Tattya Mohyaji Dhomse Vs Rabha Dadaji Dhomse

Court: Bombay High Court

Date of Decision: July 3, 1952

Acts Referred: Limitation Act, 1908 â€" Article 44
Transfer of Property Act, 1882 â€" Section 38

Citation: AIR 1953 Bom 273 : (1953) 55 BOMLR 40 : (1953) ILR (Bom) 570

Hon'ble Judges: Rajadhyaksha, J; Chainani, J

Bench: Division Bench

Advocate: M.G. Chitale, for the Appellant; R.N. Bhalerao, for the Respondent

Judgement

Rajadhyaksha, J.

(1) The plaintiff in the suit from which this second appeal arises was one Rabha Dadaji. Dadaji had four sons, Balm, Ganga, Taba and Rabha. The

four brothers formed a Joint family of which the eldest brother Babu was the manager. As such manager, he conveyed the suit property by a

conditional sale-deed in favour of the defendant on 24-10-1325. After the execution Of this conditional sale-deed, there was, according to the

finding of the lower Court, a partition between the four brothers. Although there was severance in interest between the four brothers, Babu and

Taba"s son (Taba was dead by that time) chose to live together and Ganga and Rabha who was then a minor lived together. During the minority of

Rabha, Ganga sold the suit property to the defendant in the year 1930 for a sum of Rs. 1,000. More than seven years after attaining his majority,

Rabha filed the present suit for recovery of possession of his l/4th share in the suit property on the allegation that the transaction dated 24-10-

1952, was really in the nature Of a mortgage. He alleged that Ganga had no right to pass any sale-deed in respect of his share and that the sale-

deed so far as it relates to his share was not binding upon him. He contended that his right to claim redemption was in no way affected by reason,

of the sale-deed of the year 1930. He stated that as the defendant had purchased the share of Ganga in the mortgaged property, he was entitled to

claim redemption of his own 1/4th share in the mortgaged land.

(2) The defendant resisted the suit on the ground that when he purchased the land from Ganga in the year 1930, Ganga was the de facto and the

de Jure guardian of Rabha, and as the property was sold for payment of the family debts and for meeting the expenses of Rabha"s marriage, the

sale was binding upon Rabha Another defence to the suit was that as the suit was not filed within three years after Rabha attained majority or

Within 12 years from the sale-deed, it was barred by limitation.

(3) The learned trial Judge held that Ganga was the de facto guardian of Rabha at the time of the sale. He found that the sale was for legal

necessity and was therefore binding upon the plaintiff. He raised an issue as to whether the suit was tenable without the sale-deed being declared

void, and although he came to the conclusion that the suit was tenable, there is no discussion of that issue in the judgment of the trial Court. In

accordance with these findings the trial Judge dismissed the plaintiff"s suit with costs. Against that decision an appeal was preferred to the District

Court of Poona and was heard by the learned Assistant Judge. He also found that Ganga was the de facto guardian of the plaintiff Rabha. But on

the point of legal necessity for the sale-deed, he took a view different from that of the learned trial Judge. He was of opinion that the legal necessity

for the sale-deed had not been proved and that therefore the sale-deed was not binding on Rabha. Relying upon the decisions of this Court in -

''Hanmantappa v. Dundappa'', AIR 1934 Bom 234 and - Malkarjun Annarao Gambhire Vs. Sarubai Shivyogi, he held that as there was no legal

necessity for the sale, it was void ab initio and that therefore it was not necessary for the plaintiff to file a suit for setting it aside before asking for

redemption of the suit property. His conclusion is expressed in the following words: ""It follows from this ruling that a sale of minor"s property by a

de facto guardian would be void ab initio if it is not supported by legal necessity. It is for this reason that we have to consider whether there was

legal necessity justifying the sale-deed that Ganga passed. If legal necessity is proved, then the sale would be binding on the minor''s share or

Interest but if no legal necessity is proved the sale would be void and in that case Article 44 of the Indian Limitation Act would not apply.

As the learned Assistant Judge''s finding was that there was no legal necessity for the alienation, he held that the plaintiff was entitled to sue for

redemption and that Art. 44, Limitation Act, created no bar in his way. Accordingly, the learned Assistant Judge set aside the order of the trial

Court and decreed the plaintiff"s suit for redemption of his l/4th share in the suit mortgage on payment of Rs. 150 which was the amount found due

on the mortgage. Against that order the defendant has come in second appeal.

(4) In appeal Mr. Chitale on behalf of the appellant first contended that in law the learned appellate Judge was wrong in holding that there was no

necessity for the sale. The consideration for the sale-deed has been shown to consist of Rs. 300 due On the mortgage of 1925, Rs. 236-4-0 due

on some other mortgages and Rs. 463-12-0 on account of the marriage expenses of the plaintiff who was 12 years old in 1930. There is no

dispute--and the plaintiff admits--that Rs. 300 were due on the mortgage of 1925. But there is no evidence about Rs. 236-4-0 being required for

the satisfaction of other mortgages, and it is conceded before us that the necessity to the extent of Rs.. 236-1-0 has not been established. The

whole question, therefore, depended upon as to whether Rs. 463-12-0 for the marriage expenses of the plaintiff could be regarded as expenditure

on account of necessity. The learned Assistant Judge has held that this expenditure could not be regarded as necessary on account of the fact that

at the time of the marriage, the plaintiff was only 12 years old. The Child Mar-riage Restraint Act of 1929 had come into force in October 1929

and had prohibited marriages of children of 12 years of age. It was held in - "Ram Jash Agarwala v. Chand Mandal", ILR (1937) Cal 764 that

there is no rule of Hindu Law sanctioning early marriage of male children and there is no duty upon parents or guardians to marry their sons or

male wards before they attain majority.

The practice of early marriages of Hindu minors may be sanctioned by usage; but it has been disapproved by the passing of the Child Marriage

Restraint Act of 1929.

There is no legal necessity justifying alienation of the minor"s properties to meet the expenses of the minor"s marriage.

The same view was taken in -- Hansraj Bhuteria and Another Vs. Askaran Bhuteria and Another, and -- AIR 1940 327 (Nagpur) . Therefore

there was not only no legal necessity for celebrating the marriage of the plaintiff when he was only 12 years old, but there was a legal prohibition of

such marriage taking place on account of the enactment of the Child Marriage Restraint Act of 1939. In our opinion, therefore, the learned

Assistant Judge was right in holding that the marriage expenses of minor Rabha did not constitute legal necessity under the Hindu law, and that,

therefore, no necessity was proved to the extent of Rs. 700 out of the consideration of Rs. 1,000 for the sale-deed of 1930. We, therefore, agree

with the view taken by the learned Assistant Judge that there was no justifying legal necessity for the sale-deed of 1930.

(5) The question, therefore, arises whether the present suit was maintainable without the plaintiff having taken steps to set aside the sale-deed of

1930- It- was held by the Privy Council in - "Mt. Bachi v- Bikhchandi 13 Bom LR 56 that

Special relief under the Dekkhan Agriculturists" Relief Act,...could not be granted in a suit.

which was in form a suit for redemption but in reality was a suit to recover property of which the rightful owner had been deprived by fraud"".

If, therefore, the sale-deed was binding on the plaintiff until it was set aside within the period allowed under Article 44, Limitation Act, the plaintiff

would not be entitled to ignore the sale and to file a suit for redemption as in the present case. See also -- "Malkarjun v. Narhari", 25 Bom. 337

and -- Tikirappa Limanna v. Lumanna", AIR 1920 Bom. 1. The question, therefore, boils down to this: Is the sale-deed of 1930 executed by the

"de facto" guardian of, the plaintiff during his minority in favour of the defendant void as not being justified by legal necessity, so that the plaintiff

could ignore the sale and file a suit for redemption?

(6) There is a direct authority of our High Court in the decision of Mr. Justice Divatia in Malkarjun Annarao Gambhire Vs. Sarubai Shivyogi, ".

The learned Judge"s observations in that case are as follows (p. 235):

.....In the case of a person who is not a manager but a "de facto" guardian it has been held by a full bench of our High Court in -- Tulsidas

Jesingbhai Parikh and Others Vs. Raisingji Fulabhai Vaghela and Another, that such guardian can validly sell the minor"s property only for his

benefit or legal necessity. It would therefore be void if no legal necessity was proved. It is thus quite clear that if such alienation is made either by a

manager of a Hindu family or a "de facto" guardian of the minor"s interest in the property, it is not voidable but is void in its inception. If the

alienation is made by a natural guardian or a guardian appointed by the Court, then only it is required to be avoided within three years after

attaining majority"".

If this decision of Mr. Justice Divatia is good Jaw. then it would completely cover the facts of this case, and it must be held that the alienation is

void in its inception, and was not therefore binding upon the plaintiff and that he could proceed to ask for redemption without filing a suit to set

aside that alienation. But it has been argued by Mr. Chitale for the appellant that this decision should be reconsidered and it should be held (i) that

even in the absence of necessity an alienation by a "de facto" guardian of the minor"s property is not a void transaction, but is only voidable, so

that the plaintiff was bound to sue for setting aside that alienation before filing a suit for redemption and (ii) that as no suit had been filed for setting

aside the sale-deed within the period prescribed under Article 44 of the Limitation Aet, the plaintiff was not entitled to maintain the present suit for

redemption.

(7) So far as the Mahomedan law is concerned, there is no doubt that the alienation by a "de facto" guardian whether for necessity or otherwise is

''ab initio'' void. In -- ''Mata Din v. Ah-mad Ali'', 39 Ind App 49 Lord Robson observed (p. 55):

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"".

In a later decision of the Privy Council in - --Imambandi v. Muteaddi'', AIR 1918 P. C. 11, their Lordships affirmed the same principle & relying

upon the observations of Lord Robson in - ''39 Ind. App. 49'', stated as follows (pp. 20, 15):

For the forgoing considerations their Lordships are of opinion that under the Mahome-dan 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 immovable property which the transferee can enforce 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. It follows that, being himself

without title, he cannot seek to recover property in the possession of another equally without title ....The term ''de facto guardian'' that has been

applied to these persons is misleading; it connotes the idea that people in charge of a child are by virtue of the fact invested with certain powers

over the infant''s property. This idea is Quite erroneous"".

Relying on these observations of the Privy Council, Mr. Bhalerao on behalf of the plaintiff has contended that the alienation of 1930 being that by a

''de facto'' guardian without any justifying legal necessity is void ''ab initio'' and the plaintiff was not bound by such alienation. Mr. Chitale on behalf

of the appellant-defendant has, however, argued that the position under the Hindu law is somewhat different.

Mr. Chitale is undoubtedly correct when he said that the position under the Hindu law is different if the alienation is for necessity. In --

''Hunomanpersaud Panday v. Mt. Babooee Munraj Koonweree'', 6 Ind. App. 393 their Lordships of the Privy Council stated (p. 412):

.....it is to be observed that under the Hindoo law, the right of a ''bona fide'' incumbran-cer who has taken from a ''de facto'' manager a charge on

lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances 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'' title"".

Their Lordships further observed (p. 423):

The power of the Manager for an infant heir to charge an estate not his own, is, under the Hindoo law, a limited and qualified power. It can only

lie exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner

would make, in order to benefit the estate, the ''bona fide'' lender is not affected by the precedent mismanagement of the estate. The actual

pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded"".

Following this decision of the Privy Council in -- ''Hunoomanpersaud''s case (L)'', it was held by a full bench of this Court in Tulsidas Jesingbhai

Parikh and Others Vs. Raisingji Fulabhai Vaghela and Another, .

....that under Hindu law, a ''de facto'' guardian of a minor can validly sell the property of the minor to a third person for legal necessity"".

That was a decision of Patkar and Barlee JJ. who relied principally on -- ''Hunoomanpersaud''s case (L)'', whereas Beaumont C. J., who took a

different view, was inclined to follow the principles laid down by the Privy Council, so far as Mahomedan law was concerned. The earifer decision

in -- ''Limbaji Ravji v. Rahi'', AIR 1925 Bom. 499 in which it was held ""that a sale made by a step-mother on behalf of her minor son was a sale

by an unauthorised person and that it was not voidable, but void ''ab initio'', even though there was justifying necessity for the sale"" was not

approved. This decision of the full bench in -- ""Tulsidas v. Vaghela Raisingji'', (I) was in conformity with the earlier decisions of this Court in --

''Bai Amrit v. Bai Manik'', 12 HCR 79 and -- ''Nathuram v. Shoma Chha-gan'', 14 Bom. 562. In the first case although the sale was by the natural

guardian, it was treated on the footing as if it was a sale by a ''de facto'' manager. In the second case, the loan in question was taken by a ''de

facto'' guardian of a minor. In both the cases the alienations were for legal necessity, and the alienations were held to be valid. In -- ''Abhar Chan-

dra Dutta v. Kirtibash Bairagec'', 12 Cal. 586, it was conceded by Dr. Rash Behary Ghose that the powers of a ''de facto'' guardian are tltf. same

as those of a legal guardian. But the concession was made by the learned Doctor when it was found as a fact that there was necessity for the

repairs for the benefit of the estate and that the income of the property was not sufficient to provide the requisite funds and that consequently it was

necessary to sell what was sold. In -- ''Arunachela Reddi v. Chidambara. Reddi'', 13 MLJ 223 it was observed (p. 224):

....it is well settled that an alienation may be validly made by a ''de facto'' guardian, (assuming, of course, a necessity)"".

The case of -- ''Mohanund Mondul v. Nafur Mondul'', 26 Cal. 820 also supports the same proposition. It must, therefore, be held as well settled

that an alienation by a ''de facto guardian if effected for necessity and for the benefit of the estate of the minor, will be upheld by Courts.

(8) But these decisions do not lay down as to what the powers of a ''de facto'' guardian are. If a ''de facto'' guardian alienates the property of a

minor for necessity, such a transaction would be upheld by the Courts. But does it follow therefrom that a ''de facto'' guardian has any power to

deal with the minor''s property? It has been urged by Mr. Bhalerao for the plaintiff-respon-dent that the ''de facto'' guardian under Hindu law has

no power to mortgage or sell the pre-perty of the minor, that his position is no better than that of an executor ''de son tort'', and that although he

would be subject to all the disabilities of a guardian, he could not clothe himself with the rights so as to give a valid title to s purchaser or to effect a

valid mortgage of the property. Mr. Chitale, on the other hand, contends that a ''do facto'' guardian is, under Hindu law, in the same position as a

''de jure'' guardian, and that although his alienations may be challenged by the minor on his attaining majority and are therefore voidable, they are

not void ''ab initio'' so that the minor can ignore them.

(9) In -- Balappa Dundappa Todkal Vs. Chanbasappa Shivlingappa Patil, it was held by Scott C. J. and shah J. that

Article 44 of the Second Schedule to the In- dian Limitation Act has no application to the case of a ''de facto'' guardian wholly unautho- rised to

effect a transfer"".

That was a case of an alienation of the minor''s property by the step-mother of the plaintiff. It was held (p. 151):

The step-mother cannot be in a better position than any other manager to deal with immove-able property which is not her own .... A mother or a

step mother, whether a Hindu or otherwise, purporting to act on behalf of a minor son is, to use the words of Section 38 of the Transfer of

Property Act, a person authorised only under circumstances in their nature variable to dispose of imnioveable property, and the onus of proving

authority arising from necessity or apparent authority arising from that cause, Justified by reasonable inquiry, is upon the person who tries to assert

the transfer against a minor"".

The alienation could not be binding upon the minor unless it was supported by necessity and therefore an issue was sent down to the trial Court to

find out whether the sale by the stepmother to the defendant was for necessity, and whether it was binding upon the plaintiff. This decision is said to

have been overruled by a full bench decision in -- ''Fakirappa Limanna v. Lum-aona'', AIR 1920 Bom. 1, to which case also Shah J. was a party.

In that case, however, the plaintiff''s mother, acting as the natural guardian of her son, sold the equity of redemption in a certain property to the

defendant. The minor son Omanna attained majority and subsequently died. The plaintiff, who was the next reversioner, sued to recover

possession of the suit property from the defendant or in the alternative to redeem the mortgage. It was held that the suit was governed by Article

44, Limitation Act, because Omanna ought to have sued to set aside the alienation within three years of his attaining majority. It would be noticed

that this case of -- "A. I. R. 1920 Bom 1 WES the case of an alienation by the natural guardian of a minor, whereas the earlier case - Balappa

Dundappa Todkal Vs. Chanbasappa Shivlingappa Patil, , was a case of a "de facto" guardian, and it was precisely on this footing that Mr. A. G.

Desai who appeared for the defendant sought to distinguish this case. His arguments as reproduced at page 750 (of 44 Bom) are these:

The alienation in each of these cases was by a "de facto" guardian and not by a guardian "de Jure" and could thus very rightly be ignored. In the

case under consideration however the alienation is by the mother who is recognised under Hindu law as the natural and the lawful guardian of the

minor. In such a case the alienation being good on the face of it cannot be ignored, but must be set aside within three years as laid down in Article

41"".

It would appear from the Judgment of the learned Chief Justice, and particularly from the Judgment at Shan, J. that their Lordships recognised this

distinction, for, at page 7 Shah J. states as follows:

....I am satisfied that the reasoning in --Balappa v. Chanbasappa (S)", cannot be properly applied to the case of a sale by the natural guardian of a

Hindu minor, who has power to sell the property of the minor under certain circumstances.

Therefore, although the head-note to the Report says that -- "Balappa. v. Chanbasappa (S)", and -- "Anandappa v. Totappa". AIR 1915 Bom

132, had been overruled, it will be noticed that the fun bench case of -- "AIR 1920 Bom 1, dealt wtth the case of an alienation by the natural

guardian of a minor while the earlier case of -- "Balappa v. Chanbasappa (S)", dealt with the case of an alienation by a "de facto" guardian. The

real ratio of the decisions as stated by Shah J. at page 8 is as follows:

....On a further consideration I am satisfied that the necessity for suing to set aside a sale does not depend so much upon the question whether the

onus lies upon the plaintiff or the defendant in the first instance, but upon the question whether the sale is by a person wholly unauthorised or by a

person who is authorised only under certain circumstances to alienate the property or in other words whether the sale is null and void or only

voidable if the person interested seeks to avoid it.

The alienation by a natural guardian can be said to have some basis in legal authority and therefore the alienation may be binding upon the minor, if

it is for necessity, or voidable at the option of the minor if it is not for necessity. The same cannot be said of an alienation by a ''de facto'' guardian

who is nothing more than an In-termeddler and cannot derive any kind of authority for alienation of the property by reason of his merely being a

''de facto'' guardian without being placed in the position of authority either by relationship with the minor or by the appointment as such by Court.

(10) It is true that there have been observations in some cases that the powers of a ''de facto guardian are the same ss those of a natural guardian.

But wherever those observations have been made, as for instance, in -- ''26 Cal 820, or in ''12 C L. J. 586, they have been made in order to

uphold an alienation made by a ''de facto'' guardian for necessity. We have not been referred to a single case where a ''de facto'' guardian had

alienated property of the minor without a justifying necessity, anil the transaction was held not void, but only voidable at the option of the minor,

except perhaps the observations in one Madras case to which I shall presently refer.

(11) Apart from authorities, it seems to us that an alienation by a ''de facto'' guardian of the minor''s property without Justifying necessity must be

held to be void ''ab initio'' as has been held by Divatia J. in Malkarjun Annarao Gambhire Vs. Sarubai Shivyogi, . As stated by their Lordships of

the Privy Council in the decision under Mahomedan law the ''de facto'' guardian is nothing more than an intermeddler not deriving any authority for

the alienation either by natural relationship with the minor or legal authority from appointment by a Court. There seems no reason why in such a

case minor should be held bound by the transaction which is not for his benefit and has been entered into by a person who has no semblance of

authority to deal with the minor''s property.

(12) The one Madras decision where observations in support of Mr. Chitale''s contentions have been made is - ''Seetharamanna v. Appiah'', AIR

1929 Mad 45. In that case the learned Judges have taken the same view as all the other High Courts so far as the alienation by a ''de facto''

guardian of a Hindu minor for the necessity of the minor is concerned. They have held that such alienation is valid under the Hindu law. But they

have gone on to observe that

An alienation by a ''de facto'' guardian, not for a necessity of the minor, is only voidable and therefore can be ratified by the minor on attaining his

age of majority.

It would be noticed that even in this case the learned Judges have used the word ""voidable"" In the sense that It is open to the minor to ratify the

alienation on attaining majority. They have not said that it confers a good title on the alienee until it is set aside by the minor. The very observations

of the learned Judges that the alienation can be ratified by the minor on attaining majority suggests that until it is so ratified, it is open to the minor to

ignore such alienation. The other decisions of the Madras High Court, however, have expressed a contrary view. In -- ''Thayammai v. Kuppanna

Koundan'', AIR 1915 Mad 659, the head-note to the Report is as follows:

Under the Hindu law, 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) is entitled as a matter of natural right to be and to act as a guardian of a minor''s person and property;

consequently a paternal aunt is not a natural guardian of a minor.

Where there is no natural guardian alive, recourse must be had to the Court, as representing the rights of the King which are paramount to even the

rights of the parents, for the appointment of a guardian.

Alienations without necessity, made by a ''de facto'' guardian, need not be set aside. Article 44 of the Limitation Act (IX of 1908) docs not apply

to alienations by unauthorized guardians.

In -- ''Ranmswamy pillai v. Kasinatha Iyer'', AIR 1928 Mad 228 it was held that

A ''de facto'' guardian is under the Hindu law in the same position as the ''de jure'' guardian so far at least as acts done by him for the benefit of the

minors are concerned and as regards such acts the same test is to be applied as would be applied in case of an alienation by a legal guardian.

In that case one of the transactions evidenced by cxh. I was not held to be justified by legal necessity and at page 232 of the Report Kumaraswami

Sastri J. stated

that.....Art. 44, Schedule 1 to the (Limitation) Act....does not apply to cases of alienations by ''de facto'' guardians.

In -- ''Chinna Alagumperumal v. Vinayagatham-inal'', AIR 1929 Mad 110, the property was alienated by a ''de facto'' guardian without legal

necessity. The learned Judges held that the sale was void and not binding upon the minor. It has been observed as follows at page 114 of the

Report:

.....Moreover, it has been held in several cases that the unauthorized or improper alienation of a minor''s property by a ''de facto'' guardian need

not be set aside ....As we have held that the sale is absolutely void, defendant 1 is not en-titled to be paid the amount that he spent to relieve the

burden on the estate, as he was only a volunteer in as much as he had no title to the property.

In -- ''Bapayya v. Pundarikabshayya'', AIR 1946 Mad 193, Wadsworth C. J. and Patanjali Sastri J. held as follows:

The test of a transfer being void or voidable is not always decisive on the question of the liability of the transferee for mesne profits on the transfer

being set aside. While an alienation by a "de facto" guardian for necessity is binding on the minor, the minor need not sue to set aside an alienation

without necessity by such a person, within three years of attaining majority, but can sue for possession treating it as a nullity just like a reversioner.

That is to oay, no improper alienation by a "de facto" guardian is binding on the minor until it is set aside, although it may be voidable in the sense

that he may elect either to ratify it or avoid it by treating it as a nullity."" The trend of the decision"s of the Madras High Court, therefore, is that an

alienation by a "& facto guardian of the minor"s property is void in the sense that it confers no title upon the alienee, and that it is open to the

minor, an attaining majority, either to ratify it or to ignore the transaction altogether.

(13) Mr. Chitale for the appellant invited our attention to a decision of a single Judge of the Lahore High Court in -- "Tapassi Ram v. Raja-Ram",

AIR 1930 Lah 138. Bhide J. in the case expressed the opinion ""that under Hindu law, a mortgage effected even by a "de facto" guardian is not a

void but only a voidable transaction-"" It appears, however, that the attention ol fta learned Judge was not invited to an earlier division bench

decision of the same Court in -- Labbs Mal v. Malak Ram", AIR 1925 Lah 619, where a different view has been expressed. In the course of his

judgment, Shadi Lal C. J. made the following observations (p. 620): ""....It is true that the Courts below have held that the sale was not for

necessity, but that finding does not affect the nature of the transaction, which should be treated as an unauthorized transfer by an authorized

guardian. (That was a sale by the natural guardian of the minor). If a sale is effected by a person who is not the minor"s guardian either according

to his personal law or by appointment by the Court, such a sale is a nullity and does not affect the minor"s property. If, on the other hand, the sale

is made by a natural guardian, who beyond the scope of his authority, the tion cannot be regarded as a nullity and bind the minor unless he

succeeds in ing it within the period prescribed by This decision of the Lahore High Court the view which we are taking.

(14) A case precisely In point was decided by the Patna High Court in - Kailash Chandra Pradhan Vs. Rajani Kanta Panda and Another, .

Chatterji v. made the following observations in the course of his judgment (p. 300):

.....It is obvious that this article (Article 44 of the Limitation Act) can have 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. It may be assumed for the present purpose that under the Hindu law an alienation by a

natural guardian, not for necessity, is voidable in this sense, so that a suit to set aside such alienation will be governed by Article 44. It may also be

regarded ae well settled by judicial decisions that under the Hindu law an alienation by a de facto guardian, if for necessity, is binding on the minor.

But it does not follow that an alienation by s. de facto guardian, not supported by necessity, in voidable in the sense that it is binding on the minor

until it is set aside. Mr. B. Mahapadra on behalf of the appellant laid great stress on the observation in some of the decided cases that the powers

of a de facto guardian are the same as those of a legal guardian: see -- AIR 1928 Mad 457, -- Jamula Narayana Murthi and Others Vs.

Nilambara Prudhvisinghi Santo and Others, , and -- (Kaveripakkam) Bangarammal Vs. Lydia Kent and Others, . But if these decisions are closely

examined, it will appear that this observation has refrence to cases where the alienation is for necessity, whether made by the legal guardian or by

de facto guardian. In the last mentioned case Curgenven J. clearly stated that a de facto guardian under the Hindu law ''is in the name position as a

de jure guardian so far as acts done (or the minor''s benefit are concerned.'' To intend this analogy to cases where the alienation by a de facto

guardian is not for the benefit of the minor would be to assign to the de facto guardian the same position as that of a legal guardian under the Hindu

law, a position for which I find no justification. In -- ''Adeyya v. Govindu'', AIR 1931 Mad 274, however. Cur-genyen J,, sitting alone, observed:

If a de facto guardian, equally with a de Jure guardian, can alienate for necessity, it is not very easy to perceive why, if not so supported, the one

should be only voidable and the other sold. Even to alienate for necessity connotes some power to deal with the property and indeed not only is

such a power recognized in a de facto guardian but the view seems to be that in all such dealings no distinction can be drawn between the powers

of the two classes of guar-dians.''

But with all respect, the distinction between the powers of the two classes of guardian lies in the fact that while the de jure guardian is under the law

clothed with authority to deal with the minor''s property, the de facto guardian is not clothed with similar authority, though if The latter alienates the

minor''s property for his ""benefit, the court will uphold the transaction, in the case of an alienation by a ''de jure'' guardian, not for the benefit of the

minor, the guardian acts in excess of his authority derived under the law, whereas in the case of a similar alienation by a de facto guardian, his act is

wholly unauthorised. In the latter case, however, t''ne minor may choose to ratify the tran-action, though it is not, binding on him. To that extent the

alienation is voidable. The position is the same as in the case of an alienation by a Hindu widow, unsupported by legal necessity, which, as pointed

out by the Privy Council in -- "Bijoy Gopal Mukerjec v. Krishna Mahishi Devi", 5 C L. J. 334 may be affirmed by reversioner, though it is not

binding on him, and is in that sense voidable.

With respect we are in agreement with the view expressed by the Patna High Court.

(15) The learned appellate Judge in the Court below has also relied on the case of -- AIR 1934 Bom 234. That was a case of an alienation by a

manager of a joint Hindu family, consisting of himself and his minor brother, of two fields belonging to the joint family property to defen-dant 1 who

was a member of another joint Hindu family. The sale was effected on 9-6-1913. The minor brother Ramaswami, on attaining majority sold his

undivided half share in the two fields to the plaintiff on 13-11-1922. On 9-6-1925, the plaintiff sued to recover his half share in the two fields by

partition. This Court Broomfield and Wadia JJ. held that the suit was not barred by limitation as it was not necessary for the minor to set aside the

alienation but all that he had to do was to bring a suit to recover his share which, if legal necessity had not been proved, would have been

unaffected by the sale. It would appear "that even a manager of a joint Hindu family cannot bind a minor by an alienation which is not for legal

necessity, and that in such a case it is necessary for a minor to set aside the sale under Article 44, Limitation Act, within the period prescribed

therein and that it is open to him to ignore the sale and to sue for possession. The powers of a de facto guardian cannot be placed on a higher

footing than those of a manager of a joint Hindu family. The manager has some legal basis for the exercise of the power of alienating joint family

property. In some cases the alienation may be good as being justified by legal necessity; but if it is not for legal necessity, it is open to the minor to

ignore the alienation and it is not necessary for him to have the sale set aside before suing to recover his share in the joint family property. A "de

facto" guardian is an intermeddler and does not derive authority to deal with the property either from natural relationship with the minor or from

legal authority conferred upon him by a Court. The case of an alienation by a "de facto" guardian, which is not justified by legal necessity, is far

weaker than that of an alienation by a manager of a joint Hindu family.

(16) In our opinion, therefore, 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. It is open to the minor on attaining majority to ignore such an alienation & 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 proscribed under Article 44 of the Limitation Act.

We think that the view taken by Divatla J. in -- "Malkarjun Annarao v. Sarubai Shivyogi", (B), is correct and does not call for reconsideration.

(17) The appeal, therefore, fails and is dismiss ed with costs.

(18) Appeal dismissed.