

crippled. Under somewhat similar circumstances the Court, in *Alfootoonnissa v. Goluck Chunder Sen* (1), declined to disturb a

(1) *Before Mr. Justice Markby and Mr. Justice Romesh Chunder Mitter.*

*The 23rd April 1874.*

ALFOOTOONNISSA (PLAINTIFF) v. GOLUCK CHUNDER SEN AND ANOTHER (DEFENDANTS).\*

Act XL of 1858, s. 18—Sale by Guardian without Sanction of the Court.

Where a guardian had mortgaged certain property of a minor without previously obtaining the sanction of the Court under s. 18 of Act XL of 1858, but it was found that the mortgage transaction was a proper one, and there had since been a decree in a suit in which the minor was properly represented under which the property had been sold, the irregularity as to the mortgage being made without the sanction of the Court was not allowed to prevail.

SUIT for a declaration of right to, and for possession of, a share in certain immoveable property, which the plaintiff alleged had been alienated improperly by her mother, who had been appointed her guardian under Act XL of 1858. The plaintiff alleged that her mother had, during her minority, executed a bond in favor of Gopaul Chunder Sen, one of the defendants, by which the property in question was mortgaged, and subsequently sold under a decree obtained in a suit on the bond; that the sale was made without any pressing necessity, and that it was invalid, as having been made without the sanction of the Court under s. 18, Act XL of 1858.

The defence was (*inter alia*) that the plaintiff had been a party to the suit on the bond through her mother

and guardian, and as the present suit was virtually to set aside the proceedings in execution of the decree in that suit, the suit would not lie: and that the sale was a *bond fide* one and valid, notwithstanding the omission to obtain the sanction of the Court.

The Munsif found that there was a sufficient necessity to justify the sale, and that the plaintiff had failed to prove fraud or collusion. He accordingly dismissed the suit.

The Judge held that there was nothing to support the charge of fraud and collusion; that the alienation had been made for pressing necessity and for the benefit of the estate; and that the fact that the sale took place without the sanction of the Court though an irregularity, was not sufficient to make the sale invalid as against the purchaser. He confirmed the decision of the Munsif.

From this decision the plaintiff appealed to the High Court.

Baboo Rama Churn Banerjee for the appellant.

Baboo Kally Mohun Dass for the respondents.

The judgment of the Court was delivered by

MARKBY, J.—We think that the District Judge has disposed of this case rightly, and has given very clear and satisfactory reasons for his decision. The District Judge considers that there was an irregularity in consequence of the guardian not having

\* Special Appeal, No. 1193 of 1873, against a decree of the Judge of Zilla Tipperah, dated the 13th March 1873, affirming a decree of the Munsif of Soodharam, dated the 30th of August 1871.

1875

SHUBRUT  
CHUNDER  
v.  
RAJKISSEN  
MOOKERJEE.

1875  
 SHURRUT  
 CHUNDER  
 v.  
 RAJKISSEN  
 MOOKERJEE.

mortgage by a guardian notwithstanding the sanction of the Court had not been obtained. The object of the law is merely to secure *bona fides* on the part of the guardian in dealing with the property of the minor; and in the present case both the lower Courts have found that the sale was *bonâ fide*.

The judgment of the Court was delivered by

MACPHERSON, J.—There is but one point raised in this special appeal. The plaintiff seeks to set aside a sale made during his minority by his elder brother Ashootosh Chatterjee, who was his guardian appointed by the Court under Act XL of 1858.

The Court below has found that the purchaser (the respondent) did not act fraudulently in the matter; that he gave a fair price; and that the condition of the estate necessitated a sale. The question is whether such a sale is bad, and can now be set aside for the one reason that the sanction of the Court, which s. 18 of Act XL of 1858 declares necessary, was never obtained.

S. 18 enacts that every person to whom a certificate shall have been granted "may exercise the same powers in the management of the estate as might have been exercised by the proprietor if not a minor; and may collect and pay all just claims, debts and liabilities due to or by the estate of the minor. But no such person shall have power to sell or mortgage any immovable property, or to grant a lease thereof for any period

obtained the sanction of the Court under s. 18 of Act XL of 1858 before this property was mortgaged. But I think he very rightly points out that inasmuch as the mortgage transaction was a proper one, and there has been since a decree in a suit in which the minor was represented under which this property has been sold, the objection on the ground of that irregularity ought not now to prevail.

As regards the other point, namely, that the evidence of the debt for which the property was mortgaged

was not admissible, we think that objection cannot prevail. But in saying this we must not be understood as expressing any opinion that that point is open for enquiry in this case. It was found (and no doubt rightly found) that the minor was properly represented in the suit in which a decree was obtained against the minor upon this mortgage, and such a decree under ordinary circumstances would be conclusive.

The special appeal will be dismissed with costs.

exceeding five years, without an order of the Civil Court previously obtained." This is not a simple direction that the sanction of the Court shall be obtained. It is a positive declaration that, in the absence of such sanction, the guardian has no power to sell. If the guardian, having no power to sell, does sell, does he pass a good title to the estate? All persons being presumed to know the law, it must be presumed that the purchaser took with knowledge that, except with the sanction of the Court previously obtained, the guardian had no power to sell to him.

We have been able to find only three cases reported which bear at all upon the question, and in no one of them is it actually decided (1).

The first is *In the matter of the petition of Busunto Coomar Ghose* (2), where, the matter not arising for judicial decision, it is said by Jackson, J., that the guardian in granting a mortgage of the minor's property acted in direct violation of s. 18 of Act XL, and that the mortgage so executed without the order of the Court would be invalid.

*The Court of Wards v. Kupulmun Sing* (3) was a case under the Lunatics Act, XXXV of 1858. The words in s. 14 of that Act are the same as those in s. 18 of Act XL of 1858,—that the manager shall not have power to sell or mortgage without an order of Court previously obtained. Referring to this section, Phear and Morris, JJ., have declared that, without the sanction of the Court, the manager can pass no good title.

A Division Bench in *Alfootoonnissa v. Goluck Chunder Sen* (4) declined to disturb a mortgage made by a guardian without sanction. But this was after a suit (to which the minor was a party) had been brought on the mortgage, and a decree had been given in favor of the mortgagee.

However much we may desire to support a purchaser who has not acted dishonestly, and by whom a fair price has been paid, we think it impossible to declare a sale valid which is made by a guardian without the sanction which s. 18 requires. The words are very strong. It is not merely that they contain a

1875

---

SHURRUT  
CHUNDER  
V.  
RAJKISSEN  
MOOKERJEE.

(1) See also the observations of Markby, J. in *Gopalnarain Mozoomdar v. Muddomutty Guptee*, 14 B. L. R., 21, at p. 29.

(2) *Ante*, p. 351.

(3) 10 B. L. R., 364.

(4) *Ante*, p. 353.

1875

SHURRUT  
CHUNDER  
V.  
RAJKISEN  
MOOKERJEE.

direction that the sanction of the Court shall be obtained: they say without an order of Court previously obtained the guardian shall absolutely not have the power to sell. It seems to us we are bound to treat the sale as made by one having no power in the matter, and therefore as bad. The purchaser who, knowing that he is dealing with a guardian, chooses to ignore the provisions of the Act, has no one but himself to blame if he suffers from the consequences of his negligence.

As, however, the lower Court finds that the conduct of the purchaser was not dishonest, and that he paid a fair price, we shall declare that the plaintiff is entitled to be restored to possession with mesne profits on his repaying to the purchaser so much of the money paid by the purchaser as has been applied to the benefit of the minor's estate. The purchaser on being repaid so much as shall be found to have been applied for the benefit of the minor with interest at 6 per cent. on the money so paid, must give up possession to the plaintiff, accounting for the mesne profits for the time he has been in possession.

The decrees of the lower Courts are set aside, and the suit must go back to the Court of first instance in order that the necessary inquiries may be made, and accounts taken in order to the carrying out of the directions we now give

We may add that we do not think that the position of the purchaser (respondent) is in any way stronger by reason of the accident that the guardian appointed under Act XL of 1858 happened also to be the elder brother and natural guardian (if such he really was) of the plaintiff. Having been appointed under Act XL of 1858, he could not longer act for the minor otherwise than under his appointment by the Court. If one, who is the natural guardian, is appointed by the Court, and acts under the appointment, he can have no powers other than that given him by Act XL of 1858.

The appellant will get his costs of this appeal and in the lower Courts.

*Appeal allowed.*