wherein he expressed no objection for grant of reliefs sought for by the petitioner/ mother of the minor children in the petition filed before the court below. But, unfortunately, the said affidavit, though referred to by the court below in the order under appeal, had not either been marked as a document nor the father of the minor children was examined as a witness to speak about the contents of the affidavit. In such a case, the petition filed by the mother of the minor children shall have to be treated as filed only by an incompetent person. The reasons for filing the petition by the mother of the minor children, ignoring their natural guardian (father) as contemplated in law are indiscernible – perhaps, it is only to avoid likelihood of future/further complications from the purchasers of the property belonging to the minors. However, those reasons are not, in fact, necessary for this court to look into or guess about.

21. On this ground itself, the petition filed by the mother of the minors under Section 7 of the GW Act in the Court below is liable to be dismissed.

22. It is settled concept that the interest of the minors is paramount either under the GW Act or the HMG Act, which is more apparent and explicit from the language employed in Sub-section (4) of Section 8 of the HMG Act.

23. Even though the father of the minors filed an affidavit in the court below supporting the claim of the mother seeking permission to sell away the property of the minors, the same cannot be taken into consideration inasmuch as such an affidavit would not cure the derogation of the statutory provision, i.e., Section 6 of the HMG Act. Much worse in the case

on hand is that even such an affidavit was not brought on record.

24. In *Githa Hariharan v. Reserve Bank of India*, the Constitutional validity of Section 6(a) of the HMG Act has fallen for consideration. While dealing with the scope and ambit of the said provision, a three-judge Bench of the Supreme Court held thus (at paragraphs 9 and 10 of SCC):

“Is that the correct way of understanding the section and does the word ‘after’ in the Section mean only ‘after the lifetime’? If this question is answered in the affirmative, the section has to be struck down as unconstitutional as it undoubtedly violates gender-equality, one of the basic principles of our Constitution. The HMG Act came into force in 1956, i.e., six years after the Constitution. Did the Parliament intend to transgress the constitutional limits or ignore the fundamental rights guaranteed by the Constitution which essentially prohibits discrimination on grounds of sex? In our opinion- No. It is well settled that if on one construction a given statute will become unconstitutional, whereas on another construction, which may be open, the statute remains within the constitutional limits, the Court will prefer the latter on the ground that the Legislature is presumed to have acted in accordance with the Constitution and courts generally lean in favour of the constitutionality of the statutory provisions.

We are of the view that Section 6 (a) (supra) 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) (supra), it means ‘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 harmonious construction of Section 4 and Section 6 of HMG Act, without causing any violence to the language of Section 6(a) (supra).”

25. Though, in fact, the other question, i.e., selling the property of the minors for the benefit and advantage of the minors need not be gone into in this case in view of our conclusion that the petition filed by the mother is not maintainable in law, if gone into incidentally, it is on record that the lands, which were proposed to be sold by the mother of the minor children and which are standing in the name of the minor children, are admittedly wet-lands and despite of the said fact, the averment in the petition filed in the court below as that the minors were not getting any yield therefrom. This aspect has been doubted by the court below.

26. Furthermore, the relief sought was to permit the mother of the minor children to sell away the property of the minors and to put the sale proceeds in a Nationalised Bank or in

the alternative to purchase some other alternative land, which fetches some income. The original averment made and the relief claimed in the petition are apparently incompatible. In our considered view, in such circumstances, the court below had rightly exercised its discretionary jurisdiction in dismissing the petition. In other words, even if a petition under Section 7 of the GW Act is presented to a Court, still the Court has to satisfy itself before granting the relief prayed in such a petition. But, as already pointed out by us and under the circumstances stated supra, the Court below was wholly justified in not getting satisfied with the petition presented by the mother of the minor under Section 7 of the GW Act for granting the reliefs sought for in the said petition.

27. In the result, and for the aforementioned reasons, the order under appeal does not call for any interference by this Court, and this appeal is dismissed. No costs.