

missing the application for revision preferred by the convict I accept the recommendation made by the learned Sessions Judge so far as to impose upon the convict a sentence of rigorous imprisonment for 6 months in addition to the fine inflicted by the Magistrate.

C. H. O.

Revision accepted.

APPELLATE CIVIL.

Before Mr. Justice Zafar Ali and Mr. Justice Addison.

RANG ILAHI (DEFENDANT) Appellant

versus

MAHBUB ILAHI AND ANOTHER (PLAINTIFFS)

Respondents.

1925

Nov. 19.

Civil Appeal No. 1302 of 1921.

Muhammadian Law—Alienation by mother of minor son's property—invalid—Discretionary power of Court to order refund of the amount by which the minor and his estate has benefited—Specific Relief Act, 1 of 1877, section 41.

It is settled law that a Muhammadian mother has no power to alienate the property of her minor son. This being so, the mortgage in the present case made by the plaintiffs' mother was void *ab initio*, and the mortgagee's position was no better than that of a trespasser.

Imambandi v. Mutsaddi (1), followed.

Held however, that in setting aside the mortgage the Court had discretionary power under section 41 of the Specific Relief Act to make it a condition that the minors should refund the amount by which their estate and themselves were benefited, and that the lower Court had correctly assessed this amount.

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Mohori Bibee v. Dharmodas Ghose (1), Dattaram v. Vinayak (2), and Limbaji Ravji Hajare v. Rahi Ravji Hajare (3), followed.

First appeal from the decree of Lala Achhru Ram, Senior Subordinate Judge, Jhang, dated the 4th February 1921, granting plaintiffs' possession of the house in suit on payment of Rs. 3,400.

FAKIR CHAND AND J. L. KAPUR, for Appellant.

NIAZ MUHAMMAD AND MUHAMMAD MONIER, for Respondents.

The judgment of the Court was delivered by—

ZAFAR ALI J.—The property in suit consisting only of certain portions of a house devolved on the plaintiffs on the death of their father Allah Ditta in April 1905 when they were minors of tender ages. In February 1906 their mother raised Rs. 3,000 by mortgaging this property on their behalf to the defendant who is the owner of the rest of the house. The deed of mortgage executed by her was duly registered and as stated therein the term of mortgage was 60 years. The plaintiffs now sue to recover possession of the property stating that as their mother had no authority to alienate it the mortgage was void and inoperative as against them. The defendant-mortgagee pleaded that the mortgage having been made for the benefit of the minors was binding on them, that the suit was barred by time, and that in addition to the mortgage money he was, according to the express terms of the mortgage, entitled to recover Rs. 1,100 on account of the costs of the improvements to the house made by him. The Court below came to the conclusion that the suit was within

(1) (1902) I.L.R. 30 Cal. 539 (P.C.). (2) (1903) I.L.R. 28 Bom. 181.

(3) (1925) I.L.R. 49 Bom. 576.

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time and the mortgage was void, but that the plaintiffs were bound to pay the amount by which they were benefited. It further found that out of the mortgage money Rs. 2,500 was paid to the creditors of plaintiffs' father who had shortly before his death executed a bond hypothecating certain house property for this amount and agreeing to pay interest thereon, that as the father died poor and left no money, the mother required Rs. 500 to bring up the plaintiffs, and that Rs. 400 was payable to the defendant on account of improvements to the house. A decree for possession of the house on condition of payment of Rs. 3,400 was accordingly passed and the parties were left to bear their own costs.

The defendant appeals to urge (1) that the suit should have been dismissed because the mother was competent by custom to make the alienation, and also because it was barred by time as one of the plaintiffs was over 21 years of age at the time of the institution of the suit, and (2) that in any case he is entitled to the full amount of the costs of the improvements. The plaintiffs have filed cross-objections against the order for payment of Rs. 3,400.

Counsel for the plaintiffs-respondents raised a preliminary objection that the appeal is not properly stamped. The value of the suit was Rs. 5,200 but the appeal is valued at Rs. 1,800 only. Counsel for the appellant states that the trial Court having allowed him Rs. 3,400 he valued the appeal at Rs. 1,800. But the relief sought in appeal being dismissal of the suit and not merely enhancement of the amount allowed, court-fee was obviously payable on the value of the suit. The appellant's counsel was therefore put on his option either to make good the deficiency

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in Court fee or to confine his appeal to the matter for which he had paid the court-fee. He chose the latter course and therefore the only question for determination as regards the appeal is whether the defendant is entitled to recover from the plaintiffs Rs. 700 more on account of the well that he has constructed in the house. This point and the cross-objections can be dealt with together.

Now, it is settled law, as is laid down by their Lordships of the Privy Council in *Imambandi v. Mutsaddi* (1), that a Muhammadan mother has no power to alienate the property of her minor son. This being so the mortgage in the present case was void *ab initio* and the mortgagee's position was no better than that of a trespasser. The plaintiffs are therefore entitled to recover possession of the property, and the question is whether, in accordance with the provisions of section 41 of the Specific Relief Act, the relief to which they are entitled should be granted subject to the condition of their making compensation to the defendant. In *Mohori Bibee v. Dharmodas Ghose* (2), their Lordships of the Privy Council made the following observations with regard to this section:—"Another enactment relied upon as a reason why the mortgage money should be returned is section 41 of the Specific Relief Act (I of 1877), which is as follows:—*Section 41* —' On adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to make any compensation to the other which justice may require.' Section 38 provides in similar terms for a case of rescission of a contract. These sections, no doubt, do give a discretion to the Court; but the Court of First Instance and subsequently

(1) (1918) I.L.R. 45 Cal. 878 (P.C.). (2) (1902) I.L.R. 30 Cal. 539 (P.C.).

the Appellate Court, in the exercise of such discretion, came to the conclusion that under the circumstances of this case justice did not require them to order the return by the respondent of money advanced to him with full knowledge of his infancy, and their Lordships see no reason for interfering with the discretion so exercised." In view of the above it was held in *Dattaram v. Vinayak* (1) and recently in *Limbaji Ravji Hajare v. Rahi Ravji Hajare* (2) that "in setting aside a sale made on behalf of a minor by an unauthorised person, the Court may under section 41 of the Specific Relief Act make it a condition that the minor should refund the amount by which his estate and himself were benefited."

We find that in the present case the minors and their estate were benefited to the extent of Rs. 3,400 and we, therefore, consider that justice requires that they should pay this amount to the mortgagee before taking possession of the mortgage property. We agree with the Court below that the construction of the well in the house was not necessary and does not constitute an improvement, and we are of opinion that the cost of the well was rightly disallowed. The result is that we dismiss the appeal as well as the cross-objections and leave the parties to bear their own costs.

A. N. C.

Appeal dismissed.

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(1) (1903) I.L.R. 28 Bom. 131.

(2) (1925) I.L.R. 49 Bom. 576.