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March 9, 10

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RASHID-UN-NISA (PLAINTIFF) v. MUHAMMAD ISMAIL KHAN

AND OTHERS (DEFENDANTS).

[On appeal from the High Court, North Western Provinces at Allahabad].

Civil Procedure Code (Act XIV of 1882), section 244—Execution of decree—Parties to suits—Minor representation of in suits—Appointment of "married woman" to be guardian ad litem contrary to section 457 of Civil Procedure Code—Suit by minor to set aside decrees and sales in execution—Separate suit—Guardians and Wards Act (VIII of 1890), section 53.

The words "parties to the suit" in section 244 of the Civil Procedure Code (Act XIV of 1882) mean, persons who have been properly made parties in accordance with the provisions of the Code.

Where contrary to the provisions of section 457 of the Code a minor had been represented throughout certain litigation by a married woman, her sister and guardian of her person, who was appointed her guardian *ad litem*.

Held that the minor had not been properly represented in the litigation, and that a suit by her to set aside decrees, and sales which had taken place in execution of them, and as to which she alleged fraud and breach of trust was not barred by section 244.

Section 53 of the Guardians and Wards Act (VIII of 1890) does not give a married woman who is guardian of the person of a minor a preference to the appointment of guardian *ad litem* of such minor. That section leaves section 457 of the Civil Procedure Code untouched, the effect of the two sections read together being that a proper guardian of the person of the minor may, *if properly qualified*, be preferred as the guardian *ad litem*.

APPEAL from a judgment and decree (5th August 1902) of the High Court at Allahabad which reversed a judgment and decree (7th October 1899) of the Court of the Subordinate Judge of Meerut, and dismissed the appellant's suit.

The suit was brought on 21st September 1898 for a declaration that two decrees dated 16th September 1891 and 28th August 1894, and three sales in execution of decrees, 20th February 1892, 20th June 1892, and 8th July 1896 were invalid and should be set aside so far as the plaintiff was concerned.

Sardar Khan one of two brothers died on 1st May 1888 leaving two daughters Uifa-un-nissa and Ra-hid-un-nissa (the plaintiff), an illegitimate son Abdul Majid, and his brother Maula Dad Khan who were entitled under the Muhammadan law to succeed to shares of his estate as follows, namely, the daughters $\frac{1}{2}$ each, and the brother $\frac{1}{2}$. Sardar Khan owned a 9 biswas share in Mahal Bakimanda in the village of Gai-upur, and on his death Maula Dad Khan applied for mutation of names in the Revenue

Present:—Lord ATKINSON, Lord COLLINS, Sir ANDREW SCOBLE and Sir ARTHUR WILSON,

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registers. Ulfat-un-nissa purporting to act on behalf of her minor sister Rashid-un-nissa opposed the application, and allowed it to be supposed that Abdul Majid was the legitimate son of Sardar Khan which excluded Maula Dad Khan from inheriting any portion of the estate. By agreement dated 22nd December 1888 the dispute was referred to arbitration and the award, dated 13th January 1889 allotted to each of the claimants shares as follows, namely, Maula Dad Khan $1\frac{3}{4}$ biswas $2\frac{1}{2}$ biswansis, Ulfat-un-nissa $2\frac{1}{4}$ biswas, Rashid-un-nissa $2\frac{1}{4}$ biswas, and Abdul Majid $2\frac{1}{2}$ biswas $12\frac{1}{2}$ biswansis. Mutation of names was made in accordance with the award and has ever since been acted on.

The estate of Sardar Khan was liable for several mortgage debts. One Fateh Chand who had obtained a decree against him on 18th December 1882 with a charge on a 6 biswas share in the village of Gaisapur proceeded to execute it, and the sale was fixed for 20th June 1889. Maula Dad Khan purchased the decree from Fateh Chand on 10th June 1889, and on 23rd April 1891, applied for execution, and after apportioning the mortgage money on the shares held by him and the other heirs of Sardar Khan, sought to bring to sale the shares of the other heirs in the 6 biswas share ordered by the decree to be sold. In these execution proceedings Ulfat-un-nissa was appointed guardian *ad litem* of her minor sister Rashid-un-nisa. On 20th February 1892 a 4 biswas $17\frac{1}{2}$ biswansi share out of the 6 biswas share mortgaged was sold by the court and purchased by Maula Dad Khan, being the first of the sales which the plaintiff claimed to have set aside.

On 17th January 1883 another decree had been obtained by a firm of Sant Lal Moti Lal against Sardar Khan with a charge on a 5 biswas share in Gaisapur, and the decree was, on 6th April 1889 transferred to the four sons of Maula Dad Khan, namely Muhammad Ismail Khan, Dost Muhammad Khan, and Taj Muhammad Khan the three original defendants, and Niaz Muhammad Khan, the husband of the plaintiff. In execution of that decree the 5 biswas share was sold on 20th June 1892 and purchased by the defendant Muhammad Ismail Khan. This was the second sale impeached by the plaintiff.

Sardar Khan had also on 18th May 1886 mortgaged with possession a $2\frac{1}{2}$ biswas share of Gaisapur to Maula Dad Khan and

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subsequently taken a lease of the said share. On 26th May 1891 a suit was brought for rent due under the said lease in which on 16th September 1891 a decree was obtained, and at the sale in execution of the decree, the sons of Maula Dad Khan, on 8th July 1896, purchased the shares of Ulfat-un-nis-a and the appellant in certain re-ervoirs and vats. This was the third sale sought to be cancelled, and it was also sought to set aside the decree of 16th September 1891.

One Achal Das was another creditor, and in his favour Sardar Khan had, on 31st January 1882 executed a bond, which was on 8th April 1889 transferred to the sons of Maula Dad, who on 28th August 1894 obtained the second decree which the plaintiff now sought to have declared invalid.

At the institution of the suit the plaintiff was a minor and her husband Niaz Muhammad Khan acted as her next friend. The plaint alleged that the arbitration award made on the death of Sardar Khan, the purchase of the decrees, and the sale of the plaintiff's legal share were illegal and fraudulent; that her share in her father's property was 3 biswas; that the two decrees dated September 16th 1891, and 28th August 1894 were not binding on her because her sister Ulfat-un-nissa had in the suits been improperly appointed her guardian *ad litem*, and the sales in execution of decree were invalid not only for that reason, but also because Maula Dad Khan was debarred by section 232 of the Civil Procedure Code from executing the decrees in pursuance of which the sales were made. The plaintiff prayed for cancellation of the decrees and sales and a restoration to possession of her full share of 3 biswas with mesne profits and costs.

The defendants Muhammad Ismail Khan, Dost Muhammad Khan, and Taj Muhammad Khan alone defended the suit. They denied fraud and collusion, and that the purchases by Maula Dad's sons were benami for their father; asserted the validity of the decrees and sales in execution; claimed a full share of three biswas if the award were set aside, and pleaded that the suit was barred by the provisions of section 244 of the Code of Civil Procedure.

The Subordinate Judge held that the plaintiff was not properly represented in the mutation proceedings, and that the

award made on 13th January 1889 was not binding on her; that Maula Dad's sons made purchases *benami* for him; that Ulfat-un-nis-a had no right to act as the plaintiff's guardian and that her interests were adverse to the plaintiff and being a married woman she could not legally be her guardian *ad litem*, and that the plaintiff was not properly represented by her in the execution proceedings. As to the want of proper representation in the execution proceedings and suits and Maula Dad's improper action in dealing with the decrees he said:—

"We have already seen that Maula Dad was appointed by the District Judge as the guardian of the properties of the plaintiff. It is an admitted fact that when Sant Lal's decree was executed Maula Dad acted as plaintiff's guardian. Maula Dad himself was the *de facto*. The decree was executed, the properties sold and purchased by Maula Dad and the interest of the minor was not even attempted to be saved. It could hardly be therefore said that the minor was duly represented in the execution proceedings of Sant Lal's decree. Maula Dad who was the certificated guardian was not appointed as a guardian *ad litem* by order of the court. The proceedings therefore against the minor were utterly illegal.

"In the execution proceedings under the decree of Achal Das it is shown that the minor, the plaintiff, was not duly represented. The execution proceedings therefore are not binding as against the minor plaintiff."

"It has further been contended on behalf of the plaintiff that Maula Dad being himself a judgment-debtor after Sardar Khan's death and he having bought the decrees, had no right to execute the decrees. Section 232, Civil Procedure Code is very clear and supports the above contention. The ruling in *Banarsi Das v. Maharani Kuar* (1) also supports the above contention. It is therein laid down that the purchase by one judgment-debtor of a decree extinguishes the liability under the decree and he can sue for contribution and not execute the decree."

"As I have already found in the present case that the plaintiff, a minor, was not duly represented in the execution proceedings, and inasmuch as all the execution proceedings are not binding on the plaintiff she having been a minor unrepresented in those proceedings, she could therefore bring a regular suit."

The Subordinate Judge accordingly made a decree giving the plaintiff the relief she claimed.

On appeal by the defendants to the High Court a Divisional Bench of that Court (SIR JOHN STANLEY, C. J., AND MR. JUSTICE BURKITT) said as to the plaintiff's right to sue :

"The decrees upon which those execution proceedings were founded are not in any way impeached in the suit, nor could they be. The impeached transactions were proceedings of those decrees in execution and this being so, it was the proper course for the plaintiff, if she had any objection to make to the execution

(1) (1882) I. L. R. 5, All. 28, at-p. 83.

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of the decrees, to raise these objections under the provisions of section 244 of the Code of Civil Procedure and not by a separate suit. If Maula Dad Khan was not entitled to execute the decrees or if there was any irregularity in the proceedings which were taken in carrying out the execution, it was open to the plaintiff or any one who was injured thereby to apply under section 244 and have these questions decided by the court executing the decree, they being questions 'arising between the parties, to the suit in which the decree was passed, or their representatives, and relating to the execution' of the decrees. It is not open to the plaintiff in an independent suit now to impeach the proceedings so had in execution. As regards the bond, dated the 31st January 1892, in favour of Achal Das, it is admitted that there has been no sale of any property. Consequently we may put it out of account as the plaintiff has in no way been damnified in respect of it.'

The High Court therefore reversed the decision of the Subordinate Judge and dismissed the suit with costs. On this Appeal

Cave, K. C. and W. A. Raikes for the appellant contended that the provisions of section 244 of the Civil Procedure Code (Act XIV of 1882) were no bar to the present suit. Clause (c) of that section provides for the decision, by the court executing a decree and not by separate suit, of "questions arising between the parties to the suit in which the decree was passed." In this case the appellant was a minor and was not properly represented in the suits in which the decrees were made, and she was, therefore, it was submitted, not really a party to the suit at all. One of the grounds alleged why the decrees and sales under them should be set aside was that they had been brought about by fraud and breach of trust on the part of those who conducted the proceedings which led to them; and another was that purchases had been made *benami*, and to such a case the section was not applicable. Reference was made to *Mohendro Narain Chaturaj v. Gopal Mondul* (1), *Murigeya v. Hayat Saheb* (2), *Hassan Ali v. Gauzi Ali Mir* (3), and *Prosuano Kumar Sanyal v. Kali Das Sanyal* (4). Where there is fraud the decrees and sales could be treated as invalid, a decree against a minor not properly represented was null and void, the provisions of section 443 of the Civil Procedure Code being imperative, *Hanuman Prasad v. Muhammad Ishaq* (5). The plaintiff was not properly represented

(1) (1890) I. L. R., 17 Cal., 769 (777, 754) (3) (1903) I. L. R., 31 Cal., 179.

(4) (1898) I. L. R., 23 Bom., 237. (4) (1892) I. L. R., 19 Cal., 683

L. R., 19 I. A., 166.

(5) (1905) I. L. R., 28 All., 137.

in the suits because, although her sister was appointed her guardian *ad litem*, she was a "married woman" and her appointment was illegal under section 457 of the Civil Procedure Code. The procedure in connexion with the appellant's property was illegal, her guardian Maula Dad Khan having taken an unfair advantage of his position and committed a breach of his trust, and section 232 of the Civil Procedure Code, debarred him as one of several judgment-debtors purchasing a joint decree, from executing such decree, *Banarsi Das v. Maharani Kuar* (1). In any case the dealing with her property in the mutation proceedings and the award by which she was deprived of her proper share in her father's property did not come within the scope of section 244, but necessitated a suit to set them aside: since attaining majority she had never consented to or ratified those proceedings. The sales should be declared invalid and void as against the appellant who was a minor never legally represented, and neither the respondents nor their father Maula Dad Khan were competent to bring to sale her property and become possessed of it themselves. Reference was made to the Civil Procedure Code (II of 1908), section 47 (corresponding to section 244 of the Code of 1882, and being as a procedure section retrospective) which enabled this court to say it did not apply: the Guardians and Wards Act (VIII of 1890), section 20, Act XL of 1858, section 7, and Civil Procedure Code 1882, section 460 were also referred to.

De Gruyther, K. C., and *B. Dube* for the respondents contended that section 244 of the Code was a bar to a separate suit to set aside any of the proceedings in execution challenged in the present litigation. The questions for decision here were all questions relating to the execution of decrees; and the appellant, it was submitted, was sufficiently represented in, and therefore a party to, the proceedings. In *Khijarajmal v. Daim* (2) it was held that certain sales could not be voided or set aside for mere irregularities of procedure in obtaining the decrees, but if the court had sold the property of persons who were not parties to the proceedings or properly represented on the record the decrees and sales would be void as against such persons, and might be disregarded

(1) (1882) I. L. R., 5 All., 28 (33). (2) (1904) I. L. R., 32 Cal., 296,
L. R., 32, I. A., 23.

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without any procedure to set them aside. But the court executing the decrees would be the proper tribunal to decide whether those persons had been properly represented or not in the proceedings. If Ulfat-un-nissa was not a proper person to be appointed guardian *ad litem* of the appellant, her appointment was a mere irregularity and not a ground for setting aside the decrees, and sales which took place in execution of them: see *Wabian v. Banke Behari Pershad Singh* (1) which was opposed to *Hanuman Prasad v. Muhammad Ishaq* (2) cited for the appellant. But a guardian *ad litem* of a minor only represented the infant, and not the property, and by section 53 of the Guardians and Wards Act (VIII of 1890) a guardian of the person of the minor is given a preference in making an appointment of a guardian *ad litem*: notwithstanding section 457 of the Code therefore, Ulfat-un-nissa, who was guardian of the appellants' person, was qualified for appointment as guardian *ad litem*; so that there was no want of proper representation in the suits: see Rule 4 under Act VIII of 1890. Prior to that Act the court had a discretion, but after the amendment of section 443 of the Civil Procedure Code by section 53 of Act VIII of 1890 the court had no discretion except when no guardian had been appointed. No provision of Muhammadan law prohibits a married woman from being guardian of a minor or her property. Reference was made to section 9 of Act VIII of 1890: Civil Procedure Code, sections 232 and 443; and the Indian Trusts Act (II of 1852), section 53 (which provision as to persons qualified for trustees) applied to the North-Western Provinces. There was no fraud here; the case of *Prosunno Kumar Sanjyal v. Kali Das Sanjyal* (3) was applicable, and it should be held that section 244 of the Code barred the suit.

Cave, K. C., replied referring to *Kundan Lal v. Gajadhar Lal* (4) which decided that the appointment of a married woman as guardian *ad litem* notwithstanding section 457 of the Code was not a mere irregularity. [DeGruyther, K. C., referred to *Kachayi Kuttiali Haji v. Udumpanthala Kunbi Putra* (5) a contrary decision.]

- (1) (1903) I. L. R., 30 Cal., 1021: (3) (1892) I. L. R., 19 Cal., 683;
L. R., 30 I. A., 182. L. R., 19 I. A., 166.
(2) (1905) I. L. R., 28 ALL., 137 (138), (4) (1907) I. L. R., 29 ALL., 728,
139, 141.)

- (5) (1905) I. L. R., 29 Mad., 58,

1909, *July 30th* :—The judgment of their Lordships was delivered by SIR ANDREW SCOBLE.

Muhammad Sardar Khan, the father of the appellant, died on the 1st May 1888, possessed of a half share in mauza Gaisupur and other property, and leaving as his heirs according to Muhammadan law (1) Ulfat-un-nisa, an adult daughter by his first wife; (2) the appellant Rashid-un-nisa, aged four years, daughter by his second wife; and (3) a brother named Mauladad Khan. Each of them was entitled to a third share in the estate. He also left an illegitimate son, named Abdul Majid Khan, for whom he made provision in his lifetime, by a gift of a share in his mauza of Gaisupur, leaving nine biswas of that property to be divided among his legitimate heirs at the rate of three biswas apiece.

At the time of his death Sardar Khan was indebted to the following persons :—

(1) to Fateh Chand for Rs. 8,280-11, under a decree dated the 18th December 1882 ;

(2) to Achal Das for Rs. 2,500, under a bond dated the 31st January 1882 ;

(3) to Sant Lal and Moti Lal, for Rs. 2,294-1 under a decree, dated the 17th January, 1883 ; and

(4) to his brother Mauladad Khan, under a possessory mortgage deed for Rs. 14,000, dated the 18th May 1886.

On the 9th May 1888, Mauladad Khan filed an application for mutation of names in respect of Gaisupur in favour of the three legal heirs of the deceased. This application was opposed by Ulfat-un-nisa, on the ground that Abdul Majid (who was then a minor and as to whose illegitimacy she was silent) was entitled to half the estate, to the exclusion of the brother, Mauladad Khan. And the matter was referred to the arbitration of one Abdul Karim Khan, who made his award under date the 12th January 1889, whereby he gave the largest share of the property to Abdul Majid, and reduced the share of the appellant Rashid-un-nisa from 3 to 2½ biswas. In this arbitration Ulfat-un-nisa represented herself as acting as guardian of the minors, Abdul Majid and Rashid-un-nisa, and her general attorney, one Siraj Ahmad, signed the award on their behalf. This award seems to

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have been so far acted on that mutation of names was ordered to be made in conformity with it.

While these proceedings were pending Ulfatun-nisa, on the 18th July 1888, applied to the District Judge of Meerut for a certificate of guardianship under Act 40 of 1858, in regard to both minors, and her application was opposed by Mauladad Khan, as regards Rashid-un-nisa, on various grounds, one being that the minor was married to his son, Niaz Muhammad Khan, and that he "maintained and looked after" her. He therefore asked that a certificate of guardianship might be granted to himself. His petition is dated the 2nd August 1888; and by an order of the District Judge of Meerut, dated the 13th April 1889, it appears that Ulfat-un-nisa had withdrawn her claim, and a certificate of management of the girl's estate was granted to Mauladad; but, as "the uncle cannot properly be constituted guardian of the girl's person," the Judge directed that she should "remain in charge of her half-sister Ulfat-un-nisa."

Meanwhile, Mauladad was actively engaged in settling the claims against Sardar Khan's estate. On the 6th April 1889, he purchased, in the name of his four sons, the decree held by Sant Lal and Moti Lal, for the sum of Rs. 2,500; and on the 8th April 1889, he purchased, in the same names, the claim of Achal Das for the sum of Rs 3,000. On the 10th June 1889, he purchased, in his own name, the decree held by Fateh Chand for the sum of Rs. 12,842-2. He thus became the sole creditor of Sardar Khan's estate. He died on the 22nd July 1893, and the present respondents are two of his sons, and the representatives of a third son.

The fourth son, Niaz Muhammad Khan, who, as has already been stated, is the husband of the appellant, instituted the present suit on behalf of his wife, then a minor of fourteen years of age, on the 21st September 1898. The object of the suit is to obtain a declaration that two decrees and three sales in execution affecting her share in her father's estate are invalid as against the appellant, who was a minor and not legally represented in the proceedings from which they resulted; and, for the same reason, that the submission to arbitration, and consequent award, reducing her share from 3 to 2½ biswas, are not binding on her.

It was not seriously contended before their Lordships that these arbitration proceedings, so far as the appellant's interest is concerned, could be supported. She was then about four years of age, and her consent seems to have been taken for granted to what was no doubt considered a fair family arrangement. But it has never been ratified by her, and is imperative as regards her interest in her father's property. It is true that, in the award, her sister Ulfat-un-nisa is described as acting "for herself and as guardian of Abdul Majid Khan and Rashidan, minors"; but at the date of the award, the 12th January 1889, an application was actually pending in her name in the court of the District Judge of Meerut for a certificate of guardianship of these minors, and this application was rejected by the above mentioned order of the 13th April, 1889. The statement in the award was therefore unjustified, and the appellant is entitled to the declaration which she seeks, that the award is a nullity, as far as she is concerned.

Mauladad Khan, as has already been stated, had in 1889 got into his own hands all then existing claims against Sardar Khan's estate, and after a short interval, he proceeded to realize them. On the 23rd April 1891, he applied for execution of Fateh Chand's decree, and in his application the appellant is described as "Musammat Rashidan, minor, under the guardianship of her sister Musammat Ulfat-un-nisa." On the 16th May 1891, a similar application was made, in the name of his four sons, for execution of Sant Lal's decree, and in it the appellant is described as "minor . . . under the guardianship of Mauladad Khan" and there is no room for doubt that though the sons were the nominal applicants, Mauladad was the person really interested in the application. In the sales which followed on these applications, the decree-holders were, in both cases, the purchasers. On the 26th May 1891, Mauladad brought a suit to recover interest on the mortgage which he himself held, and in the plaint, the appellant is described as "under the guardianship of her sister Ulfat-un-nisa," who, he states, is "certificated guardian of her person," and "has been made guardian *ad litem*." In this case the decree was made in the absence of both the female defendants. No step appears to have been taken to enforce the bond to Achal

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Das until after Mauladad's death, which occurred on the 22nd July, 1893. On the 4th January, 1894, his four sons put the bond in suit, and obtained an *ex parte* decree on the 28th August, 1894. In this case also the appellant is described as "under the guardianship of her sister," who, by order of the Court, dated 10th March 1894, was appointed guardian *ad litem*. The possessory mortgage in favour of Mauladad Khan is admittedly still in force.

The learned Subordinate Judge found that the proceedings impeached in the plaint failed as against the plaintiff (appellant), because she was not properly represented in them. He held that Ulfat-un-nisa, as a married woman, could not have been appointed guardian *ad litem*, and that Mauladad, whose sons were merely *benami* purchasers on his behalf, had an interest adverse to that of the minor, and was therefore disqualified. The High Court on appeal set aside his decree, and dismissed the suit upon the ground that

"the decrees upon which the execution proceedings were founded are not in any way impeached in the suit, nor could they be. The impeached transactions were proceedings on those decrees in execution, and, this being so, it was the proper course for the plaintiff, if she had any objection to make to the execution of the decrees, to raise these objections under the provisions of section 244 of the Code of Civil Procedure, and not by a separate suit."

With all respect to the learned Judges of the High Court, their Lordships are unable to agree with this conclusion. Section 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the appellant was never a party to any of these suits in the proper sense of the term. Her sister, Ulfat-un-nisa, was a married woman, and therefore was disqualified under section 457 of the Code from being appointed guardian for the suit, and Mauladad's interest was obviously adverse to that of the minor. An ingenious argument was put forward by counsel for the respondents to the effect that as section 53 of the Guardians and Wards Act (Act VIII of 1890) gives a preference to the appointment of the guardian of the person of a minor as guardian for the suit, and as Ulfat-un-nisa was guardian

of the person of her minor sister, she could properly have been appointed her guardian *ad litem* in these proceedings. But this argument is open to the obvious objection that the later enactment leaves section 457 of the Code untouched, and that the effect of the two statutes, read together, is that a proper guardian of the person of a minor may, if properly qualified, be preferred as his or her guardian *ad litem*.

For these reasons their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decree of the High Court should be discharged with costs, and that, subject to the payment, or allowance on account, by the appellant of any sum that may be found to be due by her in respect of the possessory mortgage of the 18th May, 1886, the decree of the Subordinate Judge should be restored.

The respondents must pay the costs of the appeal.

Appeal allowed.

Solicitors for the appellant:—*T. C. Summerhays & Son.*

Solicitors for the respondents:—*Ranken Ford, Ford & Chester.*

J. V. W.

IZZAT-UN-NISA BEGAM AND ANOTHER (TWO OF THE DEFENDANTS) v. PARTAB SINGH (PLAINTIFF) AND OTHERS (THE REMAINING DEFENDANTS).

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[On appeal from the High Court, North-Western Provinces at Allahabad.]

Mortgage—Sale of mortgaged property—Purchasers—Sale subject to prior encumbrances—Purchase by decree holder—Suit to recover from purchaser the amount due on prior encumbrances when they have been, after the purchase, declared invalid.

Certain villages were put up for sale in execution of a decree under section 88 of the Transfer of Property Act (IV of 1882), and it was notified in the proclamation of sale that the property was to be sold subject to two prior mortgages of 25th May, and 2nd December, 1877. The decree-holder (the predecessor in title of defendants) obtained leave to bid and became the purchaser of eight of the villages. Subsequently, as the result of suits to enforce them, the two mortgages of 1877 were, by decrees of the Privy Council and the High Court respectively, declared to be invalid. In a suit brought by the vendor against the representatives of the auction purchaser to recover the amount due on the two mortgages of 1877, as "unpaid vendors' purchase money."

Held (reversing the decision of the High Court) that the suit was not maintainable. On the sale of property subject to encumbrances the vendor gets the

Present:—Lord MACNAGHTEN, Lord DUNEDIN, Lord COLLINS, Sir ANDREW SCOBLE, and Sir ARTHUR WILSON,