

1902 property she purchased ; and the Society also agreed to make her advances to complete certain buildings thereon. They made the advances
 JUNE 11, 12. and took from her a mortgage for the amount. On attaining 21 she
 NOV. 26. brought the action to have the mortgage declared void under the Infants
 1903 Relief Act. The Court held that, as regards the purchase-money paid to
 MARCH 4. the vendor, the Society was entitled to stand in his place and had a lien
 PRIVY upon the property ; but that the mortgage must be declared void and
 COUNCIL. that the Society was not entitled to any repayment of the advances.
 30 C. 539= Dealing with this part of their claim Lord Justice Romer says at
 30 I. A. 114= page 13 : " The short answer is that a Court of Equity cannot say that
 7 C. W. N. it is equitable to compel a person to pay any moneys in respect of a
 441=5 Bom. transaction which, as against that person, the Legislature has declared
 L. R. 421= to be void." So here.
 8 Sar. 374.

Their Lordships observe that the construction which they have put upon the Contract Act seems to be in accordance with the old Hindu Law as declared in the laws of Manu, ch. viii., 163, and [550] Colebrooke's Digest (1), although there are no doubt decisions of some weight that before the Indian Contract Act, an infant's contract was voidable only, in accordance with English law as it then stood.

The appeal therefore wholly fails ; and their Lordships will humbly advise His Majesty that it should be dismissed. The appellants must pay the costs of the appeal.

Appeal dismissed.

Solicitors for the appellants : *Watkins and Lempriere.*

Solicitor for the respondent : *W. W. Box.*

30 C 550 (=30 I. A. 81=7 C. W. N. 425=5 Bom. L. R. 428=8 Sar. 444.)

PRIVY COUNCIL.

JIBAN KRISHNA ROY v. BROJO LAL SEN.*

[5th, 6th February and 4th March, 1903.]

[*On Appeal from the High Court at Fort William in Bengal.*]

Execution of decree—Sale for arrears of rent—Bengal Rent Act (Bengal Act VIII of 1869) ss. 59, 60, 64—Decree for arrears of rent against Hindu hetress—Rent accrued due after death of full owner—What passes by sale, whether limited or absolute estate.

In execution of a decree for arrears of rent obtained in a suit under the Bengal Rent Act (Bengal Act VIII of 1869) by some only of several co-sharer landlords against a Hindu daughter for arrears accruing after her father's death, an under-tenure of which she was in possession and in enjoyment of the rents and profits was sold under the provisions of s. 64 of the Act :

Held by the Judicial Committee (affirming the judgment of the High Court) that only the limited interest which she took as her father's daughter, and not an absolute interest in the estate passed by the sale. The liability for rent ought to be regarded as her personal liability, and ought not to be held as attaching to the reversion unless the landlords proceeded to bring the tenure to sale under the special provisions of the Rent Law.

[*Foll.* 4 C. L. J. 68=10 C. W. N. 176; 9 C. L. J. 479=13 C. W. N. 746; 15 I. C. 351; 16 C. W. N. 1070; 34 I. C. 581; 17 C. W. N. 337=16 I. C. 437. *Ref.* 1 C. L.

**Present* : Lords Macnaghten and Lindley, Sir Andrew Scoble, Sir Arthur Wilson and Sir John Bonser.

(1) Book II, ch. 4, s. 2, art. 3, verses 53, 57.

J. 500 ; 35 Cal. 391 ; (P. C.)=7 C. L. J. 189=18 M. L. J. 43=10 Bom. L. R. 66. Dist. 9 C. W. N. 34.]

APPEAL from a judgment and decree (8th September 1898) of the High Court of Calcutta by which the decree (3rd October [551] 1896) of the First Subordinate Judge of the 24-Pergunnahs, which had dismissed the respondent's suit, was varied.

Appeal by the defendant, Jiban Krishna Roy, to His Majesty in Council.

The property in suit was known as Chuck Bele Doorganugger which had belonged to one Ram Sagore Mitter, who died intestate in 1834, leaving two daughters, Anundomoyi and Isaneswari, who inherited the property jointly. Anundomoyi died in 1835, leaving a son, Uma Churn Dutt, between whom and Isaneswari an arrangement was made by which they divided the property equally between them. Uma Churn died in 1872. Isaneswari died on 26th February 1894, leaving no issue surviving her. On 27th July 1894 the respondent brought his suit for the whole of the property, claiming as daughter's son of Gadadhur Mitter, paternal uncle of Ram Sagore Mitter, to be the nearest reversionary heir. Both Courts held that the interest which had been acquired by Uma Churn Dutt to a moiety of the property was an absolute interest, and as to that moiety the respondent's claim was dismissed. On this appeal the 8-anna share of Isaneswari only was in dispute. Both Courts below held that the respondent was the nearest heir, and the only question argued on this appeal was whether an execution in sale of 5th January 1885, under which Isaneswari's half share had been sold for arrears of rent, passed to the purchaser an absolute estate in the property or only the limited estate held by Isaneswari as a Hindu daughter.

The Subordinate Judge held that the sale passed an absolute estate and dismissed the suit, but the High Court (MACLEAN, C. J. and BANERJEE, J.) were of opinion that only the limited estate passed by the sale ; and they gave the respondent a decree for Isaneswari's moiety of the property sued for.

The case in the Courts below is reported in I. L. R. 26 Cal. 285, where all the facts are fully stated.

On this appeal :

De Gruyther, for the appellant, contended that the purchaser at the sale of 5th January 1885 acquired an absolute interest in the property sold, and not only the limited estate held by Isaneswari. Where property in possession of a Hindu lady is itself sold for arrears of rent, the whole estate passes to the [552] purchaser and the interest of the reversioners is extinguished. Bengal Act VIII of 1869, under which the sale in execution took place, enacts that the landlord has the right to sell the whole of the tenure, not only the right and interest of the tenant, for arrears of rent. Bengal Act VIII of 1869, ss. 34, 59, 60, 64 and 66, and the cases of *Ashanulla Khan v. Rajendra Chandra Rai* (1) and *Teluck Chunder Chuckerbutty v. Muddon Mohun Brahmin Joogee* (2) were referred to.

The position of a Hindu female owner is such that she represents the estate absolutely. Reference was made to *Katama Natchier v. Rajah of Shivagunga* (3), *Hunooman Persaud Panday v. Munraj Koonweree* (4),

(1) (1885) I. L. R. 12 Cal. 464.

(2) (1869) 15 B. L. R. 143 (note) ; 12 W. R. 504.

(3) (1863) 9 Moo. I. A. 539, 604.

(4) (1856) 6 Moo. I. A. 393, 423.

1903
FEB. 5, 6 &
MARCH 4.
—
PRIVY
COUNCIL.

30 C. 550=
30 I. A. 81=
7 C. W. N.
425=5 Bom.
L. R. 428=
8 Sar. 444.

1903
FEB. 5, 6 &
MARCH 4.

PRIVY
COUNCIL.

30 C. 550=
30 I. A. 81=
7 C. W. N.
425=5 Bom.
L. R. 428=
8 Sar. 444.

Kameswar Pershad v. Run Bahadur Singh (1), *Baijun Doobey v. Brij Bhookun Lall Awasti* (2), *Anund Moyee Dossee v. Mohendro Narain Doss* (3). Cases to the contrary effect are cases in which what was brought to sale was not the tenure in respect of which the arrears were due: see *Mohima Chunder Roy Chowdhry v. Ram Kishore Acharjee Chowdhry* (4), and *Kristo Gobind Majumdar v. Hem Chunder Chowdhry* (5).

As to what was actually sold, *Jugul Kishore v. Jotendro Mohun Tagore* (6), was referred to as laying down the construction of sale certificates in cases similar to the present. In this case Isaneswari applied to have the sale set aside, and it was submitted that the decision refusing her application was *res judicata* and bound the respondent.

W.C. Bonnerjee, for the respondent, referred to the form of the prayer of the petition for execution of the decree which was for the amount due, and that it might be recovered by the sale of the property in arrear; and to the decree which was an ordinary decree for money. Only a portion of the tenure was [553] in arrear. If the whole of it passed under the sale, what became of the security of the other fractional shareholders? It was submitted that all that was sold was the right, title, and interest of Isaneswari: the tenure itself was not sold, and did not pass by the sale in execution. To effect that result, the special procedure provided by the Rent Act must be resorted to, and all the other co-sharers must have been made parties. Here the procedure in execution was that under the Code of Civil Procedure. Bengal Act VIII of 1869, ss. 59 and 64; *Nugender Chunder Ghose v. Sreemutty Kaminee Dossee* (7) and *Baijun Doobey v. Brij Bhookun Lall Awasti* (8) were referred to, and it was submitted that the latter case laid down the principles which governed the present case. A Hindu lady in the position of Isaneswari took an absolute estate, but her power of alienation over it was limited. The decision of the High Court was right and should be upheld.

DeGruyther replied.

The judgment of their Lordships was delivered by

SIR ANDREW SCOBLE. The question in this appeal is as to the title to a half share of the estate of Chuck Bele Doorganugger in Bengal, which, prior to 1834, belonged to one Ram Sagore Mitter. Upon his death he was succeeded by his two daughters, Anundmoyi and Isaneswari; and upon the death of the former, her son and his aunt Isaneswari divided the estate equally between themselves; and Isaneswari continued to hold her half share until her death in February 1894. The respondent now claims it as next heir to the estate of Ram Sagore according to the Hindu law in force in Bengal, while the appellant claims as purchaser at a sale in execution of decrees for rent obtained against Isaneswari in 1883-84. And the point for determination is whether the purchaser at the sale acquired an absolute interest in the estate sold, or only such limited interest as Isaneswari took as her father's daughter.

(1) (1880) I. L. R. 6 Cal. 843; L. R. 8 I. A. 8. (5) (1889) I. L. R. 16 Cal. 511.
(2) (1875) I. L. R. 1 Cal. 133; L. R. 992; L. R. 11 I. A. 66, 71, 73. (6) (1884) I. L. R. 10 Cal. 985, 991,
2 I. A. 275. (7) (1867) 11 Moo. I. A. 241.
(3) (1871) 15 W. R. 264. (8) (1875) I. L. R. 1 Cal. 133; L. R.
(4) (1875) 15 B. L. R. 142; 23 W. R. 2 I. A. 275.
174.

Both Courts in India have found that the property in question was originally the estate of Ram Sagore Mitter, and that on the death of Isaneswari the respondent was the next heir, and these findings were not disputed before their Lordships. It is therefore only necessary to consider the circumstances of the case so far as [554] they relate to the execution sale which is the foundation of the appellant's claim.

The estate known as Chuck Bele Doorganugger is an undertenure of a zemindari which is not specifically named, and in which there are several co-sharers. To the suits brought against Isaneswari in 1883-84 for arrears of rent only some of these co-sharers were parties; and although, in one of them, the plaintiffs prayed that the amount decreed might be "recovered by the sale of the property in arrears," the decrees given were for money only. This was in accordance with the provisions of Bengal Act VIII of 1869, by which the procedure in suits between landlords and tenants was at that time regulated. Section 64 enacts that when a decree for arrears of rent has been obtained by a co-sharer in a joint undivided estate, the under-tenure cannot be sold until the moveable property of the judgment-debtor has been sold, and proved insufficient to satisfy the decree. "In such case," the section proceeds, "such under-tenure, if of the nature described in s. 59" (that is to say, if by the title-deeds or the custom of the country it is transferable by sale), "may be seized and sold in execution of such decree, according to the ordinary procedure of the Court, and not in the manner provided in the said section, and every such sale shall have such and the same effect as the sale of any immovable property sold in execution of a decree, not being for arrears of rent payable in respect thereof;" in other words, as if the sale were in execution of an ordinary money-decree, in which case, as is established by a long series of decisions, only the right, title and interest of the judgment-debtor passes. To make the tenure itself liable to sale in execution, the special procedure required by the Act would be necessary, and all the co-sharers would have to be made parties to the suit. This course was not followed in the case under consideration, but the execution-sale was made under the ordinary conditions imposed by the Code of Civil Procedure.

The Subordinate Judge held that what was sold was not the interest of a Hindu widow (? daughter), but the estate which she represented. The learned Judges of the High Court, however, were of opinion that as "the suit for rent was brought against Isaneswari alone, and in respect of arrears which accrued due [555] after her father's death, and as she was in enjoyment of the rents and profits of the Chuck, the liability for rent ought to be regarded as her personal liability, and ought not to be held as attaching to the reversion unless the landlords proceeded to bring the tenure itself to sale under the special provisions of the Rent Law." In this opinion their Lordships concur. The provisions of the Rent Law were devised for the protection of all parties interested in the tenure, and they would be defeated if fractional shareholders were allowed to evade them by the method adopted in this case.

It was properly pointed out to their Lordships by Mr. Bonnerjee, the learned Counsel who appeared for the respondent, that in awarding mesne profits "for the three years next preceding the institution of the suit," the High Court had lost sight of the fact that Isaneswari died on the 26th February 1894, and that the suit was instituted on the 27th

1903

FEB. 5, 6 &
MARCH 4.PRIVY
COUNCIL.

30 C. 550=

30 I. A. 81=

7 C. W. N.

428=8 Bom.

L. R. 428=

8 Sar. 414.

1903
 FEB. 5, 6 &
 MARCH 4.
 ———
 PRIVY
 COUNCIL.
 ———
 30 C. 550=
 30 I. A. 81=
 7 C. W. N.
 425=3 Bom.
 L. R. 428=
 8 Sar. 444.

July 1894, about five months after her death. The decree must therefore be amended so as to give mesne profits from the 26th February 1894, on which date the respondent succeeded to the estate, until delivery of possession to him. Subject to this amendment, their Lordships will humbly advise His Majesty that the decree of the High Court should be confirmed and this appeal dismissed. The appellant must pay the costs of the appeal.

Decree varied. Appeal dismissed.

Solicitors for the appellants : T. L. Wilson & Co.

Solicitor for the respondents : G. C. Farr.

30 C. 556 (=30 I. A. 71=7 C. W. N. 482=8 Sar. 439.)

[556] PRIVY COUNCIL.

ASGHAR REZA KHAN *v.* MAHOMED MEHDI HOSSEIN KHAN ; AND
 THE CROSS APPEAL.* [5th February and 4th March, 1903.]

[*On Appeal from the High Court at Fort William in Bengal.*]

Res judicata—Decision in former suit—Parties—Parties in subsequent suit all claiming under one party only in former suit—Deeds, construction of—What passes under deed in absence of words reserving rights—Transfer of Property Act (IV of 1882) s. 8.

The decision in a suit by one of two zemindars against the other as to the right to the profit rental of a bazar was held not to be *res judicata* in a subsequent suit for possession of a share of the bazar in which suit all the parties, plaintiffs and defendants, claimed under the plaintiff in the former suit. Such a plea, however, might well be a defence to a hostile claim by persons asserting a title under the defendant-zemindar in the former suit against those claiming under the plaintiff-zemindar in that suit :

Held, on the true construction of deeds of mortgage, and of sale, and a certificate of sale, of shares in a zemindari, where the documents contained no words of exception or reservation that they conveyed all the interests of the mortgagor, vendor, and judgment-debtor respectively in the zemindari. Their interests in the houses on the land and in the profit rents derived from them passed in the absence of any words showing an intention to retain or exclude them.

[*Ref. 27 M. L. J. 486=26 I. C. 16. Fol. 17 I. C. 129.*]

APPEAL and cross-appeal consolidated from a judgment and decree (21st January 1898) of the High Court at Calcutta modifying a decree (31st March 1896) of the Subordinate Judge of Purneah, which was in favour of the respondents and cross-appellants.

Appeal by the first defendant, Ashgar Reza Khan, and Cross-Appeal by the plaintiffs Mahomed Medi Hossein Khan and others, to His Majesty in Council.

The suit out of which these appeals arose was brought by the respondents, who were the heirs of Nawab Syad Latif Ali Khan, and they sued the appellant, Asghar Reza, his brother Dilawar Reza, and certain other defendants to establish their title to and [557] obtain possession of certain properties—(1) an undivided share in a village and bazar called Kutubgunge, (2) an *arhat* called Phar, (3) a hat or market called Alimganj, and (4) a julkur or fishery called Peazmoni : all situate in pergunnah Surjapore. The suit was brought

* *Present* : Lords Macnaghten, Shand and Lindley, Sir Andrew Scoble, Sir Arthur Wilson and Sir John Bonser.