

**(2013) 05 AHC CK 0448**

**Allahabad High Court**

**Case No:** Second Appeal No. 117 of 2013

Badri Vishal and Others

APPELLANT

Vs

Raj Narain

RESPONDENT

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**Date of Decision:** May 7, 2013

**Citation:** (2014) 2 ALJ 333

**Hon'ble Judges:** Saeed-uz-Zaman Siddiqi, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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### **Judgement**

@JUDGMENTTAG-ORDER

Saeed-uz-Zaman Siddiqi, J.

Heard learned counsel for the appellants and perused the records. The instant appeal has been preferred against the judgment and decree dated 22.12.2010, passed by learned Additional Civil Judge (J.D.), Court No. 21, Barabanki, in Regular Suit No. 134 of 1996, by which the plaintiffs suit for cancellation of sale deed was dismissed with costs but Civil Appeal No. 5 of 2011 preferred by the defendant has been allowed and judgment and decree passed by the learned Trial Court has been set aside and the suit for cancellation of sale deed has been decreed with costs by learned First Appellate Court who has discussed the entire evidence and law laid down by the Hon'ble Apex Court as well as this Court in detail.

2. Simple dispute in this case is that the plaintiff was the recorded tenure holder of disputed agricultural plots. Since he was minor, his mother was natural guardian who sold it to the defendants without obtaining any permission from the learned District Judge as required u/s 8 of Hindu Minority and Guardianship Act, 1956. It is admitted case between the parties that while executing the sale deed plaintiff's mother did not obtain any permission from the District Judge. The plaintiff after attaining majority, filed suit for cancellation which has already been decreed by the learned First Appellate Court. The law has been settled by the Hon'ble Apex Court in

[Amirtham Kudumbah Vs. Sarnam Kudumban,](#) and [Vishwambhar and Others Vs. Laxminarayana \(Dead\) through L.Rs. and Another,](#) , which have been relied upon by this court in a catena of judgments. The law is also clear on the point. Section 8 of Hindu Minority and Guardianship Act, 1956 deals with power of natural guardian. Sub-section (2) of which prohibits a guardian not to transfer any part of immovable property of the minor without previous permission of the Court. The legislature has put a rider on the Courts itself by incorporating sub-section (4) which says that no Court shall grant permission to the natural guardian to transfer except in the case of necessity or for an evident advantage to the minor. These words denote that if the property has been transferred without permission of the District Judge for the benefit of minor, he may not challenge it after attaining the age of majority and, as such, such transfer has been made voidable at the instance of the minor or by any person claiming under him. Sub-section (4) deals with proceedings of application for obtaining permission of the Court in the same fashion as are provided u/s 29 of Guardian and Wards Act, 1890.

3. Learned counsel for appellants relied upon the law laid down by this Court in Smt. Sursati Devi v. The Joint Director of Consolidation, Basti and others (1982 (1) RR 122): (1982 All LJ 1473), wherein following observations have been made:--

In view of aforesaid, one has to make strict interpretation of Entries 5 and 6 of List III so as to enable those to operate fully in their respective legislative fields. While Entry 5 covers a very wide field in matters of marriage and divorce; infants and minors, adoption, wills, intestacy and succession; joint family and partition all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law, Entry 6 of List III covers the legislative field on the topics; "Transfer of property other than agricultural land; registration of deeds of documents." There appears to be good reason for the authors of the Constitution to exclude agricultural land from the ambit of legislative field on the topic "transfer of property" enumerated in Entry 6 of List III because such matter has been enumerated in Entry 18 of List II and the State Legislature has been given exclusive jurisdiction to make laws about transfer and alienation of agricultural land. A harmonious construction is to be made so as to give full effect to Entry 18 of List I. The exclusion of "agricultural land" from the ambit of Entry 6 clearly makes out that the Parliament has got no jurisdiction to legislate on the matter regarding transfer and alienation agricultural land because of specific exception provided in Entry 6 of List III in respect of such land.

There is a presumption that the legislature does not intend to exceed its jurisdiction and that the general words in a Statute are to be construed with reference to the powers of the legislature which enacts it. If Parliament enacts law on the subject enumerated in List II or the State Legislature enacts laws on the subject enumerated in the List I, the law so enacted would be ultra vires to that extent are liable to be struck down being enacted beyond the legislative competence envisaged in the

Constitution.

In this view of the matter, the provision of Section 8 of the H.M. & G. Act have got to be construed as to bring the said provision within the legislative competence of the central legislature. Since the Parliament could not make laws regulating transfer of agricultural land, it would be apt to construe the said provision to be not applicable to agricultural land so as to bring the said provision within its legislative competence.

4. It has been further held by this court in the above said case that the words "immovable property" has not been defined in Section 4 of the H.M. & G. Act nor u/s 4 of the G. & W. Act. But, this Court in *Murari Lal v. DDC and others*, 1978 AWC 13 has held as under:--

.....relying on the authority reported in [Mohd. Sohrab Khan and Others Vs. The Deputy Director of Consolidation, Ghazipur and Others](#), in which it was held that transfer of share of a minor in agricultural land by a guardian is prohibited. It is also further held in this authority that there is no provision in U.P. Zamindari Abolition and Land Reforms Act dealing with the subject with which Sec. 11 of Hindu Minority and Guardianship Act of 1956 deals. That provision would, therefore, prevail and on this basis the revision was allowed.

5. Not only this in a recent case of [Hari Mohan Vs. Additional District Judge and Others](#), same view has been reiterated. In *Amrithan Kudumbah v. Sarnam Kudumban*, AIR 1991 SC 1256, the Hon"ble Apex Court has relied upon a number of decisions and held as under:--

The rationale of these decisions is that the right to impeach a sale effected by the guardian is a personal right vested in the minor and it is not transferable inter vivos. The expression "person claiming under him", according to this line of reasoning must, therefore, be understood as a legal representative and not as assignee.

6. In the above mentioned case it was further held:--

The transfer made by the father during his son's minority was voidable at the instance of his son who was the real owner, and any "person purchasing such property from the natural guardian obtained only a defensible tide. The minor retained a right in the property to defeat existing adverse claims, and such right is an assignable right. We are in complete agreement with what has been stated on the point of [Palaniappa Goundan Vs. Nallappa Goundan and Others](#), and in [Putrevu Kamaraju Vs. Chunduri Gunnayya and Others](#), . We do not agree with the contrary view expressed on the point in [Jhaverbhai Hathibhai Patel Vs. Kabhai Becher Patel](#), : [Mon Mohan Bhattacharjee and Others Vs. Bidhu Bhusan Dutta and Others](#), and [Palani Goundan and Another Vs. Vanjiakkal and Another](#), .

7. In an earlier decision in the case of [Banshi and Others Vs. The Deputy Director of Consolidation and Others](#), , this court has held as under:--

As regards the third submission that the provisions of Section 8 of the Hindu Minority and Guardianship Act, 1956 were not retrospective and sale-deed was dated 20.6.1956 and the Hindu Minority and Guardianship Act came into force on 27.8.1956. No doubt that the sale-deed was executed prior to 27th August, 1956 when the Hindu Minority and Guardianship Act came into force and the same was retrospective in its operation. But before the enforcement of this Act in such matters where the property of minor was sought to be alienated of compromised Order Thirty two (32) Rule 7, C.P.C. was applicable. Even though provisions of the CPC do not apply in terms to consolidation proceedings but its spirit or substances has to be made applicable to secure the ends of justice. In respect of the land of the minor if any transfer or compromise was sought to be made, the permission of the District Judge must have been obtained. In the present case the permission of the District Judge was not obtained. The sale-deed in question, cannot, accordingly be said to have been legally executed. This submission is equally devoid of substance.

8. In view of the authorities as mentioned above, it is quite clear that u/s 4(b) of Hindu Minority & Guardianship Act, 1956, guardian of minor means a person having the care of the person of a minor or of his property or of both his person and property. u/s 5(b) of this Act the Act has overriding effect of any other law in force immediately before the commencement of this Act shall cease to have effect insofar as it is inconsistent with any of the provisions contained in this Act.

9. In view of these provisions textual Hindu law which is the general law is no more in force and Hindu Minority & Guardianship Act, 1956 is a special law which has got an overriding effect over any other law. In this aspect of the matter, a study of U.P. Zamindari Abolition and Land Reforms Act shows that there is no such provision in the entire Act which deals with the powers of natural guardian. Since the Act is silent on the point of rights of minor and powers of natural guardian is special law i.e. Hindu Minority & Guardianship Act, 1956 and Section 4 of Guardian and Wards Act shall prevail and prior permission must have been obtained of the learned District Judge u/s 8 of the Act.

10. In view of this matter I respectfully disagree with the law laid down by a single Judge of this Court in Smt. Sursati Devi's case (1982 All LJ 1473) (supra) and I conquer with the law laid down by the Hon'ble Apex Court as well as various authorities as mentioned above and in view of law laid down by this Court in [Banshi and Others Vs. The Deputy Director of Consolidation and Others](#), , [Hari Mohan Vs. Additional District Judge and Others](#), and Murari Lal's case (supra). Particularly, because the State legislature while enacting U.P. Z.A. & L.R. Act has purposely omitted to deal with properties held by a minor keeping in view of the fact that such matters have already been dealt with by the Parliament in Hindu Minority and Guardianship Act and under Guardian and Wards Act.

11. A detailed hearing and perusal of the judgment and orders of both the Courts below made it abundantly clear that no substantial question of law is involved in this

appeal. Even appreciation of evidence by the two Courts below has not been assailed before this Court. Since the question involved in the instant second appeal has already been decided by the Hon"ble Apex Court as well as this Court in three cases, I do not find it fit and expedient to refer this matter to a larger Bench of this Court as provided under Chapter V of Rules of the Court, 1952.

12. In [Sir Chunilal V. Mehta and Sons, Ltd. Vs. The Century Spinning and Manufacturing Co., Ltd.](#), the Hon"ble Apex Court for the purposes of determining the issue has held :

The proper test for determining whether a question of law raises in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties.

13. Further in [Rajeshwari Vs. Puran Indoria](#), it was held:

The Court, for the reasons to be recorded, may also entertain a second appeal even on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. Therefore, the existence of a substantial question of law is a sine qua non for the exercise of jurisdiction under the provisions of Section 100, C.P.C. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence.

14. In AIR 1947 19 (Privy Council), it has been held:

the Privy Council has provided the guidelines as in what cases the second appeal can be entertained, explaining the provisions existing prior to the amendment of 1976, observing .... that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word a judicial procedure at all. That the violation of some principles of law or procedure must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding, is such a question of law.

15. In [Vijay Kumar Talwar Vs. Commissioner of Income Tax, Delhi](#), it has been held:

a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. It will, therefore, depend on the facts and circumstances of

each case, whether a question of law is a substantial one or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.

16. In the case of [Union of India \(UOI\) Vs. Ibrahim Uddin and Another](#), the Hon"ble Apex Court has held:

There may be exceptional circumstances where the High Court is compelled to interfere, notwithstanding the limitation imposed by the wording of Section 100, C.P.C. It may be necessary to do so for the reason that after all the purpose of the establishment of courts of justice is to render justice between the parties, though the High Court is bound to act with circumspection while exercising such jurisdiction. In second appeal the court frames the substantial question of law at the time of admission of the appeal and the Court is required to answer all the said questions unless the appeal is finally decided on one or two of those questions or the court comes to the conclusion that the question(s) framed could not be the substantial question(s) of law. There is no prohibition in law to frame the additional substantial question of law if the need so arises at the time of the final hearing of the appeal.

In view of the law as discussed above, the second appeal is dismissed.