

LETTERS PATENT APPEAL.

Before Mookerjee and Cuming JJ.

DWIJENDRA MOHAN SARMA

v.

MANORAMA DASL.*

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Feb. 13.

Minor—Alienation by guardian—Guardians and Wards Act (VIII of 1890) ss. 29 and 30. Whether controls the provisions of s. 305 of the Code of Civil Procedure (Act XIV of 1882)—Scope of enquiry under each.

In a conveyance executed by the guardian of a minor without the previous sanction of the District Judge as laid down in sections 29 and 30 of the Guardians and Wards Act, 1890, where it appeared that at the time when the transfer was made the property was under attachment in execution of a decree for money held by the creditor of the infant, the sanction of the execution Court was obtained in the manner prescribed by section 305 of the Code of Civil Procedure, 1882 (corresponding to O. XXI, r. 83 of the Code of Civil Procedure, 1908):

Held, that a private alienation though confirmed by the execution Court under section 305 of the Code of Civil Procedure, 1882, is not validated, if such alienation is made by a certificated guardian and the transaction is not confirmed by the Court which appointed the guardian.

Dattaram v. Gangaram (1), *Sarju v. The District Judge of Benares* (2) followed.

The scope of enquiry under section 29 of the Guardians and Wards Act is entirely distinct from the scope of an enquiry under section 305 of the Civil Procedure Code, 1882. In the former the matter to be considered is the benefit of the infant and in the latter the matter for enquiry is the protection of the Execution Creditor.

Barkar v. Jamila (3), *Abdur Rashid v. Sheikh Khandkar* (4), *Nakimo Dewani v. Pemba Ditchan* (5) discussed.

* Letters Patent Appeal No. 8 of 1921, in Appeal from Appellate Decree No. 1643 of 1919.

(1) (1898) I. L. R. 23 Bom. 287. (3) (1918) P. W. R. 61.

(2) (1909) I. L. R. 31 All. 378. (4) (1922) 35 C. L. J. 206.

(5) (1917) I. L. R. 44 Calc. 829.

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Section 30 of the Guardians and Wards Act makes the transaction voidable : that is, liable to be avoided in a proper proceeding. Consequently when the person affected seeks to avoid its consequence he is in the position of a person who seeks equity and must do equity.

The Eastern Mortgage and Agency Co. v. Rebati Kumar Ray (1), and other cases followed.

THIS was a suit for recovery of possession of one-third share of a homestead upon declaration of title and for incidental reliefs. The Court of first instance dismissed the suit, but on appeal the Subordinate Judge reversed that decision. On second appeal to this Court Shams-ul-Huda J. (sitting singly), by the following judgment, set aside the decree of the Subordinate Judge and restored that of the Court of first instance :

SHAMS-UL-HUDA J. This appeal arises out of a suit for declaration of title to and recovery of possession of one-third share of a homestead described in the plaint and for certain other reliefs. The suit was dismissed by the First Court but on appeal that decree was reversed and the plaintiff's suit was decreed. The defendant No. 1 is the appellant before this Court. The facts of the case are somewhat complicated but having regard to the points that have been urged before me by either side they may be shortly stated to be these. One-third of the disputed homestead belonged to one Kandarpa who was a minor and his father was his guardian appointed by the District Judge. With the permission of the District Judge the guardian sold Kandarpa's one-third share to one Sitanath by a Kobala dated the 1st Magh 1312. Plaintiff derives his title from Sitanath. The main defence with which I am concerned in this appeal is that Kamini before the sale to Sitanath had sold one-third share of the minor to one Gourhari on the 22nd Chaitra 1311, and that after such sale no interest was left in the minor which the guardian could convey to Sitanath even with the sanction of the District Judge. Defendant claims to have acquired title to the land by various purchases.

The lower Appellate Court accepts the contention that if the sale to Gourhari was a valid sale, plaintiff cannot succeed in this suit and this is not disputed. In the opinion of the Court below however, the sale to Gourhari was not a valid sale, because it was effected by the guardian of the minor without the permission of the District Judge obtained under section

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29 of the Guardians and Wards Act. Defendant, however, contended that the permission of the District Judge was obtained, and he relies on a recital in Gourhari's Kobala in support of this contention. The defendant also urged that the property of the minor had been attached in execution of two decrees obtained against the minor and the sale to Gourhari was effected with the previous permission of the attaching Court under section 305 of the old Code of Civil Procedure, and that this was sufficient even without the sanction of the Judge. The learned Judge however, overruled these contentions and held that the sanction of the District Judge under section 29, to the sale to Gourhari had not been proved. There was no evidence to prove the fact except the recital in the Kobala and that such recital was no evidence against the plaintiff. The learned Judge, however, held that substantial compliance with the provisions of section 305 of the Civil Procedure Code has been established, but this was not enough. Two main points have been argued in support of the appeal (i) that the recital in Gourhari's Kobala was evidence in the case and the Court below was wrong in holding the contrary ; (ii) that even if no such sanction was obtained the permission under section 305 was sufficient and these are the only two main points that arise for my consideration and in my opinion both these contentions must prevail.

In support of the first contention the learned vakil for the appellant relies on *Banga v. Jagat* (1) which lays down that a recital is evidence between the parties and those claiming under them. In this case the recital in the Kobala executed by the guardian was evidence against him and is also evidence against the plaintiff who derives his title through the same guardian.

As regards the second point, I am of opinion that compliance with the provisions of section 305 was sufficient to validate the sale even if there was no permission under section 29 of the Guardians and Wards Act.

The learned vakil for the respondent has relied on *Sarju v. District Judge* (2) and *Dattaram v. Gangaram* (3) as supporting his contention that the sanction of the District Judge was necessary. In my opinion the point involved in this case did not directly arise in either of the two cases.

I hold that the special provision of section 305, is not controlled by the provisions of section 29 of the Guardians and Wards Act. The unreported decision of this Court referred to in the judgments of the Courts below though not a direct authority lends some support to the view I have taken. On these grounds I allow the appeal, set aside the decree passed by the Court below and restore the decree of the First Court. The defendants are entitled to their costs throughout.

(1) (1916) 21 C. W. N. 225.

(2) (1909) I. L. R. 31 All 378.

(3) (1898) I. L. R. 23 Bom. 287.

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Against this judgment the plaintiff preferred this appeal under clause 15 of the Letters Patent which was heard by Mookerjee and Cuming JJ. who affirmed the decree of dismissal made by Shams-ul-Huda J. but disagreed with the grounds stated in his judgment. The facts of the case appear from the judgment of Mookerjee and Cuming JJ.

Babu Brajalal Chuckerburty and Babu Hemendra Kumar Das, for the appellants.

Babu Birendra Chandra Das, for the respondents.

Cur. adv. vult.

MOOKERJEE AND CUMING JJ. This is an appeal under clause 15 of the Letters Patent from the judgment of Mr. Justice Huda in a suit for recovery of possession of a one-third share of a homestead upon declaration of title and for incidental reliefs. The Court of first instance dismissed the suit. Upon appeal, the Subordinate Judge reversed that decision. On second appeal to this Court, Mr. Justice Huda has set aside the decree of the Subordinate Judge and restored that of the primary Court.

The disputed property belonged to an infant, Kandarpa Kumar Sen, whose father Kamini Kumar Sen was appointed as guardian of his property by the District Judge. The root of this title of the plaintiff is a conveyance executed by the guardian on the 14th January, 1906, with the sanction of the District Judge and registered three days later. The foundation of the title of the contesting defendants is a prior conveyance executed by the guardian on the 4th April, 1905, and registered six days later. This conveyance, like the one previously mentioned, recites that "it has been executed with the sanction of the District Judge." The defendants, however, failed to satisf

the Courts below that the assertion made by the executant of their conveyance was well-founded on fact, for whereas the record shows that the transaction of the 14th January, 1906, was sanctioned by the District Judge, no order has been traced in favour of the transaction of the 4th April, 1905. The case has consequently been tried on the hypothesis that the conveyance set up by the defendant, though prior in point of time, was executed without the sanction of the District Judge, while the conveyance set up by the plaintiff, though subsequent in point of time, was executed with the sanction of the District Judge. In these circumstances, the question arose, whether the plaintiff is entitled to treat the defendants as persons without title and to obtain relief on that basis.

Section 29 of the Guardians and Wards Act, 1890, provides that a guardian of the property of a Ward shall not, without the previous permission of the Court, mortgage, charge or transfer by sale, gift, exchange or otherwise, any part of the immoveable property of his Ward. Section 30 then ordains that the disposal of immoveable property by a guardian in contravention of either of the two last foregoing sections, is voidable at the instance of any other person affected thereby. It cannot consequently be maintained that the conveyance which is the foundation of the title of the defendants is not liable to be impeached. The defendants have appreciated this danger and have relied upon a circumstance extraneous to the provisions of the Guardians and Wards Act.

It appears that at the time when the transfer in favour of the defendants was made, the property was under attachment in execution of a decree for money held by a creditor of the infant. The transfer could consequently be effected, only with

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the sanction of the execution Court obtained in the manner prescribed in section 305 of the Code of Civil Procedure, 1882, which has since been replaced by Order XXI, rule 83, of the Code of 1908. The Court below has held that there was substantial compliance with the provisions of section 305 and we shall assume without discussion that this view is well-founded. This consequently raises the question, whether compliance with the provisions of section 305 cures the defect which attaches to a transaction effected in violation of the provisions of section 29 of the Guardians and Wards Act. The decisions in *Dattaram v. Gangaram* (1) and *Sarju v. The District Judge of Benares* (2) point to the conclusion that the answer should be in the negative. These cases are authorities for the proposition that a private alienation, though confirmed by the execution Court under section 305 of the Code of 1882, is not validated, if such alienation is made by a certificated guardian and the transaction is not confirmed by the Court which appointed the guardian. We are of opinion that this conclusion is sound on principle.

The scope of an enquiry under section 29 of the Guardians and Wards Act is entirely distinct from the scope of an enquiry under section 305 of the Civil Procedure Code of 1882. When an application is made under section 29 of the Guardians and Wards Act to a District Judge to sanction a proposed alienation, the matter to be considered is the benefit of the infant. When an application is made to an execution Court to sanction an intended transfer under section 305 of the Code of 1882, the matter for enquiry is the protection of the execution creditor. Compliance with the provisions of section 305 of the Civil Procedure Code, should not consequently render

(1) (1898) I. L. R. 23 Bom. 287. (2) (1909) I. L. R. 31 All. 378.

unnecessary the fulfilment of the requirements of section 29 of the Guardians and Wards Act, in a case which falls within the scope of both these provisions of the law. This view is not opposed to the decisions in *Barkar v. Jamila* (1), *Abdur Rashid v. Sheikh Khandkar* (2) and *Nakimo Dewani v. Pemba Ditchan* (3). In the first of these cases, the transfer was effected, not by a certificated guardian but by a guardian-ad-litem appointed for the purpose of a suit, and the Punjab Chief Court held that section 29 of the Guardians and Wards Act could not by its very terms be applied to such a contingency. In the second case, the question was considered, whether Order XXXII, rule 7 of the Code of 1908 rendered unnecessary compliance with the requirements of section 29 of the Guardians and Wards Act. The answer was given in the affirmative. This view may perhaps be justified on the hypothesis that the objects of these provisions of the law are identical, namely, the protection of the infant concerned. On this ground alone, the decision is distinguishable, and we need not express an opinion as to its soundness. In the third case, the question was raised whether the fact that a compromise had been sanctioned by the Court of Wards rendered needless a compliance with the provisions of Order XXXII, rule 7 of the Civil Procedure Code, and the answer was given in the affirmative. There is no real analogy between the provisions of the Court of Wards Act and the Guardians and Wards Act.

Finally, our attention has been drawn to the decision in *Biku v. Mohesh* (4), which deals with the question of the power of a certificated guardian to

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(1) (1918) P. W. R. 61.

(3) (1917) I. L. R. 44 Calc. 829.

(2) (1922) 35 C. L. J. 206.

(4) (1907) 8 C. L. J. 266.

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compromise a suit without the sanction of the District Judge. This is plainly of no assistance to the respondent. We consequently hold that the position of the defendant must be adjudged on the assumption that the conveyance which is the root of his title did not comply with the requirements of section 29. It was assumed in the Courts below that a transaction of this description might be ignored by the party prejudicially affected thereby and that the guardian who had executed the conveyance of the 4th April, 1905, might indicate his repudiation of the transaction by execution of the conveyance of the 14th January, 1906. In our opinion, this position is manifestly untenable.

Section 30 of the Guardians and Wards Act makes the transaction voidable: that is, liable to be avoided in a proper proceeding. Consequently, when the person affected by such a transaction seeks to avoid its consequence, he is in the position of a person who seeks equity and must do equity. Thus, not only can he not ignore the transaction, but he must offer to reimburse the prior transferee whose money has benefited the infant. In support of this proposition, reference may be made to the decisions in *The Eastern Mortgage and Agency Coy. v. Rebati Kumar Ray* (1), *Hem Chandra v. Lalit Mohan* (2) and *Manasharam Das v. Ahmad Hossein* (3). As was observed in the first of these cases, nothing can be more unjust than to permit a person to sell a tract of land and take the purchase money, and then because the sale happens to be informal and void, to allow him or, which is the same thing, the person on whose behalf he acts, to recover back the land and keep the money: any Code of law which would tolerate this would seem to be liable to the reproach of being a very imperfect or a

(1) (1906) 3 C. L. J. 260.

(2) (1912) 16 C. L. J. 537.

(3) (1916) 21 C. W. N. 63.

very inequitable one. The plaintiff in this litigation has ignored this view and has entirely misconceived his remedy. He has never offered to reimburse the defendant; for there is no question that the transfer in favour of the defendant must have been for the benefit of the infant whose property was under attachment at the time. We have considered whether the plaintiff may at this stage legitimately expect an opportunity to set matters right, and we have arrived at the conclusion that the answer should be in the negative, as he should not be permitted to change the whole aspect of the case.

We consequently affirm the decree of dismissal made by Mr. Justice Huda, but not on the grounds stated in his judgment, and dismiss the appeal, with costs.

S. M. M.

Appeal dismissed.

LETTERS PATENT APPEAL.

Before Mookerjee and Cuming JJ.

PRASANNA KUMAR SEN

v.

DURGA CHARAN OHAKRAVARTI.*

*Enhancement of Rent—Bengal Tenancy Act (VIII of 1885) ss. 50,
115—Presumption under s. 50—Applicability of s. 115.*

In a suit by plaintiff landlord in 1918 for enhancement of rent on the ground of rise in the price of staple food crops where the tenant in 1914 was recorded as an occupancy raiyat in the finally published record of rights, the tenant defendant resisted the claim on the ground that he was a raiyat at a fixed rate and invoked the aid of s. 5 of the Bengal Tenancy Act and claimed the benefit of the presumption mentioned therein :

* Letters Patent Appeal No. 13 of 1921, in Appeal from Appellate Decree No. 2319 of 1919.

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