

58/23

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

AFR
CIVIL APPEAL NO.32-K OF 2018
(Against the judgment of the High Court of Sindh at Karachi dated 31.05.2018 passed in Second Appeal No.46 of 2006)

Muhammad Aqil

...Appellant(s)

VERSUS

Muhammad Amir & others

...Respondent(s)

For the Appellant:

*Mr. Muhammad Ali Lari, ASC
Mr. K.A. Wahab. AOR
(via video link from Karachi)*

For Respondents :

Mr. Muhammad Safdar, ASC

For Respondent . . .

Mian Abdul Rauf, ASC

Date of Hearing: 20.10.2022

JUDGMENT

IJAZ UL AHSAN, J- Through this instant Appeal, the Appellant has challenged a judgment of the High Court of Sindh at Karachi dated 31.05.2018 (the “**Impugned Judgment**”) whereby the Second Appeal of the Respondent was partially allowed.

2. Briefly stated, the facts giving rise to this *lis* are that Mst. Maria Siddique and her older brother Muhammad Amir

(both hereinafter referred to as the "**Respondents**") inherited House No.D-97, Block No.6, Federal "B" Area, Karachi (the "**Suit House**") from their father. On 12.06.1996, the Respondents entered into an agreement to sell (the "**Sale Agreement**") with Muhammad Aqil (the "**Appellant**"). It is not disputed that at the time of this agreement to sell, Mst. Maria Siddique was 15 years old. Through the sale agreement, the suit house was sold for Rs.1,600,000/- . Rs.200,000/- was received in cash at the time of the agreement to sell and the balance amount of Rs.1,400,000/- was paid by the Appellant in due time. Supplementary agreements and payments thereto were also entered into between the parties. Ultimately, on 04.11.1996, possession of the suit house was handed over to the Appellant along with original documents of the suit house as well as the original possession letter. However, when the Respondents failed to transfer the suit house in favour of the Appellant by way of a registered sale deed, the Appellant filed a suit for specific performance wherein he sought performance of the sale agreement, registration of the suit house in his name, a sum of Rs.231,000/- as rent for the ground floor of the suit house along with permanent injunction. The suit of the Petitioner was initially decreed in toto by the 2nd Senior Civil Judge, Karachi Central (the "**Trial Court**") vide judgement dated 16.04.2005. However, vide judgement dated 23.05.2006, the 7th Additional District Judge, Karachi Central (the "**Appellate Court**") set aside the judgement of the Trial Court and dismissed the suit of the Appellant. Aggrieved, the Appellant preferred a second appeal before the High Court

which, vide the impugned judgement, partially allowed the suit of the Appellant, decreed the Appellant's suit to the extent of Muhammad Amir's share in the suit house and dismissed the suit to the extent of Mst. Maria Siddique's share in the suit house. The Appellant now assails the impugned judgement before this Court by way of this instant Appeal.

3. It was the case of the learned ASC for the Appellant that while the Appellant was aware that Mst. Maria was a minor at the time of the agreement to sell, the Appellant had been assured that Muhammad Amir was the guardian of Mst. Maria Siddique and that he had a guardianship certificate to this effect as well. Further contends that the High Court has misinterpreted Section 359 and 362 of D.F. Mulla's Muhammadan Law when it declared the sale agreement *void ab initio* to the extent of Mst. Maria Siddique.

4. The learned ASCs for the Respondents as well as Respondent No.3 on the other hand have argued in favour of the impugned judgement.

5. We have heard the learned counsel for the parties and gone through the record.

Before we formulate our issues, we would like to point out that the prayer clause of the instant appeal seeks setting aside the impugned judgement only to the extent of Mst. Maria Siddique's share in the suit house. The points of law that have been raised by the Appellant in his appeal before us reflect a

similar stance. In such a situation, this Court shall only confine itself to the following issue:-

i. *Whether or not a suit for specific performance of the sale agreement could be decreed to the extent of Mst. Maria Siddique's share in the suit house?*

6. The High Court has relied heavily on the relevant portions of D.F. Mulla's Muhammadan Law when it arrived at the conclusion that the sale agreement was void to the extent of Mst. Maria Siddique. Chapter 18 of Muhammadan Law deals with Guardianship of Person and Property. Part A of the said chapter deals with Appointment of Guardians. In Section 348, Mullah defines a minor as a person who has not reached the age of eighteen years. He further goes on to state that all applications for the appointment of a guardian of the person or property or both of a minor are to be made under the Guardian and Wards Act of 1890. However, the Guardian and Wards Act is not important for the purposes of this instant appeal. What is important is Part C of the said chapter which deals with Guardians of the Property of a Minor. Section 359 lists the following persons who are *de jure* guardians of the property of a minor. In order, they are:-

- i. *The father;*
- ii. *The executor appointed by the father's will;*
- iii. *The father's father;*
- iv. *The executor appointed by the will of the father's father.*

However, in default of anyone who falls within the aforesaid list, Section 360 states that it is the duty of the State (through a Judge) to appoint a *de jure* guardian for the protection and preservation of the minor's property. In contrast, Section 361 of Mohammadan Law deals with *de facto* guardians. Section 361 is reproduced for ease of reference:-

"A person may neither be a legal guardian (section 359) nor a guardian appointed by the Court (section 360), but may have voluntarily placed himself in charge of the person and property of a minor. Such a person is called de facto guardian. A de facto guardian is merely a custodian of the person and property of the minor."

Section 364 of Mohammadan Law deals with alienation of immovable property by *de facto* guardians. The same is reproduced for ease of reference:-

"A de facto guardian (section 361) has no power to transfer any right or interest in the immovable property of the minor. Such a transfer is not merely voidable, but void."

The only power that a *de facto* guardian can exercise relates to disposal of movable property in terms of Section 368. Prior to Independence, the Allahabad High Court in Mt. Auto vs. Mt. Reoti Kaur (AIR 1936 All 837) dealt with the matter of ratification of an agreement made by a person during the age of minority. In deciding the said case, the High Court held that:-

"2. Subsequently on attaining majority the sons made the two transfers on the 24th June 1921, and 27th October 1926, in favour of the contesting defendants. In this suit the sons admitted that maintenance allowances

had been paid to the mother for six years, but said that they had remained outstanding for the last six years just before the suit. The lower appellate Court found that the transaction was a result of a family arrangement. It was therefore, contended on behalf of the plaintiff that this family arrangement was binding on the minor sons as well, as it was for their benefit and their interest. Two questions have been referred to this Full Bench by the Bench before which the case came up for disposal. They are as follows: (1) Can a transaction amounting to an alienation of an immoveable property belonging to a Mohammadan minor by the de facto guardian of the minor be ratified by the latter upon his attainment of majority? (2) Where the transaction has been ratified by him after he has attained majority, can it be subsequently challenged by him or by his transferees? Undoubtedly there was some conflict of opinion among the Indian High Courts prior to 1918; but a definite rule has been laid down by their Lordships of the Privy Council in their authoritative pronouncement in Imambandi v. Haji Mutsaddi 1918 16 ALJ 800. Their Lordships considered it necessary to lay down such a definite rule in view of the conflict of opinion that had prevailed. Emphasis was laid on the previous ruling of their Lordships of the Privy Council in Matadin v. Ahmad Ali (1912) 39 IA 49, where Lord Robson had observed:

It is urged on behalf of the appellant that the elder brothers were de facto guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore, necessary in his interest. It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a "de facto" guardian. He may, by his "de facto" guardianship, assume important

responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.

3. Their Lordships after an exhaustive review of several cases considered it necessary to examine the case in *Ayderman Kutti v. Syed Ali* 1914 37 Mad 514. The learned Judges of the Madras High Court had held (1) as regards the powers of guardians, *de jure* as well as *de facto*, that the Mohammedan law recognizes no distinction as to the nature or kind of property, namely, whether it is immoveable or moveable, (2) that in substance the powers of an unauthorized person, who has charge of an infant, are coextensive with those of a lawfully constituted guardian, except in so far that the acts of the former are subject to considerations of necessity or benefit to the infant; and (3) that dealings by a *de facto* guardian are neither void nor are voidable but are suspended until the minor on attaining majority exercises his option of either ratifying the transaction or disavowing it. As regards the first proposition their Lordships held that the Mohammedan law, for obvious reasons, makes a distinction, and a sharp distinction, between "goods and chattels" and immoveable property with regard to the powers of dealing by guardians. As regard the second proposition their Lordships considered that the conclusion of the learned Judges of the Madras High Court would wipe out one of the most important safeguards provided by the Mohammedan law for the protection of the interest of infants. Dealing with the third proposition, their Lordships examined the text of the Hidayah and the Fatwa-i-Alamgiri and came to the conclusion that the Hanafi doctrine relating to a sale by an unauthorised person remaining dependent on the sanction of the owners refers to a case where such owner is *sui juris* possessed of the capacity to give the necessary

sanction to make the transaction operative, and that they did not find any reference in these doctrines relating to fazuli sales, so far as they appear in the Hidayah or the Fatwa-i-Alamgiri, to dealings with the property of minors by persons who happen to have charge of the infants and their property, in other words, the de facto guardians. In their Lordships' opinion the doctrine about fazuli sales appears clearly to be based on the analogy of an agent who acts in a particular matter without authority, but whose act is subsequently adopted or ratified by the principal which has the effect of validating it from its inception. The idea of agency in relation to an infant is as foreign, their Lordships conceived, to Mahomedan law as to every other system. Their Lordships held 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 therefore be conveniently called a de facto guardian, has no power to convey to another any right or interest in immoveable property which the transferees can endorse against the infant; nor can such transferee, if let into possession of the property under such unauthorized transfer, resist an action in ejectment on behalf of the infant as a trespasser.

4. It seems therefore that this case is a clear authority for the proposition that a person who is merely a de facto guardian has no power or authority whatsoever to transfer any right or interest in immoveable property belonging to an infant. This view has been recently confirmed by their Lordships in Mohammad Ejaz Husain v. Mohammad Iftikhar Husain 1932 ALJ 199. In that case an agreement of reference to arbitration had been signed by the mother of certain minors. The matter was referred to arbitration and an award was delivered under which a certain partition was effected

and in consequence certain mortgage deeds were allotted to the share of the minors. A suit was brought on these mortgages by an adult son after attaining majority for himself and on behalf of his three brothers, including one Ejaz Husain, who were minors at the time. A preliminary decree was obtained and then an application for a decree absolute was filed which was signed by Ejaz Husain as well who had by that time attained majority. In that way Ejaz Husain accepted the validity of the mortgage deeds sued upon which had been allotted to the sons' share under the award which was the result of an agreement of reference to arbitration signed by the de facto guardian, the mother only. Their Lordships overruled the view taken by the Indian High Court and held that this was not a sufficient ground to prevent Ejaz Husain from maintaining his suit for recovery of the property, in spite of the award which had been delivered. Their Lordships approving of the previous pronouncement in Imambandi v. Haji Mutsaddi 1918 16 ALJ 800, again laid down that under the Mahomedan law the mother as the de facto guardian has no authority to enter into an agreement of reference to arbitration on behalf of her minor sons so as to make the award binding on them as to their share in the immoveable property, nor has she power or authority to enter into an arrangement whereby the minors' share in the immoveable property of their father would be affected. In view of the fact that at the time of the said agreement she was not their legal guardian, she cannot be clothed with the necessary authority by calling the transaction a family arrangement. The learned Counsel for the plaintiff has relied strongly on an earlier case decided by their Lordships of the Privy Council, namely the case in Kali Dutt Jha v. Abdul Ali (1889) 16 Cal 627. That however was a case which arose before the coming into force of the Transfer of Property Act under which a

conveyance of property worth more than Rs. 100 is required to be effected by means of a registered document executed by the true owner as transferor. Furthermore, there the guardian was the father of the minors, who, under the Mahomedan law, was the natural guardian of their property. Then again in that case the title of the minors to the property affected was a disputed one. As observed by their Lordships at p. 634:

It was not a case of a sale by a guardian of immoveable property of his ward, the title to which was not disputed, in which case a guardian is not at liberty to sell except under certain circumstances.

5. Furthermore, the transaction had been followed by a settlement made by the Collector. Accordingly their Lordships at p. 635 held that looking at the whole transaction, it was within the power of the guardian to make the sale. That case therefore is clearly distinguishable. The next point for consideration is whether it is open to the defendants transferees to raise the question of the invalidity of the hypothecation bond when the sons in the present suit are not raising any such question. It seems to us that if as laid, down by their Lordships of the Privy Council, the transaction was invalid from its very inception, it must be regarded as a void transfer and it must therefore be open to the subsequent transferees to set up its invalidity. Even in a case of alienation made by a manager of a joint Hindu family without legal necessity, it has been held by a Full Bench of this Court in *Muhammad Muzamil-Ullah Khan v. Mithu Lal* (1911) 33 All 783, that the invalidity of the transaction can be challenged by a subsequent transferee who has acquired interest in the property subsequent to the transfer. It seems to us that the rule

laid down in that case would apply with equal, if not greater, force to a case where the de facto guardian of a minor has transferred property without any authority and power. It is unnecessary at this stage to express any opinion as to whether the mother can claim the benefit of any charge arising in her favour under Sections 120 and 55(4)(b), T.P. Act. Our answer to the first question referred to us is in the negative, as the transaction being void there is no question of ratification. The answer to the second question is that there can be no valid ratification and therefore there can be no estoppel on account of any such ratification."

(Underlining is ours)

This principle has been reaffirmed by this Court in various cases. It was held by this a three-member bench of this Court in the case of Muhammad Haneef vs. Abdul Samad (PLD 2009 SC 751) that:-

"8. The legal position of alienation of immovable property of a minor by his/her mother, brother, uncle and other close relatives as de facto guardians of the minors, has been examined by superior Courts in a number of cases.

In the case of Ahmed Khan and others v. Rasool Bakhsh and others (PLD 1975 SC 311), a sale deed was executed by a widow/mother alienating property of her minor son purporting to be his de facto guardian in order to pay off certain outstanding debts of her deceased husband. It was held that such a sale was not merely voidable but void under the Muslim Law and that a de facto guardian of a minor had no power to transfer any immovable property of the minor. In Haji Abdullah Khan and others v. Nisar Muhammad Khan

and others (PLD 1965 SC 690), this Court took the view that it was only a guardian which could enter into a contract on behalf of a minor. Under Mohmmadan Law, the guardians of the property of a minor were the father and grand-father or their executors or persons appointed as guardians by their will. Since the uncle of the minor was no nowhere found in the list of guardians, therefore, he was not competent to enter into an agreement on behalf of the minor for alienation of property. In the case of Imambandi and others v. Haji Mutsaddi and others (AIR 1918 P.C. it 45 Indian Appeals 73 = 918 (47 Indian Cases 513), the, following observations were made by the late Right Hon'ble Syed Amir Ali:-

(Underlined text)

"Under the Mahomedan Law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor (under the Sunni Law), is the legal guardian. If the father dies without appointing an executor (Wali) and his father is alive the guardianship of his minor children devolves on their grandfather. Should he also be dead, and have left an executor, it vests in him. In default of these de jure guardians the duty of appointing a guardian for the protection and preservation of the infant's property devolves on the Judge as the representative of the sovereign. When the mother is the father's executrix or is appointed by the Judge as guardian of the minors, she has all the powers of a de jure guardian."

In Muhammad Ejaz Hussain and another v. Muhammad Iftikhar Hussain and others (AIR 1932 PC 76), it was held that the mother as a de facto guardian could not enter into reference to make award binding

upon the share of minors nor could she enter into family arrangement on their behalf. It was further held that the subsequent appointment of the mother as a guardian would not validate the arbitration agreement. To the same effect are the cases of *Mst. Abdara v. Salim Khan and others* (PLD 1992 Peshawar 98), *Mst. Subhan Bibi and another v. Mst. Musarrat Jabeen and others* (PLD 1969 Karachi 563), *Musali Khan v. Nazir Ahmed and others* (PLD 1952 Peshawar 1), *Ziarat Gul v. Mian Khan* (PLD 1950 Peshawar 69), *Zinda and others v. Mst. Roshna and another* (AIR 1928 Lahore 250) and *Rang Ilahi and another v. Mahboob Ilahi* (AIR 1926 Lahore 170)."

6. Coming to the merits of the instant Appeal, the Trial Court, when passing its judgement, framed an issue as to "Whether Defendant No.1 (Muhammad Amir) obtained any permission to sell from Guardian Judge in respect of minor's share i.e. Defendant No.2 (Mst. Maria Siddique)?". The said issue arose out of the fact that in his plaint, the Appellant had admitted that he was aware that Mst. Maria Siddique was a minor at the time the sale agreement was drawn up, that Muhammad Amir failed to produce the guardianship certificate with respect to Mst. Maria Siddique up to 11.10.1996, and that Muhammad Amir failed to honour their promise to produce the guardianship certificate and permission for completion of selling her sale in spite of receipt of the sale consideration and delivery of possession. The Trial Court, while deciding the issue, held that in the absence of any documentary evidence produced by the Respondents to the contrary, the said issue was decided in favour of the Appellant and it was held that

Muhammad Amir had a guardian certificate and was in fact the *de jure* guardian of Mst. Maria Siddique at the time of the sale agreement. This finding was rendered in spite of the specific denial of the Respondents in their joint written statement that the both of them never promised to produce the guardianship certificate in question. There is also nothing on the record to suggest that the said guardianship certificate, if it at all existed, or any specific order from any Court authorising the sale of Mst. Maria Siddique's share in the suit house was ever brought on record by either of the parties before the Trial Court. We note that the Trial Court had failed to appreciate the fact that since no evidence had been brought on record to establish that Muhammad Amir was the *de jure* guardian of Mst. Maria Siddique, it could not have mechanically held that in the absence of any documentary evidence to the contrary, Muhammad Amir was the *de jure* guardian of Mst. Maria Siddique and was authorised to enter into an agreement to sell with respect to her share in the suit house. The issue of agency to enter into an agreement to sell on behalf of a minor was not discussed by the Appellate Court which dismissed the suit of the Appellant on the ground of limitation as well as the ground that the Appellant had failed to honour his obligations under the sale agreement within the stipulated three-month time period. The High Court has, however, relied on the principle that a minor's share cannot be sold by a *de facto* guardian when it dismissed the suit of the Appellant to the extent of Mst. Maria Siddique. In the absence of any evidence on the record to indicate that Muhammad Amir

was ever made the guardian of Mst. Maria Siddique by virtue of a guardianship certificate or an order from a Court authorising the sale of Mst. Maria Siddique's share in the suit house, we find ourselves in agreement with the conclusion arrived by the High Court when it dismissed the suit of the Appellant to the extent of Mst. Maria Siddique. In the absence of any evidence to the contrary, we have no hesitation in also concluding that Muhammad Amir was, at the time of the sale agreement, the *de facto* guardian of Mst. Maria Siddique and was barred from selling Mst. Maria's share in the suit house in the absence of a guardianship certificate or an express order from a Court of competent jurisdiction.

7. Insofar as the argument of the Learned ASC for the Appellant that Mst. Maria Siddique never challenged the sale agreement even after attaining majority and therefore the agreement to sell was ratified when Mst. Maria Siddique failed to either expressly or impliedly cancel the sale agreement is concerned, we would like to note since we are in agreement with the impugned judgement that the agreement to the extent of Mst. Maria Siddique was *void ab initio*, we find that there was no need for Mst. Maria to challenge the said sale agreement since the same did not infringe or alter any of her legal rights in the suit house whatsoever. In the case of Abdul Majeed v. Muhammad Subhan (1999 SCMR 1245), a three-member bench of this Court held that:-

"6. ... If the transaction which is sought to be set aside was a voidable one, it is essential that the transaction

be set aside. If it be not voidable, but void, the question of setting it aside would not arise. As to whether a transaction is voidable or void there is a simple criterion: did the transaction create any legal effects, that is, did the transaction transfer, create or terminate or otherwise affect any rights? In a void transaction no legal effects are produced. ... If it comes to the conclusion that, by itself, the transaction produced no effects no need for setting it aside will arise. ... “Setting aside” is wholly inappropriate for a document which has produced no legal effects though the expression is sometimes loosely used in respect of a declaration of invalidity of a document.”

(Underlining is ours)

8. For the aforesigned reasons, we find ourselves in agreement with the impugned judgement to the extent that it was challenged before this Court by way of this instant Appeal. The learned ASC for the Appellant has failed to point out any ground which would lead us to a conclusion different from the one arrived at by the Learned High Court. Consequently, we do not find any merit in this Appeal. It is accordingly dismissed.

ISLAMABAD, THE
20th of October, 2022
Khalil Sahibzada, LC*/-

NOT APPROVED FOR REPORTING/*