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MAUNG PO MYIT v. MAUNG PO SIN.

PAGE, C.J.

granted by Das, J., by whom the judgment was passed.

For these reasons this appeal is dismissed with costs.

MAUNG BA, J.—I concur.

BAGULEY, J.—I concur.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice and Mr. Justice Mosely.

V. ZOLLIKOFER & CO.

v.

O.A.O.K.R.M. CHETTYAR FIRM.*

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Dec. 1.

Probate and Administration Act (V of 1881) *s.* 90—*Mortgage by administrator without leave of Court—Mortgage whether void or voidable*—Bona fide *mortgagee—Restitution on avoidance.*

A mortgage by an administrator without the leave of the Court is not void but voidable under s. 90 (4) of the Probate and Administration Act of 1881 at the instance of a person interested in the property. The holder of a money decree against the estate cannot avoid the mortgage if it was *bona fide* effected for the purposes of the estate, unless he is prepared to make restitution to the mortgagee to the extent of the money advanced.

The Eastern Mortgage and Agency Company, Limited v. *Rebati Kumar Ray*, 3 C.L.J. 260—*referred to.*

Paget for the appellants.

Jeejeebhoy for the respondents.

PAGE, C.J., and MOSELY, J.—This appeal must be dismissed.

The facts lie within a narrow compass. On the 30th September, 1920, one Afzal Alli Naderally mortgaged certain land amounting to 15 acres for Rs. 20,000 at 10 per cent. per annum interest to a

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* Civil First Appeal No. 243 of 1929 from the judgment of the Original Side in Civil Regular No. 243 of 1928.

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Mrs. Villa. In September, 1921, Afzal Alli died, and in 1922 his brother Macksed Ally Naderally obtained letters of administration to his estate as attorney of his wife and child. Afzal Alli was a guarantee broker of the appellant firm, and in 1923 and 1924 the appellant firm obtained money decrees against the estate of Afzal Alli in one case for Rs. 15,000 and in the other for Rs. 21,000. On the 13th December, 1924, Macksed Ally, as administrator of the estate of Afzal Alli, mortgaged the 15 acres which was the subject matter of Mrs. Villa's mortgage and in addition a further 6 acres, in all 21 acres, to the respondent for Rs. 25,000 at 13 per cent. per annum interest. In 1926 the appellant firm, in execution of the two decrees that they had obtained against Afzal Alli, attached the property in suit. In 1927 Macksed Ally died. In May 1928 the respondent brought a mortgage suit against the widow and daughter and guardian *ad litem* of the minor son of Afzal Alli to recover what was due under the mortgage of 13th December, 1924. The appellant firm applied for and obtained leave to be added as a party defendant to the suit before trial. My learned brother Das, J., passed a decree in favour of the plaintiff.

It appears that Macksed Ally had failed to obtain the leave of the Court prescribed in that behalf under section 90 of the Probate and Administration Act (V of 1881); and by section 90 (4) it is provided that "A disposal of property by an executor or administrator in contravention of sub-section (2) or sub-section (3), as the case may be, is voidable at the instance of any other person interested in the property." Now, the learned Judge held, in our opinion correctly, that the mortgage in suit was not void but voidable at the instance of any person other than Macksed Ally who was interested in the

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property. Under section 64 of the Indian Contract Act "where a party to a voidable contract rescinds it, he shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received." Now, it does not appear to be clear from the judgment of the learned Judge whether he intended to hold that the appellant firm were "parties" within section 64 of the Contract Act. In our opinion, they were not; but the first question which falls to be determined is whether in the circumstances obtaining in this case the appellant firm were persons interested in the property within section 90 (4) of the Probate and Administration Act, and as such entitled to avoid the contract; and, if so, upon what terms. The appellant firm were persons entitled to redeem the mortgage within section 91, sub-section (6) of the Transfer of Property Act, and for the purposes of this case, but without finally determining the question, we may assume that the appellant firm were persons who were interested in the property within section 90, sub-section (4) of the Probate and Administration Act, and, as such, entitled to avoid the mortgage. The main question to be determined in this case, upon the assumption that the appellant firm were entitled to avoid the mortgage, is whether they were entitled to do so with or without making restitution to the mortgagees to the extent to which the mortgagees had *bona fide* advanced money to the mortgagor. Now, the defendants, other than the appellant firm, could only avoid the mortgage if they complied with the provisions of section 64 of the Contract Act. This they have not done, and, inasmuch as the mortgage was executed in 1924 and no steps to avoid the mortgage were taken by or on behalf of the

representatives of the estate of Afzal Alli before the suit was filed, in our opinion, it was too late for the representatives of the estate of Afzal Alli to seek to avoid the mortgage for the first time by their written statement in the suit. Now, it would be an anomalous and strange situation if an unsecured judgment-creditor of a mortgagor was able to avoid a mortgage which did not comply with the provisions of section 90 (3) of the Probate and Administration Act upon more favourable terms than the mortgagor himself, and Mr. Paget, who argued his case exhaustively and fairly on behalf of his clients, did not contend that it was open to the appellant firm to avoid the mortgage out of hand and without submitting to such equitable terms as the Court might, in the circumstances, deem fit to impose. Now, what are these terms? Mr. Paget urged upon the authority of *Butler* v. *Rice* (1), that the proper course for the Court to take in the present case would be to dismiss the suit as against his clients, but to declare that the respondent was entitled to be subrogated to the rights which Mrs. Villa possessed under the mortgage of September, 1920. This is not a case, however, in which a stranger to a mortgage has advanced money without security to pay off the mortgage with the intention thereby of standing in the shoes of the original mortgagee. The question in the present case is whether, and if so upon what terms, the appellant firm is entitled to avoid the plaintiff's mortgage upon the technical ground that the necessary sanction had not been obtained. In the circumstances of this case we are of opinion that the right course for the Court to take is to hold that the appellant firm ought either to make restitution

(1) (1910) 2 Ch. Div. 277.

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to the respondent to the extent to which the respondent has *bona fide* advanced the money for the benefit of the estate as a condition precedent to avoiding the mortgage, or that the respondent should be allowed to enforce his mortgage against the estate. [See *The Eastern Mortgage and Agency Company, Limited* v. *Rebati Kumar Ray* (1)]. As between the respondent and the defendants who are heirs of Afzal Alli the mortgage stands good. They have no defence to this suit. The position now taken up by the appellant firm is this: that they do not desire, and are unable, to make restitution to the respondent to the extent to which the respondent has advanced money *bona fide* to the mortgagors, and the order, therefore, which we pass is that, while it has been unnecessary to determine whether the grounds upon which the learned Judge passed the decree were correct or not, the decree passed in favour of the respondent at the trial was the right order for the learned Judge to make, and the appeal is dismissed with costs.

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(1) 3 Cal. L.J. 260.