

In our opinion, therefore, article 145 applies so far as the plaintiff seeks to recover the deposited ornaments, and the rule should therefore be made absolute with costs. Costs of the lower Court to be in proportion.

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Rule made absolute.

APPELLATE CIVIL.

Before Mr. Justice Fulton and Mr. Justice Crowe.

DALIBAI (ORIGINAL DEFENDANT NO. 2), APPELLANT, v. GOPIBAI AND ANOTHER (ORIGINAL PLAINTIFF AND DEFENDANT NO. 1), RESPONDENTS.*

1902.
January 24.

Hindu Law—Guardian—Minor—Mortgage by guardian of minor's property—Duty of mortgagee to inquire as to necessity for loan.

Where the guardian of a minor Hindu purports to mortgage the minor's property on behalf of his ward, the lender is bound to ascertain whether the guardian is acting for the benefit of the minor. It is only, however, when there has been at the time of the loan due inquiry as to the necessity for it, that the lender can obtain a charge over the minor's property.

SECOND appeal from the decision of Dayaram Gidumal, District Judge of Dhulia, confirming the decree passed by Ráo Bahádur K. B. Marathe, First Class Subordinate Judge at Dhulia.

Suit by the plaintiff as mortgagee to recover a debt due on a mortgage, and for foreclosure and sale of the mortgaged property.

The first defendant, Punamchand, and one Jitmal (father of Dalibai, defendant 2) were brothers. They became separate in 1875-76. Jitmal died in 1883, leaving a widow and a daughter, Dalibai (defendant 2), an infant of three years old.

Jitmal's widow died about six months after her husband, and by her will, dated the 8th July, 1883, she devised all her husband's property, including the property now in question, to Punamchand (defendant 1).

Dalibai (defendant 2) was subsequently brought up and maintained by her uncle Punamchand (defendant 1).

On the 17th June, 1893, Punamchand mortgaged for his own

* Second Appeal No. 335 of 1901.

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purposes the house in dispute to plaintiff for Rs. 3,000, as if it belonged to him. The mortgage-deed recited that it had been left to him by Jitmal's widow.

In 1899 the plaintiff filed this suit. The Court of first instance passed a decree in his favour, holding that Punamchand, as managing member of the family in which Dalibai had been brought up and maintained, and as her natural guardian, could create a charge on her property. In his judgment the Subordinate Judge said :

Defendant 1 was competent to make a mortgage of the property or to create a lien in the interest of the family which entirely brought up the second defendant and gave her a status in life, according to the second defendant's admissions. The fact that the property belonged to the second defendant's father, who was divided from the first defendant, does not bar the plaintiff's right to recover the amount of his lien from the property, and inasmuch as the first defendant has charitably maintained the second defendant, brought her up, and got her married, he, as managing member of the family in which the second defendant was brought up, had, as a natural guardian of the second defendant, power to create a lien on the property which would descend to the second defendant as heir to her father.

Dalibai (defendant 2) appealed, but the appeal was dismissed by the lower Appellate Court.

She then preferred a second appeal.

M. B. Chaubal for appellant (defendant 2) :—The mortgaged property belongs to Dalibai. Jitmal's widow had no power to devise it to Punamchand, and Punamchand had no right to mortgage it to the plaintiff. He mortgaged it for his own debt. The plaintiff (mortgagee) was aware of all the facts and took the mortgage at his peril. Dalibai, who is now of age, is entitled to ask this Court to save her property from sale. There is no law or equity of the kind mentioned by the Subordinate Judge, viz., that the minor is bound by an alienation of her property where that alienation is in the interest of the family which brought her up.

D. A. Khare for respondent No. 1 (plaintiff) :—The lower Court has not found the necessary facts. If Punamchand (defendant 1) mortgaged the house for the purposes of the minor as her guardian, then the minor is bound. Punamchand main-

tained the minor. It is also not found whether the house did really belong to the minor's father. The will of the mother is not clear upon the point.

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FULTON, J.:—The mortgaged property belonged originally to Jitmal, who was the divided brother of the mortgagor Punamchand (defendant No. 1). Jitmal died leaving a widow, who survived him a few months, and an infant daughter named Dalibai (defendant No. 2), who after her parents' death was brought up by her uncle to whom the widow by will had left the property.

In June, 1893, Punamchand mortgaged the property for Rs. 3,000 and interest as if it were his own, the deed reciting that it had been left to him by Jitmal's widow. It has not been found for what purposes the money was required, nor is it contended that there is any evidence to show either that there was any necessity to borrow it on behalf of Dalibai or that the mortgagee made any inquiries on the subject. Notwithstanding the clear recital that the property had been left to the mortgagor by the widow of Jitmal, which ought certainly to have suggested inquiry, the mortgagee appears to have accepted Punamchand's title without demur. The property belongs, however, to Dalibai and could only be charged by Punamchand for the purposes for which a guardian has authority to alienate the immoveable property of his ward. No such purpose has been proved. The mere fact that Dalibai lived with her uncle does not show that there was any necessity for him to borrow money on her behalf, as we do not know what other property (if any) Jitmal may have left or how much money was reasonably required for the proper maintenance of the child.

When a guardian purports to mortgage on behalf of his ward, the validity of the charge depends on the considerations mentioned in the case of *Hanumanpersad v. Mussumat Babooee Munraj*.⁽¹⁾ "A lender in such circumstances is bound to inquire into the necessities of the loan, and to satisfy himself as well as he can with reference to the parties with whom he is dealing that the manager is acting in the particular instance for the benefit of the

(1) (1856) 6 Moore's I. A. 393.

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minor. If he does inquire and acts honestly, the real existence of an alleged and reasonably credited necessity is not a condition precedent to the validity of the charge," nor is he bound to see to the application of the money. It is only, however, when there has been at the time of the loan due inquiry as to the necessity for it that the lender can obtain a charge over the minor's property.

Here, on the facts found in the Courts below, it is clear that he obtained no charge. He simply accepted a title from a person who had none to give. There is no provision in the Transfer of Property Act to help him. Section 41, which relates to transfers by ostensible owners, has no application where the minor is an owner incapable of giving consent. The consent of the widow in her will obviously was of no effect, as she had only a life interest which terminated on her death.

It was argued by Mr. Khare that the District Judge has not recorded any finding as to the partition between Jitmal and his brothers. The Subordinate Judge, however, had recorded a distinct finding on the subject and no issue was asked for in the lower Appellate Court. The reason why no issue was asked for is manifest, because the partition deed was registered and the mortgage deed recited that Punamchand derived the property from Jitmal's widow. We think, then, that it would not now be right to send down an issue on the subject. The point was abandoned in the lower Court and cannot be raised again in second appeal.

The District Judge seems to have thought that defendant No. 2 was not a necessary party to the suit. It is true she was not an original party, but section 85 of the Transfer of Property Act is imperative. She had a right to intervene.

We must now reverse the decrees of the Courts below so far as they authorize the plaintiff to foreclose and sell the mortgaged property. The personal decree against defendant No. 1, who has not appealed, remains untouched. Plaintiff must pay the costs of defendant No. 2 throughout.

Decree reversed.