1968 *Present :* Samerawickrame, J., and Weeramantry, J.

L. C. N. FERNANDO, Appellant, *and* L. A. G. FERNANDO and another, Respondents

S. C. 151/68 (F)—D. C. Negombo, 2392/C

Jurisdiction—Sale of immovable property of minor—Property situate outside jurisdiction of Court of minor's residence—Appropriate Court to which the curator should apply for sanction to sell—Courts Ordinance, s. 69—Civil Procedure Code, ss. 6, 9 (a) (b), 584.

An application for permission to sell land belonging to a minor should bh made to the District Court within whose jurisdiction the minor resides, although the land in question may be situate within the territorial limits of the jurisdictioc of another District Court. In such a case it is not necessary to obtain the consent of the Court where the property is situate.

APPEAL from a judgment of the District Court, Negombo.

S. J. P. Fernando, with *N. T. S. Kularatne*, for the petitioner-appellant.

Ananda de Silva, Crown Counsel, as *amicus curiae*, for the respondents.

Cur. adv. vult.

August 11, 1968. WEERAMANTRY, J.—

The petitionor-appellant filed an application in the District Court of Negombo praying that he be appointed curator of the property of the first respondent, a minor resident within the jurisdiction of that court. The guardian *ad litem* of the minor for the purpose of this application was the scond respondent.

In the same application the petitioner-appellant sought permission to sell an item of immovable property belonging to the minor situated in the Puttalam district. The learned District Judge dismissed that part of the application which related to the sale of the land, holding that he had no jurisdiction to order such a sale inasmuch as the land was situate outside the territorial limits of his jurisdiction.

This appeal therefore raises the interesting question whether an application for permission to sell land belonging to a minor should be made to the District Court within whose jurisdiction the minor resides or to the court within whose jurisdiction the land is situate.

Section 69 of the Courts Ordinance provides that every District Court shall have the care and custody of the persons and estates of all idiots and persons of unsound mind and others of insane and non-sane mind resident within its district, with full power to appoint guardians and curators of all such persons and their estates. The section goes on to provide that in the like manner and with the same powers, the care of the persons of minors and wards and the charge of their property within its district shall be subject to the jurisdiction of the District Court.

Although the words "within its district" appear immediately after the word "property" in this provision it has been held on more than one occasion by this court that the former expression qualifies the words "minors" and "wards" rather than the word "property"[1]. This interpretation would seem to follow from the fact that the words "also and in like manner" suggest that the jurisdiction of District Courts as regards minors and wards should be of the same nature as the jurisdiction in respect of idiots and insane persons conferred on them by the earlier part of the section. This view also received approval in *Keppitipola Kumarihamy v. Rambukpotha.*[2] It seems settled then that the jurisdiction of a District Court to appoint guardians and curators of minors and their estates depends on the residence of the minor within the territorial limits of the jurisdiction of such court.

It is true that a somewhat different view has more recently been expressed by this court in *Cassaly v. Buhari*[3]. Gratiaen J. there observed in regard to section 69 (1) of the Courts Ordinance that it gives statutory recognition to the powers and responsibilities of a court as the traditional upper guardian of minors under the Roman-Dutch law and that this provision entrusted every District Court with the care and management of a minor's estate situate within its jurisdiction.

Gratiaen J. was in that case considering the question of a sale of a minor's property by his curator without the proper sanction of the court and was not giving his attention specifically to the question whether the

[1] *In the matter of May Fernando a minor (1896) 2 N. L. R. 249; Muthiah v Baur* (1906) 9 N. L. R. 190, F.B.

[2] *(1928) 30 N. L. R. 273.*

[3] *(1956) 58 N. L. R. 78.*

court of residence had jurisdiction in preference to the court where property was situate. The dictum to which I have referred must not therefore be taken to be one to the effect that the court where property is situate has jurisdiction in preference to the court of residence, but rather as one emphasising that the powers of District Courts over minors though conferred by statute hark back to the traditional notion of upper guardianship so well known to and recognised by the Roman-Dutch law.

It would not appear, therefore, that this Court has at any stage departed specifically from the view expressed in its earlier decisions to which I have already referred, and these decisions having as they do the support of a full Bench of this Court must be taken to state authoritatively the law on this subject.

In the Roman-Dutch law likewise there would appear to have been a principle that for an order of court to be made relating to the property of a ward, the ward should have his domicile within the district of the Judge or Magistrate making such order, a rule which obtained even though the things of which the alienation was in question were situate in places not subject to the power of such Magistrate [1].

As Voet observes [2] this principle is similar to that by virtue of which the praetor permitted the property of a ward to be sold not only in Italy but even in the provinces, provided the guardianship was being conducted at Rome and the guardian had undertaken at Rome the administration of the property in the provinces [3].

There is indeed a statement in the Digest [4] to the effect that if a patrimony over which a tutor is appointed is situate in very different parts, a tutor might apply to have other tutors appointed to act in those parts. This passage does not however derogate from the general principle that the tutor appointed has control over all property wherever situate, for, as is observed in the Institutes [5] and in the Digest,[6] a tutor who is appointed is considered appointed for the whole patrimony.

Applying this principle then, the appointment of a curator over the property of a minor would ordinarily give that curator control over all the property of the minor even though some items of property be situate outside the territorial limits of the court making the appointment.

The South African Courts have in reliance on this Roman Dutch principle held that it would be proper to apply in the first instance to the Court of the minor's domicile even though in certain cases it might be necessary to obtain a further order from the Court where the property

[1] *Voet 27.9.5*
[2] *Voet 27.9.5*
[3] *D. 27.9.5.12*
[4] *27.1.21.2*
[5] *1.25.17*
[6] *27.1.21.2*

was situate [1]. They have also observed that there can be no doubt that as a general rule the *most convenient* place for investigating whether the alienation is in the interests of the minor or not is the Court of the minor's domicile [2].

In Ceylon we do not have a multiplicity of divisions and jurisdictions such as may make it necessary in certain cases in South Africa to obtain the consent of the Court where the property is situate[3]. I do not think therefore that under our procedure it becomes necessary as a matter of law to obtain the dual consent which may sometimes be rendered necessary in South Africa.

It may also be observed that it is not possible to derive guidance on this matter from either English or Indian procedure. In the former case, guardians are appointed by the Chancery Division of the High Court in the exercise of its traditional function of superintendence of the care and custody of infants, and any analogy with the territorial jurisdiction of District Courts becomes inappropriate ; and in the latter case the matter is dependent on the special provisions of the Guardians and Wards Act, No. 8 of 1890, section 9 (2) of which expressly provides that an application may be made either in the court where the minor resides or in the court where the property is situate. Likewise, little guidance can be obtained from decisions on the New York Code of Civil Procedure, from which many of our provisions of Civil Procedure are taken, for the reason that in that jurisdiction as well, application for appointment of a guardian of the property may be made to the Supreme Court [4].

We must next consider the effect on the present application, of section 584 of the Civil Procedure Code, which provides that if the property is situate in more than one district, an application for appointment of a person to take charge of the property and person of a minor should be made to the District Court of the district in which the minor at the time of application resides.

It is not clear what precisely was the necessity for the enactment of such a section having regard to section 69 of the Courts Ordinance which had already provided that the Court of the minor's residence should be vested with such jurisdiction. A section expressly giving such jurisdiction to the Court of residence when property is situate in more than one jurisdiction seems to be superfluous in the light of section 69 (1) of the Courts Ordinance, but I do not think that the mere existence of this provision is sufficient of itself to justify a departure from the view that the intention of section 69 (1) of the Courts Ordinance was to vest jurisdiction in the Court of residence. Compelling reasons deriving both from

[1] *Ex parte Uys* 1929 T. P. D. 443 at 444; *ex parte Ford* 1940 W. L. D. 155 at 157. See also *ex parte Estate Hiddingh* 1935 O. P. D. 92 at 95.

[2] *Ex parte Uys*, 1920 T. P. D. 443.

[3] *Ex parte Ford*, 1940 W. L. D. 155. See also *ex parte Snyman*, 1930 C. P. D. 107 and *ex parte Jhaveri*, 1933 N. P. D. 104.

[4] Section 2349 of the New York Code of Civil Procedure, 1876.

the context of that section itself and from the underlying principles of common law must necessarily outweigh such inference to the contrary as may be suggested by section 584.

There are other practical reasons which point also to the necessity for the principle that the Court of residence should have jurisdiction.

It will readily be appreciated that the Court, discharging as it does the role of upper guardian, is expected to perform the same functions as those which an individual would have to perform had he been placed in a position of supervisory authority over a guardian or curator. This function cannot be split as between different Courts for one Court alone must take this responsibility and discharge this function.

In particular, where property is situate in more jurisdictions than one, it would be undesirable to have this supervisory function exercised piecemeal by the different Courts in which such property happens to be situate. One Court would not then be able to have that overall view of the minor's affairs and of the conduct and activities of the guardian or curator, which would be necessary to a proper assessment of the necessity for sale or other disposition of property. Sales or other dispositions, or, for that matter, the very conduct of a guardian or curator, may well, when viewed in their totality, put the Court upon inquiry in cases where an individual application to deal with property may not arouse suspicion. It is desirable therefore that when a Court discharges the supervisory responsibility lying upon it, it should not be denied the benefit of seeing the minor's affairs in this wider way.

An alternative basis is also available in law on which to rest the jurisdiction of the Court of the minor's residence.

An application for the appointment of a curator and the sale of property has been held by this Court to be an action as defined in section 6 of the Civil Procedure Code.[1] To such an application the minor is required by law to be made a party and he must in such application be represented by a guardian *ad litem*.[2] Since the application constitutes an action, the minor respondent would be in the position of a defendant and in terms of section 9 (*a*) of the Civil Procedure Code, the Court of the minor's residence would be a Court having jurisdiction to hear and determine such application.

It is also pertinent to observe, though it is not necessary to rest this decision upon that principle, that the mere fact that an application concerns land does not necessarily make it an action in respect of land within the meaning of section 9 (*b*) of the Civil Procedure Code, for this

[1] *Muliyanse v. Pemawathie* (1962) 64 *N. L. R.* 542 *at* 543.
[2] *Cassaly v. Buhary* (1956) 58 *N.L.R.* 78 *at* 81.

Court has held that an action for specific performance of an agreement to sell land is not an action in respect of land within the meaning of that provision.[1] On the basis of this decision an application for permission to sell land may well fall outside the ambit of actions in respect of land, in which case the Court where the property is situate may not in any event be a Court vested with jurisdiction to entertain such application.

Having regard to all these considerations it would appear that statute law, common law and considerations of practical advantage all combine in indicating the Court of the minor's residence as the appropriate Court to which application should be made for sale of property.

The order of the learned District Judge refusing permission on the ground that the Court of residence had no jurisdiction is therefore wrong in our view and we remit this case to the learned District Judge in order that he may consider the application for sale made to him.

We have in this case called for the record in an earlier Curatorship case concerning these minors to which reference has been made in the course of these proceedings. This case, No. 2327 Curatorship of the District Court of Negombo, has been instituted on 9th October 1962 and the maternal aunt of the minors has been appointed therein as curatrix over the property of the minors. Order nisi was entered on 9th October 1962 and was made absolute on 7th March 1963. Thereafter, on 4th September 1963 the present petitioner appears to have been substituted as curator, the earlier order appointing the curatrix having been cancelled. Certificate of curatorship was accordingly issued on 8th January 1964. Various steps have been taken on the basis of this order and there does not appear to be any entry in the record of that case showing that that order has at any time been vacated.

As long as that order stands, it would appear that there is no need for a fresh appointment of the petitioner as curator over the same minors. We accordingly formally set aside the order appointing a curator, leaving it to the learned District Judge to consider whether the present application for sale should have been made upon the basis of the earlier appointment and within the framework of the earlier case or whether the circumstances call for a fresh application and a fresh appointment, after cancellation of the earlier appointment.

After determining upon the manner in which the curator should be appointed and making the appointment accordingly, the learned District Judge will proceed to consider the application for permission to sell on the footing that his Court has jurisdiction to decide this matter.

SAMERAWICKRAME, J.—I agree.

Order set aside.

[1] *Pelis v. Silva (1958) 60 N. L. R. 289.*