

(1868) 07 CAL CK 0001

Calcutta High Court

Case No: Special Appeal No. 3088 of 1867

Syed Shah Enaet Hossein

APPELLANT

Vs

Syed Ramzan Ali

RESPONDENT

Date of Decision: July 31, 1868

Judgement

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 bond 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.

2. 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 bond fide, and for full consideration, may not by his purchase acquire a good title as against a creditor who subsequently gets a decree against the heirs and estates 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 lifetime; 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 bond 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 *Zabardast Khan v. Indurman* [Agra H.C.R., (F.B.R.), 71].

3. The case of *Khaja Abdul Hossein v. Maharaja Hetnarayan Singh*, (S.D. B., 1869, 540), 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.

4. 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."

5. The law being such, there is nothing *prima facie* bad in a sale by a Mohammedan heir,--nothing which should invalidate the title of a bond 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 buying bond 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.

6. 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 bond 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.

7. 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.