

I accordingly accept this appeal, set aside the order of the Commercial Subordinate Judge and order the award to be filed in accordance with law. The appellant will get his costs of both the Courts from the respondent Harnam Das.

A. K. C.

Appeal accepted.

APPELLATE CIVIL.

Before Din Mohammad J.

AHMAD KHAN (DEFENDANT) Appellant,

versus

MIRAJ DIN (PLAINTIFF)
ALLAH DITTA AND ANOTHER } Respondents.
(DEFENDANTS)

Regular Second Appeal No. 517 of 1939,

Muhammadan Law — Mortgage of minor's property by his mother — Decree obtained by mortgagee and property sold to auction purchaser in execution of decree — Suit by quondam minor claiming property on the ground that mortgage was void — Sale in favour of auction purchaser — Whether can be challenged — Legal position of bonâ fide auction purchaser — Discretionary power of Court to order refund of the amount by which minor was benefited — Specific Relief Act (1 of 1877), S. 41.

A Muhammadan minor's property was mortgaged by his mother. The mortgagee obtained a decree on foot of the mortgage, the minor being represented by his brother who admitted the claim and the property was sold in execution of the decree in favour of an auction purchaser. The minor instituted the present suit against the auction purchaser, claiming the property on the ground that as he was a minor at the time of the mortgage, his mother had no right to alienate his share of the property and as the mortgage was void, all subsequent proceedings were invalid and that the admission of the claim by his brother was not binding on

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him as his brother, as his guardian *ad-litem*, had failed to raise the pleas that could and should have been raised on his behalf.

Held, that, though the mother could not execute a valid mortgage on behalf of her minor son and though such plea was not raised by the guardian in the previous suit, which would have defeated mortgagee's claim, the sale in favour of the auction purchaser cannot on any account be set aside as he was a *bonâ fide* purchaser and was not a party to the decree which was then valid and in force and he had nothing to do further than to look to the decree and the order of the sale.

Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan (1), *Rewa Mahton v. Ram Kishen Singh* (2) and *Kirpa Singh v. Mula Singh* (3), relied upon.

That a Mohammadan mother has no power to alienate the property of her minor son and the mortgage effected by her on his behalf is void *ab initio* but in setting aside the mortgage the Court has discretionary power under s. 41 of the Specific Relief Act to make it a condition that the minor should refund the amount by which he was benefited.

Rang Ilahi v. Mahbub Ilahi (4), *Imumbandi v. Mut-saddi* (5), *Khairu v. Dheru* (6), *Charanji Lal v. Tota Ram* (7) and *Abdul Majid Saib v. Ramiza Bibi Sahiba* (8), relied upon.

Second appeal from the decree of Malik Ahmad Khan, Senior Subordinate Judge, Lahore, with enhanced appellate powers, dated 11th January, 1939, affirming that of Sheikh Maqbul Ahmad, Subordinate Judge, 1st Class, Lahore, dated 11th July, 1938, granting the plaintiff a declaration to the effect that the decree, dated 25th October, 1937, is not binding on him, etc., etc.

(1) I. L. R. (1888) 10 All. 186 (P. C.).

(2) I. L. R. (1887) 14 Cal. 18 (P. C.).

(3) (1921) 63 I. C. 970.

(4) I. L. R. (1926) 7 Lah. 35.

(5) I. L. R. (1918) 45 Cal. 878 (P. C.).

(6) 1927 A. I. R. (Lah.) 722.

(7) (1930) 31 P. L. R. 732.

(8) 1931 A. I. R. (Mad.) 468.

AMAR NATH CHOPRA, for Appellant.

GIAN SINGH, for (Plaintiff) Respondent.

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DIN MOHAMMAD J.—This is an appeal by one Ahmad Khan against Mehraj-ud-Din and others. The facts are these. On the 1st March, 1932, Ghulam Haider, son of Ghulam Hussain, and *Mussammatt* Allah Rakhi, widow of Ghulam Hussain, on her own behalf as well as on behalf of her minor son Mahraj-ud-Din mortgaged a shop with possession to one Allah Ditta for Rs.1,100. The consideration was made up as follows :—

	Rs.
For expenses of execution and registration of the deed	50
For paying off the previous mortgage	700
Cash received before the Sub-Registrar	350

On the 24th March, 1934, Allah Ditta instituted a suit against his mortgagors for recovery of Rs.1,331 made up of Rs.1,100, the principal mortgage money and Rs.231, interest, by the sale of the mortgaged property. On the 6th March, 1935, the defendants put in a written statement admitting the claim. Mehraj-ud-Din was still a minor and was represented by his brother Ghulam Haider as guardian for the suit. Allah Ditta's suit was consequently decreed as lodged. The mortgaged property was ultimately sold in pursuance of Allah Ditta's decree and was purchased by Ahmad Khan for Rs.1,350. This took place on the 27th December, 1935. On the 17th February, 1936, the sale was confirmed and possession of the property delivered to Ahmad Khan. On the 11th January, 1938, the present suit was instituted by

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Mehraj-ud-Din claiming 7/16ths share of the property sold in favour of the auction-purchaser on the ground that he being a minor at the time of Allah Ditta's mortgage, his mother had no right to alienate his share of the property and that as the original transaction was void, all subsequent proceedings had no force. It was further alleged that the admission of claim made by his brother in Allah Ditta's suit was not binding on him inasmuch as his brother as his guardian failed to raise the pleas that could and should have been raised on his behalf to defeat Allah Ditta's claim as regards his share of the property. It may be stated here that though the property mortgaged was described as a shop in the mortgage-deed executed in favour of Allah Ditta as well as in the suit instituted by him, parties later agreed to describe it as a house and in the present suit it has been described as a residential house.

The suit was resisted by Ahmad Khan on various grounds. Both the Subordinate Judge who tried the suit and the Subordinate Judge who heard the appeal found in favour of Mehraj-ud-Din. Hence this appeal.

Counsel for the appellant concedes that the transaction entered into by *Mussammat* Allah Rakhi on behalf of Mehraj-ud-Din at the time of the latter's minority was void but he contends that that does not affect Ahmad Khan who was a *bonâ fide* purchaser at a Court sale in execution of a decree which was valid at the time of the sale. It is also argued that for the reasons stated above it does not matter if the guardian showed any negligence in the conduct of the minor's suit and failed to raise the necessary pleas on his behalf. It is further urged that in any circumstances

both the Courts below have erred in granting Mehraj-ud-Din an absolute decree for possession inasmuch as the original mortgage had been effected for his benefit and he was, if not at law, at least in equity, bound to restore the benefit so received.

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In support of the first contention reliance is placed on *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan* (1), *Rewa Mahton v. Ram Kishen Singh* (2) and *Kirpa Singh v. Mula Singh* (3). In the Allahabad case it was observed by their Lordships of the Privy Council that a sale, having duly taken place in execution of a decree in force at the time, cannot afterwards be set aside as against a *bonâ fide* purchaser, not a party to the decree, on the ground that, on further proceedings, the decree has been, subsequently to the sale, reversed by an appellate Court. Their Lordships remarked: "So in this case those *bonâ fide* purchasers, who were no parties to the decree which was then valid and in force, had nothing to do further than to look to the decree and to the order of sale."

In *Rewa Mahton v. Ram Kishen Singh* (2), the head-note reads as follows: "If a Court ordering a sale in execution of a decree has jurisdiction, a purchaser of the property sold is not bound to inquire into the correctness of the order for execution, any more than into the correctness of the judgment upon which the execution issues. * * * * Where property, sold in execution of a valid decree, under the order of a competent Court, was purchased *bonâ fide*, and for fair value; held, that the mere existence of a cross-decree for a higher amount in favour of the judgment-

(1) I. L. R. (1888) 10 All. 166 (P. C.). (2) I. L. R. (1887) 14 Cal. 18 (P. C.).
 (3) (1921) 63 I. C. 970.

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debtor, without any question of fraud, would not support a suit by the latter against the purchaser to set aside the sale." It cannot be doubted in this case that Ahmad Khan was a *bonâ fide* purchaser and had paid an adequate price at the auction held by the Court.

In *Kirpa Singh v. Mula Singh* (1), the guardian of a minor defendant was found guilty of negligence but inasmuch as a sale had been effected in execution of the decree passed against the minor in that suit, Martineau J. following the two judgments cited above came to the conclusion that the sale in execution could not be set aside later on the suit of the minor. This case is exactly on all fours with the case before me.

I accordingly hold that in spite of the fact that *Mussammat Allah Rakhi* could not execute a valid mortgage on behalf of Merhaj-ud-Din and also in spite of the fact that Ghulam Haidar had not raised any such plea in the previous suit instituted by Allah Ditta, Ahmad Khan is not affected in the least and the sale in his favour cannot now on any account be set aside.

In this view of the case no other question arises but with a view not to leave any point arising in the case undecided, I take up the second contention raised by the appellant. The leading authority on the subject now is *Rang Ilahi v. Mahbub Ilahi* (2). In that case the head note reads as follows: "It is settled law that a Muhammadan mother has no power to alienate the property of her minor son. This being so, the mortgage in the present case made by the plaintiff's mother was void *ab initio* and the mortgagee's position

(1) (1921) 63 I. C. 970.

(2) I. L. R. (1926) 7 Lah. 35.

was no better than that of a trespasser. (*Imabandi v. Mutsaddi* (1) followed). Held, however, that in setting aside the mortgage the Court had discretionary powers 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.' This decision was followed by Dalip Singh J. in *Khairu v. Dheru* (2), by another Division Bench of this Court in *Charanji Lal v. Tota Ram* (3) and by Madhawan Nair J. in *Abdul Majid Saib v. Ramiza Bibi Sahiba* (4). It is deplorable that these judgments were not brought to the notice of the Courts below and their decision on the point at issue consequently went against the rulings of this Court. *Mussammatt Allah Rakhi* has stated that the various mortgages of the property in suit had been effected as she had to maintain two sons and three daughters and she was too poor to find sustenance for them. The transaction was evidently for the benefit of the minor and he could not therefore recover his share without restoring the benefit received, even if the transaction on his behalf was void *ab initio*.

Before I conclude, I may advert to another aspect of the case which has also been discussed by both the Courts below. Mehraj-ud-Din had originally sued for 7/16ths of the property but it was contended that his share was only 4/16ths as he had three sisters who were also heirs under the Muhammadan Law. Both the Courts below agreed with this contention. The daughters being no parties to the suit, I decline to express any opinion on the question whether they had any subsisting claim against the auction-purchaser

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(1) L. R. (1918) 45 Cal. 878 (P. C.).

(3) (1930) 31 P. L. R. 732.

(2) 1927 A. I. R. (Lah.) 722.

(4) 1931 A. R. (Mad.) 468.

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or not in view of section 41 of the Transfer of Property Act and I accordingly leave this matter open.

On the grounds stated above, I accept this appeal but in the peculiar circumstances of the case I leave the parties to bear their own costs throughout.

A. N. K.

*Appeal accepted.***PRIVY COUNCIL.**

*Before Viscount Maugham, Lord Wright and
Sir George Rankin.*

MIRZA AKBAR—Appellant,

versus

THE KING-EMPEROR—Respondent.

Privy Council Appeal No. 15 of 1940.

**On Appeal from the Court of the Judicial Commissioner,
North-West Frontier Province.**

Criminal law — Rules under North-West Frontier Province Courts Regulation, 1931 — Jurisdiction of Single Judge of Judicial Commissioner's Court to hear appeals from a sentence of death — Rules 1 and 3 — Statement of conspirator, when evidence against co-conspirator — Indian Evidence Act (I of 1872), S. 10.

The Judicial Commissioner, sitting alone, heard an appeal from a sentence of death when the only other Judge of his Court was on leave and the Judge acting for him was disqualified from hearing the appeal as he had exercised judicial functions in a stage of the case.

Held, that the Judicial Commissioner had jurisdiction to hear the appeal sitting alone for it was not practicable on the day fixed for the hearing of the appeal to constitute a bench.

There is no qualification of the words "not practicable" in the Rule, but, even if the words could be read as meaning "not reasonably practicable," it would be for