Before Mr. Justice Phear and Mr. Justice Ainslie.

1873 *Feby.* 11, 12, 13, & 18.

THE COURT OF WARDS, ON BEHALF OF KASHOPERSHAUD SING LUNATIC (DEFENDANT) *v.* KUPULMUN SING AND ANOTHER PLAINTIFFS).*

Act XXXV of 1858—*Lunatic—Guardian—Mortgage by* de facto *Guardian—Necessity—Regulations X of* 1793, *V of* 1799, *I of* 1800, *XVII of* 1806, *and XVII of* 1806, *s.* 8—*Notice of Foreclosure.*

See also 15 B L R 252

A Hindu being a lunatic, may be possessed of property, although he cannot take it by inheritance. All dealings with such property to be binding must be effected by a guardian or manager duly appointed by the supreme civil authority; and since the passing of Act XXXV of 1858, a guardian or manager can only be appointed in the special manner prescribed by that Act. A *de facto* manager can have no greater powers than one duly appointed. Where, therefore, the mother of a lunatic, who had not been so appointed, mortgaged his estate without the previous sanction of the Court, the mortgagee's suit for foreclosure was dismissed.

IN this suit Kupulmun Sing and Ramdut Sing, co-plaintiffs, sued the Court of Wards, as guardian of one Kashopershaud Sing, an idiot, the part owner of a certain mehal, to foreclose a mortgage of the idiot's share of the mehal, and to obtain possession of the mortgage premises.

The plaint alleged that, after the death of the idiot's father, date unmentioned, Mussumat Lukhee Kowar, the mother and guardian of the idiot, was appointed manager and administrator of his estate; that the father in his lifetime had borrowed money, and that the loan effected by him at usurious interest had swelled up to a very large sum; that the estate of the idiot, in execution of a decree of Court for ancestral debt, was advertized for sale; that inasmuch as the complicated and heavy debt at a usurious rate of interest rendered its liquidation fraught with difficulty and danger of the loss of the whole property, the Mussumat, with the view to preserve the ancestral estate of the idiot, through an agent, formally executed, in February 1860, a deed of *bybilwafa*, upon which the plaintiffs' claim was based, for a consideration of Rs. 26,000, at a monthly interest of 7 annas 9 pie *plus* a fraction per cent., stipulating

* Regular Appeal, No. 169 of 1871, from a decree of the Subordinate Judge of Shahabad, dated the 5th May 1871.

that the whole consideration should be repaid at the end of Jeyt 1276 (June 1869). The plaint further alleged that the consideration-money was duly applied to the relief of the estate, and that the plaintiffs regularly relized all the interest thereon up to the end of Jeyt 1276 (June 1869) by the receipt of rent from certain lessees of the estate, but that the Mussumat, notwithstanding the plaintiffs' importunities, refused to pay the mortgage-money at the stipulated period, *viz.*, the end of Jeyt 1276 (June 1869),and that the plaintiffs, therefore, filed an application to the Judge's Court for foreclosure, and got the notice formally issued, and duly served upon the mother of the idiot. The plaint then alleged that the property of the idiot had been placed by an order of the Judge under the management of the Court of Wards, but nevertheless the money had been deposited; and inasmuch as the period of time prescribed by the law had elapsed, the plaintiffs brought this suit for foreclosure (1).

The written statement by the Court of Wards, as guardian of the idiot Kashopershaud, stated that Mussumat Lukhee Kowar never was the *bonâ fide* guardian of the idiot, and never had authority in law to execute the *bybilwafa* on which the plaintiffs relied; that she had in fact applied to the Court for a certificate of guardianship, but her application was rejected on the 8th February 1860, just before she executed the deed of *bybilwafa*. The Court of Wards, in the same written statement, further denied that, at the time of the execution of the deed, there was any such legal and ancestral debt as would be sufficient in law to support the deed; and also denied that the consideration-money for the *bybilwafa* was applied as the plaint alleged. Further, the Court of Wards, alleged that the plaintiffs procured the execution of the *bybilwafa* by the exercise of undue influence, fraud, and collusion, and that the value of the property pledge was greatly more than the alleged consideration for the mortgage.

Upon these statements on the one side and on the other, three issues were raised, namely :—

"*First.*—Whether Mussumat Lukhee Kowar, mother of

(1) The suit was entitled "claim to foreclosure of mortgage and possession,&c."

1873

COURT OF WARDS v. KUPULMUN SING.

Kashopershaud (the lunatic), was, on the date of the admitted deed of *bybilwafa*, the guardian of the said lunatic under Hindu law and Government enactment, and as such legally authorized to contract a loan, and mortgage the lunatic's property, in order to liquidate ancestral debts of the lunatic and to save the estate from ruin.

"*Second.*—Whether the said guardian, Mussumat Lukhee, did actually liquidate the ancestral debt of Kashopershaud (the lunatic) with the Rs. 26,000 contracted on this deed or not, *i.e.*, whether her action in contracting the loan and executing the said deed was for legal necessity and justifiable or not.

"*Third.*—Whether the defendant's alleged difference in the amount of the loan contracted, and the amount of the value of the property mortgaged, would make any difference in the nature of this case."

It appeared from the evidence that Lukhee Kowar had never been appointed manager under Act XXXV of 1858. The proceedings in certain suits brought by her for arrears of rent, and which had either been compromised, or in which she had obtained *ex parte* decrees, and certain documents in which she was styled manager by strangers, or was alleged to have so styled herself, were filed by the plaintiffs. There was no evidence to show when Kashopershaud became insane, or who were the other members of his family, and the evidence as to the liability of the estate consisted chiefly of copies of decrees against the idiot's father and of securities executed by him. Of the latter, many had not been filed, and were not shown to the witnesses called to speak to the debts secured thereby, and to payment of such debts out of the money lent by the plaintiffs.

The Subordinate Judge held that Kashopershaud being a lunatic could not inherit, that Lukhee Kowar was sole heir to her husband, and could not raise any objection to the validity of the mortgage, which, he considered, had been entered into by her in her proprietary, and not in a fiduciary, character. He also found that the transaction was for the benefit of the estate. He passed a decree in favor of the plaintiffs.

1873

COURT OF WARDS v. KUPULMUN SING.

The Court of Wards appealed to the High Court.

Mr. *Woodroffe* (with him Baboo *Unnoda Persad Banerjee*) for the appellants.

Baboos *Mohesh Chunder Chowdhry*, *Romesh Chunder Mitter*, and *Abinash Chunder Banerjee* for the respondents.

Mr. *Woodroffe*, for the appellants.—In order that a person should be *de jure* manager of a lunatic's estate, he must be duly appointed under Act XXXV of 1858. Lukhee Kowar never was so appointed. As manager *de facto*, she would have had no greater powers than a manager *de jure* has, and, therefore, by s. 14 of the Act, she could not mortgage without an order of Court. But there is no evidence on the record to show that she was even *de facto* manager with the exception of certain documents, in which she is styled manager by third persons, or is said to have so styled herself.

Assuming that there was a valid mortgage, there has been no proper notice of foreclosure under Regulation XVII, s. 8, which provides that the notice shall be served on the mortgagor or his "legal representative." The guardian of a lunatic's person is not necessarily his legal representative—*Kishen Bullubh Muhta* v. *Belasoo Commur* (1). Moreover, the evidence does not show that there was any service on Lukhee Kowar as guardian. The words "legal representative" are very strictly construed by the Court; Macpherson on Mortgages, p. 177. Service on a person believed to be the legal representative is not sufficient—*Id.*, 181, citing *Cheydee Lall* v. *Mussumat Choonya* (2). In *Ras Muni Dipiah* v. *Pran Kishen Das* (3), the mother was guardian *de facto* and *dejure*.

The plaintiffs' mortgage-deed disclosed the existence of a *cestui qui trust*; see *Pilcher* v. *Rawlins* (4). The learned Counsel commented on the evidence as failing to support the plea of necessity and referred to the following cases—*Tiluck*

(1) 3 W. R., 230.
(2) 6 S. D. A., N. W., 278.
(3) 4 Moore's I. A., 392.
(4) L. R., 7 Ch. App., 259.

1873

COURT OF WARDS v. KUPULMUN SING.

Roy v. *Phoolman Roy* (1) and *Mussumat Bukshan* v. *Mussumat Maldai Kooeri* (2).

Baboo *Mohesh Chunder Chowdhry* for the respondents.—Lukhee Kowar was the natural guardian of her lunatic son, and as such the manager of his estate. The evidence shows that she was in several instances sued as manager, and that she herself had successfully brought suits for rent in that capacity. At the date of this mortgage, she was the *de facto* manager of the estate, and the absence of a *de jure* title will not invalidate the transaction—*Hunoomanpersaud Panday* v. *Mussumat Babooee Munraj Koonweree* (3), *Lalla Boodhmul* v. *Lalla Gowree Sunkur* (4), and *Gunga Pershad* v. *Phool Singh* (5). Act XXXV

(1) 7 W. R., 450.
(2) 3 B. L. R., A. C., 423
(3) 6 Moore's I. A., 393.
(4) 4 W. R., 71.

(5) *Before Mr. Justice Bayley and Mr. Justice Macpherson.*

GUNGA PERSHAD AND OTHERS (DEFENDANTS) *v.* PHOOL SINGH AND OTHERS (PLAINTIFFS).*

The 3rd July 1868.

Alienationby de facto *Guardian--Necessity*

Baboos *Annoda Prosad Banerjee, Chunder Madhab Ghose, Khetter Nauth Bose Nilmadub Sen, and Roop Nath Banerjee* for the appellants.

Baboos *Onoocool Chunder Mookerjee* and *Kally Mohun Doss* for the respondents

THE judgment of the Court was delivered by

MACPHERSON, J.—These two appeals, Nos. 3227 and 3252, are from one judgment. The suit is brought to recover possession of certain property under a kabala dated May 1861, which was executed by the defendant, Duryao Lall for himself and as guardian of his minor brothers, the defendants, Gunga Persaud, Hur Persaud, and Chooa Lall. Duryo Lall's defence is that he did not execute the bill of sale at all. The defence of his brothers is, 1stly, that Duryao Lall never executed the deed of sale; and, 2ndly, that if he did execute it, his act is not binding upon them. The appeal 3252 is by Duryao Lall, who, both the lower Courts having found against him as to the fact of his having sold the property to the plaintiff, contends that the judgment of the lower Appellate Court is insufficient, inasmuch at it does not show that the Principal Sudder Ameen took into consideartion all the evidence adduced by the defendant. There is nothing whatever in this objection, for there is nothing to lead me to suppose that the evidence upon this issue has not been fully considered by the lower Appellate Court. The appellants, Gunga Persaud, Her Persaud, and Chooa Lall, contend that, even if the kabala was executed by Duryao Lall as their guardian, it is not binding upon them for two reasons: 1stly, because he was not their legal guardian, their father being alive at the time of the execution of the deed; 2ndly because there was no such necessity for the sale as makes it binding upon them.

*Special Appeals, Nos. 3227 and 3252 of 1861, from the decrees of the Principal Sudder Ameen of Gya, dated the 6th September 1867, affirming the decrees of the Moonsif of that district dated the 23rd May 1867.