1962 *Present :* **Weerasooriya, S.P.J., and H. N. G. Fernando, J.**

MUDIYANSE, Appellant, *and* PEMAWATHIE *et al.*, Respondents

S. C. 172—D. C. Badulla, 13,288

Minors—Sale of their immovable property by curator —Sanction of Court obtained—Minors not represented by guardian ad litem—Invalidity of the sale—Civil Procedure Code, ss. 6, 8, 476, 479, 480.

A land belonging to certain minors was sold on 22nd January, 1952, by the minors' step-father who was appointed by Court as curator. Sanction of Court for the sale was obtained in the curatorship proceedings, upon the allegation that the property was held by the minors in trust. There was no appointment, however, of a guardian ad litem, and the minors were at no stage made parties. Nor did the Court give any consideration to the question whether the sale was to the advantage of the minors. In the present action instituted in 1956 the minors, by their mother as next friend, sued for a declaration of title to the land.

Held, that, even though no order discharging the order for the sale of the land was previously sought under section 480 of the Civil Procedure Code, the Court had jurisdiction, in the present action, to declare null and void the sale.

APPEAL from a judgment of the District Court, Badulla. The facts appear from the judgment of Fernando, J.

Nimal Senanayake, for 3rd defendant-appellant.

S. Sharvananda, with *Bala Nadarajah*, for plaintiffs-respondents.

Cur. adv. vult.

December 21, 1962. WEERASOORIYA, S.P.J.—

I have seen the judgment prepared by my brother in this case, and I agree that for the reasons stated by him the evidence fails to establish collusion between the 1st and 2nd defendants in obtaining the order of Court for the sale of the property of the minors in D. C. Badulla Case No. G. 1770.

I also agree that the aforesaid order was void and of no effect in that it was made in proceedings to which the minors (the plaintiffs in the present case) were not parties. Section 476 of the Civil Procedure Code requires that every action by a minor shall be instituted in his name by an adult person, designated as next friend, while section 479 provides that where the defendant to an action is a minor he shall be represented by a guardian to be appointed by the Court. Where an action in which a minor is plaintiff or defendant proceeds without section 476 or section 479 being complied with, it may be possible to treat the non-compliance as an irregularity, as was done in *Muttu Menika v.*

Muttu Menika[1] and *Rupasinghe v. Fernando*[2]. Those two cases and the more recent case of *Hamid v. Marikar et al.*[3] are, therefore, distinguishable from the present case, where the order sought to be declared null and void was obtained in proceedings to which the minors concerned were at no stage parties. The difficulty that sometimes arises in defining the precise line which separates an irregularity from a defect which makes the order a nullity is discussed by Lord Greene, M.R., in *Craig v. Kanseen*[4], and he held that an order which can properly be described as a nullity is something which the person affected by it is entitled *ex debito justitiae* to have set aside. That the order made in D. C. Badulla Case No. G. 1770 falls into such a category does not, I think, admit of any doubt. The application in that case constituted an action as defined in section 6 of the Civil Procedure Code. Section 8 enacts that save and except actions in which it is specially provided that proceedings may be taken by way of summary procedure, every action shall commence and proceed by way of regular procedure as prescribed under the Code. The prayer in the plaint was for a certificate of curatorship to be issued to the petitioner (the father of the minors and the 1st defendant in the present action) authorising him to sell the land to the 2nd defendant in settlement of a money decree said to have been entered against the 1st defendant and in favour of the 2nd defendant. The basis of the prayer was that the property sought to be sold had been conveyed to the minors by the 1st defendant on deed No. 120 dated the 10th July, 1945, and that the conveyance was in trust. The deed itself has been produced in the present action marked P2 and on the face of it is an outright transfer for valuable consideration. The substantial relief claimed was, therefore, a declaration that the minors held the land in trust for the 1st defendant for, on such a declaration being granted, the order authorising the sale of the property as prayed for would have followed as a matter of course. Hence the order for the sale of the property was tantamount to a finding by Court that the property was held by the minors in trust. That such an order should have been made without any notice to the minors, and on the bare assertion of the 1st defendant that the property was held by them in trust, shows a high degree of remissness on the part of the Judge who dealt with the application. I can see nothing in the Civil Procedure Code which countenances the institution of proceedings otherwise than by way of regular procedure where the relief claimed is for a declaration that property is held by minors in trust for a third party. Even had the application been made by way of summary procedure it would have been necessary to name the minors as respondents to it. In my opinion, the proceedings in D. C. Badulla Case No. G. 1770 were void *ab initio*, and I do not think that section 480 of the Civil Procedure Code takes away the jurisdiction of the District Court in the present action to declare void the order made in that case for the sale of the property.

I agree that the appeal should be dismissed with costs.

[1] *(1915) 18 N. L. R. 510.*
[2] *(1918) 20 N. L. R. 345.*
[3] *(1951) 52 N. L. R. 269.*
[4] *(1943) 1 A. E. R. 108.*

H. N. G. FERNANDO, J.—

This action arose out of certain transactions which had taken place about ten years previously. In 1945, the first Defendant gifted the land which is the subject of this action to his three minor step-children. Then in 1952 he made an application No. G. 1770 to the District Court of Badulla in which he alleged that the conveyance of 1945 had been made to the minors in trust and prayed for a certificate of curatorship to be issued to him authorising him to sell the property to one Ukku Banda in satisfaction of a debt alleged to be due from him to the said Ukku Banda in D. C. Badulla Case No. 8873. The District Judge allowed the application and authorised the sale to Ukku Banda for a sum of Rs. 2,500, directing in his order that the proceeds of sale should be deposited to the credit of the Case No. G. 1770. The land was thereafter conveyed to Ukku Banda by deed No. 15212 of 22nd January 1952, and Ukku Banda conveyed it to his son Mudiyanse on 22nd February 1952.

In the present action instituted in 1956, the three minors sued by their mother as next friend for a declaration of title to the land, joining as parties their father (1st Defendant), Ukku Banda (2nd Defendant), Mudiyanse (3rd Defendant) and another person in whose favour Mudiyanse executed a mortgage in 1955. The learned District Judge who tried this action has found that the 1st and 2nd Defendants acted in collusion in securing the order for sale. The ground for this finding was, principally, that the curatorship proceedings of 1952 were instituted by the 1st Defendant with the knowledge of the 2nd, and that the proceeds of the sale of the land were not brought into Court in accordance with the Court's order. But although there was such an order, it was inconsistent with the terms of the application to sell, which were " to sell the land for a sum of Rs. 2,000 in satisfaction of a debt due to Ukku Banda from the 1st Defendant. " Having regard to the terms and purpose of the application, the 2nd Defendant may well have thought that the order for sale justified his acceptance of the transfer from the 1st Defendant *in satisfaction of the alleged debt.* There are other circumstances which were also taken into consideration by the District Judge in the present action when he found that there had been fraud and collusion. But if in law the order for sale has to be regarded as valid and effectual, I would find it difficult to conclude that the conduct of the 2nd Defendant in accepting some advantage under such an order could have been held fraudulent or collusive. Even if some deceit had been practised on the Judge to induce him to make the order for sale, the evidence does not suffice to establish that the 2nd Defendant participated in such deceit. Although it was proved that the 2nd and 3rd Defendants had knowledge of the application, there was no evidence to prove any knowledge, on their part, of any deceit practised to obtain the order for sale, or of the falsity of the matters stated in that application. In brief, fraud or collusion on the part of the Defendants was not strictly proved.

In the present action, the trial Judge declined to answer an issue whether the sanction for sale given by the Court in the curatorship case was void on the ground "that the application was made in a manner not provided by law and without the appointment of a guardian ad litem." His reason for this course was that he did not wish to take the responsibility of holding that the order authorising the sale was void. But since the transfer of the minor's property was made on the purported authority of the order in the curatorship proceedings, it became the duty of the trial Judge to examine the validity of the order.

The following matters have become clear from the record of the proceedings in the curatorship case, and from the evidence of the Secretary of the District Court and of the mother of the minors :—

(1) The mother was unaware of the application for the order to sell ;

(2) No respondent was named in the application ;

(3) The Court did not appoint a guardian ad litem to represent the minors.

The principle that an alienation of a minor's property without the sanction of the Court is void has been recognised in a series of decisions of this Court. I readily adopt the observations of Gratiaen, J., as to the powers and responsibilities of the Court :—

> "The powers and responsibilities of a Court as the traditional 'upper guardian of minors' under the Roman Dutch Law have received statutory recognition in section 69 (1) of our Courts Ordinance whereby every District Court is entrusted with the care and management of a minor's estate situated within its jurisdiction. Chapter 40 of the Code provides for the appointment of curators to take charge of such property under the general supervision of the Court. No express provision is made for granting authority to a curator to sell a minor's property, but it has always been assumed (and rightly) that such authority may be given (subject to well-established limitations) in appropriate cases. Cayley, J., in *Re Hider, ex parte Corbet* (1876 3 S. C. C. 46) has clarified the rules which should guide a Judge in exercising his jurisdiction in such cases. When an application is made by a curator for sanction to sell or encumber property belonging to a minor, 'there should be a decree . . . . the minor being represented by a guardian-ad-litem for the purpose. The facts should then be specially adjudicated upon, and a formal order entered. There must in fact be, as laid down in *Voet* 27 : 9 : 6, a *causae cognitio*, a *probatio*, and a *decretum*.' The Court, before sanctioning a sale of property which is already vested in the minor, must be satisfied on proper material that the proposed transaction is 'manifestly to his advantage'." (*Cassaly v. Buhary*, 58 N. L. R. at 80).

In the present case, the Court did not give any consideration to the question whether the sale was to the advantage of the minors. More serious from the legal point of view was the failure to appoint a guardian ad litem, for the consequence was that the minors, against whom the applicant sought the order for sale, were not before the Court at all. In the result the Court made an ex parte order, which Chapter 40 of the Code did not empower it to make. The situation is no different from that in which a decree is entered without summons having been served on a Defendant, so that the order for sale is void, just as much as such a decree would be (50 N. L. R. 289).

Relying on certain decisions, counsel for the purchaser has argued that the order for sale was only voidable, and could not be disregarded until it is discharged by order made under section 480 of the Code. I do not agree that in empowering the Court to discharge an order made in proceedings affecting a minor, section 480 has the implication that the order must be regarded as valid until so discharged. Section 479, which requires the appointment of a guardian to be made, is on its face mandatory, and its mandatory character is not affected by the provisions of section 480. An opinion, which may appear contrary to mine, was expressed by de Sampayo, J., in two cases (*Muttumenike v. Muttumenike* [1] and *Rupasinghe v. Fernando* [2]). The first of these was a case in which the plaintiffs sought to avoid the effect of a decree against them which had been entered during their minority; but the same plaintiffs had been *plaintiffs* in the former action. That is at least a ground upon which the case may be distinguished from the one before us, for the question whether the provisions of section 479 are mandatory did not there arise. In the second of these cases, the competition was between the purchaser at a sale in execution against a person who was a minor, and a purchaser from that person (presumably after he attained majority). What was held here was that the sale in execution could not be the subject of a collateral attack, so long as it had not been discharged by an order under section 480. With much respect it seems to me that the eminent Judge should in the second case have noticed that its facts were not the same as those of the former. In any event this decision too is distinguishable from the present case where the previous conveyance is being attacked, not collaterally but by an action brought on behalf of the minors. The recent decision in *63 New Law Reports page 569* is not in point. It dealt with an action which had been brought *by a minor* without a next friend, and held only that the action would not be " taken off the file " under section 478, if the minor plaintiff had attained majority during the course of the action. The Chief Justice makes it quite clear in his judgment that his observations therein apply only to the particular situation under consideration, namely an action brought by a minor which was not in accord with section 476 of the Code. The judgment does not even indirectly refer to the provisions of sections 479 and 480.

[1] *(1915) 18 N. L. R. 510.* [2] *(1918) 20 N. L. R. 345.*

In my opinion, the enactment of section 480, giving a Court power to discharge an order made in proceedings in which a guardian had not been appointed to represent a minor, did not take away the power of a Court to declare the order void, whether by way of *restitutio in integrum* or in a vindicatory action. In the South African case of *Breytenbach v. Frankel* [1], the dispute was between the lessee of a minor's property (leased without judicial authority) and a transferee from the minor. The Court held, for reasons which are not relevant to the present case, that the transferee could not challenge the validity of the lease. But as to the position of the minor himself, the principles set out in *Sande* and *Voet* were approved :—

" If the immovable property of a pupil, minor, or madman is sold without good grounds for alienation and without an order of Court, the alienation is *ipso jure* void, nor does the *dominium* pass from the pupil or minor. (*Sande*, Part I, Ch. 1. section 79.)

" A pupil or minor whose landed property has been alienated in spite of a prohibition retains an *actio in rem*, that is a vindication which he can maintain not only against the purchaser, but also against any third person who has possession. (*Ibid.* section 80.)

" These are the cases where the immovable property of a minor can be alienated without an order of Court, and the other ceremonies mentioned above. With these exceptions, if an alienation is made, however unprejudicial it may be to the minor, it is void *ipso jure* as has been said above. (*Ibid.* Section 114.)

" It seems unquestionable that restitution would not be necessary to a minor, but that the ordinary vindicatory action could be brought against the purchaser as possessor, because no one's property can be transferred to another by someone else at his pleasure. (*Voet*, 4.4.16.)

" And the distinction drawn by Voet and Sande between the two actions is a matter of substance, and not merely of form. For where the vindicatory action lies, the minor is entitled to succeed on mere proof that his property was alienated by his guardian without the sanction of the Court ; whereas, as pointed out by the learned Judge-President in his judgment, if the action is one for *restitutio in integrum*, the onus lies on the minor to prove damage. We were referred to authorities to the effect that it is necessary for a minor to come to the Court for restitution in cases where his guardian has entered into contracts on his behalf. But in my opinion, those authorities apply to contracts only, and have no reference to the case of an alienation of immovable property. Such an alienation is dealt with on entirely different lines, and, as I have pointed out, there is a great mass of authority to the effect that such an alienation is of no effect, and that there is no necessity, therefore, for the minor to apply for restitution." (*Breytenbach v. Frankel*—per Solomon, J., at page 400).

[1] *1913 A. D. 390.*

Relying on these authorities, I am satisfied that the present action for vindication, being brought on behalf of the minors by their next friend, their mother, is maintainable, even though no order was previously sought under section 480 of the Code. By establishing the invalidity of the Court's order for sale of the minor's property the Plaintiff succeeded in establishing that the conveyance of 1952 did not transfer to the Defendants the title to the property, and that title remained in the minors. The action had therefore to succeed, and the appeal is dismissed with costs.

Appeal dismissed.