APPELLATE CIVIL.

Before Mr. Justice Parsons and Mr. Justice Ranade.

BAI DIVALI (ORIGINAL PLAINTIFF), APPLICANT, *v.* HIRALAL AND ANOTHER (ORIGINAL DEFENDANTS), OPPONENTS.*

1898. *August* 23.

Lunatic—Guardian of the person of a lunatic not competent to sue in respect of the lunatic's estate—Civil Procedure Code (Act XIV of 1882), *Sec.* 440—*Guardian—Right to sue—Practice—Procedure.*

A guardian of the person only of a lunatic has no right to bring a suit in respect of the lunatic's estate. The manager of the lunatic's estate is the only person who can institute such a suit.

The word "guardian" in section 440 of the Civil Procedure Code (Act XIV of 1882) as amended by Act VIII of 1890, when applied to a lunatic means the manager of his estate. Under this section a person other than the guardian of the estate can also sue with the leave of the Court.

APPLICATION under section 622 of the Code of Civil Procedure (Act XIV of 1882).

One Ichhalal Vrijbhukan died in 1891 possessed of ancestral property worth about six lákhs of rupees. He had three sons, Navnidlal, Hiralal, and Chotalal.

Navnidlal was adjudged a lunatic under Act XXXV of 1858. His wife Bai Divali was appointed guardian of his person, and his brother Hiralal was appointed manager of his estate, under sections 9 and 10 of the Act.

In 1897 Bai Divali, as guardian of the lunatic, applied for leave to sue *in formâ pauperis* for partition of the lunatic's share in the ancestral property.

This application was rejected by the First Class Subordinate Judge of Surat on the ground that Bai Divali had no right to sue, and that the only person, who could bring a suit in respect of the lunatic's property, was the manager of his estate and not the guardian of his person.

Against this order Bai Divali applied to the High Court under its extraordinary jurisdiction.

*Application No. 63 of 1898.

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Govardhanram M. Tripathi for applicant:—The applicant is the guardian of the person of the lunatic on whose behalf the suit is to be instituted. The lower Court is wrong in holding that the applicant is not entitled to sue. The provisions of the Code of Civil Procedure relating to suits by minors are made applicable to suits by or on behalf of lunatics. The last clause of section 440 of the Code provides that a person appointed a guardian of a minor can bring a suit on behalf of the minor. This clause is added by section 53 of the Guardians and Wards Act VIII of 1890. In that Act the word "guardian" is defined to be a person having the care of the person of a minor or of his property, or of both his person and property. In other words, the word "guardian" means both a guardian of the person and a guardian of the property of a minor. That being so, a guardian of the person of a minor or a lunatic can institute a suit under section 440 of the Code. Before this section was amended by Act VIII of 1890, any adult person, whether a guardian or not, could sue as next friend of a minor. The applicant is the wife as well as guardian of the lunatic. She is, therefore, competent to sue. In the present case, if she were debarred from suing on behalf of the lunatic, his interest would not be safe in the hands of the defendants.

Macpherson (with *Chitnis, Motilal and Malvi*) for the opponents:—The applicant's husband was adjudged to be a lunatic under Act XXXV of 1858. The opponent was appointed a manager of the lunatic's estate under section 9 of the Act. The whole estate of the lunatic is now vested in the manager so appointed. Under section 14 of the Act the manager has the same power in the management of the estate as might have been exercised by the proprietor if he had not been a lunatic. He alone has the power to collect and pay all debts and liabilities due to or by the estate of the lunatic. He is, therefore, the only person who can bring a suit in respect of the lunatic's estate. And it is the invariable practice, both here and in England, for the committees of the estate of lunatics to institute suits or other proceedings on behalf of lunatics. Section 440 of the Code of Civil Procedure does not alter the existing law on the subject. The word "guardian" as used in the section, so far as it is applicable to a

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lunatic, means the manager of the estate of a lunatic. Moreover, the applicant has no right to sue for a partition of the ancestral property while her husband is a lunatic—*Dayabhai* v. *Umed* [1].

PARSONS, J.:—The Subordinate Judge, First Class, rejected the petition of the applicant for permission to sue as a pauper on the ground that it was presented by an unauthorized person.

It was presented by the applicant (the wife of a lunatic) who had been appointed the guardian of the person of the lunatic under the Lunacy Act, XXXV of 1858, and it asked for a severance of the share of the lunatic by a partition of the joint family property. A different person had been appointed manager of the estate of the lunatic, and the Subordinate Judge was of opinion that the manager alone had the power to bring a suit in respect of the estate of the lunatic. We think that he is right.

The contention of the applicant is that she, having been appointed guardian of the person of the lunatic, comes within the definition of guardian in section 440 of the Code of Civil Procedure, and that as such she has, if not the sole right, yet the right to bring any suit she pleases in respect of his property.

Whatever may be the meaning of the word "guardian" used in the clause added to section 440 of the Code of Civil Procedure by the Guardians and Wards Act, 1890, when minors are concerned, we have no reason to suppose that the Legislature, when making the addition, intended in any way to alter or affect the existing law in respect of the persons who alone are entitled to bring suits on behalf of the estate of a lunatic. The provisions of that section have by section 463 to be applied to lunatics *mutatis mutandis*, and we cannot construe the word "guardian" in section 440 to mean a guardian of the person who is, by the Lunacy Act itself section 13, given only the care of the person and maintenance of the lunatic. We must take it to mean the manager of his estate, who alone has the right to bring a suit in respect of the estate of the lunatic as being the person in whom by section 14 all the powers of management of that estate are vested, and who has to provide for the maintenance of the lunatic. It would lead to endless confusion if, in cases where

(1) P. J. for 1896, p. 654.

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there is both a guardian of the person and a manager of the estate of a lunatic, we were to rule that each had the power to sue. The Legislature has provided for this contingency where a next friend has to be appointed (see the addition to section 443 made by the Act of 1890), but it has used the single word "guardian" in section 440, thereby, in our opinion, indicating that irrespective of the name of the appointment, the guardian intended in it must have the power to bring a suit which he could only have in the case of a lunatic by virtue of his being appointed the manager of the estate,—in other words, that the person denominated guardian must mean the person who is himself competent to sue. A guardian of the person only of the lunatic has no such power. While, however, holding that the Subordinate Judge was right in deciding that the application was presented by an unauthorized person, we must rule that he was wrong in summarily rejecting the application. Under section 440 a person other than the guardian is given the power to institute a suit with the leave of the Court. The Subordinate Judge should have followed the provisions of that section, and determined whether or not such leave should be given. We reverse his order for this reason and return the application for him to dispose of it according to law. We express no opinion on the new point raised before us as to the right of the lunatic to a separate share. We make costs costs in the cause.

APPELLATE CIVIL.

Before Sir C. F. Farran, Kt., Chief Justice, and Mr. Justice Fulton.

1898.

August 29.

HONAPA (ORIGINAL PLAINTIFF), APPELLANT, *v.* NARSAPA AND OTHERS (ORIGINAL DEFENDANTS NOS. 1 TO 4 AND 7), RESPONDENTS.*

Fraud—Fraudulent conveyance—Conveyance by plaintiff to defeat creditors—Subsequent suit by plaintiff to recover possession.

When property has been conveyed by the owner to another person with the object of defrauding his (the owner's) creditors, and the fraud has been carried out, the owner cannot succeed in a suit to recover possession.

* Second Appeal, No. 28 of 1898.