

1934.

KAMAKHYA

NARAIN

v.

ABHIMAN

SINGH.

SIR

LANCELOT
SANDERSON.

in which case possession of the village was to be given up to the grantor.

Their Lordships are of opinion that the true construction of the two above-mentioned documents is that the performance of the said service was a condition of the grant, and that inasmuch as the said service was discontinued in May, 1919, the plaintiff became entitled upon such discontinuance to obtain possession of the said village.

The defendants, who contested the suit and based their claim upon the mukarrari lease of the 11th March, 1889, and their alleged subsequent purchase of the reversion, can be in no better position than their lessors, and the plaintiff is entitled to a decree against them.

For these reasons the appeal must be allowed, the decree of the High Court set aside, and the decree of the Subordinate Judge restored. The defendants nos. 9, 10, 11, 12 and 13, who were the appellants in the High Court, must pay the plaintiff's costs in the High Court and of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant: *Solicitor, India Office.*

PRIVY COUNCIL.

LACHMI NARAIN

v.

IBRAHIM HUSSAIN.

On Appeal from the High Court at Patna.

Execution—Court of Wards—Property inherited by ward after disqualification—Property in possession of adverse claimant—Constructive possession taken by Court—Suit against

* Present: Lord Blanesburgh, Sir John Wallis, and Sir Lancelot Sanderson.

J. C. *
1934.

July, 10.

ward personally—*Court of Wards Act (Ben. Act IX of 1879), ss. 35, 51, 60A.*

1934.

LACHMI
NARAIN
v.
IBRAHIM
HUSSAIN.

In 1922 the appellants obtained a money decree against the respondent, whose property had been taken in charge in 1902 under the (Bengal) Court of Wards Act, 1879. They applied to execute the decree against property which the respondent had inherited upon his brother's death in 1919, but which was in the adverse possession of a claimant thereto. Upon the brother's death the Collector issued a notification that the Court of Wards had taken the property into charge. Later, before the application to execute was made, the manager of the Court of Wards was ordered to take possession, and he issued orders for the collection of rents; as the claimant still remained in possession actual possession was not obtained :—

Held, that the Court of Wards had taken possession within the meaning of section 35 of the Act so as to bring the property into charge, and that accordingly section 60A, precluded it from being taken in execution.

The "possession" contemplated by section 35 depends upon the nature of the interest in property.

Quere.—(1) whether the property of a disqualified proprietor comes automatically under the control of the Court of Wards, and if so whether the Court can disclaim onerous property.

(2) whether leave should ever be given to execute a decree against the property of a ward, if the suit does not comply with section 51, as to the parties to a suit of that nature.

Decree of the High Court *Saiyid Ibrahim Hussain Khan v. Ram Newaz Gayasat Ram*(1) affirmed.

Appeal (no. 29 of 1932) from an order of the High Court (February 4, 1931) reversing an order of the first Subordinate Judge of Patna (August 21, 1928).

The appellants having obtained in 1922 a money decree against the respondent, whose estate had been taken in charge in 1902 by the Court of Wards under the (Bengal) Court of Wards Act, 1879, sought to

(1) (1931) I. L. B. 10. Pat. 554.

1934.

LACHMI
NARAIN

v.

IBRAHIM
HUSSAIN.

execute the decree against certain immovable property to which the respondent had subsequently become entitled.

The facts and the material provisions of the Act appear from the judgment of the Judicial Committee.

The High Court set aside an order for execution against the property. Ross, J. said that the question was whether the Court of Wards had taken possession within the meaning of section 35 of the Act, so as to be in charge of the property sought to be sold; that depended upon the nature of the possession of which the property admitted. In the present case physical possession was not possible, and in the opinion of the learned judge the Court of Wards had done all that could be required of them to take possession. Fazl Ali, J., agreed in holding that the order should be set aside upon the above stated grounds. Further, he doubted whether under the Act it was necessary for the Court of Wards to show that they had taken possession of the particular property.

1934, Jan. 26, 29, 30. *De Gruyther, K. C.* and *Pringle* for the appellants. The property against which the appellants seek to execute their decree had not been taken in charge by the Court of Wards and therefore section 60A of the Act of 1879 did not preclude the execution. Under section 35 the Court of Wards is to be held to have taken charge of property only when it has taken possession of that property; the section treats the taking of possession as different from an order taking charge and directing the taking of possession: *Krishna Prashad Singh v. Gosta Behari Kundu*(1). An appeal to the Privy Council in that case was allowed but on the ground that there had been irregularities in the sale proceedings; the Board agreed with the view that the property in question has not been taken in charge: *Krishna Prasad Singh*

1934.

 LACHMI
 NARAIN
 v.
 IBRAHIM
 HUSSAIN.

v. *Moti Chand*(¹). At the date of the execution the Court of Wards, having failed in mutation proceedings, was not on the register, and was precluded by section 78 of the Bengal Land Registration Act, 1876, from suing for the rents. There was no effectual possession taken under the parwana of July, 1922; moreover under rules applying in Bihar and Orissa the Collector was not authorized to direct that possession be taken on behalf of the Court of Wards. In August, 1928, the Court of Wards sued for possession; no effectual possession had previously been taken. The decision in *Lachmi Narain v. Muhomed Ibrahim Hussain Khan*(²), which also related to an execution against part of the wakf property, proceeded upon an admission that possession had been taken by the Court of Wards. It was rightly there decided that section 51 did not render the execution invalid. The Act did not prevent the ward from entering into a personal contract, and property of which the Court of Wards had not taken possession being applied in execution of a decree on the contract: *Dhanipal Das v. Maneshar Baksh Singh*(³). In *Debi Baksh Singh v. Shadi Lal*(⁴), the Board decided merely that property taken into charge under the Act there in question was protected from execution although the property of the ward has been discharged from superintendence.

Dunne, K. C. and *Wallach* for the respondents. The property was in the charge of the Court of Wards, and by section 60A of the Act could not be taken in execution without their leave. By section 7 the Court had power to take charge of "all the property" of the disqualified proprietor within its jurisdiction, and the form of order made (*see* Court of Wards Manual p. 60) directs possession to be taken. The section in terms applies to reversionary interest of which actual

(1) (1913) I. L. R. 40 Cal. 635; L. R. 40 I. A. 140.

(2) (1924) I. L. R. 4 Pat. 172, 180.

(3) (1906) I. L. R. 28 All. 570; L. R. 33 I. A. 118.

(4) (1916) I. L. R. 38 All. 271; L. R. 43 I. A. 69.

1934.

LACHMI
NARAIN
v.
IBRAHIM
HUSSAIN.

possession could not be taken. Section 35 does not require possession to be taken of each item of property. By that section the Court is to be held to be in charge of "such property" (i.e. all the property of the disqualified proprietor) from the time when possession shall have been "so taken" (i.e. by the order declaring the disqualification and directing that possession be taken). If however there must be a taking of possession of each item of property, the Court of Wards did all that was possible to take possession having regard to the nature of the property. On the death of the ward's brother in 1919 the Court gave notice under section 10A (1) stating that it came under management. The Collector was deputy for the Board of Revenue, who by section 5 were the Court of Wards, and had authority to make the order of 1922 directing the manager to take possession, and it is to be presumed that the proclamation which the manager directed was duly made. In *Krishna Prasad Singh v. Moti Chand*(¹), the Court of Wards had definitely declined to take possession of the property there in question; by section 9 the Court had power to refrain from taking, or to withdraw from, charge. Further, the suit was invalidly brought having regard to section 51 of the Act and the decree was therefore inoperative for defect of parties. It was unnecessary to consider that question in *Dhanipal Das' case*(²), because the decree was held invalid on the ground that the contract was harsh and unconscionable; further that case was under the Oudh Land Revenue Act, 1876.

De Gruyther, K. C. replied.

July 10.—The judgment of their Lordships was delivered by—

LORD BLANESBURGH.—This is an appeal from a decree of the High Court of Judicature at Patna,

(1) (1918) I. L. R. 40 Cal. 635; L. R. 40 I. A. 140.

(2) (1906) I. L. R. 28 All. 570; L. R. 33 I. A. 113.

dated the 4th February, 1931, which reversed an order of the First Subordinate Judge there, passed on an objection taken to an application by the present appellants for execution of a decree of theirs against the respondent.

The decree which the appellants sought to execute was passed on the 19th September, 1922, as a money decree. It was directed against the respondent Ibrahim Hussain Khan personally, in a suit to which he alone was defendant.

The objection to its execution was taken under section 47 of the Code of Civil Procedure, 1908, and was made on behalf of the respondent through the general manager of the Court of Wards, Patna, as his next friend. The estate of the respondent had been under the management of the Court of Wards since the 9th September, 1902, when on his own application under section 6 (e) of the Court of Wards Act (Bengal Act IX of 1879) that Court assumed charge and took possession of all the property to which he was entitled. The decree-holders, the appellants, had before their present application made attempts to attach and sell in execution of their decree, properties of the respondent in charge of the Court, but, it being held that such action of theirs was in contravention of section 60A of the Court of Wards Act, their execution petitions were struck off by orders of the High Court. This, the appellant's further application for execution, was directed pointedly against certain specified properties of the respondent inherited by him from his brother, Sayid Mehdi Hussain Khan, who died on the 19th of March, 1919, the appellant's contention being that these properties have never in fact been in charge of the Court of Wards so that, to them, section 60A of the Act has no application. The sole question in the case, therefore, is whether the appellants in view of the relevant provisions of the Court of Wards Act and the action of that Court with regard to them are entitled to have recourse to these properties to satisfy their decree.

1934.

 LAGHMI
NARAIN
v.
IBRAHIM
HUSSAIN.

 LORD
BLANES-
BURGH.

1934.

LACHMI
NARAIN
v.
IBRAHIM
HUSSEIN.

LORD
BLANES-
BURGH.

Ibrahim Hussain Khan, the respondent, was one of a family of three brothers and two sisters. Mehdi Hussain, the deceased, was the eldest of the brothers, Akbar Ali the youngest.

On the death of Mehdi Hussain the respondent and his brother, Akbar Ali, became each entitled according to Mahommadan law to a one-third share of his estate, the remaining one-third devolved upon his two sisters.

Mehdi had, in his lifetime, executed two wakf deeds, dated the 25th May, 1917, and the 19th February, 1919, respectively, and at his death one Ali Zamin was, as Mutwalli, in actual possession of the property comprised therein. The property against which the appellants now seek to execute their decree is in effect the interest of the respondent in some of the properties included in the wakf, so that any right or interest of his in these properties depends upon the question whether or not the wakfnamas are void.

In 1920 Akbar Ali instituted a suit against Ali Zamin as the Mutawalli in possession to have it declared that the wakfnamas were void. In that suit the plaintiff claimed the recovery of possession of his one-third of the wakf property, and to it he joined as co-defendants the respondent and his two sisters. The manager of the Court of Wards was not made a party but as will be seen presently, that Court was clearly cognizant of all the proceedings.

On the 31st July, 1922, Akbar's suit was decreed in his favour, and on appeal by the defendant Mutawalli the High Court on the 16th January, 1928, affirmed the decree of the Subordinate Judge, declaring the wakfnamas invalid and inoperative. Against that decree of the High Court a further appeal to His Majesty in Council has been presented by the defendant. That appeal in February, 1931, when this matter came before the High Court was, and so far as their Lordships know, is still pending. It

appears, however, that so far as the plaintiff Akbar was concerned execution of these decrees in his favour has not been stayed; and possession of his share has been given up to him. But as to the remaining two-thirds shares the Mutawalli still remains in and retains possession of the property.

It is convenient at this stage to state in detail the action taken by the Court of Wards for the protection of the respondent's interest in the property inherited by him from his brother.

First of all, the Court made early intimation that it treated the respondent's share in Hussain's estate as being in its charge. Mehdi Hussain having died in March, 1919, the Collector of Patna on the 12th November, 1919, issued a notification that the Court of Wards had taken charge of the one-third share of the deceased's property inherited by the respondent. Then, on the 31st July, 1922, the day on which the decree of the Subordinate Judge in Akbar's suit was pronounced the Collector ordered the manager of the Court of Wards to take possession of the respondent's one-third share. On the same day, the manager issued orders to his tahsildars to collect rents from tenants in respect of the respondent's share in the estate, and the High Court having, on the 16th January, 1928, affirmed the decree of the Subordinate Judge against the Mutawalli, the manager of the Court of Wards, in the respondent's name, instituted, on the 18th August, 1928, a suit against the Mutawalli to recover possession of his share of the wakf property. By a subsequent order of the High Court that suit has been stayed pending the result of the Mutawalli's appeal on the main issue to His Majesty in Council.

In the result, therefore, while it is true that, as the property now sought to be brought into execution has ever since the death of Hussain Khan been in the adverse possession of the Mutawalli, neither actual

1934.

LACMI
NARAIN
v.
IBRAHIM
HUSSAIN.

LORD
BLANES-
BURGE.

1934.
 LACHMI
 NARAIN
 v.
 IBRAHIM
 HUSSAIN.
 LORD
 BLANES-
 BURGH.

beneficial possession of the property nor receipt of its rents and profits has been enjoyed either by the respondent or by the Court of Wards on his behalf it is also true that the decision of the Court of Wards to take charge of the property has since the date of Mehdi Hussain's death been avowed, and the steps taken by the Court to make the interest of the respondent effective, have in view of the adverse claim and possession of the Mutawalli, represented all, even in the matter of time, that could have been done with any result.

These are the facts with reference to which this appeal must be determined.

Section 6 of the Court of Wards Act provides that proprietors of estates shall be held disqualified to manage their own property when they are—

(e) persons as to whom the Local Government has declared on their own application that they are disqualified and that it is expedient in the public interest that their estates should be managed by the Court.

This was amended in 1915 for Bengal, and in 1916 for Bihar and Orissa, by substituting "the Court" (i.e. the Court of Wards) for "the Local Government".

Section 7 enacts that the Court shall have power to take charge of all the property of every such disqualified proprietor within its jurisdiction and also of the property of any minor member of the family of any such proprietor "who has an immediate or reversionary interest" in his property.

Section 35 provides that whenever the Court has determined to take the property of a disqualified proprietor under its charge, the Court is to make an order declaring the fact and directing that possession be taken 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."

Section 51 provides that in every suit brought against any ward he shall be therein described as a ward of Court, and the manager of such ward's property or, if there is no manager, the Collector designated in the section shall be named as guardian for the suit and shall in such suit represent such ward.

Section 60A is in the following terms:—

"No property which is or has been under the charge of the Court shall be liable at any time, except with the leave of the Court, to be taken in execution of a decree made in respect of any contract entered into by the ward without the leave of the Court while his property was under his charge."

The learned Subordinate Judge of Patna, on the 21st August, 1928, delivered judgment on the objection taken to the appellants' application for execution. In his view the case turned upon the fact that the properties in question had been throughout in the possession of Ali Zamin, and not in that of the Court of Wards, that the mere issue of orders to the servants of the Court of Wards to make collections was not enough to give the Court of Wards possession, that in his opinion the Court of Wards was not yet in charge of the properties in question and that therefore section 60A of the Act had no application, and he held that the property was liable to attachment and sale in execution of the appellants' decree even although the manager of the Court of Wards was no party to the suit or decree. He dismissed the respondent's objection.

In delivering judgment in the High Court on appeal from that order of dismissal Ross, J. expressed the view that any property that came to a ward by inheritance or otherwise after he had been declared a disqualified proprietor and after the Court of Wards had taken over his property under section 35 of the Act—as in this case it had done—must be property which he was disqualified from managing, and the management whereof must automatically vest in the Court of Wards. In this case the Court of Wards had actually exercised over the property all the rights

1934.

LACHMI
NARAIN
v.
IBRAHIM
HUSSAIN.

LORD
BLANES-
BURGH.

1934.

LACHMI
NARAIN
v.
IBRAHIM
HUSSAIN.

LORD
BLANES-
BURGH.

which the judgment-debtor himself could have exercised had he not been a disqualified proprietor. The Court of Wards had done all that it could do or could be required to do in order to take charge of the property sought to be sold. He therefore held that the application for execution should be dismissed.

In a separate judgment leading to the same conclusion Fazl Ali, J. said that the action of the Court of Wards plainly showed that it had assumed control of whatever interest was then possessed by the disqualified proprietor and that being so section 60A applied. The learned Judge, as a separate ground of decision, expressed the view that the word "property" in the sections of the Act above set forth plainly meant the entire estate possessed by the disqualified proprietor, no attempt being made in the Act to distinguish the estate as a whole from the individual properties composing it.

Their Lordships arrive at the same conclusion as did the High Court. The learned Subordinate Judge, in his judgment, failed to appreciate the governing importance of the fact that throughout the property in question was in the adverse possession of the Mutawalli, and that from him actual possession could only be obtained by legal process, which had in fact been instituted and is not yet finally concluded. Their Lordships agree with the High Court in their view that "possession" under the Act must depend upon the nature of the interest in the property in question of the disqualified proprietor. It is, for instance, assumed by the Act that a reversionary interest is one of which possession can be taken.

With regard to the matter adumbrated by both of the learned Judges of the High Court, namely, whether the whole property of the disqualified proprietor automatically comes under the control of the Court of Wards, their Lordships are not in this case called upon to settle the question or whether that

Court is entitled to disclaim onerous property, as it did or purported to do in *Krishna Pershad Singh v. Gosta Behari Kundu*(1). It is sufficient to say with reference to the property now in question that there was no disclaimer by the Court—quite the reverse. The case cited on which the learned Subordinate Judge mainly relied has therefore, in their Lordships' judgment, no application to the facts of the present case even if on principle it be not open to criticism—as to which they say nothing.

Their Lordships would add that they think that insufficient attention has, so far, been paid to section 51 of the Act and to the fact that in the appellants' suit no attempt was made to comply with its provisions. That omission must have a most important bearing on the question whether leave should ever be granted to execute against property of the disqualified proprietor any decree obtained in a suit so defective.

On the whole case their Lordships are of opinion that the decree of the High Court was quite right, and they will humbly advise His Majesty that this appeal therefrom be dismissed and with costs.

Solicitors for appellants : *Watkins and Hunter*.

Solicitor for respondent : *Solicitor, India Office*.

PRIVY COUNCIL.

MAHARAJADHIRAJ OF DARBHANGA

v.

COMMISSIONER OF INCOME-TAX, BIHAR AND
ORISSA.

On Appeal from the High Court at Patna.

Income-tax—Business—Successor carrying on business—Liability of successor—“Assessment”—Income-tax Act (XI of 1922; amended by III of 1928), section 26, subsection 2.

* Present : Lord Tomlin, Lord Macmillan, and Sir John Wallis.

(1) (1907) 5 C. L. J. 434.

1934.

LACHMI
NARAIN

v.
IBRAHIM
HUSSAIN.

LORD
BLANES-
BURGH.

1934.

J. C. *
June, 19.