

Sena Ana Hamido Mohiyadeen and others - - - - *Appellants*

v.

Kuna Mana Nana Muna Kristnappa Chetty and another - - *Respondents*

FROM

THE SUPREME COURT OF CEYLON.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL DELIVERED THE 17TH NOVEMBER, 1924.

Present at the Hearing :

LORD BUCKMASTER.

LORD DUNEDIN.

LORD SUMNER.

[*Delivered by* LORD BUCKMASTER.]

Their Lordships do not desire to hear the respondents in this case because they have formed a clear opinion on the merits of the appeal.

The case arises in the following way: One Sudakatulla Hadjar, a Muhammadan merchant, died intestate in May, 1918. He left him surviving his mother, his widow, two sons, who were then both infants, and are now appellants, and a daughter. He possessed some property in Ceylon and it is alleged he also possessed property in India. Four days before his death he executed, in favour of his two infant sons, a deed of gift of the property in Ceylon, which is the subject of the present proceedings. It is not suggested that there was any reason or consideration to support this deed at all; it was a purely voluntary gift. He died on 14th May, and proceedings were instituted shortly afterwards for the administration of his estate in which it was alleged that the assets were Rs. 9,000 and the debts were Rs. 50,000, but no reference was made to the property which he is said to have possessed in India. Those proceedings were instituted on 21st August, 1918,

and on 17th June, 1919, an application was made by one Seyado Mohammado that he might be appointed curator and guardian of the infants and for liberty to execute a mortgage of Rs. 30,000 for the purpose of raising a total of Rs. 34,000 which he had induced the creditors of the intestate to accept as a composition in respect of their debts, the amount of the composition being, it is stated, some 60 per cent. of the whole. The infants were not made parties to these proceedings by their guardian *ad litem*, but they appear to have been present in court and the Judge asked them questions. What was the character of the questions that he asked them it is impossible to know, but he states that they appeared to be intelligent and understood what took place. He at any rate made the order. He appointed Seyado Mohammado curator and he authorised him in general terms to mortgage the estate. Their Lordships think that it is regrettable that the schedule to the order on that judgment does not state in more specific terms the particular mortgage which Seyado Mohammado was in fact authorised to execute, but there has never been any question but that it was the mortgage which was in fact ultimately executed in favour of two moneylenders who advanced the necessary sum at 12 per cent. interest. The Rs. 30,000, together with a certain sum of Rs. 4000, which was raised from other parts of the estate, was used for the purpose of paying off the whole of the creditors and the estate is now free, but it is alleged, on behalf of the appellants, that it has been so freed at their expense; that their property has been used for the purpose and consequently that the mortgage executed in the circumstances mentioned cannot stand. This claim they bring forward in defence to the present suit, which has been instituted by the mortgagees for the purpose of realising the mortgage by sale. The question is whether that defence can be established. The real ground upon which Mr. Clauson bases his contention on behalf of the appellants is this. He says that by virtue of the Civil Code, Section 480, Ordinance No. 2 of 1889, minors must be represented by a next friend or guardian in any action or any application before the Court; that in this particular case the infants were not so represented; that consequently the whole order was outside the jurisdiction of the Court; that the infants were not bound and were not even under any necessity to take steps to have the order rectified; but were in a position to assert its invalidity whenever the order was invoked against them. Whatever may be said as to the merits of such a contention there is very great difficulty in Mr. Clauson's way. The point was never raised either in the Court of first instance or in the Court of Appeal, from whose judgment this appeal proceeds, and it is at least a point of very considerable importance, for it is not disputed that according to the ordinary common law of Ceylon a curator would be at liberty to make such an application on behalf of the infants unless it appeared that he was acting partly for his own benefit, in which case the infants would

require to be represented by a special guardian. It may be that it was the view taken by the advisers of the appellants in the Court below that that law still remained and that the Code of Civil Procedure merely engrafted upon the law the new provision in cases to which it had no direct application. However that may be, their Lordships will not entertain a question of such gravity as determining whether the Code of Civil Procedure has absolutely altered the common law of Ceylon, when the point has never been raised or argued in either of the Courts whose judgment is challenged. If that be disposed of there really remains nothing except this: that the property dealt with being the infants', it was an irregular proceeding to deal with it in such a manner that the whole of their property was used for the purpose of paying debts for which they would not be liable. But it must be remembered that the property had been the subject of a gift made four days before the intestate's death and, as one of the learned Judges points out, in the circumstances no delivery of possession could possibly have taken place and it could therefore by decided authority be held to be bad. But whether that be so or not it must be obvious that there are circumstances attaching to such a gift which would render it liable to challenge, when the assets of the estate as disclosed were insufficient without its aid to meet the claims of the creditors.

Their Lordships feel that the judgment was one in the interests of all parties to the estate, because it obtained satisfaction of all the debts by the payment of 60 per cent. of the assets, and the fact that the assets in India were omitted does not affect the advantage gained.

Their Lordships think that this appeal fails and that it should be dismissed with costs; but, so far as it asks for a release of the personal order made against the infants, it is not contested and that part of the order may consequently be discharged, but that will not affect the general costs which the appellants must pay.

In the Privy Council.

SENA ANA HAMIDO MOHIYADEEN AND OTHERS

vs.

KUNA MANA NANA MUNA KRISTNAPPA
CHETTY AND ANOTHER.

DELIVERED BY LORD BUCKMASTER.

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