
(1876) 06 CAL CK 0002

Calcutta High Court

Case No: None

Debi Dutt Sahoo

APPELLANT

Vs

Subodra Bibee and
Others

RESPONDENT

Date of Decision: June 2, 1876

Citation: (1877) ILR (Cal) 284

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

Bench: Division Bench

Judgement

Richard Garth, C.J.

Without going at length, however, into the general question how far a minor is bound by a decree made against his guardian, during his minority, we think it clear that in this case the plaintiff was entitled to bring the fresh suit for the purpose of asserting his rights, and that, as against the present defendants, it was the only effectual remedy which he could pursue. If his object had merely been to reverse or alter the judgment in the former suit, it is possible that an application for a review would have answered his purpose. But the plaintiff's object was to unrip transactions which formed no part of the proceedings in the former suit, and as against Rameswar Dutt, who merely acted in that suit as the plaintiff's guardian, and as against Mr. Cosserat, who had nothing whatever to do with the former suit, it is obvious that any application for the review of the proceedings in that suit would have been utterly ineffectual, and that as against those persons the plaintiff's only remedy was the one which he has adopted. His contention and his interests in this suit are not identical with, but directly opposed to, those of Rameswar Dutt.

2. He says, that Rameswar, acting professedly as his guardian, has been dealing with his property in a way which the law expressly forbids, and that, in consequence of his having so dealt with it, and also in consequence of certain legal proceedings in which Rameswar has improperly acquiesced, his (the plaintiff's) share of the mortgaged property has wrongfully come into the hands of Mr. Cosserat, and his object is to release his share of the property from the position in which it has been placed by the wrongful acts of his

guardian.

3. The first question, therefore, which we have to decide is, whether the defendant Rameswar was acting illegally when he mortgaged the plaintiff's share by the deed of July 14, 1867.

4. It is admitted that he was appointed guardian of the plaintiff under Act XL of 1858, and that he never obtained the sanction of the Judge to the mortgage, as by Section 18 of that Act he was bound to do.

5. The words of the section are: "No such person" (i.e., guardian of the estate under a certificate granted under the Act) shall have power to sell or mortgage any Immovable property or to grant a lease thereof for any period exceeding five years without an order of the Civil Court previously obtained."

6. The same words are used in Section 14, Act XXXV of 1858, ¹ limiting the powers of a manager of a lunatic's estate, and it was held by Pheall and Alnslik, JJ., in *The Court of Wards v. Kupulmun Singh* 10 B.L.R. 364 that, after the passing of the Act, no manager, de facto or da jure, can have power to do that which the Act forbids.

7. There is a decision of Macpherson and Lawpokd, JJ. in *Surnt Chunder Chatterjee v. Aushootosh Chatterjee* 24 W.R. 46 in an appeal in which the only question was the effect of Section 18, Act XL of 1858, and it was held that a sale made by a guardian without authority from the Court was invalid, even though the purchaser had acted honestly and paid a fair price.

8. On the other hand, a case was relied upon by the defendants *Alfootoonnissa v. Goluck Chunder Sen* 15 B.L.R. 353 decided by Mabkby and Mitteh, JJ., from which it would appear that those learned Judges considered that a mortgage of a minor's property by his guardian without the consent of the Court was a more irregularity. But we have consulted Mr. Justice Malikuy, who delivered the judgment in that case, and who informs us, that although the word irregularity " might have been used, it was by no means the intention of the Court in that case to treat the conduct of the guardian in mortgaging his ward's property without leave of the Court as any other than a direct breach of the law; and we find also that, before Macpherson and Lawford, JJ., delivered judgment in the case of *Surnt Chunder Chatterjee v. Aushootosh Chatterjee* 24 W.R. 46 they also consulted Mabkhy and Mittek, JJ., and that the judgment in the latter case was given with their express concurrence. The ground of the decision by Maukby and Mitter, JJ., in *Alfootoonnissa v. Goluck Chunder Sen* 15 B.L.R. 353 was, that events had subsequently transpired in that case which induced the Court to hold that the mortgage, though improper and unauthorized in the first instance, ought to stand; more especially, as in the suit [288] which was afterwards brought upon the mortgage-deed and in which a decree was obtained, the minor himself was properly represented. Their decision, therefore, will be found not to conflict with the view which we take in the present case.

9. In this case we are of opinion that, in mortgaging the plaintiff's share without the sanction of the Court, the defendant Rameswar was, undoubtedly, dealing with his ward's property in a way which the law forbids, and that in not defending the suit brought upon the mortgage-bond, and allowing the property to be sold under the decree, he was improperly sacrificing his ward's interests.

10. Subodra Bibee, the mortgagee, took the mortgage, carried on the suit, and purchased the property with full knowledge of Rameswar's conduct; and the defendant, Mr. Cosserat, had also notice that Rameswar had been dealing with his brother's property in a way unwarranted by law, because it appears that there was an agreement dated the 5th February, 1868, made by Bisseswar, Rameswar, and Purmeswar, with Mr. Cosserat, reciting that Rameswar had been appointed guardian of his minor brother Debi Dutt, and that he, as such guardian, and for himself, together with his other two brothers, had, on 9th January, 1868, sold the Dhubolia Indigo Factory to Mr. Cosserat. The agreement then goes on to indemnify the purchaser specially in respect of any claim that might be thereafter put forward by the minor brother, Debi Dutt, and generally in respect of any other claims. This document shows that Mr. Cosserat must, at least, have understood that, in purchasing the minor's property, he was on dangerous ground, and having this knowledge, he was bound to satisfy himself that the mortgage-bond had been duly executed under the authority of the Civil Court, as required by law. He cannot say that he was a bond fide purchaser for value without notice, for he certainly had notice that Rameswar Dutt's power of dealing with his ward's property was only such as a guardian appointed under Act XL of 1858 could exercise; and he was, therefore, bound to enquire whether the mortgage had ever been sanctioned by the Court. As a purchaser from Subodra he could take no better title than she had, and unless the decree protected her title, it does not secure his. But she cannot be protected by the decree. She knew from the first, that Rameswar had acted in a manner unauthorized by law; she knew that the suit on the mortgage-bond had been undefended; and further, that notice of that suit had not been given to any one but to those whose interests were opposed to those of the minor. But then it was urged very strongly by the defendant's pleader, that if the debts for which the bond of the 14th July, 1867, was given, were debts due by the father, or if they were debts incurred by all the brothers in carrying on a business which they had a right to carry on for and at the risk of the plaintiff, Rameswar would have been justified in giving a simple money-bond at reasonable interest for the payment of those debts, and that, upon that bond, a decree might have been obtained by the bond-holder, and the property in question sold under that decree.

11. It was then argued that the instrument of the 14th July, 1867, was only a bond of this description, with a mortgage of the property in question superadded by way of further security; that the suit was founded upon the personal obligation of this bond, as well as upon the mortgage security; that, consequently, the defendant had a right to sever one portion of the instrument from the other, and to insist that there was quite sufficient cause of action to support the decree without reference to the mortgage portion of the

transaction.

12. But assuming, for the purposes of argument, that in this instance the mortgagee could have severed one portion of the instrument from the other (which is at least doubtful), and that she could have sued upon the deed of July, 1867, as a simple money-bond, and obtained a decree in that suit, and sold the plaintiff's share of the property, the answer is, that in point of fact she has not adopted that course. She has sued upon the instrument as a mortgage-bond; she has obtained a decree upon it as a mortgage-bond; the decree is such as she could not have obtained, if she had sued merely upon the personal obligation; and it was under that decree that the property has been sold. The defendants, therefore, cannot now change the nature of that suit, or the form of the decree, for the purpose of placing themselves as purchasers under that decree in a different or better position; and as we find that Subodra and Mr. Cosserat were both affected with notice of Rameswar's improper conduct, we consider that the plaintiff is entitled to succeed in this suit as against all the defendants, and to recover possession of his share from Mr. Cosserat.

13. The appeal must, therefore be allowed with costs. And interest as usual, payable by the respondents who have appeared; and the plaintiff must be declared entitled to recover the property in suit, with costs bearing interest at 6 per cent. Per annum from date of decree of the lower Court, payable by Rameswar Dutt Sahoo, subodra Bibee, and Mr. Cosserat.

1.

[Section 14:

Powers of Managers.

Every manager of the estate of a lunatic appointed as aforesaid, may exercise the same powers in the management of the as might have been exercised by the pro if not a lunatic; and may collect and pay all just claims, debts and liabilities of to or by the

estate of the lunatic. But no such manager shall have power to sell or mort