

APPELLATE CIVIL.

Before Ross and Sen. J.J.

LACHMI NARAIN GOURI SHANKER

v.

SYED MAHOMED ABRAHIM HUSSAIN KHAN.*

Court of Wards Act, 1879 (Ben. Act IX of 1879), Sections 6(e), 35, 51 and 60A—Owner declared to be disqualified proprietor and order issued directing his property to be taken charge of—other property subsequently inherited—execution of hundi by ward—decree in suit on hundi—execution of decree, whether barred.

The mere fact that the manager of the estate of a person who has been declared to be a disqualified proprietor under section 6(e) the Court of Wards Act, 1879, was not made a party to a suit on a *hundi* executed by the ward, is no ground for refusing execution of the decree obtained in the suit.

Mohummud Zahoor Ali Khan v. Mussammal Thakooranee Rutta(1), *Dhunpat Singh v. Shooobhudra Kumari*(2) and *Mohammed Abdus Salam v. Rani Kamal-mukhi*(3), referred to.

Section 60A prohibits the levying of execution against any property of a ward under the charge of the Court of Wards even when the execution is of a decree obtained in respect of a personal debt contracted before the Court of Wards took possession of the property against which execution is sought to be levied.

Where an order has been issued under sections 7 and 35 declaring the determination of the Court of Wards to take under its charge the property of a disqualified proprietor, and directing that possession be taken of such property on behalf of such court, the order applies as well to after acquired properties of the ward as to properties which he owned at the date of the order.

* Appeal from Original Order no. 148 of 1923 and Civil Revision no. 235 of 1923, from an order of Rai Bahadur Surendra Nath Mukharji, Subordinate Judge of Patna, dated the 16th April, 1923.

(1) (1866-67) 11 M. I. A. 468.

(2) (1881) I. L. R. 8 Cal. 620.

(3) (1918) 46 Ind. Cas. 316.

1924.

July, 30, 31.
August, 7.

Section 60A is a bar to the levying of execution of a personal decree obtained against a disqualified proprietor in a suit on a *hundi* executed by such proprietor even when the property against which execution is sought to be levied had not been taken possession of by the Court of Wards at the time when the debt was incurred.

Appeal by the decree-holder.

The facts out of which this appeal arose were these. Manjhle Nawab was declared a disqualified proprietor under section 6(e) of the Court of Wards Act of 1879 in 1903 and the Court of Wards took charge of his property in that year. On the 19th March, 1919, his brother Badshah Nawab died and one-third of his property was inherited by the ward. On the 4th of July, 1919, the ward executed a *hundi* in favour of the appellant. On the 12th of November, 1919, a notification was published in the Gazette declaring that the properties inherited from Badshah Nawab by Manjhle Nawab had come under the management of the Court of Wards on the 19th of March, 1919; but no formal order under section 35 of the Act, declaring that the Court of Wards had determined to take this inherited property under its charge and directing that possession should be taken of such property on behalf of the Court, was made. The appellant brought a suit on his *hundi* in 1922 against Manjhle Nawab personally and obtained a decree. He proceeded to execute the decree against the inherited property when objection was taken by the judgment-debtor through the general manager of the Court of Wards under section 47 to the effect that the properties which had been attached were not liable to be attached and sold in execution of any decree under the provisions of section 60A of the Court of Wards Act, and that the suit in which the decree was passed was not framed according to law and contravened the provisions of section 51. The learned Subordinate Judge gave effect to this objection and dismissed the execution petition. Against this order the decree-holder appealed.

1924.

LACHMI
NARAIN
GOBEL
SHANKER
v.
SYED
MAHOMED
ABRAHIM
HUSSAIN
KHAN.

Cur. adv. vult.

1924.

LACHMI
NARAIN
GOBI
SHANKER
v.
SYED
MAHOMED
ABRAHIM
HUSSAIN
KHAN.

Manuk (with him *Noresh Chandra Sinha*), for the appellant: The Secretary of the Board of Revenue wrote to the Collector saying that no formal orders were necessary under section 35 of the Court of Wards Manual for the assumption of the charge. There was, therefore, admittedly no order under section 35. In fact the property was taken charge of by the Collector in November whereas a notice was issued that the property had come under the management of the Court of Wards from the date of the death of Badshah Nawab in March. I submit the Court of Wards is not legally in possession of the property as no formal order under section 35 was passed. Note (g) to section 35, in the Court of Wards Manual, edition 1923, is relied on by the Court in support of the proposition that no subsequent order under section 35 was necessary. The form of the order required under section 6(e), at page 60 of the Manual, does not contemplate that all future properties will have to be taken charge of. There is no power by which the Board can take the private rights of a proprietor. The Nawab was declared disqualified by his own application and section 7 does not contemplate all future properties. The officers have usurped a power without any authority. See *Craine's Statute Law*, pages 77-78. The omission of the words "all future properties to come in his hand" is significant. The whole question is whether the original order can cover all future properties or will be confined to those existing at that time. The disqualification cannot attach automatically to all the properties [see *Krishna Pershad Singh v. Gosta Behari Kunda* (1) and *Dhanipal Das v. Maneshar Baksh Singh* (2)].

The Subordinate Judge says that "sections 51 and 60A stand in the way." But I submit the contract was entered into when the property had not been taken under the management of the Court of Wards, and I am entitled under section 60A to follow the property

(1) (1907) 5 Cal. L. J. 484.

(2) (1906) I. L. R. 28 All. 570, P. C.

provided it had not come under the charge of the Court at the time the contract was entered into.

Lachmi Narain Singh, for the respondent : Section 6 of the Court of Wards Manual signifies that the disqualification is a general disqualification—not that he is qualified to manage property *A* and disqualified to manage the property *B*. Section 13 speaks of properties generally. It draws no distinction between properties then existing and those that might come into the hands of the ward in future. If I contract a loan from *A* to-day and the next morning I sell away my properties to *B*, how can *A* follow the properties in the hands of *B*? The real intention of the legislature is that if a disqualified proprietor deals with his properties or enters into a contract in respect thereof, that will not be binding on the property if, at the time of the contract, the property was under the management of the Court of Wards. But if the contract does not relate to the property itself and the Court, whether rightly or wrongly, has come into possession of the property, section 60A is a bar to the property being followed.

Secondly, the suit, as brought against the ward, is incompetent. He must have been represented by the guardian. If, however, he was sued on his personal covenant, the properties cannot be bound.

Novesh Chandra Sinha, in reply : The Subordinate Judge had decided against me on two points : first, that the decree is invalid as the provisions of section 51 were not complied with; secondly, that if the decree be good it cannot be executed against the properties under the management of the Court of Wards as section 60A is a bar. I take up the second point first. Section 60A is no bar, first, because when the Court is a trespasser and the charge is an invalid charge, the section is not applicable and, secondly, the contract, in order that the section may be a bar, must have been entered into at the time the properties were in the charge of the Court. The only execution which is barred is that which is levied on a decree which

1924.

 LACHMI
NARAIN
GOURI
SHANKER

 v.
SYED
MAHOMED
ABRAHIM
HUSSAIN
KHAN.

1924.

LACHMI
NARAIN
GOURI
SHANKER
v.
SYED
MAHOMED
ABRAHIM
HUSSAIN
KHAN.

is based on a contract entered into at the time when the properties were in the charge of the Court [*Mohammad Zahoor Ali Khan v. Mussammat Thakooranee Rutta Kuer* (1) considered in *Dhunpat Singh v. Sheobhudra Kumari* (2)]. There is no bar against a proprietor who has been disqualified under section 6(e) contracting on a personal covenant. The word "charge" used in section 60A is a legal charge. Section 35 contemplates that a formal order is necessary. The "court" only can make an order under section 35 and the word "court" is defined in section 3 of the Manual. It has not been shown that the power of passing orders in such cases has been delegated to the Commissioner or the Collector [see Board's Resolution at page 267 of Janak Kishore's "Selected Decisions of Board of Revenue"]. I also rely on *Krishna Pershad Singh v. Gosta Behari Kunda* (3). Now, as regards the first point, I submit that the decree passed was within the Court's jurisdiction and unless it is a nullity, the executing Court has no right to go into the question whether it is right or wrong. The suit is based on a personal covenant, so section 51 does not operate as a bar [see *Mohammed Abdus Salam v. Rani Kamelmukhi* (4)].

The ward can be proceeded against without being represented by the guardian and without being described as a ward of the Court. *Ananda Kumari v. Durgu Mohan Chuckerbutty* (5) distinguished the two earlier cases and though it has been relied on by the Subordinate Judge against me, it virtually supports my contention [see *Dhanipal Das v. Maneshar Baksh Singh* (6)].

S. A. K.

August, 7.

Ross, J. (after stating the facts, as set out above, proceeded as follows): It is contended on the decreeholder's behalf, in the first place, that the Court of

(1) (1866-67) 11 M. J. A. 468. (4) (1918) 46 Ind. Cas. 316.

(2) (1881) I. L. R. 8 Cal. 620. (5) (1915-16) 20 Cal. W. N. 81 (84).

(3) (1907) 5 Cal. L. J. 434 (435). (6) (1906) I. L. R. 28 All. 570, P. C.

Wards has no *locus standi* to apply under section 47 of the Civil Procedure Code inasmuch as it was neither a party nor a representative of a party to the suit; secondly, that the Court of Wards was not legally in possession of the inherited property at all as no fresh order under section 35 was made; thirdly, that section 51 was no bar to the suit and, fourthly, that the property is not exempt from execution under section 60A of the Act.

1924.

LACHMI
NARAIN
GOURI
SHANKER
v.
SYED
MAHOMED
ABRAHIM
HUSSAIN
KHAN.

Ross, J.

The first contention is without substance because the objection taken under section 47 is an objection taken by the judgment-debtor through the general manager of the Court of Wards.

Section 51 provides that in every suit against any ward, he shall be therein described a ward of Court and the manager of the ward's property shall be named as guardian for the suit and shall represent the ward. Now there is no bar to a disqualified proprietor contracting on his person covenants [see *Mohammad Zahoor Ali Khan v. Mussamat Thakooraanee Rutta* (1) and *Dhunput Singh v. Shoobhudra Kumari* (2)]. It was held in *Mohammed Abdus Salam v. Rani Kamal-mukhi* (3) that "it now seems to be settled that where a Court of Wards is in possession of the property of a disqualified proprietor under section 6(e) of the Act, a suit brought against such a proprietor based upon a contract may proceed without causing the defendant to be represented by the manager of the Court of Wards." In my opinion, therefore, the fact that the manager of the Court of Wards was not made a party to the suit is no ground for the executing Court to refuse to execute the decree.

Then, with regard to section 60A, it is contended by the appellant that this section does not prevent him from proceeding against the inherited property because this property is not legally in charge of the Court and

(1) (1866-67) 11 M. I. A. 468.

(2) (1881) I. L. R. 8 Cal. 620.

(3) (1918) 46 Ind. Cas. 318.

1924.

LACHMI
NARAIN
GOURI
SHANKER

v.

SYED
MAHOMED
ABRAHIM
HUSSAIN
KHAN.

Ross, J.

also because the only prohibition imposed by that section is in respect of the execution of a decree passed on a contract entered into at a time when the property against which the decree-holder desires to levy execution was in charge of the Court. It is contended that at the time when this contract was entered into, the Court of Wards had admittedly not taken possession of the inherited property; and, consequently, under section 35 the Court of Wards could not be held to have been in charge of the inherited property at that time. Consequently it is argued that the creditor was entitled to look to that property for satisfaction of his debt, as the debt was contracted when the property was free. Now if the debt had been by way of mortgage of this property, something might have been said in support of that contention; for, in such a case, the fact that the Court of Wards subsequently took charge of the property could not be held to affect the security. But the present suit was brought on a personal covenant only; and it was brought at a time when the property of the ward was under the charge of the Court of Wards. Section 60A seems to prohibit the levying of execution against any property under the charge of the Court of Wards in such circumstances, unless the leave of the Court has been taken. The expression in the section is :

“ While his property was under such charge ”

and not, as it ought to have been if the contention of the learned vakil for the appellant is sound, “ While such property was under such charge.” All that is required to bar the levy of execution against any property of the ward is that the contract, which is the basis of the decree, should have been entered into with the leave of the Court while his property was under the charge of the Court. Now it is not disputed that the property of Manjhle Nawab was under the charge of the Court from 1903.

The only question remaining, therefore, is whether this inherited property is legally under the charge of

the Court of Wards and this depends upon the construction of section 35 of the Act. Section 7 gives the Court of Wards power to take charge of all the property of a disqualified proprietor within its jurisdiction. Section 35 provides that :

“ Whenever the Court has determined to take the person or property of a disqualified proprietor under its charge.....the Court shall make an order declaring the fact and directing that possession be taken of such person and property or of such property on behalf of the Court, and the Court shall be held to be in charge of such property from the time when possession shall have been so taken.”

The form of the order issued by the Court of Wards in such cases is to be found at page 60 of the Court of Wards Manual and the operative words are as follows :

“ Under sections 7 and 35 of the said Act IX (B.C.) of 1879, the Court of Wards also declares that it has determined to take under its charge the property of the disqualified proprietor above named, and it directs that possession be taken of such property on behalf of the said Court.”

It is contended on behalf of the appellant that such an order which admittedly was made when the estate of of Manjhle Nawab came under the Court of Wards in 1903 could not cover after-acquired property. In my opinion, there is nothing to restrict the words of the section under which the order was made in this way. The Court declares that it has determined to take the property of the disqualified proprietor under its charge. The order itself refers to section 7 of the Act which empowers the Court of Wards to take charge of all the property of such proprietor. The disqualification attaches to the person; and, after a declaration under section 6 (e) of the Act, the proprietor is to be held disqualified to manage his own property. Any property, therefore, that comes to him by inheritance or otherwise, after he has once been declared a disqualified proprietor and the Court of Wards has taken over his property under section 35 of the Act, must be property which he is disqualified from managing and the management whereof must automatically vest in Court of Wards. The order no doubt does not take effect until possession of the

1924.

 LACHMI
 NARAIN
 GOURI
 SHANKER

 v.
 SYED
 MAHOMED
 ABRAHIM
 HUSSAIN
 KHAN.

Ross, J.

1924.

LACEMI
NARAIN
GOURI
SHANKER

v.

SYED
MAHOMED
ABRAHIM
HUSSAIN
KHAN.

ROSS, J.

property is actually taken; and, until such possession is taken, the Court of Wards is not in charge of the property and the ward may be free to deal with it as he likes: but this is a matter on which I express no opinion. In the present case possession was admittedly taken in November, 1919; and, if that possession was lawfully taken, then section 60A is clearly a bar to the levying of execution against it. I can see no ground for holding that possession was not lawfully taken because no fresh order under section 35 of the Act was made. In my opinion such an order is made once for all; and, after the order has once been made, all that is required to complete the charge of the Court of Wards is the taking of possession.

This appeal must be dismissed with costs and the application in revision is also dismissed.

SEN, J.—I agree.

Appeal and application dismissed.

REVISIONAL CIVIL.

Before Jwala Prasad and Kulwant Sahay, J.J.

ADIT PRASAD SINGH

v.

RAMHARAKH AHIR.*

1924.

Nov., 4.

Civil Procedure Code, 1908 (Act V of 1908), sections 148, 149 and 151, Order XLVII, rule 1 and section 114. Pleadar's clerk misappropriation of court-fee by—Plaintiff's remedy.

Where a litigant handed over to his pleader the balance of the court-fee due on a plaint, and the pleader's clerk, to whom the money was entrusted to be paid into Court, misappropriated the same and filed bogus applications for time

* Civil Revision no. 173 of 1924, from an order of Babu R. K. Ghosh, Subordinate Judge, Shahabad, dated the 30th January, 1924.