

Harikrishnan Vs. Sri Chanda Prabhuji Jain Temple and ors.

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Overruled by : [Sri Chandre Prabhuji Jain Temple and Ors. Vs. Harikrishna and Anr.](#)

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Court : Chennai

Decided On : Dec-01-1961

Reported in : AIR1962Mad267

Judge : S. Ramachandra Iyer, C.J., ;Veeraswami and ;Srinivasan, JJ.

Acts : [Guardians and Wards Act, 1890](#) - Sections 4(3), 7, 29, 31, 31(2) and 31(4);
[Code of Civil Procedure \(CPC\), 1908](#) - Sections 47, 48 and 115

Appeal No. : Original Side Appeal No. 17 of 1957

Appellant : Harikrishnan

Respondent : Sri Chanda Prabhuji Jain Temple and ors.

Judgement :

S. Ramachandara Iyer, C.J.

(1) This appeal which arises from the judgment of Balakrishna Aiyar J. Granting a decree in favour of the respondent on the foot of two mortgages of the respondent on the foot of two mortgages dated 4-3-1950 and 31-5-1950, has been placed before us on account of conflict between the decisions in N. Venkataswami v. R. Veeranna, ILR 45 Mad 429: AIR 1922 Mad 135 and Raman Chettiar v. Thirugnanasambandam Pillai, ILR 50 Mad 217: AIR 1927 Mad 233. Before

considering the correctness or otherwise of the decisions referred to above, it is necessary to set out the relevant facts which have given rise to this appeal.

(2) One Gopalakrishna Raju, who owned substantial properties, died on 13-11-1941, leaving behind him two widows, Lakshmi and Manorama, and three children born of the latter, -a son, who is the appellant in this appeal, and two daughters. A few months before his death, Gopalakrishna Raju executed, and duly registered, a will, bequeathing his properties substantially to the appellant. Lakshmi was given a life interest in a few immoveable properties in Tirunelveli Dt. Manorama, the second wife, was appointed the executrix under the will. The will made it clear that Manorama should have no power to sell, mortgage or otherwise alienate the immoveable properties left by the deceased. The executrix was not given any beneficial interest in the properties beyond a right to be maintained befitting her dignity and status. No probate or letters of administration were taken of the will. Manorama who was in possession of the properties asserted that she, as the widow of the deceased, was entitled to half of the properties left by him, and that she, as the natural guardian of the minor son, was entitled to remain in possession of the properties.

On 7-6-1948, she mortgaged certain properties to raise a loan of Rs. 7000 for the purpose of the marriage of her first daughter. About two months thereafter, she filed O.P. No. 269 of 1948 on the original side of this court, praying that she might be appointed as the guardian of her minor children and seeking permission of the court to raise a loan of Rs. 20,000, for discharging the debts till then incurred and for the celebration of the marriage of her second daughter. She suppressed in the petition the existence of the will stating that Gopalakrishna Raju died intestate and that the loan was necessary for purposes binding on her son. Along with the petition, she also filed appln. No. 2595 of 1948, seeking permission to raise the loan on the mortgage of the properties. Subba Rao J. Passed an order on 9-9-1948 appointing Manorama as the guardian of the person and properties of the minors.

The learned Judge passed another order in the accompanying application giving leave to her to raise a loan of Rs. 7000 on mortgage of two houses belonging to

minors, Armed with the order, she executed a mortgage and borrowed a sum of Rs. 7000 on 24-9-1948 from one Raja Lakshmi Ammal. Within a short time thereafter, she filed appln. No. 4689 of 1949 seeking the sanction of the court to raise a loan of Rs. 40,000; but, in the affidavit that followed the application, the amount was restricted to Rs. 30000. On 23-1-1950 Rajagopalan J. Granted leave to her to raise a loan of Rs. 30000 on the security of two houses. The loan was intended to discharge the two earlier mortgages and pay off the other liabilities said to have been incurred by her. The learned Judge while granting the sanction, observed that there were debts contracted by the guardian which would bind the estate of the minor.

On the strength of this order, Manorama borrowed on 4-3-1950 a sum of Rs. 30000 from the respondent, the trustee of Sri Chandra Prabhuji Jain Temple, after executing a mortgage of the two items of properties referred to earlier. Manorama's need for money was evidently insatiable. Within a few days after borrowing this large sum of money, she applied to this court again in Appln. No. 754 of 1950 for raising a further loan of Rs. 15000, stating that she still had pressing debts to the extent of Rs. 12000: The application was filed on 24-4-1950. On the following day, Krishnaswami Nayudu J. Granted her leave to raise a loan of Rs. 10000 on the same set of properties. The order enabled Manorama to obtain a further loan of Rs. 10000 from the respondent.

This was done by executing a second mortgage in favour of the latter on 31-5-1950 over the same properties. Towards the end of that year. The appellant's mother filed yet another application to sell one of the houses with a view to enable her to discharge the amounts due to the respondent under the two mortgages and for paying the debts subsequently incurred by her. A sale was ordered, and the Indian Bank Ltd. Purchased one of the properties for a sum of Rs. 41,500. But, before the sale was confirmed, the bank appears to have obtained information about the will left by Gopalakrishna Raju; it thereupon applied to have the sale in its favour set aside. This was done on 8-2-1952.

Sometime earlier that is immediately on the existence of Gopalakrishna Raju's will was brought to the knowledge of this court, Krishnaswami Naydu J had directed

the Administrator General to take immediate possession of the estate of the deceased and to apply for Letters of Administration. The Administrator General obtained Letters of Administration and took possession of the estate. In the course of his administration, the Administrator General, after obtaining the sanction of the court, put up for sale the same property. The Indian Bank purchased it for Rs.39200. The net sale proceeds have been retained by the Administrator General. The respondents thereupon instituted the suit, out of which this appeal arises, to recover the moneys due to them in respect of the two mortgages executed by Manorama in their favour on 4-3-1950 and 31-5-1950 in pursuance of the leave granted by this court in Appln. No. 4689 of 1949 and 1754 of 1950).

The suit was contested on behalf of the minor on the ground that Manorama had no authority to execute the mortgage and that the creation of the mortgages was the result of a fraud practised by her on the court. Balakrishna Aiyar J. Held that Manorama deliberately suppressed all information about the will of her husband to the court and that the orders authorising her to raise loans on mortgage over the property of the appellant were procured by fraud. But the learned Judge held that the respondents were, however, not parties to the fraud, that they were acting bona fide, that under the circumstances, the lender could not be required to go behind the orders of the court granting sanction to the guardian to raise a loan, and that the mortgages would therefore, bind the interests of the appellant. On these findings, a preliminary decree followed.

(3) In this appeal, the appellant challenges the correctness of the view by Balakrishna Aiyar J. In regard to the binding nature of the mortgages. One of the main points that arise for consideration in this appeal relates to the extent to which the mortgagee can rely on the two orders in order to support the mortgages executed in his favour by the guardian. The order directing this appeal to be heard by a Full Bench does not formulate any specific question for decision---the entire appeal has been and is before us. But, having regard to the arguments before us, we considered that it would be better to specify the question for decision and dispose of the appeal in the light of the answer thereto. We have therefore framed the following question:

'Whether the existence of an order under S. 31 of the Guardians and Wards Act, granting leave to a guardian for alienating the property of the ward, is conclusive proof that the alienation made in pursuance thereof is supported by necessity or benefit to the minor. If the answer to the question is in the negative, what is the value of that order in any subsequent litigation, where in the minor impugns the validity of the alienation?'

(4) The Guardians and Wards Act is enacted with a view to protect the person and property of the minor. If a guardian is appointed under the Act, the control of the person and property of the minor is vested in the court the guardian being only its nominee. In England, infants have been treated as under the special protection of the sovereign, who as *persona patriae*, had the charge of such persons. The jurisdiction over infants was delegated by the sovereign formerly to be exercised by Lord Chancellor, and from him, it passed to the court of Chancery, and, ultimately, it is now vested in the Chancery Division of the High Court of Justice.

In *Raja of Vizianagaram v. Secretary of State* ILR 1937 Mad 383: AIR 1937 Mad 51 the learned Judges while considering the protection afforded by law in our country held that the jurisdiction exercisable in England by the Lord Chancellor, who was acting for the sovereign as *parens patriae*, was vested originally in the Supreme Court in Madras, and, later, inherited by the High Court and that High Court had under Cl. 17 of the Letters Patent jurisdiction in regard to minors more extensive than those conferred on the court under the Guardians and Wards Act. The [Guardians and Wards Act, 1890](#) (which will be referred to as the Act) provides a procedure for appointing guardians of minors similar to the procedure adopted by the High Courts. As stated in Trevelyan's Law relating to Minors, the Act has brought the law on the subject more into line with the law as administered in England. S. 4(3) of the Act defines a ward as a minor for whose person or property or both there is a guardian, S. 7 provides for the appointment of a guardian.

Therefore, when a guardian is appointed by the Court for a minor, the minor would become a ward of court. A ward of court has been defined in Simpson's Law relating to Infants, 4th Edn. Page 165, as a person under the care of a guardian

appointed by court. Thus, a ward of court is an infant over whose person and property the court exercises a jurisdiction which should obviously be in the nature of a parental and administrative one. Viscount Haldane L. C. Speaking of the nature of the jurisdiction of the court over infants, observed in *Scott v. Scott*, 1913 AC 417:

'The case of wards of court and lunatics stands on a different footing. There, the Judge who is administering their affairs, in the exercise of what has been called a paternal jurisdiction delegated to him from the Crown through the Lord Chancellor, is not sitting merely to decide a contested question. His position as an administrator as well as judge, may require the application of another and overriding principle to regulate his procedure in the interest of those whose affairs are in his charge.'

'In the two cases of wards of court and of lunatics, the court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction.' It will be relevant to consider then the nature of the jurisdiction exercised by the court in granting leave to a guardian to sell the property of the minor. S. 29 states that a person other than a Collector who have been declared guardian by the court shall not mortgage or otherwise transfer the immoveable property belonging to a minor without the previous permission of the court. Sec. 30 declares any disposition of the immoveable property in contravention of the previous section as voidable at the instance of the minor Sec. 31 states:

1. Permission to the guardian to do any of the acts mentioned in S. 29 shall not be granted by the court except in case of necessity or for an evident advantage to the ward.

2. The order granting the permission shall recite the necessity or advantage, as the case may be, describe the property with respect to which the act permitted is to be done, and specify such conditions, if any, as the court may see fit to attach to the permission: and it shall be recorded, dated and signed by the Judge of the court with his own hand, shall be taken down in writing from his dictation and be

dated and signed by him.....

4. Before granting permission to a guardian to do an act mentioned in S. 29, the court may cause notice of the application for the permission to be given to any relative or friend of the ward who should, in its opinion, receive notice there-of, and shall hear and record the statement or any person who appears in opposition to the application.'

No appeal lies from the order granting leave to the guardian to alienate the ward's property. But an order refusing the grant such leave is made appealable under S. 47(e). Sec. 48 enacts that, except as provided by S. 47 and S. 115 C.P. C., an order made under the Act shall be final and shall not be liable to be contested by suit or otherwise. The result of these provisions is that an order granting leave to the guardian to mortgage or sell a minor's property cannot be challenged in appeal. A limited and restricted right of challenging such an order by way of revision to the High Court, no doubt, exists; but such right can seldom be of any practical advantage to the minor where an unscrupulous or incompetent guardian is in charge of his affairs.

Although S. 31(4) provides for hearing the objection of any third, party who opposes the application, rarely do persons come forward to place the true state of affairs before the court. Normally, the guardian and possibly the alienee are the only persons before the court in such matters. Both being interested in the alienation neither would be interested in filing a revision to the High Court against an order granting leave. It is no doubt true that it is the duty of the court, to which an application is made under S. 29 for leave to transfer the is made under S. 29 for leave to transfer the minor's property to satisfy itself by enquiry that the transaction is necessary or one for the evident benefit of the minor; a court will not normally grant such permission except in case of urgent necessity or for apparent benefit of the ward after a careful enquiry and presumably on notice to such persons as are likely to be interested in the ward.

But, from the nature of the machinery provided under the act, it will not always be possible to arrive at a correct conclusion as to whether or not the proposed transaction by the guardian is for the benefit etc. Of the minor. For one thing, there

will be no independent person conversant with the affairs of the minor to protect him against a guardian who wants to sell the minor's property for his own reasons. Secondly. The procedure in such cases would generally be ex parte. They are undoubtedly summary. There is no provision as stated earlier, for any right of appeal. There is undoubted force in the following observation of Kania J. in *In re, Dattatrava Govind Haldankar* : AIR1932 Bom537 :

'The opportunities for testing the grounds on which the alleged necessity or benefit to the family have come into existence are, as compared with the purchaser, few to the court. In the application which is generally made either by the father or the manager, who is interested in the transaction being effected ex parte statements are made and the court has ordinarily no adequate machinery to enquire into the truth or otherwise of the averments. The statements would, as I have pointed out above, be ordinarily made by a party who is interested and therefore, require to be very carefully scrutinised, especially if, on the footing of the order which the court might pass the purchaser considers that he is absolved from any further liability to make enquiries on his own account.'

The case before us itself furnishes a telling example of how imperfect the machinery provided by the Act is, to find out the true position regarding the honesty and truth of the representations made to the court by a guardian who moves it under S. 29. There is ample scope for misrepresentation and fraud. It follows that the enquiry contemplated under S. 31 would not be sufficient to enable the court to adjudicate upon the rights of the minor to regard to the propriety of the sale. As we regard to the propriety of the sale. As we state above, the jurisdiction of the court under the various provisions of the Act is essentially a parental and administrative one. No finality can therefore attach to the order sanctioning a proposed transfer by the guardian. There is nothing in S. 31 itself to suggest that the order thereunder is either conclusive or binding against the minor; the order can hardly amount to an adjudication of the rights of the minor vis-a-vis the transfer, the minor's interests not being independently represented before the Court, albeit the court is itself in the position of *parens patriae*. We are therefore of opinion that although a court, while passing the order under S. 31(2) of the Act, has to be satisfied that the proposed alienation is for necessity or for an evident

advantage of the ward, such order cannot be treated as *res judicata*, so as to bind the minor, or be conclusive against him.

(5) But the matter, however does not rest there. Section 31 is intended for the protection of the minor. Circumstances may arise when the minor's interest itself require an alienation of his property. To postpone the alienation till the minor attains the age of majority might spell disaster to him. A sale or alienation at the proper time will therefore be a necessity. Justice and fair play require that a purchaser who comes forward to purchase the property in those circumstances should himself be assured that he is getting title to the property free from challenge by the minor. In the interests of the minor himself, there should be some assurance as to title, as otherwise the property would not fetch a proper price. S. 31 is therefore, intended to secure to the minor an advantage by a disposition of his property in proper time for any compelling necessity or for evident advantage to him; he should be enabled to get a proper price by securing to the purchaser a full title. We shall consider the rule which achieves this double purpose.

(6) Under the Hindu Law, the guardian of a minor is authorised under certain circumstances, to sell the property of the minor. The existence of those circumstances (for example, necessity or benefit) will always justify the sale. But it is not necessary in all cases to furnish actual proof of necessity to justify the sale by the guardian. If the purchaser acts upon a representation that there was such necessity or benefit and he acts honestly and makes proper enquiries to satisfy himself as to the existence of such necessity, the alienation would be valid. This principle was laid down in the leading case of *Hunoomanpershad Pandey v. Mst. Babooee Mundraj Koonweree*, 6 Moo Ind App 393 and is embodied in S. 39 of the Transfer of Property Act. In *Hunooman pershad Pandey's case*, 6 Moo Ind App 393 (PC) Lord Justice Knight Bruce observed at page 423,

' 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 a case of need, or for the benefit 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..... Their Lordships think that the

lender is bound to enquire 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 Manger is acting, in the particular instance, for 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.'

An alienation by a guardian after obtaining sanction of the court under S. 31 can in proper cases be supported on the principle of enquiry laid down in above case. Under S. 31 of the Guardians and Wards Act, the court will always make as full an enquiry as is possible as to the existence of necessity or benefit to the ward. An order under S. 31(2) will be the result of such an enquiry by the court. A bona fide purchaser can therefore rely on the order, and, prima facie, such an order should be available to him to take the place of enquiry as to the existence of necessity or benefit. It was on this principle that the cases, which we shall refer to presently, uphold the alienation of a guardian after obtaining sanction under S. 31.

(7) In *Sighor Chand v. Dulaputty Singh*, ILR 5 Cal 363, Sir Richard Gath C. J. Observes that it is unreasonable to say that a party purchasing under an order will be bound to make the same enquiry which the Judge made and to determine for himself whether the judge had done his duty properly and come to a right conclusion. It was this principle of honest enquiry as to existence of necessity etc., by the alienee that the Privy Council had in mind when it observed in *Gangapershad Sahu v. Maharani Bibi*, ILR 11 Cal 379 (PC) that,

Their Lordships think that when an order of the court has been made authorising the guardian of an infant to raise a loan on the security of the infant's estate the lender of the money is entitled to trust to that order, and that he is not bound to inquire as to the expediency or necessity of the loan for the benefit of the infant's estate. If any fraud or underhand dealing is brought home to him, that would be a different matter; but, apart from any charge of that kind, their Lordships think he is entitled to rest upon the order.'

In *Ram Krishna Muraji v. Ratanchand*, there was a suit on a mortgage executed by the manager of a joint Hindu family. A guardian had been alienated on the ground of enquiry and upheld the alienation was irregular, the guardian obtained the sanction of the court for effecting the mortgage over family property in which the minor was interested. The Privy Council referred to *Hunooman Pershad Pandey's* case 6 Moo Ind App 393 in regard to the justification of the alienation on the ground of enquiry, and upheld the alienation against the minor on the ground that the creditor had by necessary enquiry satisfied himself as to the existence of necessity. Dealing with the matter in regard to the obtaining of the sanction from court to mortgage the property of the minor, their Lordships observed:

'Ramlal (Creditor) was informed that Gulabchand was guardian of Ratanchand; he asked Gulabchand for the certificate of guardianship. Gulabchand produced the certificate of guardianship, as well as the order of the court granting Gulabchand permission to mortgage the minor's share in the property as well as his own share, Ramlal was informed that the debts were not the personal debts of Gulabchand, but that they had been incurred in connection with the business carried on in the name of Hardeo Das Gulabchand. Ramlal made inquiries personally from some of the alleged creditors and he found that money was owing to them as stated by Gulabchand.....

After referring again to the appointment of Gulabchand as a guardian and to the permission granted by the court for alienation, the Privy Council observed again.

'These were matters which Ramlal was entitled to take into consideration when deciding whether he would advance the money. Though it turns out afterwards that the orders of the court may have been irregular, there is no suggestion that Ramlal had at the date of the mortgage any knowledge of such irregularity. Ramlal, however, according to the evidence did not rely solely upon the above mentioned orders of the court, for, as already indicated, he made enquiries not only from Gulabchand and the broker who was acting for him, but also from some of the creditors of the firm of Hardeo Das Gulabchand, whose names were given to him by Gulabchand and the broker.'

These observations indicate that the true basis on which an order of court under S. 31 of the Guardians and Wards Act is held to sustain an alienation of minor's property, is on the footing of an honest enquiry. It will follow that, if there are certain circumstances to the knowledge of the alienee exciting suspicion as to whether the order of court was obtained on a correct representation, it would be his duty to make further enquiries; but, if there be no circumstances to arouse such suspicion, it would be reasonable for the alienee to rest on the order itself as amounting to an enquiry made by him.

(8) In *Mahabir Das v. Jamuna Prasad Sahu*, : AIR1928 Pat543, Das J. Observed that the existence of an order under S. 31 would be conclusive on the question of due enquiry which was all that would be necessary to be made by a creditor, unless it was shown that the creditor was party to a fraudulent misrepresentation to the court. This was also the view of the Lahore High court in *Brij Raj Saran v. Alliance Bank, Simla Ltd.* ILR 17 Lah. 686: AIR 1936 Lah 946. While we are respectfully with the two judgments aforesaid as to the true principle, we must not however be taken as sharing the view of Das J. That an order under LS. 31(2) of the Act is always to be regarded as conclusive evidence of enquiry.

(9) We shall now consider the two cases which have occasioned this reference.

(10) In ILR 45 Mad 429: AIR 1922 Mad 135, it was held that the sanction of the court to an alienation of a minor's property by a guardian was only prima facie evidence that the transaction was a good one, but would not cure any inherent defect that might exist in it, and that it would be open to the minor to show that it was not supported by necessity or benefit and that the only effect of the order under S. 31 would be to cast the burden of proof on the minor to show that the transaction was not binding on him. The learned Judges in that case did not consider the question of supporting the guardian's alienation on the basis of any bona fide enquiry by the guardian. The actual decision in the case can however, be supported on the facts found. The minors in that case, who were boys were aged 3 and 6 years; a representation was made to the court that money was to be raised on a mortgage of the minor's property for the purpose of their marriage--an obvious lie.

No marriage took place for 15 years thereafter, and, even then only one was married. The learned judges themselves found that the alienee was the clerk of the guardian and there was a great deal of suspicion about the transaction. Which suggested a conspiracy between the guardian and his clerk. No question of honest enquiry could at all have arisen in the case, Spencer. J., took the view that an order under S. 31 would not cure the inherent defect in the sale itself and it would amount to nothing more than prima facie evidence that the transaction was good and that it was open to the minor to shown that the sale was fraudulent or improper. Ramesam J. Held that the effect of an order under S. 31 was nothing more than to place the burden of proof on the minor. The learned Judge distinguished the observations in ILR 11 Cal 379 (PC) as applicable to a case of mortgage, a distinction which we are unable to accept.

With great respect to the learned Judges who decided ILR 45 Mad 429: AIR 1922 Mad 135, we are of opinion that the effect of an order under S. 31 of the Guardians and Wards Act will not merely be to shift the burden of proof from the alienee to the minor, but, in the absence of other circumstances putting the alienee on notice of infirmities attaching to the transaction will support the alienation on the basis of the alienee having made proper enquiries before obtaining the transfer.

(11) In ILR 50 Mad 217: AIR 1927 Mad 233, Venkatasubba Rao and Reilly JJ. Did not accept the decision in ILR 45 Mad 429: AIR 1922 Mad 135, as laying down the correct law. Ventakatasubba Rao J. Referred in the course of his judgment to the principle of supporting a guardian's alienation on the basis of a reasonable enquiry made by him observing that where an alienation had been made with the sanction of the court the alienee could rely upon it and that the alienation must be upheld unless the alienee had been a party to a fraud or collusion or had been guilty of any underhand dealing. In the course of his judgment, the learned Judge has referred to the fact that a court would not grant sanction unless it was satisfied that the transaction was beneficial to the minor and such an order would be sufficient to protect the alienee in the absence of fraud.

Some of the observations in the judgment of the learned Judge and of Reilly J. No doubt, lend support to the argument that the order of the court under S. 31 is

conclusive on the question of the existence of necessity or benefit ; but on a close reading of the judgment, we are satisfied that the learned Judge never intended to lay down any such proposition. The existence of necessity or benefit is a fact which has got to be established by evidence and once it is held that an order under S. 31(2) is not res judicata on that question, it should be competent to the court to investigate it where the alienation is challenged by the minor. If neither necessity nor benefit exist the only ground on which the alienation could be supported is that on bona fide enquiry on the part of the alienee.

On a careful reading of the judgment of Lvenkatasubba Rao and Reilly JJ. We are of opinion that the learned Judges viewed an order under S. 31 only as a substitute for a due enquiry by the alienee, and where the alienee was honest, it would afford him complete protection with regard to the propriety of the sale in his favour.

(12) Reference may be made at this stage to the decision of the Bombay High Court in Balajee Vasudeo v. Sadashiv Kashinath : AIR1936 Bom389 . Broomfield, J. Expressed the view that a sale by a guardian sanctioned by Court prima facie conveyed good title to the purchaser, and, unless it was shown that the sanction was obtained fraudulently by underhand dealing, it would be valid. With great respect, the rule has been broadly stated to be accepted. While we agree with the learned Judge that there is no obligation on the part of the alienee to go beyond the order of court and make further enquiries, we must point out that the very principle of the rule--that of protecting an alienee who makes an honest enquiry--would require that the protection given by it should not be available to a person who, for example, knows other facts casting doubts on the existence of necessity etc. Secondly, from the point of view of the alienee, it is not every fraud that will vitiate the transaction; the should be a party to it before it can be set aside. We cannot agree with Tyabji J. When the learned Judge stated.

'The decision of the court entrusted with the duty of deciding whether or not to permit the guardian to enter into the sale has already been given. It cannot be treated as having some effect other than that laid down in the Act, under which the permission is given; nor is there any ground shown why it should be ignored.'

If the learned Judge intended to lay down that the order is conclusive on the existence of necessity or benefit, we respectfully disagree.

(13) We are, therefore of opinion that ILR 45 Mad 429: AIR 1922 Mad 135, has not been correctly decided and that the decision in ILR 50 Mad 217: AIR 1927 Mad 233, can be accepted to this extent, namely, that an order under S. 31(2) of the Guardians and Wards Act can be relied on by the alienee as a substitute for an honest enquiry by him; but that it will be open to the minor who is challenging the alienation to show that the alienee was put on notice at the time of the alienation of matters which would show defects in the transaction or that he did not act bona fide. Where there is no evidence to show that there existed circumstances exciting suspicion as to the way in which an order under S. 31(2) was obtained, the alienee would be entitled to rely on it to support his title.

It follows that an order under S. 31(2) cannot be treated always as conclusive on the question as to the existence of necessity or benefit; even as to the sufficiency of the enquiry made by the alienee, it would be competent for the minor to prove that the alienee did have sufficient reason not to rest on the mere existence of the order of court. This does not however mean that, where the guardian is guilty of misrepresentation or fraud in procuring the order from court, the alienee should suspect it and start an enquiry. So long as he has no knowledge of the guardian's misrepresentation or fraud, he will be entitled to rely on the order of the court as affording evidence of his honest enquiry. If the minor proves that the alienee knew more or did not himself rely on it but made independent enquiries, the onus being on the minor to prove it, the order of court will not afford conclusive evidence on the question of enquiry; burden will then shift to the alienee to prove due enquiry. Even if he fails in that, he can sustain the alienation on the ground that it was for the necessity or benefit of the minor.

Under the general law, the onus of proving justifying circumstances will be on the alienee; but the existence of an order under S. 31(2) or the Act which was passed after an enquiry as there being necessity etc., though not *res judicata*, will shift the onus on the minor, who will have to prove that the alienation was not for necessity etc. This is because the alienation is one sanctioned by court, albeit after a

summary enquiry.

It is needless to point out--and all the cases are unanimous on that point--that, where the guardian is guilty of misrepresentation or fraud and the alienee is a party to it, or is even aware of it, the alienation in his favour will not be protected. But, where the latter is not a party to such fraud or has no knowledge of the same, the mere fact that the guardian was guilty thereof will not disentitle him to rely on the order of court as proving an honest enquiry by him.

(14) The appeal will be posted for hearing on the merits to 6-11-1961.

(The appeal coming on for hearing after the expression of the Opinion of the Full Bench the Court delivered the following judgment on 1-12-1961:)

S. Ramachandra Iyer, C.J.

(15) When the appeal came up before us after the expression of the foregoing opinion two further contentions were raised in support of it. The first related to the validity of the permission granted by the court for the two mortgages and the second to the extent to which such permission even if valid would operate. The former aspect of the contention was put thus: Manorama Bai was not a mere natural guardian of the minor; she had been appointed as the executrix under the will of her husband which prohibited her from alienating the property bequeathed to the appellant. There being a prohibition against alienation under the will the mortgages would be valid only if the court sanctioned them under S. 28 of the Guardians and Wards Act. In the present cast it cannot be held that there was such a sanction as the court was never made aware of the existence of the will and it could never have applied its mind to the question whether having regard to the prohibition in the will there was a need for the mortgages.

(16) The argument proceeds on a misapprehension of the true position. Implicit in it is the assumption that the authority of the court depends on the correctness of the representations made to it by the guardian. The court on the other hand acts on its own authority being in locus parentis while permitting the alienation of the property of the ward. The jurisdiction of the court to grant the permission, depends

on its finding whether the sale was necessary or for evident benefit of the ward, and therefore would exist irrespective of the limitations imposed on the guardian in the matter of alienation by any deed or will granting the property to the minor. Section 28 makes it clear that the court can sanction alienation even when there is a prohibition against it by a testator. The jurisdiction of the court is determined therefore by the occasion, that is, the existence of a present necessity or benefit and not by the extent of the powers possessed by the guardian.

As the court can sanction a proposed alienation whether the guardian is vested with power or not under the terms of the will, the circumstance that the guardian suppressed all information about the limitation of her own power to sell by the will is wholly immaterial. This, as stated earlier, is of course, subject to the qualification that if the alienee is a party to the fraud or misrepresentation by the guardian, he would not be protected. Secondly, the principle on which an alienation of the minor's property is supported when it has been sanctioned by the court, it as we have pointed out, based not so much on the correctness of the conclusion arrived at by the court but on the ground that the alienation is supportable by reason of the bona fide enquiry made by the alienee. If the alienee trusts to the order of the court whether such order was obtained after a full disclosure of facts by the guardian or not, he would be deemed to have made a bona fide enquiry and satisfied himself as to the necessity for the alienation. What is necessary, therefore, is the existence of an order of court sanctioning the alienation and not whether it was correctly proved. That implies the non-disclosure to the court of a will or instrument curtailing the guardian's powers cannot affect the validity of the alienee's powers cannot affect the validity of the alienee's title. We, therefore, reject the first contention.

(17) It is next contended that the suit mortgages can be enforced only against one half share in the property and not against the entirety, as that alone was represented as the minor's property and sanction of court obtained. From what we have stated at the beginning, it will be apparent that Manorama Bai purported to execute the mortgage in her own right as well as on behalf of her minor son. The permission to sell was also obtained on the representation that she and her son were entitled to the property as co-owners. From this circumstance it is contended

that if the alienation were to be supported purely on grounds of a bona fide enquiry by the first respondent, the latter could not obtain security over a greater extent than what was represented in the order of the court as forming the minor's property which should also be deemed to be what the alienee bargained for.

In other words, it is said that while the order of the court can be used to support the alienee in regard to proof of enquiry, it can also be relied on by the ward to show the extent of the property covered by such enquiry. In the present case the alienee can enforce its mortgage right over one half of the mortgage property; the other half of the property being charged as the property of Monorama Bai not title to it could be secured by the enquiry.

(18) We were not at first inclined to permit this contention to be raised in the appeal, as the same had not been raised at the trial of the suit; but later we felt persuaded that the question would arise as a logical result of the conclusion come to by us and on the proper application of the very principle on which the alienation is now supported. Further in the grounds of appeal objection has been raised as to the propriety of the enquiry made by the first respondent before it advanced monies to the guardian. We have, therefore, permitted the appellant to raise the contention.

(19) Learned counsel for the first respondent attempted to meet the contention stating that although the proceedings for getting sanction of the court were initiated on the footing that Manorama Bai had one half interest in the property and permission was sought only in regard to the other half as the interest owned by the appellant, she alter conceded that the entire property belonged to her son and the sanction of the court should be regarded as the authorising the mortgage of the entire property as that belonging to the ward. In support of this argument reference was made to paragraph 13 of the affidavit filed by Manorama Bai in Appln. No. 4991 of 1956 wherein she state,

'There is a certain amount of hesitancy on the part of persons who offer to buy the house as it belongs to the minor ward of the court and I submit that if orders of this Hon'ble court' are obtained for the minor ward of the court are obtained for the sale of the house better offers are likely to be made' (italics (here in ' ') not in the

original)

This sentence, has, however, got to be read with the earlier statement made in the affidavit in paragraph 3 whereby the deponent definitely stated that the house belonged to the estate of her deceased husband. she later reiterated that assertion in paragraph 10. The affidavit itself referred to and incorporated an affidavit filed in the earlier application (Appln. No. 4689 of 1948) which categorically stated that the properties belonged to her and her minor son who were the heirs of her deceased husband. The orders passed in the applications sanctioning the mortgages in favour of the first respondent based as they are on those affidavits can only be taken as permitting the raising of loans on the one half share of the property on the footing that alone belonged to the minor. That the representation made to the alienee was that the minor had only a half share in the property and that the court sanction covered only that half, is supported by the terms of the mortgage deeds executed in favour of the first respondent which recited in the preamble portion thereof that the properties sought to be secured under the mortgage devolved upon Monorama Bai and her minor son on the death of her husband as his heirs.

On this evidence, there can be no doubt that Manorama Bai asserted her own independent title as the heir of her husband with respect to one half of the property offered for mortgage and that she purported to act on behalf of the minor only in regard to the other half which she represented as the minor's share. It can also be taken that the first respondent advanced monies under the mortgage only on that footing. The question then is whether in those circumstances the first respondent can enforce his security against the entire property which is now accepted as having belonged to and belonging to the minor or whether the alienee's rights should be confined only to one half thereof.

(20) In *Balwant Singh v. Rockwell Clancy*, ILR 34 All 296 (PC), of the two brothers, who were members of a joint Hindu family, the elder among them created a mortgage over a property of the family, asserting that the property descended to him as an impartible estate over which he had an absolute power of disposition. The mortgage was, no doubt, executed for purposes binding on his brother as

well. The younger brother who was a minor also joined in the execution of the mortgage. In the suit filed by the mortgagee to enforce the mortgage, his contention that the minor brother would be bound by reason of joining in the mortgage failed as the signature of the latter was made while still a minor and as that would be insufficient to prove his assent to the transaction. The mortgagee then raised the contention that in executing the mortgage the elder brother must be deemed to have acted as the manager of the family in that the money was raised for the benefit of the minor as well, the latter's share in the family properties being therefore bound by the mortgage.

This contention was repelled by the Privy Council for the reason that the elder brother could not be held in the circumstances of the case to have acted as the manager of the family consisting of himself and his minor brother as he expressly purported to mortgage the property by alleging exclusive title in himself. The decision of the Privy Council has been the subject matter of consideration in more than one case before our court. In *Sabapathi Chetti v. Ponnusami Chetti*, 28 Ind Cas 365: AIR 1915 Mad 875, that case was distinguished as one where the elder brother repudiated any claim to act in the transaction on behalf of his minor brother and merely got him to execute the document only to evidence his assent thereto. In that case the document recited that the subject-matter of alienation (a gift) was acquired out of the donor's earnings.

It was held that the recital was made with a view to strengthen the title of the donee and not to exclude an intention to execute it on behalf of the joint family to which the property belonged. Again in *Ramakrishna Mudaliar v. Manikka Mudaliar* : AIR1937 Mad375 , the same principle was accepted by holding that the mere fact that the properties were described by a member of the family as acquired out of his earnings while alienating the same for the purposes binding on the family, would not amount to an assertion of such a hostile claim as against the interests of the family or an indication that it was his own personal transaction so as to preclude the application of the principle that if the purpose was one binding on the family the transferor might still be regarded as having entered into the transaction in the capacity in which he could bind the family. Practically the same view was adopted in *Muthiah Chettiar v. Rayalu Iyer*, : AIR1944 Mad98 .

(21) This distinctive feature present in the cases cited above is that in alienating the property for the purposes of the family, the manager did not repudiate any claim to act on behalf of the family or assert a hostile title to the property against the other members of the family, thus making the transaction his own and not as representing the family.

(22) A different principle must necessarily apply when a person executing a sale or mortgage clearly asserts title in himself adversely to the other members of the family. In such a case it cannot be said that there was any representation by the alienor of the interest of the other persons in the property either expressly or impliedly. In such a case the principle to be applied will be that recognised in *Babu v. Gokuldas Goverdhandas*, 57 MLJ 404: AIR 1930 Mad 393, where a question arose whether a party dealing with a surviving partner of a dissolved partnership could rely upon the latter's apparent authority if he did not profess to deal with him as such. That question was answered in the negative. Venkatasubba Rao J. Cited with approval the following passage from *in re Queale's Estate*, 17 LR I. 361,

'The bank dealt with him (mortgagor) as and in his capacity of an individual, owner, not as an executor but a person pledging his own property for his own debt giving as security his own interest for his own purposes. In such circumstances the bank can, in my opinion have no better, title than that which its debtor really had in the capacity in which he was dealt with namely, as beneficial owner, i.e., as residuary legatee.'

The rule laid down in *Balwant Singh's case*, ILR 34 All 296 (PC) was applied in the two following cases to alienation by a guardian asserting his own title, though the purpose of such alienations was to benefit the minor's estate. In *Ammani Ammal v. Ramaswami Naidu*, 37 MLJ 113: AIR 1919 Mad 105 the guardian of a minor purported to sell the property of the latter as her own for the purpose of discharging certain debts binding on the minor out of the sale consideration.

It was held that the minor could repudiate the alienation and that he would not even be liable to pay the amount which went to discharge the debt binding on him. That was a case in which the guardian of the minor acted on the basis of her being the full owner and not at all as representing the minor. The same principle has

been applied in *Nandan Prasad v. Abdul Aziz*, : AIR1923 All581 where the mother of the minors claiming title under an alleged will of her husband purported to create a mortgage over the family property, not as guardian of her minor son but as the full owner of the property. It was held that although the money raised by the mortgage was utilised for the benefit of the sons, the mortgagee could not obtain any decree so as to bind the interests of the sons who were minors.

(23) In the present case Manorama Bai purported expressly to execute the impugned mortgages as a co-sharer of the property along with the minor. To the extent of one half of the property she asserted her title adversely to the minor; in the context of her suppression of the will which gave the entire property to the minor, such assertion of intestacy and consequent inheritance can only amount to a repudiation to the extent of one half of the minor's title to the property. It is true that she also acted as the guardian of the minor but in doing so she declared that his interest was only to a moiety property. She cannot therefore be deemed to have represented the minor in regard to the other moiety of the property to which she claimed title in herself. That was included in the mortgage purely as her property and the first respondent would have no better title in regard thereto than what Manorama Bai herself could give in the capacity in which she dealt with it; admittedly Manorama Bai had no interest of her own in the suit property.

It would follow that the mortgage can enforce the security only in regard to an undivided one half share of the property covered by the mortgage. The appeal will, therefore, stand allowed to this extent namely, that the mortgagee would be declared entitled to recover the money due under the suit mortgages on the security of a moiety of the properties mortgage; the other share not being bound by the mortgage.

There would be no order as to costs here and before the learned Judge. The Court-fee, due to the Government on the Memorandum of appeal will be borne in equal shares by the appellant and the first respondent. Time for redemption two months.

(24) Appeal partly allowed.

