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 v.  
 HARAJAL  
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The plaintiff has failed to prove either of the two conditions above referred to, and his suit must, therefore, be dismissed with costs. The point upon which our judgment is based was not determined by the learned Judges who had remanded the case on a former occasion, and I do not think, therefore, that the remand order stands in the way of our decision.

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 July 31.

*Before Mr. Justice Bayley and Mr. Justice Macpherson.*

SYED SHAH ENAET HOSSEIN v. SYED RAMZAN ALI.\*

*Mohammedan La—Creditor of Ancestor—Purchaser from Heir.*

A., a Mohammedan, died, being indebted to B. in a sum of money. B. sued the heirs of A. for the amount, and obtained a decree. Before B. obtained his decree, the heirs of A. had mortgaged the estate of A. to C. The property was put up to sale in execution of B.'s decree, and B. became the purchaser; and now sued to obtain possession from C.

*Held*, that the mere fact of the property having once belonged to the estate of A. did not entitle B. to follow it in the hands of C., so as to enable him to recover possession without redeeming. The heir of a Mohammedan may, as executor, sell a portion of the estate of the deceased, if necessary, for the payment of debts; and such sale will not be set aside, if the purchaser acted *bonâ fide*.

In this suit the property in dispute, which formed part of the estate of one Momtaz Ali, a Mohammedan, deceased, was put up for sale, and purchased by the plaintiff, in execution of a decree obtained by the plaintiff against the heirs of Momtaz Ali, in respect of a debt due to him, plaintiff, by the deceased. The plaintiff sought to eject the defendants, who held possession under a mortgage executed to them by the heirs, prior to the decree in execution of which the plaintiff had purchased.

Mr. Allan for appellant.

Mr. C. Gregory and Baboo Ramesh Chandra Mitter for respondent.

The facts, the holdings of the Court below, and the arguments on Special Appeal sufficiently appear in the judgment of the Court, which was delivered by

\* Special Appeal, No. 3088 of 1867, from a decree of the Judge of Gya, affirming a decree the Principal Sudder Ameen of that district,

MACPHERSON, J.—Momtaz Ali having died owing the plaintiff a sum of money, the latter sued his heirs, and got a decree against them for the amounts due, to be realized out of the estate of the deceased. But before the plaintiff got his decree against them, the heirs had mortgaged to the defendant (by granting zuripeshgi lease) the property, the subject of the present suit, which formed part of the assets left by the deceased. The plaintiff, in execution of his decree, attached the mortgaged property, had it put up for sale, and bought it himself. He then instituted the suit, out of which the present appeal arises, seeking to eject the defendants, and declaring that their conveyances were fraudulent and collusive. Both the lower Courts raised, but neither of them decided an issue, as to whether the defendant's mortgages were fraudulent and collusive. But they held, that because the property at one time belonged to the estate of Momtaz Ali, the plaintiff, as a creditor who has got a decree against the estate, has a right to follow the property in the hands of the defendants; and, therefore, that by purchasing at the sale in execution of his decree, the plaintiff acquired a good title, and has a right to recover possession from the defendants.

From this decision the defendants appeal, contending that they are *bonâ fide* mortgagees, who paid full consideration, and had no notice of the plaintiff's claim against the estate, and as their mortgages are prior in date to the decree under which the plaintiff purchased, the latter is not entitled to possession, until he shall have paid off what is due to the plaintiffs in respect of the mortgage.

It appears to us that the mere fact of these lands having once belonged to the estate of the deceased, does not show that the plaintiff is entitled to follow them in the defendant's hands, so as to enable him now to recover possession without redeeming. It is quite true that the assets of a deceased Mohammedan are primarily liable for and charged with his debts; and further, that it is the duty of the heir to pay all debts before appropriating any portion of the assets to his own use. But although that is unquestionably so, it does not follow that a third party who purchases from the heir *bonâ fide*, and for full consideration, may not by his purchase acquire a good title as against a creditor

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who subsequently gets a decree against the heirs and estate of the deceased. As regards Hindus, it has been decided that the creditor of a deceased man has no better position as against his debtor's estate than that which he enjoyed in his life-time; that when the estate has passed to the heirs of the debtor, the creditor may have recourse to it, so long as it remains in their hands; but that if he allows the heirs to dispose of the estate to a *bona fide* purchaser, he cannot follow it in the hands of the latter, but can proceed only against the heirs personally, who are responsible to the extent of the assets. See *Zabardust Khan v. Indurman* (1).

The case of *Khaja Abdul Hossein v. Maharaja Hetnarayan Sing* (2) was referred to in argument; but it really has no bearing on the question now before us, as it merely decides (what is indisputable) that if Mohammedan heirs misappropriate assets belonging to the estate of their deceased ancestor, they make themselves personally liable to the extent of the assets misappropriated.

The heir, when an executor, may properly sell a portion of the estate of the deceased, if such sale be necessary for the purpose of paying debts, or legacies, or otherwise, in the course of a due administration of the estate. In Baillie's Mohammedan Law, page 677, it is said:—"But if there are debts, and they cover the whole of the estate, the executor may sell the whole by general agreement (*i. e.* of the heirs), and when the debts do not cover the whole estate, he may sell as much of it as may be necessary for their payment." \* \* \* When, however, he "has actually sold *akar*, or immoveable property, for the payment of debts, while he has other property in his hands sufficient for that purpose, the sale is lawful; and if there are general legacies, the executor may sell as much of the property as may be necessary for their liquidation, &c."

The law being such, there is nothing *primâ facie* bad in a sale by a Mohammedan heir,—nothing which should invalidate the title of a *bonâ fide* purchaser who pays full consideration, and buys without notice, if there be any reason why the sale should not have been made; of course if the purchaser is not

(1) *Agra H. C. R., (F. B. R.), 71*

(2) *S. D. R., 1859, 540.*

buying *bonâ fide*, if he is in any way acting in collusion with the heir, and knows, or has reason to believe, that the money paid by him will not be duly applied for the purpose of the estate, the purchase would be liable to be set aside.

Owing to the view which the lower Courts took of the law, the present case has not been properly or fully tried, and it must be remanded for re-trial on the following issues:

*1st*—Under what circumstances, and why, the zuripeshgi leases in question were granted to the defendants by the heirs of Momtaz Ali.

*2nd*.—Did the defendants act *bonâ fide* and pay full consideration for the leases, which they obtained; and had the defendants at the time they advanced the money any (and if any, what) notice of outstanding claims against the estate of Momtaz Ali.

These issues not having been tried or determined in either Court, the Judge will refer them to the Subordinate Judge for trial, who will try the issues, and return to the lower appellate Court its finding thereon, together with the evidence.

The appellants are entitled to their costs of this appeal.

Before Mr. Justice Phear and Mr. Justice Hobhouse.

MADHAB CHANDRA PAL v. A. HILLS.\*

*Jurisdiction*—Act X. of 1859, s. 27—Act VIII. of 1859, s. 1.

The right given by section 27 of Act X. of 1859 to the transferee of a permanent transferable interest in land, to have his name registered in the sherista of the zemindar in the place of that of his vendor, is a right of a civil nature; and, therefore, the Civil Courts have cognizance of all suits necessary for the purpose of enforcing such right. The jurisdiction of the Collector is not exclusive, but concurrent.

This was a suit instituted in the Court of the Moonsiff of Chooadanga, in the district of Nuddea, to have the names of the plaintiffs registered in the zemindar's sherista, under section 27 of Act X. of 1859. The defendant, A. Hills, contended that, under that section, the Civil Court had no jurisdiction to

\* Special Appeal, No. 3078, of 1867, from a decree of the Principal Sudder Ameen of Nuddea, reversing a decree of a Moonsiff of that district.

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July 23.