Before Mr. Justice Ainslie and Mr. Justice McDonell.

ABHASSI BEGUM (DEFENDANT) *v.* MOHARANEE RAJROOP KOONWAR AND OTHERS (PLAINTIFFS).*

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Feb. 14, 15, *and March* 11.

Mortgage of a Minor's Property—De facto Guardian, Powers of—Act XL of 1858, s. 18.

No greater powers can be exercised by a *de facto* guardian who has not legally completed his right to manage a minor's estate, than can be exercised by a guardian duly appointed under Act XL of 1858, with reference to which Act his powers must be determined.

THIS was a suit brought to recover a certain sum of money advanced by the plaintiff to one Umda Khanum, as mother and guardian of one Abhassi Begum, for the alleged purpose of repaying the debts due from the estate of Aga Wahid Ali, the deceased husband of Umda Khanum, such property being the share inherited by the mother and daughter on the death of the father. The sums so advanced were secured by a mortgage of certain properties, executed on the 19th September 1868, by Umda Khanum in favor of the plaintiff. Umda Khanum admitted the plaintiff's claim, but Ahbassi Begum, who had attained her majority, contended that her mother was not her legal guardian at the time the mortgage was made, and had no power over her property, and that the money secured by the mortgage deed was not borrowed under legal necessity, nor was it applied to her benefit. The Subordinate Judge found that, at the time the mortgage was made, Umda Khanum had been acting as guardian of her daughter, and that the sums borrowed were for the benefit of the estate of the daughter, and were absolutely necessary, and therefore decreed the suit in favor of the plaintiff.

Abhassi Begum appealed to the High Court against this decision.

Mr. *Amir Ali* and Mr. *R. E. Twidale* for the appellant.—There was no necessity for the advance and mortgage, and before the minor's estate can be bound, strict proof of necessity

* Regular Appeal, No. 109 of 1876, against the decree of Baboo Booluckchund, Subordinate Judge of Zilla Gya, dated 17th December 1875.

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must be given—*Bodh Mul* v. *Gouree Sunkur* (1) and *Deoputtee Koonwar* v. *Dhumoo Lall* (2). The lender also is bound to see that there is good ground for supposing the transaction to be for the benefit of the minor—*Lalla Bunseedhur* v. *Koonwur Bindeseree Dutt Singh* (3). Admitting the guardianship to have been valid under Act XL of 1858, it was put an end to on Abhassi's marriage, which took place prior to the execution of the bond. Act XL being then in force, under s. 18 it was necessary to obtain the sanction of the Court to sales and mortgages by guardians: no such sanction was obtained by Umda Begum. No greater power can be exercised by a "*de facto*" guardian than can be exercised by a guardian "*de jure*"—*The Court of Wards* v. *Kupulmun Sing* (4). That was a decision under Act XXXV of 1858, s. 14; but there is a similar provision in s. 18 of Act XL of 1858. Sales conducted without such sanction are invalid—*Debi Dutt Sahoo* v. *Subodra Bibee* (5) and *Shurrut Chunder* v. *Rajkissen Mookerjee* (6). Further, according to the text of Macnaghten's Precedents of Hindu Law, Vol. I, p. 104, a mother cannot be a guardian to her minor daughter.

Baboo *Juggadanund Mookerjee*, Baboo *Mohesh Chunder Chowdhry*, and *Moonshee Mahomed Yussoof* for the respondent.

The judgment of the Court was delivered by

AINSLIE, J.—This suit is brought by the plaintiff against Mussamut Umda Khanum and her daughter Mussamut Abhassi Begum to recover Rs. 37,018-10-9 on a bond dated 19th September 1868 for Rs. 20,000, bearing interest at 15 per cent. per annum, which has accumulated until it now amounts to Rs. 17,018-10-9, such bond having been executed by the first defendant during the minority of her daughter on her own account and as guardian of her daughter.

The bond contains a pledge of a five-sixth share of thirty-two villages, formerly belonging to Aga Wahid Ali Khan, the

(1) 6 W. R., 16.
(2) 11 W. R., 240.
(3) 10 Moore's I. A., 454.
(4) 10 B. L. R., 364; S. C., 19 W. R., 164.
(5) I. L. R., 2 Calc., 283.
(6) 15 B. L. R., 350.

husband of Umda Khanum and father of Abhassi Begum, being the share which, under the Mahomedan law of inheritance, has descended to the two defendants jointly after deducting a one-sixth share taken by his mother.

The bond recites that monies were due to Duli Chand under four decrees, all bearing date 12th May 1862, in respect of debts due by Aga Wahid Ali; and that the executant and her daughter were liable for the amount in proportion (to their shares in the estate), and that the said decrees had been put in force and the property of the executant had been attached and advertised for sale: the amount due to Duli Chand is not stated.

It further recites that there existed other pressing necessities, such as payment of Government revenue and sundry other rents, and defraying the expenses of law-suits instituted for recovery of arrears due from defaulters; and goes on to state that the said decrees and charges had been paid out of the money borrowed.

It also contains an assignment of Rs. 733 per annum from 1266 to 1285, out of Rs. 1,400, the rent payable by Himmutram in respect of a lease of Mr. Baugawan in part-payment of the annual interest.

The answer of the defendant is, that at the date of the bond she was already married, and that her husband being of full age was her proper and legal guardian; that her mother never obtained legal authority to act as guardian or sanction of the Civil Court to the mortgage; that she has derived no benefit from the transaction; and that the allegations in the bond are false, and that her father's estate yielded a clear annual income of Rs. 5,000.

The Subordinate Judge gave one judgment in this and three other suits, in which about Rs. 36,000 was claimed under three other bonds of 1869, 1870, and 1871 respectively. In these last he absolved Abhassi Begum, holding Umda Khanum personally liable. In this suit he held that although by the Mahomedan law a mother is not the guardian of the estate of a minor child, yet, as a matter of fact, Umda Khanum had acted as guardian of her daughter from the death of Wahid Ali in

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1858, when Abhassi was an infant of a few months old, up to the time when she attained her majority; and that during this period of nineteen years neither Abhassi's husband, nor any one else, ever questioned her authority; and that as late as 16th December 1874, Abhassi, through her pleader, alleged in the Magistrate's Court that she was still a minor, and that her property was under the management of her mother. He also found that, at the date of the bond, there were debts chargeable to the estate of Wahid Ali Khan which Umda had to pay, and that there were also the marriage expenses of Abhassi, and the expenses of unavoidable law-suits to be defrayed.

In the course of his judgment, the Subordinate Judge refers to a proceeding taken for the purpose of placing the estate of Abhassi Begum under the charge of the Court of Wards, which he says was abandoned, the management being left to the mother. This paper is not of much importance, as it bears date nine days before Act XL of 1858 was passed. The fact that the Court of Wards did not then choose to interfere does not really alter the position of the mother as a guardian *de facto*, who has abstained from taking out a certificate under the Act of 1858.

Abhassi Begum appeals against the decree of the lower Court so far as it affects her, and denies her mother's right to raise money on mortgage of the estate at any time, and more especially after her own marriage; and contends that it is evident from the facts apparent on the record that she derived no benefit from her mother's acts; but, on the contrary, will be seriously prejudiced if they are allowed to have effect against her.

The right under the Mahomedan law of a mother to the guardianship of her minor daughter was discussed at the hearing of this appeal, but into this question we need not enter. We quite concur with the Subordinate Judge in holding it fully proved that, as a matter of fact, no other person than Umda Khanum did, up to 1868, and for years after, pretend to undertake the management of Abhassi Begum's property as her guardian.

It is unnecessary to go to the Mahomedan law to ascertain how far a stranger was justified in dealing with Umda Khanum

in respect of her daughter's interests. Act XL of 1858 had been in force for nearly ten years when this transaction occurred, and the power of a guardian *de facto* to mortgage property of his ward must be determined with reference to this Act.

This question has been settled by several decisions, in which it has been ruled that, since the passing of Act XL of 1858, no greater powers can be exercised by a *de facto* guardian who has not legally completed his right to manage a minor's estate than can be exercised by a guardian duly appointed under that Act. See the cases of the *Court of Wards on behalf of Kishopershad Singh* v. *Kupulmun Sing* (1), *Shurrut Chunder* v. *Rajkissen Mookerjee* (2), and *Debi Dutt Sahoo* v. *Subodra Bibee* (3).

The first was a case under the Lunacy Act XXXV of 1858, but the words of s. 14 of that Act are the same as those in s. 18 of Act XL of 1858, and this case was relied upon by the Court in the second case cited.

The bond of 1868 by the mother, so far as it purports to create a mortgage of the daughter's share in the estate of Aga Wahid Ali, is invalid.

The case of *Hunooman Pershad Panday* v. *Munraj Koonweree* (4) and other cases were relied on by the respondent. That case was decided on appeal to Her Majesty in Council before the passing of the Act of 1858, and, like many other cases of completed alienations to be found in the reports, was a suit by a minor after attaining majority to undo the acts of his guardian, by which his (the minor's) property had been charged with a mortgage, and given over into the hands of a mortgagee.

The position of the person contesting his guardian's completed acts and asking the aid of the Court to get his property back from the holder for the time being, is different from that of one who resists the giving effect to that which is on its face opposed to a specific provision of law.

When property has actually passed and cannot be recovered without invoking the aid of the Court, the plaintiff puts himself

(1) 10 B. L. R., 364; S. C., 19 W. R., 164.
(2) 15 B. L. R., 350.
(3) I. L. R., 2 Calc., 283.
(4) 6 Moore's I. A., 393.

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into the hands of the Court, and must take his remedy on such terms as the Court may impose on a consideration of the equities arising in the case. But if we allow the plaintiff in this case to sue on her mortgage as on a valid mortgage of the minor's share, we shall in effect declare that s. 18 of Act XL of 1858, so far as it limits a guardian's power, is inoperative, and may be safely ignored by any one who chooses to bargain for the minor's property in contravention of its provisions.

But it is said that if he held that the bond is invalid so far as it creates a mortgage of the minor's share of the properties named therein, it can be treated as a simple bond for money lent, and that inasmuch as that money was lent to, and the benefit of it was taken by, Abhassi Begum, she is liable to be sued on it.

Assuming that the conditions respecting the mortgage can be struck out, the case of the plaintiff would still fail. The plaintiff contends that, under the words of s. 18 of Act XL of 1858,—"every person to whom a certificate shall have been granted under the provisions of this Act, may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor,"—the mother was empowered to borrow money for the benefit of the estate. It may be conceded for the purposes of this appeal, that the mother, though not duly appointed under the Act, could legally exercise the powers which would have been conferred on her by a certificate under the Act. It does not appear to us that these words really give the mother any power to contract debts on behalf of the minor; the words must be read with the context, and so read, they evidently mean that such properties as come to the hands of the guardian may be dealt with as the minor, if of age, might deal with them, subject to the restrictions declared further on; and that such liablities to or by the estate as may be outstanding at the time are within the power of the guardian. But the power to charge the estate with a new debt without sanction of the Court is clearly restrained by the last clause of the section.

Now, if there is no power to charge the estate, how could the mother contract for the daughter that she should pay a sum of money on a given day, so as to make the contract one on which

the plaintiff can sue the daughter. Unless it is the daughter's contract, no suit will lie against her on the bond.

I will assume that the signature on the bond is sufficient to bind the daughter, if it was in the power of the mother to bind her, and that it is a bond to which the daughter's signature has been affixed by her mother.

But the daughter was a child of ten years of age, and was incompetent to contract; see Contract Act of 1872, s. 11. This is not a new law; the Act in a great part only reduces to the form of a single enactment rules long acknowledged; it purports to be an Act to define and amend certain parts of the law relating to contracts, and, save as so amending, it does not alter pre-existing rules. In fact, the respondent has cited and relied on this Act.

There is no authority that I know of for saying that one person may borrow money in the name of, or on behalf of, another and give a bond in that other's name, when that other is a person who is wholly incompetent to contract for himself. If a contract is to be made by one to bind another who cannot bind himself, it can only be under some express authority of law, and such authority is not to be found in s. 18, Act XL of 1858. We were referred to s. 65 of the Contract Act, but although the expression "any person" therein used is general, it is limited by the words "under such agreement or contract," so as to apply to those who derive advantage as parties directly from the contract, and not to everyone who may, however remotely, have gained some advantage in consequence of a contract entered into by others. The 4th chapter in which this section occurs deals with rights of parties to a contract, and there is a distinct chapter, the 5th, dealing with rights and liabilities of persons not directly contracting parties, which, under certain circumstances, arise and resemble the rights and liabilities created by contract.

The learned pleader for the respondent called our attention to ss. 68 to 70 of this chapter. As to s. 68, it is only necessary to observe that it deals with a specific class of claims for the price of necessaries of life supplied to one incapable of contracting. Section 69 cannot possibly apply, as there was no

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community of interest in the payment of Wahid Ali Khan's debts between the plaintiff and Abhassi Begum. Section 70 is equally inapplicable. Nothing was delivered to the minor; therefore, if this section can apply at all, it must be by virtue of the words "where a person lawfully does anything for another." The contention may be thus stated that plaintiff lawfully delivered money to Umda Khanum for the use of Abhassi Begum, who enjoyed the benefit of such delivery, and that consequently she (Abhassi) is bound to compensate the plaintiff. But I think this statement is not sufficient to bring the case within the section. It is not necessary that the person claiming compensation should have done an act with his own hands, but Umda Khanum here was not the plaintiff's agent to apply the money lent to the benefit of the minor, nor did the plaintiff attempt to see that the money really went to the use of the minor. She did nothing for the minor as required in the section; she simply put Umda Khanum into a position in which, if so minded, she (Umda) might apply the money to the benefit of the minor.

Whether Abhassi is indebted to Umda in respect of any portion of the Rs. 20,000 taken by Umda from the plaintiff cannot be known until the accounts of Umda's management of her daughter's estate are taken. It appears that Umda Khanum has recovered large sums of Rs. 25,000 or more under decrees obtained against Duli Chand, and there undoubtedly was a substantial income from the estate of Wahid Ali Khan to be accounted for. This account cannot be taken in this suit at the instance of the lender of the Rs. 20,000, and her remedy must be confined to a decree against the person with whom she entered into a loan transaction.

The appeal must, therefore, be allowed with costs, and so much of the decree as affects Abhassi Begum is reversed, and the suit as against her is dismissed with costs.

Appeal allowed.