1959 *Present :* **Weerasooriya, J., and K. D. de Silva, J.**

S. D. GUNASEKERA and others, Appellants, *and*
K. M. ALBERT, Respondent

S. C. 131—D. C. Galle, 5,711/L

Minor—Lease of immovable property belonging to him—Requirement of sanction of Court—Right of guardian to execute lease.

The guardian of a minor, even when he is the father of the minor, is not entitled to execute a lease of the minor's immovable property for a term exceeding one month without the prior sanction of the Court.

A party who obtains a deed of lease of a minor's immovablo property for a term exceeding one month from a person who happens to be the minor's natural guardian is not entitled to say that the deed was executed by the lessor in his representative capacity unless it is so stated in the deed itself.

APPEAL from a judgment of the District Court, Galle.

H. A. Chandrasena, for the plaintiffs-appellants.

H. W. Jayewardene, Q.C., with *E. A. G. de Silva*, for the defendant-respondent.

Cur. adv. vult.

August 6, 1959. K. D. DE SILVA, J.—

The 2nd and 3rd plaintiffs who are minors instituted this action on September 22, 1955 by their next friend the 1st plaintiff against the defendant for a declaration of title to the land called Keenakanda Waturawa in extent 7 acres and 38 perches and to recover possession of the said land together with damages in the sum of Rs. 9,365 up to May 1955 and thereafter at the rate of Rs. 300 per month until restoration of possession. Admittedly the 2nd plaintiff is entitled to 3/8th and the 3rd plaintiff to 5/8th shares of the land on the deeds P 3 to P 10 produced in the case. The learned District Judge, however, held that at the time of the institution of the action they were entitled to only three fourths. That is obviously due to an error and it was so conceded by Mr. H. W. Jayewardene Q.C. who appeared for the defendant respondent at the hearing of this appeal.

The plaintiffs alleged that in or about August, 1955 the defendant forcibly and unlawfully entered the land and started taking the produce of tea standing on it and continued to remain in unlawful possession of the land denying and disputing the plaintiffs' title to it. The defendant filed answer on December 5, 1955 averring that Alfred Dias Gunasekara who is the husband of the 1st plaintiff and the father of the 2nd and

3rd plaintiffs gave a lease of a half share of this land to him on deed D 1 of January 9, 1953, representing to him that he was entitled to that share. The defendant denied that he was in possession of the entire land. He further stated that the 2nd and 3rd plaintiffs were only nominal owners whereas Alfred Dias, his lessor, was the real owner of the interests leased on D 1. He also alleged in his answer that this action was instituted at the instance of Alfred Dias. He further stated that in terms of the lease D 1 he had improved the land and manured the tea plantation which cost him a sum of Rs. 2,500. In any event he claimed to be entitled to remain in possession of the interests leased on D 1 until the sum of Rs. 2,500 was paid to him. The case proceeded to trial on 12 issues. The learned District Judge held that a father had the right to look after the estates of the minor children according to the Roman-Dutch Law and that " there was nothing wrong in Gunasekera in leasing the land of his children. The possession of the defendant is lawful ". Accordingly he dismissed the plaintiffs' action with costs. The appeal is from that judgment.

Mr. Jayewardene contended that Alfred Dias being the father of the minor plaintiffs was their natural guardian and that the natural guardian was entitled to give a lease of the minors' property according to the Roman-Dutch Law. The right of a father, who is undoubtedly the natural guardian, of his minor children, to manage their property during their minority cannot be challenged. But the question is how far does that right extend. Is he entitled to execute leases of the minors' immovable property for a number of years without the prior sanction of the Court ? In my view he has no such right. In *Mustapha Lebbe v. Martinus* [1] it was held that a guardian is not entitled to alienate a minor's immovable property without the authority of the Court. In that case Layard C.J. observed " It is a clear principle of Roman-Dutch Law that a minor's immovable property cannot be alienated without a decree of a Court of competent jurisdiction. " In the case of *Girigoris-hamy v. Lebbe Marikar* [2] decided by a Divisional Bench, a mortgage executed by the father of the minors and their guardian appointed by the Last Will of their mother came up for consideration. The mother of the minors had specifically authorized her husband and the guardian she appointed over the children to deal with a particular land she bequeathed to her minor children in case of any necessity for the expenses of the minor children. The minors' father and the guardian mortgaged that land after the death of the testator. It was held that the mortgagors were not entitled to do so. That decision was based on the principle enunciated in *Mustapha Lebbe v. Martinus* [1]. Fisher C.J. observed in that case that by the Courts Ordinance of 1889 the charge of the minors' property vested in the District Court and the procedure of dealing with that property was set out in sections 582 and 535 of the Civil Procedure Code. In *Perera v. Perera* [3] Middleton J. stated " As

[1] *(1903)6 N. L. R. 364.* [2] *(1928) 30 N. L. R. 209.*
[3] *(1902) 3 Browne's Reports 150.*

it has been held by good authority that a notarial lease in Ceylon is an alienation *pro tanto*, I would hold that all leases granted on behalf of a minor, and requiring to be notarially witnessed, are void, unless sanctioned by the Court." In the same case Wendt J. stated that "any lease whatever for a term exceeding one month needs the Court's previous sanction for its validity." I would therefore hold that Alfred Dias was not entitled to execute the lease D 1. Accordingly no rights passed on it to the defendant.

There is another reason why Mr. Jayewardene's argument must necessarily fail. The defendant did, neither in his answer nor in his evidence, take up the position that Alfred Dias executed this lease in his capacity as the natural guardian of his minor children who were entitled to this property. In *Girigorishamy v. Lebbe Marikar* [1] it was urged that the father of the minors had the power to execute the mortgage bond in his capacity as the executor of his wife's Last Will. The learned Chief Justice rejected that contention because he said that the recitals in the bond showed that it was not executed in his capacity as executor. I do not think a party who obtains a deed of lease of the minor's immovable property for a term exceeding one month from a person who happens to be the minor's natural guardian is entitled to say that the deed was executed by the lessor in his representative capacity unless it is so stated in the deed itself. In the deed D 1 Alfred Dias did not purport to lease the property as the natural guardian of his minor children. On the contrary, according to the defendant, Alfred Dias represented to him that the property in fact belonged to him. That was not only a false representation but also a claim which was in fact adverse to the interests of his minor children. Therefore it cannot be argued that on D 1 Alfred Dias was acting as the natural guardian in the management of the property of his minor children. The possession of the property by the defendant on this lease must, accordingly, be held to be unlawful; nor do I think that the defendant is entitled to compensation for improvements—*Lebbe v. Christie* [2]. The 2nd and 3rd plaintiffs are therefore entitled to a declaration of title to the entire land and to ejectment of the defendant from it and to recover damages. The learned District Judge held that the plaintiffs were not entitled to any damages. That was based on his finding that the possession of the defendant was lawful. The case must therefore go back to the Court below to assess the damages. The appeal is allowed with costs in both Courts. The learned District Judge is directed to enter decree in favour of the 2nd and 3rd plaintiffs in terms of this judgment after the damages are assessed.

WEERASOORIYA, J.—I agree.

Appeal allowed.

[1] *(1928) 30 N. L. R. 209.*

[2] *(1915) 18 N. L. R. 353.*