

(1925) 06 CAL CK 0016

Calcutta High Court

Case No: None

Baikuntha Nath Kar and
Another

APPELLANT

Vs

Adhar Chandra Pain

RESPONDENT

Date of Decision: June 22, 1925**Citation:** AIR 1926 Cal 653 : 92 Ind. Cas. 727**Hon'ble Judges:** Chakravarti, J**Bench:** Single Bench

Judgement

Chakravarti, J.

The suit out of which this appeal by the principal defendants arises was brought by the plaintiff for a declaration that the lands in suit belonged to him and also for an injunction staying sale of the property in execution of a decree obtained by the defendants for money. The plaintiff alleged that the property in suit consisting of about 3 bighas belonged to one Baidya Nath, that Baidya Nath had borrowed Rs. 140 from the plaintiff by signing a hatchitta and that on Baidya Nath's death, plaintiff pressed for payment of the money due to him. The father of the widow of Baidya Nath, who was a minor acting as a de facto guardian of the widow arranged to pay Rs. 40 in cash and also executed a kobala for the disputed lands in favour of the plaintiff in satisfaction of the remaining Rs. 100 of the debt. The plaintiff further stated that he was in possession of the land in suit since the date of his kobala, that the defendants after the death of Baidya Nath instituted a suit for money in the Court of the Munsif of Bishnupur, that in execution of the decree obtained by them in that suit the lands covered by his kobala were attached and that on such attachment the plaintiff filed a claim in the execution case which, the plaintiff alleged, was not registered for reasons not known to him. The plaintiff, therefore, brought the present suit for the reliefs already stated.

2. The defendants resisted the plaintiff's, claim and challenged the plaintiff's conveyance as a collusive sale without any consideration. The defendants further alleged that the main object of the transfer was to defraud the creditors of Baidya Nath, that the father of

the widow of Baidya Nath was not her legal guardian and that there was no necessity for the sale of the property by the minor widow and, therefore the sale was invalid and that the property as belonging to Baidya Nath was liable to; satisfy the decree obtained by the defendants.

3. The learned Munsif raised several issues of which I shall mention only two:

Is the plaintiff's kobala valid, genuine; and for consideration?

Had minor's father any legal right to execute the kobala? Is it valid in law?

4. The learned Munsif recorded his findings on the first issue in these terms :

"Considering the evidence on the record and the circumstances of this case, I am of opinion that the kobala was without consideration and a colourable transfer by which the plaintiff acquired no rights to the disputed land". In arriving at this, conclusion the learned Munsif found that no consideration for the kobala did actually pass. The learned Munsif disbelieved the payment of Rs. 40 in cash and he also totally disbelieved the story of any debt due under the hatchitta which, he found, was not a genuine document. In considering the bona fides of the kobala the learned Munsif, to quote his own words, said as follows: "It is significant to note that the kobala, Ex. 2 was executed under somewhat strange circumstances--and I should say, with some undue haste. Baidya Nath died on 10th Pous. The Stamp for the kobala was purchased on 16th Pous, 31st December 1920, and on the very date the kobala was executed. Defendants Nos. 1 and 2 instituted their suit on the 3rd January, 1921, and the kobala was registered on the 8th January, 1921. The attachment of the property was on 29th January, 1921".

5. The kobala was, therefore, executed only 5 days after Baidya Nath's death even according to plaintiff's version. I find no explanation for this hurry especially when it appears that Baidya Nath left moveables of considerable value in his shop. Evidently Baidya Nath was a shop-keeper and had a good stock in his shop. Defendants have proved that these articles were sold soon after his death and this kobala was executed and also another arpannama was executed with respect to other properties of Baidya Nath. These circumstances lead me to think that Ex. 2 was a colourable deed".

6. The learned Munsif further found that the annual yield of this property was about Rs. 80 a year, and that Rs. 100 for which the plaintiff purchased the property was an inadequate value. The learned Munsif concluded by a finding that the kobala was really antedated.

7. As to the second point, the learned Munsif pointed out that although the father of the minor was not the legal guardian as the brother of Baidya Nath who was the legal guardian did not claim to be the guardian of defendant No. 3, the father although he had obtained no certificate of guardianship under the Guardians and Wards Act was a de facto guardian and as such he could legally execute a conveyance, subject to the restrictions which have been laid down in the case of Hunoomanpersaud Panday v.

Babooee Munraj Koonweree 6 M.I.A. 393 : 18 W.R. 81. : Sevestre 253n. : 2 Suth P.C.J. 29 : 1 Sat.P.C.J. 552 : 19 E.R. 147. On the findings which the learned Munsif had arrived at, he dismissed the plaintiff's suit without entering into the question as to whether there was justifying necessity for a conveyance on behalf of the minors.

8. On appeal by the plaintiff the learned District Judge has reversed the decree of the Munsif and granted a decree to the plaintiff. The learned District Judge, it appears to me, came to the following conclusions; first, that, no adequate motive for collusion on the plaintiff's part with--the father of the minor has been disclosed;; secondly, that Baidya Nath was indebted to the plaintiff; thirdly, that the price paid for the property was not inadequate; fourthly,;, that Rs. 40 was paid in cash; that the kobala was a genuine transfer as between the plaintiff and the father of the minor on her behalf, although it may be that it was intended to give preference to the plaintiff over the other creditors of Baidya Nath. On these findings the learned District Judge as I have already stated reversed the decree of the learned Munsif and decreed the plaintiff's suit.

9. On behalf of the defendants-appellants Mr. Roy has contended, first, that the alienation by the father, while the legal guardian was the brother, was invalid; secondly, that the learned District Judge was in error in giving effect to a conveyance by a de facto guardian and was in error in doing so without finding that there was any pressure upon the property or that there was any legal necessity for, the sale. It was further contended that the learned District Judge's finding that the value of the property was not inadequate, was not sufficient in the absence of a finding that the property was sold for an adequate and full price for the benefit of the minors; and it was generally contended that the findings arrived at by the learned District Judge are not sufficient in law to justify the upholding of a sale of the Immovable property by a de facto guardian of the minor, especially in view of some of the findings by the Trial Court were not interfered with in appeal.

10. As to the first point, the learned Advocate relied upon the passage in Trevelyan on Minority at page 93. He also quoted a passage from Macnaughten's Principles of Hindu Law. These authorities merely lay down that husband's heirs are the legal guardians of a minor widow and the father is not. No authority has, however, been cited to show that any alienation if other-; wise good is invalid under Hindu Law, simply because the alienation was made by a de facto guardian and not by a guardian de jure. On the contrary there are authorities which show that an alienation by a de facto guardian may be valid if such an, alienation is otherwise justified. But in a case like this it is the duty of the de facto guardian to satisfy the Court that the legal guardian refused to act for the minor and to protect her interest and that unless the de-facto guardian acted for her, irreparable loss to the minor would have been the result of the inaction of the legal guardian, la this case Baidya Nath's brother was the legal guardian of the minor widow and was her next reversioner and he was the person most interested in the payment of Baidya Nath's debts. The plaintiff has not given any explanation as to why he approached the minor's father and not her brother-in-law.

11. As to the other questions raised by the appellants I shall deal with them together and not separately, as it appears to me that the objection really amounts to this. The findings of the learned District Judge are not sufficient for justifying a sale by a de facto guardian and that the learned District Judge has failed to appreciate the real points which arise in a case like this and consequently the learned District Judge has not considered them. The law as to the power of a guardian of a minor to alienate the property of his ward was clearly and definitely laid down by the Judicial Committee of the Privy Council in the case of Hunoomanpersaud Panday v. Babooee Munraj Koonweree 6 M.I.A. 393 : 18 W.R. 81. : Sevestre 253n. : 2 Suth P.C.J. 29 : 1 Sat.P.C.J. 552 : 19 E.R. 147. At page 423 their Lordships observed " 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. But where, in a 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 a 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". Now what are the circumstances of this case Baidya Nath died on the 25th of January the plaintiff a creditor under a hatchitta executed by Baidya Nath pressed for payment of the money, according to the "plaintiff, immediately after the death of Baidya Nath and the father of the minor forthwith agreed to execute this conveyance on behalf of the minor and sold 3 bighas of paddy lands belonging to the minor. The Munsif found (a finding not set aside by the learned District Judge) that Baidya Nath left considerable moveable properties. The learned District Judge does not consider what pressure was there upon the, estate left by Baidya Nath to justify a sale of the Immovable property. It is not shown and in fact there was no time for it, that any attempt was made to pay off the debt by sale of the moveable properties. The onus of proof in a case like this. is entirely upon the purchaser to justify the sale Except proving that he had a claim for Rs. 140 and except showing that he, as a creditor of the dead man, threatened the minor with a litigation before even the period of mourning was over, what real necessity has the plaintiff established for the sale of this land. The guardian has given no explanation as to. whether or not it was possible for him to pay this debt out of the moveable properties left by the, deceased. We do not find any definite information as to what the value of the stock in the shop of Baidya Nath was there is no finding as to what was the benefit which was conferred upon the minor by this sale in haste nor do we find that the guardian made any attempt to find out if there was any other purchaser willing a pay a higher price. It is not for the person who challenges the sale on behalf of the minor to show that the price was inadequate, but it was for the guardian to show that he made all possible endeavours to sell the property at a proper price and that the price which he obtained was the best possible procurable one. In this case there was no time between the death of Baidya Nath and the date of the kobala for any such endeavour by the guardian. In a case t where the interest of the minor is concerned, the case ought not to be decided simply, on the questions raised by the parties, but the Court has to satisfy itself, in the interest of the minor, that the sale was a proper sale and the Court must insist upon the purchaser to satisfy it that circumstances

justifying a sale of the minor's property did really exist. In my opinion the mere fact, that there was a debt to be paid did not-justify the guardian straight off to sell the Immovable property of the minor. The learned Vakil for the respondents relied upon the case of Adhar Chandra Dutt v. Kirtibash Bairagee 6 Ind. Cas. 638 : 12 C.L.J. 586. But the facts of this case are quite different. The sale was of property in which the minor owned a share in the joint property and the guardian transferred the minor's share along with the other co-sharers who were sui juris and who considered the sale was necessary and a proper one in the circumstances of the case.

12. It appears that the fourth issue raised by the Munsif, was "Had the minor's father any legal right to execute the kobala? Is it valid in law?" In the view that the learned Munsif took that there was no debt due to Baidya Nath and that the kobala was not a genuine document it was not necessary for him to go into this question. But the learned District Judge having overruled the Munsif on that finding ought to have tried this issue. Evidently the learned District Judge has overlooked it. I think, therefore, that the learned District Judge should try this issue.

13. It appears from the judgment of the learned Munsif that the defendants in their defence challenged the conveyance of 3 bighas of paddy lands for Rs. 140 on the ground that the price was grossly inadequate. The learned Munsif found that the annual yield of the land was Rs. 80 and, therefore, the alleged consideration was grossly inadequate. As I understand the finding of the learned District Judge he thinks, in spite of the admission of the plaintiff in possession, that the income was about Rs. 24 per year and that the price was not inadequate. Here also the learned District Judge missed the real point. It was for the plaintiff to show that the price was adequate and the best obtainable. Here the price was less than six times the income of this land. In Bengal so far as I know any price less than 20 times of the income would be inadequate. The plaintiff was to show that the price paid was fair considering the price prevalent in the neighbourhood.

14. On the whole, therefore, I think that the learned District Judge has not approached the case from a proper point of view and has misapprehended the real point for trial and has altogether omitted to try the main issue in the case. For the reasons given in my judgment, I think the judgment and decree of the learned District Judge should be discharged and the appeal should be re-heard in the light of the observations made in my judgment.

15. The appellants are entitled to the costs of this appeal and other costs will abide the result.