1885

PRAMATHA BHUSANA DEB ROY v. DOORGA CHURN BHATTACHARJI.

Speaking for myself, I may say that I would gladly have come to a different conclusion, because I think that disputes between zemindars as to the right to collect rents ought not to be brought into the inferior Criminal Courts in this country. But applying the ordinary rules of construction, I do not see how we can arrive at any other conclusion than that the Legislature has not had the intention of altering the law as settled by the decisions of this Court. The rule must be discharged.

Rule discharged.

ORIGINAL CIVIL.

Before Mr. Justice Norris.

BHUTNATH DEY AND ANOTHER (PLAINTIFFS) *v.* AHMED HOSAIN AND OTHERS (DEFENDANTS.)

1885
April 8.

Mahomedan Law—Guardian—Minor—Infant—Guardian of property—Mortgage—Co-heirs—Infants' liability.

In May 1881, certain co-heirs of a deceased Mahomedan mortgaged a portion of the property which had descended to them in common with others, then infants, as heirs of the deceased. The mortgage was raised for the purpose of paying off arrears of rent of a *putni taluk* which was a part of the property inherited from the deceased. There was no evidence to show that there were any other necessary expenses connected with the deceased's estate which had to be met, nor what that estate consisted of, nor whether the arrears of rent could or could not have been paid without having recourse to the mortgage. According to the Mahomedan law the mortgagors were not the guardian of the property of the infants.

Held, that the shares taken by the infants as heirs of the deceased were not bound by the mortgage.

THIS was a suit on a mortgage of certain lands and premises situated partly in Calcutta and partly in the district of the 24-Pergunnahs. The property in question formerly belonged to one Sheik Ahmed Ally Ostagur, a Mahomedan of the Sunni sect, who died in August 1879, leaving him surviving his mother Ameenah Bibee, two sisters Sahuran Bibee and Surjein Bibee, his first wife Arzu Bibee, three children by his first wife, namely, Ahmed Hosain, Rahimunessa Bibee and Banni Jan Bibee, and one son, Palk Jan, by his second wife who predeceased him.

1885

BHUTNATH DEY v. AHMED HOSAIN.

The mortgage in question was executed on the 12th of May 1881, in favour of the plaintiff by Arzu Bibee, Ahmed Hosain and Rahimunessa to secure the repayment of Rs. 2,000, and interest at 12 per cent. per annum. It was alleged in the plaint that the Rs. 2,000 was borrowed for the purpose of paying the rent of a *putni taluk* situate in the district of Jessore, which had formerly belonged to Sheik Ahmed Ally Ostagur and which descended at his death to his heirs. The only question at issue in this suit was as to the liability of Banni Bibee and Palk Jan, both of whom were infants at the institution of the suit.

Mr. *Douglas White* for the plaintiff.

Mr. *Henderson* for the defendant Banni Bibee.

Mr. *Sale* for the defendant Palk Jan.

The judgment of the Court was as follows:—

NORRIS, J.—This was a mortgage suit, and the facts of the case were as follows:—

One Sheik Ahmed Ally Ostagur died in August 1879, leaving him surviving as his heirs, heiresses and legal representatives according to Mahomedan law, his widow Arzu Bibee, his three children by her, *viz.*, the defendants Ahmed Hosain, Rahimunessa Bibee and Banni Jan Bibee, his son by a wife who had predeceased him, *viz.*, the defendant Palk Jan and his mother Ameenah Bibee.

On the 12th May 1881, Arzu Bibee, Ahmed Hosain, and Rahimunessa Bibee mortgaged three plots of land in the 24-Pergunnahs, and one plot in Calcutta to the plaintiffs to secure the repayment of Rs. 2,000, with interest at 12 per cent.

The plot of land in Calcutta formed part of the estate of Sheik Ahmed Ally Ostagur; the plots in the 24-Pergunnahs belonged to Arzu Bibee. Subsequently to the mortgage Arzu Bibee conveyed her interest in one of the plots in the 24-Pergunnahs to Ameenah Bibee, who died in February or March 1882, leaving her surviving as her heirs and heiresses according to Mahomedan law, the defendants Ahmed Hosain, Rahimunessa Bibee, Banni Jan Bibee and Palk Jan.

Arzu Bibee died in May 1883, leaving her surviving as her heir and heiresses, and legal personal representatives her three children the defendants, Ahmed Hosain, Rahimunessa Bibee, Banni Jan Bibee, and her mother the defendant Chand Bibee.

The mortgage of 12th May 1881, purported to be executed for the purpose of raising money to pay the arrears of rent then due in respect of a certain zemindari belonging to the estate of Sheik Ahmed Ally Ostagur, situate in Jessore, for the recovery of which the zemindar had put in force the provisions of Regulation VIII of 1819, for the sale of the tenure under which notice of sale had been published, and the day for sale fixed, and for other necessary expenses connected with the said estate. There was a wicked attempt on the part of the defendant Ahmed Hosain to set up as a defence to the suit that the mortgage of 12th May 1881 was not a genuine transaction but a *benami* one; he denied having received any of the consideration money himself; denied that it was paid to his sisters in his presence; he denied that the money was advanced for the purpose of saving the *putni taluk* at Jessore. I was satisfied at the time that the man knew he was swearing falsely, and I directed his prosecution for perjury.

I am satisfied from the evidence of Golam Hosain that the money was raised for the purpose of paying the arrears of rent due in respect of the *putni* holding at Jessore, but there is no evidence that there were any other necessary expenses connected with Sheik Ahmed Ally Ostagur's estate that had to be met, nor is there any evidence as to what that estate consisted of, nor is there any evidence as to whether the arrears of rent could or could not have been paid without having recourse to the mortgage.

The defendants Palk Jan and Banni Jan Bibee are infants.

The plaintiffs contended that the mortgage was binding upon them, as it was in reality made for their benefit as heir and heiresses of their father, the executants or some one of them being their natural guardians.

Mr. *Sale* for the defendant Palk Jan argued that neither of the executants of the mortgage could, according to Mahomedan law, be guardians of his client; that the executants had signed only on their own behalf; and that even if either of the

1885

BHUTNATH DEY v. AHMED HOSAIN.

executants had authority to bind the infant's estate, there was not such an urgent necessity as to warrant them in doing so.

Mr. Henderson for the infant defendant Banni Jan Bibee followed the same line of argument. I am of opinion that, as far as Mr. *Sale's* client is concerned, these contentions must prevail. In *Shama Churn Sircar's* Tagore Law Lectures for 1873 at p. 477 it is laid down that "guardians are natural, "testamentary and appointed; and guardianship over a minor is "for the purpose of matrimony, care of his person, and manage- "ment of his property. The guardianship of a minor for the "management and preservation of his property devolves first on "his or her father, then on the father's executors—next on the "paternal grandfather, then on his executors, then on the execu- "tors of such executors, next on the ruling power or his represen- "tative, the *kazi* or judge. In default of a father, father's father "and their executors as above, all of whom are termed near guar- "dians, it rests in the Government, or its representative, to "appoint a guardian of an infant's property."

In *Macnaghten's* Principles of Mahomedan Law, 5th Ed., page 304, it is laid down that, "in law, guardianship over minors "is of two descriptions—the one for the purpose of matrimony, the "other for the care of property. The care of property legally de- "volves, first, on the father and his executor, next on the paternal "grandfather and his executor, next the right of nomination rests "in the ruling power and its administration; that is to say, any "person whom the Government may please to appoint to the "custody of the infant's property is a legal guardian, according to "the authority* above quoted. First, his father, or the executor of "the father, is his guardian, then the paternal grandfather or "his executor, then the magistrate or his executor." It is clear from these authorities that neither of the executants of the mortgage had power to bind the infant, neither of them was in the position of a guardian having any power as such over the property of the minor. The suit as against Palk Jan must be dismissed with costs on scale No. 2. I shall, however, allow the plaintiffs to add these costs to the mortgage debt.

The case against Mr. *Henderson's* client is different to the

* The Viqaya.

1885

BHUTNATH DEY v. AHMED HOSAIN.

one against Sheik Palk Jan. She is interested in the mortgaged premises, not only as heiress to her father, but also as heiress to her mother; his latter interest is bound, but not the former. I am further of opinion that, even if any one of the executants of the mortgage had been in the position of near guardian to the infants, there is no sufficient evidence to warrant me in coming to the conclusion that it was absolutely necessary to charge their shares of their father's property.

There will be the usual mortgage decree with the necessary declarations; costs on scale No. 2 against the defendants other than Palk Jan. Costs of the guardian *ad-litem* to Banni Jan Bibee to be paid by the defendants on scale No. 2, and the amount added to the mortgage debt.

Suit decreed.

APPELLATE CIVIL.

Before Mr. Justice Tottenham and Mr. Justice Ghose.

BUSSUNTERAM MARWARY (PLAINTIFF) APPELLANT *v.* KAMALUDDIN AHMED AND OTHERS (DEFENDANTS) RESPONDENTS.*

1885 *April* 1.

Mahomedan Law—Succession—Liability of one of several heirs to pay ancestors' debt, when but for his own action debt would be barred by limitation—Justice, equity and good conscience, Application of principle of Act VI of 1871, *s.* 24.

A a Hindu and a creditor of *B*, a deceased Mahomedan, sued *C*, *D*, *E* and *F*, his heirs, to recover a sum of money alleged to be due on a *roka*, alleging that they were in possession of *B's* estate, and praying for a decree against the estate upon that footing. It was not disputed that the debt would have been barred by limitation, but for a part payment made by *C*, and endorsed by him on the back of the *roka*. *D*, *E* and *F* were no parties to such payment, and it was found not to have been made with their consent. The first Court, considering that collusion existed between *A* and *C*, and having regard to the fact that *C* did not dispute his liability, gave *A* a decree for the full amount of the debt against *C* without finding whether the *roka* was genuine or not, and *held* that the shares of *D*, *E* and *F* in *B's* estate were not liable for any portion of the debt. *A*

* Appeal from Appellate Decree No. 368 of 1884, against the decree of W. Verner, Esq., Judge of Bhaugulpore, dated the 18th of December 1883, modifying the decree of Hafez Abdul Karim, Khan Bahadoor, Subordinate Judge of that district, dated the 31st of May 1882.