APPELLATE CIVIL.

Before Teunon and Beachcroft JJ.

MOHSIUDDIN AHMED

v.

K. AHMED AND OTHERS.*

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Feb. 4.

Mahomedan Law—Guardian—Power of mother as de facto guardian of minor to enter into agreement to refer dispute as to immovable property to the decision of arbitrators so as to bind the minor.

The mother, as the *de facto* guardian of minors, is not competent, under the Mahomedan Law, to enter on their behalf into an agreement to refer to arbitration any dispute, even where there is no *de jure* guardian of the minors, such agreement being one which will necessarily, if acted upon, involve dealings with the immovable properties of the minors.

Imambandi v. *Mutsaddi* (1) referred to.

APPEAL from order by Opposite Party No. 1.

This appeal arose out of a petition under section 17 of the second schedule of the Civil Procedure Code for referring the matters in dispute between the parties to arbitration according to the terms of the agreement and for having a decree passed in accordance with the award of the arbitrators. The petitioners and the opposite party possessed considerable movable and immovable properties and dispute had been going on for a long time between the parties regarding their titles to and shares in the said properties. On the 4th Kartik, 1323 (corresponding to 20th October, 1916), the petitioners and the opposite party agreed in writing that all their disputes regarding movables and immovables shall be referred to arbitration of three

*Appeal from Order, No. 225 of 1918, against the order of Bipin Behari Ghosh, Subordinate Judge of Rajshahi, dated April 30, 1918.

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persons named in the petition. Opposite party No. 1, who is the appellant in this appeal, contended, *inter alia*, that the agreement was inoperative, as Sakina Bibi, who had executed the agreement on behalf of the minors, viz., petitioners Nos. 4 and 5, had no valid and legal authority to execute the same, so as to bind the minors to the terms of the agreement, the District Judge having appointed petitioner No. 1 and one Haidar Buksh Mandal, the guardians of the properties of the minors and not Sakina Bibi, and that he (opposite party No. 1) had executed the agreement under coercion, undue influence, fraud and misrepresentation of facts and law. Opposite parties Nos. 2 and 3 filed petitions admitting execution of the agreement. The Subordinate Judge held that Haidar Buksh had been appointed guardian with respect to only some of the properties of the minors and that the mother, as the guardian, appointed by the District Judge, of the persons of the minors, had authority in the circumstances of the case to bind the estate of the minors, the transaction being for their benefit. He also negatived the allegation of coercion and allowed the application. Thereupon, opposite party No. 1 preferred this appeal against the order of the Subordinate Judge, making the petitioners and opposite parties Nos 2 and 3 respondents.

Babu Sarat Chandra Ray Chaudhuri (with him *Babu Krishnakamal Maitra*), for the appellant. It is quite plain from the evidence on record that the appellant acted under coercion. It is also evident that the agreement was abandoned. On the point of law, I submit that Sakina Bibi was not competent to enter into the agreement, as the agreement would, if acted upon, eventually deal with immovable properties of the minors. The District Judge had appointed

her only guardian of the person and others as guardian of the properties. It is immaterial that no one was appointed guardian of some of the properties. The Mahomedan law is stringent on the point. As has been observed by the Judicial Committee in *Imambandi* v. *Mutsaddi* (1), the expression "*de facto* guardian" has been used very loosely. The same judgment is authority on the general question of the power of a mother to deal with property of minors under the Mahomedan law. He also cited some texts from the Hedaya.

Babu Mahendranath Roy (with him *Babu Bankimchandra Mukherji*, *Babu Beerbhushan Datta* and *Babu Pareshnath Mukherji*), for respondents Nos. 1 and 2. The Privy Council judgment (1) cited by my learned friend is distinguishable. The question how far a mother who is a *de facto* guardian can refer a matter to arbitration is not discussed in that judgment, nor is expressly dealt with in the texts. But there are special rules in the Hedaya with regard to partition, which, by analogy, may help us.

[BEACHCROFT J. It is not merely a question of distribution.]

That is so. But see *Mata Din* v. *Ahmad Ali* (2). The general powers of a mother as *de facto* guardian are dealt with in Ameer Ali's Mahomedan Law, 4th Ed., Vol. II, p. 611, last para. and p. 613. That book was no doubt published before the Privy Council judgment cited, but remains unaffected by it.

[BEACHCROFT J. Mr. Ameer Ali was one of the Judges.]

However, in the present case, you will find that the mother signed an agreement for reference to arbitration. The reference, however, could only proceed

(1) (1918) I. L. R. 45 Calc. 878; L. R. 45 I. A. 73.

(2) (1912) I. L. R. 34 All 213; L. R. 39 I. A. 49.

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by permission of Court under rule 17 of the second schedule to the Code. It was not a case of private arbitration out of Court. The Judge has accepted this lady as the guardian for the purpose of this application. That is what is required in cases of partition: Hamilton's Hedaya (Grady, 2nd Ed., 1870), p. 568.

[BEACHCROFT J. That contemplates a guardian appointed by the *quazi*.]

But the reference to arbitration, as I have submitted, must be through Court. Here the Court has considered the eligibility of the mother. The technical objection must go. See Wilson's Digest, 3rd Ed. (1908), p. 194. The other side is not really affected.

The text books and the Privy Council judgment cited by my friend refer to mortgages. In the present case, two guardians of the property were appointed under the Guardians and Wards Act previous to the agreement for reference to arbitration. One of them did not furnish security, and the appointment was of no avail. Under such circumstances, the action of Sakina Bibi was very proper. It was for the benefit of the minors.

Babu Sharatchandra Mukherji for Gulzar Mandal, respondent No. 3 (one of the petitioners). In addition to what Babu Mahendranath Roy has said, which I adopt as part of my argument, I submit, in the first place, that if an adult, along with minors, submits to an agreement, the adults cannot withdraw: see Russell on Arbitration and Halsbury's Laws of England, Vol. XVII, p. 67. The appellant cannot therefore repudiate the contract.

[BEACHCROFT J. Your main premise is wrong. There was no contract.]

I am arguing on the extreme supposition that you hold, in view of the Privy Council case cited, that the mother could not represent the minors.

In the next place, a submission and award will bind minors also in some cases: *Temmakal* v. *Subbammal* (1).

TEUNON J. This appeal arises out of an application made under rule 17 of the second schedule to the Code of Civil Procedure.

It appears that the descendants of a person of the name of Jhalu Mandal are in dispute as to the extent of their joint properties and as to the manner in which they should be distributed amongst them. On the 21st October, 1916, these persons entered or purported to enter into an agreement to refer the dispute to the decision of certain arbitrators. The application under rule 17 was made by or on behalf of five of the persons whose signatures appear on the agreement to refer. It was made on the 4th April, 1917. After hearing the parties, the Subordinate Judge directed that the agreement should be filed and that the matters in dispute should be referred to the arbitrators named in the deed of agreement. Against this order, Mohsiuddin Ahmed, one of the parties to the agreement, has appealed.

He contends before us that in entering into this agreement he acted under coercion, and he further contends that as a matter of fact the agreement referred to was abandoned by the parties thereto and never became operative. These are matters into which we do not think it necessary to enter, because we are of opinion that on a further contention this appeal must succeed. Of the persons who purported to enter into the agreement, two are minors, viz., Din Mahomed and Kasirannessa, in whose behalf, when executing this agreement, their mother, Sakina Bibi, acted. It is contended by the appellant that inasmuch as Sakina Bibi, the mother, was not appointed guardian of the

(1) (1864) 2 Mad. H. C. R. 47.

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properties of the minors by the District Judge under the Guardians and Wards Act, she is not competent to deal with the properties of the minors and not competent to enter on their behalf into the agreement to refer to arbitration, the said agreement being one which will necessarily, if acted upon, involve dealings with the properties of the minors.

To this contention, in view of the decision of their Lordships of the Privy Council in *Imambandi* v. *Mutsaddi* (1), we think there can be no sufficient answer. It is true that in that case their Lordships of the Privy Council were dealing more particularly with cases of sale or mortgage, but they had in view also the general question how far and under what circumstances according to Mahomedan law dealings by a mother or other unauthorised guardian of a minor are operative. They observe, *inter alia*, "the mother has no longer powers to deal with her "minor child's property than any outsider or non-"relative who happens to have charge for the time "being of the infant. The term '*de facto* guardian' "that has been applied to those persons is misleading: "it connotes the idea that people in charge of a child "are by virtue of that fact invested with certain "powers over the infant's property. This idea is "quite erroneous." Later on they further say,—"without such derivative authority"—(that is, authority derived either from powers given by a will or by appointment by the Judge as guardian)—if the mother "assumes charge of their property of what-"ever description and purports to deal with it, she "does so at her own risk, and her acts are like those "of any other person who arrogates an authority "which he does not legally possess. She may incur "responsibilities, but can impose no obligations on

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"the infant." In view of this decision and these observations we cannot but hold that in the present case the mother is not competent to bind the infants by this so-called agreement to refer to arbitration.

In answer to this it is suggested that the reference to arbitration is for the manifest advantage of the infants and therefore comes within the third class of the exceptions provided for the protection of a minor child who has no *de jure* guardian. But to that suggestion we are unable to accede. Acts coming within the third exception are acts purely advantageous to the infant, or as it has been put in the judgment to which we have referred, acceptance on behalf of the minor of an unburdened bounty. It is clear that agreements to refer to arbitration disputes between infants and other persons regarding their movable and immovable properties do not come within this exception.

It has further been contended that the appellant Mohsiuddin Ahmed having entered into this agreement is not competent to withdraw therefrom. This also is a proposition which we are unable to accept Even if he had entered into it voluntarily, it would seem that he did so under a misconception as to the legal authority of the mother to bind her infant children by her dealings with their property. But now that he has been advised that, as is apparent from the judgment to which we have referred, the mother has no such legal authority and that the agreement is not binding upon the infants, it is clear that he should not be compelled to undergo the expenditure of time and money involved in a proceeding which may very possibly, and indeed, in all probability, will in the end, prove futile and infructuous.

A further contention was advanced to the effect that by an application made to the District Judge

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under the Guardians and Wards Act, two persons, one Sakina Bibi's brother, Haidar Buksh, was appointed guardian of the properties of the two minors to the extent of about one-third of their value, and that another person Khabiruddin Ahmed, who is one of the respondents in this appeal, was appointed guardian of the minors' remaining properties; these appointments, however, were both conditional on the furnishing of security. Haidar Buksh, it is true, furnished the required security. Khabiruddin Ahmed never furnished that security, he never acted as guardian of the properties of the minors, and in fact his appointment as guardian never became operative. It follows that Haidar's assent subsequently given to the agreement to refer and Haidar's participation in or assent to the application under rule 17 cannot validate the agreement which forms the basis of that application.

We, therefore, decree this appeal and set aside the order of the District Judge with costs. We assess the hearing fee in this Court at five gold mohurs. The costs are to be paid by the contesting major respondents.

BEACHCROFT J. I agree and wish only to add a few words with reference to an argument which was advanced before us. It was that the case of *Imambandi* v. *Mutsaddi* (1) did not conclude the matter before us, as there are special rules in the Hedaya with regard to partition. We were referred to one, which provides that in case of a partition between an adult and a minor, the *kazi* must appoint some one to act for the minor, and it was argued that here the Court had found the mother a fit person to represent the minors. The short answer to that is that

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the District Judge, who takes the place of the *kazi* in Mahomedan law, did not appoint the mother and the fact that the Court subsequently found her fit to act for the minors would not validate an arrangement, which in its inception was invalid.

S. M. *Appeal allowed.*

INSOLVENCY JURISDICTION.

Before Greaves J.

1920

Feb. 10.

LALBIHARI SHAH, *In re.**

Insolvency—Jurisdiction—Order by Registrar in Insolvency, appeal from—Limitation—Reference under Sch. II, s. 18 of Act III of 1909—Validity of mortgage, question of—Consent of parties—Presidency Towns Insolvency Act (III of 1909), ss. 6, 101; Sch. II, s. 18—The Calcutta Insolvency Rules, 1910, Rule 5.

The period of limitation prescribed by section 101 of the Presidency Towns Insolvency Act (III of 1909) for an appeal from an order made by the Registrar in Insolvency, shall be computed not as from the date when the findings of the Registrar are signed or filed but as from the date when the report is signed by the Registrar and the matter is thereby completed.

Upon application by certain persons claiming to be mortgagees of an Insolvent's estate, an order was made by the Court directing them to prove their mortgage before the Registrar in Insolvency under section 18 of the second schedule of the Presidency Towns Insolvency Act (III of 1909):

Held, that under such reference to him, the Registrar had no jurisdiction to deal with the question of the validity or otherwise of the mortgage, even with the consent of the parties before him, so as to affect the interest of infants adversely by his decision.

APPEAL by Mirzamull Boid, Jaharmull Boid, Punam Chand Boid, Bhowar Lal Boid, Inder Chand Boid and Chandmull Boid from the Report of the

*Insolvency Suit No. 190 of 1914.