of the case, but having pronounced judgment contingent upon the opinion of the High Court, which opinion was against that judgment, there was only one course to take.

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It seems to me that the Small Cause Court did not possess the jurisdiction it exercised, and that it did not act in conformity with section 619 in disposing of the matter as it did. The order which it purported to make was therefore bad for want of jurisdiction, and must be set aside. The matter must go back with this expression of opinion.

Rule made absolute with costs.

Attorneys for the plaintiffs: Messrs. *Dignam & Co.*

Attorneys for the defendants: Messrs. *Sowton & Sen.*

F. K. D.

APPELLATE CIVIL.

Before Mr. Justice Macpherson and Mr. Justice Hill.

IN THE MATTER OF BASHARAT ALI CHOWDHRY (A LUNATIC).*

1896 *May* 4.

Lunatic—Residence—Lunatic resident in mofussil—Guardian of Lunatic's Person—Position of Guardian towards local Court appointing him—Temporary Suspension of Guardian—Jurisdiction of District Judge—Irregularity—Act XXXV of 1858, sections 10, 18 and 22—Superintendence of High Court—Civil Procedure Code (Act XIV of 1882), section 622.

Although Act XXXV of 1858 contains no express provisions as to the place of residence of a lunatic governed by the Act, it contemplates that he shall reside within the jurisdiction of the Court that has found him to be a lunatic.

The guardian of such a lunatic's person is, in matters connected with the guardianship, subordinate to the District Court which appointed him.

A guardian, having obtained leave from the District Judge to take the lunatic out of the jurisdiction for a specified time, was, at the expiration of that time, ordered to return with the lunatic to his residence within the local jurisdiction. He failed to comply with the order. Without further notice, the District Judge, by certain orders which he gave by letter and telegram through the manager of the lunatic's estate, suspended the guardian from his office, and directed him to make over the custody of the lunatic to the manager. The guardian made over the custody accordingly;

* Civil Rule No. 814 of 1895.

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and then applied to the High Court under section 622 of the Code of Civil Procedure, to set aside those orders, and restore the custody of the lunatic to him at Calcutta (outside the jurisdiction of the Court to which the lunatic was subject). The High Court declined to interfere, even though the orders were made irregularly; because no case for its intervention had been made out, and because the lunatic ought not to be removed out of the local jurisdiction.

BASHARAT ALI CHOWDHRY was a lunatic, so found under Act XXXV of 1858. Syed Mahomed Hashim was appointed guardian of his person in 1890, and Mr. Sandys manager of his property in 1893. In November of 1894 the District Judge of Tipperah—within whose jurisdiction the lunatic resided—gave the guardian permission to take his ward for a tour in the North-West Provinces for four months, from November 1894 to February 1895. The tour was begun accordingly; but about the 22nd December 1894 the guardian and his ward went to Calcutta, where they remained until March 1895. On the 18th February 1895 the guardian wrote to the District Judge a letter asking for an extension of leave until the end of March, on the ground that the son of the lunatic desired his father's presence at his daughter's salt-tasting ceremony. The District Judge refused the extension, and directed the manager to telegraph to the guardian to return to Comilla immediately. The guardian thereupon procured a medical certificate from Dr. Crombie to the effect that there was no objection to the lunatic's remaining in Calcutta, and that he (Dr. Crombie) was informed that the lunatic's mental condition was improved by the change. The guardian forwarded this certificate to the District Judge in the hope of obtaining the extension of leave which had previously been refused.

The District Judge again sent orders, through the manager, by letter and telegram, directing the guardian to return. The guardian did not at once obey the order to return, and it was repeated on the 4th March. Being asked, on the 11th March, why he did not return, the guardian replied that his ward was under medical treatment. After some further communications had passed between the manager (acting under the orders of the District Judge) and the guardian, the manager on the 14th March enquired of Dr. Gibbons (who was attending the lunatic)

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whether he could return to Comilla, and Dr. Gibbons replied that he did not recommend the journey. On the 18th March the guardian wrote to the District Judge a letter complaining of the interference of the manager, and enclosing an opinion or certificate of Dr. Gibbons, to the effect that the lunatic had expressed a desire not to return to Comilla but to remain in Calcutta, that it would be advisable to allow him to please himself in the matter, and that forcing him to live in a place to which he appeared—from the remarks made to Dr. Gibbons—to have contracted a marked dislike, was calculated to retard his recovery.

On the 21st March the District Judge gave the manager a letter of authority to go to Calcutta and take back the ward with as little delay as possible. The letter ended with these words: "Syed Mahomed Hashim, at present guardian of the person of the ward, is hereby suspended till further orders." Mr. Sandys left for Calcutta the following day, and on the 25th March, he telegraphed to the District Judge a request for an order directing the guardian to hand over the ward to him. The District Judge telegraphed to the manager the order asked for. In pursuance of that order, the manager took over the custody of the ward from the guardian, and took him back to Comilla on or about the 28th March.

In April 1895 the guardian presented a petition to the High Court, complaining that the District Judge was not competent to pass the order of suspension, that he had no jurisdiction to order the manager to take over charge of the lunatic from the guardian, and that the District Judge before suspending the petitioner should have held a proper inquiry into the matter and given the petitioner an opportunity of being heard: he therefore prayed the Court to send for the papers relating to the matter, to set aside the orders made by the District Judge, to direct that the lunatic be made over to the petitioner at Calcutta, and to make such other order as it thought fit.

The Court (NORRIS and GORDON, JJ.) issued a rule on the District Judge and on the manager to show cause why the orders contained in the District Judge's letter and telegram dated respectively the 21st and 25th March should not be set aside, and why the custody of the lunatic should not be made over to the

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guardian at Calcutta; and the Court further ordered the District Judge to transmit without delay all the papers connected with the matter.

The rule was heard on the 17th June 1895, when neither the District Judge nor the manager appeared to show cause either in person or by Counsel or pleader. The District Judge had submitted to the Court a written explanation of the matter; but the Court, holding that such explanation could not be looked at, and that it was not a proper method of showing cause, made the rule absolute.

On the 15th August 1895, the District Judge and the manager applied for a review of the order making the rule absolute on the grounds that the Court had no jurisdiction to order the custody of the lunatic to be given to the guardian at Calcutta; that the applicants had in fact good and sufficient cause to show against the order if they were allowed to lay the facts before the Court; and that it was by a *bonâ fide* mistake on the part of the District Judge that he not only did not show cause in regular form, but also instructed Mr. Sandys that it would be unnecessary for him to appear either.

The Court granted a rule for a review, which was on the 20th December 1895 admitted by GORDON, J., sitting alone. NORRIS, J., having in the meantime retired from the Bench—his Lordship holding that the matter had not been heard on the merits, and that it ought to be.

The matter, thus re-opened, eventually came on before MACPHERSON and HILL, JJ., on the 30th April 1896.

Sir *Griffith Evans*, Mr. *Wilson*, and Moulvie *Mahomed Mostafa Khan*, showed cause against the rule obtained by the petitioner, the guardian.—Act XXXV of 1858 deals with lunatics not residing within the jurisdiction of the Supreme Court; and although it provides for the care of the lunatic's person and the management of his property, there is no provision for allowing the lunatic to go out of the local jurisdiction. The English law must, therefore, be looked to; and under it a practice has grown up of allowing the committee of a lunatic to take the lunatic out of the jurisdiction upon giving security to bring him back when called upon. The general rule, both as to infants and lunatics, is that they must not be removed

without leave of the Court out of the jurisdiction,—Pope on Lunacy (2nd Ed.) p 144; Tudor's Leading Cases (6th Ed.) II, 747. Here the District Judge allowed the lunatic to be taken out of the jurisdiction; and when the guardian disobeyed the order to bring his ward back, the Judge, having no power to issue a warrant, sent the manager of the lunatic's property to take charge of him and conduct him home. It is true that the Act does not specifically provide a power to suspend the guardian; but there is a power to discharge him, and that must include the power of suspension. The guardian now contends that the District Judge's orders are *ultra vires*; and he asks for the lunatic to be sent back from Comilla, where he ought to be, to Calcutta, where he ought not to be. He has sought the assistance of this Court under s. 622 of the Civil Procedure Code, which contemplates the decision of a case, but this is not a case. Even if the Court had the power to order the lunatic to be brought to Calcutta, this is not a case in which the Court would exercise that power. The same rule must apply here as exists in England with regard to not interfering with the local jurisdiction, and the reason is that, so long as the guardian is not within the local jurisdiction, he is out of control: moreover the lunatic was not subject to the Supreme Court; and this Court not having jurisdiction over mofussil lunatics, cannot order his removal from Comilla. And as to setting aside the order of suspension, that would be quite useless except as a preliminary step to bringing the lunatic to Calcutta, which ought not to be done. It is merely an interlocutory order and therefore this Court cannot deal with it under s. 622. *In re The Nizam of Hyderabad* (1). If this order is a final order, this Court cannot deal with it until the appeal is preferred which is given by s. 22 of Act XXXV of 1858. And if it is not a final order, the petitioner must wait until a final order is made, and then prefer his appeal. The cases on section 622 are collected in Mr. Justice O'Kinealy's work on the Code (4th Ed.) p. 547. Nothing would be gained by setting aside the order: it was merely a direction to hand over the lunatic at that time, and it was complied with.

As to the merits of the case, the affidavit put in by Mr. Sandys

(1) I. L. R., 9 Mad., 256.

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shows that upon his arrival in Calcutta he found that the guardian was neglecting his ward, and abusing his position as guardian to promote his own interests and pleasure; that the ward was badly housed in an insanitary quarter; that the deponent was informed by the lunatic's personal servants that the guardian had used threats to his ward, and had represented to him that he was to be taken back to Comilla by force. The affidavit further declares that all acts done by the manager had been done under the direct orders or with the immediate approval of the District Judge.

The *Advocate General* (Sir *Charles Paul*), Mr. *St. John Stephen*, and Babu *Gonesh Chunder Chunder*, in support of the rule.—The Court has ample power under the Charter to interfere, and it ought to have the inclination. The wishes of the lunatic should have been consulted in any matter affecting his health. He wished to remain in Calcutta, and his medical adviser said he had better stay; but he was not allowed to. Again, until a guardian is duly discharged, he is entrusted with the care of the lunatic. Had he been discharged, instead of merely suspended, he could have applied for a *habeas corpus*. To that application there would have been no answer: indeed there is no answer to the case now. To argue that a power of removal includes a power of suspension is to beg the question. [MACPHERSON, J. It may have been improper for the Judge to give his orders to the guardian through the manager; but surely they are both subordinate to him?] Certainly not; the Act does not say anything of the kind. [MACPHERSON, J. So long as there was a guardian, no Court, other than that of the District Judge, could interfere.] No; but the guardian has never been removed, even up to now. The Court cannot remove him conditionally; and it must do so upon notice or not at all,—see s. 18 of the Act. [MACPHERSON, J. Does not the power to remove include the power to suspend?] No. Suppose the petitioner is suspended, who is the guardian? If he is not doing his duty he may be removed; but he must be served with a rule to show cause why he should not be removed. It is clear, then, that no order of suspension is possible, because there would be no one duly appointed to take charge of the lunatic; and that, even if the power of removal included the power of suspension, the suspension must be upon good cause, and the procedure must be the same as in the case of discharge, that is to say the Judge must proceed properly under

section 18 of the Act. Further, the very irregularity of these acts deprives the petitioner of the right of appeal given him by section 22 of the Act: the Court can therefore get rid of them either under section 622 of the Civil Procedure Code, or under section 15 of the Charter. There has been material irregularity, and therefore this Court can interfere—*In the matter of Arathoon* (1). No man's rights should be affected without his having a full and fair opportunity of being heard,—*Cooper* v. *Wandsworth Board of Guardians* (2). Besides, a telegram is no order of Court; there is no appeal against a telegram. And the District Judge's letter is not an order under the Act either; indeed it is no judicial order at all.

The only thing to be considered in these cases is the benefit of the lunatic. Dr. Gibbon's certificate was ample justification for the petitioner's non-compliance with the Judge's letter. No act of the Court should be against the lunatic's welfare; but it was decidedly against his welfare to make him undertake a long and fatiguing journey like that from Calcutta to Comilla. It is argued that the guardian was in contempt; I deny that. It is then suggested that he wished to remain in Calcutta for his own interests. But even if he did stay in Calcutta that is no reason for depriving him of the custody of his ward. In *In re Brudre* (3) a person resident out of the jurisdiction was appointed committee of a lunatic upon his giving security. If Mr. Sandys had acted in England as he has acted here, he would have been in high contempt,—see Elmer's Law of Lunacy, p. 58. The petitioner had no other course open to him than the one he has adopted. He very reasonably asks to be restored to the guardianship; and he is willing to give security to the satisfaction of the Court if the Court will allow the lunatic to remain in or near Calcutta.

(*The Advocate-General* then applied for leave to read an affidavit in reply filed by the petitioner. The Court gave him leave, and also gave permission to Counsel on the other side to comment on the affidavit. The petitioner, in the affidavit, denied *in toto* the statements sworn to by Mr. Sandys; he complained of that gentleman's interference, because the petitioner was in

(1) 2 Boul., 74, (2) 32 L. J. C. P. 185: 14 C. B. (N.S.) 180.
(3) L. R., 17 Ch. D., 775.

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no sense subordinate to him; he deposed that it was not his pleasure or interest to remain in Calcutta, inasmuch as in March 1895 his wife, who resided at Comilla, was seriously ill, and she died in April 1895; and he set up Dr. Gibbon's certificate or report as a justification for his conduct in keeping his ward in Calcutta).

C. A. V.

On the 4th May 1896 the judgment of the Court (MACPHERSON and HILL, JJ.) was delivered in the following terms:—

We have read the affidavits and have heard learned Counsel on both sides, and are clearly of opinion that this is not a matter in which we should interfere even if we could properly do so.

It appears that Basharat Ali Chowdhry, a resident of the Tipperah District, was many years ago declared under Act XXXV of 1858 to be a lunatic by the Chief Civil Court of that District. When the occurrences complained of took place, Mr. Sandys was the appointed manager of his estate, and the petitioner, Syud Mahomed Hashim was the appointed guardian of his person. The latter under the Act was charged with the care and maintenance of the lunatic ward, but unquestionably he was in the performance of his duties in complete subordination to the Civil Court, which appointed him and could remove him for sufficient cause.

On the 18th November 1894 the petitioner and the lunatic were allowed to leave the Tipperah District, for a 4 months' tour in the Upper Provinces, the object being to give the lunatic the advantage of change of air and scene. On the 22nd December they went to Calcutta and remained there till the 18th February 1895, when the petitioner applied to the District Judge for the extension of the time allowed for tour. This was refused, and he was directed to return immediately with his ward. We need not refer in detail to the correspondence which then ensued, and which is set out in the affidavits; it is enough to say generally that the petitioner was, through Mr. Sandys, repeatedly directed to return with his ward, and that he made repeated excuses for not doing so, mainly on the ground that the ward was unwilling to go, and that he had been placed under medical treatment, which rendered it inadvisable that he should go.

On the 21st March the District Judge sent Mr. Sandys to

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Calcutta to bring back the ward, and gave him a letter which concluded thus: "Syud Mahomed Hashim, at present guardian of the person of the ward, is hereby suspended until further lers." On the 25th he telegraphed to Mahomed Hashim to ıke over the ward to Mr. Sandys immediately. The ward made over and taken back to Tipperah, and a copy of the e's letter of the 21st was sent by Mr. Sandys to the petition-

We are asked to do two things,—to reinstate the guardian, d to direct that the lunatic be made over to his care in lcutta: for that purpose the lunatic must be taken out of the isdiction of the Court which has control over him to a place ıere that Court would have no control over either him or the ıardian. We have to consider the interests of the lunatic quite apart from the interests of the guardian, and it in no way follows that the interests of both are the same.

Act XXXV of 1858 certainly contemplates that a lunatic who is brought under the operation of the Act should remain where he ordinarily resides, that is within the jurisdiction of the Court which has found him to be a lunatic, and which has appointed the manager of his estate and the guardian of his person. The Act does not provide for residence out of the jurisdiction, although there may be cases, in which this is very desirable for a time at least. In England it has been allowed, on the committee giving security to produce the lunatic when called upon to do so.

Possibly this Court would interfere if a strong case was made, and a District Court had unreasonably and improperly refused permission. We need not however consider what the power of the Court in this respect is, as in our opinion no case for the exercise of it in the interest of the lunatic has been made. We are not satisfied that it was in March 1895, much less than it is now, necessary for the lunatic to remain in Calcutta. It would require much stronger proof than is furnished by the affidavit of the petitioner to induce us to direct the removal of the lunatic from the jurisdiction of the Court which has control over him. We may add that the District Judge has shown no disinclination to allow the lunatic to leave the jurisdiction when it was considered for his benefit to go, and there is no

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reason to suppose that he will not continue to do what he considers beneficial to him.

Even, therefore, if we considered that the Judge should have allowed the lunatic to remain in Calcutta in March 1895, we could not, on the materials before us, direct that he be sent back there.

Now as regard the guardian. Some strong comments have been made on the action of Mr. Sandys, the irregularities in the proceedings of the Judge, and the injustice said to have been done to the petitioner, and we think it right to express briefly our view of the matter.

The Judge was certainly under the impression that the petitioner wished to remain in Calcutta for his own convenience rather than for the benefit of the ward, and a perusal of the affidavits has failed to convince us that the impression was wrong.

From the 22nd December to the 18th February we hear nothing of the lunatic being under medical treatment, and the application of the last mentioned date had nothing to do with his condition mental or bodily. When that failed he was taken to a leading practitioner, who gave a very guarded certificate to the effect that there was no objection to the lunatic remaining longer in Calcutta, and that his mental condition was improving under the effect of change. The latter view was obviously, however, not the result of personal observation, and must have been based on information received. The certificate when submitted to the Judge did not produce the desired effect, and it is not till the 11th March that there is any suggestion of the lunatic being put under medical treatment for the infirmity from which he had been suffering for so many years. On the 17th March a certificate was obtained from another leading practitioner, and we do not doubt the truth of what is stated in it. To our minds it does not, however, prove very much, and furnishes no sufficient excuse for the disobedience of the guardian. The lunatic ward had not been and was not then suffering from any illness which prevented his return, and the idea of putting him under treatment for his mental infirmity was clearly an afterthought.

We must, however, say that the Judge's mode of communicating with the guardian through Mr. Sandys was not right, and

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probably created unnecessary friction. The guardian was not subordinate to the manager, and many of the orders, which were very peremptory, did not even purport to be in the Judge's name, although it was doubtless known that they emanated from him. The manager also sent him a letter containing serious reflections on his character, which certainly ought not to have been sent.

It is argued that the order for suspension was illegal and that the guardian has been greatly prejudiced, as, if there had been an order for removal properly communicated, he would have had a right of appeal. We do not think he is entitled to any consideration on this account. He was, when suspended, acting in contempt of the Judge's authority, and he has never since made submission to it. He has not attempted to account to the Judge for his conduct or asked to be reinstated, and he cannot, under the circumstances, gain anything by the omission to make a final order for his removal. He wants, indeed, now to be reinstated on his own terms, which are, apparently, that he is to remain in Calcutta, and that the lunatic ward is to be brought from Tipperah and made over to his care here. This cannot be allowed.

The rule is discharged. We make no order as to costs.

H. W. *Rule discharged.*

Before Mr. Justice Macpherson, Mr. Justice Trevelyan, Mr. Justice Ghose, Mr. Justice Hill and Mr. Justice Gordon.

JAWADUL HUQ (PLAINTIFF) *v.* RAM DAS SAHA (DEFENDANT). *

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July 1.

Bengal Tenancy Act (VIII of 1885), section 22, clause (2)—Co-owner's purchase of occupancy right, Effect of.

There is no law which prevents one of several co-proprietors from holding the status of a tenant under the other co-proprietors of land which appertains to the common estate.

The effect of the purchase, by one co-owner of land, of the occupancy right, is, not that the holding ceases to exist, but only the occupancy right which is an incident of the holding.

Sitanath Panda v. *Pelaram Tripati* (1) referred to.

* Appeal under section 15 of the Letters Patent No. 50 of 1894, against the Decree of the Hon'ble Henry Beverley, one of the Judges of this Court, dated the 12th of June 1894, in appeal from Appellate Decree No. 1927 of 1893.

(1) I. L. R., 21 Calc., 869.