

COMMON JUDGMENT**ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT HYDERABAD**

R.A. No.291 of 2012
IInd Appeal No.38 of 2012.

DATE	ORDER WITH SIGNATURE OF JUDGE
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Date of hearing	06.08.2014.
Date of decision	29.08.2014

Mr. Muhammad Suleman Unar advocate for the applicants/appellants.
Mr. Waqar Ahmed Advocate for the appellant No.7.
Mr. Muhammad Asif Shaikh Advocate for the respondents.

NAZAR AKBAR, J.- By this common Judgment, I intend to dispose of Civil Revision No.291/2012 and Second Appeal No.38/2012 filed by applicants No.1 to 6 challenging two separate Judgments and Decrees both dated 03.12.2012 passed by the Ist Additional District Judge, Hyderabad in Civil Appeals No.222/2012 and 246/2012 setting aside Judgment and Decree of applicant's suit No.70 of 2006 for partition, declaration and reversing the dismissal of respondent's suit No.49/2006 for specific performance both passed by the court of Vth Senior Civil Judge, Hyderabad on 17.04.2012.

2. In fact the applicants in Civil Revision No.291/2012 should have preferred a second appeal against the Ist appellate Judgment in Civil Appeal No.222/2012 since identical law point was involved in the Second Appeal No.38/2012 filed by the same appellants against appellate decree in Suit No.49/2006 for specific performance of contract dated 10.06.1997 filed by respondents as the root of dispute was one and the same that whether the applicants were entitled to partition of their share in the suit property which they have inherited from their father late Zameer ul Hassan but the same was sold by their mother as natural guardian to the respondents namely Javed

Ahmed Shaikh and Muhammad Akram Shaikh by agreement to sell dated 10.06.1997 when they were minors, therefore, this Revision Application No.291/2012 is converted into second appeal and be treated as second appeal. The common question of law in both these IInd Appeals is that *“whether the mother of the appellants on 10.06.1997 was competent to sell joint property of their predecessor-in-interest to the respondents namely Javed Ahmed Shaikh and Muhammad Akram Shaikh as natural guardian of appellants No.1 to 6, who were minors at the relevant time”*

3. The facts leading to both these Second appeals are that by two separate Judgments delivered on 17.04.2012, learned Vth Senior Civil Judge Hyderabad dismissed suit No.49/2006 filed by the respondents namely Javed Ahmed Shaikh and Muhammad Akram Shaikh for specific performance of contract dated 10.06.1997 in respect of the House bearing No.C/5 admeasuring 1333 Sq. Ft situated at Mir Fazal Town Unit No.9 Latifabad Hyderabad (hereinafter referred to as the suit property) against the mother of appellants No.1 to 6 in which these appellants were also subsequently impleaded, and decreed suit No.70/2006 filed by appellants No.1 to 6 for partition, declaration, mesne profits and permanent injunction in respect of same suit property against their mother Mst. Khursheed Akhtar and respondents Javed Ahmed Shaikh and Muhammad Akram Shaikh. Both the findings of suit No.49/2006 and Suit No.70/2006 were in favour of appellants herein but on first appeals filed by respondents Javed Ahmed Shaikh and Muhammad Akram Shaikh bearing Civil Appeals No.222/2012 and 246/2012 were reversed by the court of Ist Additional District Judge, Hyderabad by two separate Judgments both dated 17.04.2012.

4. Briefly stated the common facts from the two plaints are that appellants No.1 to 6 being legal heirs of late Zameer ul Hassan, who died on

03.02.1997, filed suit for partition of their 88% share in the suit property and declaration that the Sale agreement dated 10.06.1997 between the respondents and their mother was null and void against the interest of the appellants. Admittedly at the time of death of Zameer ul Hassan on 03.02.1997, appellants No.1 to 6 were minors and their mother having only 12% share entered into agreement of sale dated 10.06.1997 to sell joint suit property and handed over possession of the suit property to the respondents namely Javed Ahmed Shaikh and Muhammad Akram Shaikh on receiving only Rs.400,000/-. Appellants No.1 to 6 came to know about the sale agreement in 2006 when the respondents filed suit for specific performance of sale agreement dated 10.06.1997 against their mother in the year 2006 in the court of Vth Senior Civil Judge, Hyderabad. By the year 2006, the appellants No.1 to 5 had become major and only the appellant No.6 Ahad Zameer was minor, therefore, the appellants No.1 to 6 being joint owner to the extent of 88% share in the suit property after approaching the respondents No.1 & 2 to deliver vacant possession of the suit property to them filed suit for partition and declaration that the sale agreement dated 10.06.1997 between their mother and the respondents namely Javed Ahmed Shaikh and Muhammad Akram Shaikh was abinitio illegal, void and not binding upon them. They also prayed for mesne profits according to the prevailing rent in the area where the suit property is situated for the last three years i.e. from 2003 onwards.

5. The respondents namely Javed Ahmed Shaikh and Muhammad Akram Shaikh filed their written statement in Suit No.70/2006 wherein they admitted that the appellants were minors at the time of execution of sale agreement dated 10.06.1997 and handing over possession of the suit property to them by their mother. However, they claimed that she was competent to

enter into such sale agreement being natural guardian of the minors to sell their share in the suit property. The said respondents also claimed that they have already filed suit for specific performance of contract dated 10.06.1997 in respect of the suit property.

6. After framing issues, recording evidence and hearing parties, the suit No.70 of 2006 filed by the appellants for partition and declaration was decreed and suit No.49/2006 filed by the respondents namely Javed Ahmed Shaikh and Muhammad Akram Shaikh for specific performance of the sale agreement dated 10.06.1997 was dismissed by the trial court by two separate Judgments both dated 17.04.2012. However, on appeal learned Ist Additional District Judge, Hyderabad allowed both the appeals filed by the respondents namely Javed Ahmed Shaikh and Muhammad Akram Shaikh by two separate Judgments both dated 03.12.2012 holding that mother of appellants No.1 to 6 was competent to sell out the suit property being natural guardian of appellants No.1 to 6 who were minors and in both the Judgments learned appellate court has relied upon the cases reported in 2012 MLD 202 and AIR 1936 Lahore 2020. The appellants have preferred these second appeals challenging both the Judgments and Decrees of the appellate Court.

7. I have heard the learned counsel for the parties and perused the record.

8. The only point involved in both these appeals is that whether the appellate court while reversing the findings of the trial court has properly appreciated the law on the point of the authority /competency of mother of the minors to enter into an agreement to sell their 88% share in immoveable property without being appointed as guardian of the property of the minors by a competent court and without obtaining permission to sell the property of the minors.

9. Learned counsel for the respondents has raised only one contention in support of the impugned Judgments of the appellate court that the mother is "natural guardian", therefore, she was competent to enter into agreement of sale of the entire property. He has not been able to show any case law on this point that being the natural guardian she was not required to be appointed as guardian of the property of her minor children.

10. On the other hand, the counsel for the appellants has urged that the learned appellate court has neither advanced any reason nor referred to any law to come to the conclusion that the mother being natural guardian was not required to seek permission of the court to sell the immoveable property of minors. He has further contended the learned appellate Court by referring to the section 7 of the Guardian and Wards Act, 1890 (herein after referred as G & W Act) has drawn an erroneous conclusion that mother as natural guardian was competent to sell property of her minor children. He has further pointed out that the learned appellate court has relied on AIR 1936 Lahore 2020, but the AIR 1936 Lahore 2020 has not ever been published. The learned counsel for the respondents has also informed the court that he too has not been able to lay his hand to the said citation which the learned appellate court has mentioned in the impugned judgment.

11. I regret and feel embarrassed in reading the impugned judgment of the appellate court. The Presiding Officer of the appellate Court seems to be devoid of any possible legal acumen of an ordinary man. He has relied on a case law in the impugned judgment but neither he has mentioned the parties name nor the point of law settled in the said case law to justify setting aside a well reasoned judgment of trial court on the basis of such case law. Not only that the appellate court probably without reading the provisions of section 7 of G & W Act has declared that mother is natural guardian, therefore, in

terms of section 7 of the G & W Act, 1890, she was not required to seek her appointment as guardian of personal property of the minors. It is indeed unfortunate that the appreciation of Section 7 of G & W Act, by the Presiding Officer of Ist Additional District Judge Hyderabad was erroneous. Section 7 of G & W Act does not talk about mother's authority to sell immovable property of minors as natural guardian and, therefore, I deem it necessary to reproduce section 7 of the Guardian and Wards Act, 1890:-

7. Power of the Court to make order as to guardianship.-(1) Where the Court is satisfied that it is for the welfare of a minor that an order should be made-

(a) appointing a guardian of his person or property, of both or

(b) declaring a person to be such a guardian, the Court may make an order accordingly.

(2) An order under this section shall imply the removal of any guardian who has not been appointed by will or other instrument or appointed or declared by the Court.

(3) Where a guardian has been appointed by will or other instrument or appointed or declared by the Court, an order under this section appointing or declaring another person to be guardian in his stead shall not be made until the powers of the guardian appointed or declared as aforesaid have ceased under the provisions of this Act.

12. It is also noticed that the learned appellate court while reversing the judgment of the trial court has not reflected on the reasons given by the trial court while dismissing the suit for specific performance filed by respondents and allowing the suit for partition of suit property and declaring that the agreement of sale dated 10.06.1997 was void abinitio illegal. The trial Court while declining the relief of the specific performance of contract has relied on the admissions of the respondents in his evidence that the respondent had entered into an agreement with the mother of the minors knowing well that she was not owner of the entire property at the time of entering into agreement of sale. The trial court has also referred to clause-IV of the

agreement of sale in which the respondent has himself mentioned that the mother will obtain a certificate of guardianship meaning thereby that the respondents were conscious of the fact that they were entering into an agreement of sale of the property of the minors with their mother who would require a certificate of guardianship from a competent Court to validate such a sale agreement. But the appellate court has ignored not only the reasoning advanced by the trial court without even commenting on the same but also ignored the evidence of the Respondent.

13. I have also noticed that besides AIR 1936 Lahore 2020 which was never published, the other case law relied upon by the appellate Court i.e. 2002 MLD 202 (Mst. Zubeda Begum Vs. Additional Sessions Judge and others) was also not relevant at all. In this Judgment issue was right of *Hizanat* and contest was between mother and grandmother of the minors. Question of sale of immovable property of minors by mother was not in issue nor it can be inferred from the said case law that court has held that the mother was natural guardian of the property of the minors. Under Mohammadan Law, the mother has never been treated as guardian of the property of the minors. In the Mohammadan Law by D.F. Mulla, Chapter-18 is on the subject of Guardianship of person and property. The section 352 to 358 deals with the proposition of appointment of *guardian of the person of minors* and section 359 to 368 are on the proposition of appointment of *Guardian of the property of minor*. Perusal of these sections reveals that mother or for that matter any *female* relative of minor is not mentioned as qualified to be appointed as *legal guardian of property of minor*. In this chapter *mother* is entitled to only custody (*Hizanat*) of her child to certain age (section 352) and even that right of *Hizanat* is subject to fulfillment of certain conditions (section 354).

14. It is settled law that according to Mohammadan Law, the mother of minor is not the natural guardian to deal with the property of her minor children. At the most, the mother can be de-facto guardian of the person and property of a minor in term of section 361 of the Mohammadan Law, but she has no power to transact the property of the minors. Alienation of immovable property of minors is possible only by the persons entitled to be appointed as legal guardians of property under section 359 of Mohammadan Law subject to the conditions enumerated in section 362 ibid after obtaining the permission of the Court in terms of section 362 ibid. In coming to this conclusion I am fortified with the Judgment of Honourable Supreme Court in the case reported in PLD 2009 SC 751(Muhammad Hanif Vs. Abdul Samad and others). In this Judgment, the Honourable Supreme Court has examined several other case law both from the jurisdiction of Pakistan and Indian Supreme Court while holding that mother under the Mohammadan law is entitled only to the custody of the person of her minor child upto a certain age according to sex of the child but she is not natural guardian of the property of the minors. At the most she can be a defacto guardian of the property of her minor children. Relevant paras No.6 and 7 from the Judgment are reproduced below:-

õ6. We have heard the learned counsel for the parties and have also perused the available record with their able assistance. The bare perusal of exchange Mutation No.62, dated 30.05.1967 passed by the Assistant Collector would make it manifestly clear that Mst. Ghulam Fatima, the respondent No.7, was a minor at that time and that her mother Mst. Rabia, the respondent NO.6, got transferred in her favour the suit land of her minor daughter, by way of exchange. There is nothing on record to show that Mst. Rabia was ever appointed by any

competent Court to be the guardian of the property of her minor daughter Mst. Ghulam Fatima, the respondent No.6, albeit mother of respondent NO.7, was not the natural guardian to deal with the property of her minor daughter, the respondent No.7, under the Mohammadan Law. At the most, she was the de facto guardian of the property of her daughter. Therefore, the exchange mutation No.62 showing exchange of suit land between the mother and her minor daughter was illegal..

7. In the principles of Mahomedan Law by D.F. Mulla, (Pakistan Edition) (1995), it is stated that in section 359 the following persons are entitled in order mentioned below to be the guardians of the property of a minor:-

- (1) The father;
- (2) The executor appointed by the father's will;
- (3) The father's father;
- (4) The executor appointed by the will of the father's father;

In section 360, it is provided that in default of the legal guardians appointed in section 359, the duty of appointing a guardian for the protection and preservation of the minor's property falls on the Judge as representing the State. As regards a de facto guardian, it is laid down in section 361 a person may neither be a legal guardian (section 359) nor a guardian appointed by the court (section 360) but may have voluntarily placed himself in charge of the person and property of a minor. Such a person is called de facto guardian. A de facto guardian is merely a custodian of the person and property of the minor. Section 364 leaves no doubt that a de facto guardian (section 361) has no power to transfer any right or interest in the immoveable property of the minor.

15. In the case in hand it is an admitted position that the mother has alienated 88% property of her minors children and the respondents were fully aware of the fact that they were purchasing the property of minors within hardly four months of the death of their father Syed Zameer ul Hassan, who died on 03.02.1997. Consequently, the agreement of sale dated 10.06.1997 between Mst. Khursheed Akhtar and Javed Ahmed Shaikh and Muhammad Akram Shaikh was void agreement which can not be enforced against applicants / appellants No.1 to 6. Appellants are entitled to their respective share in the suit property as legal heirs of deceased Syed Zameer ul Hassan.

16. In view of the above discussion, I hold that both the judgments and decrees of the appellate court assailed in these second appeals were perverse and contrary to law and even evidence, therefore, these second appeals are allowed and the judgments and decrees of the Ist appellate court in Civil Appeals No.222/2012 and 246/2012 are set aside and the Judgments and Decrees delivered by the trial Court in Suits No.49/2006 and 70/2006 are restored. The respondents shall bear the cost throughout.

Hyderabad.

JUDGE.

A.K