ANDHRA PRADESH HIGH COURT

Vadakattu Suryaprakasam

Vs.

Ake Gangaraju

Appeal No. 666 of 1950. Kakinada in O. S. No. 5 of 1950

(Subba Rao, C.J., Viswanatha Sastry and Bhimasankaram, JJ.)

11.07.1955

JUDGMENT

Bhimasankaram, J.

1. This appeal raises the question as to whether an agreement to sell by the guardian of a Hindu minor is specifically enforceable against the minor. Two decisions of the Privy Council have been referred to by the learned counsel as bearing on the point; viz., - *'Mir Sarwarajan v. Fakhruddin Mohammad*[1]*',* and - *'Subrahmanyam v. Subbarao*[2]*',* The earlier case laid down that it was not within the competence of the guardian of a minor to bind the minor or his estate by a contract to purchase immovable property and that such a contract was not enforceable by either party for want of mutuality. The principle of this case was applied by a Full Bench of the Madras High Court in - *'Venkatachalam Pillai v. Sethuram Rao*[3]*',* in the case of a Hindu minor seeking to - enforce an agreement in his favor for the resale of a property which had been alienated by his guardian and it has been uniformly held in that Court that no decree for specific performance could be passed in favor of or against a minor on the basis of a contract either for sale or purchase of immoveable property entered into on his behalf by his guardian. The other decision of the Privy Council related to the effect of Section 53-A, T. P. Act. There, the guardian of a minor had executed a contract for sale of the minors property and had put the contractee in possession. The question arose as to whether in a suit filed by the minor for possession of the property on the ground that the contract was not binding on him the purchaser could invoke the doctrine of part performance under the section. Their Lordships held that in the case of a contract entered into on behalf of a minor, it would be the minor who would be the 'transferor' within the meaning of Section 53-A though the contract was entered into by his guardian and the vendee could resist the action. Subsequent to the Privy Council decision, Viswanatha Sastry, J. has decided in the Madras High Court in - *Ramalingam Reddi v. Babanambal Ammal'*[4]*,* that so far as an agreement by a guardian to sell a minor's properties is concerned, it would be enforceable specifically against the minor. In - *'Hari Mohan v. Sew Narayan*[5]*',* a Bench of the Assam High Court took the opposite view. In a Full Bench of the Hyderabad High Court however in *Amid Ahmmad v. Meer Nizam Ali'*[6]

[1] 39 Cal 232 (PC)
[2] AIR 1948 PC 95
[3] AIR 1933 Madras 322
[4] AIR 1951 Mad 431
[5] AIR 1949 Ass 51
[6] AIR 1952 Hyd 120 1(FB)

two learned Judges of the High Court held that a contract to purchase immoveable property entered into on behalf of a minor by a de jure guardian was enforceable against the minor provided it is for his benefit, while the other Judge took the view that though a contract for sale in such circumstances might be enforceable against the minor a contract for purchase would not be. My Lord the Chief Justice sitting as a 'Judge of the Madras High Court referred this question for determination by a Full Bench of the Madras High Court but it does not appear that the Madras High Court has dealt with the matter yet. Though as has been recently held by a Full Bench of this Court decisions of the Madras High Court rendered before 5-7-1954 may be binding upon this Court, subsequent decisions will only have a persuasive force. Thus, there is no decision of the Madras High Court subsequent to the Privy Council decision in AIR 1948 PC 95 which is binding on us, the decision of Viswanatha Sastry, J. being only that of a single Judge. We therefore propose to refer the following question to a Full Bench of this Court.

> "Whether a contract entered into by a guardian of a Hindu minor for sale or for purchase of immovable property is specifically enforceable against a minor ?"

OPINION OF THE FULL BENCH

Subba Rao, C.J.

The following question has been referred to the Full Bench by a Division Bench of this Court :

> "Whether a contract entered into by a guardian of a Hindu minor for sale or for purchase of immoveable property is specifically enforceable against the minor ?"

2. ******

3. The facts that gave rise to the reference may be briefly stated. The suit tiled house and site in Kakinada belonged to one Akke Subbarao. having been obtained by her under a will dated 15-6-1942 executed by her mother in her favor. She executed two mortgage bonds dated 21-12-1942 and 22-12-1948 in respect of that property in favor of defendant 5 for Rs. 2,000/- and Rs. 4,000/- respectively. On her death, it devolved upon her minor daughters, who are defendants 3 and 4. Defendant 1 is her husband and defendant 2 is her minor son. The tiled house was "in ruins and the rent therefrom was insufficient even to defray the interest due under the mortgage. In the circumstances, defendant 1 as father and guardian of defendants 2 to 4 agreed to sell the same to the plaintiff under a registered agreement dated 26-4-1949 for a consideration of Rs. 11,500/- out of which Rs. 200/- was paid by the plaintiff as advance. Under the said agreement the plaintiff should discharge the two mortgages in favor of defendant 5 and keep the balance as deposit with him carrying interest and pay the same to defendants 3 and 4 after they attained majority and execute a sale deed within three months from the date of the agreement.
Subsequent to this agreement, defendant 1 sold the same to defendant 5 for. consideration. The plaintiff alleging that he was ready and willing to perform his part of the contract filed O. S. No. 5 of 1950 on the file of the Court of the Subordinate Judge, Kakinada for specific performance of the aforesaid agreement. To that suit he made the minor son and daughters of Akke Subbarao parties as defendants 2 to 4 and their father as defendant 1. Defendant 5 is the subsequent

alienee.

4. The defendants pleaded inter alia that though the agreement ex facie showed consideration of Rs. 11,500 there was concealed portion of the consideration of Rs. 2,000/- to minimise the expenses of stamp and registration which the plaintiff refused to pay, that the suit agreement was not specifically enforceable against the minors, that the agreement was not beneficial to the minors and that in any view no relief could be asked for against defendant 5.

5. The learned Subordinate Judge held that the agreement was not enforceable against the minors for want of mutuality basing his view on the decision of the Judicial Committee in 39 Cal 232 (PC). He further held that he would be entitled to recover only the sum of Rs. 200/- paid by him as advance to defendant 1. As he held against the plaintiff on the question of enforceability of the contract, he did not give any of his definite findings on the other issues raised in the case. In the result, he dismissed the suit. When, the appeal came up before a Division Bench they referred the aforesaid question to the Full Bench in view of the conflict between the decision of the Judicial Committee in 39 Cal 232 (PC) and AIR 1948 PC 95.

6. The learned counsel for the appellant argued that the decision of the Judicial Committee in 39 Cal 232 (PC), which was the foundation for a long catena of decisions of the various High Courts, is no longer good law in view of the later decision of the Judicial Committee in AIR 1948 PC 95, which, though it did not completely destroy the foundation, had rudely shaken it to such an extent that it could no longer bear the edifice of the case law built on it.

7. The learned counsel for respondents contended that the later decision had no such effect but on the other hand the two decisions of the Federal Court In - *'Sriramulu v. Pundarikakshayya*[7]*',* and - *'Bapayya v. Pundrikakshayya*[8]*',* had reinforced the foundation laid by the decision in *'Mir Sarwa-rajan v. Fakhruddin Mohammad,* and accepted and approved the principle underlying the said decision. He further argued that the general and accepted principle based on equity and good conscience is that a guardian cannot enter into a contract imposing a personal obligation on the minor, that the only exceptions engrafted on those rules are those embodied in Section 68, Contract Act and the rule of Hindu law permitting the guardian of a minor to alienate or charge immoveable property for the purpose of necessity of benefit to the estate and that, therefore, a contract to sell is not within the competency of a guardian, whether 'de facto or de jure'.

8. Before attempting to answer the question raised, it is as well that the three currents of judicial thought on distinct but closely allied topics may be pursued up to their

[7]1950-1 Mad 586

[8]1950-1 Mad LJ 612 : (AIR 1949 FC 213 (G1)

confluence in the aforesaid judgments of the Federal Court. They relate to the following three questions :

1. The right of the guardian of a minor to bind his ward personally by a simple contract debt;
2. His right to execute a promissory note on his behalf; and
3. His right to deal with immovable property of the minor.

9-10. The earliest decision on the question of a guardian's right to borrow money is that of the Judicial Committee in - *'Waghela Rajsanji v. Masludin[9]',* It was expressly ruled therein that a guardian cannot contract in the name of a ward so as to impose on him a personal liability. As a strong reliance is placed on this decision for the respondents, it is necessary to notice it in some detail. There, a widow as the guardian of her infant son, the heir of a talukdari estate, transferred some villages and in the deed of transfer, to which her ward was represented by her as his guardian nominally a party, contracted to idemnity the purchaser in case the Government should claim and enforce a right to revenue upon the villages which she transferred as being rent free. The deed purported to make both guardian and ward personally liable in that respect and also charged the liability upon other parts of the talukdari estate. The Government claimed and enforced payment of revenue upon the villages. A suit was filed by the purchaser for recovery of the rents collected from him against the quondam minor to be recovered personally from him and also out of the rents and profits of talukdari estate. The Judicial Committee held that the minor was not personally liable to pay the same. It would be seen from the aforesaid facts that a covenant to idemnify a purchaser against his loss if the Government recovered rents from him was an onerous covenant and as such could not conceivably have been for necessity or for the benefit of the minor. It was not an obligation which could be supported by the Hindu law doctrine of "necessity or benefit to the estate". Before the Judicial Committee Mr. Mayne who argued the case on behalf of the respondents conceded that there was not in Indian law any rule which gave a guardian and manager greater power to bind the infant ward by a personal covenant than existed in English law. The Judicial Committee therefore pointed out that the matter must be decided on equity and good conecience, generally interpreted to mean the rules of English law. In that view they observed at p. 561 as follows :

> "Their Lordships are not aware of any law in which the guardian has such a power, nor do they see why it should be so in India. They conceive that it would be a very improper thing to allow the guardian to make covenants in the name of this ward so as to impose a personal liability upon the ward and they hold that in this case the guardian exceeded her powers so far as she purported to bind her ward and that, so far as this suit is founded on the personal liability of the talukdar, it must fail." It is very difficult to accept the argument that this decision is an authority for the position that a contract entered into by a guardian on behalf of a minor is unenforceable against the minor even if that contract came within the doctrine of "necessity or benefit" to the estate under Hindu law. Mr. Mayne, the author of Hindu Law rightly did not rely upon the doctrine of necessity as in that case the onerous covenant of indemnity could

[9]11 Bom 551 (PC)

> not be brought within its scope. This case is only an authority for the simple proposition that a guardian cannot enter into a contract imposing an onerous obligation on a minor in a case not covered by Hindu Law.

11. Nor does the decision of the Judicial Committee in - '*Indur Chunder Singh v. Radhakishore Ghose[10]',* really support the extreme contention of the respondents. There, a person died possessing a leasehold interest in a particular land. On his death his mother and widow were in management of that land. Subsequently, a son was adopted to him by the widow. The lease having expired a renewal for five years was taken by the managers fact was surrendered before

that period elapsed during the minority of the son against whom on his attaining full age, this suit was brought by the lessor to recover three years' rent under the lease deed. The Judicial Committee held the contract of the adoptive mother and guardian was not personally binding upon the adopted son. But a careful scrutiny of the judgment discloses that the lease deed was not executed by the managers as guardians of the minor. The lessees described themselves respectively as "mother of the late Gopi Mohun Ghose" "mother of the minor adopted son" and they bound themselves to pay the rents reserved and to pay interest on any arrears. At page 511 their Lordships observed :

> "The contention that the mother and widow of Gopi Mohun Ghose had power to. bind the minor by contract was abandoned in the Court below and their Lordships are of opinion that such a contention could not be sustained."

At page 513 they made the position clearer when they - observed :

> "It may be that as between them and the infant, they might be able, in some circumstances, to show that the estate ought to bear the burden they had taken upon themselves but that is not the question raised in this case, in which the plaintiffs seek to establish a direct relation between themselves and the estate of the infant and a liability on the part of the infant now that he is of age and of his estate, to fulfill the obligations entered into by the lessees in their own name."

12. It is, therefore obvious from the aforesaid facts and observations that the lease was not executed by the managers as guardians of the minor and therefore 110 question of enforceability of the personal obligation, against the minors could arise in that case.

13. The said two decisions of the Judicial Committee were considered by a Full Bench of the Madras High Court in - *'Patchu Ramajogayya v. Vajjula Jagannadham'*[11], There, the Full Bench ruled that on a contract entered into on behalf of a minor by his guardian under which the guardian borrowed money but no charge was created on the minor's estate, no decree could be passed against the minor on his attaining majority or against his estate, except in cases in which the minor's estate would have been, liable for the obligation incurred by the guardian under the personal law to which he was subject and that a decree can be passed against the estate of a Hindu minor for a debt contracted by his guardian for the marriage of his sister.

[10]19 Cal 507 (PC)

[11] AIR 1919 Mad 641 (FB)

Seshagiri Ayyar, J. dealing with the case of the Judicial Committee in 11 Bom 551 (PC), observed at page 644 :

> "Woodroffe, J. in *'Mir Sarwarajan v. Fakhruddin Mahomed*, states that what the Judicial Committee intended to lay down was that an onerous covenant cannot be imposed by the guardian upon the person or property of the minor. That is also my view." At page 645 the learned Judge proceeded to .state, in explaining the observations of Lord Hobhouse in 11 Bom 551 (PC), extracted supra, as follows :
>
> "I do not think that it was intended to lay down by this statement that no rule to the

contrary under the Hindu law would be countenanced. The term Indian law was meant' to apply to the statute law of the land and not to Hindu or Muhammadan Law. I am therefore of opinion that the rule laid down in 11 Bom 551 (PC), was not intended to affect the Hindu Law liability of the minor.... I would therefore answer the question under reference by saying that no decree should be passed against the minor or his estate on a contract entered into on his behalf by a guardian under which covenant no charge is created on the estate except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject." This is an authoritative decision of a Full Bench; of the Madras High Court explaining the scope of the observations of the Judicial Committee in 11 Bom 551 (PC), and excluding from its scope contracts covered by domain of the personal law of minors. This view was accepted and followed in Madras without any dissent. In - *'Satyanarayana v. Mallayya'*[11], it as held that a liability to which a minor would be subject under Hindu law does not become any the less a liability because it is incurred by his guardian.

In - *'Zeebunnissa Begum v. Mrs. H.B. Danagher'*[12], it was pointed out that where a contract has been entered into by a guardian, for a purpose binding on the minor's estate, there is no question of capacity and that its binding nature depends 011 the personal law of the parties. In - *'Chockalingam Chettiar v. Muthukarappan Chettiar'*[13], on the same principle, a contract of partnership entered into by a guardian was held to be valid.

14. Leach, C.J. and Krishnaswami Ayyangar, J, reviewed the case law on the subject in - 'Annamalai Chetty, joint firm, *Palni v. Muthuswami*[14], and re-stated the legal position laid down by the Full Bench. Krishnaswamy Ayyangar, J.who delivered the judgment on behalf of the Bench at pp. 541-542 summarised the legal position thus :

"In the face of such overwhelming authority which clearly binds us, only one conclusion is possible' namely that - *'Hunoomanpershad Pandey v. Mt. Babooee Mundraj Koonwari'*[15], contains the true test for deciding the binding character even of a simple loan. We may also perhaps add that justice and equity regarded both from the point of view of the minor and the lender, are in consonance with, the view which has all along been accepted in this Court."

[11] AIR 1935 Mad 447 (FB) [13] AIR 1938 Mad 849 [15]6 Moo Ind App 393 (PC)
[12] AIR 1936 Mad 564 [14] AIR 1939 Mad 538

15. When a distinction was sought to be made between a sale or a mortgage and a simple loan on the basis that the former affected only that portion of the minor's estate which, was involved in the particular transaction, whereas a simple loan might endanger the entire estate by reason of the possibility of limitless expansion by way of accumulating interest, the learned Judge repelled that contention with the following observations :

"Even if this is a sound proposition which we doubt there is no reason why it should not equally apply to other limited owners whose position is analogous to that of the guardian. Such is not however the case. The evil, if any, is due not to the honest creditor who lends the money but to the irresponsible guardian who negligently omits to take prompt steps to

repay it. In this connection it is not to be forgotten that the creditor has to make out also for the rate of interest charged."

16. The learned Judge also explained the scope of the personal liability of the minor under Hindu law at page 542 as follows :

"It is scarcely necessary to add' that the liability of the estate, though personal in the English law sense of the word, is not personal in the sense that the person of the minor even after majority can be arrested in execution. A personal liability arising out of the contract of the guardian is a liability of minor's estate only."

17. If I may say so, the learned Judge brought out in bold relief the limited scope of the decision of the Judicial Committee in 11 Bom 551 (PC), and saved the doctrine of Hindu Law from extinction. With great respect to the learned Judge, I entirely agree with the views he expressed on the different aspects of the question raised.

18. The same view was expressed in - *'Sudarsana Rao v. Dalayya'*[16], where a contract entered into by a guardian on behalf of a minor to pay maintenance was upheld. The Nagpur High Court followed the Madras view. See - *'Pandurang Vithoba v. Pandurang Ramchandra*[17], But the Bombay and Calcutta High Courts took the contrary view and held that the guardian of a minor cannot bind his ward personally by a simple contract debt by a covenant or by any promise to pay money or damages. See - *Bhawal Sahu v. Baijanath Pertab Narain Singh'*[18], - *'Maharana Shri Ranmalsingji v. Vadilal Vakatchand*[19]*'*The Madras view appears to be more in consonance with the doctrine of Hindu law and is a successful attempt to reconcile the principles of the English law of contracts transplanted in India with the well established doctrines of Hindu Law, whereas the other High Courts, if I may say so with respect are guided only by the principles of English law without due regard to the conditions prevailing in India.

19. Pausing here for a moment let me restate the principles. A minor has no legal competency to enter into a contract or authorize another to do so on his behalf. A guardian therefore steps in to supplement the minor's defective capacity. Capacity is

[16] AIR 1943 Mad 487 [18]35 Cal 320
[17] AIR 1947 Nag178 [19]20 Bom 61

the creation of law whereas authority is derived from the act of parties. The limit and extent of his capacity are conditioned by Hindu law. He can only function within the doctrine of legal necessity or benefit. The validity of the transaction is judged with reference to the scope of his power to enter into a contract on behalf of the minor. Even the personal liability arising out of the guardian's contract is the liability of the minor's estate only.

20. I shall now proceed to consider the competency of a guardian to execute a promissory note for purposes binding on the estate. In - *'Subramania Ayyar v. Arumuga Chetti'*[20], the Madras High Court held that the minor's estate was liable on a promissory note, executed by the mother to raise money for discharging the minor's share of a prior family debt contracted by the uncle and manager. In - *'Krishna Chettiar v. Nagamani Ammal*[21]*',* the liability of the minor's estate to a debt evidenced by a promissory note executed for the benefit of or for the necessity of the minor's

estate was recognized.

> *'Meenakshisundaram Chetty v. Ranga Ayyangar'*[22], is another illustration where a decree against an estate was rendered on a promissory note. A Full Bench of the Madras High Court in AIR 1935 Madras 447 (FB), re-affirmed the principle that the minor's estate is liable to be proceeded against on a promissory note executed by a guardian on his behalf for a debt binding on the estate.

21. It has also been recognized that unless the guardian executed a promissory note on behalf of the minor, it cannot be enforced against the minor's estate, though in some cases it was held that the debt for which the promissory note was executed may afford a distinct cause of action to the creditor for enforcing the debt against the estate.
To ascertain whether the guardian executed the promissory note on behalf of the minor, Courts have looked at the whole instrument and also the surrounding circumstances to find out the intention of the guardian. But a Full Bench of the Madras High Court in - '*Sivagurunatha v. Padmavathi*[23]', that the surrounding circumstances cannot be looked into except such as those disclosed of the instrument itself. It is also true as in the case of simple debts that some of the other High Courts have taken a different view.

22. From the aforesaid decisions, the law relating to the enforcement of promissory notes executed by a guardian on behalf of a minor against the estate of the minor as laid down by the Madras High Court may be stated thus ; The Court can look into the entire promissory note to ascertain the fact whether the promissory note was executed by the guardian in his personal capacity or as guardian of his ward. If the promissory note was executed on behalf of the minor for purposes, binding on the estate, it could be enforced against the estate. Even in regard to promissory notes executed by a guardian on behalf of a minor, the same principle and its limitations applicable to ordinary bonds was applied in Madras. Under Hindu law the enforceability of a promissory note executed by a guardian of a minor depends upon the binding nature

[20]26 Mad 330 [22] AIR 1932 Mad 696
[21] AIR 1916 Mad 677 [23] AIR 1941 Mad 417 (FB)

of the debt for which the promissory note was executed.

23. I shall now take up the third point viz., the competency and the limits of the rights of a guardian to deal with the immovable property of his ward. Though the extent of the authority of a guardian over the property of the minor has not been a specific subject of discussion by any Hindu Law Smrithi writers there are a few texts which throw some light on the subject. Mitakshara lays down as a general rule that immovable properties cannot be alienated by a father except with the consent of all his sons. But the text of Vyasa gives some exceptions to the general rule. It reads :

> "Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress or for the sake of the family and especially for pious purposes." Vignaneshwara in commenting on this text observes :
> "While the son and grand-sons are minors incapable of giving their consent to a fit and

the like; or while brothers are so and continue un-separated, even one person, who is capable, may conclude a gift, hypothecation or sale of immovable property if a calamity affecting the whole family required it, or the support of the family renders it necessary or indispensable duties such-as the obsequies of the father of the like make it unavoidable."

But for the first time the question of the competency of guardian fell to be considered in the leading case on the subject 6 Moo Ind App 393 (PC) (O). The facts in that case were : The appellant was a banker and had money transactions with the paternal ancestors of the plaintiff. After the death of the plaintiff's father his mother acting as guardian from time to time settled accounts with the creditor and also executed mortgages of some villages in his favor.

Finally a sum of Rs. 15,000/- was found due and for that she executed a mortgage bond in favor of the creditor. After attaining majority the plaintiff filed a suit for possession of the Zamindari estate free from the mortgage executed by his mother. The Judicial Committee held that the mortgage was binding on the minor but remanded the case for taking accounts in the light of the observations made by them. This decision for the first time laid down in clear terms the law on the subject. At page 424 their Lordships stated :

"The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can' only be exercised rightly in case of need, or for the benefit of the estate. But where, in the particular instance the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate.

The actual pressure on the estate, the danger to be averted or the benefit to be conferred upon it in the particular instance, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party he cannot take advantage of his own wrong to support a charge in his own favor against the heir grounded on a necessity which his wrong has helped to cause. Therefore the lender in this case, unless he is shown to have acted mala fide, will not be affected though it be shown that with better management the estate might have been kept free from debt.

Their Lordships think that the lender is bound to inquire into the necessities for the loan and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the Manager is acting- in the particular instance 1'or the benefit of the estate. But they think that if he does so inquire and acts honestly the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money.

It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security and that, therefore the mere creation of a charge securing a proper debt cannot be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application and a lender can rarely have unless he enters on the management, the

means of controlling and rightly directing the actual application. Their Lordships do not think that a bona fide creditor should suffer when he has acted honestly and with due caution but is |himself 'deceived."

24. The classic passage was the foundation of a long catena of decisions delivered by various High Courts to meet different situations. The twin doctrine of necessity and benefit has equally been invoked both in the case of alienations made or mortgages effected by a guardian and also in the case of simple money debts. The principles laid down therein were applied not only to transactions effected by 'DE JURE' guardians but also by de facto guardians. The passage presupposes that a guardian could borrow money for the benefit of the estate or in .case of necessity but it goes further and holds that the guardian can even charge the properties for the purpose of raising the said loan. The use of the words 'lender' and 'loan1 in the course of the passage and the statement that the mere creation of a charge securing a proper debt cannot be viewed as improvident management indicate that they extended the principle viz., that the guardian can borrow for necessity and for the benefit of the estate to the case of a mortgage or charge by him. The Madras decisions which I have already discussed understood this passage throughout in that light and have held that the principles laid down govern the contractual competency of a guardian under certain circumstances.

25. It is not necessary to consider the innumerable decisions applying the aforesaid principles to alienations made or mortgages or charges effected by a de facto or de jure guardian for necessity or for the benefit of the estate. I have already referred in another context to the application of the same principles to simple debts contracted by a guardian and even to promissory notes executed by him. But the question 'germane to the present enquiry is whether a contract of sale or purchase entered into by a guardian for necessity or for the benefit of the estate can be enforced against the minor's estate. This question was raised and decided in *'Krishnaswami v. Sundarappayyar*[24]*'* There, the mother and guardian of a Hindu minor entered into a contract for the sale of his land. The vendee sued the minor by his mother and

[24]18 Mad 415

guardian ad litem for specific performance of the contract and for possession. It was found that the contract was binding on the minor. The learned Judges Muttuswami Ayyar and Best, JJ.held that the suit was maintainable. This is, therefore, a direct case on the point. The learned Judges made two points in coming to that conclusion (1) Section 11, Contract Act does not exclude the power of the guardian of a minor to represent him and enter into contracts on his behalf either beneficial or necessary to the minor under Hindu law and (2) the English law that a minor cannot claim specific performance proceeds on the ground of want of mutuality and that doctrine has no application to this country. This decision is a clear authority for the position that a guardian under Hindu Law can enter into a contract on behalf of his ward for purposes binding on the estate and that such a contract is specifically enforceable. But unfortunately this decision was not cited before the Judicial Committee in 39 Cal 232 (PC). It was assumed in that case that the guardian executed the agreement for the purchase of certain immoveable property on behalf, of the minor. In denying the right of the minor who attained majority to enforce the said agreement for specific performance, their Lordships made the following observations at page 237 :

"They are however of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the

minor's estate by a contract for the purchase of immovable property and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality and that the minor who has now reached his majority cannot obtain specific performance of the contract."

26. The first thing to be noticed in this case is that the parties are Muhammadans and it does not appear from the judgment that they were governed by Hindu law. The question therefore whether the agreement to purchase by the guardian was for necessity or for the benefit of the minor under Hindu law could not have arisen for consideration in that case. Secondly the case of 6 Moo Ind App 393 (PC) (O) for the same reason was neither cited nor considered in that case. Further it deals with the case of an agreement to purchase and the facts do not disclose that the purchase was for the benefit of the minor. In the circumstances, the decision should be confined to the case of an agreement to purchase entered into by a guardian en behalf of a minor not governed by Hindu law. Even the main ground of the decision viz., want of mutuality has ceased to be inflexible rule in England and is not of universal application. The doctrine of mutuality means that at the time the contract was entered into, it could have been enforced by either of the parties against the other. But many exceptions have been engrafted by English law on the general principle of equity. It is not observed in cases of conditional contracts, unilateral contracts, waiver by conduct, transfers with incidental covenants, contracts of minors embodied in compromise decrees and contracts to transfer future property.

27. In - *'Salisbury v. Hatcher'*[25], Knight Bruce V. C. stated the scope of the doctrine as follows :

"In cases of specific performance the want of mutuality is a consideration

[25](1842) 12 " LJ-Ch 68

generally material, but it is contrary to principle and authority to say that perfect mutuality is requisite in order to call a Court of equity into action. There are cases in which plaintiffs have had a decree for specific performance against defendants Who when the bill was filed were not in a condition, to enforce specific performance in their own, favor. Where no legal invalidity affects the contract, the enforcement of it in this Court is a matter of judicial discretion".

28. These observations also indicate that under certain circumstances Courts in exercise of judicial discretion can override the doctrine of mutuality. See "Law of Equity" by G.C.V. Subbrao, pp. 512, 513 and 514.

29. Under Hindu law, as I have already indicated in a different context, a guardian has legal competency to enter into a contract on behalf of a minor for necessity or for the benefit of the estate. In the case of contract coming within the four corners of that doctrine no question of invalidity arises. It is valid at the time of inception and if either of the parties can enforce the contract against the other at the time it was entered into, the test of mutuality is also satisfied. Unfortunately the decision in 39 Cal 232 (PC) was applied in a long catena of decisions in different Courts and suits for specific performance of contracts of sale or purchase or for reconveyance filed at the instance of either party were dismissed by all the Courts on the ground of want of mutuality. See - *'Narayana Rao v. Venkata Subba Rao*[26]*',* - *-Ramakrishna Reddiar v.*

Chidambara Swamigal'[27], - *'Singara Mudali v. Ibrahim Baig*[28]*',* and AIR 1933 Madras 322. The other High Courts also followed suit. See - *'Swarath Ram Ram Saran v. Ram Ballabh*[29]*',* - *'Srinath v. Jatindra'*[30], - *'Nripendrachandra Sarkar v. Ekherali Joardar'*[31], and - *'Malla v. Muhammad Sharif*[32]*,*

30. At the stage in 1948 the Judicial Committee gave another decision on the scope of Section 53-A, T. P. Act and though it revolutionised the settled law on the subject, in my view it approached the question from the correct perspective. In AIR 1948 PC 95 their Lordships of the Judicial Committee held that a minor was a "transferor" within the meaning of Section 53-A and therefore a transferee from him who was in possession was protected by Section 53-A of the Act. As much of the discussion at the Bar turned upon the scope of this decision and as there is also some conflict of judicial opinion on the interpretation of the views expressed therein, it is necessary to consider that case in some detail. The facts there were: The respondent, being minor by guardian and mother agreed to sell certain land to the appellants, the purchase price to be applied in discharging a debt owing to the appellants which had been incurred by the respondent's father. The appellants were let into possession of the land but the provision in the contract that the sale deed was to be executed and registered was never complied with. The minor represented by his mother filed the suit claiming possession on the land contracted to be sold. The defendant relied upon the provisions of Section 53-A, Transfer of Property Act which reads :

> "Where any person contracts to transfer for consideration any immovable

[26] AIR 1920 Mad 423 [28] AIR 1347 Mad 94 [30] AIR 1926 Cal 445
[27] AIR 1928 Mad 407 [29] AIR. 1925 All 595 [31] AIR 1930 Cal 457
[32] AIR 1927 Lah 355

> property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has in part performance of the contract taken possession of the property or any part thereof or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then notwithstanding that the contract, though required to be registered, has not been registered, or where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continue in possession, other than a right expressly provided by the terms of the contract :
>
> Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof".

31. It will be seen from the aforesaid provisions that "transferor" referred to in that section is the person who entered into a contract to transfer for consideration any immoveable property by writing signed by him or on his behalf. Unless the minor enters into a valid, contract to transfer his immoveable property the provisions of Section 53-A cannot obviously be invoked. It therefore became necessary for the Judicial Committee to consider whether it was within the

powers of the mother as guardian to enter into a contract and whether the contract not entered into was a valid contract. At p. 98 their Lordships observed :

> "Their Lordships entertain no doubt that it was within the powers of the mother as guardian to enter into the contract of sale of 29-11-1935 on behalf of the respondent for the purpose of discharging his father's debts and that if the sale had been completed by the execution and registration of a deed of sale, the respondent would have been bound under Hindu law".

32. This is a, clear statement recognizing the right of the guardian to enter into a contract to sell for a purpose binding on the estate. Their Lordships after noticing the provisions of Section 11, Contract Act proceeded to state at page 96 :

> "It is clear that, if the mother and guardian had taken no part at all in the transaction, the respondent could not have entered into a valid contract to sell the land in suit to the appellants but it, is equally clear that such a contract could, and did come into existence in the present case".

33. This passage is clear and unambiguous. It shows that such a contract entered into by the guardian on behalf of the minor for a binding purpose is a valid contract. Then they cited the following passage from Pollock and Mulla's Indian. Contract and Specific Relief Acts, Edn. 7, p. 10 :

> "A minor's agreement being now decided to be void, it is clear that there is no agreement to be specifically enforced; and it is unnecessary to refer to former decisions and distinctions, following English authorities which were applicable only on the view now overruled by the Judicial Committee."
> XX XX XX
> "It is however different with regard to contracts entered into on behalf of a minor by his guardian or by a manager of his estate. In such a case it has been held by the High Courts of India, in cases which arose subsequent to the governing decision of the Judicial Committee, that the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it and further if it is for the benefit Of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all."

The approval of this passage by the Judicial Committee puts beyond any doubt the legal position. The passage makes a distinction between void contracts entered into by minors in England and contracts entered into by guardians on behalf of minors in India for purposes binding on the estate. The next passage in the judgment refutes the contention that their Lordships did not approve of the passage extracted from Pollock and Mulla for they say :

> "In the present case neither of the two conditions mentioned is a wanting, having regard to

the findings in the Courts in India. It would appear, therefore, that the contract in the present case was binding upon the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent and not his mother, was the owner. If an action had been brought for specific performance of the contract, it would have been brought by or against the respondent and not by or against his mother."

34. What clearer exposition of the law is necessary than, the aforesaid passage ? The passage extracted from the judgment leaves no doubt in my mind that the Judicial Committee recognized that in India a guardian has legal competency to enter into contracts to sell the property of a minor for purpose binding on the estate and in such a case if a default is made the vendee or the guardian representing the minor as the case may be can file a suit for the specific performance of the contract. As there is legal competency on the part of the guardian in the circumstances, no question of mutuality can arise at all.

35. It is said that the decision in 39 Cal 233 (PC)' (A) has not been referred to in this judgment. But the arguments advanced by Sir Herbert Cunlifee, K.C. at page 143 (of ILR 1949 Mad) show that the said decision was cited. But presumably because it was not relevant, it was not referred to in the judgment. What is more the decision in 6 Moo Ind App 393 (PC) (O) which was omitted to be considered in the earlier decision was noticed in the later one in support of their view that the guardian's arts are on behalf of the minor. I have, therefore, no hesitation to hold that the considered judgment of the Judicial Committee in AIR 1948 PC 95 must be taken as overruling all the previous decisions based upon 32 Cal 232 (PC) ..

36. After the decision of the Judicial Committee there was again some conflict of view on the question whether and to what extent the said, decision overruled the earlier decisions. In AIR 1951 Madras 431 Viswanatha Sastry, J., relying upon the decision of the Judicial Committee in AIR 1948 PC 95 held that a contract for the sale of the property of a minor entered into by his mother and guardian for purpose considered necessary and proper in Hindu law would be binding on the minor from the time when the contract is entered into and is capable of being enforced against him. Though the learned Judge exhaustively considered the question and was inclined to hold that under Hindu law, whether it is a contract of sale or purchase on behalf of a minor, it would be binding and enforceable if the sale or purchase was for necessity and for the benefit of the estate, he distinguished the decision in, 39 Cal 232 (PC) on the ground that it-related to a contract entered into by a guardian on behalf of a minor to purchase the property. The learned Judge did not express his final opinion in the case of agreement of sale by a guardian on behalf of a minor as obviously he could not do so contrary to the decisions of the Full Bench and Division Bench of the Madras High Court. I have carefully gone through the judgment. I entirely agree with the view expressed by him. I would go further and hold that there cannot 'be any essential distinction, between a contract of sale and contract of purchase. The difference is only one of degree. It may perhaps be more difficult in the case of a purchase by a guardian on behalf of a minor to sustain it on the ground of necessity or benefit but circumstances can easily be conceived when even a purchase of land by a guardian on behalf of a minor could be for necessity or for the benefit of the estate. I cannot, therefore, find any difference in principle between the case of purchase by a guardian and that of a case of a sale by a guardian. Both depend for their validity on the competency of the guardian acting within the scope of his power under Hindu law.

37. Lodge, C.J., and Bam Labhaya, J. of the Assam High Court held in AIR 1949 Assam 57 that the natural guardian of a Hindu minor is not competent to bind the minor or his estate by a contract for sale even though-it may be for necessity or for the benefit of the minor. In coming to that conclusion they relied upon the decision of the Judicial Committee in 39 Cal 232 (PC). When the decision of the Judicial Committee in AIR 1948 PC 95, was cited, the learned Judges ruled it out on the ground that the point before their Lordships was very different from that which arose in 39 Cal 232 (PC), and that the said authority had got no bearing on the case before them. When the passages in Pollock and Mulla's Indian Contract and Specific Relief Acts on which the Judicial Committee relied were cited they ignored them on the ground that the said observations must have been based on decisions given by High Courts in India before the decision in 39 Cal 232 (PC). The way in which the learned Judges distinguished the decision of the Privy Council in AIR 1948 PC 95, does not appeal to me. As aforesaid the Privy Council in express terms recognized the competency of a guardian to enter into a contract on behalf of a minor to sell his property for a purpose binding on the estate. I cannot therefore follow this decision.

38. A similar question arose for decision before a Full Bench of the High Court of Hyderabad in AIR 1952 Hyderabad 120 (FB). The learned Judges relying upon, the decision of the Judicial Committee in AIR 1948 PC 95, held that a minor can enforce a suit for a specific performance when the contract, be it a purchase or a sale, is for the benefit of the minor's estate. Deshpande, J. who expressed a dissenting view also agreed with the other learned Judges that a suit for a specific performance can be instituted in case the contract was for the sale of the property of the minor by a guardian but that a contract for the purchase of immovable properties cannot be enforced for the reasons already stated. I agree with the majority view and I cannot on principle make a distinction between a, contract of sale and that of purchase if as a matter of fact it is established that the guardian entered into the contract for necessity or for the benefit of the estate.

39. The matter may be looked at from a different perspective. Assuming there is difference in law vis-a-vis the power of the guardian of a minor to incur debts and to deal with immoveable property, the question is to which category contracts of sale or purchase of immoveable properties pertain. It is a settled law that a guardian of a minor can alienate the property of his ward or otherwise charge it for purposes binding on the estate. See 6 Moo Ind App 393 (PC) . An agreement to convey or purchase is only a preliminary step in completing a transaction of sale or purchase as the case may be. Without negotiations and without any agreement oral or in writing rarely is a sale deed executed and registered. To hold that guardian can execute a sale deed in respect of a specific property but he cannot legally enter into an agreement to convey or purchase the same is incongruous and illogical. The question is whether such a contract partakes of the nature of simple debts or forms an intergral part of a transaction dealing with property. It is true that under Section 54, Transfer of Property Act a contract of sale of immoveable property does not of itself create an interest in or charge on such property. But that section does not exhaust the relations which flow from a contract for sale of immoveable property. Under Section 40, Transfer of Property Act, where a third person is entitled to the benefit of an obligation arising out of contract and annexed to the ownership of immoveable property but not amounting to an interest therein or an easement thereon such right or obligation may be enforced against R, transferee with notice thereof or a gratuitous transferee of the property affected thereby but not against a transferee for consideration and without notice of the right or obligation nor against such property in his hands. This section indicates that though the benefit of an obligation arising out of

a contract is not an interest in immoveable property or easement thereof it is an obligation annexed to the ownership of immoveable property. Section 27, Specific Relief Act also recognizes the right of a person under a prior contract to specifically enforce it against any other person claiming under the same vendor by a title arising subsequent to the contract except a transferee for value who has paid his money in good faith and without notice of the original contract. This section also recognizes the obligation under a contract as one-annexed to immovable property. Illustration (g) to Section 3 of the same Act reads :

> "A buys certain land with notice that B-has already contracted to buy it. A is a trustee within the meaning of this Act for B of the land so bought."

Section 91, Indian Trusts Act also lays down :

> "Where a person acquires property with notice that another person has entered into an existing contract affecting that property of which specific performance could be enforced the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract."

40. By reason of the aforesaid two sections a purchaser with notice of the prior contract is in the position of a trustee and he can only stand, in the shoes of the vendor and receive the purchase money from the person with whom the earlier contract was entered into. In other words, a party claiming under an earlier contract has an equitable right to enforce his contract against a subsequent purchaser and perfect his title by obtaining a sale deed from him. It follows that though the contract does not create an interest or a charge in favor of a party, an obligation arising out of a contract is annexed to the property and is enforceable against the purchaser of the same with knowledge of the earlier contract. If so, contracts to sell or purchase property are transactions closely connected with dealings in immoveable-property by a guardian giving rise to obligations annexed to that property. They cannot be equated with contracts of loans imposing personal obligations on the minor. If as laid down in the decision of 6 Moo Ind App 393 (PC), a guardian can alienate property for necessity or for the benefit the estate of his ward there cannot be any reason why a different rule should be applied to contracts which, form only one of the necessary steps in a transaction of sale or purchase as the case may be.

41. Further it cannot be laid down as an inflexible rule that under no circumstances the personal liability of a minor can be enforced against him. If that was so even in the case of a sale or mortgage executed by a guardian on behalf of a minor for necessity or for the benefit of the estate, there would be personal obligations to be enforced, against the minor under certain contingencies. If any of the covenants incorporated in the sale deed are broken by a guardian or the statutory covenants embodied in Section 55. Transfer of Property Act or not carried out, it cannot be contended that they could not be enforced against the guardian representing the minor. After the sale deed was executed if the guardian did not pay the consideration certainly the-vendor could recover the money from the estate of the minor. If the title was defective, the estate of the minor would be liable for damages. But the learned counsel of the respondents contends that the said obligations and liabilities would arise only after a valid transfer deed is executed and that they have bearing in a case where the competency of the guardian to enter into a contract itself is questioned.

While I appreciate the distinction, the fact remains that a minor under Hindu law is not completely immune from the enforceability of personal obligations against him. If he was liable after the sale deed was executed by the guardian I do not see any justification for holding that the obligation to execute a sale deed is not binding en him. All the Courts have held consistently relying upon the decision In 6 Moo Ind App 393 (PC) (O) that the guardian of a minor can, alienate his property or charge it for necessity or for the benefit of the estate. There is an unbroken line of judicial opinion in Madras that the same principle will apply to simple debts incurred by a guardian or to promissory notes executed by him on behalf of the minor. To put it differently such debts would be enforceable against the minor's estate if they were incurred for purposes binding on the estate. But other High Courts refused to extend the principle of the decision in 6 Moo Ind App 393 (PC) (O) to contracts of simple debts and to promissory notes executed by a guardian on behalf of a minor on the ground that by recognising the validity of such contracts the guardian would be enforcing the personal liability of the minor. All the Courts again following the decision in 39 Cal 232 (PC) have unanimously held till the Privy Council decision in AIR 1948 PC) 95 (B) that a contract of sale or purchase entered into by a guardian on behalf of a minor could not be enforced against the minor on the ground of want of mutuality. But as I have pointed out the said view is no longer sound in view of the later Privy Council decision in AIR 1948 PC 95 which in clear and unambiguous terms ruled otherwise.

42. It is said that in the case of simple debts the whole property of the minor would be liable for being taken in execution of the decree while an the case of a sale of a specific item by the guardian the misconduct of the guardian can be localized and exposed. In the case of a simple debt, the argument proceeds, the creditor can attach any property of the debtor or by allowing interest to accumulate may under certain circumstances bring the entire property to sale whereas in the case of an alienation on behalf of the minor, it can easily be proved that a particular property was not sold for necessity and if it is proved otherwise, he would lose only that property. But these arguments have really no force for the simple reason that even in the case of a simple debt, if it is established that the debt was not incurred for necessity or for the benefit of the estate, no decree can be passed against the minor. Assuming there is any such principle underlying the sale of immovable property and the incurring of a simple debt the same considerations that apply to the sale of immoveable property would apply also to an agreement to sell that property, for, in both the cases, the property conveyed or purchased or to be conveyed or purchased is localised and there is no danger of the entire property of the minor being proceeded against. Agreements of sale and purchase therefore must be placed in the same category as sales and purchases executed by a guardian.

43. The question may be approached from a different perspective i.e., from the standpoint of the power of a guardian to sell his ward's properties under certain circumstances. A guardian who has entered into a contract with a third party to see his ward's property for necessity or for benefit has undoubtedly the right and power to execute a sale deed pursuant to the agreement entered into by him. What the Court In a suit for specific performance does is only compel him to do what he should have done. In - *'Abdul Hameed Sait v. Provident Investment Co. Ltd.*[33]*',* a Full Bench of the Madras High Court, of which I happened to be one of the members, held under analogous circumstances, that a Court in selling the property of the son in execution of a decree obtained against the father exercises only the power whereunder the father himself could have sold the property. After considering the case law on the subject at page 978 I observed as follows :

"But when the creditor chooses to obtain a decree only against the father and seeks to bring the entire family property to sale the Court by selling the property does only what the father could have done. The power of the Court to sell is co-extensive with the power of the father to sell. The existence and continuance of the power of the father and not the exercise of it by him enables the Court to sell the properties in his stead. If he exercises the power to sell no question of the Court selling the property would arise and indeed the

[33] AIR 1954 Mad 961 (FB)

Court's intervention becomes necessary only when a father refuses or neglects to exercise that power.

The Court's power to sell comes to an end when the father's power ceases."

44. The aforesaid observations can equally apply to the case of a guardian for the Court by directing the guardian to sell or if he makes a default by selling the property itself is in effect and substance really exercising the power of the guardian to sell the property. If a guardian is competent to sell the property in order to pay off debts binding on his ward, the Court may also compel him to do so. In this view, no question of making the minor personally liable arises.

45. This leads to the consideration of the question how far and to what extent these principles have been overruled or modified by the Federal Court in their two judgments in '*Sriramulu v. Pundarikakshayya* ' and *'Bapayya v. Pundarikakshayya (G1)' The facts in*[34] were : One Chelamayya Chowdari had borrowed a sum of Rs. 3,000/- on a promissory note from the defendant. He died leaving two widows empowering his junior widow to take a boy in adoption. Pursuant to that power the plaintiff was taken in adoption. The adoptive mother as de jure guardian of the minor renewed the promissory note. On the same day she executed another promissory note in respect of a further sum alleged to be due to the defendant for professional work done by him during the life-time of Chelamayya. Some time thereafter, she executed a consolidated promissory note in renewal of the two promissory notes. After her death the natural father of the adopted son entered upon the management of the estate and professing to act as guardian of the respondent, renewed the promissory note in the name of the minor. Later on, he executed a sale deed conveying the immoveable properties mentioned in the plaint to the creditor in discharge of the amount due under the aforesaid promissory note and a small cash paid to him towards registration charges. The Federal Court held that a de facto guardian had no power to execute promissory note in renewal of earlier promissory notes and therefore the said promissory note could not be a valid consideration. Though the learned Judges who formed the Bench agreed on the conclusion, they have given different reasons for arriving at that conclusion. It is, therefore, necessary to ascertain the majority view, which would only be binding on this Court. The learned Chief Justice pronounced at page 221 the following three points for consideration :

"(1) Whether an alienation (mortgage or sale) of a minor's immoveable property is permissible in case of necessity ?

(2) Whether there is liability for money borrowed for necessity and if so in what manner it could be so borrowed and

(3) Whether a negotiable instrument can be executed for or in the name of the minor so as

to be enforceable against the minor's estate."

46. Though the questions propounded are general in terms applicable to de facto as well as de jure guardians the discussion in the judgment clearly indicates that his Lordship confined his opinion only to a de facto guardian. The following passage from the judgment at page 222 indicates the scope of the judgment :

[34] AIR 1949 FC 218

> "The principle of the minor's estate being liable in case of necessity has been recognized by an Act in India in 1872 in Section 68, Contract Act which is applicable to all persons. Under that section it is provided that if necessaries were supplied to a minor, his estate could be made liable for the same. The statement of law by the Privy Council in 6 Moo Ind App 393 (PC) (O) has been followed in India for nearly a century and titles to properties have been created on that basis.

Similarly loans taken for the necessity of a Hindu minor have been ordered by the Courts to be repaid out of the minor's estate for several years past. It is necessary to have a discussion here on that question. That, however, will be no justification for extending the application of the principle of necessity to transactions, which do not strictly conform to that test..... .As the minor cannot enter into a contract, I am reluctant to accept the argument that a de facto manager is the authorized agent of the minor and can therefore make his estate liable even in the case of necessity by making a contract in the name of the minor."

47. After discussing the point to some extent, his Lordships says :

> "In my opinion, therefore, the law as it stands permits a 'de facto' manager to borrow money for the necessity or the benefit of the minor's estate so as to make the minor's estate liable for the loan when he can do so without making out a contract between the minor and the creditor."

48. It is therefore obvious that the learned Chief Justice confined his remarks to the case of a de facto manager and in the learned Judge's view he can borrow money for necessity only if he can do so without making out a contract between the minor and the creditor.

49. But in regard to promissory notes the learned Chief Justice observes :

> "In respect of borrowing money on the security of negotiable instrument the same test should be applied but with greater strictness because by giving a negotiable instrument in the name of a minor, a de facto manager is bringing into existence a contract between a minor and the creditor and which contract under the Negotiable Instruments Act creates rights and privileges in favor of third parties e.g., presumption as to consideration of rights of holders in due course etc..... If the lender files a suit on the debt (apart from the negotiable instrument) he will have to satisfy the conditions necessary to make the minor's estate liable in respect of the transaction sought to be enforced by him."

50. But Fazl Ali, J. went further and covered a wider field. The learned Judge deduced the following principles from a discussion of the case law.

> "(1) The manager of an infant's estate can deal with the minor's estate by way of mortgage, in case of need or for the benefit of the estate.
> (2) He cannot bind the minor by contract or under obligations and then transfer them to the minor's estate so as to enable the creditor to establish a direct relation between himself and the estate.
> (3) In certain cases (which must presumably be cases of necessity or benefit to the minor), he might be able to show that the estate ought to bear the burden which he had taken upon himself."

51. These principles are applicable according to the learned Judge to both de jure and de-facto guardians. In case where the third principle can be invoked his Lordship says that the creditor might be allowed to stand in the shoes of the guardian and invoke the latter's right to reimbursement out of the minor's estate and that right must usually be subject to the state of accounts between the guardian and his ward. According to this view, a guardian whether de jure or de facto cannot enter into a contract bringing about a direct contractual relationship between the creditor and the minor or the minor's estate though the creditor under certain circumstances relying upon the principle of subrogation, can enforce the rights of the guardian against the minor's estate.

52. In regard to the liability of a minor on a promissory note executed by the guardian the learned Judge says at page 227 :

> "A promissory note executed by a guardian on behalf of a minor is not a document containing an unconditional undertaking to pay a certain sum, because the undertaking is subject to two conditions. Firstly, that the note is to be enforced against the minor, if necessity is proved and secondly that the amount is not payable except out of the estate of the minor, the creditor being thus unable to proceed personally against the guardian or the minor. It is clear that the negotiable quality of a merchantile instrument such as a promissory note will be greatly affected by reading these conditions into it."

53. Mukherjee, J. propounds the question to be decided at p. 234 in the following terms :

> "This leads us to inquire as to how far a guardian in Hindu law whether de jure or de facto can bind his ward personally by a simple contract debt, or by a covenant or promise to pay money without creating a charge on his properties and to what extent, if any, such liability could be enforced against the estate of the minor."

After discussing the case law on the subject, the learned Judge observes at page 237 as follows :

> "The minor being incapable of being a party to a contract there could be no direct contractual liability established against him or his estate. But as the guardian was

personally liable under the contract, he would be entitled to reimbursement from the minor's estate under the rule of Hindu law if the borrowing was for necessity or benefit of the minor. The creditor in such circumstances can invoke the equitable doctrine of subrogation in his favor and claim to be placed in the position of the guardian for enforcement of the latter's right of reimbursement against the minor's estate.

Instead of there being two suits, one by the creditor against the guardian and the other by the guardian against the minor, both the reliefs may be worked out in one and the same suit and thereby multiplicity of litigation could be avoided. This is the only proper way in which the Hindu law rights of the guardian in. the matter of contractual debts for necessity or benefit of the minor could be given effect to in perfect consonance with the well established principles of the law of contract and the ordinary rules of procedure in. personal actions:"

The learned Judge proceeds to state :

"When the guardian borrows money on a bond in his capacity as guardian but excludes his personal liability altogether there could be no suit on such a bond against the minor's estate, for, the guardian can claim indemnity when lie is personally liable and it is only by subrogation to the rights of the guardian that the creditor can have recourse to the minor's, estate."

The learned Judge concludes his reasoning with the following words :

"The position therefore is that in case of contractual debts borrowed either on simple bonds or promissory notes the creditor can have recourse to the minor's estate indirectly on the principle of subrogation when the guardian has the right of indemnity against the estate of the ward and he would have the right of direct reimbursement out of the properties of the infant, only when the debt is for necessaries supplied to the infant.

In this way effect can be given to the personal law of the Hindus in respect of the liability of a minor's estate for debts contracted by the guardian for legal necessity without infringing in any way the basic principles of the law of contract and in this way alone, the different pronouncements of the Judicial Committee mentioned above can be consistently explained." The view of the learned Judge has been clearly and unambiguously stated. Except in the case of necessaries governed by Section 68, Contract Act a guardian cannot borrow money on simple bonds or promissory notes directly making the minor or his estate liable to the creditor.

54. In regard to the liability of a minor on a promissory note the learned Judge observes :

"A promissory note is payable unconditionally on demand and it has got some other special features, via., there is a presumption that it was made for consideration and that the holder of it is a holder in due course. It has been suggested in some of the cases, which I have mentioned above that if a promissory note executed by the guardian is to be

> read as an undertaking to pay out of the minor's estate, then it would not be payable at all events and that would detract from the unconditional nature of the undertaking which is the essential thing in a promissory note."

55. As regards the minor's liability under a promissory note executed by a guardian their Lordships unanimously held that the promissory note would be invalid as obviously the guardian cannot give an unconditional undertaking on behalf of the minor. The majority view in the case of simple debts is that both in the case of de facto as well as de jure guardians they have no power to incur contractual debts so as to bind directly the minor or his estate.

56. The Federal Court again considered a similar question in AIR 1949 FC 218. This case came up before four learned Judges. Only Mahajan, J. was not a member of the Bench which decided the previous case. The facts are the same as in the earlier one. The learned Judges came to the same conclusion. They held that the natural father or a minor who has been given away in adoption as the de facto manager of his estate has no authority to execute a promissory note on his behalf so as to bind his estate on the note itself and that such. a promissory note cannot form a valid consideration for the sale of the minor's property by the de facto manager.

57. Kania, C.J. followed his previous judgment. Fazl Ali and Mukherjea, JJ. agreed with the view of the learned Chief Justice. Pausing for a moment here, if it is strictly construed the opinion of Fazl All and Mukherjea, JJ. would mean that they confined their reasons for their conclusion to those expressed by the Chief Justice in the earlier decision. But I think they meant to say that they stood by their judgment in the connected case. Mahajan, J. on the other hand, though on a consideration of the Hindu Law texts and the case law on the subject he comes to the same conclusion, was inclined to accept the view of the Madras High Court in regard to simple debts. But in regard to the rights of a de facto guardian to enter into contracts of loans on behalf of a minor he summarized his views .at p. 254 as follows ;

> "In the light of the above discussion the next question that falls for decision is whether a de facto guardian (manager) can also incur simple debts without charging the estate and bind the minor's estate though not making the minor personally liable for those debts provided those debts are incurred in situations and circumstances stated in 6 Moo Ind App 393 (PC) (O). Contracts of loan entered into by the guardian,, though they do not bind the minor's person, bind the estate by an indirect process.

The guardian himself can become liable for those debts personally and is entitled to reimbursement and indemnity from the minor if the debts are incurred for the need of the minor. When the guardian himself has the right to reimbursement and the indemnity from the minor, the creditor on the rule of subrogation would no doubt be entitled to proceed against the property of the minor. This rule is subject to two exceptions in which a lender has direct recourse to the minor's estate where the contract is for necessaries supplied to or on behalf of the minor and where the liability is one to which the minor is subject under Hindu law. These exceptions are supported by judicial authority and on the principles of English law and in Section 68, Contract Act. In these two circumstances the guardian may directly incur a debt on behalf of the minor and bind his estate. Recourse to the principle of subrogation is unnecessary in such cases." But in

regard to a promissory note executed by a guardian on behalf of a minor, he observed at page 263 :

> "The result of the decision therefore is that a minor cannot be made liable under promissory note executed in his name by the guardian whether he is the natural guardian or the de facto-guardian. A promissory note is a peculiar kind of document and by its very nature it imposes, an onerous liability on the minor.... It is also clear that if the guardian has given a promissory note making himself personally liable, then he can be sued on the note and he can then seek reimbursement from the minor's estate and that otherwise the note can be sued as evidence of the debt. There is no liability on the promissory note; the liability, if any, is aliunde of the note i.e. on the loan itself, if it is for the benefit of the estate or is given for a pre-existing liability that has been discharged by a fresh borrowing taken for the purpose and evidenced by the note."

58. Having regard to the aforesaid two decisions, the majority view, which is binding on us, may be stated thus. A guardian cannot, execute a promissory note on behalf of a minor for the reason that the minor's liability under Hindu law is conditional and, therefore no unconditional undertaking can be given by him. The guardian cannot also enter into contracts of loan making the minor or his estate liable direct to the creditor. But where a guardian personally makes himself liable under a contract, the creditor can getting into the shoes of the guardian, indirectly work out the guardian's right of subrogation against the minor's estate. Except in the case of necessaries supplied to the minor governed by the provisions of Section 68, Contract Act, there cannot be direct recourse by the creditor against the minor or his estate. But no question was raised nor did the Federal Court purport to decide any question as regards the competency of a guardian to enter into a contract of sale or purchase on behalf of the minor under circumstances binding on him under Hindu law. That question has no relation to the right of the guardian to incur simple debts or execute promissory notes in favor of creditors. It really pertains to the law of real property. Indeed Mahajan, J. cites in extenso at pp. 253-254 the observations of the Privy Council in AIR 1948 PC 95, with, approval. It is, therefore, clear that the Federal Court in either of the two aforesaid decisions has not laid down any proposition, which is in conflict with that of the Privy Council in AIR 1948 PC 95. The judgments of the Federal Court may, therefore, be confined to a guardian's power to incur simple debts and execute promissory notes on behalf of the minor, while the two decisions of the Privy Council in 6 Moo Ind App 393 (PC) (O) and AIR 1948 PC 95, will govern the guardian's right to enter into transactions in regard to his ward's immoveable property.

59. Before concluding it is as well that I should express my opinion on a question that might incidentally arise. The question is whether the transaction should stand the test of the doctrine of necessity and benefit even on the date when, the Court seeks to enforce it. To put differently, is it necessary that the validity of the transaction should depend upon the facts and circumstances existing on the date of the Court's decree as if the sale deed was executed on that date ?
I have held that if the contract of sale was for necessity or for the benefit of the minor, it would be valid and enforceable. The competency of the guardian to enter into a valid contract is conditioned by the existence of facts attracting the aforesaid doctrine. Once the condition, is fulfilled, the competency to execute it is complete. If that is conceded, it becomes enforceable

and the supervening circumstances cannot in validate it. But the existence of a valid and enforceable contract cannot in itself deprive the Court of its discretionary power to refuse to enforce the contract, if the supervening circumstances obviously affect the interests of the minor. In all transactions affecting a minor, a paramount duty rests upon a Court not to put its seal on transactions affecting his interests. Therefore, though the contract might be valid and otherwise enforceable, if at the time the Court was asked to enforce it it transpires that the circumstances have so changed that it would obviously be unjust and detrimental to the interests of the minor to enforce it the Court may well in the exercise of its discretion refuse to give a decree for specific performance. For the aforesaid reasons, I would answer the question in the affirmative. Judgment of the Division Bench Persuant to the opinion expressed by the Full Bench, we set aside the decree of the learned Subordinate Judge and remand the matter to the lower Court to be disposed of in accordance with law. Costs will abide result. Court-fee paid on the appeal memo will be refunded.

Case remanded.