

BEFORE A FULL BENCH.

1875.
August 27.

(*Mr. Justice Turner, Officiating Chief Justice, Mr. Justice Pearson, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

HAMIR SINGH AND OTHERS (DEFENDANTS) v. MUSAMMAT ZAKIA
(PLAINTIFF)*.

Muhammadan Law—Inheritance—Minor.

Two of the widows of a deceased Muhammadan sold a portion of his real estate to satisfy decrees obtained by creditors of the deceased against them as his representatives. The sale-deed was executed by them on behalf of the plaintiff, a daughter of the deceased, she being a minor, in the assumed character of her guardians.

Held, if the plaintiff was in possession, and was not a party to, or properly represented in, the suits in which the creditors obtained decrees, she could not be bound by the decrees nor by the sale subsequently effected, and she was entitled to recover her share, but subject to the payment by her of her share of the debts for the satisfaction of which the sale was effected.

THE plaintiff sued to obtain possession, by right of inheritance, of a share in certain property forming portion of the real estate of her deceased father. The property was sold during her minority to satisfy decrees obtained by creditors of her deceased father against two of his widows, Musammat Sadat-un-nissa and Musammat Maghlu, as his representatives. The sale-deed was executed by them on behalf of themselves, and as guardians of his minor children. The deceased left considerable personal property as well as real. The plaintiff was not the daughter of either Musammat Sadat-un-nissa or Musammat Maghlu, but of a third widow of the deceased. At the time of the sale she lived with her mother, but was supported by Musammat Maghlu. She had no legal guardians at the time. From the sale-deed it appeared that she was in possession of the property. It did not appear that the plaintiff was a party to the suits brought by the creditors, and properly represented in those suits, nor whether the decrees obtained in those suits passed on confession of the defendants in them, or after proof of the debts. The Court of first instance held that the sale was invalid, because the defendants Musammat Sadat-un-nissa and Musammat Maghlu

* Special Appeal, No. 168 of 1875, from a decree of the Subordinate Judge of Moradabad, dated the 4th December, 1874, affirming a decree of the Munsif of Amroha, dated the 30th March, 1874.

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were not competent to deal with the plaintiff's share in her deceased father's estate as her assumed guardians, and because there was no necessity for the sale of the share, as it appeared that the personal property of the deceased was sufficient to have met his debts. In this view the lower appellate Court concurred.

The vendees appealed to the High Court, the grounds of appeal being as follows :—“(1) When it is admitted that the property in dispute was sold for the payment of the debts of the ancestor, and that such debts were paid, it is improper to set aside the sale. (2) When no legal guardian, according to the Muhammadan law, was present, and the property was sold by the stepmothers of the plaintiff, who were in possession, for the payment of the debts of the ancestor, such sale is valid according to law.”

The Court (Turner and Oldfield, JJ.), in reference to the doctrines of Muhammadan law expounded in Bk. xx., ch. 4 of the Hedaya, referred to the Full Bench the following question :—

“Whether, under the circumstances found by the Courts below, the sale by the widows in possession, against whom decrees had passed as representatives of the deceased, is or is not binding on all the heirs, the sale being made for the purpose of satisfying such decrees.”

Babu *Oprokash Chandar*, for the appellants, contended that the sale was valid under Muhammadan law, the property having been sold by the heirs in adverse possession of it in satisfaction of a debt adjudged to be due from it.

Munshi *Hanuman Parshad* for the respondent.—This is not a case of a sale by one or more heirs in possession of an estate to satisfy a debt against the estate. It is the case of the sale of a minor's property by a so-called guardian, and is illegal under Muhammadan law.

TURNER, OFFG. C.J. and SPANKIE and OLDFIELD, JJ. concurred in the following opinion :—

Under the Muhammadan law, the estate of a deceased person must be applied to the payment of his funeral expenses and debts before the heirs can make partition of it. The discharge of debts is a matter of necessity, the right of the heirs is connected with the

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estate on the sole condition of its being free from incumbrance, whence it is that the discharge of the funeral expenses precedes the right of the heirs, as that is also a matter of necessity—Hedaya, Bk. xxv. Nevertheless, the circumstance of a small debt attaching to the estate of a deceased person does not prevent the heirs from inheriting, whereas if the estate were completely involved in debt they would be prevented—Hedaya, Bk. xxvi. While then the heirs might lawfully take possession of an estate not completely involved in debt, the creditors have the right to sue such of the heirs as have taken the estate; “but they are entitled to have recourse to a single heir only in a case where all the effects are in the hands of that heir;” and the reason given is—“that although any one of them (the heirs) may act as plaintiff in a cause on behalf of the others, yet he cannot act as defendant on their behalf unless *the whole of the effects are in his possession.*”

There is, however, still another provision of the Muhammadan law, that if a creditor desires to realize his debt out of the *ākār*, or immoveable property, of the deceased, he cannot obtain a decree to the prejudice of heirs who are not parties to the suit on the mere confession of some of the heirs, but he must establish his claim by proof—Hedaya, Bk. xxxix., ch 1.

In the case now before the Court it appears from the sale-deed that the plaintiff was in possession, and that the deed was executed on her behalf by a person who had no legal right to represent her. It does not appear whether she was or was not a party to the suits brought by the creditors and properly represented in those suits: nor whether the decrees obtained in those suits passed on confession of the defendants or after proof was given of the debts.

If the minor was in possession, and was not a party to, or properly represented in the suits in which the creditors obtained decrees, then it would seem she cannot be bound by the decrees, nor by the sale subsequently effected, and she is entitled to recover her share, but it is only equitable to require that the recovery of her share should be contingent on the payment by her of her share of the debts, for the satisfaction of which the sale was effected.

PEARSON, J.—The doctrine that a sale made by one or more of the heirs of a deceased Muhammadan, in lawful and exclusive

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possession of his estate, in discharge of a debt which has been adjudged to be due from it, is valid, though it appears reasonable and equitable, may not be altogether free from doubt. But, in the case in which this reference has been made, it is not clear that the two widows, who took upon themselves to sell the plaintiff's share, were lawfully in possession of it to her exclusion, and they were certainly not legally competent to act on her behalf as her guardians. Under the circumstances, it would seem, therefore, that she is entitled to recover her share, on payment of her share of her father's debt which was discharged by the sale (1).

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(*Sir Robert Stuart, Kt., Chief Justice, Mr. Justice Pearson, Mr. Justice Turner, Mr. Justice Spankie, and Mr. Justice Oldfield.*)

LYELL (DEFENDANT) v. GANGA DAI (PLAINTIFF).*

Carrier.—Duty of Persons sending goods of a dangerous nature—Notice—Act XVIII. of 1854, s. 15—Act XIII. of 1855—Negligence—Action for compensation for destruction of life.

Held (PEARSON, J. dissenting) that a person who sends an article of a dangerous and explosive nature to a railway company to be carried by such company, without notifying to the servants of the company the dangerous nature of the article, is liable for the consequences of an explosion, whether it occurs in a manner which he could not have foreseen as probable, or not.

Held, also (PEARSON, J. dissenting), that such a person is liable for the consequences of an explosion occurring in a manner which he could not have foreseen, if he omits to take reasonable precautions to preclude the risk of explosion.

Mode of estimating damages under Act XIII. of 1855 discussed.

THE plaintiff sued, under Act XIII. of 1855, to recover Rs. 9,360, damages for the loss of her husband, Bábu Ganpat Rai, deceased.

(1). The case having been returned to the Division Bench (Turner and Oldfield, JJ.), it was remanded to the lower appellate Court to try the following issues :—“Was the plaintiff a party to, and properly represented in, the suit in which the creditors of her ancestor obtained decrees which were subsequently satisfied by the sale proceeds? What is the sum she was bound to contribute in payment of the debts discharged out of the sale proceeds?”

* Appeal under cl. 10 of the Letters Patent, No. 2 of 1875.