
(1879) 08 CAL CK 0002

Calcutta High Court

Case No: None

Dulputty Singh

APPELLANT

Vs

Sikher Chund

RESPONDENT

Date of Decision: Aug. 30, 1879

Acts Referred:

- Limitation Act, 1963 - Article 145, 15, 92

Citation: (1880) ILR (Cal) 364

Hon'ble Judges: Richard Garth, C.J; Prinsep, J

Bench: Division Bench

Judgement

Prinsep, J.

Although it is not necessary that I should deal with all the points raised in these appeals, I think it my duty to do so, as it is not improbable that these suits, or some of them, will be taken in appeal to Her Majesty's Privy Council. In dealing with these cases, it is preferable that they should be first of all taken up together on points common to all, and that afterwards the facts peculiar to each should be considered.

2. The first objection taken is to the validity of the adoption, and whether the plaintiff is the lawfully adopted son of Aree Bhunjun Singh. That Aree Bhunjun was himself a minor, about 15 years of age, when he is said to have adopted the child Dulputty, would not render adoption invalid. Mr. Justice Dwarkanath Mitter (Mr. Justice Paul concurring), in the case of *Rajendro Narain Lahoree v. Saroda Soonduree Dabee* (15 W.R. 548), has clearly stated the law in this respect, and this case has been quoted with approbation by their Lordships of the Judicial Committee of the Privy Council in the case of *Jummoona Dassya Chowdhrani v. Bama Soonderai Dassya Chowdhrani* (L.R. 3 IA 83).

3. The lower Court considered the evidence given as to the alleged adoption, and eventually found that no adoption ever took place in the lifetime of Aree Bhunjun.

4. That some ceremonies of adoption were performed about two months later by Aree Bhunjun's widow, seems established, for even the defendant's witnesses state that they heard of the celebration of the rites, which were done, they add, to defraud creditors; but, however that may be, it is equally clear that whatever did take place was without necessary authority and without the permission of Aree Bhunjun. That permission was, it is said, given when Aree Bhunjun took the boy from Goman; but I have already expressed my opinion that that fact is not established.

5. It now becomes necessary to consider the objections raised by the defendants that these suits are barred by limitation, and to determine what is the effect of the sanction of the Judge u/s 18, Act XL of 1858, having been given to the sales, which it is the object of these suits to set aside.

6. That these suits fall within Act IX of 1871, Scheduleii, Article 15, as being suits to "set aside an order of a Civil Court in a proceeding other than a suit," is not now pressed upon us, though it was raised in the lower Court. I have no doubt that this article does not apply, and that the sanction of the District Judge u/s 18, Act XL of 1858, is not an order of the nature contemplated by that article.

7. It is next contended, that these suits are barred by Article 92 of the Limitation Act of 1871, inasmuch as they are suits to "cancel or set aside an instrument not otherwise provided for by that Act."

9. If these suits are of this nature, it will be necessary to consider how far the minority of the present plaintiff and of Aree Bhunjun is any protection,--that is, whether Aree Bhunjun, having died a minor and under a disability to sue, and being succeeded by the plaintiff, who is still a minor, and now sues through his guardian, the second and succeeding disability continues to suspend the operation of the law of limitation, for if the second disability is not recognized by law, and these suits are governed by Article 92, they are clearly barred, having been brought long after three years from Aree Bhunjun's death.

10. It is, however, unnecessary, in the view I take, for me at present to consider this last-mentioned point, because in my opinion these suits are not governed by Article 92, but by Article 145 of the Limitation Act.

11. The object of the suits is, in my opinion, to show that the sales which it is sought to set aside were made unlawfully,--that is, not for purposes legally binding on the minor; and that, therefore, possession taken under those sales was unlawful.

12. The fact that a guardian may have improperly sold property belonging to his ward, and may have embodied this transaction in a written instrument, cannot, in my opinion, affect the position of a minor seeking to recover that property, merely because a written instrument was executed. That instrument is between the guardian and a third party. If the guardian has exceeded his authority, the

instrument is not the act of the minor, and it would not be incumbent on him to sue to set it aside as in the case of one who has himself executed an instrument the validity of which he impugns. The fact that the District Judge, on the application and representation of a guardian u/s 18, Act XL of 1858, may have sanctioned an alienation, cannot, in my opinion, affect the present cases, except in so far as it may rightly be considered as a general rule to throw the onus on the plaintiff to show that the alienations were improperly made contrary to the usual rule requiring the purchaser to establish the validity of the alienations, or that he acted with due care and caution after making such enquiry as an honest and prudent man would make. In all these suits, however, the defendants, purchasers, are the creditors (or rather their heirs) whose debts were satisfied by these alienations; and therefore, in my opinion, they should not be placed on the same footing as strangers, who were not aware of the real state of the family and the nature of the debts to be liquidated.

13. It cannot be denied that a stranger purchasing from a guardian acting under authority from the District Judge u/s 18, Act XL of 1858, would be entitled to every protection from our Courts so long as it is not shown that he acted in a fraudulent or collusive manner, knowing that the debts for the liquidation of which the purchase-money would be applied were not debts lawfully binding on the minor. The burden of proof would, in such a case, lie heavily on any one seeking to set aside such an alienation. But where, as in the present case, the purchasers were themselves the creditors of the family whose debts it was the object of these alienations to liquidate, it appears to me that, inasmuch as they have the means of satisfying a Court as to the origin and nature of those debts, and how they are binding on the minor, the burden of proof is shifted on their shoulders as soon as the plaintiff has established a *prime facie* case.

14. We should not, in such a case, exact from a plaintiff the same amount of proof as in the case first put. In every one of the cases now before us, the defendants are either the actual purchasers or their heirs. In some of these cases the defendants are men of business, money-lenders or bankers, who may not unreasonably be considered to have at hand evidence of the nature just stated. They may have paid some money in these transactions, but the question before us is, whether they made sufficient and proper enquiry, or had means of knowing, whether the money was to be applied in payment of debts for which the minor's estate was liable. Having stated what I consider to be the relative position of the contending parties, I now propose to state what seems to me to be the manner in which we should deal with the proceedings taken by the District Judge on the application made to him for his permission u/s 18, Act XL of 1858. The law allows an appeal against any order passed under this Act, but with respect to an order u/s 18, permitting an alienation, this provision would obviously be a dead letter, because there could, be no party dissatisfied with the order passed who could appeal. Any friend of the minor, who might be induced to interpose to prevent a fraud, could not take the place of an appellant in proceedings to which he was no party.

15. The only protection that the minor would have against an improper alienation of his property by his guardian would be, that the District Judge made full enquiry before according his sanction thereto. But it must be recollected that the District Judge has before him an ex parte case, and that with every desire to act for the interests of the minor, it is impossible for him to become acquainted with the exact state of affairs. Any orders that he may pass can only have reference to the case laid before him, and on discovery of other matters it would surely be competent to the minor on attaining his majority, or to another person, as in the present case, acting on his behalf, to bring a suit to have the matter reconsidered. Of course, in such a case, a third party purchasing in full confidence in the Judge's sanction to the alienation would be protected under ordinary circumstances; but in the present case the purchasers are creditors who would be able to judge for themselves how far the minor's estate was liable to satisfy the particular debts. Then, if we examine the Act (XL of 1858) itself, we find that every order passed by a District Judge is open to appeal. If he refuses to sanction a sale of any property of a minor, the guardian can take the case in appeal to a superior Court; but if, through inadvertence, through a misapprehension of the position of the minor, or through misrepresentation of the parties concerned, the Judge sanctions an alienation of property belonging to a minor, there is no appeal, because no one could appear; as appellant. It surely cannot have been the intention of the legislature to give more force to such an order of a District Judge than to any other order that he might pass under the Act. That would not have the effect of protecting the minor's estate. It appears to me that the entire case upon which an alienation of property belonging to a minor was sanctioned by a District Judge can be considered in a regular suit, if the minor, on attaining his majority, or if, as in the present case, another representing the minor as his guardian, thinks that such alienation has been wrongly permitted, and that the minor was not liable to satisfy the particular debts, which the District Judge, in the ex parte case before him, held were binding on the estate.

16. The Court trying such a suit would be entitled to consider the evidence on which the District Judge proceeded, and any other evidence. But it has been stated that such a suit might be brought in a Court inferior to that of a District Judge, and that consequently a subordinate Judicial officer would have to express an opinion regarding the correctness of the order of a superior tribunal. That is not unusual in our present judicial system, and many cases of this description could be cited, so that this objection is of little value.

17. To show the nature of the enquiry made by the District Judge, I have only to refer to his proceedings, which have been already detailed.

18. His enquiry was of a very summary character, so far as the minor's interest were concerned. No attempt apparently was made to distinguish between the debts due from the minor's estate and from his guardians', though by the deed of partition executed by their father in 1849 separate properties were assigned to each; nor, in

nearly every instance, was an attempt made to show, when the debts were incurred, and how the minor was liable.

19. No doubt, the affairs of the family were much involved when the application was made to the Judge in 1864; but so they were in 1849, when the partition was effected; and it was, therefore, most necessary to distinguish between the debts prior and subsequently, and those for which the brothers were jointly or separately liable.

20. All these are points which, from the nature of the case, should have attracted special attention; but they have received no remark from the District Judge, nor, as I have stated, so far as the record goes, was evidence laid before him. But it will be necessary to examine those proceedings more minutely, when each case comes separately under consideration.

21. I have already referred to the fact that the defendants, the purchasers and present possessors of the properties which it is the object of these suits to recover, are the creditors whose debts were satisfied, or their immediate heirs, and also that many of them are men of business, money-lenders or bankers, with whom the family has dealt for some time past. It is, therefore, easy for such persons to produce their books and their servants to show the origin and nature of the transactions; but they have not done so. The evidence adduced is of an extremely meagre description, consisting of oral evidence of a very general and unsatisfactory character, and decrees and deeds which will be presently mentioned. No account-books have been produced, nor is there any evidence of the parties themselves or of their chief managers.

22. It is right, however, that I should state that no objection has been made to the adequacy of the consideration entered in the deeds-of-sale, as not properly representing the full value of the properties sold.

23. I attach no importance to the fact which has been prominently noticed that there are no reported cases of suits brought to recover property alienated with the District Judge's sanction u/s 18, Act XL of 1858, for we have no means of knowing in how many instances such sanction has been given. Speaking from an experience of about ten years as a Judge in important Districts, I can state that I do not recollect giving such sanction except in two or three instances. Then, again, we do not know whether such suits have not been brought and compromised, instead of being fought out to the bitter end in the last Court of appeal.

24. The learned Advocate-General has pressed on us that a recital in a deed would be conclusive, or at least satisfactory, evidence of a necessity for contracting a debt binding on a minor or a member of a joint family. I am prepared to admit that such a recital is some evidence that the fact recited was present to the minds of the parties to the transaction; and further, that the absence of any such recital in a deed would, probably, make it more difficult for the party on whom the burden of proof

lay to establish the existence of a legal necessity. But I cannot accept a mere recital in a deed as evidence sufficient to establish the fact so recited. In the case of *Sunker Lall v. Juddoobuns Suhaye* (9 W.R. 285), Sir Barnes Peacock, Chief Justice, held, that a recital in a deed that the money was borrowed by Hindu widow for the performance of her husband's *sradh* was no evidence of the fact in a suit against the husband's heirs, or, to charge the estate.

25. (His Lordship then proceeded to consider how far in each case, taken separately, the plaintiff had shown that the alienation which he impeached was not to satisfy debts for which he could properly be held liable. The judgment on these points is not material for the purposes of this report.)

Richard Garth, Kt., C.J.,

26. As my learned colleague has explained the general facts of this case more fully than I have, and as there are certain points in it upon which unfortunately we are not agreed, I have asked him to be kind enough to deliver his judgment first.

27. The case is one, undoubtedly, which involves several difficult and novel questions; and I desire in the first place to thank the learned Counsel on both sides for the valuable assistance which they have rendered us.

28. These appeals are preferred in five out of a large number of suits, which have been brought by the plaintiff as the adopted son of one Aree Bhunjun Singh, who died a minor, to recover possession of Aree Bhunjun's shares in several ancestral properties, which were sold many years ago to the principal defendants or their ancestors under an order of the Civil Court.

29. There is no question that, at the time when this order was made, the affairs of Aree Bhunjun and his two brothers were in the most involved and perilous condition. The family were oppressed with a heavy load of ancestral and other debts. Decrees for large amounts had been outstanding against them for many years; the whole of the family estates had been mortgaged to such an extent, that no further money could be obtained upon them; the property was all under attachment; and unless some immediate arrangement had been made for sale of a large portion of it by private contract, there was every reason to suppose, that it would be sold by public auction at a ruinous, sacrifice.

30. In this state of things, the two elder brothers, who were the certificated guardians of their minor brother Aree Bhunjun, applied to the Civil Court, u/s 18 of Act XL of 1858, for leave to sell the minor's share in certain portions of the property, in order to save the rest, if possible, and so relieve the family from their pressing difficulties. Particulars of the debts were submitted to the Court. Enquiries appear to have been made, and explanations given to the Judge as to the necessity and propriety of the sale; and eventually, the Judge ordered that a sale should take place, and that the deeds of conveyance should be submitted to him for his

approval. The properties in question were all sold under this order; and the Judge signed his name on each of the deeds, in token, as I think we must presume, that he approved of the terms of the conveyance. The deeds were all executed on the 9th or 11th August 1864, and registered, a few days afterwards, on the 22nd August.

31. Aree Bhunjun Singh died about three years after this transaction; and on the 21st August 1876, just in time, as it is contended, to save the twelve years" limitation, and when some of the purchasers were dead, these suits were brought to recover back Aree Bhunjun's share of the properties sold by Mussamut Bisnath Koer, the widow of Aree Bhunjun, as the adoptive mother and guardian of Dulputty Singh, Goman Bhunjun's third son, who is alleged to have been adopted by Aree Bhunjun on his death-bed.

32. The complaints are all in much the same language; and the grounds upon which the claim is made are the same in each suit, namely, that Aree Bhunjun's two brothers, Rit Bhunjun and Goman Bhunjun, were simpletons and ignorant of business, and helpless in the hands of their servants; and that they fraudulently and illegally sold the property in each case, to satisfy personal debts of their own, with which the minor had no concern. Not a word is said in the complaints as to the sales having been made under an order of the Civil Court.

33. The material issues raised in the Court below were as follows:

1st.-Whether the suits were barred by limitation?

2nd.-Whether Dulputty Singh was legally adopted?

3rd.-Whether the sales were made to satisfy personal debts of Aree Bhunjun's two brothers, or for a legal and proper consideration?

34. The Subordinate Judge decided the first two questions, as to limitation and adoption, in the plaintiff's favour. He treated the order made by the District Judge for the sale of the property, and the proceedings upon which that order was founded, as if they were so much waste paper. He held that, notwithstanding that order, the onus lay upon the defendants (the purchasers or those claiming under them), in each case, to show that the consideration for the deeds were debts or sums due from the minor, and that in other respects the sales were such as the guardians had a right to make. Upon this principle he dealt with the evidence in each transaction, and decided all the cases in favour of the plaintiff.

35. The first point raised before us on appeal, as regards limitation, we disposed of during the argument. It is clear, that these are not suits to set aside the Judge's order for sale, and consequently that it was not necessary for the plaintiff (under Article 15 of the Limitation Act) to sue within one year from the date of that order.

36. The second point raised as regards limitation was one which, during the argument, I had some doubt about,--namely, that as the plaintiff could not recover

his property so long as the deeds by which it was conveyed continued in force, the primary object of these suits was to set aside the deeds; and that, therefore, they should have been brought (under Article 92 of the Limitation Act) within three years from the time when the deeds were made.

37. But I am glad to have come to the conclusion that this is not so. It would be very hard upon minors in many cases to be allowed only three years to bring a suit of this kind; and when we consider that, in this instance, the minor himself was no party to the deeds, and that he is disputing the legality of the transaction, I think he has a right to sue, and does in fact sue, in all these cases, to recover possession of the property sold; and if it were necessary for him to say anything in his plaint with regard to the deeds, it would only be to ask the Court [as was done in the case of *Bennett v. Hamll* (2 Schedule & Lefroy, 566), which I shall mention presently] to restrain the defendants from setting up the deeds as an answer to his claim.

38. The substantial object of the plaintiff is to recover the property; and the validity or invalidity of the sales forms only one of the questions which are involved in that claim.

39. The third point as regards limitation, viz., whether the suits are in time, assuming twelve years to be the proper period, I shall dispose of, when I come to deal with each transaction, separately.

40. As to the alleged adoption of the plaintiff, I agree in the conclusion arrived at by Mr. Justice Prinsep, and mainly upon the same grounds. (His Lordship proceeded to consider the facts relating to the adoption and continued.)

41. This finding would of course dispose of all the five suits, but as it is possible that the plaintiff may desire to appeal to a higher tribunal, I think that we ought to decide the other points, which have been argued before us.

42. And first, we have the very important question, how far the Act XL of 1858, and especially the 18th section of it, has had any, and what, effect upon suits of this nature.

43. There is no doubt that, previously to the passing of that Act, a purchaser buying immovable property of a minor, was bound to inquire into the circumstances which rendered the sale necessary, and to satisfy himself, as an honest man, of the existence of such necessity. He knew or was presumed to know, that the minor's guardian had no right to sell or mortgage the property except for special reason; and the existence of those reasons formed, under the circumstances, one of the elements of the purchaser's title; see *Hunooman Panday's case* (6 I.A. 423), *Lalla Bunseedhur v. Koowur Dutt Singh* (10 I.A. 471); and so before the passing of that Act, where a suit was brought by a minor on coming of age, to recover property sold by his guardian during his minority, it was generally incumbent upon the purchaser to prove that he acted in good faith; that he made proper enquiries as to the

necessity for the sale, and had honestly satisfied himself of the existence of that necessity; see *Roopnarain Singh v. Gugadhur Pershad Narain* (9 W.R. 297) and *Syud Lootf Hossein v. Dursun Lall Sahoo* (23 W.R. 424).

44. The reason why the onus was thus generally thrown upon the purchaser is explained in *Hunooman Panday's* case (6 I.A. 423) to be based upon this principle: that the circumstances under which the sale took place, and which made it necessary, must be presumed to be rather within the knowledge of the purchaser than of the minor, who was often quite a child at the time of the transaction; and the same reason was given by the Court in *Syud Lootf Hossein's* case (23 W.R. 424), "as the sale was made during the minority of the plaintiff, at a time when he could know nothing of the circumstances of the case, it was obligatory on the defendants to prove, that when the original loan was taken from the widow, it is taken for the benefit of the infant".

45. This rule, however, is not always applicable; see *Oomed Rai v. Heera Lal* (6 Section D.R., N.W.P., 618), referred to by the Privy Council in *Hunooman Panday's* case (6 I.A. 423). Their Lordships there expressly say, that the question--on whom the onus of proof lies in suits brought by an infant to recover property improperly sold or mortgaged,--"is one which is not capable of a general or inflexible answer. The presumption proper to be made, will vary with circumstances, and must be regulated by, and dependent on, them."

46. This being the state of the law previously to the passing of the Act XL of 1858, let us see, whether that Act has made any, and what, difference in that respect.

47. Now the Act, as it seems to me, is intended to place the persons and property of all minors, whose guardians may obtain a certificate, under the special charge and control of the Civil Courts.

48. We have lately held here in a Full Bench of this Court--see *Ram Chunder Chuckerbutty v. Brojonath Mozumdar* (I.L.R. Cal. 929)--that it is not necessary for all guardians to obtain such a certificate, and that an un-certificated guardian has the same rights and obligations as regards the minor and his property since the Act as he had before it passed. But in the case of minors of large property, especially Immovable property, the Act renders it very desirable (although not absolutely imperative) that their guardians should obtain a certificate, and thus place themselves under the protection and authority of the Court. The Act gives such guardians larger powers, in some respects, than are possessed by uncertificated guardians. It imposes upon them certain duties, such as the education of the minor, the rendering accounts, &c. (see Sections 16 and 25), and it forbids them to sell or mortgage the minor's Immovable property without an order from the Court (Section 18).

49. This last provision, in my opinion, was intended to effect, and has in fact been the means of effecting, a manifest improvement in the law.

50. The powers exercised by guardians of minors under the Hindu law, had given rise to great inconvenience, and been productive of much fraud and litigation.

51. A Hindu guardian, let him be ever so honest, was often in doubt and difficulty as to how he ought to deal with a minor's property under circumstances of pressure. The family might be very seriously in debt. It was often a doubtful question, both of law and fact, whether the minor was liable for any and what portion of the family debt; or whether the necessity was sufficiently urgent to justify the sale or mortgage of the minor's Immovable estate. The guardian was oftentimes a purdahnasheen lady, or some other member of the family, entirely ignorant of law and business, and of the true state of the family affairs; too often guided by the advice of some unreliable mooktar, and under the influence of other members of the family, whose interests might be adverse to those of the minor.

52. The minor's position, even under these circumstances, was sufficiently unfortunate; but it was of course still more so, if the guardian himself, as not unfrequently happened, was a dishonest man, whose interest and whose object was to sacrifice the minor's property to his own advantage.

53. No wonder that, in this state of the law, the estates of minors were so constantly sold and mortgaged without any legal necessity. No wonder that when brought to sale, they were sold at a ruinous sacrifice. No wonder that the purchasers of those estates, as well as the minors themselves, should so often have been the victims of fraud and ignorance, and that dealings of this kind with the property of minors should have proved such a fruitful source of litigation.

54. It was to remedy these evils, I conceive, and to assimilate the law in this country more closely to the English law upon this subject, that Section 18 of Act XL of 1858 was enacted.

55. It was intended by this section not only to protect the interests of minors, but to throw upon the Civil Courts a large share of the duties and responsibilities which had previously been thrown upon guardians, and to which the latter had been found as a rule deplorably unequal.

56. The Civil Court has now not only the power, but it is bound, as I consider, under the section, to enquire into the circumstances of each case, and to determine whether, as a matter of law and prudence, it is right that any proposed sale or mortgage of the minor's property should take place. The Judge may require the guardian to produce any evidence, or to afford any information or particulars to enable him to come to a just conclusion; and if the Court, upon the materials and information brought before it by the guardian, makes an order for sale, I think that a purchaser, who buys in good faith under that order, acquires a good title to the property sold, unless the minor or those claiming under him can show at some future time that the sale was fraudulent or improper.

57. It appears to me, that, construing the section in this way, its provisions are calculated to prove most beneficial. The property of minors is thus no longer left at the mercy of dishonest or ignorant guardians. It is protected by the Court from alienation, except in cases of real and legal necessity; and as bona fide purchasers may thus acquire the property with some confidence in the validity of their title, they are naturally prepared to give for it a fair and adequate price.

58. This brings the law of this country in the case of certificated guardians much more nearly upon a par with the law of England.

59. By that law neither a minor himself nor his guardian has any power to dispose of his real property without the sanction of the Court; and the Court, as a rule, never orders a sale of such property, merely because it may be beneficial to the minor, but only in case of urgent pressure or necessity. (See Simpson on Infants, pp. 323 and 352, and the authorities there cited.) The means by which the sanction of the Court is usually obtained for such sales is by a suit brought by a creditor of the estate; and an enquiry then takes place before the Court or one of its officers, to ascertain whether the proposed sale under the circumstances is legal and proper. If, upon this enquiry, a decree is made for sale, a purchaser buying in good faith under the decree acquires a valid title as against the minor himself, and all other persons who may be parties to the suit, or bound by the decree; and the title so acquired cannot afterwards be impeached by any of those parties, except by showing that the decree was illegal, or else obtained by fraud.

60. The law upon this subject is exemplified and very clearly explained in the case of *Bennett v. Hamill* (2 Schedule and Lefroy, 566), which was decided by Lord Redesdale in the year 1806.

61. The plaintiff in that case, whilst he was a minor, was entitled to certain leaseholds for lives as his father's heir. His mother, Mary Bennett, was appointed his guardian by the Court of Chancery. The plaintiff's father, when he died, was indebted to two persons, named Palmer and Williams, for the amounts of certain judgment-debts. William Johnson, the plaintiff's maternal grandfather, obtained from Palmer and Williams an assignment of those debts, and then in 1774 filed a bill in Chancery against the plaintiff and Mary Bennett (his mother), alleging that £329 was due to him upon those judgments; and praying that an account might be taken, and that the plaintiff's interest in the leaseholds might be sold to satisfy his debt. Mary Bennett, the guardian, put in an answer, admitting the allegations in the bill, and stating that she had no assets of her husband's except the household property, out of which the debt could be satisfied, and that it would be for the benefit of the plaintiff himself, that his interest in the leaseholds should be sold.

62. The case was referred to the Master, who made his report, and upon that report a decree was made by the Court in May 1774 for the sale of the plaintiff's interest in the property.

63. Under this decree the leaseholds were sold to one Hart for £375, who died soon afterwards, leaving his son Simon Hart his heir-at-law. Simon Hart then conveyed the property to one Mr. McCann, who afterwards sold it to Hamill. In 1792 the plaintiff came of age; and in 1795 he filed a petition in the cause of Johnson v. Bennett, alleging several errors and irregularities in the proceedings, and praying that the original decree, the Master's report, and the final decree should be set aside; and the Lord Chancellor upon that petition made an order setting aside the decrees as prayed.

64. The plaintiff then, on the 21st of March 1796, brought this suit against Hugh Hamill, Simon Hart, Mary Bennett (his mother), and the personal representatives of William Johnson, impeaching the decree and sales of 1774 as being both fraudulent and erroneous, praying in effect, that he (the plaintiff) might receive possession of the property and. title-deeds, that Hart and Hamill might account to him for the rents and profits, and that the defendants might be restrained from setting up the deeds of conveyance which were executed in 1774 under the authority of the Court as an answer to this bill.

65. The case was referred to the Master to inquire into all the circumstances of the suit and of the sale of 1774; and the Master made a report, which Lord Redesdale considered to establish a case of fraud as against Mary Bennett and Johnson, but not as against Hart and Hamill, the purchasers.

66. The proceedings, however, of 1774 disclosed several serious errors and irregularities, which, it was contended, were sufficient in law to justify the Court in setting aside the sale to Hart; and upon this part of the case Lord Redesdale in his judgment says as follows:

The principal question in the case, with respect to Hamill and the executors of Hart, is one of considerable importance: Whether a sale under a decree of a Court of Equity is to be impeached on the ground on which this is sought to be impeached.

67. Then, after pointing out the errors and irregularities which had occurred in the proceedings of 1774, and that there was good reason to suppose that these proceedings were fraudulent, and intended, between Mary Bennett and Johnson, to cheat the minor, his Lordship proceeds:

Now, on that subject, I must confess after considering this a good deal, I think it would be too much to say, that a purchaser, under a decree of that description, can be bound to look into all these circumstances; if he is, he must go through all the proceedings from the beginning to the end, and have the opinion of the Court that the decree is right in all its parts, and that it would be impossible to alter it in any respect. The cases warrant no such opinion. On the contrary, as far as I can find, the general impression they give is, that a purchaser has a right to presume, that the Court has taken the steps necessary to investigate the rights of the parties; and it has on that investigation properly decreed a sale. Then he is to see, that this is a

decree binding the parties claiming the estate. He has no right to call upon the Court to protect him from a title not in issue in the cause; but if he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate his title, although the decree may be erroneous and therefore to be reversed, I think the title of the purchaser ought not to be invalidated. If we go beyond this, we shall introduce doubts on sales under the authority of the Court, which would be highly mischievous.

A case came before Lord Eldon, which was much debated upon a variety of points, and fully considered by him in all its parts, and where the irregularity in the proceedings was far beyond what occurs in the present case; yet he conceived that the title of the purchaser could not be impeached on these grounds, and that he had a right to be protected, for that the purchaser had a right to presume that the Court had done right.--*Lloyd v. Jhones* (9 Ves. 37).

Lord Eldon seems to have been clearly of opinion, that mere irregularity, such as was in that case, without making out a case of fraud and collusion of some sort or other in the purchaser, was not sufficient to affect the purchaser.

"In this case, therefore", said Lord Redesdale, "I think I cannot impeach the purchase made by Hart, much less that made by Hamill.

68. That case, which has since been a leading authority, is valuable to us in this case, not only as showing the effect of sales made under the authority of the Court in England, but also with reference to the question with which I have already dealt, namely, whether the three years' limitation is applicable, Lord Redesdale clearly treats a suit of this kind by the minor as one to recover the property, the Court being merely asked to prevent the defendants from setting up the deeds-of-sale as an answer to the suit.

69. The rule thus laid down by Lord Redesdale was afterwards approved and acted upon by Lord St. Leonards in *Bowen v. Evans* (1 JL 178), where his Lordship says:

70. I am content to be bound by the rule which Lord Redesdale laid down in that case (*Bennett v. Hamill*); and he has carried the rule against a purchaser as far as any Judge". His Lordship then cites several other authorities in support of his position: *Kennedy v. Daly* (1 Schedule and Lefroy, 355), *Gifford v. Hort* (1 Schedule and Lefroy 386), and *Gore v. Stacpole* (1 Dow. 18).

71. I think that the principle laid down in these cases, which appears to me not only consistent with justice, but also in accordance with the best interests of minors, is one which ought to guide us in the construction which we are now called upon to put upon Section 18 of the Act of 1858. If a minor is not subject to the Court of Wards, there would seem to be no better mode of protecting his property from improper alienation than by placing him under the protection of the District Judge, and making it the Judge's duty to decide in each instance, whether any proposed

sale and mortgage of the minor's property is legal and proper.

72. The Judge is the highest judicial authority in each District. He understands, or ought to understand, matters of business. He is at least an independent gentleman, capable of forming an honest judgment unbiased by prejudice or favour, and he has the means, as far as any body has, of obliging the guardian, who applies for leave to sell the property, to provide him with all necessary evidence and information.

73. If, under these circumstances, the Judge, upon whom the responsibility is thus thrown by the law, makes an order for sale, it seems to me in the highest degree unreasonable to say, that a party purchasing under that order is bound to make the same enquiry which the Judge has made, and to determine for himself whether the Judge has done his duty properly, and come to a right conclusion.

74. If this were so, a purchaser buying under an order of the Court would be under the same obligation, and would obtain no better title, than if he had bought direct from an uncertificated guardian. Unless sales made under the authority of the Court are to have to some extent at least the protection which they have in England, it seems to me, that the provisions of Section 18 will only be made a snare to delude unwary purchasers; that these sales will be questioned and litigated almost as frequently as they were before the Act passed; and that minor's estates can never be expected to sell (any more than they were before the Act) for anything like an adequate price.

75. That the public in this country have hitherto adopted the same view which I take of Section 18, is manifest to any mind from this remarkable fact, that whereas before the Act sales made by guardians were a constant source of litigation in the Civil Courts, we have not been able to find a single case, reported or otherwise, (even with the assistance of the able, experienced counsel who have addressed us) in which a sale made by order of the District Judge since the Act passed, has ever been questioned in a Court of law, and this, notwithstanding that the Act has now been in force for upwards of twenty years.

76. My learned colleague seems to consider, that sales made under the sanction of the Courts ought not to be of the same authority here, as they are in England, because the Indian Courts have not the same means as English Judges have of arriving at a right decision.

77. The same might probably be said with truth of almost all decrees or orders which are made by the Courts in this country. No evidence here, whether oral or documentary, is as a rule so reliable as it is in England. And it is quite true, that u/s 18 the evidence which the Judge would take, need not be upon oath, and he might not have the power of compelling the attendance of witnesses, or the production of documents, which a Judge would have in the English Courts. But probably the fact of the witnesses not being examined on oath would not make much difference; and I see no reason why the District Judge, if he performs his duty, and insists upon being

furnished with all the requisite information, before he makes an order, should not have sufficient means, in the great majority of cases at any rate, to form a correct opinion: and the sources from which he would obtain his information, namely, the guardian of the minor and other members and advisers of the family, together with such accounts and documents as he might require, would be much the same here as in England.

78. In both cases, no doubt, the Judge, however careful he may be, is liable to be deceived or mistaken; but in both he has the means of compelling the applicants to provide him with all proper materials before he makes any order for sale.

79. In this particular instance my learned colleague seems to consider, that the District Judge did not do his duty properly; and that he made the order for sale without being duly informed of the circumstances.

80. I must say, I do not think we have any right to say this. The matter was not a contested one, and the District Judge may have received a great deal of information, and examined a great many documents and witnesses, no mention of which appears upon the proceedings; and it is difficult for us to ascertain (even if it were our duty to do so) what materials or information he had before him when he made his order.

81. We are bound, I think, to presume that he did his duty to the best of his ability; and whether he did or not, I think it clear that our present duty is to enquire, whether upon the evidence, which we have before us in these suits, the sales were illegal or fraudulent. But then I also consider, that as the sales took place under the order of the Civil Court, the onus lies upon the plaintiff to make out a *prima facie* case, such as she has alleged in her plaint, of fraud or illegality and to show, that the debt or sum of money, which formed the consideration for the sale in each case was one for which the minor was not responsible. Upon this principle I proceed to consider the grounds upon which each transaction is sought to be impeached; and I believe it will be found that the main difference between my learned colleague and myself is with reference to what constitutes such a *prima facie* case, as the plaintiff is bound to establish. (His Lordship then proceeded to consider the grounds upon which each transaction was sought to be impeached, and came to the conclusion that the appeals should be allowed, and that the plaintiff's suit should be dismissed in each case with costs in both Courts.