

tion. I have assumed throughout these remarks that an error of law has been committed, but I have made that assumption only for the purposes of the argument. Considering the law bearing on the application to be such as I have stated, I have thought it unnecessary to hear the affidavit. The refusal to commit is not tantamount to an acquittal, and the prosecution can, if they choose, go before the Magistrate again, though I am by no means saying they ought to do so. The application must be refused (1).

1877

IN THE MAT-
TER OF THE
EMPRESS OF
INDIA ON
THE PROSE-
CUTION OF
MALCOLM
v.
GASPER.

Application refused.

Attorney for the applicant: Mr. *Leslie*.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Ainslie.

DEBI DUTT SAHOO (PLAINTIFF) v. SUBODRA BIBEE AND OTHERS
(DEFENDANTS).*

1876

June 2.

Act XL of 1858, s. 18—Act VIII of 1859, ss. 2 and 3—Mortgage by Administrator of a minor's property—Purchaser with notice, Title of—Duties of Purchaser.

A mortgage of the property of a minor made by the Administrator appointed under Act XL of 1858, is invalid, unless the sanction of the Court has been previously obtained under s. 18 of the Act.

Where the administrator was sued, as representing the minor, by the mortgagee, and made no defence to the suit, and the property was sold under a decree so obtained to the mortgagee, by whom it was again sold to a third person, who knew that the administrator had executed the mortgage in that capacity,—*held*, that the decree did not protect the mortgagee who purchased at the Court sale, nor her vendee, from suit by the minor for recovery of the property.

THE plaintiff in this suit was one of four sons of one Imrit Lall Sahoo, a trader, who died in December, 1863, intestate. The plaintiff being a minor, his brother Rameswar Dutt obtained, under s. 7 of Act XL of 1858, a certificate of adminis-

* Regular Appeal, No. 65 of 1875, against a decree of W. DaCosta, Esq., Subordinate Judge of Zilla Sarun, dated the 18th of January, 1875.

(1) See *Corporation of Calcutta v. Bheecunram Napit, post.*

1876
 DEBI DUTT
 SAHOO
 v.
 SUBODRA
 BIBEE.

tration of the minor's property. Rameswar Dutt was also appointed guardian of the person of the minor. After the death of Imrit Lall, his sons took possession as his heirs of all his property, and living as a joint Hindu family carried on the business formerly carried on by their father. On the 14th July, 1867 (Asar, 1274) Rameswar Dutt, for himself and the plaintiff, his minor brother, and the other two brothers, Bisseswar Dutt and Purmeswar Dutt, gave a bond for Rs. 37,000 to Subodra Bibee, payable on the 30th Pous, 1275, (February, 1868), in which bond, as a security for the above amount, they pledged Mouzah Dhubolia and a certain warehouse in Mouzah Shamsoodinpur, both which properties belonged to all the four brothers. The consideration set out in the bond was as follows: *1st*, a sum of Rs. 2,500, due on an account current extending from 24th Asin, 1923 S. (18th October, 1866), to date of the bond; *2nd*, of Rs. 27,500, on account of bills discounted by Subodra Bibee, the said bills having been dishonored on presentation in Calcutta; and *3rd*, of the sum of Rs. 7,000, being a loan made by Subodra Bibee to pay certain business debts for which suits were then pending.

No question was raised as to the due execution of the bond, or the existence of the debts therein mentioned: it was admitted that no such sanction of the Civil Court as is provided for by Act XL of 1858, s. 18, was obtained.

Subodra Bibee in another suit had sued all four brothers on this bond, treating it as a mortgage bond. None of the defendants in that suit appeared, and service of summons upon them having been proved, the suit was treated as undefended, and a decree obtained on the 28th March, 1868, directing a sale of the mortgaged property. The property was, accordingly, put up for sale under the decree, and bought by Subodra herself on the 1st June, 1868, through her gomastah Gopi Lall, who was made a defendant in this suit. On the 16th November, 1870, Subodra sold the purchased property and her outstanding rights under the decree to Mr. Lewis Cosserat, who had already purchased the indigo factory in Mouzah Dhubolia from the four brothers (the plaintiff being represented by his guardian Rameswar Dutt) under a conveyance dated 9th January, 1868.

Debi Dutt having attained majority brought the present suit to recover possession of his share of the property from Mr. Cosserat, upon the ground that it was illegally mortgaged by his brother and guardian, and that, notwithstanding the proceedings and sales which subsequently took place, he had a right to regain possession of his estate.

1876

DEBI DUTT
SAHOO
v.
SUBODRA
BIBEE.

The Subordinate Judge held, that the suit was not maintainable, on the ground that the plaintiff was, by his guardian, a party to the suit on the bond instituted by Subodra Bibee, and that ss. 2 and 3 Act VIII of 1859 barred any other remedy than a review of judgment in that suit, especially as the plaintiff did not allege that the bond was a fraudulent one.

From that decision the plaintiff appealed to the High Court.

Mr. *R. T. Allan* (with him Baboo *Moheschunder Chowdry*) for the appellant.

Mr. *Arathoon* (with him Baboo *Chunder Madhub Ghose*) for the respondents.

The arguments sufficiently appear in the judgment of the Court:—

The following cases were cited:—For the appellant, *Gireewur Singh v. Muddun Lall Doss* (1), *Surut Chunder Chatterjee v. Ashutosh Chatterjee* (2), and *Prosunno Kumari Debya v. Golab Chand* (3). For the respondents, *Hunooman Persaud Panday v. Mussamat Baboooe Munraj Koonweree* (4), *Lalla Bunseedhur v. Koonwur Bindisseree Dutt Singh* (5), *Lekraj Roy v. Mahtab Chand* (6), *Looloo Singh v. Rajendur Laha* (7), *Alfootoonnissa v. Goluck Chunder Sen* (8), *Sheoraj Kower v. Nukchedee Lall* (9), *Sherafutoollah Chowdhry v. Abedoonissa Bibee* (10), *Modhoo Soodun Sing v. Rajah Pirthee Bullub Paul* (11), and *Prosunno Kumari Debya v. Golab Chand* (3).

(1) 16 W. R., 252.

(6) 14 Moore's I. A., 393.

(2) 24 W. R., 46; S. C. reported as *Shurrut Chunder Chatterjee v. Rajhissen Mookerjee*, 15 B. L. R., 350.

(7) 8 W. R., 374.

(8) 15 B. L. R., 353

(9) 14 W. R., 72.

(3) 14 B. L. R., 450.

(10) 17 W. R., 374.

(4) 6 Moore's I. A., 393.

(11) 16 W. R., 231.

(5) 10 Moore's I. A., 454.

1876

DEBI DUTT
SAHOO
v.
SUBODRA
BIBEE.

The judgment of the Court was delivered by—

GARTH, C.J. (who, after stating the facts, continued):—Without going at length, however, into the general question how far a minor is bound by a decree made against his guardian, during his minority, we think it clear that in this case the plaintiff was entitled to bring the fresh suit for the purpose of asserting his rights, and that, as against the present defendants, it was the only effectual remedy which he could pursue. If his object had merely been to reverse or alter the judgment in the former suit, it is possible that an application for a review would have answered his purpose. But the plaintiff's object was to unrip transactions which formed no part of the proceedings in the former suit, and as against Rameswar Dutt, who merely acted in that suit as the plaintiff's guardian, and as against Mr. Cosserat, who had nothing whatever to do with the former suit, it is obvious that any application for the review of the proceedings in that suit would have been utterly ineffectual, and that as against these persons the plaintiff's only remedy was the one which he has adopted. His contention and his interests in this suit are not identical with, but directly opposed to, those of Rameswar Dutt.

He says, that Rameswar, acting professedly as his guardian, has been dealing with his property in a way which the law expressly forbids, and that, in consequence of his having so dealt with it, and also in consequence of certain legal proceedings in which Rameswar has improperly acquiesced, his (the plaintiff's) share of the mortgaged property has wrongfully come into the hands of Mr. Cosserat, and his object is to release his share of the property from the position in which it has been placed by the wrongful acts of his guardian.

The first question, therefore, which we have to decide is, whether the defendant Rameswar was acting illegally when he mortgaged the plaintiff's share by the deed of July 14, 1867.

It is admitted that he was appointed guardian of the plaintiff under Act XL of 1858, and that he never obtained the sanction of the Judge to the mortgage, as by s. 18 of that Act he was bound to do.

The words of the section are: "No such person" (*i.e.*, guardian of the estate under a certificate granted under the Act) "shall

have power to sell or mortgage any immoveable property or to grant a lease thereof for any period exceeding five years without an order of the Civil Court previously obtained."

The same words are used in s. 14, Act XXXV of 1858, limiting the powers of a manager of a lunatic's estate, and it was held by Phear and Ainslie, JJ., in *The Court of Wards v. Kupulmun Singh* (1), that, after the passing of the Act, no manager, *de facto* or *de jure*, can have power to do that which the Act forbids.

There is a decision of Macpherson and Lawford, JJ., in *Surut Chunder Chatterjee v. Aushootosh Chatterjee* (2), in an appeal in which the only question was the effect of s. 18, Act XL of 1858, and it was held that a sale made by a guardian without authority from the Court was invalid, even though the purchaser had acted honestly and paid a fair price.

On the other hand, a case was relied upon by the defendants *Alfooonnissa v. Goluck Chunder Sen* (3), decided by Markby and Mitter, JJ., from which it would appear that those learned Judges considered that a mortgage of a minor's property by his guardian without the consent of the Court was a mere irregularity. But we have consulted Mr. Justice Markby, who delivered the judgment in that case, and who informs us, that although the word "irregularity" might have been used, it was by no means the intention of the Court in that case to treat the conduct of the guardian in mortgaging his ward's property without leave of the Court as any other than a direct breach of the law; and we find also that, before Macpherson and Lawford, JJ. delivered judgment in the case of *Surut Chunder Chatterjee v. Aushootosh Chatterjee* (2), they also consulted Markby and Mitter, JJ., and that the judgment in the latter case was given with their express concurrence. The ground of the decision by Markby and Mitter, JJ., in *Alfooonnissa v. Goluck Chunder Sen* (3) was, that events had subsequently transpired in that case which induced the Court to hold that the mortgage, though improper and unauthorized in the first instance, ought to stand; more especially, as in the suit

1876

DEBI DUTT
SAHOO
v.
SUBODRA
BIBEE.

(1) 10 B. L. R., 364

(2) 24 W. R., 46

(3) 15 B. L. R., 353..

1876

DEBI DUTT
SAHOO
v.
SUBODRA
BIBEE.

which was afterwards brought upon the mortgage-deed, and in which a decree was obtained, the minor himself was properly represented. Their decision, therefore, will be found not to conflict with the view which we take in the present case.

In this case we are of opinion that, in mortgaging the plaintiff's share without the sanction of the Court, the defendant Rameswar was, undoubtedly, dealing with his ward's property in a way which the law forbids, and that in not defending the suit brought upon the mortgage-bond, and allowing the property to be sold under the decree, he was improperly sacrificing his ward's interests.

Subodra Bibee, the mortgagee, took the mortgage, carried on the suit, and purchased the property with full knowledge of Rameswar's conduct; and the defendant, Mr. Cosserat, had also notice that Rameswar had been dealing with his brother's property in a way unwarranted by law, because it appears that there was an agreement dated the 5th February, 1868, made by Bisseswar, Rameswar, and Purmeswar, with Mr. Cosserat, reciting that Rameswar had been appointed guardian of his minor brother Debi Dutt, and that he, as such guardian, and for himself, together with his other two brothers, had, on 9th January, 1868, sold the Dhubolia Indigo Factory to Mr. Cosserat. The agreement then goes on to indemnify the purchaser specially in respect of any claim that might be thereafter put forward by the minor brother, Debi Dutt, and generally in respect of any other claims. This document shows that Mr. Cosserat must, at least, have understood that, in purchasing the minor's property, he was on dangerous ground, and having this knowledge, he was bound to satisfy himself that the mortgage-bond had been duly executed under the authority of the Civil Court, as required by law. He cannot say that he was a *bonâ-fide* purchaser for value without notice, for he certainly had notice that Rameswar Dutt's power of dealing with his ward's property was only such as a guardian appointed under Act XL of 1858 could exercise; and he was, therefore, bound to enquire whether the mortgage had ever been sanctioned by the Court. As a purchaser from Subodra he could take no better title

1876

 DEBI DUTT
 SAHOO
 v.
 SUBODRA
 BIBEE.

than she had, and unless the decree protected her title, it does not secure his. But she cannot be protected by the decree. She knew from the first, that Rameswar had acted in a manner unauthorized by law; she knew that the suit on the mortgage-bond had been undefended; and further, that notice of that suit had not been given to any one but to those whose interests were opposed to those of the minor. But then it was urged very strongly by the defendant's pleader, that if the debts for which the bond of the 14th July, 1867, was given, were debts due by the father, or if they were debts incurred by all the brothers in carrying on a business which they had a right to carry on for and at the risk of the plaintiff, Rameswar would have been justified in giving a simple money-bond at reasonable interest for the payment of those debts, and that, upon that bond, a decree might have been obtained by the bond-holder, and the property in question sold under that decree.

It was then argued that the instrument of the 14th July, 1867, was only a bond of this description, with a mortgage of the property in question superadded by way of further security; that the suit was founded upon the personal obligation of this bond, as well as upon the mortgage security; that, consequently, the defendant had a right to sever one portion of the instrument from the other, and to insist that there was quite sufficient cause of action to support the decree without reference to the mortgage portion of the transaction.

But assuming, for the purposes of argument, that in this instance the mortgagee could have severed one portion of the instrument from the other (which is at least doubtful), and that she could have sued upon the deed of July, 1867, as a simple money-bond, and obtained a decree in that suit, and sold the plaintiff's share of the property, the answer is, that in point of fact she has not adopted that course. She has sued upon the instrument as a mortgage-bond; she has obtained a decree upon it as a mortgage-bond; the decree is such as she could not have obtained, if she had sued merely upon the personal obligation; and it was under that decree that the property has been sold. The defendants, therefore, cannot now change the nature of that suit, or the form of the decree, for the purpose of placing

1876

DEBI DUTT
SAHOO
v.
SUBODRA
BIBEE.

themselves as purchasers under that decree in a different or better position; and as we find that Subodra and Mr. Cosserat were both affected with notice of Rameswar's improper conduct, we consider that the plaintiff is entitled to succeed in this suit as against all the defendants, and to recover possession of his share from Mr. Cosserat.

The appeal must, therefore, be allowed with costs, and interest as usual, payable by the respondents who have appeared; and the plaintiff must be declared entitled to recover the property in suit, with costs bearing interest at 6 per cent. per annum from date of decree of the Lower Court, payable by Rameswar Dutt Sahoo, Subodra Bibee, and Mr. Cosserat.

Appeal allowed.

ORIGINAL CRIMINAL.

Before Mr. Justice Macpherson.

1877

April
19 § 23.

THE CORPORATION OF CALCUTTA v. BHEECUNRAM NAPIT
alias BHEECUN NAPIT.

High Courts' Criminal Procedure Act (X of 1875), s. 147—Acquittal—
Presidency Magistrates' Act (IV of 1877), s. 181—The Calcutta Municipal Act (Beng. Act IV of 1876), ss. 75—79.

The powers of interference given to the High Court by s. 147 of the High Courts' Criminal Procedure Act, were not intended to be exercised in the case of an acquittal by the Magistrate, but only in the case of convictions or other orders whereby a defendant is aggrieved or injured (1).

APPLICATION under s. 147 of the High Courts' Criminal Procedure Act (X of 1875). The facts in support of the application appeared from the affidavit of M. R. Shircore, formerly License officer to the Justices of the Peace for the Town of Calcutta, and since the passing of Beng. Act IV of 1876, License officer to the Corporation established under that Act. He stated that, under s. 78 of the Act, he had received express authority from the Corporation to assess persons exercising within the town of Calcutta any trade, profession, or calling

(1) See *Malcolm v. Gasper*, *ante*, p. 278.