

1951

Present: Nagalingam J. and Swan J.

HAMID, Appellant, and MARIKAR *et al.*, Respondents

S. C. 14—D. C. Colombo, 4,851 (P)

Mortgage—Decree entered on bond—Objection that bond was void cannot be taken thereafter.

Lunatic—Unrepresented by guardian ad litem—Validity of decree entered against him—Contract of person adjudged lunatic—Made during lucid interval—Is such contract valid?—Civil Procedure Code (Cap. 86), ss. 476 et seq., 501, 555 et seq., 578.

Where a mortgage bond is put in suit a decree entered thereon by a Court of competent jurisdiction would be binding on the mortgagor and those claiming through him, even if the mortgage bond was in fact null and void. The objection that the bond is a nullity should be taken before judgment is entered. Once decree is entered the mortgage creditor's rights and the mortgage debtor's liability must be considered as based on the decree and not on the bond; it cannot thereafter be contended that if the bond was null and void a decree entered thereon must also be null and void.

A decree entered against a person of unsound mind who was unrepresented by a guardian *ad litem* is good and binding against him until it is set aside; the failure to have a guardian *ad litem* appointed is at the most an irregularity.

Obiter: A contract of a lunatic while the adjudication of lunacy remains unreversed would be valid if it can be shown that at the time he entered into the contract he was of sound mind and understood the nature of the transaction.

APPEAL from a judgment of the District Court, Colombo.

One Razeena Umma was adjudged to be of unsound mind and her husband was appointed manager of her property. While this order of adjudication remained unreversed, Razeena Umma, assisted by her husband mortgaged certain property without obtaining the permission of Court. The mortgage bond was put in suit and at the execution sale the mortgaged premises were sold and purchased by X. In the hypothecary action Razeena Umma was not represented by a guardian *ad litem*. In the present partition action the title of X to the property which he had purchased at the execution sale was challenged by the heirs of Razeena Umma.

M. Markhani (N. E. Weerasooria, K.C., with him), for the plaintiff appellant.—The District Judge has taken the view that the mortgage decree was voidable only and not null and void. This is incorrect. A decree against an unrepresented lunatic is a nullity. In *Khiarajmal v. Daim* ¹ the Privy Council held that, where a minor was sued without a guardian *ad litem* being appointed, the decree and the court-sale that took place in execution of the decree were absolutely null and void, because in the absence of the proper representation of the minor the Court had no jurisdiction. In *Moothetuth Kanari v. Hari Shenoy* ² it was held that a lunatic stands in the same position as a minor, and therefore a sale of a lunatic's properties in execution of a decree entered against him in a suit in which he was not properly represented by a guardian *ad litem* is a nullity and the lunatic can resist an action for possession without seeking to set aside the sale. In *Hakimullah v. Nobin Chandra Barua* ³, it was held that a sale in execution of a decree obtained against a lunatic who had not been properly represented is without jurisdiction and void and not merely voidable. The fact that it was not brought to the notice of the Court that the defendant was a lunatic left the Court entirely without jurisdiction.

As regards the order made in the mortgage action confirming the sale, it is submitted that section 344 of the Civil Procedure Code does not enable a person to raise questions of title in execution proceedings—*Peris v. Silva* ⁴. The Court had no power to re-adjudicate on the question of lunacy on the application of the purchaser under the decree. The proper procedure to be adopted when a lunatic is alleged to have recovered is laid down in section 578 of the Civil Procedure Code.

D. Abayawickrema, for the 1st defendant respondent.

H. V. Perera, K.C., with *N. Kumarasingham* and *S. Sharvananda*, for the 2nd defendant respondent.—The Indian cases cited have no application. Roman-Dutch law applies on the question of the capacity of a lunatic to contract. Under the Roman-Dutch law a lunatic can enter into a valid contract in a lucid interval—*Wessels: Contract* Vol. I, p. 236, section 697; *Voet* 27—10—3; *Wille: South African Law*, 2nd ed., p. 104. There is abundant evidence to show that the mortgage was executed in a lucid interval.

As regards the decree, section 501 of the Civil Procedure Code places lunatics in the same position as minors. Non-representation of a minor does not render the decree void even if a curator had been appointed under section 582. The decree is binding until set aside—*Muttumenika v. Muttumenika* ⁵; *Rupasinghe v. Fernando* ⁶. In *Somasunderam v. Ukku* ⁷ it was held that a decree entered against an unrepresented minor may be set aside under section 480 of the Civil Procedure Code. In *Thiagarajah v. Balasooriya* ⁸ it was held that no *restitutio in integrum* lies where action under section 480 could be taken.

¹ (1905) L. R. 32 Ind. Ap. 23.

² A. I. R. (1917) Madras 616.

³ A. I. R. (1915) Calcutta 19.

⁴ (1918) 21 N. L. R. 117.

⁵ (1915) 18 N. L. R. 510.

⁶ (1913) 20 N. L. R. 345.

⁷ (1943) 44 N. L. R. 446.

⁸ (1939) 14 C. L. W. 91.

M. Markhani, in reply.—In view of the statutory provisions contained in the Lunacy Ordinance (Cap. 177), section 69 of the Courts Ordinance, and Chapter 89 of the Civil Procedure Code, English cases are applicable on the question of the capacity of an adjudged lunatic to contract. A person so adjudged cannot contract—*re Walker*¹. Even if Roman-Dutch law is applicable and the mortgage is regarded as valid, still, the cause of action is now merged in the decree. The decree is a nullity for want of jurisdiction. The Indian cases which interpret the relevant sections of the Indian Civil Procedure Code are exactly in point. The corresponding sections of the Ceylon Civil Procedure Code are similar. The view expressed by de Sampayo J., in *Muttumenika v. Muttumenika*² is not correct. That view was based on *Hukm Chand's Res Judicata* which followed some American decisions. The Privy Council decision in *Khiarajmal v. Daim*³ was not brought to the notice of de Sampayo J.

January 18, 1951. SWAN J.

Cur. adv. vult.

The plaintiff-appellant instituted this action for the sale, under the provisions of the Partition Ordinance, of premises No. 84, Silversmith Street, Colombo. He stated in his plaint that he and his brother, the 1st defendant, had become entitled thereto in equal shares upon the death of their sister, Razeena Umma. The second defendant was made a party merely to give him notice of the action. It was alleged in the plaint that he was in unlawful occupation of the premises as a trespasser. I have no doubt that the plaintiff knew all about the 2nd defendant's assertion of title to the premises. In fact I would characterize this action as an improper use of the provisions of the Partition Ordinance. The plaintiff and the 1st defendant whose interests were identical should have sued the 2nd defendant for declaration of title to the premises in question.

For the purposes of this appeal it is unnecessary to recite the entire chain of title set out by the plaintiff. But it is interesting to note that the plaintiff himself was at one time the owner, having purchased the property under deed No. 2069 dated October 26, 1899 (P4). About ten years later he gifted it to his sister, Razeena Umma, by deed No. 2057 dated May 27, 1909 (P5).

In case No. 1,079 of the District Court of Colombo Razeena Umma was adjudged to be of unsound mind and incapable of managing her affairs. The application was made by the appellant and his mother, the respondents being Razeena Umma and her husband. The application was opposed, but after inquiry the learned District Judge held that Razeena Umma was of unsound mind and appointed the appellant to be the manager of her property, and one C. M. U. Lebbe the guardian of her person. There was an appeal against the appellant's appointment as Manager. Ultimately this Court by its order dated September 21, 1920, appointed Razeena Umma's husband to be Manager.

While this order of adjudication remained unreversed Razeena Umma, assisted by her husband, by deed No. 788 dated February 10, 1930, mortgaged the property in question to one Blanche Constance Fernando. The bond was put in suit in case No. 49,745 of the District Court of Colombo and, under the decree, entered therein, the premises were sold by public auction and purchased by the 2nd defendant's father.

¹ (1905) 1 Ch. 160.

² (1915) 18 N. L. R. 510.

³ (1905) L. R. 32 Ind. Ap. 23.

Thereafter the purchaser, having become aware that the mortgagor had at one time been adjudged a lunatic, moved the Court either to set aside the sale or to ratify Razeena's act. After inquiry the learned District Judge by his order dated February 12, 1934, held that "the bond was validly executed, that all proceedings taken on the bond including the action and decree were valid". I find that in the course of his order the learned judge has stated that "from the affidavit of the husband it would appear that he did not think it necessary to obtain the permission of Court because at the date the bond was executed his wife had fully recovered".

At the trial of this case it was urged on behalf of the appellant that the bond executed by Razeena Umma was null and void and the order of the District Judge holding that it was validly executed and that the proceedings thereon were valid was made without jurisdiction. On both these matters the learned trial Judge held in the appellant's favour but he dismissed the action because the mortgage decree under which the property was sold had not been set aside. In his view, with which we agree, even if the bond was null and void a decree entered thereon by a Court of competent jurisdiction would be binding on Razeena Umma and those claiming through her.

Whether the mortgage bond entered into by Razeena Umma was null and void is a matter of interest. If it was executed by her in a lucid interval it would, under the Roman Dutch Law, be considered valid. Under English Law, however, once a person is adjudged to be of unsound mind and incapable of managing his affairs, any contract entered into by him, while that order stands, is null and void—see *In Re Walker*¹. In India the position is the same. Under the Roman Dutch Law, however, a contract made by a person, declared by a competent court to be a lunatic and for whom a curator has been appointed, would be valid if it was made during a lucid interval. That was the view taken by the Transvaal Supreme Court in the case of *Prinsloo's Curators v. Crafford and Prinsloo*². In that case Prinsloo had, by order of Court, been declared to be of unsound mind and curators were appointed in 1903. In 1905 he married. It was proved that he was then no longer insane. It was contended that he could not contract while the order was in force. The court, however, held that an order declaring an alleged lunatic to be of unsound mind was not a judgment *in rem* but only operated, while in force, so as to create a rebuttable presumption that he was a lunatic. Hence a contract by a lunatic while an adjudication of lunacy remains unreversed would be valid if it can be shown that at the time he entered into it he was of sound mind and understood the nature of the transaction. Counsel for the appellant has made no attempt to show that a Muslim lunatic stands in a different position from a person to whom the Roman Dutch Law applies.

Let us now consider the effect of an order made under Cap. XXXIX of the Civil Procedure Code. When after inquiry the court finds a person to be of unsound mind and incapable of managing his affairs it is required to appoint a Manager for the lunatic's estate. Sec. 571 defines the

¹ (1905) 1 Ch. 160.

² (1905) T. S. 669.

powers of the Manager. Sec. 572 provides that the Manager should file an inventory of the lunatic's property and submit annual accounts. Sec. 574 provides that any relative of the lunatic may sue the Manager for an account. Sec. 576 provides for punishment of the Manager for neglect or refusal to account. In due course we come to Sec. 578 which provides for a further inquiry when the lunatic is alleged to have recovered. This inquiry may be initiated by the erstwhile lunatic himself or by any other person acting on his behalf or having or claiming any interest in respect of his estate. But the object of the inquiry appears to be not to obtain a declaration that the lunatic has regained his sanity but an order for his estate to be delivered over to him. If in point of fact an adjudged lunatic on recovering his sanity takes back or is given back his property there would be no need for an inquiry under Sec. 578.

I do not think it necessary to pursue the matter any further because for the purposes of this appeal it is only of academic interest. Assuming that the bond given by Razeena Umma to Blanche Constance Fernando was a nullity, that objection should have been taken before judgment was entered thereon. Once decree was entered the mortgage creditor's rights and the mortgage debtor's liability must be considered as based on the decree and not on the bond. A decree draws a curtain, so to speak, on the anterior rights and liabilities of the parties. One cannot look behind the curtain till the decree is set aside. I cannot agree with the contention of Counsel for the appellant that if the bond was null and void a decree entered thereon would also be null and void.

The last matter to determine is whether the decree against Razeena Umma was bad because she was not represented in the action by a guardian *ad litem*. We are of the opinion that if she should have been represented by a guardian for the action, the omission at best is an irregularity and that the decree until set aside is good and binding. Chapter XXXV of the Civil Procedure Code deals with actions by and against minors and persons under other disqualification. Towards the end of that chapter is Sec. 501 which states that "the provisions contained in this chapter shall, *mutatis mutandis*, apply in the case of persons of unsound mind adjudged to be so under the provisions of this Ordinance or under any law for the time being in force". In other words, in the matter of representation, a minor and a lunatic stand in the same position. In *Muttu Menika v. Muttu Menika*¹ de Sampayo J. with whom Shaw J. agreed, held that a judgment against a minor who was unrepresented by a guardian *ad litem* was at the most an irregularity, and the judgment would stand as a valid adjudication against the minor until reversed and that it would not be open to a collateral attack. In the case of *Rupasinghe v. Fernando*² de Sampayo J., sitting alone, considered the matter again and stated that he saw no reason to think that the opinion he expressed in the earlier case was wrong. My learned brother and I are in complete agreement with the view taken by de Sampayo, J., in the two cases referred to above. In the result the appeal fails and we would dismiss it with costs.

Appeal dismissed.

NAGALINGAM J.—I agree.

¹ 18 N. L. R. 510.

² 20 N. L. R. 345.