

1878  
 FEHRSEN  
 v.  
 SIMPSON.

for the purpose of giving the fund to the issue of the deceased child who in his lifetime enjoyed it.

I think, therefore, that, on the proper construction of the will of Dr. Simpson, the settlement of Mr. and Mrs. Fehrsen and their will, the corpus of the fund, of which the interest was paid to Mrs. Fehrsen during her lifetime, devolved at her death upon her only child.

The costs of the parties must be paid out of the estate.

## APPELLATE CIVIL.

*Before Mr. Justice Ainslie and Mr. Justice Macleum.*

1878  
 Sept. 13.

MADHOO PROSHAUD SINGH AND OTHERS (DEFENDANTS) v. PURSHAN RAM AND OTHERS (PLAINTIFFS).\*

*Sale for Arrears of Rent—Previous Purchase by Mortgagee of Portion of Tenure—Ejectment—Right of Purchaser to question by Suit the validity of Decree for Ejectment if not a party to the Rent-suit.*

In a suit for arrears of rent by a mukuraridar against his dur-mukuraridar, a decree was passed ejecting the latter, and, as a consequence, the tenure of the dur-mukuraridar was cancelled. *Held*, that a mortgagee from the dur-mukuraridar, who had, previously to the rent-suit, obtained a decree on his mortgage and purchased himself at the auction-sale, and who had not been made a party to the rent-suit, was entitled to question by suit the validity of the decree obtained in the rent-suit ordering ejectment of the dur-mukuraridar.

THE plaintiffs sued as the auction-purchasers at an execution-sale held on the 15th June 1875, to obtain possession of the right of one Parbhu Singh in a dur-mokurari tenure. They stated that one Uzimaddin Khan originally was the owner of seven-half annas in a certain mokurari tenure; that he subse-

\* Special Appeal, No. 2173 of 1877, against the decree of Baboo Mutadin, Officiating Subordinate Judge of Zilla Gya, dated the 16th of July 1877, affirming the decree of Moulvi Feda Hosain, Munsif of Aurrungabad, dated the 19th of June 1876.

quently made a dur-mokurari settlement of three-half annas out of the seven-half with Parbhu Singh and Bal Gobind in equal shares; and that, he subsequently sold the entire seven-half annas to one Sidahur Singh (father of the defendant No. 1) who confirmed the dur-mokurari tenure above-mentioned. The plaintiffs, having obtained a mortgage of one-half annas of the dur-mokurari tenure belonging to Parbhu Singh, brought a suit and obtained a decree on the mortgage-deed, and at the auction-sale purchased the property themselves. The defendants, who represented the mokuraridar, brought a suit against the dur-mokuraridars for arrears of rent from January to May 1875, and obtained a decree framed under s. 52 of the Rent Law, directing the ejectment of the dur-mokuraridars in the event of the arrears of rent not being paid within fifteen days, but neglected to make the plaintiffs, the purchasers at the auction-sale, parties to the suit. In pursuance of their decree they entered into possession, cancelling the dur-mokurari right of Parbhu Singh. The plaintiffs then brought this suit to recover possession.

The defendants contended that the suit could not be brought unless the provision of s. 272 of Act VIII of 1859 were complied with; that the plaintiffs should have intervened when execution of their decree was obtained; and that the plaintiffs had neglected to enter their names in the zemindari books of the defendants when they purchased at the auction-sale.

The Munsif found that the plaintiffs not having been made parties in the suit for arrears of rent, had no notice of the institution of the suit and the subsequent decree in favor of the defendants, and they, therefore, were entitled to bring the present suit; that they were not bound to intervene in the suit in which the defendants obtained their decree; that inasmuch as the plaintiffs had never been in possession of the property under their decree, because the order cancelling the dur-mokurari tenure took place before they were able to take possession, it was not necessary for them to enter their names in the zemindari books. He, therefore, gave a decree in favor of the plaintiffs and put them in possession of the one-half annas purchased by them, ordering the decree obtained by the defendants in the suit for arrears of rent to be modified accordingly.

1878

---

MADHOO  
PROSHAUD  
SINGH  
v.  
PURSHAN  
RAM.

1878

MADHOO  
PROSHAUD  
SINGHv.  
PURSHAN  
RAM.

The defendants appealed to the Officiating Subordinate Judge of Gya, who affirmed the decision of the Munsif, dismissing the appeal with costs.

The defendants appealed to the High Court.

Moonshee *Mahomed Yusoof* for the appellants.

No one appeared for the respondents.

The judgment of the High Court was delivered by

AINSLIE, J. (MACLEAN, J., concurring).—The plaintiffs sued to obtain possession as auction-purchasers of the right of Parbhu Singh in a dur-mokurari tenure at an execution-sale held on the 15th of June 1875. The dur-mokurari tenure was held jointly by Parbhu Singh and Bal Gobind.

The defendants, who represent the mokuraridar, brought a suit against the dur-mokuraridars for arrears of rent for certain months,—*i. e.*, from Magh to Joyt 1282, corresponding with January to May 1875. That suit was not commenced until the 25th of August of that year, and the decree in it is dated the 27th of September 1875. That decree contains an order framed under s. 52 of the Rent Law, directing the ejection of the dur-mokuraridars in the event of the arrears decreed not being paid within fifteen days. That suit was brought and decree obtained after the sale of the interests of Parbhu to the plaintiffs without any reference to them.

It may be that the landlord was justified in refusing to notice the transfer of this tenure as one which required registration, in consequence of its not having been registered; but although the decree against Parbhu may so far be sustainable, we think that the purchasers are at liberty to question the validity of the decree so far as it directs the cancelment of the tenure. The question is not really whether there was any collusion between the superior tenant and the former dur-mokuraridars, but whether the decree obtained by the mokuraridar is one which could have been legally made. That this question may be raised by the auction-purchasers is clear from the decision of the late learned Chief Justice Sir Richard Couch in the case of

*Tirbhobun Singh v. Jhono Lall* (1). The language there used is as follows:—"Therefore the facts appear to be that this was a transferable tenure that might and ought, according to the provisions of Act X of 1859, to have been sold; but, instead of the Collector making the proper decree,—namely, a decree for sale,—a decree of ejectment under s. 78 of Act X was made. Now, the present plaintiff, the mortgagee, was not a party to those proceedings; if he had been, the proper course would have been to question the validity of the decree for ejectment under s. 78 by an appeal, but having been no party to those proceedings, the plaintiff is now, we think, at liberty to question the validity of that decree and to shew that in fact the Collector had no power, under Act X of 1859, to make a decree for ejectment."

1878

MADHOO  
PROSHAUD  
SINGH  
v.  
PURSHAN  
RAM.

We, therefore, remand the case to the Subordinate Judge that he may try and determine whether the dur-mokurari tenure was of such a character that it could be properly cancelled by a decree for ejectment made under s. 52 of Beng. Act VIII of 1869, or whether it was not a transferable tenure in respect of which the proper procedure was to hold a sale. Costs will follow the result.

*Case remanded.*

*Before Mr. Justice Mitter and Mr. Justice Maclean.*

PROSONNA NATH ROY CHOWDRY (PLAINTIFF) v. AFZOLONNESSA  
BEGUM (DEFENDANT).\*

1878

Aug. 14.

*Limitation Acts, IX of 1871, s. 7, and XV of 1877, sched. ii, art. 44—  
Minority—Alienation by Guardian.*

*K. R.* died in 1844, leaving a widow *O. T.* and a minor son *G. D.* In 1847 *O. T.* executed in favor of the defendant a mourasi izara of certain property, but it did not appear whether she so acted as guardian or mother of *G. D.* *G. D.* died in 1855 before attaining majority, and, under an *anumati patra* executed by *K. R.* before his death, the plaintiff was adopted in 1858. *O. T.*

\* Appeal from Appellate Decree, No. 2360 of 1877, against the decree of E. S. Moseley, Esq., Officiating Judge of Zilla Mymensingh, dated the 27th of June 1877, affirming the decree of Baboo Bidhu Bhoosun Banerji, First Subordinate Judge of that District, dated the 26th of November 1875.

(1) 18 W. R., 206.