

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Blenner-
hassett.

1896
May 13.

NIZAM-UD-DIN SHAH (DEFENDANT) v. ANANDI PRASAD (PLAINTIFF).
Guardian and minor—Liability of minor for act of person without authority purporting to act as the guardian of the minor.

The uncle of a minor Muhammadan purporting, though without authority, to act as the minor's guardian, made a mortgage of certain property belonging to the minor, and subsequently took a lease of the mortgaged property in favour of the minor. The minor having made default in payment, the mortgagee sued to recover rent. *Held* that the mortgagee was not entitled to recover, although had the minor sued the mortgagee to avoid the mortgage he might not have been able to succeed without paying compensation to the mortgagee to the extent to which he or his property had benefited by the money advanced on the security of the mortgage. *Ruttun v. Dhoomes Khan* (1), *Bhutnath Dey v. Ahmed Hosain* (2), *Anapurnabi v. Durgapa Mahalapa* (3), *Baba v. Shivappa* (4), *Mussamut Bukshun v. Mussamut Doolhin* (5) and *Girraj Bakhsh v. Kazi Hamid Ali* (6) referred to.

THE facts of this case are as follows:—

On the 4th of September 1888, Ghulam Jilani, Farid-ud-din, for himself and as guardian of Nizam-ud-din, his minor nephew, and Musammat Anwari Begam, executed a mortgage with possession of certain shops and houses in favour of the plaintiff Anandi Prasad. The money borrowed was Rs. 2,600, and the stipulated interest was annas 14 per cent. per mensem. The mortgagors did not give possession under the mortgage, but took a lease of the mortgaged property from the mortgagee. Some of the rent due under this lease being in arrears, the mortgagee lessor sued the mortgagors lessees therefor and obtained a decree on the 4th of July 1892, which decree was confirmed on appeal on the 30th of November 1892. The minor, Nizam-ud-din, applied to have this decree set aside as being an *ex parte* decree, so far as he was concerned, and it was set aside as regards him on the 23rd of July 1893. The suit was subsequently retried as to the interest of the minor in the property mortgaged. The minor objected that Farid-ud-din had

* Second Appeal No. 263 of 1894, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 2nd February 1894, confirming a decree of Babu Hari Mohan Banerji, Munsif of Agra, dated the 4th July 1892.

(1) N.-W. P., H. C. Rep. 1868, p. 21.
(2) I. L. R., 11 Calc., 417.
(3) I. L. R., 20 Bom., 160.

(4) I. L. R., 20 Bom., 199.
(5) 12 W. R., 337.
(6) I. L. R., 9 All., 340.

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no authority to borrow on his behalf, and that the debts incurred by Farid-ud-din were not binding on him.

The Court of first instance (Munsif of Agra) was of opinion that Farid-ud-din had power to bind the minor's share, and gave the plaintiff a decree.

The minor appealed. The lower appellate Court (District Judge of Agra) confirmed the decree of the first Court.

The minor defendant thereupon appealed to the High Court.

Maulvi *Ghulam Mujtaba*, for the appellant.

Munshi *Ram Prasad*, for the respondent.

EDGE, C. J., and BLENNERHASSETT, J.—This was a suit for rent of shops brought against a Muhammadan who is a minor and has appeared under the guardianship of his mother. An uncle of the minor, assuming to act as a guardian, had granted to the plaintiff a mortgage over the minor's property, and on the same day took a lease of these shops which were the mortgaged property, in favour of the minor. It is for rent alleged to be payable under that lease that this suit is brought. The first Court decreed the claim. The lower appellate Court confirmed the decree. The defendant has appealed here.

The minor's guardian was not a guardian having power to mortgage the minor's property, and as he had not that authority, he was not in a position to give the plaintiff a good title as against the minor. In our opinion that view is supported by the decisions in *Ruttun v. Dhoomee Khan* (1), *Bhutnath Dey v. Ahmed Hosain* (2), *Anapurnabi v. Durgapa Mahalapa Naik* (3), *Baba v. Shivappa* (4), *Mussamat Bukshun v. Mussamat Doolhin* (5) and *Girraj Balhsh v. Kazi Hamid Ali* (6).

It appears to us that if the plaintiff had brought his suit to enforce his mortgage against the minor it would have been a perfect defence for the minor to make that his uncle had no authority to bind the minor or his estate. It also appears to us that the position is not altered by the fact that the minor's uncle,

(1) N.-W. P., H. C. Rep. 1869, p. 21.

(2) I. L. R., 11 Cal., 417.

(3) I. L. R., 20 Bom., 150.

(4) I. L. R., 20 Bom., 199.

(5) 12 W. R., 337.

(6) I. L. R., 9 All., 340.

Farid-ud-din, having made the mortgage, took a lease of the mortgaged property in favour of the minor. If we were to enforce this lease, we should be practically enforcing the mortgage, for this reason that the lease stands or falls with the mortgage. The property belongs to the minor. If the minor were bringing a suit to set aside the mortgage or to set aside the lease, we could, no doubt, in such a suit decline to grant him relief until he had made compensation to the mortgagee to the extent to which the minor or his property had benefited by the money advanced on the security of the mortgage. The position is altered when the minor is a defendant and not a plaintiff.

We need not decide whether or not the plaintiff could succeed in another suit in obtaining restitution or compensation. We cannot give the plaintiff a decree here to be executed in case the minor does not make compensation. We allow this appeal with costs, and set aside the decrees in the Courts below, and dismiss the suit with costs as against Nizam-ud-din Shah. The other parties are not before us, so this decree will not affect the decrees against them.

Appeal decreed.

MATRIMONIAL JURISDICTION.

*Before Sir John Edge, Kt., Chief Justice, Mr. Justice Aikman and
Mr. Justice Blennerhassett.*

F. H. PERCY (PETITIONER) *v.* J. PERCY (RESPONDENT).

Act No. IV of 1869 (Indian Divorce Act) sections 3, sub-section (2), 8, 9, 13, 17, 55—Notification No. 1203, dated the 23rd September 1874—Statute 28 Vict. Cap. XXV, section 3—Act No. XIII of 1879 (Civil Courts Act, Oudh) section 27—Act No. XX of 1890 (North-Western Provinces and Oudh Act), section 42—Act No. XIV of 1891 (Oudh Courts Act) section 8—Divorce—Appeal—Jurisdiction.

The High Court of Judicature for the North-Western Provinces has no jurisdiction to entertain an appeal from the decree of a District Judge in Oudh dismissing a suit for dissolution of marriage. *Morgan v. Morgan* (1) overruled.

(1) I. L. R., 4 All., 306.

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