FULL BENCH.

Before Shadi Lal C. J., Broadway and Tek Chand JJ.

1930

March 20.

SHAM DAS (PLAINTIFF) Appellant

versus

UMER DIN AND OTHERS (DEFENDANTS) Respondents.

Civil Appeal No. 1073 of 1924.

Guardians and Wards Act, VIII of 1890, sections 7, 29, 34—Guardian appointed by Court—status of—prior to complying with condition as regards security—Hindu Law—Mother of minor—Natural Guardian—sale by—whether voidable.

In 1902 the mother of a minor, governed by Hindu Law, was appointed under section 7 of Act VIII of 1890 guardian of his property "on her supplying Rs. 2,500 security," but she did not furnish the security till 1909. In the meantime, in 1906, she sold a part of the minor's immovable property. The son, on attaining majority, sued the vendee for recovery of the property on the allegation that his mother, having been appointed guardian under the Act in 1902, had no power to sell it, without the sanction of the Court under section 29.

Held, that section 7 of the Guardians and Wards Act, under which the Court has full power to appoint a guardian on such terms and subject to such conditions as it, in its discretion, considers conducive to the welfare of the minor, is not controlled by section 34, the powers conferred by which are not exclusive, but additional.

And, therefore, an order appointing a person guardian of the property of a minor, conditional on his furnishing security, is not *void ab initio*.

Harendra Nath Mukerjee v. *Ardhendu Kumar Ganguly* (1), and *Subba Naik* v. *Rama Ayyar* (2), followed.

In re Natha Venkatesa Perumal (3), dissented from.

Gopammal v. *Srinivasa Aiyangar* (4), referred to.

(1) (1914) 24 I. C. 202, 203. (2) (1917) I. L. R. 40 Mad. 775.
(3) (1926) I. L. R. 49 Mad. 809 (F. B.).
(4) (1916) 30 Mad. L. J. 508.

1930

SHAM DAS
v.
UMER DIN.

Held also, that, whether an appointment of this kind takes effect from the date when the conditional order was passed or the date when the condition was complied with, depends upon the wording of the order passed in each case. Where (as in the present case) the furnishing of security is a condition precedent to the appointment, it cannot be effective so long as the condition remains unfulfilled.

Freeman on *Judgments*, volume I, page 220, and Broom's *Legal Maxims*, page 85, referred to.

Held, therefore, that, as on the date of the sale the status of plaintiff's mother was that of a *natural* and not a *certificated*, guardian, it was not necessary for her to take the permission of the Court under section 29 of Act VIII of 1890 for making the transfer, and the validity of the transaction must be judged by the rule of Hindu Law, which permits a natural guardian to alienate the property of his ward in case of necessity or for the benefit of the estate.

Second appeal from the decree of W. Malan, Esquire, District Judge, Amritsar, dated the 19th January 1924, affirming that of Khawaja *Abdus Samad, Subordinate Judge, 1st class, Amritsar, dated the 15th July 1922, dismissing the plaintiff's suit.*

GOBIND RAM KHANNA, for Appellant.

BASANT KRISHEN, for Respondents.

TEK CHAND J.—The facts of the case, which has given rise to this reference, fall within a very narrow compass and may be shortly stated as follows: The appellant Sham Das, when he was an infant, inherited from his father immovable property of considerable value. His mother *Mussammat* Gopi was the natural guardian of his person and property under Hindu Law, which admittedly governed the family. It was, however, thought proper to appoint a guardian

TEK CHAND J.

1930

SHAM DAS
v.
UMER DIN.

TEK CHAND J

of his property under Act VIII of 1890. Accordingly, on the 13th of November 1902, the District Judge passed an order appointing *Mussammat* Gopi guardian of the property "on her supplying Rs. 2,500 security." For some reason or other, *Mussammat* Gopi failed to comply with this condition for more than six years and it was not until 16th March 1909 that she furnished the required security. In the meantime, on the 17th of August 1906, she sold a part of the immovable property belonging to the minor which, after passing through several hands, is now held by defendants 2-7. On attaining majority, Sham Das brought an action for possession of the property sold, urging that the sale by *Mussammat* Gopi was not binding upon him, as she had been appointed guardian under the Act before the sale and had not obtained sanction of the Court to sell, as required by section 29. The contesting defendants pleaded *inter alia* that, as the order of the District Judge, dated the 13th of November 1902, appointing *Mussammat* Gopi guardian, was conditional on her furnishing security, and as the security was not actually furnished till March 1909, the status of *Mussammat* Gopi on the date of the sale was that of an ordinary guardian under the Hindu Law, and not that of a certificated guardian under Act VIII of 1890, and that the sale being for the benefit of the plaintiff was binding upon him. Both the Courts below have accepted this plea, and have dismissed the suit, holding that the sale was beneficial to the plaintiff.

On second appeal the following three questions of law were raised before the learned Judges of the

Division Bench, who, having regard to the general importance of the points involved, have referred them for the opinion of the Full Bench :—

" On the 13th November 1902 a person is appointed, under section 7 of the Guardians and Wards Act, to be the guardian of the property of a minor on his furnishing security, but does not furnish security until the 16th March 1909—

" (A) Is the order of appointment *void ab initio* so that the minor does not become a ward of the Court ?

" (B) If the order is not void, does the appointment take effect from the 13th November 1902, or the 16th March 1909 ?

" (C) In the latter case is an alienation of the immovable property of the minor made by his natural guardian without the permission of the Court a void or voidable transaction ? "

On the first question, I can see no reason for holding that an order appointing a person guardian of the property of a minor, conditional on his furnishing security, is *void ab initio*. Section 7 of the Act, which empowers the Court to make an order appointing a guardian of the person or property of the minor is comprehensive in its terms and does not lay down, expressly or by necessary implication, that the Court cannot impose a condition of this kind in cases where it thinks fit to do so. The paramount consideration which the Court has to keep in view in making appointments under this

1930

SHAM DAS
v.
UMER DIN.

TEK CHAND J.

section is the welfare of the minor. If, in a particular case, the Court considers an applicant to be personally fit to manage the estate, but is of opinion that, in order to safeguard the interests of the minor and to ensure the proper management of the estate, such person should be entrusted with his duties only if he furnishes security, there seems to be no reason why it should not make the appointment conditional on such security being furnished. I can find nothing in the Act which prohibits the Court from passing such an order, nor do I see why, on general principles, the discretion of the Court should be fettered in this behalf. Rule 5 of the rules framed by the Lahore High Court under section 50 lays down that, except in cases in which, for reasons to be recorded in writing, the Court directs otherwise, every guardian of property appointed by the Court (other than the Collector of the district) shall be required to execute a bond in the prescribed form with or without a surety or sureties, as the Court may think fit to direct, in a sum not less than the total estimated value of the movable property and three years' profit of the estate. The form of the bond prescribed in these rules is as follows :—

"* * * * *. Whereas by an order of the Court of the District Judge made on the———— day of————under section 7 of the Guardians and Wards Act (VIII of 1890) the above-named———— *has, subject to his entering into a bond* in Rs.————, *been appointed* guardian of the property, etc. * * * "

It will be seen that these rules clearly contemplate that a conditional order of appointment can be made under section 7, and it is a matter of common experience that such orders are frequently passed by

Courts in this province, but so far as I am aware their legality has never been disputed.

The question has, however, been considered in Madras, where similar rules had been promulgated by the High Court and followed for a number of years. It first arose incidentally in the case reported as *Gopammal* v. *Srinivasa Aiyangar* (1), where the Judges composing the Division Bench expressed divergent views. In that case a conditional order of this description had been passed and upheld on appeal. Subsequently the required security was furnished and approved by the District Judge. On an appeal being preferred to the High Court against the order approving the security, it was objected that the appeal was incompetent under section 47 (*a*). Both the Judges agreed in upholding the objection and dismissed the appeal. In arriving at this conclusion Sadasiva Aiyar J. remarked that the original order making the appointment of the guardian conditional on his furnishing security was illegal as the only provision in the Act authorizing the Court to pass an order for security was under section 34 (*a*), under which security could be demanded only *after* the appointment of a guardian had been made under section 7. The learned Judge expressed the opinion that the Act contemplated first the appointment of the guardian under section 7 and then his giving security, if so required, under section 34 (*a*), and his liability to be removed under section 39 (2) if he failed to furnish security contumaciously. He held accordingly that rule 240 of the Rules and Orders of the High Court, which permitted such appointments, was *ultra vires*

(1) (1916) 30 Mad. L. J. 508.

1930

SHAM DAS v. UMER DIN.

EK CHAND J.

and the appointment was invalid. Moore J. did not accept this view as correct and observed :—

"The practice in the mofussil is this: when a guardian of the property is appointed, a time is fixed for his furnishing security. The appointment is made conditional on security being furnished. If the guardian fails to do so, or if the security tendered is insufficient, the petition is dismissed. The formal order of appointment is not signed and the petition is treated as pending until the guardian has furnished the required security. This procedure appears to be correct and does not, I think, contravene any express provision in the Act." After pointing out that section 7 is silent as to furnishing security, and that section 39 (*e*) applied only when a guardian was guilty of contumacious disregard of any provision of the Act or any order of the Court: but that a guardian who failed to furnish security, perhaps for unavoidable reasons, or was unable to furnish sufficient security, could hardly be said to be acting in contumacious disregard of the order of the Court, the learned Judge came to the conclusion that rule 240 aforesaid was not *ultra vires*.

The question was again considered by the same Court in *Subba Naik* v. *Rama Ayyar* (1), where Ayling and Seshagiri Aiyar JJ. adopted the view of Moore J. in the Madras Law Journal case already cited, and held that there was nothing in the Act to make such an appointment illegal. They explained that clause (*a*) of section 7, which spoke of a guardian being appointed, did not negative the suggestion that such an appointment might be made conditional upon the furnising of security, and that section 34 was a further provision which enabled the Court to demand

(1) (1917) I. L. R. 40 Mad. 775.

security even in the case of persons originally appointed unconditionally. "It may be in the interests of the minor", observed the learned Judges, "that there should be a prompt appointment of a guardian, and the Court may, after making the appointment to take effect at once, insist upon the guardian giving security. It is that class of cases that section 34 provided for. It does not take away the general power possessed by the Court of imposing conditions upon persons who are appointed guardians."

The most recent Madras decision bearing on the point is *In re Natha Venkatesa Perumal* (1), where the question arose in reference to the provisions of section 3 of the Indian Majority Act. In that case an order had been passed under Act VIII of 1890 appointing a certain person as guardian of the person and property of a minor conditional on his furnishing security, but such person had died a few months later without having furnished the required security. No other guardian had been appointed, and the question for decision was whether the minor attained majority at the age of 18, or whether the period of his minority was extended under the Indian Majority Act till he had completed his 21st year. The Full Bench ruled that the minor in that case had not become a ward of the Court and that he attained majority as soon as he was 18 years old. The learned Judges endorsed the reasoning of Sadasiva Aiyar J. in *Gopammal* v. *Srinivasa Aiyangar* (2), and held that it is not open to the Court under Act VIII of 1890 to pass a conditional order of the description given above. They further

(1) (1926) I. L. R. 49 Mad. 809 (F.B.). (2) (1916) 30 Mad. L.J. 508.

1930

SHAM DAS
v.
UMER DIN.

TEK CHAND J.

held that the order was bad *in toto* as the actual appointment had been made dependent upon a condition which was not warranted by the statute.

After giving the matter my most careful consideration I venture to think that the actual decision in the case last cited, that the minor attained majority at the age of 18, was correct, but I feel constrained to say, with all respect, that the reasoning on which it is based is defective. As stated already, the appointment had been made conditional upon security being furnished, but as this condition was not complied with, the order never became effective. The proposed guardian died before he had entered upon his duties and no other guardian was appointed. The minor never became a "ward" as defined in section 4 (3) of Act VIII of 1890 and for this reason the case did not fall within the first part of section 3 of the Indian Majority Act. The minor therefore attained majority when he had completed the age of 18. The view of the learned Judges that a conditional order of appointment could not be passed under section 7 is based on the assumption that section 34 (*a*) is exhaustive as to the powers of the Court to demand security. With all respect, I think that there is no warrant for this assumption. This section obviously confers on the Court powers which are additional, and not exclusive. It deals with the obligations of a guardian of property, who has already been appointed as such, and empowers the Court to require him to furnish security if and when, subsequent to his appointment, it becomes necessary to do so. It does not in any manner control or qualify section 7, under which the Court has full power to make the appointment on such terms and subject to such conditions as it, in its discretion,

1930

SHAM DAS
v.
UMER DIN.

TEK CHAND J

considers conducive to the welfare of the minor. This view is in accord with that taken by the Calcutta High Court in *Harendra Nath Mukerjee* v. *Ardhendu Kumar Ganguly* (1), where a Division Bench rejected the argument that an order appointing a person as guardian on condition that he furnished security in a certain sum should be taken to have been passed under section 34, and not under section 7. Mookerji J., who delivered the judgment of the Court, observed that section 7 is couched "in the widest possible terms and entitles the Court to impose such conditions as may be necessary for the protection of the person or property of the infant. To such a case section 34 has obviously no application. That section merely defines the obligations of the guardian of the property appointed or declared by the Court * * *. It is plain that the conditional order in this case for the appointment of the appellant as guardian was and could only have been made under sub-section (1) of section 7." After giving the matter my best consideration, I am of opinion that an order appointing a person guardian of the property of a minor, conditional on his furnishing security, is not *void ab initio*, and I would answer question (A) in the negative.

The second question for consideration is whether an appointment of this kind takes effect from the date when the conditional order was passed, or the date when the condition was complied with. The answer to this question will depend on the wording of the order passed in each case. If, as in the case before us, furnishing the requisite security is a condition precedent to the appointment, there can be

(1) (1914) 24 I. C. 202, 203.

1930

SHAM DAS v. UMER DIN.

ER CHAND J.

no doubt that it cannot be effective so long as the condition remains unfulfilled. It is not denied that in such a case the guardian-designate could not be entrusted with the control of the minor's estate and could not deal with any part of his property until he had furnished the required security. In sub-section (2) of section 4 of Act VIII of 1890 "guardian" is defined as meaning "a person *having the care* of the person of a minor or his property or of both his person and property." Obviously a person, whose title and authority as well as the right to take possession of property are dependent upon his fulfilling a certain condition, cannot be said to have "the care" of such property so long as he has not complied with the specified condition. It is only when this has been done that he is clothed with the character of a "guardian," and it is from that time that his appointment takes effect.

It is hardly necessary to point out that if the contrary view, that the appointment is effective from the moment the conditional order was passed, were to be accepted, some very serious consequences would follow. In sub-section (2) of section 7 it is laid down that an order of appointment under that section shall result in the automatic removal of any guardian who has not been appointed by will or other instrument, or appointed or declared by the Court. According to this statutory provision the natural or *de facto* guardian who had hitherto held charge of the minor's estate became *functus officio* as soon as the order in question was passed, for *ex hypothesi* another person had been appointed guardian under the Act. But such person himself could not act so long as he had not complied with

the condition laid down in the order of appointment. What, then, is to happen to the estate in the meantime? Does the law contemplate that it is to be in charge of no one, and is to remain wholly unprotected and unlooked after in the interval? Such an absurdity cannot be imputed to the legislature and, in the absence of a clear expression of its intention in the statute, an interpretation which leads to such startling results must be rejected.

It is, however, suggested that the order was suspensory in its nature and that, the moment the condition was fulfilled, it at once related back to the date when the original order was passed. The doctrine of *nunc pro tunc* is invoked, according to which retroactive effect is given to an act which was omitted to be done at the proper time, but which is afterwards performed and, by a legal fiction, it is given the same force and virtue, and is attended with the same consequence as if it had been regularly done. In my opinion, this argument is fallacious and is based on an erroneous view of the rule of *nunc pro tunc*, which is really based on the maxim *actus curiae neminem gravabit* (see Freeman on *Judgments*, volume I, page 220, and Broom's *Legal Maxims*, page 85). The applicability of this rule is confined to those cases only in which some hardship would be visited upon a party, without any fault of his, unless he were relieved from it by allowing "a proceeding to be taken *now* for *then*, *i.e.*, for the proper time when it should have been taken." A person who could have complied with the conditional order forthwith, but who delayed doing so for reasons of his own, cannot invoke this doctrine, and be heard to say that his authority and title related back to the date when the

1930

SHAM DAS
v.
UMER DIN.

TEK CHAND J.

order imposing the condition was passed. To do so would not only be contrary to the underlying principle of the rule, but might lead to a great deal of injustice to innocent third parties.

In my opinion, the answer to question (B) is that the appointment of the plaintiff's mother as guardian under Act VIII of 1890 took effect from 16th March 1909.

The last question presents no difficulty. On the date of the sale in dispute, the status of the plaintiff's mother was that of a *natural*, and not a *certificated*, guardian, and consequently it was not necessary for her to take the permission of the Court under section 29 for making the transfer. The validity of the transaction must therefore be judged by the rule of Hindu Law, which permits a natural guardian to alienate the property of his ward in case of necessity or for the benefit of the estate.

For the foregoing reasons I would answer the reference as follows :—

(A) The appointment is not void *ab initio*;

(B) The appointment took effect from 16th March 1909;

(C) The alienation in question can be avoided by the *quondam* minor if it was not effected for necessity or the benefit of the estate.

SHADI LAL C.J. SHADI LAL C. J.—I concur.

BROADWAY J. BROADWAY J.—I concur.

N. F. E.