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take the benefit of the sale, or disavow it. In our opinion, in claiming to set aside the sale, the plaintiffs are simply exercising a right which belongs to them. They are therefore entitled to a decree annulling the sale, so far as it affects their two-anna share. But as to their claim for possession of the property, we think that the plaintiffs cannot, as against the defendant who before the sale held the property in mortgage, be entitled to be placed in a better position than they would have been if no sale had taken place. They cannot be entitled, on the annulment of the sale, to get back an unencumbered estate in the place of one charged with a liability to the repayment of the zuripeshgi, and therefore the effect of our decree will be that the defendant is entitled to stand in the position of an incumbrancer on Mauza Shahpore to the extent to which the plaintiffs' share would have remained liable to the payment of the share of zuripeshgi, if no sale had taken place. There will be a decree accordingly.

If in a suit to redeem, it turns out that the defendants have received out of the plaintiffs' share of the estate a sum sufficient to satisfy the plaintiffs' share of zuripeshgi, plaintiffs will of course get possession. The plaintiffs must get their costs of this suit in all the Courts upon a valuation equal to the difference in the value of the two-anna share of the estate, and that of the proportion of the principal of zuripeshgi, to the payment of which they were liable when the sale took place.

Before Mr. Justice Markby and Mr. Justice Hobhouse.

1869
Sept. 6.

HARI RAM AND ANOTHER (PLAINTIFFS) v. JITAN RAM AND ANOTHER (DEFENDANTS.)*

Minor—Sale in Execution of Decree—Usufructuary Mortgage—Right of Purchaser.

The acts of a minor are only voidable, and not absolutely void. The purchasers of the right, title, and interest of a judgment-debtor sued to obtain immediate possession of the property purchased at a sale held in execution of a decree, after setting aside an usufructuary mortgage executed by the judgment-debtor while a minor.

* Special Appeal, No. 1155 of 1869, from a decree of the Judicial Commissioner of Chota Nagpore, dated the 19th March 1869, reversing a decree of the Assistant Commissioner of that district, dated the 15th September 1868.

Held, that the sale in execution merely transferred to the purchaser the reversionary right of the judgment-debtor in the property, after the satisfaction of the usufructuary mortgage, and not the right to set aside an act done during minority.

Held, that until a transaction by a minor was avoided by some distinct act on attaining majority, it must be considered valid.

Baboo *Bhairab Chandra Banerjee* and *Purnu Chandra Shoma*,
for appellants.

Baboo *Kali Mohan Das* for respondents.

MARKBY, J.—In my opinion this special appeal ought to be dismissed. The case was that two persons, of the name of Andeswar Patak and Radeswar Patak, were the joint owners of certain immoveable property, in equal shares. In execution of a decree obtained against Radeswar, on the 10th of April 1863, execution was had; and on the 5th of April 1867 Radeswar's right, title, and interest in the property were conveyed to the present plaintiffs, who are the auction-purchasers under the execution. Upon their going to take possession, the defendants set up a title under an usufructuary mortgage granted to themselves for Radeswar's share, on the 31st of August 1861, which usufructuary mortgage they alleged had still two years to run. It does not appear that they in any way disputed the title of the plaintiffs to the reversion of the property after that usufructuary mortgaged had expired, but they asserted that they had a right to hold the property for the remaining two years. The plaintiffs, accordingly, brought this suit to recover immediate possession of Radeswar's 8-anna share; and with respect to the usufructuary mortgage held by the defendants, they allege that it was executed during the minority of Radeswar by a person who had no authority in that behalf. The defendants admit the minority of Radeswar at the time of the grant of the usufructuary mortgage, but nevertheless contend that it constitutes a valid answer to the plaintiffs' claim. In the judgment of the lower Court, what I call an usufructuary mortgage is described as a bond, and the Court says: "I find that this bond was executed on the " 31st August 1861; that it was signed in the presence of the " Deputy Commissioner of the district by Andeswar Patak and " Ahin Chand Patak, agent of Radeswar Patak, a minor, in

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“ open Court, and was duly registered by him ; and it is admitted by the plaintiffs that the defendants hold possession of the Mauza under that bond.” He then goes on to say : “ The Assistant Commissioner was therefore in error when he stated that the bond had not been duly executed, and that the property sold was not encumbered by any lease ; his finding on the facts is therefore wrong, and as the mortgagee in possession cannot be ousted by the purchaser of the land at a subsequent sale in execution of a decree of a Civil Court, until the term of his lease has expired, which it has not in this case, or the balance due on the bond paid up, the suit brought for possession ought to have been dismissed.” Now the effect of that finding I take to be this, that the Judicial Commissioner considered that the effect of the transaction of the 31st August 1861 was to pass the present interest of the minor, during the period which the usufructuary mortgage had to run, from him to the defendants, I think he adopts this view of the facts, and I think he was justified in so doing, that this was the same as if the minor himself had executed the deed ; and in his view of the law, he considers that such a transaction by a minor is not absolutely void but only voidable, and in that view of the law I think he was right. I think this transaction by a minor was, undoubtedly, voidable ; and I think that in this case we must presume that it was still capable of being avoided by the minor when the sale to the plaintiffs took place, but it seems to me that until it was avoided by some distinct act on the part of the minor after his coming of age, it must be considered a valid transaction, that is to say valid for the purpose of vesting in the defendants the interest of Radeswar in this property during the pendency of the usufructuary lease, leaving in the minor nothing more than a bare right to sue, if he thought proper so to do, to recover this property after he came of age. Now although some four years, if not more, have elapsed since the minor came of age, it is not shown that he has taken any steps whatever to avoid this lease ; it is found by the first Court that he did not ratify it ; but he also did not repudiate it, and therefore it seems to me that this lease is still in that condition in which it may either be affirmed or avoided by the minor. In that condition of things the

plaintiffs have become the purchasers of the rights and interest of the minor, and there is no doubt (in fact the point is not contested) that this purchase vests in them the reversion of the minor after the usufructuary lesse has expired; but in my opinion nothing more than that passed to them by his sale certificate. It has been held in a decision by Justices PHEAR and HOBHOUSE in *Chandra Khant Buttacharji v. Jadupati Chaltherjee* (1), that it a suit under Act X., a Collector has no right to sell rights of suit *quâ* rights of suit alone; that was held following and adopting a decision of Mr. Justice NORMAN in *Chunder Khant Buttacharji v. Bindabun Chunder Mookerjee* (2), where the question arose upon a right to sue being attached by a judgment-creditor in a civil suit; and in this case I follow and entirely adopt these two decisions. I think there is no power, under Act VIII. of 1859, to seize and sell merely rights of suit. I consider this to be a totally different case from that in which the judgment-debtor is entitled to property, but when execution is sued out and the sale takes place, happens to be out of possession. In that case, in contemplation of law, the property still remains the property of the judgment-debtor, and the fact that he happens to be out of possession is disregarded; but the very foundation of my judgment in this case is that all that remained in the minor, in contemplation of law, at the time of the execution, was the mere right to sue to recover the property, which for the time being was vested in the usufructuary mortgagees; so far as regards his interest in the property during the currency of the mortgage lease, the minor had left in him a bare right to sue. Then applying the decision to which I have referred, what passed to the auction-purchaser under the sale was clearly only the reversion of the property after the term of the mortgage lease had expired, because the only other thing which remained to the judgment-debtor, namely the right to sue, did not, because it could not, pass to the auction-purchaser.

It was also contended that we ought to hold that, inasmuch as Radeswar himself, upon coming of age, had the power to avoid this usufructuary mortgage; we ought to hold that the effect of the sale in execution against him

(1) 1 B. L. E., A. C., 177.

(2) 7 W. R., 277.

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transferring as it does all his rights with reference to this property to the auction-purchaser, is *ipso facto*, and by its mere force to avoid this lease; but I think this would be giving a far greater effect to proceedings in execution of decrees than was ever intended by the law. I think, that upon this point one may refer to the case in which property is sold either for arrears of revenue due to Government or for arrears of rent due to the landlord. It is provided by well known provisions of the law, that in such cases all incumbrances, in the shape of interior tenures, that may have been created by the act of the defaulting proprietor, can be avoided by the auction-purchaser. It is generally admitted that these provisions give a somewhat greater power to the execution-creditors in these particular cases than that given to execution-creditors in ordinary cases; but even there it has been held by the Privy Council with reference to sales for arrears of Government revenue, in *Raja Satyasan Ghosal v. Mahesh Chandra Mitter* (1), and by a Division Bench of this Court, in *Gobind Chunder Bose v. Alimooddeen* (2), that the mere fact of such sales does not of itself render void the encumbrances created by the former owner; but that some act must be done by the purchaser evincing his intention to get rid of those encumbrances. Therefore I think it would be giving a greater effect to the execution in this case than that given even in cases of execution for arrears of rent by the landlord, or for arrears of revenue, if I should declare that, by the mere fact of this execution and sale, the voidable lease granted by the minor has been actually avoided. This would be contrary to the principles laid down in the decisions above quoted, and on that point also the special appellant therefore fails. I think therefore that this special appeal must be dismissed with costs.

HOBHOUSE, J.—After the very exhaustive judgment given by my learned colleague I have very little to add upon this question, but it seems to me that the lower Appellate Court distinctly held that when the plaintiffs bought the property in question, they bought it encumbered by the lease under which, as the

(1) 2 B. L. R., P. C., 23.

(2) 11 W. R., 160.

the lower Appellate Court expresses it, by the plaintiffs' own admission, the defendants had, from the very first creation of the lease, that is from the year 1861, been in possession of the property. Then what was the right, title, and interest that the judgment-debtor, Radeswar Patak, had in this property so encumbered by this lease? He had, it seems to me, a right of two kinds: first of all a right to re-enter on the property on the expiry of the lease; and, secondly, a right of suit to set aside that lease. Now it cannot be doubted that the plaintiffs have bought the right to re-enter on the expiry of the lease, but I think that, under the decisions to which Mr. Justice Markby has referred, the plaintiffs cannot be held to have bought the right of suit to set aside the lease; and this being so, I think the lower Appellate Court was perfectly right in dismissing the plaintiffs' suit.

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Before Mr. Justice Markby, and Mr. Justice Glover.

MADHUSUDAN KUNDU (DEFENDANT.) v. RAMDHAN GANGULI
(PLAINTIFF.)*

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Sept. 9.

*Regulation VIII. of 1819—Sale of Patni—Incumbrances by Defaulting
Tenant—Purchaser at a Patni Sale.*

A sale under Reg. VIII. of 1819 does not, *ipso facto*, annul all tenures created by the defaulting *patnidar*, but the purchaser, if he thinks proper can avoid them.

Baboo *Purna Chandra Shome* for appellant.

Baboos *Krishna Sakha Mookerjee* and *Nilmadhab Sein* for respondent.

MARKBY, J.—I think that the special appellant in this case has made out a good ground of special appeal. The case originally came before the Deputy Collector, upon a suit by the plaintiff for arrears of rent at an enhanced rate. The plaintiff is a *darpatnidar* under a person who purchased the *patni* when it was sold for arrears of rent under Regulation VIII. of 1819. The defendant, in answer to this suit, denied that his tenure

* Special Appeal, No. 1412 of 1869, from a decree of the Judge of East Burdwan, dated the 17th February 1869, affirming a decree of the Deputy Collector of that district, dated the 31st October 1868.