

(1875) 05 CAL CK 0004

Calcutta High Court

Case No: Special Appeal No. 2029 of 1874

Shurrut Chunder Alias

Bholanath

Chuttopadhya

APPELLANT

Vs

Rajkissen Mookerjee

and Others

RESPONDENT

Date of Decision: May 11, 1875

Judgement

Macpherson, Officiating C.J.

1. There is but one point raised in this special appeal. The plaintiff seeks to set aside a sale made during his minority by his elder brother Ashootosh Chatterjee, who was his guardian appointed by the Court under Act XL of 1858. The Court below has found that the purchaser (the respondent) did not act fraudulently in the matter; that he gave a fair price; and that the condition of the estate necessitated a sale, The question is whether such a sale is had, and can now be set aside for the one reason that the sanction of the Court, which s. 18 of Act XL of 1858 declares necessary, was never obtained.

2. S. 18 enacts that every person to whom a certificate shall have been granted "may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor; and may collect and pay all just claims, debts and liabilities due to or by the estate of the minor. But no such person shall have power to sell or mortgage any immoveable property, or to grant a lease thereof for any period exceeding five years, without an order of the Civil Court previously obtained." This is not a simple direction that the sanction of the Court shall be obtained. It is a positive declaration that, in the absence of such sanction, the guardian has no power to sell. If the guardian, having no power to sell, does sell, does he pass a good title to the estate? All persons being presumed to know the law, it must be presumed that the purchaser took with knowledge that, except with the sanction of the Court previously obtained the guardian had no power to sell to him.

3. We have been able to find only three cases reported which bear at all upon the question, and in no one of them is it actually decided See also the observations of Markby, J. in *Gopalnarain Mozoomdar v. Muddomuttu Gupte*, 14 B.L.R., 21, at p. 29.

4. The first is in the matter of the petition of *Busunto Coomar Ghose* Ante, p. 351, where, the matter not arising for judicial decision, it is said by Jackson, J., that the guardian in granting a mortgage of the minor's property acted in direct violation of s. 18 of Act XL, and that the mortgage so executed without the order of the Court would be invalid.

5. The *Court of Wards v. Kupulmun Sing* 10 B.L.R., 364 was a case under the Lunatics Act, XXXV of 1858. The words in s. 14 of that Act are the same as those in s. 18 of Act XL of 1858,--that the manager shall not have power to sell or mortgage without an order of Court previously obtained. Referring to this section, Phear and Morris, JJ., have declared that, without the sanction of the Court, the manager can pass no good title.

6. A Division Bench in *Alfootoonnissa v. Goluck Chunder Sen* Ante, p. 353 declined to disturb a mortgage made by a guardian without sanction. But this was after a suit (to which the minor was a party) had been brought on the mortgage, and a decree had been given in favor of the mortgagee.

6. However much we may desire to support a purchaser who has not acted dishonestly, and by whom a fair price has been paid, we think it impossible to declare a sale valid which is made by a guardian without the sanction which s. 18 requires. The words are very strong. It is not merely that they contain a direction that the sanction of the Court shall be obtained: they say without an order of Court previously obtained the guardian shall absolutely not have the power to sell. It seems to us we are bound to treat the sale as made by one having no power in the matter, and therefore as bad. The purchaser who, knowing that he is dealing with a guardian, chooses to ignore the provisions of the Act, has no one but himself to blame if he suffers from the consequences of his negligence.

7. As, however, the lower Court finds that the conduct of the purchaser was not dishonest, and that he paid a fair price, we shall declare that the plaintiff is entitled to be restored to possession with mesne profits on his repaying to the purchaser so much of the money paid by the purchaser as has been applied to the benefit of the minor's estate. The purchaser on being repaid so much as shall be found to have been applied for the benefit of the minor with interest at 6 per cent. on the money so paid, must give up possession to the plaintiff, accounting for the mesne profits for the time he has been in possession.

8. The decrees of the lower Courts are set aside, and the suit must go back to the Court of first instance in order that the necessary inquiries may be made, and accounts taken in order to the carrying out of the directions we now give.

9. We may add that we do not think that the position of the purchaser (respondent) is in any way stronger by reason of the accident that the guardian appointed under Act XL of 1858 happened also to be the elder brother and natural guardian (i) such he really was) of the plaintiff. Having been appointed under Act XL of 1858, he could not longer act for the minor otherwise than under his appointment by the Court. If one who is the natural guardian, is appointed by the Court, and act under the appointment, he can have no powers other than the given him by Act XL of 1858. The appellant will get his costs of this appeal and in the lower Courts.

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Before Mr. Justice L.B. Jackson and Mr. Justice Glover.

The 24th of March 1870.

In The Matter of The Petition of Busunto Coomar Ghose.*

Act XL of 1858, s. 18 - Sale made by Guardian without the sanction of the Court--Grounds for Recall of Certificate.

Where a guardian, appointed under Act XL at 1858, mortgaged certain immoveable property of the minor without obtaining the sanction of the Court under s. 18 of that Act, and it appeared he was related to and jointly interested with the minor in the management of the property, held, that it was not a sufficient cause to recall the certificate, unless it was made clear that in the mortgage transactions he had acted in bad faith or had injured, or was likely, or bad intended, to injure the interests of the minor.

In this case a certificate of guardianship under Act XL of 1858, granted to Raja Brojendro Narain Raj was, on the petition of Buasunto Coomar Ghose, recalled, on the ground that he had, without the sanction of the Court wider s. 18 of the Act executed a bond in his character of guardian in favor of Doorga Bibee, by which certain property of the minor was mortgaged. From the order recalling the certificate Raja Brojendee Narain appealed.

Baboo Mohini Mohan Roy for the appellant.

The following judgments were delivered.--

Jackson, J.--It seems to me that the Judge has, without sufficient pause recalled the certificate granted under Act XL of 1858 to the appellant. The appellant is himself a co-sharer, being the half-brother of the minor. The certificate has been recalled on the ground of a bond entered into by the appellant, by which certain joint immoveable property was pledged to one Doorga Bibee, such bond being executed without the permission of the Civil Court.

The Judge observes that such execution of the bond is a direct violation of the provisions of s. 18, Act XL of 1858. No doubt it is a violation of that section, in so far as that the bond so executed without an order of the Civil Court would be invalid. It does not follow however that because a person has executed a bond which would have no legal force, he must therefore be removed from the guardianship to which he has been appointed. It should have been made clear, I think, that the guardian, in so executing the bond, acted in bad faith, or had injured, or was likely, or intended, to injure the interests of the minor. It does not appear even that he "knowingly contravened the terms of that section, and, at any rate it appears that the bond in question was executed four or five years ago, and that it has been superseded by a patni settlement entered into by the guardian with full sanction of the Civil Court.

It appears to me therefore, that the Judge had no sufficient ground for Betting aside the certificate.

It seems to me that there ought to be specially good cause made out before removing from the office of guardian and manager of minors" estates a person who is himself jointly interested with the minor in the management of the property. I think, therefore, that the order of the Judge must be set aside with costs.

Glover, J.--I also think that the Judge has taken too narrow a view of the circumstances of the case, and I think no sufficient cause has been shown for recalling the certificate granted to the manager.

* Miscellaneous Regular Appeal, No. 34 of 1870, against an order of the Judge of Zilla Moorshedabad, dated the 11th of December 1869.