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proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one. These propositions are substantially the same as those laid down by JENKINS, C. J., and MUKERJI, J., in the case of *Debi Prosad*".

We think that this principle applies to the present case. There is no rebutting evidence. The origin of the debt is lost in the dim past. There are facts which go to show that the lady, Musammat Durga Kunwar, had good reason to incur debt for and on behalf of the estate and we have the sole next reversioner (her own son) capable of consenting, joining with her in executing the mortgage. It must be remembered that she was not without advice or help, she had her husband as well as her adult son. There was no incentive for her to destroy the estate or to encumber it without good cause. Her natural affection alone would have made her strive to protect the estate for her son. This is not the case where the next reversioner is a distant relative of a deceased husband, but one in which the next reversioner is actually the own son of the female owner. We think, therefore, that, applying the principle laid down in the cases mentioned above, we must in the circumstances draw the clear inference that the mortgage was executed for the purposes of the estate and is therefore a legal and binding one. Under these circumstances we think that the decree granted by the court below is a proper decree and the appeal therefore fails. We dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Lindsay and Mr. Justice Stuart.

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August, 1.

KANNU MAL AND ANOTHER (PLAINTIFFS) *v.* INDARPAL SINGH AND OTHERS (DEFENDANTS)*.

Act No. IV of 1882 (*Transfer of Property Act*), *sections* 83, 84 *and* 103—*Mortgage—Deposit of mortgage money—Procedure necessary when the mortgagee is a minor.*

On a construction of sections 83 and 84 of the Transfer of Property Act, 1882.

*Second Appeal No. 1187 of 1919, from a decree of A. Hamilton, Second Additional Judge of Aligarh, dated the 15th of August, 1919, modifying a decree of Hanuman Prasad Varma, Second Additional Subordinate Judge of Aligarh, dated the 9th of April, 1919.

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Held by LINDSAY, J. (STUART, J., *dissentiente*) that it is the duty of a mortgagor, in cases where he is dealing with a minor mortgagee, to take all steps which are necessary to procure the appointment of a guardian *ad litem*. In a case like this the mortgagor must apply to the Court and must bring before the Court some person who is willing to act as guardian, or, failing that, he must satisfy the Court in whatever way he can that there is no person to his knowledge who is willing to accept the duties of a guardian. In that case he can ask the Court to take action under order XXXII, rule 4, of the Code of Civil Procedure. *Pandurang* v. *Mahadaji* (1) and *Shivnath Singh* v. *Manohar Lal* (2) referred to.

If, by reason of delay in the appointment of a guardian *ad litem*, the original deposit has become insufficient, an additional sum may be deposited. *Deo Dat* v. *Ram Autar* (3) referred to.

STUART, J., *contra*. Every such case should be looked at upon its merits. But, speaking generally, a mortgagor has done all that has to be done by him when he deposits the sum due on the date of the deposit, when he presents a duly verified petition and when he states to the best of his knowledge and ability the correct address of an adult mortgagee and proposes, in the case of a minor mortgagee, a suitable person as guardian *ad litem*. To ask him to see that the guardian *ad litem* is appointed is to ask him to do something which it is not in his power to do.

THE facts of this case are fully set forth in the judgment of Lindsay, J.

Mr. *B. E. O'Conor* and Babu *Durga Charan Banerji*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

LINDSAY, J.:—The principal question for discussion in this appeal is whether a deposit of mortgage money made by the plaintiffs in this suit under the provisions of section 83 of the Transfer of Property Act had the effect of stopping the running of interest.

The facts may be stated as follows:—The plaintiffs in the suit are mortgagees who held under a mortgage, dated the 7th day of September, 1913. The mortgage money was Rs. 2,900 and out of this sum Rs. 2,425 was left to redeem a prior mortgage which was executed on the 29th day of June, 1910.

The suit was a suit for sale and the defendants first party were the mortgagors. The defendants second party were the prior mortgagees.

(1) (1902) I. L. R., 27 Bom., 23. (2) (1913) 16 Oudh Cases, 261.

(3) (1886) I. L. R., 8 All., 502.

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The earlier mortgage of the 29th day of June, 1910, had been executed in favour of five persons, some of whom were minors.

On the 24th day of September, 1913, the plaintiff, Kannu Mal, deposited Rs. 2,425 in court under the provisions of section 83 of the Transfer of Property Act. At the time of making this deposit he applied to the court for service of notice and mentioned that two of the mortgagees were minors. He made an application for the appointment of a guardian *ad litem* to these minor mortgagees and suggested the name of Chhiddu Singh who was the elder brother of the minors.

There was a great deal of difficulty about the service of notice in the case. It is not necessary to refer to the various applications which had to be made, but eventually notice was served on Chhiddu Singh, who agreed to be the guardian *ad litem* of one of the minors whose name was mentioned in the notice. He refused, however, to accept the office of guardian in respect of his other minor brother.

This led to another application being made by the mortgagor Kannu Mal, who asked that the father of the remaining minor, namely one Dambar Singh, should be appointed guardian *ad litem*. After various proceedings Dambar Singh appeared in court and on the 15th day of May, 1914, he was appointed a guardian *ad litem* by the court.

After this, fresh notices were issued to the parties under section 83 of the Transfer of Property Act and the result was that the mortgagees refused to accept the money which had been deposited, saying that it did not make up the full amount which was due under their mortgage.

The courts below have differed in their view of the law. The first court held that in the circumstances the interest on the prior mortgage ceased to run from the date of the deposit, that is to say, from the 24th day of September, 1913. The Subordinate Judge was of opinion that Kannu Mal, the second mortgagee, had done all that was required from him in order to have notice of the deposit given to the prior mortgagees.

The lower appellate court has held that the deposit made on the 24th day of September, 1913, had not the effect of causing interest to cease running. The learned Judge, relying upon

a decision of the Bombay High Court—*Pandurang* v. *Mahadaji* (1)—and also upon a decision in *Shivnath Singh* v. *Manohar Lal* (2), held that on the interpretation of section 84 of the Transfer of Property Act it could not be held that the mortgagor had done all that he had to do until the 15th day of May, 1914, when an order for the appointment of a guardian *ad litem* of one of the minor mortgagees was made. In this view the Judge held that the deposit made in court on the 24th day of September, 1913, was inadequate and consequently interest did not cease to run.

The whole case, therefore, turns upon the interpretation of the following words which are to be found in section 84 of the Transfer of Property Act:—"Or, as soon as the mortgagor. . . has done all that has to be done by him to enable the mortgagee to take the amount out of court."

In order to arrive at a correct interpretation of these words it is necessary to refer back to section 83, which sets out in what circumstances the mortgagee can withdraw the money out of court.

Under section 83, if the deposit has been made, the court has the duty cast upon it of serving a notice of the deposit on the mortgagee. After the mortgagee has received the notice he has to present a petition verified in the manner prescribed by the law for the verification of plaints. In this petition he has to state the amount then due on the mortgage and his willingness to accept the money so deposited in full discharge of such amount. Then, on depositing in court the mortgage-deed, if in his possession and power, he may apply for and receive the money.

Where the mortgagee is a person of full age no difficulty can arise. The mortgagor goes to the court, makes his deposit, supplies the address of the mortgagee and thereupon the court has to issue a notice. In this case there is nothing more for the mortgagor to do.

Where, however, the mortgagee is a minor it seems impossible to hold that he can take the steps which are laid down in section 83, that is to say, the steps which a mortgagee has to

(1) (1902) I. L. R., 27 Bom., 23. (2) (1913) 16 Oudh Cases, 261.

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take before he can withdraw the money out of court. No minor is entitled to present a petition to court or to verify it in the manner prescribed by law for the verification of plaints, nor can he do any other act in court except through a person who has been appointed his guardian *ad litem*.

It follows, therefore, that up till the time a guardian *ad litem* has been appointed for a minor mortgagee he is not in a position to take action under section 83 for the withdrawal of the mortgagee money.

The question then arises whether in such a case the mortgagor has done all that the law requires him to do when he has presented a petition to court supported by an affidavit in which he alleges the minority of the mortgagee and where, in addition, he applies to the court for the appointment of a guardian *ad litem*.

That such an appointment has to be made in order to make the proceedings under section 83 valid in the case of a minor mortgagee is clear from the provisions of section 103 of the Transfer of Property Act. This section refers to chapter XXXI of the Code of Civil Procedure of 1882, which corresponds to order XXXII of the present Code of Civil Procedure.

It is apparent from the provisions of order XXXII that the appointment of a guardian *ad litem* to a minor defendant is the act of the Court. The Court has to make an order directing such an appointment but such an order can only be obtained upon an application made to the Court by the plaintiff.

Further, it is to be remembered that the power of the Court under order XXXII of the Code of Civil Procedure to appoint a guardian *ad litem* is limited in this way, namely, that no person can, without his consent, be appointed a guardian for the suit. This being so, no court can make an order for the appointment of the guardian *ad litem* unless it has before it a person signifying his willingness to accept the office of guardian. There is, indeed, a provision, namely, rule 4, sub-rule (4) ,of order XXXII, which enables a court, in cases where no suitable person can be found willing to accept the office of a guardian, to appoint one of its officers as guardian *ad litem*.

It appears to me, therefore, that it is the duty of a mortgagor, in cases where he is dealing with a minor mortgagee, to take all steps which are necessary to procure the appointment of a guardian *ad litem*. In a case like this the mortgagor must apply to the Court and must bring before the Court some person who is willing to act as guardian, or, failing that, he must satisfy the court in whatever way he can that there is no person to his knowledge who is willing to accept the duty of a guardian. In that case he can ask the Court to take action under order XXXII, rule 4.

Applying these principles to the case now before us, it seems to me that until the 15th day of May, 1914 when the Court finally on the application of the mortgagor appointed Dambar Singh the guardian *ad litem* of one of the minor mortgagees, the mortgagor had not, in the language of section 84 "done all that had to be done by him to enable the minor mortgagee to take the money out of court."

This is the view which was taken in the Bombay case which has been followed by the lower appellate court. I was at first inclined to doubt whether that ruling laid down the law correctly, but on consideration I think it does.

There can be no doubt that this interpretation produces inconvenient results for the mortgagor. In the first place, owing to the delay which necessarily takes place in the appointment of a guardian, he is not in a position to deposit in court the precise amount which would be owing on the mortgage at the date of the appointment of guardian *ad litem*. It is no doubt the fact that appointment of a guardian is very often protracted and, as in the present case, this protraction is often the result of some trickery on the part of the defendant or his friends. Another anomaly which arises from this interpretation is this, namely, that it gives a minor mortgagee an advantage over a mortgagee of full age, inasmuch as the interest goes on running after the date of the deposit and can only stop when the appointment of a guardian has been ordered by the court and the full money is paid in. On the other hand, it is to be observed that as soon as a guardian *ad litem* of a minor mortgagee is appointed there seems to be no difficulty in the way of the

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mortgagor's making a fresh deposit. The Act does not specifically provide for this, but there appears to be no reason why it should not be done. I notice that in a case of this Court in *Deo Dat* v. *Ram Autar* (1) such a course was taken. And, again while this interpretation of the section produces the inconvenience to the mortgagor which I have noted above, it is to be remembered that this procedure is enacted for the protection of the mortgagor. By following this procedure the mortgagor can pay the mortgage money to a person who can give a valid discharge in law for the debt.

I have come to the conclusion, therefore, that the view taken by the lower appellate court is correct and that it cannot be said in the present case that interest ceased to run from the 24th day of September, 1913, the date on which the second mortgagee deposited Rs. 2,425 in court. I am assuming of course that Rs. 2,425 represented the full amount which was due on the earlier mortgage on the date of the deposit.

In the fourth ground of the memorandum of appeal a plea is taken that an offer of the mortgage money to one of the joint mortgagees was quite sufficient. That question, however, does not arise, because it is not made to appear that the second mortgagee made any offer of this kind. No offer was made to one of the mortgagees on behalf of all the other mortgagees; on the contrary, the petition which was presented under section 83 shows that a deposit was made for all the mortgagees and the Court was asked to send notice to them all.

Paragraph 5 of the memorandum of appeal raises a question of costs which we think ought to be determined in favour of the appellants. The court of first instance had allowed the plaintiffs' costs against the mortgagors. The appeal in the court below was brought by the prior mortgagees, and the mortgagors did not bring any appeal against the order of costs passed by the court of first instance. In these circumstances I think the learned Judge of the court below was not right in refusing the plaintiffs' costs against the first set of defendants (the mortgagors). Those costs should now be included in the decree in the plaintiffs' favour. Lastly, it is brought to our notice that the

(1) (1886) I. L. R., 8 All., 502.

decree which the court below has passed is wrong in form. As to that there can be no doubt whatever. It does not provide for the sale of the property for both the mortgage debts in case the second mortgagee pays off the prior mortgage. I direct that a decree be drawn up by this Court in Form 8, Schedule I, Appendix D, of the Code of Civil Procedure, and allow a period of six months for redemption of the earlier mortgage.

STUART, J.:—The main question is whether the rule laid down by the Divisional Bench of the Bombay High Court in *Pandurang* v. *Mahadaji* (1) should be followed. I propose to examine that ruling. It is agreed that the decision of this appeal will turn, as it turned in the Bombay case, upon the interpretation given to the words in section 84 of the Transfer of Property Act (No. IV of 1882), "as soon as the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of court" to the facts. The Transfer of Property Act nowhere lays down what are the duties of a mortgagor in this respect and the facts in each case must be separately considered. The eminent Judge who delivered the judgment in the Bombay case says, at p. 29:—"The sole question appears to me to be whether it was not incumbent on the mortgagor, in the circumstances of this case, not only to apply for a guardian *ad litem* but also to see that one was appointed. It is clear that for the purposes of a tender under this Chapter of the Transfer of Property Act it would be incumbent on a mortgagor to procure the appointment of a guardian *ad litem*. Till such an appointment has been made there was no one to whom, under the Act, a tender on behalf of the minor could be made. Does not this furnish us with some clue as to the measure of the mortgagor's duty for the purpose of a deposit? I think it does, though I concede that the analogy is not perfect." The learned Judge does not lay down anything definitely here, and with due respect I am unable to agree that the provisions of the Act as to the conditions of making a tender afford any indication as to what are the duties of the mortgagor when he makes a deposit. "Until a guardian *ad litem* has been appointed, all has not been done to enable the minor mortgagee, to take the money out of

(1) (1902) I. L. R., 27 Bom., 23.

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court. Something more remains to be done,—the appointment of a guardian *ad litem*. Can the mortgagor claim that he has completely performed his part when he has made his application?." The answer to that question is, as is stated later, the answer to the question whether it is the duty of the mortgagor to see that a guardian *ad litem* is appointed or whether it is the duty of the court to see that a guardian *ad litem* is appointed. "Suppose, for example, that the guardian proposed by the mortgagor were to refuse to act, would nothing remain to be done by the mortgagor? Surely it would be incumbent on him to propose some other guardian, because it is his duty, as it would be under Chapter XXXI of the Code of Civil Procedure, to see that a guardian *ad litem* is actually appointed, for until then there is no one on whom the requisite notice can be served, or authorized to take the money out of court." Here I must differ respectfully from the learned Judge. I do not agree that it is the duty of any litigant to see that a guardian *ad litem* is actually appointed. "It is true that the language of the Legislature is not specific on this point, but any other view might operate hardly on those, who from personal incapacity cannot protect themselves, whereas a construction that would impose on the mortgagor the duty of seeing that a guardian is appointed involves no practical detriment to him if he acts with prudence. Thus it was open to the mortgagor in this case to have moved with sufficient promptness to secure that a guardian should have been appointed in time." I would point out here that if the view taken by the learned Judge is accepted, no amount of promptness on the part of the mortgagor in endeavouring to secure the appointment of a guardian would protect him in respect of the deposit which he made at the time of his application, for *ex necessitate rei* the guardian must be appointed after the money has been deposited; and the money which was sufficient on the date of the deposit is necessarily insufficient at any subsequent date. "I am even inclined to think that he might have made his application for a guardian before depositing his money, for the Act does not dictate any order of sequence, and it is obvious that in the case of an infant ortgagor the application for a guardian must precede the

deposit." This suggestion is open to the criticism that before an application there must be a "lis" and until the money is deposited there is no "lis." If a man applied to the court to appoint a guardian *ad litem* to a minor on the allegation that he proposed to deposit money subsequently under section 83 to the credit of that minor, he would be met by the court's refusal on the ground that his application was premature because up to date there was nothing in respect of which a guardian *ad litem* could be appointed. The next passage of the judgment has no bearing on the point and may be omitted. The remainder is as follows: "The balance of convenience appears to me to favour the view that the mortgagor had not done all that had to be done by him until he procured the appointment of a guardian *ad litem*, and where language is not precise, it is permissible to attribute that effect to it which best accords with convenience and justice, for an argument drawn from inconvenience is forcible in law. There is certainly enough doubt in the language of the Act to permit of the application of this principle. In coming to this conclusion I have not overlooked the arguments based on section 102, but they are, in my opinion, outbalanced by the considerations which have led me to the result I have expressed." It will thus be seen that the decision of the learned Judge, then Chief Justice of the Bombay High Court, was based very largely on considerations of convenience. I am unable myself to accept the view that the point should be determined upon considerations of convenience, but if I accepted that view I should arrive at diametrically the opposite conclusion. Further, it would appear that this judgment proceeds largely upon considerations of protecting adequately an infant mortgagee; but I would suggest here that an infant mortgagee should not be protected in such a manner as to give him an advantage over an adult mortgagee or to the detriment of an honest mortgagor.

With regard to the question of the balance of convenience, it is settled law in this province (and as far as I know the view has not been dissented from in any other province) that in the case of an adult mortgagee the interest ceases to run when the money due is deposited under section 83 from the date

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of the deposit. This view is taken by a Bench of this Court in *Deo Dat* v. *Ram Autar* (1). Interest stops running from the date of the deposit and does not run until the mortgagee has received notice. Now it may be that the mortgagor gives in perfectly good faith what he believes to be the correct address of the mortgagee, and that the mortgagee (whose conduct can also not be questioned) cannot be found at that address. It may then take a very considerable period before it is brought to the notice of the mortgagee that the mortgagor has deposited the money. Nevertheless it has been laid down that once the money is deposited, if the amount is sufficient on the date of the deposit, the mortgagee will get no further interest, however long he may have to wait before he is informed that the money is standing to his credit. A point that does not appear to have suggested itself in the Bombay case is this, how is the mortgagor to know the amount that he should deposit in court when one of the mortgagees is an infant? The amount that he has to deposit will vary, according to this view, with the interest that accrues to the date of the actual appointment of the guardian *ad litem*. It is of course impossible for the mortgagor even to guess as to what that date will be. What has he to do? Is he to add six months' interest, or 12 months' interest, or how much, to secure the amount being sufficient by the time the guardian *at litem* is appointed? There will be inconvenience if he deposits too much in getting the balance returned to him. If he deposits too little, he is of course out of court. If he deposits too much, he is a loser. Surely these considerations affect the balance of convenience.

Secondly, under the Bombay decision a minor mortgagee is placed in an extremely advantageous position compared with an adult mortgagee. In the case of an adult mortgagee the interest stops running from the date of the deposit. In the case of a minor mortgagee he must get more than the amount due on the date of the deposit, and he may get very much more, if his friends are sufficiently astute to refuse one after another to appear as guardian *ad litem*. This is perfectly easy, as we have seen to some extent in the present case. The

(1) (1886) I. L. R., 8 All, 502.

interest for a year or even more could be added, by one man after another refusing to appear as guardian *ad litem*. These questions again appear to me to affect the balance of convenience. While it is clear that everything should be done to protect the interest of a minor mortgagee, I do not see why a child who has money invested to his credit should be given such an advantage over a grown man. In no circumstances is a minor worse off than an adult, if my view be accepted. I would not, however, decide the matter myself upon the balance of convenience but upon another consideration. The law says that the mortgagor must do all that has to be done by him. Surely that means all that lies in his power. It is to be noted that he is not considered responsible for service of notice upon an adult mortgagee, the reason being that he has not the power to enforce the service of notice. That power rests with the court. Similarly he has not the power to appoint a guardian *ad litem*. He can only suggest. He suggests the appointment of a suitable person. If that person refuses, he then suggests the appointment of another suitable person. If that person also refuses, a fresh suggestion must be made, until finally, helpless, he asks the Court to appoint one of its officers. But who makes the appointment? It is perfectly clear that the appointment of a guardian *ad litem* rests with the court and not with the applicant, just as the service of a notice upon a defendant rests with the Court and not with the applicant. When the mortgagor has done his best to inform the court as to who is a suitable person to be appointed as a guardian *ad litem*, does not his duty end there? In my opinion his duty ends there. It is certainly incumbent upon such an applicant to inform the court who is a suitable person to be appointed as guardian *ad litem* to the minor. But if he honestly carries out that duty to the best of his ability, he should be exonerated from payment of subsequent interest if that person refuses to accept the office of guardian *ad litem*. I consider that each case should be looked at upon its merits. In this case I find that the applicant, finding that there were three adult brothers and two minor brothers, co-mortgagees, requested that one of the adult brothers should be appointed as the guardian *ad litem* of the two minors. Could anything be

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more reasonable? The refusal to accept the office of guardian *ad litem* of the minors in question was based upon no sufficient ground, and was palpably made to delay the proceedings. I consider that a mortgagor has done all that has to be done by him when he deposits the sum due on the date of the deposit, when he presents a duly verified petition and when he states to the best of his knowledge and ability the correct address of an adult mortgagee, and I would only superadd as a duty in the case of a minor mortgagee, the proposing of a suitable person as a guardian *ad litem*. To ask him to see that the guardian *ad litem* is appointed is to ask him to do something which it is not in his power to do.

For the above reasons I consider that the deposit made on the 24th day of September, 1913, was sufficient. I do not understand it to be seriously argued in this Court that the deposit was not sufficient on that date. I should take the view which was taken by the trial court and allow the plaintiffs to sell the mortgaged property and the prior mortgagees to take the deposit out of court. As, however, this view is not the view taken by my learned senior brother the order on the appeal will stand as laid down in his judgment.

BY THE COURT:—The appeal is dismissed with costs, subject to the modification noted in the judgment.

Appeal dismissed.

1921
August, 4.

Before Mr. Justice Tudball and Mr. Justice Sulaiman.

SAID-UD-DIN (DEFENDANT) *v.* LATIF-UN-NISSA BIBI (PLAINTIFF) AND SHAFI-UN-NISSA BIBI (DEFENDANT).*

Pre-emption—Muhammadan law—Shafi-shariq—Basis of right of pre-emption—Imperfectly partitioned mahal.

In the case of zamindari property, where the Muhammadan law of pre-emption applies, the basis of the right of pre-emption as a shafi-shariq is the common liability for payment of Government revenue. Where, therefore, the property sold is part of an imperfectly partitioned mahal, it does not make any difference whether the pre-emptors own shares within the same sub-division of the mahal as the share sold or not. *Jadu Lal Sahu* v. *Janki Koer* (1 referred to.

*Second Appeal No. 696 of 1920, from a decree of Murari Lal, Additional Judge of Moradabad, dated the 12th of February, 1920, confirming a decree of Mohsin Ali Khan, Munsif of Nagina, dated the 20th of May, 1919.

(1) (1912) I. L. R., 39 Calc., 915.