1915

RAM UGRAH PANDE v. ACHRAJ NATH PANDE.

application to be treated as made within time. We note that the respondents plead before us in argument that both the agreement and the award were *primâ facie* legal and binding, subject to any objection which could be raised on the ground of fraud or misconduct of the arbitrator, *etc.* The court below has found that both the agreement and the award were valid and that the present application was barred by time. With this we find ourselves in agreement. This result therefore is that the appeal fails and is dismissed with costs.

Appeal dismissed.

1915
November, 26.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

ABID ALI (PLAINTIFF) *v.* IMAM ALI AND ANOTHER (DEFENDANTS). *

Mortgage—Contribution—Payment by co-mortgagor—Guardian and minor—Power of de facto *guardian to mortgage minor's property—Muhammadan Law.*

Held that where a joint mortgagor seeks contribution upon the ground that he has paid the whole mortgage debt and thus relieved the property of his co-mortgagor from a burden, it is not necessary for him to plead that he did so under compulsion.

Held also that the *de facto* guardian of a minor Muhammadan is competent, in case of necessity and for the benefit of the minor, to make a valid mortgage of the minor's property.

THE facts of this case were as follows :—

The plaintiff came into court on the allegation that he and the defendants had borrowed Rs. 3,000 on the 11th of April, 1908, from Dalel Khan and Sikandar Khan, and that he and defendant No. 1 and Musammat Shaffat Fatima as mother and guardian of defendant No. 2, who was then a minor, executed on the said date a simple mortgage-deed in favour of the said creditors, but as the rate of interest stipulated in the mortgage-deed was very high, the plaintiff alone paid the amount due on foot of the said mortgage to the creditors on the 1st of July, 1912. The plaintiff having paid the amount brought this suit for contribution against the defendants. The defendant No. 1 pleaded unsoundness of mind and the exercise of undue influence over him. The defendant No. 2 contended that the mortgage-deed had not been executed by his

* Second Appeal No. 1290 of 1914, from a decree of C. M. Collett, First Additional Judge of Aligarh, dated the 18th of May, 1914, reversing a decree of Shams-ud-din Khan, Additional Subordinate Judge of Aligarh, dated the 5th of January, 1913.

mother nor did she receive the consideration thereof, and that she was not legally entitled to transfer his property. The court of first instance dismissed the suit. On appeal by the plaintiff, the lower appellate court found as a fact that the execution of the deed and the receipt of consideration by the executants was proved and that defendant No. 1 had failed to substantiate the pleas as to unsoundness of mind and the exercise of undue influence. He accordingly decreed the suit for half of the amount claimed as against defendant No. 1. As against defendant No. 2 he upheld the decree of the court of first instance, relying upon the Privy Council ruling in *Mata Din* v. *Ahmad Ali* (1) and on the question of the necessity for the loan he observed that although it did not seem that there was any ground for assuming that the money was not taken for necessity, it could not be said that plaintiff had clearly proved the existence of necessity. The plaintiff appealed and defendant No. 1 filed cross-objections.

Maulvi *Iqbal Ahmad* (with him Munshi *Gulzari Lal*) for the appellant :—

The mother of defendant No. 2 being his *de facto* guardian was competent to transfer his property for his benefit. *Majidan* v. *Ram Narain* (2) and *Ram Charan Sanyal* v. *Anukul Chandra Acharjya* (3). In the Privy Council case referred to by the court below it was never decided that a *de facto* guardian is not competent to transfer a minor's property for his benefit. In that case it had been found that the transfer was not for the minor's benefit, and it was absolutely unnecessary to decide the question of law involved in this case. The District Judge never intended to find against the plaintiff on the question of necessity for the transfer. The meaning of his finding is that the plaintiff has proved that the money was taken for necessity, but that the plaintiff had failed to prove that fact clearly. He decided the case against the plaintiff on the question of law, but he never intended to find on the question of fact against the plaintiff. At any rate there is not such a clear and definite finding of fact against the plaintiff as would be binding on this Court.

(1) (1912) I. L. R., 34 All., 213. (2) (1903) I. L. R., 26 All., 22.

(3) (1906) I. L. R., 34 Calc., 65.

1915

ABID ALI v. IMAM ALI.

Mr. *B. E. O'Conor*, for the respondent.

The finding of the lower appellate court on the question of necessity is clear and against the appellant. It lay upon the plaintiff to prove satisfactorily that the transfer was for the minor's benefit, and as he had failed to establish that fact, the suit was rightly dismissed as against defendant No. 2.

Maulvi *Iqbal Ahmad*, was not heard in reply.

BANERJI, J :—This appeal arises out of a suit for contribution brought by the plaintiff appellant against the defendants in respect of a mortgage, dated the 11th of April, 1908, alleged to have been executed in favour of Dalel Khan and Sikandar Khan by the parties to this suit. The plaintiff discharged the mortgage and he claims to recover from the defendants their rateable share of liability for the mortgage debt. The defendants denied the execution of the mortgage and the payment of consideration. It was further contended on behalf of Imam Ali that he was of unsound mind at the date of the mortgage, and that the mortgage, if at all made, had been obtained from him by undue influence. On behalf of Shahamat Ali, who is a minor, it was urged that his mother, who is said to have executed the mortgage as his guardian, was not competent to do so on his behalf, that there was no necessity for the mortgage, and that he did not benefit by it. The court of first instance found in favour of the defendants and dismissed the suit. Upon appeal the learned Judge came to the conclusion that Imam Ali was not of unsound mind at the date of the mortgage, that there was no undue influence, and that the execution of the mortgage was proved as well as the payment of consideration. The learned Judge decreed the claim against Imam Ali. As regards the minor defendant, he was of opinion that his mother, not being his legal guardian according to Muhammadan Law, was not competent to mortgage his property. He further proceeded to try the question of necessity, and on that point he observed that, although it did not seem that there was any ground for assuming that the money was not taken for necessity, it could not be said that the plaintiff had clearly proved the existence of necessity. He accordingly affirmed the decree of the first court as against the minor defendant. The plaintiff filed this appeal and objections have been preferred under order XLI, rule 22, on behalf of Imam

Ali. We may deal with these objections first of all. It was urged that as the mortgage was not discharged under compulsion, the plaintiff could not maintain a suit for contribution. We do not agree with the contention. It is clear that if the plaintiff discharged the mortgage he relieved the property of the defendants from a burden which lay on it, and is, therefore, entitled to be compensated for what he paid for the defendants and for their benefit. It was also not necessary, in order to entitle him to contribution, that he should have been put into possession of the property of the defendants. As he relieved the defendants of a burden, whether under compulsion of law or as a private transaction, he is entitled to claim that the defendants, his co-mortgagors, should pay him what he has paid for their benefit.

It is next urged that the lower court did not come to a clear finding as to Imam Ali's state of mind at the date of the mortgage, and as to undue influence. We think that the finding of the learned Judge on the point is as clear as it could be. He was distinctly of opinion that at the date of the mortgage the defendant Imam Ali was not of unsound mind such as incapacitated him from understanding the nature of the transaction. He also clearly found that there was no undue influence. The objections put forward on behalf of the respondent Imam Ali must, therefore, fail.

As for the appeal, the first ground of the learned Judge's decision, namely, that the mother of the defendant had no power to make the mortgage, and that the mortgage could not be binding whether it was for necessity and for the benefit of the minor or not, cannot be supported in view of the decisions of this Court in *Majidan* v. *Ram Narain* (1), which followed the ruling in *Hasan Ali* v. *Mehdi Husain* (2). According to these rulings, if the mother of the minor defendant, who was his *de facto* guardian, made the mortgage for the benefit of the minor and for necessity, the mortgage would be binding on the minor. The learned Judge's finding on the question of necessity is not very clear and is open to doubt. It is, therefore, necessary to obtain from the court below a clear and distinct finding on the issue whether the debt in question was incurred by the mother of Shahamat Ali, minor, for valid necessity and for his benefit.

(1) (1903) I. L. R., 26 All., 22. (2) (1877) I. L. R., 1 All., 538.

1915

ABID ALI v. IMAM ALI.

We refer this issue to the court below under order XLI, rule 25, of the Code of Civil Procedure. The court will decide the issue upon the evidence already on the record. On receipt of its finding the usual ten days will be allowed for filing objections.

WALSH, J.—I want to say a word or two about this case out of respect to the learned Judge of the lower court. It is quite clear that he followed the dictum which has been cited from the argument in the Privy Council, and did not recognize that the decisions of this Court, which were quoted to him, were binding upon him. Now it is quite true that, in spite of the decision to which he came upon the point of law, he would still have to dispose of the issue as to necessity, and if he had done so in any shape or form, however unsatisfactory on the face of it, I should have to accept it. To my mind it is perfectly clear that he came to no decision at all. I look at the decisions to which he did come. In clear unambiguous language he held that the execution of the deed was proved. In clear unambiguous language he held that the two issues of unsound mind and undue influence failed. In clear unambiguous language he held that the mother had no power to mortgage. I, therefore, find that out of five decisions to which he is alleged to have come he used clear unambiguous language in four. In the fifth he used language which under no circumstances can be called either clear or unambiguous. Mr. *O'Conor* sought to justify or rather to satisfy us that it was a finding of fact on two grounds. The first, as I understand him, is that it was a slipshod judgement; secondly, that there had already been a finding by the Subordinate Judge. To my mind both these points rather confirm the view which I took on a study of the language used by the District Judge. If it had been a slipshod judgement, one might possibly infer that he intended to come to some decision. But to my mind it is a very clear and well expressed judgement from the beginning to the end, and my view, therefore, is strengthened that he did not intend to come to any decision on this point. Secondly, the fact that he had a decision before him of the Subordinate Judge on this point rather strengthens my view that the tendency of his mind was not to agree with the Subordinate Judge. He could have said, on the merits as to necessity, that the Subordinate Judge had found that there was no necessity, and that he agreed with him.

1915

ABID ALI v. IMAM ALI.

So far from saying that, he dwelt upon the strength of the argument in favour of necessity, and he went on to say, "it does not seem that there is any ground for assuming that the money was not taken for necessity, though it cannot be said that plaintiff has clearly proved this." Under these circumstances it is impossible for me to come to the conclusion that the District Judge intended to find that there was no necessity.

Issue referred.

Before Sir Henry Richards, Knight, Chief Justice, and Mr. Justice Muhammad Rafiq.

1915

November, 30.

BANSGOPAL AND OTHERS (PLAINTIFFS) v. SHEO RAM SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Construction of document—Anomalous mortgage—Suit for foreclosure—Limitation—Act No. IX of 1908 *(Indian Limitation Act), schedule I, article* 135*—Regulation No. XVII of* 1806.

A mortgage was made on the 25th of February, 1866, for a period of six years. It was provided that, if after six years anything remained due to the mortgagees, they might forthwith enter into possession of the mortgaged property and realize the principal and interest. It was further provided that the property would not be transferred so long as any principal or interest remained due; and that if it was transferred, or if the money due to the mortgagee was not paid, the mortgagee, without waiting for the expiry of the six years, might bring a suit for recovery of the principal and interest, and might also get possession "by completion of sale." Nothing at all was paid by the mortgagor in the way of either principal or interest and in 1867 part of the mortgaged property was transferred. Proceedings under section 8 of Regulation XVII of 1806 were not taken by the mortgagee. In the year 1910 the representative of the mortgagee instituted a suit for foreclosure.

Held, on a construction of the mortgage bond in suit, that the cause of action accrued in 1867, and the suit was barred by limitation.

Kishori Mohun Roy v. *Ganga Bahu Debi* (1) distinguished. *Srinath Das* v. *Khetter Mohun Singh* (2) followed. *Shyam Chander Singh* v. *Baldeo* (3) and *Ram Dawar Rai* v. *Bhirgu Rai* (4) referred to.

THIS was a suit for recovery of money and in default of payment by the defendants, for foreclosure of the mortgaged property.

The property in dispute, a village called Razipur, was mortgaged by the predecessors in title of the defendants on the 25th of February, 1866, for a period of six years. It was provided by the

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* First Appeal No. 449 of 1913, from a decree of Murari Lal, Subordinate Judge of Cawnpore, dated the 2nd of October, 1913.

(1) (1895) I. L. R., 23 Calc., 228. (3) (1912) 10 A. L. J., 522.

(2) (1889) I. L. R., 16 Calc., 693. (4) (1912) 10 A. L. J., 538.