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RANGI LAL J.

I, therefore, accept the appeal and declare that the amount was not attachable in execution of the decree against the appellant. Under the circumstances I leave the parties to bear their own costs throughout.

C. H. O.

*Appeal accepted.***APPELLATE CIVIL.***Before Dalip Singh and Bhide JJ.*

DIWAN CHAND AND OTHERS (DEFENDANTS)

Appellants

versus

MANAK CHAND (PLAINTIFF)	} Respondents.
MAULA BAKHSH (MORTGAGOR)	
AND OTHERS (DEFENDANTS)	

Civil Appeal No. 871 of 1931.

Provincial Insolvency Act, V of 1920, section 28 (4) : Property devolving upon the insolvent after adjudication and before his discharge—vests in the Official Receiver—Mortgage of this property by insolvent before his discharge—whether valid and whether mortgagee entitled to enforce his mortgage after mortgagor's discharge—Transfer of Property Act, IV of 1882, section 43 : Mortgage of undivided share of joint property—Mortgagee's right to proceed against the share allotted to the mortgagor on partition.

This was a suit for recovery of the mortgage-money due on a mortgage of certain house-property effected by one M.B. in favour of plaintiff, dated 27th December, 1922. The property mortgaged was a portion of the estate left by S.D. the grandfather of M.B. (who died on 15th March, 1919), to which M.B. and some others, were the heirs. Partition of this property was effected under an award of arbitrators, dated 26th May, 1924. M.B. was a party to the arbitration proceedings. M.B. was adjudged insolvent in 1916 and was not discharged till 1927.

Held, that under section 28 (4) of the Provincial Insolvency Act, 1920, all property which devolved on the insolvent after the date of the order of adjudication and before his discharge vested in the Official Receiver and, therefore, the mortgage made by M.B. in 1924 was invalid, notwithstanding that the Receiver had not claimed the property.

Mussamat Ramanandi Kuer v. Mst. Kalawati Kuer (1), *Ma Phaw v. Maung Ba Thaw* (2), relied upon.

Alimohamad Abdul Hussain v. Vedilal Devchand Parekh (3), *Chhote Lal v. Kedar Nath* (4), and *Dastru Mahar v. Official Receiver* (5), not followed.

Cohen v. Mitchell (6), distinguished.

Held, however, that as the Receiver never claimed the property in the insolvency proceedings and the property re-vested in the mortgagor after his discharge, on the principle laid down in section 43 of the Transfer of Property Act, the mortgagee was entitled to enforce the mortgage.

Rup Narain Singh v. Har Gopal Tewari (7), followed.

Held also, that the mortgagee could only proceed against the property which fell to the share of his mortgagor on partition, in the absence of proof that the partition was fraudulent.

Mohammad Afzal Khan v. Abdul Rahman (8), followed.

First Appeal from the preliminary decree of Chaudhri Kanwar Singh, Senior Subordinate Judge, Gujranwala, dated 3rd February, 1931, decreeing the plaintiff's suit.

J. N. AGGARWAL and J. L. KAPUR, for Appellants.

SHAMAIR CHAND and JAGAN NATH TALWAR, for (Plaintiff) Respondent.

BHIDE J.—This was a suit for recovery of Rs. 10,000 on foot of a mortgage of certain house property effected by Maula Bakhsh, defendant No. 1, in

(1) (1928) 55 I. A. 18 (P.C.). (5) (1927) 97 I. C. 980.
 (2) (1926) I. L. R. 4 Rang. 125. (6) (1890) L. R. 25 Q. B. D. 262.
 (3) (1919) I. L. R. 43 Bom. 890. (7) (1933) I. L. R. 55 All. 503.
 (4) (1924) I. L. R. 46 All. 565. (8) (1932) I. L. R. 13 Lah. 702 (P.C.).

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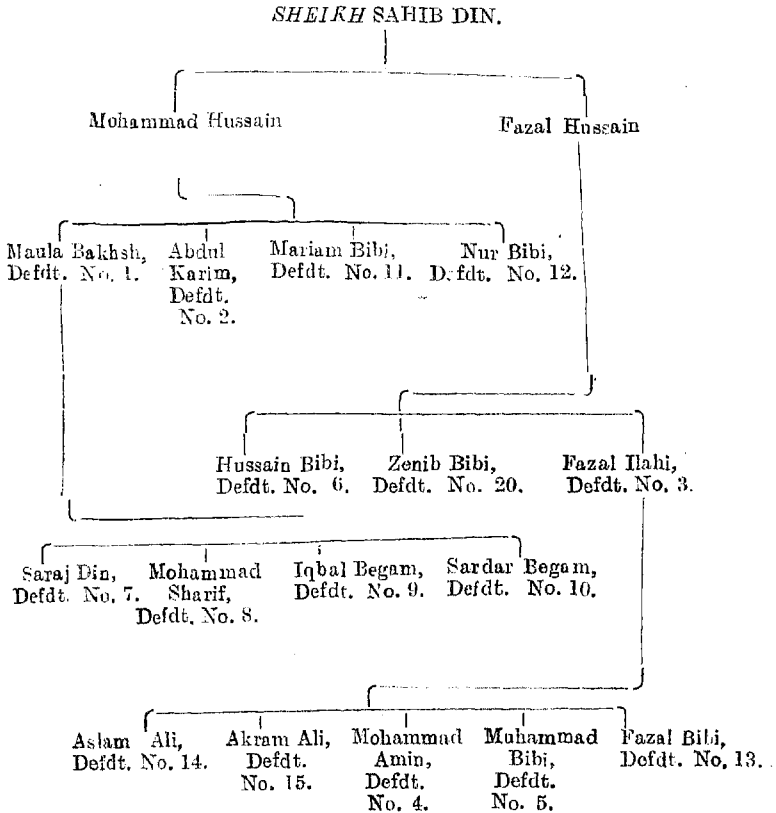
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favour of the plaintiff by a deed, dated the 27th December, 1922. Defendants Nos. 2 to 15 and defendant. 20 are relatives of defendant No. 1, being descended from Sahib Din, the common ancestor, as shown in the pedigree-table given below:—



It may be pointed out here that the pedigree-table given at page 40 of the printed record is not correct and the above table represents the relationship of the parties as admitted before us.

The property mortgaged by Maula Bakhsh was a portion of the estate of Sahib Din who died on 15th March, 1919.

Defendants 4, 5, 7, 8, 9 and 10 claim an interest in the property on the basis of a will,

dated 27th February, 1919, left by Sahib Din and a subsequent partition of that property effected by arbitrators who gave their award on 26th May, 1924 (*vide* Exhibit D/10 at page 78 of the printed record). Defendants Nos.16 to 18 are purchasers of the mortgaged property. Defendant No.16 claims to have purchased house No.1 in the mortgage-deed from *Mussamat* Hussain Bibi, guardian of defendants Nos.7 to 10 (who are minors) to whose share the house had fallen as a result of the partition. The guardian sold this house to defendant No.16 with the sanction of the Court under the Guardians and Wards Act on 9th February, 1926 (*vide* Exhibits D/1 and D/2, pages 88-91 of the printed record). House No.3 in the mortgage-deed was sold by Government in 1923 after the death of Sahib Din for recovery of arrears of income-tax due from him. It was purchased at an auction sale by one Rattan Chand, who sold it to Dr. Maula Bakhsh (not the mortgagor) and Dr. Maula Bakhsh in his turn sold it to defendant No.17. Defendant No.18 similarly claimed to have purchased house No.2 in the mortgage-deed, but it is unnecessary to go into the details of his claim as he has not appealed.

Defendants Nos.16 and 17 who were the principal contesting defendants resisted the plaintiff's claim mainly on the following grounds:—

(a) The property in dispute belonged to Sahib Din and devolved on his heirs including the mortgagor Maula Bakhsh on Sahib Din's death in 1919. Maula Bakhsh was adjudged insolvent in 1916 and was not discharged till 1927. He was, therefore, an undischarged insolvent in December, 1922, when the mortgage in question was executed. According to the provisions of section 28, sub-section 4 of the Provincial

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Insolvency Act, 1920, Maula Bakhsh's share in Sahib Din's property, vested forthwith in the Official Receiver and consequently the mortgage effected by Maula Bakhsh in favour of the plaintiff was invalid.

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(b) Sahib Din had left a will in respect of which letters of administration were granted to Abdul Karim, a nephew of Sahib Din, on the 26th July, 1921 (*vide* Exhibit D/3 at page 71 of the printed record). According to law Abdul Karim was, therefore, the only person entitled to dispose of the property at the time of the execution of the mortgage.

(c) Defendants Nos.16 and 17 were *bonâ fide* purchasers for value of a part of the mortgaged property and their title could not be defeated.

(d) Maula Bakhsh mortgaged 1/3rd of his share in the property specified in the mortgage-deed in favour of the plaintiff; but his share in the property according to Muhammadan Law was much less. He could not in any case mortgage more than his own share.

The plaintiff denied any knowledge of the will left by Sahib Din and pleaded that the alleged partition of the property was a fraudulent transaction which was not binding on him.

The learned Subordinate Judge found the material issues in favour of the plaintiff and granted plaintiff a decree under Order 34, rule 4, Civil Procedure Code, for recovery of Rs.10,000 by the sale of the mortgaged property, with costs and future interest at the stipulated rate of Rs.2 per cent. per mensem up to realization. The costs were directed to be borne in equal shares by (i) descendants of Maula Bakhsh, (ii) defendant No.16, and (iii) defendant No.17. From this decision defendants Nos.7 to 10, 16 and 17 have

appealed. Defendant No.18, who claimed to be a purchaser of house No. 2 in the mortgage-deed, has not appealed.

The main points agitated in this appeal were (a), (b), (c), and (d) as given above.

As regards (a), it is not disputed that at the time of the execution of the mortgage-deed Maula Bakhsh was an undischarged insolvent and the property in suit was really vested in the Receiver according to section 28 (4) of the Provincial Insolvency Act. But the learned Judge of the trial Court has held that the mortgage was all the same valid, as the Receiver had not yet intervened and claimed the property. In support of this view he has relied on *Alimohamad Abdul Hussain v. Vedilal Devchand Parekh* (1), *Chhote Lal v. Kedar Nath* (2) and *Dastru Mahar v. Official Receiver* (3). It was held in these cases on the basis of the rule laid down in *Cohen v. Mitchell* (4), that the property acquired by an insolvent after adjudication but before his discharge can be transferred by him provided that the transaction is *bonâ fide* and for value and is completed before the intervention of the Receiver. The learned counsel for the appellants has submitted that these decisions cannot be held to lay down the law correctly in view of the clear language of section 28 (4) of the Punjab Insolvency Act and has cited in support of this contention *Ma Phaw v. Maung Ba Thaw* (5) in which it was held that the rule laid down in *Cohen v. Mitchell* (4) could not be applied in a case governed by the provisions of section 28 (4) of the Provincial Insolvency Act, 1920.

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(1) (1919) 53 I. C. 197; I. L. R. 43 Bom. 890. (3) (1927) 97 I. C. 980.

(2) (1924) 84 I. C. 289; I. L. R. 46 All. 565. (4) (1890) L. R. 25 Q. B. D. 262.

(5) (1926) I. L. R. 4 Rang. 125.

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Sub-section (4) of section 28 of the Provincial Insolvency Act runs as follows :—

(4) All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or Receiver, and the provisions of sub-section (2) shall apply in respect thereof.

According to the plain language of the section it seems clear that on the death of Sahib Din the share of his estate which devolved on Maula Bakhsh forthwith vested in the Receiver, Maula Bakhsh being an undischarged insolvent at the time. The facts in *Cohen v. Mitchell* (1) are distinguishable as the property had not devolved on the insolvent in that case by inheritance. The rule laid down therein was based on equitable grounds and given effect to in a long series of decisions and eventually received statutory recognition in England in section 47 of the Bankruptcy Act of 1914. The Provincial Insolvency Act now in force in India was enacted in 1920; but the Legislature has not thought it fit to import therein the provisions of section 47 of the English Bankruptcy Act of 1914. It was pointed out by their Lordships of the Privy Council in *Mussammatt Ramanandi Kuer v. Mst. Kalawati Kuer* (2) that when there is a positive enactment of the Indian Legislature, the proper course is to examine the language of the statute and to ascertain its proper meaning uninfluenced by any considerations derived from the previous state of the law or of the English law on which it may be founded. In view of this dictum of their Lordships and the plain language of section 28 (4) of the Provincial Insolvency Act, 1920, I would adopt the view taken by the

(1) (1890) L. R. 25 Q. B. D. 262. (2) (1928) 55 I. A. 18 (P.C.).

Rangoon High Court in *Ma Phaw v. Maung Ba Thaw* (1) and hold that the mortgage executed by Maula Bakhsh in favour of the plaintiff in 1922 was invalid as the mortgagor's interest in the property was vested in the Receiver at that time.

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It follows from the above that the subsequent partition of the property amongst the descendants of Sahib Din was also not valid so far as Maula Bakhsh's share was concerned inasmuch as the Receiver in whom that share was vested was not a party to that partition.

In view of the above finding it is hardly necessary to discuss point (b) relating to the situation created by the issue of letters of administration to Abdul Karim in 1921. But it may be mentioned that the will with respect to which the letters of administration were granted had been really superseded by another will, dated 27th February, 1919, and during the arbitration proceedings relating to the partition, the former will was treated as cancelled and the latter will was accepted as binding on the parties concerned. Abdul Karim the administrator was himself a party to these partition proceedings. The letters of administration cannot, therefore, affect the validity of the mortgage in question.

The mortgage in favour of the plaintiff must be treated as invalid in its inception owing to the insolvency of Maula Bakhsh as stated above. But the insolvency proceedings having come to an end by the discharge of Maula Bakhsh in 1927, it is necessary to consider the effect thereof on the plaintiff's claim. Although the property which is the subject matter of the appeal vested in the Receiver, he apparently never claimed it in the insolvency proceedings and

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even in the course of the present suit he did not care to appear or put forward any claim. In the absence of any order to the contrary, the property in question must therefore be considered to have re-vested in the mortgagor on his discharge. The question for consideration now is whether in view of this re-vesting of the property in the mortgagor the plaintiff is entitled to any relief on the basis of the mortgage. It was held in similar circumstances in *Rup Narain Singh v. Har Gopal Tewari* (1), that the principle laid down in section 43 of the Transfer of Property Act would be applicable and on the re-vesting of the property in the mortgagor the mortgagee will be entitled to enforce the mortgage. Similarly, the partition of 1924 must also be held to be now binding. For although the Receiver was not a party to it, Maula Bakhsh, the mortgagor, was, and he is consequently estopped from repudiating that transaction.

Assuming then that the plaintiff can now enforce his mortgage, the next point for consideration is whether he is entitled to enforce it against the specific property mortgaged in spite of the fact that in the course of a subsequent partition it fell to the lot of other co-sharers. The property being joint at the time of the execution of the mortgage, Maula Bakhsh could only mortgage his undivided share in the property. As pointed out by their Lordships of the Privy Council in *Mohammad Afzal Khan v. Abdul Rahman* (2), such a right is always subject to the right of the other co-sharers to effect a partition and when such partition is carried out the mortgagee can only enforce his rights against such property as falls to the share of his mortgagor, unless he can show that the partition was fraudulent. In the present instance,

(1) (1933) I. L. R. 55 All. 503. (2) (1932) I. L. R. 13 Lah. 702 (P.C.).

it was no doubt alleged by the plaintiff that the partition carried out through the arbitrators was fraudulent; but there seems to be no adequate evidence on the record to establish this allegation. All that the learned counsel for the plaintiff pointed out in this connection was that Maula Bakhsh got very little in the way of immoveable property and that his share consisted mostly of cash or actionable claims, while some of the minor members of the family got considerable immoveable property. This circumstance is no doubt suspicious but some of the other co-sharers also appear to have been allotted moveable property. The schedules giving full details of the property were not proved, nor was the arbitrator Ghulam Rasul, who was examined as a witness, questioned on the point. In the circumstances I am unable to hold on the evidence as it stands on the record that the partition was fraudulent.*

If the partition was valid, it follows that according to the decision of their Lordships of the Privy Council in *Mohammad Afzal Khan v. Abdul Rahman* (1), the mortgagee can now enforce his rights only against the property which fell to the share of Maula Bakhsh in the course of the partition. It was urged that the mortgagee was not a party to the partition proceedings; but no authority has been cited to show that this was essential. The mortgagee was not a co-sharer. He had only a charge on the undivided share of the mortgagor and he had no right to prevent the co-sharers from partitioning the property. In the event of partition he could therefore only enforce it against such property as fell to the share of the mortgagor. It may be pointed out that in the case before their Lordships of the Privy Council in *Mohammad Afzal Khan v. Abdul Rahman* (1) also the

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mortgagee does not appear to have been a party to the partition proceedings.

The property purchased by defendant No.16 admittedly did not fall to the share of the mortgagor and his appeal must therefore succeed. The property purchased by defendant No.17 stands on a different footing. It had already been sold before the partition for realization of the arrears of income-tax due from Sahib Din and this property was therefore not affected by the partition. All that need be considered in the circumstances is whether the incumbrance created by Maula Bakhsh thereon in 1922 was binding on Rattan Chand who purchased it later at the auction sale in 1923, and on the subsequent transferees.

It has been pointed out above that the mortgage in favour of the plaintiff was invalid in its inception as the mortgagor was insolvent at the time of the execution of the mortgage in 1922. Consequently no valid incumbrance was created in favour of the plaintiff at that time. Subsequently the property was sold at an auction sale in 1923 for realization of the arrears of income-tax due from Sahib Din. Maula Bakhsh's share in the property was vested in the Receiver at the time. But the Receiver did not claim it and in fact he could not have raised any objection, as the debts due from Sahib Din formed a first charge on the estate. Ratan Chand consequently acquired an indefeasible title by the auction sale and so did defendant No.17 who stands in his position now. The learned counsel for the plaintiff referred to para. 32 of Mulla's Muhammadan Law (edition of 1933), in which it is stated that any heir may even before the distribution of the estate transfer his own share and pass a good title to a *bonâ fide* transferee for value notwithstanding any debts due from the deceased; but

this cannot help the plaintiff, as he acquired no valid title by the mortgage of 1922 as pointed out above. The appeal of defendant No.17 also must therefore succeed.

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On the above findings it seems unnecessary to go into the question as to what share, in the estate of Sahib Din, Maula Bakhsh was entitled to get according to Muhammadan Law, or the question of future interest which was argued before us. As the appellants have succeeded there seems to be no good reason why they should not get their costs throughout. The plaintiff took the mortgage long after Maula Bakhsh was adjudged insolvent and he could scarcely have been unaware of his insolvency, especially in view of the evidence given by Banarsi Das, P.W.4.

Sardari Mal, defendant No.18, who had purchased a portion of the mortgagor's property and the mortgagor have not appealed. Consequently the decree passed against them must stand. I would, therefore, accept the appeal and modify the decree of the lower Court to the extent of directing that houses Nos.1 and 3 which were purchased by defendants Nos.16 and 17 shall not be liable to be sold for satisfaction of the plaintiff's claim. The plaintiff will, however, be entitled to realize the decretal amount from house No.2 in the mortgage-deed as ordered by the learned Subordinate Judge and shall also be entitled to realize it from such property as fell to the share of Maula Bakhsh by virtue of the partition effected by the award of the arbitrators, dated 26th May, 1924. The appellants shall get their costs throughout.

DALIP SINGH J.—I agree to the order proposed. I would like only to add that I do not think the rule in *Cohen v. Mitchell* (1) applies in the circumstances.

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of this case. I should prefer to express no opinion on the question whether it might not apply in another case.

P. S.

Appeal accepted.

APPELLATE CIVIL.

Before Addison and Beckett JJ.

PRABH DIYAL (PLAINTIFF) Appellant

versus

MUHAMMAD NAWAZ SHAH (DEFENDANT)

Respondent.

Civil Appeal No. 586 of 1932.

Punjab Court of Wards Act, II of 1903, sections 3, 8 and 46 : Release of property of one ward from the Court of Wards—except that held jointly with another ward—whether this exception continues his status as a ward—Debts incurred during minority—whether can be ratified by ward after his release.

The respondent and another person B were under the superintendence of the Court of Wards. A part of their property was held jointly by them. The person and property of the respondent were released from the Court of Wards, with the exception of the land jointly held with B, and the question was whether this exception was sufficient to continue his status as a Ward.

Held, that the Court of Wards may retain superintendence over joint property when any of the proprietors ceases to be under any legal incapacity and in such cases, the proprietor who has ceased to be disqualified, shall not be deemed to be a ward for the purpose of the Court of Wards Act, *vide* section 46 of the Punjab Court of Wards Act.

Held further, that although a ward is capable of entering into a fresh contract after release from the Court of Wards, he cannot ratify any debt incurred during his minority.

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