

The Weekly Reporter,

APPELLATE HIGH COURT.

The 4th January 1866.

Present :

The Hon'ble L. S. Jackson and J. B. Phear,
Judges.

Sale of lands for arrears of Revenue—Object of Section 54, Act XI. of 1859, as to encumbrances—Onus probandi.

Case No. 2512 of 1865.

Special Appeal from a decision passed by Mr. A. Pigou, Judge of Hooghly, dated the 29th June 1865, reversing a decision of Moulvie Nazirooddeen Mahomed, Principal Sudder Ameen of that District, dated the 28th November 1864.

Monohur Mookerjee (Plaintiff), *Appellant,*

versus

Joykishen Mookerjee and others (Defendants),
Respondents.

Mr. R. T. Allan and Baboo Bamachurn Banerjee for Appellant.

Baboos Mohendro Lal Shome and Banee Madhub Banerjee for Respondents.

The object of Section 54, Act XI. of 1859, is to protect, not every encumbrance which may be set up, but only *bonâ fide* encumbrances executed in contemplation of an impending sale, or in fraud of a possible purchaser. Where surrounding circumstances suggest such creation, it is for the party setting up the encumbrance to establish its *bonâ fide* character.

In this case a share in a joint estate, consisting of a specific portion of land, had been separated from the estate under Section 11,

Act XI. of 1859, and, default in the payment of the Government Revenue having occurred, was separately sold under Section 13 of the same Act. The plaintiff, who purchased, sought to obtain immediate (*khas*) possession of a piece of land comprised within the portion sold, but was met by an allegation of mokurruree lease, granted by the defaulter to his son some months before the sale, which lease was said to be protected under Section 54 of the Act cited. Plaintiff impugned the lease as collusive and fraudulent, and sued for possession of the ground. The Principal Sudder Ameen, who tried the suit in the first instance, being of opinion that the lease was of this character, decreed to set it aside; but, having referred to the object to which the land had been devoted, further decreed that, on payment by the defendant of an enhanced rent, the land should be left in the condition in which it then was.

The Zillah Judge in appeal, finding the lease to have been really executed by the defendant Joykishen, and observing that it was for the plaintiff "to prove his pleas of collusion and fraud and antedating," decided that no such proof had been afforded, and reversed the decree.

Mr. Allan for the plaintiff (special appellant), having to deal with this positive finding in a matter of fact, has had some difficulty in making out a case on which a special appeal would lie.

We are of opinion that, by a slight shifting of the burthen of proof, the Lower Appellate Court has departed from the principles on which this case should have been determined; and that a rigid adherence to those principles is absolutely necessary for the purpose of preventing serious frauds under the operation of this portion of the Sale Law.

It cannot be doubted, but the object of Section 54, Act XI. of 1859, was to protect, not every encumbrance which might be set up, but only *bona fide* encumbrances executed in contemplation of an impending sale, or in fraud of a possible purchaser; and that, where surrounding circumstances suggested such creation, it would be for the party setting up the encumbrance to establish its *bona fide* character, which he could readily do if it were really of that complexion.

Applying these principles to the present case, the Courts below should have enquired into the following points:—

1stly.—Was the pottah Joykishen's deed?

2ndly.—Was it executed at the time stated, *bona fide*, with the intention of immediately passing a substantial interest to the lessee, his son?

3rdly.—Was this assignment intended to operate in fraud of a foreseen possible auction-purchaser?

Another point appears not free from doubt, and, therefore, calling for enquiry, namely,

4thly.—To what extent, looking at Joykishen's relations with his co-sharers, could this pottah constitute an encumbrance on the plaintiff's purchase within the meaning of the Act?

Now, looking at the relations of all the parties to this suit, and to the continual occurrence in this country of family arrangements made for the purpose of defeating the legal consequences of acts and omissions, we have no hesitation that there were points on which it was for the defendant to satisfy the Court; in other words, that the burthen of proving the *bona fide* encumbrance lay on him. The Judge, on the other hand, we think, as contended by Mr. Allan, finding a mere *factum* of a pottah, has thrown it entirely on the plaintiff to prove the fraud. It seems to us more than probable that, if he had looked at the case in the light in which we now set it before him, he might have come to a different conclusion. At any rate, it will be his duty now attentively to re-consider the case in that light.

We, therefore, reverse the decision of the Lower Appellate Court, and remit the case with directions to re-hear it as above indicated. The costs will be costs in the suit.

The 4th January 1866.

Present:

The Hon'ble C. B. Trevor and G. Campbell,
Judges.

Minors—Section 2, Regulation XXVI., 1793—Proprietors of estates paying Revenue to Government—Necessaries—Power of Minor to authorize third party to settle an account.

Case No. 300 of 1865.

Regular Appeal from a decision passed by the Judge of Dacca, dated the 12th August 1865.

Bykuntnath Roy Chowdry (Defendant),
Appellant,

versus

Mr. N. P. Pogose (Plaintiff), *Respondent.*

Baboo Sreenath Doss for Appellant.

Mr. C. Gregory and *Baboo Dwarkanath Miller* for Respondent.

Suit laid at Rupees 3,801-9.

Section 2, Regulation XXVI., 1793, extends the term of minority of proprietors of estates paying revenue to Government, from the end of the 15th to the end of the 18th year, in respect of all acts done by such proprietors, both as to matters connected with real estate, and matters of personal contract.

Minors have a qualified power of contracting, and an implied or expressed contract for necessities is binding absolutely on a minor.

As a minor cannot himself, by reason of insufficient capacity for business, state and settle an account so as to be bound thereby, so neither can he authorize another party to do for him that which he cannot do himself.

THE plaintiff in this suit, Mr. N. P. Pogose, sues the defendant, Bykuntnath Roy Chowdry, a zemindar of Zillah Mymensing, for a sum of money due on three bonds executed by him: one for 1,450 rupees, dated 6th Aghran 1260, another for 550 rupees, dated 30th Aghran of that year, and a third for 250 rupees, dated 29th Pous of the same year, and for 680 rupees under an account stated and signed by Bindabun Chunder Mojoomdar, the gomashtah of the defendant.

The plaintiff alleges that, in consequence of disputes between the defendant and his mother regarding the property left by his father, Gokoolnath Roy Chowdry, having risen to a great height, he left his house, and went to Bagoonbary to secure the assistance of Khajah Abdool Gunee, the zemindar of Baliati, and several other persons, residents of Dacca; but, having failed in all these places, he, defendant, with Bindabun Chunder Mojoomdar, his well-wisher Prannath Gossain, and his spiritual guide