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easy to draw by those who are living under the conditions of 1920, and there is always a danger of inferring that the only probable conduct of an individual is the course which you yourself would have taken.

In my judgment the appeal ought to be allowed and the suit dismissed with costs.

BY THE COURT.—In accordance with the decision of the majority of the Bench the order of the Court is that this appeal be allowed, the order of the court below be set aside and the decree of the court of first instance be restored with costs in all courts.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

AZIZ-UN-NISSA BIBI (APPLICANT) *v.* O. M. CHIENE (OPPOSITE PARTY.)*

1920 *May*, 14.

Act No. III of 1907 *(Provincial Insolvency Act), section* 16(4)—*Muhammadan law—Bequest to an heir—Consent of other heirs to bequest—Such consent not affected by insolvency of other heirs.*

When the consent of the heirs of a Muhammadan to a bequest in a will in favour of an heir has been signified the legatee takes from the testator and the consent does not operate as a transfer by the heirs of a right which has in the mean time vested in them.

Such consent would not be affected by the fact of the consenting heirs being insolvents.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Iqbal Ahmad*, for the appellant.

The Hon'ble Saiyid *Raza Ali*, for the respondent.

PIGGOTT and WALSH, JJ.:—This is an appeal in an insolvency matter. The insolvents are father and son, Muhammad Murtaza and Muhammad Khalil. It is sufficient to say that they were declared insolvents in separate proceedings. Muhammad Murtaza's wife, Hajra Bibi, was possessed of some immovable property. She died on the 1st of November, 1918. The receiver has taken possession, we are told, of certain shares in mauza Sarai Abdul Malik as having devolved upon the two insolvents

*First Appeal No. 109 of 1919, from an order of F. D. Simpson, District Judge of Allahabad, dated the 14th of May, 1919.

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by inheritance from this lady. There were one or two other properties of lesser consequence involved when the case was heard in the court below, but practically we are concerned only with the shares in the village above referred to. The receiver's action is challenged by Musammat Aziz-un-nissa Bibi, the daughter of Musammat Hajra Bibi and therefore the daughter of one insolvent and sister of the other. She says that the whole of the properties in question have passed to her under a will, executed by her mother on the 27th of October, 1918, that is to say, four days before her death. She further claims that in any case the whole of Musammat Hajra Bibi's share in mahal Bisheshar Dayal, one of the two mahals in question in the said village, is subject to a mortgage charge of Rs. 2,650 in her favour. The learned District Judge has found that there is no valid mortgage in favour of the objector. He has found that the deed of the 27th of October, 1918, is proved, but that it is on its terms a deed of gift *inter vivos* and not a will. If a deed of gift, it is invalid for want of registration and delivery of possession. The findings of the District Judge on each of these points are challenged before us in appeal. The document is curiously drafted and it is not altogether easy to decide the meaning which ought to be attached to its various parts. As regards the property in mahal Bisheshar Dayal, we are clearly of opinion that the District Judge was right. The document recites the fact of a mortgage in favour of Musammat Aziz-un-nissa Bibi and purports to convey by gift the equity of redemption. It would undoubtedly operate, if at all, as a conveyance by way of gift taking effect immediately, of whatever interest Musammat Hajra Bibi possessed in this mahal. We think, therefore, that nothing passed to Musammat Aziz-un-nissa Bibi in virtue of this part of the document, and whatever rights her mother possessed in this mahal on the 1st of November, 1918, have devolved upon her heirs, that is to say, 1/4th on her husband, Muhammad Murtaza, one-half on her son, Muhammad Khalil, and one-fourth on her daughter, the appellant, Aziz-un-nissa Bibi. With regard to Musammat Hajra Bibi's interests in the other mahal in the same village, we think we must interpret the document as testamentary in its character. Unless,

therefore, it can be challenged on some other ground, it would operate to pass this property to the legatee from the date of the testator's death. It has been contended before us that, considered as a testamentary disposition, the document is invalid being a bequest to an heir. This point has been gone into on evidence, and we are satisfied that it has been rightly found that the remaining heirs both consented beforehand to the making of the will in these terms, and gave an effective consent after the death of the testatrix.

An ingenious argument has been pressed upon us on behalf of the respondent, to the effect that the only consent which would make the bequest valid was the consent given after the death of the testatrix, and inasmuch as the bequest was invalid until that consent was given, the provisions of section 16, clause (4), of the Insolvency Act came into operation and their shares under the Muhammadan Law vested in the two respondents, and therefore in the receiver, on the death of the widow, before the insolvents could possibly have validated the bequest by their consent. We think this argument ought not to prevail. It is an established principle of Muhammadan Law that, once the consent of the heirs has been signified, the legatee takes from the testator, and that the consent does not operate as a transfer by the heirs of a right which has in the meantime vested in them. There may be perhaps some conflict between this principle of Muhammadan Law and the strict wording of section 16(4) of the Insolvency Act, but we think the principle of Muhammadan Law ought to be applied and that, in view of the consent signified by the heirs, we must take it that the property in the other mahal passed to Musammat Aziz-un-nissa Bibi as legatee of her mother on the death of that lady. There remains the question of the mortgage on the share in mahal Bisheshar Dayal. We think it sufficient to say that the learned District Judge has fully discussed the very curious and involved proceedings leading up to the execution of the said mortgage deed, that in our opinion he has rightly inferred, on the evidence as a whole, that there was no genuine mortgage, that no consideration passed and that the whole transaction was never intended to be anything but a fictitious transfer, made probably by

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way of precaution in view of the insolvency of the male heirs. The result of this is that we partly allow and partly dismiss the appeal. We think the appellant is right in saying that it ought to be made quite clear that she takes her own share under the Muhammadan Law in the property in both mahals of Sarai Abdul Malik. The learned District Judge probably intended this, but the point should be put beyond doubt. Our order is that the receiver is entitled to take free of any mortgage charge one-half of the property in mahal Bisheshar Dayal as that of the insolvent, Muhammad Khalil, and another 1/4th as that of the insolvent, Muhammad Murtaza Husain, but that the share in the other mahal must be released from the claim of the receiver and left to Musammat Aziz-un-nissa Bibi as legatee under the will. The appeal is, therefore, partly decreed and partly dismissed. The parties should bear their own costs in this Court. The receiver will be entitled to take his costs out of the estate.

Decree modified.

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

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May, 15.

BHUP SINGH AND OTHERS (PLAINTIFFS) *v.* CHEDDA SINGH AND OTHERS (DEFENDANTS).*

Mortgage—Partition - Effect of partition on a mortgage of an undivided share in joint property—Decree for sale passed prior to final decree for partition, but actual sale subsequent to such decree.

It is one of the incidents of a mortgage of an undivided share that the mortgagee cannot follow his security into the hands of a co-sharer of the mortgagor who has obtained the mortgaged share upon partition. If the partition is tainted with fraud, or if in the making of the partition the incumbrance was taken into account and the partition was made subject to the incumbrance, the result will be different, but in the absence of fraud or of the circumstances mentioned above the mortgagee's remedy is against the share or property which the mortgagor has obtained under the partition.

Hence where execution of a decree for sale of a share in undivided property the subject of a mortgage was going on *pari passu* with proceedings for partition, and the mortgaged share was sold two days after the final decree for partition, (by which the mortgaged property fell to the share of a member of the family other than the mortgagor) was made, it was *held* that the auction purchasers (in this case the decree-holders themselves) took nothing by their purchase.

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* First Appeal No. 387 of 1917, from a decree of Shams-ud-din Khan, First Additional Subordinate Judge of Aligarh, dated the 7th of July, 1917.