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plaintiff had established his claim, and therefore, decreeing his appeal, reversed the Munsif's decision and decreed the plaintiff's claim. In the course of his judgment the learned Subordinate Judge refers to the evidence of the witnesses called for the defendants, and apparently disbelieves their statements for reasons stated in his judgment, *viz.*, that they appear all to be the creatures of the defendants, who are the zamíndárs of the mauza. Whether the learned Subordinate Judge's attention was called to the fact that the Munsif had made a *rubkar* on the 18th May, 1885, does not appear from the record. But it seems to me that before reversing the decision of the Munsif, and discrediting the evidence on the record presented by the defendants, the Subordinate Judge should have taken pains to afford the defendants an opportunity to supplement the evidence which they had given in the first Court by the testimony of those witnesses whom the Munsif had declared it unnecessary to hear. I think the case must be regarded, and should have been so regarded by the learned Subordinate Judge, as one in which the first Court had refused to examine the witnesses tendered by the party. I think the first plea taken in appeal and, in fact, the only plea which was urged by the learned counsel for the appellants has force, and should be allowed to prevail. What I am now going to do, and what the Subordinate Judge should have done before, is to direct the Munsif to examine the defendants' witnesses, and when he has done so, return their depositions to the Court of the Subordinate Judge, who will then replace the appeal on his file of pending appeals, and dispose of it according to law, and with regard to all the evidence appearing on the record. The costs incurred will be costs in the cause.

Cause remanded.

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December 23.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

GIRRAJ BAKHSH (DEFENDANT) *v.* KAZI HAMID ALI (PLAINTIFF).*

Guardian and minor—Muhammadan mother—Act XL of 1858 *(Bengal Minors Act), s.* 18.—*Mortgage by certificated guardian without sanction of District Court—Mortgage money applied partly to benefit of minor's estate—Suit by minor to set aside the mortgage—Act IX of* 1872 *(Contract Act), s.* 65—*Obligation of person receiving advantage under void agreement—Restitution.*

S. 18 of the Bengal Minors Act (XL of 1858) does not imply that a sale or mortgage or a lease for more than five years, executed by a certificated guardian

* First Appeal No. 123 of 1885 from a decree of Maulvi Muhammad Saiyyid Khan, Subordinate Judge of Agra, dated the 18th March, 1885.

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without the sanction of the civil Court, is illegal and void *ab initio*; but the proviso means that in the absence of such sanction the certificated guardian who otherwise would have all the powers which the minor would have if he were of age, shall be relegated to the position which he would occupy if he had been granted no certificate at all. If any one chooses to take a mortgage or a lease for a term exceeding five years under these circumstances, the transaction is on the basis of no certificate having been granted.

S. 65 of the Contract Act (IX of 1872) should not be read as if the person making restitution must actually have been a party to the contract, but as including any person whatever who has obtained any advantage under a void agreement.

In a suit brought by the guardian of a Muhammadan minor for a declaration that a mortgage deed executed by the minor's mother was null and void to the extent of the minor's share and for partition and possession of such share, it was found that a considerable proportion of the monies received by the mortgagor had been applied for the benefit of the minor's estate by discharging incumbrances imposed on it by his deceased father. It appeared that, at the time of the mortgage, the mother held a certificate of guardianship under the Bengal Minors Act, and that she had not obtained from the civil Court any order sanctioning the mortgage, under s. 18 of that Act.

Held that the omission to obtain such sanction did not make the mortgage illegal or void *ab initio*, but relegated the parties to the position in which they would have been if no certificate had been granted, *i. e.*, that of a transaction by a Muhammadan mother affecting to mortgage the property of her minor son, with whose estate she had no power to interfere.

Held that this fell within the class of cases in which it has been decided that if a person sells or mortgages another's property, having no legal or equitable right to do so, and that other benefits by the transaction, the latter cannot have it set aside without making restitution to the person whose money has been applied for the benefit of the estate.

Held that even if mortgages executed by a certificated guardian without the sanction required by s. 18 of the Bengal Minors Act were void, the section did not make them illegal; and with reference to s. 65 of the Contract Act, the plaintiff could not obtain a decree for a declaration that the mortgage was inoperative as against his share, except on condition of his making restitution to the extent of any monies advanced by the defendant under the mortgage deed which had gone to the benefit of the plaintiff's estate, or had been expended on his maintenance, education, or marriage.

Mauji Ram v. *Tara Singh* (1) distinguished. *Shurrut Chunder* v. *Rajkissen Mookerjee* (2), *Mirza Puna Ali* v. *Saiad Sadik Hossein* (3), *Sahee Ram* v. *Mahomed Abdul Rahman* (4), *Hamir Singh* v. *Zakia* (5), and *Gulshere Khan* v. *Naubey Khan* (6) referred to.

(1) I. L. R., 3 All. 852.
(2) 15 B. L. R., 350.
(3) N.-W. P. H. C. Rep., 1875, p. 201.
(4) N.-W. P. H. C. Rep., 1874, p. 268.
(5) I. L. R., 1 All. 57.
(6) Weekly Notes, 1881, p. 16.

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The facts of this case are stated in the judgment of Edge, C. J.

The Hon. Pandit *Ajudhia Nath* and Munshi *Kashi Prasad* for the appellant.

Mr. *Habibullah* and Pandit *Nand Lal* for the respondent.

The following authorities were cited during the argument, in addition to those referred to in the judgment:—Act IX of 1872 (Contract Act), s. 1, cl. *(g)*, *Seshaiya* v. *Kandaiya* (1), *Debi Dutt Sahoo* v. *Subotra Bibee* (2), *Sikher Chund* v. *Dulputty Singh* (3), Act XXXV of 1858 (Estates of Lunatics Act), s. 14, *The Court of Wards* v. *Kupulmun Singh* (4), and *Surut Chunder Chatterjee* v. *Ashootosh Chatterjee* (5).

EDGE, C. J.—This was an action brought by the guardian of a minor for the purpose of obtaining a declaration that a mortgage-deed executed on the 24th December, 1877, by the minor's mother in favour of one Kashi Ram, father of the defendant, was null and void to the extent of the plaintiff's share. There was also a prayer for a decree for proprietary possession of the properties detailed in the plaint to the extent of 14 out of 16 annas, and also that the minor's share might be partitioned off the property to the extent of the 14 annas share, and also that mesne profits might be awarded. The Subordinate Judge of Agra, by a judgment dated the 18th March, 1885, decided most of the issues arising in the case in favour of the defendant, but held that the mortgage-deed was invalid so far as the plaintiff's share in the property was concerned, on the ground that the mortgagor party to the deed was the minor's certificated guardian under Act XL of 1858, and she had not obtained under s. 18 of that Act an order from the District Judge sanctioning the mortgage. The Subordinate Judge accordingly decided that the plaintiff was entitled to the property in dispute and to its partition. The defendant has appealed from this decision, and we have to consider how far it is right, and what our own judgment should be.

There are two or three facts to be considered before stating our views as to the law. In appears that in 1869, Kazi Ahmed Ali, the father of the plaintiff minor, who, I should mention, is now of

(1) 2 Mad. H. C. Rep., 249.
(2) I. L. R., 2 Calc. 283.
(3) I. L. R. 5 Calc. 363.
(4) 19 W. R. 164.
(5) 24 W. R. 46.

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of age, died. It has been proved to us that, during his lifetime, he executed three mortgages, which were unsatisfied when he died. We are also satisfied that out of the monies received by his widow, the plaintiff's mother, in consideration of the mortgage in dispute in this action, a proportion, at all events, between Rs. 3,800 and Rs. 4,000, was applied by her to satisfying the debt, as it then stood, which originated in the three mortgage transactions of the father. Whether any further portion of the Rs. 6,000 advanced on this mortgage was borrowed or applied for the benefit of the minor's estate, or for his support, education, or marriage, the evidence on the record does not enable us to decide; but we consider it proved that out of the Rs. 6,000 a large proportion was applied for the benefit of the minor's estate by discharging the incumbrances imposed on it by the father. It is admitted that the mother, at the time of the mortgage of the 24th December, 1877, held a certificate of guardianship under Act XL of 1858, and that she had not obtained any order or consent from the District Judge sanctioning the mortgage which is the subject of dispute in this case. It is contended on behalf of the plaintiff that, under these circumstances, not only is the mortgage void *ab initio*, but the plaintiff is entitled to have the decree which he asks for, without making any restitution to the mortgagee's representative. In support of this contention several cases have been cited, including rulings by the Calcutta High Court, and the case of *Mauji Ram* v. *Tara Singh* (1), decided by this Court.

With reference to this last-mentioned judgment, I observe that what the learned Judges apparently had present to their minds was the question whether a minor could ratify such a contract as this which has been made without the District Judge's sanction having been first obtained by the certificated guardian. That is not the point which has to be decided in this case. It is true that it was said in that case that such a contract was void *ab initio*, but it is right to remember that one of those learned Judges, though he did make use of that expression, in a subsequent unreported case, *Narotam Singh* v. *Ram Chander* (F. A. No. 4 of 1883), based his judgment on considerations which are inconsistent with such a view. In the subsequent case, it is obvious that the Judges considered the

(1) I. L. R., 3 All. 852.

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case to be one to which s. 18 of Act XL of 1858 applied. For the purpose of passing the decree, they must have considered that the property in suit was immoveable property of the minor which had been dealt with, and which was within the scope of s. 18, and in the judgment we find the law laid down in terms which we entirely adopt. At p. 13 of that judgment, the following passage occurs:—"The plaintiff therefore was entitled to have the mortgage of the 20th December, 1872, avoided on this ground, and his objection to the decision of the Court below, with reference to the lease, must likewise prevail. The matter then stands thus: the defendants-appellants are in possession of property belonging to the plaintiff-respondent as trespassers, and their document of title being declared invalid, the natural and legal consequence is that he may oust them. But then comes the question as to whether, assuming the monies advanced to Musammat Sita by the defendants to have been spent for the benefit of the plaintiff or his estate during his minority, we ought not, as a Court of equity, to make his obtaining possession by the machinery of the Court contingent on his repaying to the defendant the amount of such monies with reasonable interest." The Court in that case acted upon the view that whether the contract were called void or invalid or anything else, a plaintiff going to the Court for relief was bound to submit to the Court's right to order restitution by him. There is another similar judgment of Oldfield and Brodhurst, JJ., (1) which also relates to s. 18 of the Act. The Judges in that case were of opinion that the plaintiff could not claim possession of the property in suit without making restitution of the monies which had been received and had gone to the benefit of his estate. Again, the same view was expressed in *Shurrut Chunder* v. *Rajkissen Mookerjee* (2). In that case, Macpherson, Offg. C. J., said:—"The purchaser who, knowing that he is dealing with a guardian, chooses to ignore the provisions of the Act, has no one but himself to blame if he suffers from the consequences of his negligence. As, however, the lower Court finds that the conduct of the purchaser was not dishonest, and that he paid a fair price, we shall declare that the plaintiff is entitled to be restored to possession with mesne profits on his repaying to the purchaser so much of the money paid by the purchaser as has been applied to the benefit of the minor's estate."

(1) S. A. No. 197 of 1885, not reported. (2) 15 B. L. R., 35

These authorities appear to us to be directly in point, and to show that, whether the contract is void or voidable, the minor seeking to set it aside cannot claim the interference of a Court of law or equity without making restitution. It has been contended that s. 18 makes a difference between cases where the person who has made the mortgage is the certificated guardian of the minor, and other cases where a person acting as a guardian without authority to sell or mortgage, has sold or mortgaged. I cannot see how the section has the force which Pandit *Nand Lal* suggests. To my mind, all that it does is this: It does not provide that a sale or mortgage or a lease for more than five years, and executed without sanction, shall be treated as illegal, but the proviso means that the certificated guardian who otherwise would have all the powers which the minor would have if he were of age, shall be relegated to the position which he would occupy if he had been granted no certificate at all. In other words, if any one chooses to take a mortgage or a lease for a term exceeding five years under these circumstances, the transaction would be on the basis of no certificate having been granted. *Qua* certificated guardian, the vendor or mortgagor or lessor could have no power, without sanction, to sell or mortgage, or grant a lease for more than five years. This view of the meaning of Act XL of 1858 is supported by the following considerations. If the Legislature had intended to make contracts, if entered into without sanction, illegal and void *ab initio*, it would have been easy to express that intention by using the words "but no such person shall sell or mortgage any immoveable property, or grant a lease thereof for any period exceeding five years, without an order of the civil Court previously obtained." If these words had been used, there would have been an absolute prohibition of such contracts if entered into without sanction. But the words are "no such person shall have power to sell or mortgage," &c., and this places any certificated guardian who does sell or mortgage without sanction in the position of one who had no power to do so. In the view which I take of s. 18, there is no reason why this case should not be treated as falling within the class of cases in which it has been decided that if a person sells or mortgages another's property, having no legal or equitable right to do so, and that other benefits by the transaction, the latter cannot have it set aside without

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making restitution to the person whose money has been applied for the benefit of the estate. That these cases are applicable to a transaction which is impugned under s. 18 of Act XL of 1858 is shown by *Shurrut Chunder* v. *Rajkissen Mookerjee* (1) and the two decisions of this Court to which I have referred. The section merely relegates the parties to the position in which they would be if no certificate had been granted. That position is this: a Muhammadan mother on her own behalf, and as guardian of her minor son, proposes to mortgage his estate. It is clear that a Muhammadan mother is not the guardian of her son's estate, and has no power to interfere with it. Nevertheless, we find that in the three cases which have been cited, a transaction of sale or mortgage by a Muhammadan widow mother was challenged, and that in each case the successful heir was held to be not entitled to relief without making restitution of the monies which had gone to benefit his estate—see *Mirza Pana Ali* v. *Saiad Sadik Hossein* (2), *Sahee Ram* v. *Mahomed Abdul Rahman* (3) and *Hamir Singh* v. *Zakia* (4). In all these cases the transaction had been effected by the mother, who had no title in law or equity to sell or mortgage, and yet the Court held that the plaintiff must take the estate subject to repayment of the monies which had been paid by the purchaser or mortgagee, and which had gone to the benefit of the estate. A similar and a very strong case was decided by this Court in *Gulshere Khan* v. *Naubey Khan* (5). In that case, two Muhammadan brothers having sisters who were co-sharers in certain property, and acting adversely to them, sold the property, purporting to sell it as belonging to themselves alone. It was held that the sisters were bound to make restitution before they could get a decree for possession of their shares. That was a case where the vendor did not even profess to act on behalf of the other persons entitled, and still those other persons were held bound to do equity with regard to any monies which had gone to the benefit of the estate from the innocent purchaser.

Under my view of s. 18, therefore, I am of opinion that the parties in this case are in the same position as that illustrated in

(1) 15 B. L. R., 350.
(2) N.-W. P. H. C. Rep., 1875, p. 201.
(3) N.-W. P. H. C. Rep., 1874, p. 268.
(4) I. L. R., 1 All. 57.
(5) Weekly Notes, 1881, p. 16.

the cases which have been cited, namely, where a Muhammadan mother has affected to deal with the property of her minor son; and I therefore hold that the plaintiff must make restitution before he can take the benefit of any decree which we may make in his favour.

But if we assume that I am wrong in the view which I take of s. 18, and if it is assumed that that section does make these contracts void, what then is the result? The section still does not say that such agreements are *illegal*, but only that they are *void*, and cannot be enforced. Upon this point we must look at s. 65 of the Contract Act, to see whether a plaintiff who comes to this Court and says that an agreement is void by reason of s. 18 of Act XL of 1858, can claim a decree for possession of the property without making restitution. It appears to me that in this view of s. 18, the provisions of s. 65 of the Contract Act would apply. That section provides that "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or make compensation for it, to the person from whom he received it." It has been suggested that this section should be read as if the person making restitution should actually have been a party to the contract; but the section is expressed in the widest terms, and includes any person whatever who has obtained any advantage under a void agreement. So that even if s. 18 had the effect of making the agreement of mortgage in this case void, I should still hold that, with reference to s. 65 of the Contract Act, the plaintiff could not have the benefit of our decree except on condition of his making restitution to the extent of any monies advanced by the defendant under the mortgage-deed which had gone to the benefit of the plaintiff's estate, or were expended on his maintenance, education, or marriage.

This is all that I need say in reference to the legal bearings of the case. Then how are we to apply these principles to the facts before us? We are not in a position to ascertain what actual proportion of this Rs. 6,000 went to the benefit of the plaintiff's estate or was reasonably borrowed and expended on his personal uses for what may be called necessaries. Under these circumstances, before a decree can be drawn up for a declaration that this mortgage is imperative as against the plaintiff's 14 annas share, it is necessary

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to ascertain, by an issue to be determined by the Court below, or by agreement between the parties, what proportion of these monies have been expended for the benefit of the plaintiff's estate or for his support, education, or marriage. It should also be ascertained what has been the net income during these years, from the 24th December, 1877, to the present, of the property of which possession has been taken. To ascertain these matters, it would be necessary to make an order of remand under s. 566 of the Civil Procedure Code; but as we understand that there is some chance of the amount being settled by agreement between the parties, we suspend the making of such an order for a fortnight. The result is that if the figures are ascertained either by remand or by agreement, there will be a decree for the plaintiff conditional upon his paying the monies so ascertained within a time to be fixed by the decree. In ascertaining the amount of the monies which have been applied for the benefit of the plaintiff's share, it should be borne in mind that his interest in the estate is only $\frac{14}{16}$. The question of costs is reserved.

TYRRELL, J.—I concur. In reference to the learned Chief Justice's reading of s. 18 of Act XL of 1858, I will only add that it seems to me unreasonable to hold that the public, in dealing with a person who represents or professes to represent a minor's estate, should be in a worse position if that person is a widow or a mother who has obtained a certificate of guardianship from the District Court, than if the person so acting were an absolute outsider.

[On the 10th January, 1887, the following order was passed by Edge, C. J., and Tyrrell, J.—"The order referred to in the judgment is made. Ten days will be allowed for objections on the return of the findings."]

Issues remitted.

1887
January 7.

CRIMINAL REVISIONAL.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* NIHAL.

Res nullius—Bull set at large in accordance with Hindu religious usage—"Stolen property"—Act XLV of 1860 *(Penal Code)*, ss. 410, 411.

A Hindu who, upon the death of a relative, dedicates or lets loose a bull, in accordance with Hindu religious usage, as a pious act for the benefit of the soul of