

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**SECOND APPEAL NO.150 OF 1998
WITH
INTERIM APPLICATION NO.1 OF 2019**

1. Shri Dadu Nemisha Balwan }
since deceased through LR }

1A. Hirabai Dadu Balwan }
Age:69 years, Occ:Household, }
R/o. Kurundwad, Tal. Shirol, }
District:Kolhapur. }

1B. Sangita Raosaheb Anuje }
Age:50 years, Occ: Household, }
R/o. Nrisinamhawadi, Tal. Shirol, }
District:Kolhapur. }

1C. Adinath Dadu Balwan }
Age:45 years, Occ:Agriculturist }
R/o. Kurundwadi, Tal. Shirol, }
District:Kolhapur. }

1D. Surekha Jingonda Patil }
Age:45 years, Occ: Household, }
R/o. Herwad, Tal. Shirol, }
District:Kolhapur. }

1E. Sunita Ramchandra Bedkyale }
Age:40 years, Occ. Household, }
R/o. Ichalkaranji, Tal. Hatkanangale, }
District:Kolhapur. }

1F. Neminath Dadu Balwan }
Age:35 years, Occ:Agriculturist }
R/o. Kurundwad, Tal. Shirol, }
District:Kolhapur. }

2. Panditsaheb Baburao Chavan }
Age:36 years, Occ:Agriculturist, }
R/o. Dhepannur Galli, Kurundwad, }
Tal. Shirol, District:Kolhapur. }

3. Vikrant Surendra Khot }
Age:27 years, Occ. Agriculturist, }
R/O. Kumbhar Galli, Kurundwad, }
Tal. Shirol, District:Kolhapur. } ... **Appellants**

versus

1. Sadik Malikso Bargir }
Age:31 years, Occ. Labour Work, }
R/o. Mangalwar Peth, Mali Gali, }
Miraj, District:Sangli. }

2. Shahabuddin Malikso Bargir }
Age:37 years, Occ. Business, }
R/o. Momin Galli, Ward No.17, }
Kurundwad, Tal. Shirol, }
District:Kolhapur. }

3. Salima Malikso Bargir }
Age:56years, Occ. Household }
R/o. Momin Galli, Ward No.17, }
Kurundwad, Dist:Kolhapur. } ...
Respondents

Mr.P.M. Arjunwadkar for the appellant.
Mr. Vaibhav Gaikwad for the respondent and applicant
in IA No.1 of 2019.

CORAM :- SMT.BHARATI DANGRE, J.

DATE :- MARCH 12, 2020

ORAL JUDGMENT :-

1. On 18th June, 1998, the Second Appeal came to be admitted on the following two questions of law:

“1. Whether a purchase in the name of sons from the moneys advanced by the father is covered by the definition of Benami under Section 2A of the Benami Transactions (Prohibition) Act, 1988 and is hit by Section 3 of the said Act?

2. Whether a mother professing the Mohomedan faith who was appointed as an Executor can sell the property of a Minor boy without being the legal guardian?”

2. On receipt of record and proceedings, the appeal is heard.

3. The original plaintiff- Sadik Bargir filed a suit for partition and possession in the Court of Civil Judge, Junior Division, Kurundwad and it came to be registered as Regular Civil Suit No.31 of 1986. The suit revolved around an agricultural land admeasuring 3 Acres and 24 Gunthas situated at village Kurundwad, Taluka Shirol, District Kolhapur. According to the plaintiff, the suit property is joint property owned by him and Shri Shahabuddin Bargir (defendant No.1) who is his elder brother. The case pleaded was that the suit property was purchased by the father of the plaintiff and defendant No.1, Shri Maliksaheb on 27th June, 1966 for their welfare, in consideration of Rs.8,000/-. At the time of purchase of the property, since the plaintiff and defendant No.1 were minor, the document included the name of defendant No.2-

Smt.Salima, the mother as a guardian of the two minors. On 6th March, 1976, Maliksaheb met with an accident and succumbed to the same. It is specific case pleaded in the plaint that defendant No.2 and defendant No.1, on attaining majority, executed two Sale Deeds on 31st October, 1980 and 2nd February, 1981 in favour of defendant Nos.3 and 4. The plaintiff allege that this was done in collusion of defendant Nos.1 and 2. On attaining majority, the plaintiff sought his share in partition, which was declined and he allege that the sale transaction between defendant Nos.1 and 2 on one hand and defendant Nos.3 and 4 on other hand, is illegal, void *abinitio* and, therefore, instead of seeking declaration, he sought partition and possession since the transaction is not binding on him as far as his one half share is concerned.

4. The suit was contested by defendant Nos.3 and 4 by filing their written statement. Defendant Nos.1 and 2 though duly served, remained absent and the case proceeded *ex-parte* against them.

5. The Court of original jurisdiction i.e. Civil Judge framed the Issues and Issue No.1 as to whether the plaintiff had proved that the suit property jointly belong to him and defendant No.1 to the extent of one half share each came to

be answered in negative. As a necessary corollary, Issue No.4 as to whether he is entitled for partition and possession to the extent of one half share was answered in the negative. In negating the aforesaid Issues, the learned Civil Judge, whose attention was drawn to the position of law under Islamic law as regard who can be the legal guardian of the property of the minor, the learned Civil Judge recorded that there is no prohibition for a female member to be appointed as an executor though he accepted the legal scenario that she cannot be a *de jure* guardian. The learned Civil Judge accepted the submission that defendant No.2 was appointed as a guardian of the plaintiff and defendant No.1 by deceased Maliksaheb in the Sale Deed itself and, hence, she was the executor of Maliksaheb and thus, became legal guardian of the plaintiff and defendant No.1. Being a legal guardian, she was entitled to sell the suit property for maintenance of plaintiff and defendant No.1 and to clear the debt of Maliksaheb.

6. Relying upon Section 361 of the Mahomedan Law by Mulla, which provide that mother, brother, uncle and all relation other than father and father's father are *de-facto* guardian unless they are appointed executors by the Will of

father or father's father, the Court held that at the time of purchasing the suit property, Maliksaheb was alive so the question did not arise about the appointment of defendant No.2 as guardian de facto. The learned Civil Judge held that the presumption can be drawn from the intention of deceased Maliksaheb was to appoint executor to manage his property and, therefore, he had entered the name of defendant No.2 in the Sale Deed and, therefore, she became the legal guardian of plaintiff and defendant No.1. The transaction was, therefore, held to be valid and covered by Section 362 of the Mahomedan Law and Section 108 of Islamic Law as per B.R.Varma. The Court of first Fora therefore, held that plaintiff has utterly failed to prove that he and defendant No.1 had one half share in the suit property when it was established that the property was sold to defendant Nos.3 and 4 for benefit of plaintiff and defendant No.1. Resultantly, the suit was dismissed.

7. On an Appeal instituted by the plaintiff in the Court of Additional District Judge, Kolhapur in the form of Regular Civil Appeal No.290 of 1992, the finding recorded by the First Court were reversed and the plaintiff got relief sought for in the plaint.

8. The Appellate Court, on noting a finding of the Trial Court that deceased Maliksaheb has appointed his wife-defendant No.2 as his executor in the Sale Deed and, therefore, had become a legal guardian and was competent to alienate the suit land for legal necessity of her minor sons, recorded that none of defendant Nos.3 and 4 had pleaded that defendant No.2 was appointed by Maliksaheb as his executor and she has alienated the property in such capacity. The Court also recorded that Maliksaheb expired at the age of 35 on account of an accident and it cannot be accepted that he anticipated his death in the year 1966 itself and appointed his wife as executor. The Court of First Appeal recorded that though he entered defendant No.2's name as guardian of his sons, it cannot be accepted that he intended to appoint her as an executor, to manage property of his minor sons and perusal of the Sale Deed Dated 25th June, 1966 (Exhibit 46) was not reflective of the intention of Maliksaheb to appoint defendant No.2 as his executor and, therefore, the finding recorded by the Trial Court was found to be unsustainable. The Appellate Court went further and held that an executor is appointed by a testator for posthumous agreement of his property and Maliksaheb never intended to make such an arrangement in the year 1966 when he was alive. On mere mentioning of

defendant No.2 as a guardian of the plaintiff and defendant No.1 while purchasing the land, the Court concluded that it did not lead to a factum of defendant No.2 being appointed as an executor by Maliksaheb.

9. On the aspect of “whether *de facto* guardian who place himself in charge of the property of the minor, the Court held that defendant No.2 had no power to transfer any right or interest in the suit lands and the Sale Deeds executed by her in favour of defendant Nos.3 and 4 are void. Further it was recorded that there is no evidence to prove that deceased Maliksaheb raised the loan and the loans remained unpaid till his death and the suit land was sold for satisfaction of those debts. Accepting the position as regards a *de facto* guardian of a Muslim minor, the Appellate Court concluded that the Sale Deeds, executed by defendant No.2 in favour of defendant Nos.3 and 4 in absence of an authority in law, were void as she was incompetent to sell the suit land in the capacity of “*de facto* guardian”. Resultantly, the judgment of the Civil Judge, Junior Division was set aside and the Regular Civil Suit No.31 of 1986 was decreed.

10. The facts being not in dispute, the substantial question of law which arise in the present Second Appeal assailing the

judgment passed by the District Court is whether the mother i.e. defendant No.2 was an executor and, therefore, a *de facto* guardian and whether she was entitled to deal with the property of the minor.

11. Exhibit 47 is the Sale Deed by which the properties were purchased by Maliksaheb on 27th June, 1966. The Sale Deed incorporate the name of Shahabuddin i.e. defendant No.1 aged 7 years and Sadik (plaintiff) aged 10 months as a purchaser. On their behalf, the name of the mother is introduced as a guardian of the minors. Apart from this, the document at Exhibit 47 do not contain any recital permitting the mother to deal with the property on behalf of the minors. Her name finds place in the document, in the column of purchaser only as the mother of the two minors. The parties are govern by Mahomedan law. Under the Mahomedan Law, four types of guardians are recognised being (1) Natural or legal guardian *de jure*, (2) Testamentary guardian (3) Guardian appointed by Court and (4) *De facto* guardian. The natural or legal guardian has a legal right to control and supervise the activities of a minor child. The father is recognised as a natural guardian under all the schools prevailing under the Mahomedan Law. In absence of father, father's executor can

act as a legal guardian. The executor is a person who is appointed by father or grandfather to act as guardian of his minor child on his behalf. In absence of the father or his executor, paternal grandfather or paternal grandfather's executor can act as legal guardian. Testamentary guardian is a guardian appointed by Will and even a non Muslim or a female can be appointed as such. The father may, entrust the custody of his minor children to the executor appointed by his Will. *De facto* guardian is an authorised person, who has custody of a minor or his property and is a person holding no authority of guardianship, but under circumstances has taken responsibility to act as a guardian of a minor.

12. As per Mulla Principles of Mahomedan Law (21st Edition), the mother is not a *de jure* guardian and, therefore has no right to sell the interest of her minor children in immovable property. Such a transaction is not merely voidable but void.

13. Mulla also recognises the aforesaid four categories to be the guardians of the property of the minor and it is the only four type of guardians mentioned above who are referred as legal guardians. No other relation is entitled, according to Mulla, to the guardianship of the property of a minor as of right, not even the mother, brother, uncle or any other person

as his executor or executrix, in which case they become legal guardians and have all the powers of legal guardian. The Court also may appoint any one of them as guardian of the property of the minor, in which case they will have all the powers of a guardian. A person appointed executor by the Will of the father or paternal grandfather of the minor becomes by virtue of his office, legal guardian of the property of the minor. *De facto* guardian is described by Mulla as a person who may be neither a legal guardian nor a guardian appointed by the Court, but may have voluntarily placed himself in charge of the person and property of a minor. He is merely a custodian of the person and property of the minor.

14. A legal guardian is also entitled to sell the immovable property of the minor in the following circumstances :

- (1) Where he can obtain double its value;
- (2) where the minor has no other property and the sale is necessary for his maintenance;
- (3) where there are debts of the deceased, and no other means of paying them;
- (4) where there are legacies to be paid, and no other means of paying them;
- (5) where the expenses exceed the income of the property;
- (6) where the property is falling into decay; and

(7) when the property has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.”

15. This position prevailing in Mahomedan law has received its recognition and has been accepted by the Hon’ble Apex Court in series of judgments. In Mohd Amin vs. Vakil Ahmed, AIR 1952 SC 358, relying on the decision in Privy Counsel, a position in law has been taken that under Mahomedan Law a person who has charge of the person or property of a minor without being his legal guardian and who may be referred to as “de facto guardian” has no power to convey to another any right or interest in immovable property which the transferee can enforce against the infant. A deed of family settlement to which a minor was a party represented by his brother is the de facto guardian was held to be void.

16. In the backdrop of the fact that the plaintiff was minor of the age of about 9 years, at the time of execution of a deed and he was not represented by any legal guardian in the arrangement, relying on Mulla’s Mahomedan Law, it was held that the minor’s brother had no power to transfer any right or interest in the immovable property of the minor and such transfer if made was void. Reference was made to the decision of Their Lordship of the Privy Council in Imambandi &

Ors. Vs. Mustaddi & Ors, (1918) LR 45 P.C. 878, and the said decision was relied upon in paragraph no.11.

15 Reference may be made to the decision of their Lordships of Privy Council in Imabandi Vs. Mutsaddi & ors, (1918) ILR 45 P.C. 878. In that case, the mother who was neither the legal guardian of her minor children nor had been appointed their guardian under Guardian and Wards Act, purported to transfer shares of her minor children in her property inherited by them from their deceased father. Mr.Amir Ali who delivered the judgment of the Board observed at P.82 as follows:

“The question how far, or under what circumstances according to Mahomedan law, a mother's dealings with her minor child's property are binding on the infant has been frequently before the Courts in India. The decisions, however, are by no means uniform, and betray two varying tendencies: one set of decisions purports to give such dealings a qualified force ; the other declares them wholly void and ineffective. In the former class of cases, the main test for determining the validity of the particular transaction has been the benefit resulting from it to the minor; in the latter, the admitted absence of authority or power on the part of the mother to alienate or encumber the minor's property.

“The test of benefit result from the transaction to the minor was negatived by the Privy Council and it was 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, therefore, be conveniently called “de facto guardian” has no

power to convey to another any right or interest in immovable property which the transferee can enforce against the infant”

17. In *Meethiyan Sidhiqu Vs Muhammed Kunju Pareeth Kutty and Ors.*¹, the Hon’ble Apex Court has held as under :-

“Father is the natural guardian and in his absence other legal guardians would be entitled to act. In their absence, property guardian appointed by the competent court would be competent to alienate property of the minor with the permission of the court. When 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 minor and, therefore, the competent person entitled to alienate the minor’s property would be, subject to the above condition, either the natural guardian or the property guardian appointed by the court. In this case after the demise of the father no property guardian was appointed. The mother, therefore, is not guardian for the alienation of the property of the minor. The sale made by the mother, therefore, is void.”

18. In light of the aforesaid position of law emerging the mother who merely find a mention as a guardian while purchasing the property for the benefit of the minor, the sale deed would not confer the status of a legal guardian on defendant No.2. The finding recorded by the Trial Court that she became a *de facto* guardian as an executant and was so appointed by the father in this capacity is an erroneous

¹ (1996) 7 SCC 436

finding. The document-Exhibit 47, apart from the fact that it is not in a form of a Will, only find mention of the mother as a guardian of the minors, who are shown as the purchasers of the property in the Sale Deed. She is not conferred with any power to deal with the property and, therefore, the said document do not confer upon the mother, the status of an executant. As a consequence, she is neither a legal or a *de jure* guardian nor she is a testamentary guardian. The finding recorded by the First Court that she is an executant cannot be sustained since the document is executed at the time when the father was alive. There was no question of she being executant of the said document and particularly, when no powers flow to her from the said document; She has been solely named as guardian of the minors. It cannot be assumed that the father has purchased the property in the name of the minor and, therefore, he entrusted the responsibility to deal with their property. It is only if the mother is the executrix or a certified guardian under the Mahomedan law, all powers of *de jure* guardian are conferred upon her. In absence thereof, the transaction by her on behalf of the minors is void. Para 40 of the decision of Privy Council in Imambandi Vs. Mutsaddi (supra) need a reproduction :-

“The above case shows that even where the mother believes she is vested with authority as her husband’s executrix, and in that belief purports to deal with the minor’s property, a purchaser let into possession by her is liable to be ejected at the instance of the minor. Her own subsequent denial of authority does not affect the purchaser’s position; but if the transaction is impugned by the rightful owner namely, the infant, the onus is on the vendee to establish the foundation of his title, that is, that his vendor possessed in fact the authority under which she purported to act”

19. Though the Appeal came to be admitted on two substantial questions of law and the Question No.2 being answered to the above effect, as far as question no.1 is concerned, the First Appellate Court has recorded that no arguments were advanced on the plea that defendant no.2 or her husband were real owners and their sons were benamidars. The Appellate Court recorded in para 17 that when a person buys a property with his own money in the name of another person without any intention to benefit such person, the transaction becomes a benami transaction. However, by delving into the facts of the case the Court recorded that the purchase of land in the name of minor sons by Maliksaheb was for their benefit and no plea of the sons being the benamidar was ever taken. The substantial question of law no.1 therefore, do not call for any consideration.

20. The finding recorded by the Appellate Court being based on the factual position emerging from the case being premised against the position prevailing in Mahomedan Law, calls for no interference. Resultantly, the Second Appeal is liable to be dismissed by upholding the judgment of the Additional district Judge, Kolhapur delivered in Appeal No. 150 of 1998. Declaring that the plaintiff is entitled for partition and separate possession of his half share in the suit land bearing Block No.1454/1 admeasuring 0 Hectare 60 R and 1454/2 admeasuring 0 Hectare 81R situated at Mauja Kurundwad, Taluka Shirol, District Kolhapur. Rule discharged.

21. Decree be drawn accordingly along with the direction of calculation of mesne profits in terms of the order of the Addl. District Judge, Kolhapur.

(SMT.BHARATI DANGRE, J.)