
(1873) 02 CAL CK 0007

Calcutta High Court

Case No: Regular Appeal No. 169 of 1871

Kupulmun Sing and
Another

APPELLANT

Vs

The Court of Wards on
behalf of
Kashopershaud Sing
Lunatic

RESPONDENT

Date of Decision: Feb. 18, 1873

Judgement

Phear, J.

The case has been fully tried, and the Subordinate Judge has given a decree in favor of the plaintiffs. His judgment is certainly in some respects remarkable. He says:-- "It is an admitted fact that the defendant is a lunatic; he is not, therefore, legal heir of his father, but his mother is the sole heir of Chowdhary Kissendyal Sing, deceased. * * * It is patent that the lunatic has no locus standi, and that his guardian and proxy, as a matter of law, cannot raise any objection as to the legality and Validity of the transaction. It is manifest from the above that the lunatic is not the heir of his late father, and that his mother is the heir under the shastras." The Subordinate Judge then argues that, although the Mussumat did in fact execute the deed as if on behalf of her son, yet "the contract was made in her proprietary, and not in her fiduciary, character, and therefore the contract was not vitiated on that account." The lower Court says that its findings on this head "are sufficient for the disposal of the case," and accordingly it gives a decree to the plaintiffs for possession of the mortgaged premises, together with costs. It thus appears to have altogether escaped the notice of the Judge that the suit was brought against the idiot alone, as represented by the Court of Wards, and that the Mussumat, his mother, was no party to the suit in any way. If, therefore, the Court's finding that the property did not belong to the lunatic be correct, still the plaintiffs, in order to succeed, must make out their own title to possession, and that they cannot do on the facts which they themselves put forward, without thawing something more than the mortgage made to them of the property by the real owner; they must, in addition, show that the real owner's equity of

redemption has been foreclosed, so that the full title to the property and to possession of it has passed to them. But obviously they cannot do this, because no suit for the purpose of foreclosing the equity of redemption has been brought against the owner excepting this suit; and if the lunatic be not the owner of the estate, this suit is worthless for the purpose of foreclosing the real owner's equity of redemption, and consequently that equity is still outstanding. It would seem clear, therefore, that, on the finding which the lower Court has come to, it ought to have dismissed the suit with costs. But, further than this, it is beyond question of the essence of the plaintiffs' suit that the property belongs to the lunatic, and I need not say that, according to Hindu law, a lunatic may possess property. No issue was raised in the first Court, or suggested by either party for any purpose connected with the suit, relative to the lunatic's proprietary right. The Subordinate Judge was, therefore, quite wrong in raising himself for the first time in his judgment an issue of fact of this kind, and then determining it upon the evidence before him, notwithstanding that the parties did not themselves desire it, and had not had an opportunity of bringing any evidence to bear on the point. It might well enough be in this case, and would accord with all the facts that are stated or proved, that Kashopershaud became insane after he had succeeded to his father's property. As the case stands, we must certainly take it that the property which was mortgaged by the Mussumat to the plaintiffs was at the time of the mortgage transaction the property of her son Kashopershaud, and that he was then an idiot or lunatic. It therefore becomes necessary to enquire what was the state of the law at the period when the mortgage was effected, so far as it bore upon the matter of the alienation of the lunatic's property.

2. Now I apprehend it is quit clear, as I have already said, that a Hindu being a lunatic may nevertheless have property, even though he is not capable of taking property by inheritance in the event of his being lunatic at the time when the inheritance opens to him. But if a lunatic has property, it is, then, I think quite certain that by Hindu law he cannot himself make valid contracts binding either on himself or on his property. If it is necessary to refer to authority for this purpose, it may be found in Menu, both as given in Sir William Jones' edition and in the text given in Colebrooke's Digest. The text 11 in the 2nd Book, Ch. 2, s. 1 of Colebrooke's Digest, headed Menu, runs thus:-- "A contract made by a person intoxicated or insane, or grievously disordered, or wholly dependent, by an infant or decrepit old man, or by a person without authority, is utterly null." Again, the following text of Yajnavalkya:-- "A contract made by a person intoxicated or insane, or grievously disordered, or disabled, by an infant, or a man agitated by fear or the like, or in the name of another by a person without authority, is utterly null."

3. Therefore, all dealings with the property of one who is insane if dealings can be effected so as to be valid and binding upon it, (and obviously such property needs to be managed as much as any other), must be made by the hands of a guardian or a Manager; and the Hindu law, as I understand it, recognized this necessity quite as early as it laid down the disqualifications which I have referred to; and I think it is undoubted that (to adopt the generalisation of Sir Thomas Strange) the supreme civil power is the

authority to appoint an efficient manager and guardian of a disqualified person's property. In the Strange ch. 8, cl. 4, Sir Thomas Strange says:-- "With respect to the relation of guardian and ward, the king, as he is, by the Hindu law, failing all others, the ultimate heir of all, Brahmins excepted, as is he, to an extent beyond what is recognized by us in our Court of Chancery, the universal superintendent of those who cannot take care of themselves. In this capacity it rests with him, i.e., with the judicial powers exercising for him this branch of his prerogative, to select for the office the fittest among the infant's relations; preferring always the paternal male kindred to a maternal ancestor or female." For this position, Sir Thomas Strange refers to Menu, ch. 8, cl. 27, and also to some texts in Colebrooke's Digest Sls. 27 and 28 of Menu's 8th ch, run thus: 27.--"The property of a student and of an infant, whether by descent or otherwise, let the king hold in his custody, until the owner shall have ended his studentship, or until his infancy shall have ceased in his sixteenth year." 28.--"Equal care must be taken of barren women, of women without sons, whose husbands have married other wives, of women without kindred, or whose husbands are in different places, of widows true to their lords, and of women afflicted with illness." And the propriety of giving an extension to Menu's words such as to make them applicable in regard to all persons incapable of taking care of themselves, as Sir Thomas Strange has given it, has been recognized many times in this Court. I will only now refer to a case which was quoted by both sides in argument before us, namely, *Goureenath v. The Collector of Monghyr* 7 W.R., 5.

4. No doubt, the Court, when representing the supreme authority in appointing a guardian, is bound to choose the fittest and most proper person from among the disqualified person's relations who can be found for the purpose, and in this sense it has been recognised that the father is the legal guardian of his minor children, in default of the father, the mother, and so on. The technical term thus arising--legal guardian--was used in argument before us, and insisted upon with some force for the purpose as I understood the learned pleaders, of leading the Court to the conclusion that the mother, in this particular case, was by Hindu law the guardian de jure in the sense which the Privy Council seem to have given to that phrase in the new celebrated case-- 6 M.I.A. 393 (Privy Council) . But it seems to me that, according to the true principle of Hindu law, the legality of the guardianship ultimately depends upon the appointment to the office of guardian by the supreme civil authority as represented by the Court. The guardian, when thus duly appointed, no doubt, has certain powers of dealing with the disqualified person's estate, and of making contracts with respect to it which shall be as binding as if they had been made by the owner himself. And it may, I suppose, be taken as a general rule of equity that any one dealing bona fide for valuable consideration with one who is de facto guardian within the limits of the powers which snob a guardian if acting de jure, would have in respect of his ward's property, will be relieved from the necessity of enquiring whether the de facto guardian is also de jure guardian,--that to, whether he was originally duly appointed or not.

5. Up to the year 1858, no special rules or enactments, as far as I am aware, existed to govern the action of the Courts in the matter of appointing a guardian or manager for a lunatic generally. We have on this point been referred to the Regulation passed in 1793 and to two or three other Regulations passed subsequently. But think it is admittedly both sides that there was no Act which was generally applicable to all cases of lunatics until the date of the passing of the Act XXXV of 1858. Now, by that Act, a particular course is marked out for the Court to pursue in regard to appointing a guardian or a manager of the lunatic's estate; and I apprehend that, after the date of the passing of this Act, an appointment of a guardian or manager of a lunatic's estate could not be properly effected in any other manner than in the special manner prescribed by that Act. Possibly, though as to this I desire to express no judicial opinion, even since the passing of that Act, third parties may, under some circumstances, be held to have dealt bona fide with a manager acting de facto not duly appointed, and on that ground be relieved, under the general principles of equity to which I have referred, from the necessity of enquiring whether or not the de facto manager is also de jure manager provided always the dealing in question falls within the area for which a de jure manager has undoubtedly powers to deal in respect of his ward's property. But in the present case it is all-important to bear in mind that the Act of 1858 not only prescribed a particular proceeding as the method to be followed in appointing a manager, but also limited the powers of the manager when so appointed, in regard to the aliening and encumbering of his ward's property. And it seems to me that whatever may be the true limit of the application which ought to be made of the above referred to equitable principle in favor of a bona fide purchaser for valuable consideration, since the passing of this Act at any rate, no such application can be made as would have the effect of giving a de facto manager not being a manager de jure a greater power of aliening and encumbering than a de jure manager would have: for such an application of the principle would have the effect of reducing the enactment 1858 to a nullity.

6. I now come to the critical point in this case. The plaintiffs, although they say in the plaint that the Mussamat was appointed manager, have not attempted for one moment to prove any fact of appointment, and I suppose that they simply relied upon the equitable presumption being made in their favor for the support of their allegation. Not only, however, have they not proved it, but I believe it is admitted by the plaintiffs' advisers that the statement made on behalf of the lunatic is true, namely that the widow never was appointed; and that, although she did in fact make an application to the Court for appointment, her application was refused. So that it is abundantly clear that the person from whom the plaintiffs say they obtained their title was not duly appointed as by law was necessary in order to give her de jure power to deal with the lunatic's estate, and it is also further apparent, and indeed the plaintiffs did not allege it that the person from whom the plaintiffs pretend to have got their mortgage did not give it to them under the sanction of the Court, without which sanction no good title could be passed by the manager under the Act of 1858. The case of the plaintiffs is simply that there was necessity, and that in the event of necessity, the manager has the requisite power. I think

this position is not tenable now. I think it would be almost absurd to hold that a manager, acting without proper authority, is in this respect more free and more favorably situated than is a manager duly appointed. It seems to me in short that the plaintiffs fail entirely to make out their title, because they are unable to show that the provisions of s. 14, Act XXXV of 1858, were complied with in their case. The words of that section are:-- "Every manager of the estate of a lunatic appointed as aforesaid may exercise the same, powers in the management of the estate as might have been exercised by the proprietor, if not a lunatic: and may collect and pay all just claims, debts, and liabilities due to, or by, the estate of the lunatic. But no such manager shall have power to sell or mortgage the estate or any part thereof, or to grant a lease of any immoveable property for any period exceeding five years, without an order of the Civil Court previously obtained." No such order of the Civil Court empowering the Mussamut to mortgage the lunatic's property, or to otherwise, alienate it, was obtained or attempted to be obtained. I think, therefore, that the plaintiffs have got no title under the alleged deed of bybilwafa against the estate of the lunatic, who is represented in this suit by the Court of Wards. It follows then upon this ground alone that the suit must be dismissed.

7. I wish to add that, upon the evidence which has been minutely analysed before us by both parties, I am by no means satisfied that there was a debt, or were debts, so pressing upon the estate as would constitute a legal necessity for mortgaging it upon the ground put forward by the plaintiffs. And, indeed, less sufficient evidence of payment of the alleged debts than that which is in the record I have seldom seen. It may be well enough, for anything that the witnesses deposed to, that several of the bonds which the plaintiffs maintain have been paid off with their money are still outstanding, and may yet be put in force at some subsequent period. We really know nothing whatever upon this point. The original bonds have not been produced,--have not been accounted for. And so far as there was anything proved by the plaintiffs in the shape of a charge or inchoate charge upon the estate, I may say that in not one instance had it ripened into actual pressure. The mortgage of the whole estate, which the plaintiffs alleged that they obtained, seems to me to have been at least as great and exhaustive a burden as that which it pretends to replace. In fact, if they had established their case, it would have shortly come to this, namely, that they really swallowed up the whole of the lunatic's property in the place of those creditors whom they say they had paid off. Of course, this result is not itself sufficient ground whereon to dispose of the plaintiffs' case, but it seems to afford strong reason for scrutinising very closely the whole mortgage-proceedings, and for insisting upon strict proof of the plaintiffs' material allegations. It is unnecessary, however, that I should say any thing further upon the merits of the plaintiffs' claim. We confine ourselves simply to dismissing the suit with costs.

(1) Before Mr. Justice Bayley and Mr. Justice Macpherson.

The 3rd July 1868.

Alienation by de facto Guardian--Necessity

Baboos Annoda Prosad Banerjee, Chunder Madhab Ghose, Khetter Nauth Bose Nilmadub Sen, and Roop Nath Banerjee for the appellants.

Baboos Onoocool Chunder Mookerjee and Kally Mohun Doss for the respondents

The judgment of the Court was delivered by

Macpherson, J.--These two appeals, Nos. 3227 and 3252, are from one judgment. The suit is brought to recover possession of certain property under a kabala dated May 1861, which was executed by the defendant, Duryao Lall for himself and as guardian of his minor brothers, the defendants, Gunga Persaud, Hur Persaud, and Chooa Lall. Duryo Lall's defence is that he did not execute the bill of sale at all. The defence of his brothers is, 1stly, that Duryao Lall never executed the deed of sale; and, 2ndly, that if he did execute it, his act is not binding upon them. The appeal 3252 is by Duryso Lall, who, both the lower Courts having found against him as to the fact of his having hold the property to the plaintiff, contends that the judgment of the lower Appellate Court is insufficient, inasmuch as it does not show that the Principal Sadder Ameen took into consideration all the evidence adduced by the defendant. There is nothing whatever in this objection, for there is nothing to lead me to suppose that the evidence upon this issue has not been fully considered by the lower Appellate Court. The appellants, Gunga Persaud, Her Persaud, and Chooa Lall, contend that, even if the kabala was executed by Duryao Lall as their guardian, it is not binding upon them for two reasons: 1stly, because he was not their legal guardian, their father being alive at the time of the execution of the deed; 2ndly because there was no such necessity for the sale as makes it binding upon them.

As regards the objection of Duryao Lall's not being his brother's guardian, the first objection which I have to make is that this plea was not raised in the Court of first instance; and that, although it was mentioned in the written grounds of appeal filed in Court of the Principal Sadder Ameen, no issue was fixed raising the question. The objection taken to Duryao Lall's being their guardian, in the Court of first instance, was based only upon the ground that he had not obtained a certificate. If the defendants wished the lower Appellate Court to decide the question whether Duryao Lall was or was not their guardian, when their father was alive, it was their business to have seen that that issue was distinctly raised, and to have taken steps to ensure its being raised if the Principal Sadder Ameen did not raise it himself. As matters stand, there is nothing to lead us to suppose that the Principal Sadder Ameen's attention was ever drawn to the fact that their father, and not Duryao Lall, was alleged to have been their guardian at the time when the sale was made. But supposing that the father was alive at that time, it appears to us that if Duryao Lall was de facto acting in the matter as the guardian of his brothers, the plaintiff's title would not be bad so far as this objection is concerned.

In 6 M.I.A. 393 (Privy Council) their Lordships of the Privy Council expressed their opinion that a sale made by a de facto guardian under pressing necessity would be good. Their Lord-Ships say:-- "Under the Hindu law, the right of a bond fide incumbrancer who has taken from a de facto manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a de facto and de jure manager) affected by the want of union of the de facto with the de jure title." In the present instance the Principal Sudder Ameen finds as a fact that Duryao Lall for himself, and as guardian of his minor brothers, executed the kabala, and that the consideration-money was fully paid, and it is clear from the judgment of the Principal Sudder Ameen that Duryao Loll was in this matter acting as de facto guardian of his minor brothers.

There remains the question whether any sufficient necessity for the sale has been proved. As regards this point, their Lordships of the Privy Council observe in Hunoomanpersaud Panday v. Mussumat Babooee Munraj Koonweree Id., p. 423 that "where the charge is one that a prudent owner would make, in order to benefit the estate, the bona fide lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is, or has been, a party, he cannot take advantage of his own wrong, to support a charge in his own favor, against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender, unless he is shown to have acted mala fide, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt." In the present case, the lower Appellate Court says:-- "In this case the guardian, in order to save an entire property which was in danger of being ruined, sold a portion thereof, and thus saved the entire property, that is to say, he saved it by selling a part of it, and applying its purchase-money to the expenses incurred in a suit brought as against the whole estate. This was, therefore, an act every way beneficial to the minor, and consequently the sale of his share by his guardian is fit to be held valid by the Court." There is an express finding here that the sale to the plaintiff's was beneficial to the estate, and that the necessity which called for it arose out of a suit which was pending at the time. It appears from the statement of the pleader for the special appellants that the suit was brought by Duryao Lall for himself and for his minor brothers, in order to have it declared that a certain tenure set up by one Raout Sahoy was not a mokurari tenure; and that Duryao Lall was eventually successful in that suit. This being so, and the lower Appellate Court having found as a fact that the bringing of the suit was beneficial to the whole estate, we, sitting in special appeal, cannot say that there is anything wrong in that finding merely on a consideration of the possibility that it might have been equally beneficial to the estate if the suit had not been instituted till the minor brothers had attained their full age.

On the whole, the lower Appellate Court finding as a fact that the deed of sale was executed by Duryao Lall for himself and as de facto guardian of his brothers, and the

Court further finding that full consideration was paid, and that the money paid was applied for the benefit of the property, and that the transaction was beneficial to the minors, I think that the judgment of the lower Appellate Court must be upheld, and both these special appeals must be dismissed with costs.

*Special Appeals, Nos. 3227 and 3252 of 1861, from the decrees of the Principal Sudder Ameen of Gya, dated the 6th September 1867, affirming the decrees of the Munsif of that district dated the 23rd May 1867.