

(2015) 07 GAU CK 0012

In the Gauhati High Court

Case No : Regular Second Appeal 193 and 194 of 2004

Amanat Hussain and Others

APPELLANT

Vs

Sahida Begum and Others

RESPONDENT

Date of Decision : 29-07-2015

Acts Referred:

Hindu Minority and Guardianship Act, 1956 — Section 11, 6, 7, 8, 8(2)
Limitation Act, 1963 — Section 6

Citation : (2015) 07 GAU CK 0012

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : K.P. Sarma, Senior Advocate and H. Das, for the Appellant; A.B. Choudhury, Senior Advocate and P.M. Ahmed, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Arup Kumar Goswami, J—Heard Mr. K.P. Sarma, learned Senior counsel for the appellants in both the appeals. Also heard Mr. A.B. Choudhury, learned counsel for the respondent Nos. 1 and 2 in RSA 193/2004, and for respondent No. 1 in RSA 194/2004.

2. The respondent No. 1 in RSA 194/2004 had filed a suit, being Title Suit No. 10/94, in the Court of Civil Judge, Junior Division No. 1, at Goalpara, against the appellants in RSA 194/2004 for declaration of right, title and interest in respect of Schedule-A and Schedule-B land; for a decree of mesne profit @ Rs. 1,000/- per month with effect from 01.03.94 with interest @ 15% per annum; injunction, etc. Schedule-B land, measuring 1 Katha, is within Schedule-A land and Schedule-A land measures 1 Katha 12 Lecha. Recovery of possession was sought for in respect of Schedule-B land by evicting the defendants. The details in respect of the claim, as set out in the plaint will be adverted to subsequently. The suit was dismissed by the learned trial court by a judgment and decree dated 23.12.02. An appeal, being Title Appeal No. 4/2004, was preferred before the Court of Civil Judge, Senior Division, Goalpara, and by a judgment and decree

dated 28.05.04, the judgment and decree passed by the learned trial court was reversed and the appeal was allowed.

3. The appellants in RSA 193/2004 had also filed a suit praying for right, title and interest in respect of Schedule-A land measuring 1 Katha 12 Lecha, which also formed the subject matter for declaration of right, title and interest in Title Suit No. 10/94. Prayer was made for recovery of possession of Schedule-B land measuring 12 Lecha as well as for cancellation of the sale deeds being Sale Deed No. 4398 dated 25.11.82 and Sale Deed No. 1965 dated 19.03.84 declaring the same to be void. Mesne profit @ Rs. 2,000/- per month from the date of institution of the suit was also a prayer in the suit. The suit was registered in the Court of learned Civil Judge, Junior Division No. 1, Goalpara, as Title Suit No. 75/94. The facts, as projected in the suit, would be dealt with at a subsequent stage. The suit was decreed by a judgement and decree dated 23.12.02. An appeal, being Title Appeal No. 3/04, was preferred before the Court of the learned Civil Judge, Senior Division, Goalpara, which was allowed by a judgment and decree dated 28.05.04.

4. It is to be noted that both in the trial court as well as in the first appellate court separate judgments are passed though the suits and the appeals were taken up for consideration together.

5. RSA 193/04 was admitted to be heard by an order dated 03.12.04 on the following substantial questions of law:

"1. Whether the plaintiff's suit for right, title and khas possession of the suit land and declaration of the sale deed as void and cancellation of the same is governed by Article 60(a) or Article 65 of Limitation Act, 1963?

2. Whether the finding of the appellate court that the suit is barred by equitable estoppels is based on misconception of law relating to doctrine of estoppel that there can be no estoppel against the statute and hence perverse?

3. Whether on facts and circumstances of the instant case the sale deed dated 25.11.82 (Ext.-3) and sale deed dated 19.03.94 (Ext.-5) is void in view of provisions of Section 364 of Mohammedan Law?"

6. On the very same date, i.e. on 03.12.04, RSA 194/04 was also admitted to be heard on the following substantial questions of law:

"1. Whether the finding of the appellate court that even if the suit land is proved to be share of minors, the claim is barred by doctrine of Equitable estoppels and the defendant/appellant cannot challenge and the defect in sale of the minor's share of land vide sale deeds, Ext.-3 and Ext.-5 if any has been perfected by law of estoppels is based on misconception of law relating to doctrine of estoppels that there can be no estoppels against a stature and as such perverse?

2. Whether on the facts and circumstances of the instant case the sale deed dated 25.11.82 (Ext.-3) and sale deed dated 19.03.84 (Ext.-5) are void in view

of Section 364 of Mohammedan Law?

3. Whether the finding that there was partition of the land in question is perverse?"

7. In RSA 194/04, there are five appellants and in RSA 193/04 there are four appellants. Four sons of Late Abdul Jabbar are common in both the appeals, while Lajjatun Nessa, wife of Late Abdul Jabbar and mother of the other appellants, is an appellant in RSA 194/04. In RSA 193/04, respondent No. 1 is the purchaser who is also the respondent No. 1 in RSA 194/04 and she is plaintiff in Title Suit No. 10/94. Respondent No. 2 in RSA 194/04 is the husband of the plaintiff in Title Suit No. 10/94.

8. The projected case in Title Suit No. 75/94 is that father of the four plaintiffs, Abdul Jabbar, had a plot of land measuring 4 Bigha 3 Katha 9 Lecha. He died in the year 1970 leaving behind his wife, Lajjatun Nessa, nine sons and two daughters. Abdul Jabbar had another wife, who died earlier. She also had four sons. One son of Abdul Jabbar was no more and the plaintiffs are all sons of the surviving wife of Abdul Jabbar. It is pleaded that on the death of Abdul Jabbar, his wife inherited 1/8th share of his property. It is also stated that shares of each daughter and each son in the property is 7/160th and 14/160th, respectively. When the plaintiffs were minors, taking advantage of their minority, the entire land of Abdul Jabbar, excepting 1 Katha 12 Lecha described in Schedule-A, were sold in excess of the shares of the vendors and the land described in Schedule-A was the only land left for the minors, which was, even otherwise, less than the share to which they are otherwise entitled to. It is alleged that the defendant Nos. 1 and 2, in collusion with Ajmal Hussain and Aftab Hussain, who are also sons of Abdul Jabbar through the predeceased wife, created one fraudulent sale deed, being Sale Deed No. 4398 dated 25.11.82, in favour of the defendant No. 1. Defendant Nos. 1 and 2 also created another fraudulent sale deed, being Sale Deed No. 1965 dated 19.03.84, in collusion with Altaf Hussain, Monowara Bewa (wife of Late Asraf Hussain, a son of Abdul Jabbar through the pre-deceased wife) and Amir Hussain (son of Late Asraf Hussain) in favour of defendant No. 1. It is also stated that the defendants are possessing the suit land.

9. The case of the plaintiff in Title Suit No. 10/94 is that after the death of Abdul Jabbar, her vendors inherited Schedule-A land through a mutual partition and they possessed the suit land. Subsequently, she had purchased the suit land measuring 1 Katha 12 Lecha by two registered sale deeds dated 25.11.82 and 19.03.84 and was delivered possession. It is also averred that Schedule-B land is in the eastern part of Schedule-A and, in the western part of Schedule-A land, the plaintiff had constructed one Assam-type building with eight rooms and the plaintiff had inducted tenants therein. On the Schedule-B land, she had planted betal-nut trees and except for the betal-nut trees, Schedule-B land was otherwise vacant. Defendant Nos. 1, 3 and 4 were minors when their shares had been sold through their next kin with defendant No. 5 and the said minor vendors had attained their majority about 4 to 8 years back and none had raised

any objection to the sale of their shares and, on the contrary, they had confirmed their sale. The defendant No. 2 also had sold her share. On 07.02.94, when the husband of the plaintiff was out of station, the defendants, taking advantage of the absence of her husband, trespassed into Schedule-B land and raised two temporary sheds and defendant No. 2 began to live in one of the sheds while using the other as a kitchen. Request of the plaintiff for vacating the suit land being denied and the plaintiff's title being questioned, the suit was filed. After Title Suit 75/94 came to be instituted, Schedule-B land, by an amendment, was described to be entire purchased land, increasing the same from earlier 1 Katha of land.

10. In the written statement filed by the plaintiffs of Title Suit No. 10/94, various legal pleas were taken, one of them being that the suit was barred by limitation. It is stated that the Sale Deed dated 25.11.82 had been executed by sons of Late Abdul Jabbar including the plaintiffs. Plaintiff Nos. 1 and 3 are twins and they were the youngest and they had become major in the month of March, 1986. The plaintiff No. 4, Latafat Hussain, had become major in the month of January, 1979. It is also stated that the plaintiff No. 2, Adalat Hussain, was major when Sale Deed No. 1965 dated 19.03.84 was executed. Allegations of fraudulent creation of sale deeds were denied and, while stating that there was a family partition, details of various sale deeds, numbering 12, executed by the family of the plaintiffs were given. The proximate cause for filing the suit was stated to be greed occasioned by escalation of the value of the land due to establishment of a market by the Goalpara Municipality.

11. In the written statement filed in Title Suit No. 10/94, the plaintiffs of Title Suit No. 75/94 stated that defendant Nos. 1, 3, 4 and 5 never sold any land to the plaintiff and they were all minors on the alleged date of sale. They also replicated the plaint story as projected in Title Suit No. 75/94 and asserted that the plaintiff never possessed the suit land.

In Title Suit No. 75/94, they had, however, stated that the defendants were in possession.

12. Mr. K.P. Sarma, learned Senior counsel for the appellants has submitted that under the Mahomedan Law, a de facto guardian is merely a custodian of the person and property of the minor and he has no power to transfer immovable property of the minor and if any such transfer is made, such a transfer is not merely voidable, but void. Mr. Sarma has drawn the attention of the Court to Section 361 and 364 of the Principles of Mahomedan Law by Mollah. In support of his contention, he has referred to the cases of Mohd. Amin and Others Vs. Vakil Ahmed and Others, AIR 1952 SC 358 : (1952) 1 SCR 1133 , Meethiyan Sidhiqu Vs. Muhammed Kunju Pareeth Kutty and others, (1996) 1 AD 803 : AIR 1996 SC 1003 : (1996) 1 JT 578 : (1996) 1 SCALE 498 : (1996) 7 SCC 436 : (1996) 1 SCR 11 . It is contended by him that the admitted position being that minors' property has been sold not by a court-appointed guardian but by a de facto guardian, seeking a declaration that the sale deeds in question are void is

not necessary. In this connection, he refers to the cases of Thomman Parakkal Vs. Madhavan Arakkaparambil and others, AIR 1953 Ker 197 , Iruppakkatt Veettil Viswanathan's wife Santha Vs. Deceased Kandan's L.Rs. Wife Cherukutty and Others, AIR 1972 Ker 71 , Tattya Mohyaji Dhomse Vs. Rabha Dadaji Dhomse, AIR 1953 Bom 273 : (1953) 55 BOMLR 40 : (1953) ILR (Bom) 570 , Ethilavulu Ammal and Others Vs. Pethakkal and Others, AIR 1950 Mad 390 : (1942) 55 LW 82 , Madhukar Vishwanath Munje Vs. Madhao and Others, (2001) 10 SCC 460 , State of Madhya Pradesh v. Syed Qamarali, reported in 1967 (1) SLR 228.

13. Mr. Sarma has further submitted that learned Lower Appellate Court was wrong in applying Article 60(a) of the Limitation Act, 1908 as Section 60(a) will not be applicable in a case where the transaction is void but it applies only to voidable transactions. The learned Senior counsel submits that in the instant case the suit for possession will be governed by Article 65 and the limitation of 12 years for recovery of possession will be applicable. He has also submitted that Article 60(a) will not apply also for the reason that the same relates to transfer of property made by only a lawful guardian and not by a de facto guardian. In support of his submissions, Mr. Sarma has placed reliance in the cases of Muthalu Ammal Vs. A.V. Amudham alias Pichamani, (1977) 90 LW 557 : (1977) 2 MLJ 215 , Banku Behary Mondal Vs. Banku Behary Hazra and Another, AIR 1943 Cal 203 , Kartar Singh Vs. Bogasingh and Others, AIR 1963 Raj 211 , Lalit Kumar Das Chaudhury and Others Vs. Nogendra Lal Das and Others, AIR 1940 Cal 589 , Kailash Chandra Pradhan Vs. Rajani Kanta Panda and Another, AIR 1945 Patna 298 , Keluni Dei Vs. Kanhei Sahu and Others, AIR 1972 Ori 28 : (1971) 37 CLT 178 .

14. Learned Senior counsel submits that the learned Lower Appellate Court committed manifest error of law in holding the suit to be barred by equitable estoppels as there can be no estoppel against provision of Section 364 of the Mahomedan Law and, in this connection, he places reliance on the judgment of the Apex Court in the case of Jalandhar Improvement Trust Vs. Sampuran Singh, AIR 1999 SC 1347 : (1999) 2 JT 598 : (1999) 122 PLR 295 : (1999) 2 SCALE 415 : (1999) 3 SCC 494 : (1999) AIRSCW 1047 : (1999) 4 Supreme 270 , as well as in the case of Essakkyal Nadar Michayel Nadar Vs. Sreedharan Babu and Others, AIR 1992 Ker 200 : (1991) 3 ILR (Ker) 289 : (1991) 2 KLJ 124 . He has also submitted that the findings of the learned Lower Appellate Court that the minors attained majority about 8 to 12 years before filing of the suit, that the suit was filed after expiry of the period of limitation, that the plaintiffs in Title Suit No. 75/94 failed to establish that the suit land represents the share of the minors and that they had right and title on the same, are perverse. It is submitted that the learned Lower Appellate Court failed to take note of the relevant evidence as a result of which the judgment of the learned Lower Appellate Court is vitiated. It is also strenuously argued that the finding recorded by the learned Lower Appellate Court that the defendants in Title Suit No. 75/94 had acquired right, title and interest on the basis of Ext.-3 and Ext.-5 sale deeds are not tenable in law inasmuch as the sale deeds are void in terms of Section

364 of the Mahomedan Law and, thus, cannot confer any valid right, title and interest. It is also submitted that while the learned Trial Court declined to grant mesne profit, the learned Lower Appellate Court observed that the plaintiffs are not entitled to mesne profit and this goes to show that there was total non-application of mind on the part of the learned Lower Appellate Court. The learned Senior counsel relies on, in support of his submissions, in the cases of Santosh Hazari Vs. Purushottam Tiwai (Dead) by Lrs., (2001) 251 ITR 84 : (2001) 2 JT 407 : (2001) 1 SCALE 712 : (2001) 3 SCC 179 : (2001) 1 SCR 948 : (2001) AIRSCW 723 : (2001) 1 Supreme 642 , Yadarao Dajiba Shrawane (dead) by Lrs. Vs. Nanilal Harakchand Shah (dead) and Others, AIR 2002 SC 2849 : (2002) 5 JT 579 : (2002) 5 SCALE 461 : (2002) 6 SCC 404 : (2002) 2 UJ 1191 : (2002) AIRSCW 3238 : (2002) 5 Supreme 282 , Dilbagrai Punjabi Vs. Sharad Chandra, AIR 1988 SC 1858 : (1988) 3 JT 308 : (1988) 2 SCALE 523 : (1988) 2 SCR 276 Supp : (1988) 2 UJ 512 .

15. Mr. A.B. Choudhury, learned Senior counsel for the respondents, on the other hand, supports the impugned judgments of the learned First Appellate Court. It is submitted by him that from the evidence of PW2, the headmaster of the school, it is crystal clear that the youngest amongst the plaintiffs of Title Suit No. 75/94, namely, Ebadat, attained majority on 03.02.86. It is submitted that Articles 59 and 60 deal with cancellation of instrument. Unless prayer for cancellation of a sale deed is made and granted, recovery of possession cannot be decreed. It is submitted that Article 60(a) is attracted and, therefore, the suit filed by the plaintiffs being Title Suit No. 75/94 was clearly barred by limitation. It is submitted that to attract Article 65 , title must be intact and that with the execution of sale deeds in favour of the defendants in Title Suit No. 75/94, the plaintiffs had no semblance of right, title and interest in respect of the suit land. Even if an instrument is void, there has to be declaration made by the Court and, for the said purpose, necessarily, a suit has to be filed within the period of limitation. The plaintiffs did not make a whisper as to when they had attained majority though, in order to succeed, it was essential for them to have disclosed their dates of attaining majority. It is also submitted that the plaintiffs could not have joined together in a suit and, on that count also the suit was not maintainable. In support of his submissions, learned counsel relies on the following judgments: Jadav Prabhatbhai Jethabhai Vs. Parmar Karsanbhai Dhulabhai, AIR 2001 Guj 118 : (2001) 1 GLR 16 , Madhukar Vishwanath Munje Vs. Madhao and Others, (2001) 10 SCC 460 , Vishwambhar and Others Vs. Laxminarayana (Dead) through L.Rs. and Another, AIR 2001 SC 2607 : (2001) 5 JT 539 : (2001) 4 SCALE 420 : (2001) 6 SCC 163 : (2002) 1 UJ 37 : (2001) AIRSCW 2616 : (2001) 5 Supreme 220 , Kollandiyil Ammad Vs. Changaran and Others, AIR 1963 Ker 344 , Dodda Thimma Naika Vs. V. Lakshmaiah and Others, AIR 1979 Kar 68 : (1979) ILR (Kar) 1165 : (1979) 1 KarLJ 289 , Kasturi Lakshmibayamma Vs. Sabnivis Venkoba Rao and Others, AIR 1970 AP 440 , Amritham Kudumbam v. Sarnam Kudumbam, reported in AIR 1991 SC 1256 , State of Punjab and Others Vs. Gurdev Singh, AIR 1992 SC 111 : AIR 1991 SC

2219 : (1991) 63 FLR 529 : (1991) 3 JT 465 : (1992) 1 LLJ 283 : (1991) 2 SCALE 365 : (1991) 4 SCC 1 : (1991) 3 SCR 663 , K. Jagannathan Vs. A.M. Vasudevan Chettiar and 12 others, AIR 2001 Mad 184 : (2001) 2 LW 492 : (2001) 1 MLJ 614 .

16. I have considered the submissions of the learned Senior counsel for the parties and have perused the materials on record.

17. The primary questions that will be begging for an answer in these two appeals are: (i) Whether Article 60(a) of the Limitation Act, 1963 applies to set aside a transfer of property made by a de facto guardian in respect of property of a minor whose religion is Islam, (ii) Whether in case of documents, which are proclaimed by the plaintiff to be void documents, it will be necessary to seek a declaration within the period of limitation prescribed, or (ii) whether, without seeking for a declaration that documents are void, the plaintiff can proceed to claim for reliefs, which are basically in the nature of consequential relief, such as, recovery possession and/or confirmation of possession?

18. Section 359 to Section 368 of the "Principles of Mahomedan Law" by Mollah deal with guardian of the property of a minor. Section 359 provides that father, the executor appointed by the father's will, the father's father, the executor appointed by the will of the father's father, in the order above-mentioned, are guardians of the property of a minor and they are called legal guardians. In default of the legal guardians mentioned in Article 359, the court may appoint a guardian for the protection and preservation of the minor's property. Section 361 deals with de facto guardian who voluntarily places himself in charge of the person and property of a minor. Section 362 lays down that a legal guardian of the property of a minor has no power to sell the immovable property of the minor except in the cases indicated therein. Section 363 provides that a guardian of a property appointed by the court under the Guardian and Wards Act, 1890, without the previous permission of the court, has no power to mortgage or charge or transfer by sale, gift, exchange, or otherwise, any part of the immovable property of his ward, or to lease any part of that property for a term exceeding five years, or for any term extending more than one year beyond the date on which the ward will cease to be a minor. Section 364 lays down that a de facto guardian has no power to transfer any right or interest in the immovable property of the minor. For the purpose of this case, it may not be necessary to look into the provisions of Section 365 to 368.

19. The only relatives who are the legal guardians of the property of a minor, as of right, are the father and the father's father. Therefore, mother, brother, uncles, etc. are in the category of de facto guardians who are merely custodians of the person and property of the minor. The Privy Council, in *Imambandi and Others vs. Mutsaddi and Others* (1918) ILR 45 878 (Privy Council) , had laid down that under the Mahomedan Law, a person who has charge of the person or property of a minor without being his legal guardian and who may be called a de facto guardian, has no power to convey to another any right or interest in

immovable property which the transferee can enforce against the minor. In *Mohd. Amin (supra)*, the Apex Court had laid down that the minor's brother had no power to transfer any right or interest in the immovable property of the minor and such a transfer, if made, was void. In *Meethiyan Sidhiqu (supra)*, the Apex Court held that the sale made by the mother, who was not a guardian appointed by the court, was void.

20. Father is the natural guardian and, in his absence, other legal guardians would be entitled to act on behalf of the minor. In absence of the legal guardians, guardian appointed by the competent court would be competent to alienate property of the minor with the permission of the court. If a sale is to be made on behalf of the minor, the necessary ingredients are that the sale must be for the benefit of the estate of the minor. The only competent person entitled to alienate the minor's property subject to the limitations imposed, as noticed earlier, would be either the natural guardian or the guardian appointed by the court. Any alienation of the property of the minor by a *de facto* guardian, under the Mahomedan Law, is void.

21. At this stage, it will be relevant to extract Article 60(a) of the Limitation Act, 1963.

22. Article 44 of the Limitation Act, 1908, is also relevant and the same reads as follows:

23. Thus, Article 44 of the Limitation Act, 1908, finds reproduction in similar terms in Article 60(a) of Limitation Act, 1963. In addition, Article 60(b) of the Limitation Act, 1963, covers cases where the ward dies before attaining majority or dies within three years from the date of attaining majority.

24. In *Ethilavulu Ammal (supra)*, the Madras High Court, while considering Article 44 of the Limitation Act, 1908, opined that the word "lawful", though not prefixed to the word "guardian" in the said Article, the guardian contemplated under the Article is either a natural guardian or a testamentary guardian or a certificated guardian as the legislature must have meant to apply the word only to a lawful guardian and not to persons who had assumed the power to manage without authority and concluded that Article 44 has no application in case of a transfer of a property of a minor by a *de facto* guardian.

25. In *Tattya Mohyaji Dhomse (supra)*, the Bombay High Court held that an alienation by a *de facto* guardian which is not justified by legal necessity is void in the sense that it confers no title upon the alienee and is open to the minor, on attaining majority, to ignore such an alienation and to proceed to file a suit for the recovery of the property without, in the first instance, filing a suit for setting aside the alienation within the period prescribed under Article 44 of the Limitation Act. The aforesaid judgment was rendered in the context of Hindu joint family.

26. In *Thomman Parakkal (supra)*, the Travancore-Cochin High Court laid down

that Article 44 does not apply to a transfer of property by a de facto guardian of a Hindu minor and that a suit to set aside the transaction made by the mother as guardian of the minor sons, on their attaining majority, to be governed by Article 142 or Article 144. It was held that setting aside of the transaction is not a condition precedent to the ward for recovering the property from the alienee and the ward can treat the alienation as nullity and simply sue for possession of the property and the suit will be governed not by Article 44. In *Iruppakkatt Veettil* (supra), the Kerala High Court was considering Section 8 of the Hindu Minority and Guardianship Act, 1956. In the said case, no sanction of the court was taken for alienation by the mother acting as the guardian of the minor and, therefore, there was clear violation of Section 8(2) of the Act inviting Sub-section (3) of Section 8 providing 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. A question was posed as to whether the process of avoidance will be effective by a suit to set aside the alienation or is it enough if the minor repudiates the transaction by his own act. It was held 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 and he can avoid it by his conduct and there is no need to file a suit for avoiding the transfer.

27. In *Muthalu Ammal* (Supra), the Madras High Court held that alienation contemplated by Article 60 is the alienation by a lawful or a de jure guardian and that alienation by a de facto guardian is not covered by that Article and therefore, it would follow that the period of limitation prescribed under that Article would not apply to an alienation made by a de facto guardian.

28. In *Banku Behary* (Supra), the Calcutta High Court also took the view that any transfer by an unauthorized person would not effect in the interest of the minors in the property at all and Article 44 of the Limitation Act, 1908 will have no application in case of transfer by wholly unauthorized persons. The Rajasthan High Court in *Kartar Singh* (Supra) observed that the word "guardian" in Article 44 of Limitation Act, 1908 cannot be extended so as to include a de facto guardian and the Article is not applicable when the transfer of the property of a minor is made by any person who is not a legal or natural guardian.

29. In *Lalit Kumar Das Choudhury* (Supra), the Calcutta High Court held that Article 44 of the Limitation Act, 1908 would apply if the transfer was binding unless it was set aside by a suit. The Patna High Court in *Kailash Chandra Pradhan* (Supra) had held that Article 44 of the Limitation Act, 1908 has no application unless the transfer sought to be set aside is voidable in the sense that it is binding on the minor until it is set aside. In *Keluni Dei* (Supra), it was held by the Orissa High Court that an alienation by de facto guardian under the Mahomedan Law, whether for necessity or otherwise, is void ab initio and in respect of such alienation by de facto guardian enlarged period of 12 years applies.

30. However, in *Kasturi* (Supra), the Andhra Pradesh High Court held that no distinction is made in Article 44 of the Limitation Act, 1908 between de facto or lawful guardian as the expression used by the Legislature is "guardian" simpliciter, and accordingly, opined that there is no warrant for reading the provisions of Article 44 of the Limitation Act, 1908, the word "lawful" so as to restrict its operation to transfers effected only by lawful guardians. The alienation made by de facto guardians are on a par with those made by de jure guardian under the Hindu Law and if they lack justification, they are voidable and as such application of Article 44 of the Limitation Act, 1908 is an inescapable corollary which is not the position in respect of transfers made by a de facto guardian under the Mahomedan Law, where all transfers made by a de facto guardian are void.

31. *Dodda Thimma* (Supra) was also a case under the Hindu Law. It was held that a de facto guardian is as much a guardian as a natural guardian and the powers of the de facto guardian also include the power to sell a minor's property for legal necessity, and therefore, an alienation made by a de facto guardian would attract Article 44 of the Limitation Act, 1908. It also recognized that alienations by such guardians are only voidable in the same manner as alienations made by a de jure guardian.

32. In *Amirthan Kudemdah* (Supra), the Apex Court while dealing with Hindu Minority and Guardianship Act, 1956, held that transfer made by the father during his son's minority without the permission of the court as required under Section 8 and without any legal necessity, was voidable at the instance of son, who is the real owner, as also the person to whom the minor has transferred his rights. It was also held that any person purchasing such property from the natural guardian obtain only a defeasible title. Such a sale until set aside is sufficiently effective to pass title, but being a voidable sale, what the buyer has obtained is a defeasible title which is liable to be set aside at the instance of a person entitled to impeach it. Such action must be brought within a period of three years from the date on which the minor died or attained majority, as the case may be.

33. In *Syed Qamarali* (Supra), holding that the order of dismissal was totally invalid as the same was passed in violation of a mandatory provision contained in para 241 providing that a police officer on acquittal by a criminal Court may not be punished departmentally when the offence for which he was tried constitutes the sole ground of punishment, the Apex Court observed that the order of dismissal had no legal existence and it was not necessary for the dismissed employee to have the order set aside by a Court.

34. *Syed Qamarali* (Supra) came to be considered in *Gurdev Singh* (Supra) and it was observed as follows:

"9.We may examine the case in detail. The respondent in that case was dismissed from service on 22 December, 1945. His appeal against that order

was dismissed by the Provincial Government, Central Provinces and Berar on 9 April, 1947. He brought the suit on 8 December, 1952 on allegation that the order of dismissal was contrary to the para 241 of the Central Provinces and Berar Police Regulations and as such contrary to law and void, and prayed for recovery of Rs. 47,245/- on account of his pay and dearness allowances as sub-inspector of Police for the three years immediately preceding the date of the institution of the suit. The suit was decreed and in the appeal before the Supreme Court, it was urged that even if the order of dismissal was contrary to the provisions of law, the dismissal remained valid until and unless it is set aside and no relief in respect of salary could be granted when the time for obtaining an order setting aside the order of dismissal had elapsed. It was observed:

"We therefore hold that the order of dismissal having been made in breach of a mandatory provision of the rules subject to which only the power of punishment under Section 7 could be exercised, is totally invalid. The order of dismissal had, therefore, no legal existence and it was not necessary for the respondent to have the order set aside by a Court. The defence of limitation which was based only on the contention that the order had to be set aside by a court before it became invalid must therefore be rejected."

10. These observations are of little assistance to the plaintiffs in the present case. This Court only emphasized that since the order of dismissal was invalid being contrary to para 241 of the Berar Police Regulations, it need not be set aside. But it may be noted that Syed Qamarali brought the suit within the period of limitation. He was dismissed on 22 December, 1945. His appeal against the order of dismissal was rejected by the Provincial Government on 9 April, 1947. He brought the suit which has given rise to the appeal before the Supreme Court on 8 December, 1952. The right to sue accrued to Syed Qamarali when the Provincial Government rejected his appeal affirming the original order of dismissal and the suit was brought within six years from the date as prescribed under Article 120 of the Limitation Act, 1908."

35. The Apex Court in *Gurdev Singh* (supra) held that if an act is void or ultra-vires, it is enough for the Court to declare it so and it collapses automatically. It need not be set aside and the aggrieved party can seek a declaration that it is void and not binding upon him. A declaration merely declares the existing state of affairs and does not "quash" so as to produce a new state of affairs. It was also held that such an order at least has a de facto operation until and unless it is declared to be void or nullity by a competent body or Court. The Apex Court also quoted the following observation of *Smith v. East Elloe Rural District Council*, (1956) 1 All ER 855 :

"An order even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders."

36. Paragraphs 7 and 8 of Gurdev Singh (supra) are also very relevant and they read as follows:

"7. Apropos to this principle, Prof. Wade states "the principle must be equally true even where the "brand" of invalidity" is plainly visible; for their also the order can effectively be resisted in law only by obtaining the decision of the Court (See: Administrative Law 6th Ed. P. 352). Prof Wade sums up these principles:

"The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the "void" order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another. (Ibid p. 352)"

8. It will be clear from these principles that the party aggrieved by the invalidity of the order has to approach the Court for relief of declaration that the order against him is inoperative and not binding upon him. He must approach the Court within the prescribed period of limitation. If the statutory time limit expires the Court cannot give the declaration sought for."

37. In Jadav Prabhatbhai (supra), the Full Bench of the Gujarat High Court held that a suit for setting aside a transaction by a de facto guardian without authority and without any legal necessity, has to be filed within a period of three years from the date of attaining majority and that even if the suit is filed on the basis of title without seeking the relief of quashing the impugned transaction, it will be necessary to consider the issue of limitation as to at what point of time the legal disability ceased for filing the suit. It was held that a ward desirous of challenging a transaction as void, by way of declaration or by any other mode to claim possession, has to initiate legal action as prescribed in Section 6 read with Article 60 of the Limitation Act.

38. In Madhukar (supra), the Apex Court rejected the contentions advanced taking aid of Section 11 of the Hindu Minority and Guardianship Act, 1956 that disposal of property by a de facto guardian was void and as a result, Article 65 of the Limitation Act prescribing the period of twelve years for filing a suit for possession of immovable property based on title would be applicable and that time would begin to run when the possession of the defendant became adverse to the plaintiff. The Apex Court noted that in the plaint there should have been proper pleading for a declaration that the alienation was bad in law as possession is only a consequential relief. It was held that to such a suit, the provision of Article 60 would apply.

39. In Vishw am bhar (supra), a case under the Hindu Minority and Guardianship

Act, 1956, the Apex Court held that the plaintiffs were required to get the alienations set aside if they wanted to avoid the transfers and regain the properties from the purchasers. It was held that if, in law, the plaintiffs were required to have the sale deeds set aside before making any claim in respect of the properties sold, then a suit without such a prayer was of no avail to the plaintiffs.

40. In *K. Jagannathan (supra)*, which was also a case under the Hindu Minority and Guardianship Act, 1956, the Madras High Court held that the minor has to pray for cancellation of the earlier partition and also sue for cancellation of the sale deed.

41. The position of de facto guardian was well recognised under Hindu Law. Before the Hindu Minority and Guardianship Act, 1956, came into force, the position of a natural guardian and a de facto guardian under Hindu Law was almost same except in certain aspects. The position is different in respect of Mahomedan Law and under Mahomedan Law, a de facto guardian has no right of alienation of a minor's property. There is a fundamental difference in respect of alienation made by a de facto guardian under Hindu Law and under Mahomedan Law. While any transfer of a minor's property by a de facto guardian under Mahomedan Law is void, the same is not so under Hindu Law.

42. A number of High Courts had taken a view that alienation contemplated under Article 44 of the Limitation Act, 1908, or Article 60 of the Limitation Act, 1963, is by a lawful or de jure guardian and the said provisions are not applicable in respect of a transfer of property of a minor made by a de facto guardian. There are also some decisions holding that Article 44 of the Limitation Act, 1908, has no application unless the transfer, sought to be set aside, is voidable. There are also cases where some High Courts had taken the opposite view in the sense that Article 44 of the Limitation Act, 1908, did not make any distinction between de facto or lawful guardian and that the provision applies irrespective of the fact whether the minor's property was transferred by a lawful or a de facto guardian.

43. Article 60 of the Limitation Act provides for limitation to set aside a transfer of property made by the guardian of the ward. It is not limited in its application to cases under Hindu Law to the exclusion of cases under Mahomedan Law. Though there is fundamental difference in respect of alienation of property of a minor by a de facto guardian under Hindu Law and Mahomedan Law, Section 361 of Mahomedan Law, nevertheless, recognises a de facto guardian. The mother, brothers, uncles fall in the category of de facto guardian under Mahomedan Law. There is a long and unbroken chain of authority to sustain the view that Hindu Law recognises the power of a de facto guardian to deal with the property of a minor in cases of necessity and the Legislature, in its wisdom, has merely used the word "guardian" simpliciter. Viewed in that perspective, I am of the considered opinion that it will not be permissible to restrict operation of Article 60 only to transfers of a property of a minor made by prefixing the word "lawful"

to the word "guardian" in Article 60, when, advisedly, the Legislature had omitted to use the word "lawful".

44. The plaintiffs in Title Suit No. 75/94 had prayed for a declaration that the sale deeds dated 25.11.82 and 19.03.84 are void and also for cancellation of the same. Therefore, going by the plaint, the limitation for making a prayer for cancellation of such deeds will come into play. The cause of action for filing the suit was, however, stated to be forceful possession by the defendants in the year 1985. A reading of the plaint shows that the plaintiffs claimed that sale deeds had been fraudulently executed during their minority.

45. With the execution of the sale deeds and also handing over possession to the purchasers, the plaintiffs in Title Suit No. 75/94 had been divested of whatever interest they had in the property in question. If a suit is filed for declaration that the sale deed is void on the ground that a de facto guardian had sold the property of a minor, who is professing Islam, it may not be necessary to pray for cancellation of the sale deed as once a declaration is obtained to the effect that the sale deeds are void, the transferees, consequentially, would have derived no right, title and interest over and in respect of the land in question from the very inception of the transaction and the plaintiffs' title would remain intact as if there had been no transfer. A declaration declaring a transaction to be void means that there was no transaction in law.

46. Once it is established in a court of law that a particular property belonged to a minor, whose religion is Islam, and such property was alienated during his minority by a de facto guardian, the transaction would be declared as void provided that any such suit is filed for such declaration within the period of limitation as prescribed. It will not do for anyone to unilaterally proclaim that the transaction is void. Necessary proceedings have to be instituted to obtain such a declaration, because the stamp of nullity does not get affixed on its own in the body of the act. That the act or transaction complained of is a nullity or void will have to be established in a due process after conforming to the requirements under the law and till the same is done, such an act or transaction will continue to have effect. I find it difficult to accept the submission of Mr. Sarma that because the minors' property was alienated by the de facto guardian, the property did not change hands and the minors continued to be the owners of the property and, therefore, Article 65 of the Limitation Act, 1963, would come into play and for the purpose of the suit, limitation of 12 years for possession would be applicable. In Title Suit No. 75/94, it was pleaded that the purchasers were in possession and, therefore, khas possession was prayed for. Without a declaration that the transaction was void, khas possession could not have been obtained as possession is only a consequential relief. First of all, a declaration has to be obtained that the sale deeds were void and, that is why in Title Suit No. 75/94, a prayer for declaration of the sale deeds being void was made.

47. By their own pleadings, the plaintiffs had brought the suit within the purview of Article 60(a) of the Limitation Act, 1963. Assuming that it was not necessary

for the plaintiffs to have prayed for cancellation of the sale deeds in question, it will have to be considered as to whether the suit for declaring the sale deeds as void was filed within the period prescribed so as to enable the plaintiffs to get such a declaration. The period of limitation for seeking such a declaration is three years from when the right to sue first accrues. In terms of Section 6 of the Limitation Act, 1963, a minor can institute a suit within the aforesaid period of limitation after the disability had ceased upon his attaining majority. It is to be noted that the learned Trial Court had recorded the finding that the plaintiffs of Title Suit No. 75/94 had the knowledge about the "sale" prior to 12 years from the filing of the suit. The Apex Court had the occasion to consider in detail the case of Syed Qamarali (Supra), on which much reliance was placed by Mr. Sarma, in the case of Gurdev Singh (Supra). It was observed therein that Qamarali had brought the suit as prescribed under Article 120 of the Limitation Act, 1908 within six years from the date when the right to sue had accrued to him. It is to be noted that Article 120 of the Limitation Act, 1908 provides that the limitation for filing a suit, for which no period of limitation is prescribed elsewhere in the Schedule, is six years from the date when the right to sue accrues. Article 58 of the Limitation Act, 1963, is similar to Article 120 of the Limitation Act, 1908. However, period of limitation is reduced to three years from the time when the right to sue first accrues.

48. Vide Ext.-3, sale deed, 1 Katha 4 Lecha of land was sold to defendant No. 1 by 7 sons of Abdul Jabbar out of whom plaintiff Nos. 1, 2 and 3 of Title Suit No. 75/94 were shown as minors. Share of the aforesaid three minors and the plaintiff No. 4 were shown as 12 Lecha. In Ext.-5, sale deed, by which 8 Lecha of land was sold to the plaintiff of Title Suit No. 10/94, the minors were not parties. Though Mr. Sarma has submitted that the finding of the learned Lower Appellate Court that the plaintiffs in Title Suit No. 75/94 failed to establish that the suit land represents the minors' share, is perverse, it has not been brought to the notice of the Court the evidence which was not considered and which would, if considered, have enabled this Court to take a contrary view. At the most, on the basis of Ext.-3, it can be held that the share of the minor plaintiffs, along with plaintiff No. 4, came to 12 Lecha.

49. The plaintiffs of Title Suit No. 75/94 did not indicate when they had attained majority. The argument of Mr. Sarma that finding recorded by the learned lower Appellate Court that the minors had attained majority about 8 to 12 years from filing of the suit is not borne out by records, cannot be accepted. Structured as the case was, it was incumbent for the plaintiffs to have disclosed their dates of attaining majority. It appears from the evidence of PW1 that Ebadat Hussain was the youngest amongst the brothers. Evidence of PW-2 Nurul Islam, who is a Headmaster of a Madrasssa, goes to show that Ebadat Hussain was a student of his school and he had issued Ext-9, a certificate. He has deposed that Ebadat Hussain had enrolled in the Madrassa on 17.03.1979 and on that date he was 11 years 1 month and 16 days. There was no cross-examination in respect of the aforesaid evidence of PW-2. Going by his evidence, Ebadat Hussain attained

majority on 03.02.1986. Therefore, suit having been instituted in the year 1994, it is apparent that suit was filed by him after 8 years of attaining majority. In that view of the matter, the suit for declaration is also barred by limitation under Article 58 of the Limitation Act, 1963.

50. In view of the judgments in Jalandhar Improvement Trust and Essakkyal Nadar Michayel Nadar (supra), Mr. Sarma is right, having regard to provision of Section 364 of the Mahommedan Law, in submitting that learned lower Appellate Court committed error in holding that Title Suit No. 75/94 is barred by equitable estoppel. The learned lower Appellate Court also overlooked that mesne profit was declined by the learned Trial Court in TS 75/94. The infirmities noted above in the judgment of the learned lower Appellate Court will not necessarily lead to setting aside the judgment of the learned lower Appellate Court. As the suit filed by the plaintiffs of Title Suit No. 75/94 is filed beyond the period of limitation, the infirmities noted above will not be of much consequence.

51. The plaintiffs of Title Suit No. 10/94 had proved the sale-deeds in question. As the challenge made in Title Suit No. 75/94 to the sale-deeds executed in favour of the plaintiffs of Title Suit No. 10/94 has been held to be barred by limitation, the judgment of the learned lower Appellate Court decreeing the suit of plaintiffs in Title Suit No. 10/94 cannot be faulted.

52. In view of the above discussions, I find no merit in these appeals and accordingly, they are dismissed. Substantial questions of law are answered accordingly. No costs.