APPELLATE CIVIL.

Before Mr. Justice Baguley.

MAUNG THIN MAUNG AND OTHERS
v.
MA SAW SHIN AND OTHERS.*

1933
Jan. 16.

Guardian and Ward—Natural or de facto *guardian's power to dispose of ward's property—Burmese Buddhist minor.*

Burmese Buddhist law does not recognise guardians of the property of minors. A *de facto* or a natural guardian of a Burmese Buddhist minor cannot validly dispose of or encumber in any way the property of his ward. To be enabled to do so a person must apply to be appointed guardian, and obtain the sanction of the Court under the provisions of the Guardians and Wards Act.

Imambandi v. *Mutsaddi*, I.L.R. 45 Cal. 878; *Ma Si* v. *Hoke Hu*, 13 B.L.T. 9; *Mata Din* v. *Ahmad Ali*, I.L.R. 34 All. 213—*referred to.*

Sanyal for the appellants.

Mukerjee for the respondents.

BAGULEY, J.—The plaintiffs, who are appellants in this Court, filed a suit against the six respondents claiming a mortgage over certain property. This property belonged to defendants 2 to 6 inclusive. They were met by the defence that defendants 2 to 6 were all minors at the time the mortgage was entered into. The mortgage, it may be mentioned, was signed only by the first three defendants. An application was made to amend the plaint in which the plea was taken that the mortgage was executed for the benefit of the defendants and for the sake of necessaries, but the application to amend the plaint was rejected, and an appeal against this refusal to allow amendment was also rejected. The case in consequence went to trial on the original plaint with the result that the plaintiffs got a money decree for

* Civil Second Appeal No. 173 of 1932 from the judgment of the District Court of Pyapôn in Civil Appeal No. 10 of 1932.

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Rs. 1,000 against Ma Saw Shin only. An appeal was filed to the District Court on three grounds, namely, that the trial Court erred in disallowing the amendment of the plaint, that it erred in not allowing the appellants to adduce evidence of how the full amount of Rs. 3,500 claimed was arrived at and that the trial Court erred in not holding that the respondents 2 and 3 were majors at the time they executed the mortgage. The District Court held that the question of allowing amendment of the plaint having already been taken up once in appeal it could not be taken up again, and with regard to the question whether the 2nd and 3rd defendant-respondents were minors at the time of the execution of the mortgage deed it agreed with the trial Court and found definitely as a fact that these defendants were minors at the time of the execution. The present appeal has been filed on many grounds, but only two have been argued. In the first place, it was strongly contended that amendment of the plaint should have been allowed, and, in the second place, it was contended that defendants 2 and 3 by misrepresentation had induced the appellants to believe that they were majors at the time they executed the mortgage deed and, therefore, they or their interest in the estate, should be held to be bound by the mortgage deed. The second point was never raised in either of the lower Courts. It is a point of fact which certainly should have been raised, and it cannot be raised in second appeal. In any event, as the District Judge has agreed definitely with the trial Court that the evidence of the witnesses who say that Tin U and Ma E Kyi told the plaintiffs that they were of age, is entirely unreliable, there is (in consequence) no evidence worthy of consideration of any such misrepresentation. The main argument

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adduced, however, was that the plaintiffs should have been allowed to amend their plaint in order that they might get a decree binding the interests of the minors in the property purporting to have been mortgaged. It seems to me that to allow such amendment would be quite useless because even on the facts alleged the interests of the minors would not have been bound. The only person capable of executing the deed, who executed this mortgage, was Ma Saw Shin. She is the mother and the *de facto* guardian of the minors, but no case has been brought to my notice which is authority for holding that the *de facto* guardian of a Burmese Buddhist is able to bind his ward's estate.

For the appellants the only case quoted was *Bon Kwi* v. *S.K.R.S.K.R. Firm* (1); but this case seems to me to be entirely irrelevant to the point now in issue. This was a case in which Chinese Buddhists were concerned. In the argument and in the judgment nothing is said with regard to the powers of a guardian to deal with the interests of his minor ward. A reference to the case itself shows, at page 34 of the printed book, in the deposition of Ma Kyin Yon the widow, that when her husband died he left surviving him five children one of whom was Son Hock who died before the case got to the Privy Council, and it was his sons who were the minors before the Privy Council. It will be seen, therefore, that this ruling in no way deals with the powers of a guardian to deal with the property of his wards. It is rather striking that there seems no direct authority with regard to the powers of a guardian to bind his ward's estate in any of the authorised rulings except in cases in which the minor was either

1) (1930) I.L.R. 8 Ran. 172.

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a Mohammedan or a Hindu. It may perhaps be remarked in passing that it is not quite clear that Hindu or Mohammedan minors are governed by any separate rule in this province from the ordinary rule. The Burma Laws Act, s. 13, refers to special laws in cases in which the Court has to decide questions regarding succession, inheritance, marriage, caste or any religious usage or institution. At first sight it is rather difficult to see how the binding of a ward's estate by a guardian can be regarded as a question regarding succession, inheritance, marriage, caste or religious usage. Be that as it may, in this case the general law seems to apply.

In Trevelyan on Minors, Sixth Edition, page 167, there is a passage, "The law applicable to persons other than Hindus and Mohammedans does not permit guardians other than those appointed by the Court or having power given to them by the instrument appointing them to sell or charge the immovable property of their wards," but it is unfortunate that the text-book writer seems to have found himself unable to quote any case to support his dictum. It has, however, been followed by a Bench of the late Chief Court in *Ma Si* v. *Hoke Hu* (1), and there is a passage in the judgment of the Privy Council in *Mata Din* v. *Ahmad Ali* (2) which is also referred to in *Imambandi* v. *Mutsaddi* (3) another Privy Council ruling which seems to me to be to the point. This case dealt with a Mohammedan minor but in terms this passage is quite general. It runs as follows:

"It is difficult to see how the situation of an unauthorised guardian is bettered by describing him as a '*de facto*' guardian.

(1) 13 B.L.T. 9. (2) (1912) I.L.R. 34 All. 213, 222.
(3) (1918) I.L.R. 45 Cal. 878.

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 the present case Ma Saw Shin was, in fact, the guardian of the remaining defendants. She was the natural guardian, but so far as I am aware she was in no way the legal guardian. Buddhist law does not seem to recognise guardians of the property of minors, at any rate, May Oung's and Lahiri's works do not contain the word "guardian" in their index, and even if it did I doubt that the principles of Buddhist law would apply because, as I have said before, s. 11 of the Burma Laws Act does not appear to cover the question which is now under consideration. The ordinary rule seems to me to apply, and, that is, that unless a guardian is appointed by the Court and gets permission from that Court to dispose of the property of his ward he cannot part with or in any way encumber the property of that ward.

An attempt was made to argue that s. 68 of the Contract Act would govern the case, but s. 68 of the Contract Act refers to a person who supplies a minor with necessaries suited to his condition in life. This, however, does not show that a guardian can execute a valid mortgage of the ward's properties. It does not seem that it can be held as necessary in the interests of justice, equity and good conscience to hold that the minor's estate must be bound. The plaintiffs had a perfectly good way of getting a valid mortgage over the minor's property. They had only got to direct Ma Saw Shin to apply to the Court to be made guardian of the estate of her children—quite a simple matter—not entailing an expensive *ad valorem* Court fee, and then they were in a position to direct Ma Saw Shin to get the consent of the Court to execute the mortgage. People who choose to take