

(1925) 10 MAD CK 0086
In the Madras High Court

Vermulapalli Seetharamamma and Others

APPELLANT

Vs

Maganti Appiah and Another

RESPONDENT

Date of Decision : 06-10-1925

Acts Referred:

Citation : AIR 1926 Mad 457 : (1926) ILR (Mad) 768 : (1926) 23 LW 285 :
(1926) 50 MLJ 689

Hon'ble Judges : Odgers, J

Bench : Division Bench

Judgement

Odgers, J.—The question in this case is whether an alienation by a de facto guardian is valid under the Hindu Law. The person in question is the maternal uncle of the plaintiff and of course is neither the natural nor the legal guardian. The District Munsif dismissed the suit which was a claim for a declaration that the alienation made during the minority of the plaintiff did not bind him. The Subordinate Judge reversed this decision holding that the alienation made by the maternal uncle was a void transaction.

2. It has been argued at length for the respondents that a de facto guardian is unrecognised in the Hindu Law. It may be at once said that, if there is such a recognition I am satisfied that the recognition is more or less modern and possibly, to some extent, the recognition, if it is legally recognised at all, has come about by necessity. The earliest case, as far as I know is the well-known case in Hunoomanpersaud Panday v. Mussumat Babooee Munraj Kunweree (1856) 6 MIA 393 where their Lordships of the Privy Council say: "Upon the third point it is to be observed that under the Hindu Law, the right of a bona fide incumbrancer who has taken from a de facto manager a charge on lands created honesty, for the purpose of saving the estate or for the benefit of an estate is not (provided the circumstance would support the charge had it emanated from a de facto and de jure manager) affected by the want of union of the de facto with the de jure." It has been said that this dictum is obiter as the Rani in the case under discussion was undoubtedly the natural guardian. It might perhaps also be said

that the 3rd point was not absolutely essential to the decision. However, that may be, any dicta that may fall from the Privy Council are naturally entitled to great weight and, if the powers of a de facto guardian under the Hindu Law have been recognised in other decisions, it must, I think, be taken that a de facto guardian is known to that Law. Much stress has been laid for the respondents on the Privy Council case in *Imambandi v. Mutsaddi* (1918) 35 MLJ 422 where it is clearly laid down that a de facto guardian is unknown in the Mahomedan Law. The decision of the Courts on this point of Mahomedan Law are fully examined and, in their Lordships' judgment delivered by Mr. Ameer Ali, a person who may be conveniently called a de facto guardian has no power under the Mahomedan Law to convey to another any right or interest in Immovable property which the transferee can enforce against the infant. Nothing can be clearer than that. But it has to be observed that not only there but all through the judgment only the question as arising under the Mahomedan Law is dealt with. On the other hand, in Gour's Hindu Code, Section 906, it is asserted that the powers of a natural and de jure guardian are the same as those of a legal guardian. Any act done by the de, facto guardian would be equally binding on the minor if it is supported by necessity or benefit to the minor. See also Section 913 where the learned author expressly states that the Mahomedan Law is different.

3. In *Mohanund Mondal v. Nafur Mondul* ILR (1899) C 820, a grandmother purported to sell a minor's estate. The Court found that she was a de facto guardian, and, relying on *Hanoomanpersaud Panday v. Mr. Babooee Munraj Kunweree* (1856) 6 MIA 393 it held that not only might a de facto guardian mortgage but also sell. Bannerji, J. points out that there may be cases where the sale of a part of the minor's estate might be more beneficial to him than a mortgage. In *Adhar Chandra Dutta v. Kirtibash Rairagee* (1910) 12 CLJ 586 it is said in the judgment: "It is conceded by the learned Doctor who appeared for the appellants that the powers of a de facto guardian are the same as those of a legal guardian." It appears that the Court adopted that admission which was that of Dr. Rash Behari Ghose. In *Bat Amrit v. Bai Manik* (1875) 12 Bom HCR 79 which is a case of a transaction by the mother as guardian of her son and of her minor daughter-in-law, she would of course be the natural guardian of the son, but the case is treated as if she was the manager de facto of the family, any sales for valuable consideration the proceeds of which were applied to meet the family necessities were held to be unquestionable. *Nathuram v. Shoma Chhagan* ILR (1890) 14 Bom 562 was a case of the father's cousin taking charge of a minor and borrowing money to meet the funeral expenses of the deceased father. It was held that he had sufficient authority to bind the minor by a loan if it were necessary. *Sadasiva Aiyar, J. in Vembu Aiyar v. Srinivasa Aiyangar* (1912) 33 MLJ 638 citing *Hunoomanpersaul Panday v. Mussumal Babooee Munraj Kunweree* (1856) 6 MIA 393 says that, when the act is done by the person who is not the guardian but who is the manager of the estate in which the minor is interested, the latter will equally be bound if under the circumstances the step taken was necessary, proper or prudent.

4. On the other hand, no case has been cited, except possibly one, which lays down that a de facto guardian has no power to deal with the property of a minor for necessity. On the other hand in *Arunachela Reddi v. Chidambara Reddi* (1902) 13 MLJ 223 it is said: "It is well settled that an alienation may be validly made by a de facto guardian (assuming of course the necessity)." It is true that there the guardian in question was a natural guardian. But, in my view, having regard to the authorities I have cited, that can make no difference.

5. *Arumugam Cketti v. Duraisinga Tevar* ILR (1911) M 38 which was referred to by the learned vakil for the respondents, merely lays down that, once a guardian has been appointed by the Court, the rights of the natural guardian are extinguished. It will be noticed at page 41 the learned Judges say that there is no proof that the 1st defendant's mother was the de facto guardian. In *Gopi Ram v. Jeot Ram* ILR (1923) A 478 the mother did not mortgage the property on behalf of her son and no question of necessity arose. *Mala Din v. Ahmad Ali* (1911) 23 MLJ 6 is again, like *Imambandi v. Mutsaddi* ILR (1918) C 878, a case under the Mahomedan Law. The family were Mahomedans and were governed by the Mahomedan Law relating to guardianship. It is pointed out by their Lordships that the question was whether, according to Mahomedan Law, a sale by a de facto guardian if made for necessity, and if beneficial to the minor, is altogether void or merely voidable but it was unnecessary to decide the question as the appellant had not shown that the sale was for necessity or was beneficial to the minor. Reliance is also placed for the respondent on a remark of Sadasiva Aiyar J. in *Thalagara Ramanne and Others Vs. Kalagare Gangayya and Others*, that nobody else than the father and the mother of a minor (with probable exceptions in favour of the elder brother and the direct male and female ancestors of the minor) is entitled, as a matter of natural right, to be and to act as a guardian of a minor's person and property. Recourse must be had to the Court (representing the rights of the king which are paramount to even the rights of the parents where there is no natural guardian alive. I am unable to see how this helps the respondent in the present case as the relation in question was the maternal uncle, who is therefore a direct male ancestor of the minor. The decision was that the paternal aunt was not a natural guardian. A decision much relied on is *Nalannad alias Palliprom alias Thattukkasseril Manakkal Narayanan Nambudri and Another Vs. Kanhirampare Ravunni Nair and Another*, by a single Judge of this Court where in the case of a Nambudri illom, the step-mother of the minors, who was managing the household and looking after them, borrowed money, for necessity. On the assumption that the parties were prima facie governed by Hindu Law and that no special custom had been set up in the pleadings it was held that the step-mother had no legal authority. The learned Judge said: "It is not contended that the de facto guardianship gave her, i.e., the step mother, any right to mortgage the estate." With great deference I am unable to see first how the dictum applies to the facts of this case and secondly, if necessary, I would take leave to say that if the parties were governed by the Hindu Law, I should have thought it might have been well contended that the mortgage, if for

necessity, could be upheld.

6. The Court below has found that, as to one of the sale-evidenced by Ex. IV, which is the only one in question before us, there was necessity to the extent of Rs. 275 out of a total consideration for Rs. 400. It is said by the appellants that there has been a ratification by hx. ill by the minor on attaining his age of this alienation by his de facto guardian. On the other hand, it is said that any alienation not for necessity is void and not voidable and as there can be no ratification of a void transaction it is of no effect in this case. It is, I think, clear that an alienation by a de jure guardian or a natural guardian is voidable and, as I am inclined to hold the powers of these guardians are similar, I think a transaction entered into by a de facto guardian not for necessity is only voidable and therefore can be ratified by the minor on attaining his age. In *Chetty Colum Comara Venkatachella Reddiar v. Rajah Rungaswami Aiyangar Bahadur* (1861) 8 MIA 319 the minor recognised a transaction made during his minority by his adoptive mother and guardian. This was upheld without determining the question as to the power of a Hindu widow as guardian to create a charge during the minority of the minor son.

7. Further, it is said that this suit is barred by limitation. The sale is dated 28th February, 1907. The suit was brought on the 1st March, 1919 which is admittedly the last day of the 12 years allowed. But it is said in the letter, Ex. III, that the transferee had had possession delivered to him some time before the date of the sale deed. The words which have been retranslated are, "whether before the delivery of possession to you in pursuance of the sale before now or after." The words "before now" are indefinite, but they might refer to possession being given on the same day. There is further some contention on the other side that these persons were already in possession as tenants. However, that may be, the matter is much too indefinite for us to attach the slightest weight to those words. I therefore think that this point fails. This question of limitation, though dealt with by the District Munsif and found in favour of the defendants, was not considered by the learned Subordinate Judge. In my view, there is nothing in the point.

8. I think the learned Subordinate Judge is wrong in holding that the alienation made by the de facto guardian is a void transaction. In my view, the appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

9. Viswanatha Sastri, J: Defendants 1 to 5 are the appellants. The suit was for a declaration that the alienation made by plaintiff's maternal uncle during his minority were not binding on him, and for recovery of the items alienated.

10. The alienations were made under two sale deeds of the dates 28th February, 1907 (Ex. IV) and 7th October, 1913, and the suit was instituted (it was said on the last day of limitation) in 1919. The District Munsif dismissed the suit and on appeal the Subordinate Judge gave plaintiff a decree for possession. The contentions urged in Second Appeal are:

(1) That the alienations by way of sale, by the maternal uncle who was not the de jure guardian of plaintiff were void and

(2) That the suit was barred by limitation with respect to the items covered by Ex. IV, as defendants were placed in possession prior to the date of Ex. IV. The Second Appeal first came on/or hearing before Ramesam, J., who referred it to a Bench "as the matter (which forms the subject matter of the first contention) was not concluded by authority so far as the Hindu Law is concerned.

11. It was argued before us that under the Hindu Law, the father, the mother, and failing them the king, were the guardians of an infant; that no other relation was the guardian; that de facto guardians were no better than inter meddlers; and that alienations by de facto guardians were void as was laid down by the Privy Council in *Imambandi v. Mutsaddi* (1918) 35 M L J 122. That case related to a Mahomedan minor; their Lordships based their decision on Mahomedan Law Texts; and so far as I am able to see, I do not find reference in the judgment to any decided cases concerning Hindu minor. Alienations by the de facto guardians of Hindu minors have come up very frequently before Courts, and our attention has not been directed to any decided case in which it has been held that such an alienation was per se void, apart from any question as to whether it was for legal necessity or not. It was said that this may be due to the fact that the point was not raised in those cases, but, as observed by Maclean, C.J., in *Mohanund Mondul v. Nafur Mondul* ILR (1899) C 820 "the absence of judicial authority suggests that the point has not been regarded as open to serious argument."

12. So far as Hindu Law goes, it appears to me that there is nothing in it which limits guardianship only to the father, the mother, and failing them the king. Macnaughten in his *Principles and Precedents of Hindu Law* says that in default of the father and mother, "an elder brother of a minor is competent to assume the guardianship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian; and failing such relations, the office devolves on the maternal kinsman, according to their degree of proximity, but the appointment of guardian universally rests with the ruling power. See Volume 1, pages 103, 104 And in Volume II (Precedents) case III at page 204 gives the opinion of pundits based on the authority of the *Dayabhaga* *Dayatatwa*, *Dayakrama Samgraha* that the husband's sister's son is the guardian of a childless widow who is a minor. It was said that in the absence of the father and mother, "recourse must be had to the Court (representing the rights of the King which are paramount to even the rights of the parents where there is no natural guardian alive"; as observed by Sadasiva Aiyar, J. in *Thalagara Ramanne and Others Vs. Kalagare Gangayya and Others*, . But it must be remembered that the learned Judge in the previous sentence includes among natural guardians the elder brother and the direct male and female ancestors of the minor, although according to respondent's *vakil*, they would not be the natural guardians under Hindu Law. Applications to Courts can only be made under the *Guardian and Wards Act*, and it has been held by a Full Bench of the Calcutta High Court in

Ramachandra Chuckerbutty v. Brojnnath Mozumdar ILR (1879) C 929 that this Act would not affect or alter any provision of Hindu Law as to guardians who do not avail themselves of the Act. It is true that in that case the person who acted as guardian of the minor was the mother; but this circumstance-would not in my opinion make any difference.

13. Coming to decided cases, it was held in Mohanund Mondul v. Nafur Mondul ILR (1899) C 830 on the authority of the Privy Council case in Hunooman Persaud Panday v. Mussumat Babooee Munraj Koonweree ILR (1899) C 830 that a sale by a de facto guardian (it was the grand mother), in case of necessity, was valid. And in Arunachella Reddi v. Chidambara Reddi (1902) 13 MLJ 223 White, C.J. and Benson, J. held that "it is well settled that an alienation may be validly made by a de facto guardian (assuming of course necessity)." In B. Tirapayya Minor by guardian T. Ganjayya Vs. Mallidi Ramaswami, it was held that the natural mother was a "lawful guardian" for the purpose of Section 21 of the Limitation Act, even though there was a testamentary guardian named in the will of the adoptive father who was unwilling to act. In Nathuram v. Shoma Chhagan ILR (1890) 14 Bom 562 a debt contracted by the father's cousin for necessary purposes was held to bind the minor. Although it is no authority in the sense of its being a judicial decision, I may state that in Adhar Chandra Dutta V. Kirtibask Bairage (1910) 12 CLJ 586 such an eminent lawyer as Dr. Rash Behari Ghosh conceded the powers of a de facto guardian (of a Hindu) were the same as those of a de jure guardian. Our attention was drawn to the observations of Sadasiva Aiyar, J. Thayammal v. Kuppanna Goundar (1914) 37 MLJ 133 wherein the learned Judge holds that "Under the Hindu Law, nobody else than the father and mother of a minor (with probable exception in favour of the elder brother and the direct male and female ancestors of the minor) is entitled as a matter of natural right to act as guardian of his person and property. " In that case the alienation by the paternal aunt was found to be " for no necessity " and the second appeal could have been decided only on this finding without considering the question whether she was a natural guardian under Hindu Law. I may also state that the probable exceptions which the learned Judge recognises, supports the view that guardianship under the Hindu Law is * not confined only to the father, mother, and the king, as contended for by respondent's vakil. The learned Judge relies on the decisions of the Calcutta High Court, Kristo Kissor Neoghy v. Kadermoyee Dossee (1878) 2 CLR 583 and Wusammatt Bhikno Koer v. Musammatt Chamela Koer 2 CWN 191 in support of his view. They were both cases in which the Court was moved to appoint a guardian, and there was no question as to the binding nature of an alienation made by de facto guardian. It may here be stated that the case in Mohanund Mondul v. Nafur Mondul ILR (1899) C 830 is referred to with approval by Sadasiva Aiyar, J. in Vembu Iyer alias Ramanadha Iyer Vs. Srinivasa Iyengar and Others, . Reference was made to a case in Nalannad alias Palliprom alias Thattukkasseril Manakkal Narayanan Nambudri and Another Vs. Kanhirampare Ravunni Nair and Another, when a single Judge of the Court held that a de facto guardian of a Hindu Nambudri minor (a step-mother) was no

better than an inter meddler, and had no right to represent a minor. It does not appear that any of the cases referred to were brought to the notice of the learned Judge. Decisions under the Mahomedan Law have no bearing on the present question; and I am clearly of opinion that the right of a *de facto* guardian to deal with the property of a Hindu minor has been recognised by our Courts ever since the decision of the Privy Council in *Hanuman Bersaud Panday v. Musammatt Babooee Munraj Kunweree* (1856) 6 MIA 393, provided the alienation was for necessity.

14. I may here state that in the present case the *de facto* guardian was the maternal uncle who took charge of the minor after his mother's death; and the evidence of D.W. 1 is to the effect that the paternal aunt with whom the minor was for a time was not in a position to maintain herself. So far as Hindu society in South India goes, the maternal uncle is treated as the closest relation of a person, next to his father and mother; and at all ceremonies at which presents are given, it is his that is first handed over.

15. Appellant's *vakil* next contended that the alienations now sought to be set aside were ratified by plaintiff; and that they were therefore valid, apart from any question of the maternal uncle being only the *de facto* guardian. Exs. II and III are two letters passed on by plaintiff to the vendees on 9th November, 1918, wherein he approved of the sale deeds of the dates 7th October, 1913 and 1st March, 1907. That such a ratification would make the alienation binding will be clear from the decision in *Chetti Colum Comara Venkatachella Reddiar v. Rajah Rungaswamy Aiyangar Bahadur* (1861) 8 MIA 319.

16. It was also urged before us that so far as the alienation under Ex. IV went, the suit was barred by limitation, as possession was, as stated in it, given before its date (28th February, 1907); that the evidence was that it was given during the previous cultivation season (August, 1906); and that time ran from August, 1906. The question under Article 144 of the Limitation Act would be when the possession became adverse to the plaintiff. The District Munsif held that it became adverse when possession was given, but the Subordinate Judge did not consider this question. Since possession was given in view of a contemplated sale, it cannot be said that it became adverse to the vendor from the date it was given in case the sale was held not binding on the minor.

17. The sale to the father of defendants 1 to 3 has been found by both Courts to be binding to the extent of Rs. 275, and the sale to the 5th defendant has been held to be wholly binding. In my view the effect of the ratification evidenced by Ex. III is to make the sale to the father of defendants 1 to 3 wholly binding on plaintiff.

18. I would therefore allow the appeal, and reversing the decree of the Court below, dismiss the suit with costs throughout