can be any such right as could [473] constitute a "saleable property" within the meaning of s. 266, Code of Civil Procedure. The fact that there is a disposing power in the idol, as represented by the High Priest, over the offerings when once received does not necessarily imply a disposing power over what is called the right of receiving them.

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We think that the attachment in the present case was not an attachment which could be made under the provisions of s. 266, Code of Civil Procedure, and that we must therefore decree the appeal with costs.

Appeal allowed.

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29 C. 473.

Before Mr. Justice Rampini and Mr. Justice Pratt.

MOYNA BIBI *v.* BANKU BEHARI BISWAS.* [19th March, 1902.]

Mahomedan Law—Mother's power to bind her minor children's estate—Minor—Guardian—Liability of minor for the act of mother purporting to act as guardian.

Under the Mahomedan Law a mother is not *de facto* guardian of her minor children and, unless she is appointed a guardian *de jure* or is especially authorised by the District Judge, she has no power to bind their estate by mortgage or otherwise. Such an act by the mother is entirely void.

***Bhutnath Dey* v. *Ahmed Hosain* (1), *Baba* v. *Shivappa* (2), and *Nizamud-din Shah* v. *Ananda Prasad* (3) referred to.**

THE defendants Nos. 1, 2 and 3 appealed to the High Court.

This appeal arose out of an action brought by the plaintiff to enforce a mortgage bond against the defendants Nos. 1 to 3. The allegation of the plaintiffs was that the first defendant, Moyna Bibi, executed a mortgage bond both for herself and as mother and guardian of her minor daughters, defendants Nos. 2 and 3. The defence of the first defendant was that the mortgage bond was not genuine, and that there was no consideration for it. [474] The other two defendants contended that they knew nothing about the said bond; that, under the Mahomedan Law, their mother had no right to mortgage their shares; and that, therefore, they were not bound by such a mortgage. The Court of First Instance found the bond to be genuine and duly executed by the first defendant, and the consideration for it to be the sum spent by the plaintiff for conducting litigation to save the property; and, as the transaction was for the benefit of the minors, *viz.*, defendants Nos. 2 and 3, they were directed to make restitution to the plaintiff to the extent of their shares in the mortgaged property. Accordingly, a mortgage decree was passed against defendant No. 1 and a money decree only against defendants Nos. 2 and 3, directing their shares in the mortgaged property to be released. On appeal to the District Judge of Nadia, Mr. G. K. Deb, the decision of the First Court was affirmed, but the decree was modified in one respect, namely, that the shares of defendants Nos. 2 and 3 were not to be released till they made restitution to the plaintiff to the extent of their shares.

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* Appeal from Appellate Decree No. 2784 of 1899, against the decree of G. K. Deb, Esq., District Judge of Nadia, dated the 31st of May 1899, modifying the decree of Babu Prasanna Kumar Ghose, Subordinate Judge of that district, dated the 30th of April 1898.

(1) (1885) I. L. R. 11 Cal. 417.
(2) (1895) I. L. R. 20. Bom. 199.
(3) (1896) I. L. R. 18 All. 378.

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Dr. *Ashutosh Mookerji* and Babu *Jnanendranath Bose* for the appellants.

Babu *Lal Mohun Das*, Babu *Ashutosh Mookerji* and Babu *Hem Chandra Mitra* for the respondents.

RAMPINI AND PRATT, JJ. The suit out of which this appeal arises was brought by the plaintiffs to recover a sum of money due upon a registered bond, dated the 10th November, 1885. The bond was executed by the first defendant, Moyna Bibi, for herself, and, it is alleged, as mother and natural guardian of her minor daughters, the defendants Nos. 2 and 3.

The defence of the first defendant was that the bond was not genuine. The defence of the defendants Nos. 2 and 3 was that they new nothing about the bond, and that as, under Mahomedan Law, their mother had no right to mortgage their shares, they were not bound.

Both the Courts below have found that the bond was a genuine one; that it was executed by the defendant No. 1, who is bound by it; that the consideration for it was a sum of money **[475]** spent by the plaintiffs in conducting a litigation to save the property; and that, as the transaction was for the benefit of the minors, they should make restitution to the plaintiffs in proportion to their shares before they can have them released from liability under the bond. A period of six months was fixed for their making such restitution, and it was ordered that, failing their doing so, their shares, equally with that of the defendant No. 1, should be sold.

The defendants appeal to this Court.

A preliminary objection has been raised by the respondents that the Court-fee paid on the appeal is insufficient. The appellants have paid a Court-fee of Rs. 10 only, and it has been urged that an *ad valorem* Court-fee should have been paid. We think that there is some foundation for this preliminary objection, because the defendants Nos. 2 and 3 certainly seek to have set aside the order directing them to make restitution to the plaintiffs to the extent of their shares. We understand that, in proportion to their shares in the property, they would have to make restitution of the consideration money of the mortgage to the extent of Rs. 2,100. They are, therefore, liable to pay an *ad valorem* duty on this amount before they can have their appeal heard. The learned pleader for the appellants has undertaken to pay this amount without delay: so we proceed to deal with the appeal. Of course, the payment of this Court-fee will be a condition precedent to any benefit that the appellants can obtain in the decretal order we are now about to make.

Turning to the merits, the grounds of appeal are—*First*, that no personal decree should be given against any of the defendants because the plaintiffs' claim to a personal decree is barred by limitation, the suit having been instituted more than six years after the date of the payment of the mortgage money. This ground of appeal is urged on behalf of all the three defendants. On behalf of the minor defendants Nos. 2 and 3, it is further contended that as their mother was not their guardian *de jure* or *de facto*, she had no power to bind their property, and so no decree should have been given against them; that the mortgage of their shares in the property should be declared void; and that they should not be held liable to make restitution to any extent.

[476] We are relieved from the necessity of discussing the first ground of appeal by the admission of the pleader for the respondents

that he does not, on behalf of his clients, seek for a personal decree against any of the defendants, but entirely gives up the prayer for a personal decree. That being so, we need not discuss any further this ground of appeal: we need only say that we, of course, in the circumstances, set aside the decision of the Lower Appellate Court so far as it gives a personal decree against any of the defendants.

As for the second ground of appeal, namely, that the minors are not bound by the act of their mother, the learned pleader who appears on their behalf has cited the cases of *Bhutnath Dey* v. *Ahmed Hosain* (1), *Baba* v. *Shivappa* (2) and *Nizamuddin Shah* v. *Ananda Prasad* (3). These cases seem to us fully to support the contention of the pleader for the appellants that the mother of the minors, not being their natural guardian according to Mahomedan Law, being only their mother and not one of their paternal relations, and not being a certificated guardian appointed under any Guardian and Wards Act then prevailing, her act cannot, in any way, bind them or their property. We may here mention that, from the terms of the bond, it is clear that when the defendant No. 1 mortgaged the property, although she mortgaged her daughter's shares as well as her own, she did not profess to do so as their guardian *de jure* or *de facto*. In these circumstances we consider that we must hold, as has been laid down in the cases cited by the pleader for the appellants, that the act of the mother was entirely void so far as the shares of the minors in the property are concerned.

The pleader for the respondents, in reply, has cited the cases of *Ram Chunder Chuckerbutty* v. *Brojo Nath Mozumdar* (4) and *Modhoo Dyal Singh* v. *Golbur Singh* (5), a passage from Mr. Justice Trevelyan's work on Minors, second edition, page 180, and a passage from Mr. Justice Amir Ali's work on Mahomedan Law, Vol. II, page 476. We think, however, that none of these cases or works furnish a sufficient reply to the contention of the pleader **[477]** for the appellants. The case of *Ram Chunder Chuckerbutty* v. *Brojo Nath Mozumdar* (4) lays down that Act XL of 1858 does not affect any provision of Hindu or Mahomedan Law as to guardians, who do not avail themselves of the Act. But in the present case the mother was not the guardian of the minors under Mahomedan law, so this ruling is no authority for the contention that her act binds the minors or their property. The passage cited from Mr. Justice Trevelyan's work on Minors is to the effect that "an alienation by a guardian which does not bind the minor is not void, but voidable at the instance of the ward. Subject to the payment of such money as he may have obtained the benefit of, the minor is entitled before or after obtaining his majority to recover such of the property as by the wrongful and unauthorized act of his guardian has come into the hands of other persons." That may be; but the answer for the minors is (1) that their mother was not their guardian; (2) that her act was not voidable, but void; and (3) that they are not seeking to avoid a contract, but that it is the plaintiffs who are endeavouring to enforce a void contract as against them. The case of *Madhoo Dyal Singh* v. *Golbur Singh* (5) is the case of a Hindu son who, under the Mitakshara Law, was held entitled to set aside the sale by his father, by which he benefited on his refunding his share of the purchase-money. It has,

(1) (1885) I. L. R. 11 Cal. 417.
(2) (1895) I. L. R. 20 Bom. 199.
(3) (1896) I. L. R. 18 All. 373.
(4) (1879) I. L. R. 4 Cal. 929.
(5) (1868) 9 W. R. 511.

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however, no analogy to the present case; and, though it may be that, if the minors had been suing in this case to recover possession of their shares of the property, they might have been compelled, on the principle that he who seeks equity must do equity, to refund the consideration-money of the mortgage to the extent to which they had benefited by it, and though it may be anomalous that they should be in a better position when sued instead of suing, yet this does seem to be the effect of the cases above cited for the appellants, especially of the decision in *Nizamuddin Shah* v. *Ananda Prasad* (1) which no authority relied on by the respondent's pleader in any way controverts. In Mr. Justice Ameer Ali's work on Mahomedan Law, Vol. II, it is laid down that "the mother is not a natural guardian. She is entitled to the custody **[478]** of the persons of her minor children, but she has no right to the guardianship of their property. If she deals with their estate without being specially authorized by a Judge or by the father, her act should be treated as acts of a *fazuli*. If they are to the manifest advantage of the children, they should be upheld; if not, they should be set aside." To this it may be replied that, in the first place, it does not appear to be for the manifest advantage of the minors that their property should have been mortgaged for a sum carrying interest at the rate of 18 per cent. per annum, and, in the second place, that this passage does not seem to us to be of sufficient authority to justify our disregarding the judicial decisions to the contrary effect above referred to.

We accordingly decree this appeal with costs, subject, of course, to the payment of the *ad valorem* Court-fee mentioned in the commencement of this judgment. If that fee is not paid within seven days from this date, the appeal will stand dismissed with costs.

This decision does not, of course, affect the decree which has been given against the defendant No. 1. It sets aside the decree of the Lower Appellate Court only so far as it makes the defendant No. 1 and the other defendants personally liable, and so far as it directs that the defendants Nos. 2 and 3 do make restitution to the plaintiffs, and that their shares in the property be sold.

Appeal allowed.

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29 C. 479.

[479] CRIMINAL REVISION.

Before Mr. Justice Prinsep and Mr. Justice Stephen.

KINA KARMAKAR *v.* PREO NATH DUTT.* [4th February, 1901.]

Complaint—Dismissal of complaint as false, vexatious and malicious—False charge with intent to injure—Prosecution—Compensation—Criminal Procedure Code (Act V of 1898) s. 250—Penal Code (Act XLV of 1860) s. 211.

Where in a criminal trial it is found by the Magistrate that, owing to the previous relations between the principals of the complainant and the accused, the complaint made was both false and malicious and made with some deliberation, and that the complainant, with intent to cause injury to the accused, instituted criminal proceedings against him, knowing that there was no just and lawful ground for such proceedings:

Held, that it was a case in which proceedings under s. 211 of the Penal Code should have been instituted against the complainant, and that the Magistrate,

* Criminal Revision No. 1069 of 1901, made against the order passed by Babu Jadu Nath Sarkar, Deputy Magistrate of Rangpur, dated the 10th of October 1901.

(1) (1896) I. L. R. 18 All. 373.