

way of earnest-money Rs. 25 was paid on account and the balance was to be forthcoming on the certificate of sale and the decree being handed over. This the decree-holders failed to do and on the contrary pursued these proceedings in execution, causing Sita Ram to be arrested in December, 1879. Objection was necessarily made by him and further execution was stayed for three months in order to enable him to bring a suit. This he has now done in conjunction with Kashi, the legal representative of his deceased co-judgment-debtor, and the relief he asks is that the defendants may be compelled to perform their contract of 22nd August, 1879, by being ordered to deliver up the sale-certificate and decree. The two lower Courts have dismissed the claim, holding it to be prohibited by ss. 244 and 258 of the Civil Procedure Code. We are clearly of opinion that the suit is maintainable and is in no way barred. The words "any Court" in the last paragraph of s. 258 have reference to proceedings in execution and refer to the Court or Courts executing a decree. They have no application to a Civil Court entertaining a separate suit asking for specific and legitimate relief of the character now prosecuted by the plaintiffs-appellants. The lower Courts have formed an altogether erroneous view and their decision cannot be sustained. The appeal is decreed with costs and the plaintiffs' claim will be allowed. Upon payment into Court of the balance due under the sale-deed of August, 1879; they will be entitled to receive the sale-certificate and decree, and in default of these being delivered over within fourteen days from the payment of such money being notified to the defendants, the plaintiffs will be entitled to proceed in execution.

Appeal allowed.

Before Sir Robert Stuart, Kt., Chief Justice, and Mr. Justice Spankie.

ROSHAN SINGH AND OTHERS (DEFENDANTS) v. HAR KISHAN SINGH
(PLAINTIFF).*

Guardian and minor—Hindu Law—Act XL of 1858.

The mother and guardian of a Hindu minor, although a certificate of guardianship has not been granted to her under Act XL of 1858, may deal with the estate of the minor, within the limits allowed by the Hindu Law.

* Special Appeal, No. 130 of 1880, from a decree of J. W. Power, Esq., Judge of Ghazipur, dated the 13th February, 1880, reversing a decree of Maulvi Abdul Majid Khan, Subordinate Judge of Ghazipur, dated the 30th September, 1879.

1881

OSMAN
SINGH
v.
KISHAN
SINGH.

THE plaintiff in this suit, a Hindu, claimed possession of his share in a certain joint undivided family property, which his mother, during his minority, had conditionally sold to the defendants. He alleged that his mother was not competent to mortgage such share, as she had not taken out a certificate of guardianship under Act XL. of 1858, and that such share had been mortgaged without lawful necessity. The defendants set up as a defence that the mother of a Hindu minor was competent as his natural and legal guardian to mortgage his estate for lawful purposes, and that the plaintiff's mother had made the mortgage impugned in this suit for such purposes. It appeared that the joint undivided family property of which the plaintiff now claimed his share was under mortgage, and that notice of foreclosure had been given, and the year of grace would have expired on the 18th August, 1872. In order to save the property the members of the plaintiff's family, including the plaintiff's mother, as guardian of the plaintiff, the plaintiff being a minor, joined in making a conditional sale of the property to the defendants, the deed of conditional sale bearing date the 14th August, 1872. With the money advanced to them under this conditional sale they satisfied the debt of the prior conditional vendees. The Court of first instance held that the plaintiff's mother was competent as his natural and legal guardian to mortgage her minor son's estate for lawful purposes, and that she did not require to hold a certificate of guardianship under Act XL of 1858, and that she had made the mortgage complained of by the plaintiff for such purposes, *viz.*, for the payment of ancestral debts, in good faith, and such mortgage was binding on him; and it dismissed the suit. On appeal by the plaintiff the lower appellate Court held that the plaintiff's mother was not competent as his natural and legal guardian to alienate his property in any way, and, reversing the decree of the first Court, gave the plaintiff a decree.

The defendants appealed to the High Court, contending that a Hindu widow was competent as the natural and legal guardian of her minor son to mortgage his property for lawful purposes.

Messrs. Conlan, Howard, and Hill, for the appellants.

Pandit Ajuahia Nath and Lala Lalta Prasad, for the respondent.

The Court (STUART, C. J., and SPANKIE, J.,) made the following

1881

 ROSHAN
SINGH
v.
HAR KISHI
SINGH.

ORDER OF REMAND.—The judgment of the lower appellate Court appears to be erroneous ; certainly it is contrary to the precedents of this Court. The Judge cites a decision of a Division Bench of the Calcutta Court in support of his ruling—*Abassi Begam v. Maharanee Rajroop Koonwar* (1). In the same volume there is another decision of a Division Bench of the same Court and of a later date—*Soonder Nurain v. Bennud Ram* (2)—which takes the opposite view of the case, which indeed is in accordance with the rulings of this Court, to the effect that the mother and guardian of a Hindu minor, though not a guardian appointed under Act XL. of 1858, when acting *bonâ fide*, and under the pressure of necessity, may sell his real estate to pay ancestral debts and to provide for the maintenance of the minor. This Court has ruled in *Hait Singh v. Thakoor Singh* (3) that s. 2, Act XL. of 1858, does not preclude the natural and legal guardian of a Hindu minor from dealing with his property, within the limits allowed by the Hindu law, without having acquired a certificate of administration from the Civil Court, and that ruling is still followed. That judgment distinctly states that the act of the guardian must be one within the limits of the Hindu law. Whether it was or was not so has not been determined by the Court below. It does not appear to be denied in appeal before the Judge that the plaintiff was a member of a joint and undivided family, but the character of the alleged debt and liability is impugned. The lower appellate Court should ascertain and determine whether, as alleged by the plaintiff, the alienation of his property by Sheoka Kuar on the 14th August, 1872, was made without any pressing necessity, and to the injury of the minor, or, as contended by the defendants, whether the transaction was one done in good faith, for the satisfaction of ancestral debts, and for the benefit of the minor. To enable the Court to determine these points we remand the case to the lower appellate Court.

(1) I. L. R., 4 Calc., 33. (2) I. L. R., 4 Calc., 76.

(3) N.-W. P. H. C. Rep., 1872, p. 57.