Before Mr. Justice Norman and Mr. Justice E. Jackson.

MUSSAMAT BUKSHAN AND ANOTHER (PLAINTIFFS) *v.* MUSSAMAT MALDAIKOOERI AND OTHERS (DEFENDANTS.)*

1869 *Aug.* 25.

Mahomedan Law—Guardian and Ward—Sale by Guardian.

Under the Mahomedan law a sale by a guardian of property belonging to a minor is not permitted otherwise than in case of urgent necessity or very clear advantage to the infant.

A purchaser from such guardian cannot defend his title on the ground of the *bona fides* of the transaction.

An elder brother is not in the position of a guardian having any power as such over the property of his minor sisters.

Baboos *Chandra Madhab Ghose* and *Ramesh Chandra Mitter* for appellants.

Baboo *Mahesh Chandra Chowdhry* for respondent.

NORMAN, J.—The plaintiffs, who are Mahomedan women, sue to set aside a sale, and for the recovery of their two-anna share in Mauza Shahpore, sold during their infancy by their brother, Syud Bahadur Hossein, who assumed to act as their guardian, to the defendants, who were the mortgagees.

The Moonsiff, Baboo Balai Chand, said that according to Mahomedan law he could not find that a brother, without being appointed guardian by some competent authority, had any power to sell any portion of the immoveable property of his ward. He also found that there was no legal necissity for the sale. He thought that the debts, for the payment of which the money was applied, might have been paid off out of the income of the property without the sale of any portion of the plaintiff's estate; and accordingly he declared the sale invalid, and decreed possession to the plaintiffs.

The Subordinate Judge of Bhaugulpore, Moulvie Waheed-ooddeen, reversed this decision. He says, that Syud Bahadur Hossein, as guardian of his sisters and brother, Altof Hossein, sold six annas out of fourteen annas of the Mauza belonging to himself, his brother, and sisters, for Rs. 5,560, out of which he

* Special Appeal, No. 2570 of 1868, from a decree of the Subordinate Judge of Bhaugulpore, dated the 30th June 1868, reversing the decree of the Sudder Ameen of that district, dated the 16th March 1868.

1869

MUSSAMAT BUKSHAN v. MUSSAMAT MALDAI KOOERE.

deducted Rs. 3,564 to pay off the zuripeshgi, and Rs. 1,926 for satisfying the dues of other mahajans; that this was done in good faith, to pay off old debts; that it was not done fraudulently; that it was good management to redeem the mortgage and pay off debts bearing large rates of interests; and that only illegal acts of a guardian are cancelled under the Mahomedan law. He says, that the plaintiffs' allegation that the debts could have been paid off out of the income of the estate, which was Rs. 2,000 a year, did not deserve attention, because the estate was involved in debt from the time of Mussamut Dulhin, the ancestress of the plaintiffs. He also disregards the plaintiffs' contention, that Syud Hossein was not their guardian under the Mahomedan law. He says, that the mother cannot be guardian, and a brother is quite competent to be a guardian. He reversed the Sudder Ameen's decision, and dismissed the plaintiff's suit.

From that decision the plaintiffs appeal. They contend, first that a brother is not a guardian by Mahomedan law, and that supposing he could act as guardian, the circumstances of the present case are not such as would have justified a guardian in selling an infant's property.

We are not aware of any rule of Mahomedan law which empowers an elder brother in managing the family property acting or assuming to act on behalf of an infant brother or sister, to sell the share of such infant in order to pay family debts; nor are we aware of any authority, either in any book of Mahomedan law or in any decided case, leading to the inference that a person taking the share of an infant by purchase from an elder brother can defend his title by showing that he acted in good faith in making the purchase and that the person from whom he bought acted honestly, and did more than a prudent manager might, had he full authority to bind the infant co-sharer by a sale of the whole or a part of the property.

In Macnaghten's Principles of Mahomedan Law, Chapter VIII., "section 5, it is said: Gaurdians are near or remote. Of the former "description, are fathers and paternal grandfathers and their exe- "cutors and the executors of such executors. Of the latter "description, are the more distant paternal kindred, and their

"guardianship extends only to matters connected with the educa-
"tion and marriage of their wards. The former description of
"guardians have power over the property of the minor, for
"purposes beneficial to him. In their default, this power does
"not vest in the remote guardians, but devolves on the ruling
"authority." See to the same effect John Baillie's Digest of the Mahomedan Law, page 319.

Syud Bahadur Hossein was therefore not in the position of a guardian having any power as such over the property of his minor sisters. That power, had he possessed it, is a very limited one. According to Mahomedan law, a sale by a guardian of the landed property of an infant is not permitted otherwise than in case of urgent necessity, or very clear advantage to the infant. See Macnaghten's Precedents, Chapter VII., case 2, page 305; Macnaghten's Principles, page 64; John Baillie's Digest of Mahomedan Law, page 321.

The Subordinate Judge says, the estate had been in debt from the time of Mussamut Dulhin, and asks how it could be expected to disentangle and clear it from debt from its income only. The Mahomedan law empowers a guardian to sell the property of his ward, "when the minor has no other property, and the "sale of it is absolutely necessary to his maintenance; or when "the late incumbent died in debt which cannot be liquidated "but by the sale of such property."—Macnaghten's Principles, page 64. The duty of a guardian, in a case like the present, would then be to pay off the debt if that were possible by strict economy, and not to sell an infant's property because it might be the easier mode of clearing the estate of debt.

The Moonsiff appears to have been right in saying that there was no such urgent necessity in the present case as, according to Mahomedan law, would have warranted a sale of the land of his ward by a guardian. The case thus resolves itself into this: Syud Bahadur Hossein may be taken to have been a person who, in good faith, assuming and intending to act for the benefit of his infant sisters, took upon himself to sell their property.

Now, according to Mahomedan law, see The Hedaya, Vol. II., page 508, and according to a principle well established as law in the Courts of this country, the infant on coming of age might either

1869

MUSSAMAT BUKSHAN v. MUSSAMAT MALDAI KOOERI.

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.