APPELLATE CIVIL.

Before Henderson J.

JOGESH CHANDRA BANERJI

v.

DIGENDRA CHANDRA BANERJI.*

1939

Jan. 19, 20, 23.

Certificate sale—Sale of property of person of unsound mind without proper service of notice, if void—Plea, if can be urged by way of defence—Bengal Public Demands Recovery Act (Ben. III of 1913), ss. 4, 7, 36, 41.

A certificate has the force of a decree when signed under s. 4 and filed under s. 7 of the Bengal Public Demands Recovery Act. No evidence has to be taken and no notice at this stage has to be served. Unsoundness of mind of the certificate-debtor at the date of the signature or want of proper service of notice, therefore, does not make the certificate or the sale held under it void *ab initio*.

Purna Chandra Kunwar v. *Bejoy Chand Mahatab* (1) distinguished.

It is not open to a party to take this plea by way of defence to a suit by the purchaser or his transferee. But the only remedy provided in such a case for a party who has been injured by the sale is by a suit under s. 36 of the Act to have the sale set aside on the ground of irregularity of service of notice.

APPEAL FROM APPELLATE DECREE preferred by the defendants.

The facts of the case and the arguments in the appeal are sufficiently stated in the judgment.

Gopendra Nath Das and *Sambhu Nath Banerjee* for the appellants.

Hira Lal Chakravarti, Jitendra Chandra Banerji and *Nirmal Kumar Sen* for the respondents.

Cur. adv. vult.

*Appeal from Appellate Decree, No. 460 of 1937, against the decree of Bishnu Pada Ray, First Subordinate Judge of Faridpur, dated May 28, 1936, reversing the decree of Uma Das Gupta, Munsif of Bhanga, dated Aug. 22, 1935.

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HENDERSON J. The principal question of law raised in this appeal is whether a certain certificate and sale held hereunder were void or voidable.

The facts are as follows: One Ishan Chandra Banerji was proprietor of a certain *tâluk* bearing *touzi* No. 1745 in the Faridpur Collectorate. It eventually passed to his son Dinesh and his nephew Gobinda, the share of the former being two-thirds and of the latter one-third. Cesses due from Gobinda fell into arrears and a certificate was filed to realise the same. As nothing was paid, Gobinda's share was put up to sale in execution of the certificate and purchased by a certain *mukhteâr* who eventually sold it to the plaintiffs. There was an allegation that this *mukhteâr* was the plaintiffs' *benâmdâr;* but the learned Subordinate Judge found and gave cogent reasons in support of his finding that this gentleman had made a speculative purchase on his own behalf. The defendants got their names registered in place of Gobinda in the register maintained in the Collectorate under the provisions of the Land Registration Act. The plaintiffs subsequently applied for substitution of their own names, alleging that they did so on coming to know of the action taken by the defendants. Of course, if Gobinda's share really passed to them, they were bound to register their names whatever the defendants might or might not have done. This application was rejected. The plaintiffs then instituted the present suit for a declaration of their title and confirmation of their possession on the ground that a cloud had been cast on their title.

Now this is not a suit for having the certificate set aside. The plea is taken by way of defence and it can only succeed if the defendants can show that the certificate or the sale were void *ab initio.* This view found favour with the learned Munsif, but was reversed by the learned Subordinate Judge in appeal.

This defence plea is founded on an averment that Gobinda was of unsound mind at the time when the

certificate was filed. It was, accordingly, argued, that, as he was not in a position to defend himself, the certificate was void *ab initio*.

It was contended on behalf of the plaintiffs that there was no real evidence to support this plea. In attempting to do so the defence called evidence to show (i) that Gobinda was actually of unsound mind at the time when the certificate was filed; (ii) that he was adjudged to be of unsound mind in a proceeding under Act XXXV of 1858 in the year 1893. As a result, his wife Soudamini was appointed guardian of his person and the manager of his property (*vide* Ex. F).

The evidence given under the first hearing was almost entirely oral. The learned Munsif came to a definite finding that Gobinda was of unsound mind at the time the certificate was filed: but he reached this finding in a most halting manner; for example, he observed very shrewdly that after such a lengthy lapse of time it is very easy to fill up gaps in the evidence in order to improve the case. He also said that the evidence would not be inconsistent with the position that Gobinda, though normal to a certain extent, was not perfectly normal. This, of course, is quite insufficient to prove that he was of unsound mind. In the view which he took of the case, the learned Subordinate Judge did not think it necessary to examine this evidence at length. He, however, observed that he could not attach much importance to this oral evidence in view of the fact that a guardian was actually appointed in the proceedings under the Lunacy Act. He was clearly dissatisfied with it and unable to hold on this evidence that Gobinda was actually of unsound mind at the time when the certificate was filed.

Furthermore, this evidence, even if true, is quite useless. Even if it is supposed that Gobinda was of unsound mind when the certificate was filed, a notice under s. 7 was properly served upon him. There was nothing before the certificate-officer to suggest that

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he was not perfectly sane. Section 41 of the Act lays down that where the certificate-officer is satisfied that the certificate-debtor is of unsound mind, he shall permit him to be represented by any suitable person. The only material before him was a report by the serving peon of one of the processes to the effect that he was wrong in the head. Even if this report were well founded, it would not necessarily mean that he was of unsound mind; nor would it make the certificate void: It would merely give a right to bring a suit under s. 36 of the Act.

Exhibit F, of course, is a far stronger piece of evidence. It establishes that Gobinda was adjudged by the Court to be of unsound mind in a proper proceeding, and that Soudamini was appointed his guardian and manager in the year 1893.

Now s. 21 of that Act provides for an enquiry by the Court on a proper application whether the unsoundness of mind has ceased. Mr. Das contended that, until such an enquiry is held, the person adjudged to be of unsound mind continues to be under a disability. Mr. Chakravarti, on the other hand, contended that the lunacy is determined not by an order of the Court but by recovery. He admitted that failure by the lunatic to apply under s. 21 after recovery might raise equities in favour of persons *bona fide* taking transfers of properties from the manager, but contended that actual competence to deal with the estate himself would depend upon recovery. The learned Subordinate Judge apparently took the first view. The learned Munsif with some hesitation took the latter view. I may say that as at present advised I should be disposed to agree with the learned Munsif.

The question, however, is of no practical importance in the present case. The burden of proving that Gobinda recovered rests upon the plaintiffs, and they have entirely failed to discharge it. The learned Munsif has referred to the fact that shortly before the filing of the certificate in a suit instituted

by Soudamini it was alleged that Gobinda was a lunatic. It does not appear that any attempt was made to traverse this allegation. Then again, in a suit two years earlier (1919), Gobinda was represented by his guardian Soudamini. It was urged that he was not of unsound mind. This plea, however, was overruled. Digendra and the other plaintiffs were parties to that suit. It would be quite idle to contend that there is any reliable evidence to show that Gobinda ever recovered.

The result, therefore, is that on the materials it must be held that Gobinda was of unsound mind at the time when the certificate was filed.

It was accordingly argued by Mr. Das that as Gobinda was not properly represented in the proceedings the certificate was void. In this connection reference was made to the case of *Purna Chandra Kunwar* v. *Bejoy Chand Mahatab* (1). That case was concerned with a decree passed against a minor who had been described as a major. It was held that such a decree is a nullity. The decision is wide enough to cover the case of a person who had been adjudged to be of unsound mind.

There is, however, an essential difference between a decree passed by a Court and a certificate. A decree cannot be made without proper service on the defendant and without some evidence. A certificate has the force of a decree when signed under s. 4 and filed under s. 7 of the Public Demands Recovery Act: no evidence has to be taken and no notice has to be served. The failure to serve the notice under s. 7 does not even make the sale void. The terms of s. 36 of the Act are perfectly plain.

In the present case it was not even disputed that cesses were actually due from Gobinda. There is absolutely nothing wrong in the certificate and it cannot be held that it was void. The mistake made was in connection with the service of the notice under

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s. 7. It was actually served on Gobinda instead of upon his guardian. As I have already pointed out, by the very terms of s. 36 the sale was not void.

It is desirable to advert to one other matter which was argued by Mr. Chakravarti. It was contended that, in view of the wording of s. 41, the certificate-officer is not bound to serve a notice under s. 7 on the guardian appointed in proceedings under the Lunacy Act, as the section provides that a certificate-officer must himself be satisfied that the certificate-debtor is of unsound mind. On the view which I have already taken it is not necessary to decide this point.

The result is that the appeal fails and is dismissed with costs.

Leave to appeal is refused.

Appeal dismissed.

A. A.