

M. Mahomed Yusuf, Babu Umakali Mukerjee, Babu Tarit
Mqhun Das and M. Mahomed Habibullah for the appellant.

Mr. C. Gregory, for the respondents.

The judgment of the High Court (TREVELYAN and BEVERLEY,
JJ.) was as follows :—

It is difficult to conceive of a case where the formalities of the
law have been more neglected than in the present instance.

The suit was brought against a minor. No guardian *ad litem*
was appointed of that minor, yet the case was allowed to proceed
to decree. No attempt was made to serve the minor with a
summons, but some attempt apparently was made to effect service
of notice upon the lady who had been appointed guardian by the
Court under Act VIII of 1890. Section 53 of that Act, amend-
ing the Civil Procedure Code, expressly requires the appointment
of a guardian *ad litem*, whether or not a guardian is appointed
under Act VIII of 1890, although that section gives precedence
to the appointment of a guardian appointed under the provisions of
that Act.

It is perfectly obvious that the decree appealed against is bad
and must be set aside, and the case must go back to the lower
Court in order that the minor may be represented in accordance
with law, and then the case must be retried. Until the minor is
represented in accordance with law no proceedings had can be
binding upon him.

s. c. c.

Appeal allowed.

Before Mr. Justice Ghose and Mr. Justice Gordon.

MAHANUND CHUCKERBUTTY AND ANOTHER (DEFENDANTS NOS. 2 & 3)
v. BANIMADHUB CHATTERJEE AND OTHERS (PLAINTIFFS)
AND OTHERS (DEFENDANTS). *

1896
July 24.

*Bengal Cess Act (Bengal Act IX of 1880), section 47—Decree for Arrears
of Cess—Sale in execution of decree, Effect of.*

Although the procedure for the realization of cesses may be the same
as the procedure laid down for the realization of rent due upon the tenure,
yet it does not necessarily follow that the effect of a sale for cesses should

* Appeal from Original Decree No. 270 of 1894 against the decree of
Babu Debendra Lal Shome, Subordinate Judge of Manbhoom, dated the
27th of July 1894.

1896
DAKESHUR
PERSHAD
NARAIN
SINGH
v.
REWAT
MEHTON.

1896

MAHANUND
CHUCKER-
BUTTY
v.
BANIMADHUB
CHATTERJEE.

be the same as that of a sale for arrears of rent for which the tenure itself is liable to be sold. *Umachurn Bag v. Ajadannissa Bibee* (1) followed.

Notwithstanding, therefore, that section 47 of the Cess Act, 1880, provides that "every holder of an estate or tenure to whom any sum may be payable under the provisions of this Act may recover the same with interest at the rate of twelve and a half per centum per annum in the same manner and under the same penalties as if the same were arrears of rent due to him," the effect of a sale by the Collector in execution of a decree for cesses against some of the owners of a tenure is not to convey to the purchaser the whole tenure, but only the right, title and interest of the particular persons against whom the decree had been obtained.

THE road cess and public works cess payable for the share of the plaintiffs in a certain *mouza* having fallen into arrear the defendant No. 1 brought separate suits against them for their respective shares of the cesses, and obtained decrees. He then instituted against some of the other defendants a suit for recovery of the cesses due for the entire *mouza*, and in execution of this decree he caused the entire *mouza* to be put up for sale, and it was purchased by the defendants Nos. 2 and 3, the appellants. The plaintiffs then brought a suit for a declaration that the sale did not affect their shares of the *mouza*. The Subordinate Judge decreed the suit. The defendants 2 and 3 appealed.

Dr. *Rash Behari Ghose* and *Babu Digamber Chatterjee* for the appellants.

Babu Dwarkanath Chuckerbutty for some of the respondents; *Babu Hem Chunder Banerji* and *Babu Ram Churn Mitter* for others.

The judgment of the Court (GHOSE and GORDON, JJ.) was as follows:—

We think that the Court below in this case has arrived at a proper conclusion.

The whole question discussed before us by the learned *vakil* for the appellants is as to the effect of the sale held by the Collector in execution of a decree under Act X of 1859 for cesses against certain of the owners of the tenure in respect of which the cesses were due, that is to say, whether it was a sale of the

(1) I. L. R., 12 Calc., 430.

tenure itself, or simply the right, title and interest of the persons against whom the said decree had been obtained.

The contention of the appellant depends entirely upon the construction to be put upon section 47 of Bengal Act IX of 1880. That section runs thus: "Every holder of an estate or tenure to whom any sum may be payable under the provisions of this Act may recover the same with interest at the rate of twelve and half *per centum per annum* in the same manner and under the same penalties as if the same were arrears of rent due to him."

It has been contended that when the Legislature says that the cess may be recovered in the same manner and under the same penalties as if the same were arrears of rent due to the landlord, it means that the same incidents which attach to, and follow upon, a sale for arrears of rent for which the tenure itself is liable to be sold, equally attach to a sale for cesses, and that, therefore, the sale at which the defendants-appellants purchased the property conveyed to them the whole tenure, and not simply the right, title and interest of the particular individuals against whom the decree for cesses had been obtained.

We are, however, unable to accept this argument as correct. We think that, although the procedure for the realization of cesses may be the same as the procedure laid down for the realization of rent due upon the tenure, yet it does not necessarily follow that the effect of a sale for cesses should be the same as that of a sale for arrears of rent for which the tenure itself is liable to be sold under section 105 of Act X of 1859. We observe that this is the view that was substantially adopted by a Division Bench of this Court in the case of *Umachurn Bag v. Ajadannissa Bibee* (1) where the learned Judges had, amongst other matters, to construe the meaning of section 25, Act X of 1871, the language of which (so far as the question we are now dealing with is concerned) is substantially the same as that of section 47 of Bengal Act IX of 1880.

We think that what the defendants-appellants have purchased in this case is, not the tenure itself, but simply the right, title and interest of the particular individuals against whom the decree for cesses had been obtained.

(1) I. L. R., 12 Calc., 430.

1896

 MAHANUND
CHUCKRABUTTY

 v.
BANIMADHUR
CHATTERJEE.

1896
 MAHAMED
 CHUCKER-
 BUTTY
 v.
 BANMADHUB
 CHATTERJEE.

It has been found by the Court below that the plaintiffs are entitled to a 9-anna share of the tenure, and no attempt has been made before us to question the finding of the lower Court in that respect.

It follows, therefore, that the decree of the lower Court should be affirmed and this appeal dismissed with costs. The Maharajah is entitled to separate costs.

H. W.

Appeal dismissed.

Before Sir W. Comer Petheram, Kt., Chief Justice, and Mr. Justice Rampini.

ESOOF HASSHIM DOOLY AND ANOTHER (PLAINTIFFS) v. FATIMA
 BIBI *alias* MAH POH AND OTHERS (DEFENDANTS).⁹

1896
 August 6.

Appeal—Lower Burmah Courts Act (XI of 1889), section 40—Burmah Courts Act (XVII of 1875), section 49—Probate and Administration Act (V of 1881), sections 3 and 86—Code of Civil Procedure (Act XIV of 1882), sections 595 and 614—Final decree passed by the Recorder of Rangoon in the exercise of Original Civil Jurisdiction where the value of the subject matter of the suit is above ten thousand rupees.

A decree passed by the Recorder of Rangoon, in a suit for grant of probate of a will, is a final decree passed by him in the exercise of Original Civil Jurisdiction.

No appeal lies to the High Court from a final decree passed by the Recorder of Rangoon in the exercise of Original Civil Jurisdiction, where the value of the subject-matter of the suit is above ten thousand rupees, but an appeal lies to Her Majesty in Council.

ONE Esoof Hasshim Dooly and another sought to propound the will of one Mahomed Ibrahim Dooly, who died on the 17th November 1894. The alleged will was dated the 10th October 1894. Caveats were entered on behalf of the widow and five daughters of the testator. The caveators objected to the grant of the probate of the will, on the ground that the testator at the time of its execution was of such feeble mind that he was incapable of understanding the nature of the act. The value of the estate was above six lakhs of rupees. The learned Recorder of Rangoon refused to grant probate and dismissed the suit, holding that the testator was not in full possession of his senses when he executed the will.

⁹ Appeal from Original Decree No. 194 of 1895, against the decree of W. F. Agnew, Esq., Recorder of Rangoon, dated the 5th of April 1895.