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Saheb having been found to be in all other respects unimpeachable. We quite discredit Kulsambi's affectation, in her written statement in the present suit, of ignorance of the foreclosure suit. She did not attempt, in the Courts below, to raise any issue as to her not having been duly served with process in it.

If the sons of Umar Saiba had been made parties to that foreclosure suit, it is clear that they could not have averted a decree for sale and foreclosure, except by redeeming the property by paying off the mortgage. To that decree of relief only we think them now entitled—the payment, however, must be to the defendants, the heirs of Ibrahim Saheb, who now stand in the place of Abdul Rahiman, inasmuch as his rights, at least, as mortgagee passed by the Court sale to his brother Abdulla, and have by him been conveyed to Ibrahim Saheb; and should the heirs of Umar Saiba, under the decree which we are now about to make, fail to redeem, the heirs of Ibrahim Saheb will be entitled to have the mortgage foreclosed in his favour and for his benefit, and to recover possession of the mortgaged premises.

[14] Accordingly, we reverse the decree of the District Judge and order the defendants in the present suit, other than Abdul Rahiman and Kulsambi, to pay to the plaintiff (who now stands in the former position of Abdul Rahiman as mortgagee; for he as well as Kulsambi are bound by the decree and sale in the foreclosure suit), the sum of Rs. 460 and further interest on Rs. 400 from the date of the plaint filed in suit No 311 of 1871 at the rate of 10 khandis of rice *per annum* down to the day of payment. And in the event of the said defendants, other than Abdul Rahiman and Kulsambi, not paying the said sum of Rs. 460, and the said further interest within six calendar months from this second day of August 1880, it is decreed that the mortgage on the 7th of May, 1865, be foreclosed, and that the defendants be for ever barred from redeeming the property, the subject thereof, and that they do deliver up possession thereof to the plaintiff. The plaintiff and defendants respectively must bear their own costs of this suit and of both appeals.

Decree reversed.

[NOTE.—See the next case.]

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Before Sir Michael Roberts Westropp, Kt., Chief Justice, and Mr. Justice F. D. Melvill.

JATHA NAIK (*Original Defendant*), *Appellant v.* VENKTAPA (*Original Plaintiff*), *Respondent.** [3rd August, 1880.]

Mortgage—Suit for foreclosure and sale—Parties—Minor—Guardian—Certificate—Madras Reg. V of 1804*—Act XX of* 1864*—Form of decree.*

J. (defendant No. 1) brought a suit (No. 374 of 1861) against the plaintiff's father G. on a mortgage-bond, dated the 2nd April 1856. G. having died before any decree was passed, his widow (plaintiff's mother) was substituted as defendant, and a decree was made against her *ex parte*. It was, however, set aside after her death on the application of M. (defendant No. 2) the sister of G., on the ground of want of due service of process upon G. and his widow. M. was substituted as defendant in the suit, and a new decree was made in her favour. That decree was reversed, in appeal, by the District Court, which allowed J.'s

* Second Appeal No. 188 of 1880.

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claim. In execution of the decree of the Appellate Court the mortgaged property was sold and purchased by J. for Rs 250. J. obtained a certificate of sale, headed thus:—"Jatha Naik, son of Lakshmi, plaintiff; Govinda, son of Naga, deceased, supplement or (substitute) his sister Manji, defendant," and it [15] certified that J. had purchased "all the right title and interest, which the said defendant had in the said property." J. was put into possession of the property. In 1877, the plaintiff (son of the original mortgagor G.) filed the present suit against J. and M., alleging that the mortgage-bond on which J. had obtained his decree had been *forged by J.; and contending that the decree* and subsequent proceedings under it did not affect his rights, inasmuch as he had not been made a party to them. The prayer in the plaint was that the decree and sale should be set aside, and the property restored to his possession. The defence of J. substantially was that the suit and appeal were *defended by person* who were proper guardians of *the plaintiff* and had been in the management of his property. M. did not appear. The Subordinate Judge rejected the plaintiff's claim, holding that M. was his guardian and manager of his property in the previous suit and appeal, and that the mortgage-bond was genuine. In appeal, that decree was reversed by the District Judge on the ground that the plaintiff had not been represented in the previous litigation by a guardian duly appointed under Madras Regulation V of 1804, and was no party to it. He accordingly allowed the plaintiff's claim. On second appeal to the High Court.

Held that, on the death of G. the plaintiff was his sole heir; that the equity of redemption in the mortgaged property vested in him; and that the inheritance was wholly *unrepresented in the previous litigation*, inasmuch as M. was not appointed guardian of the plaintiff's person or administratrix of his estate, either under Madras Reg. V of 1804, ss. 2, 19, 23, or under Act XX of 1864, nor was she appointed his guardian *ad litem* in the mortgage suit.

Ishan Chunder Mitter v. *Buksh Alli Soudagur* (1) referred to and distinguished.

[R., 9 B. 86 (92); 9 B. 429 (431); 12 B. 18 (22); 20 B. 338 (342); 24 B. 135 (141, 142) = 1 Bom.L.R. 627; *14 C. 464 (482); 7 C.W.N. 11 (20).*]

THIS was a second appeal from the decision of A. L. Spens, District Judge of Kanara, reversing the decree of the Subordinate Judge of Honavar.

The plaintiff Venktapa instituted this suit against (1) Jatha, and (2) Manji to recover possession of certain immoveable property, purchased by defendant No. 1 at a Court sale. The following are the facts of the case:—Jatha brought a suit (No. 374 of 1861) against Govinda, father of the plaintiff, on a mortgage-bond, dated the 2nd April, 1856, and purporting to have been executed by the said Govinda to him (Jatha). Govinda having died before any decree was passed, his widow (plaintiff's mother) was substituted as defendant, and a decree was made by the Court against her *ex-parte*. That decree, however, was set aside after her death on the application of Manji (defendant No. 2) Govinda's sister, on the ground that due service of the process had not been made either on Govinda or his widow. Manji (defendant No. 2) was [16] substituted as defendant in the suit, and a new decree was made in her favour. It was reversed, in appeal (No. 53 of 1865) by the District Court, which awarded Jatha's claim. The defendant (Manji) having failed to satisfy the decree, the mortgaged property was attached and sold in execution of it, and purchased by Jatha himself for Rs. 250. Jatha obtained a certificate of sale from the Court, which was headed as follows: "Jatha Naik, son of Lakshmi, plaintiff; Govinda, son of Naga, deceased, supplement or (substitute) his sister Manji, defendant." The certificate stated that Jatha had purchased "all the right, title and interest which the said defendant had in the said property." Jatha was duly put into possession. In 1877 the plaintiff brought the present suit, alleging that the mortgage-bond on which Jatha obtained a decree in appeal No. 53 of 1865 (in Suit No. 374 of 1861), had

(1) Marshall, Calc. Rep. 614.

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been forged by him ; that the decree and all the subsequent proceedings under it did not affect his rights, inasmuch as he (plaintiff) had not been made a party to them. He, therefore, prayed that the decree and sale should be set aside, and that he should be placed in possession on the property.

The defence of Jatha (No. 1) substantially was that the claim was barred by limitation ; that the suit No. 374 of 1861 and appeal No. 53 of 1865 were defended by persons who were proper guardians of the plaintiff, and had been in the occupation and management of the property in dispute ; that no fraud had been committed in any of the proceedings. Manji, defandant No. 2, did not appear.

The Subordinate Judge found that the suit was not time-barred ; that the mortgage-bond was genuine and not forged ; that Jatha had not obtained the previous decree by fraud ; that Manji, defendant No. 2, was the plaintiff's guardian under Madras Reg. III of 1802, s. 16, cl. 3, and manager of his property in the previous suits and proceedings. He accordingly rejected the plaintiff's claim.

In appeal, the District Judge reversed the decree of the first Court, on the ground that the plaintiff was not represented in the previous litigation by a guardian duly appointed under Madras Reg. V of 1804, ss. 2, 19, and 23, and that, therefore, [17] he was not a party to it. The Judge accordingly made a decree for the plaintiff.

Jatha thereupon appealed to the High Court, Manji, defendant No. 2, did not join in the appeal.

Shamrav Vithal, for the appellant.—The Subordinate Judge found that the mortgage deed was genuine, and that the interests of the plaintiff were properly guarded in the previous litigation. The Judge decided the case on the technical ground that the guardian was not appointed by law. The provisions of Madras Reg. V of 1804 must be taken to have been substantially complied with, because Manji, who appeared in the previous litigation, was actually the plaintiff's guardian, and, as such, managed his property, as found by the first Court. In *Ishan Chunder Mitter* v. *Buksh Alli Soudagur* (1), the Calcutta High Court upheld the title of the purchaser at a Court sale, although the decree under which the property was sold, was against the mortgagor's widow, and although his son, who was a minor, was not a party to it.

The learned pleader also referred to *Bai Kesar* v. *Bai Ganga* (2), and *Hoo* v. *Marquis* as quoted in *Naoroji Beramji* v. *Rogers* (3), to show that though the alienations in them were held invalid as against the minor, the Court placed him under terms to repay the purchase-money before recovering the property alienated.

Ghanasham Nilkanth Nadkarni, for the respondent.—Manji had no certificate of the plaintiff's guardianship while defending the mortgage suit and appeal. She does not appear in them, even as the plaintiff's guardian *ad litem*. The name of the plaintiff does not appear in any of the proceedings in the previous litigation. There was, therefore, no adjudication between him and Jatha. He was in no sense a party to the former suit and appeal. In *Assamathem Nessa Bibi* v. *Roy Lutchmeeput Singh* (4) a Full Bench of the Calcutta High Court held that the omission of one of the heirs of a deceased mortgagor rendered invalid a sale of the mortgaged property under a decree of the Court. In *Vasudev* [18] *Vishnu* v.

(1) Marshall, Calc. Rep. 614.
(2) 8 B.H.C.R. A.C.J. 31.
(3) 4 B.H.C.R. O.C.J. 43 (78).
(4) 4 C. 142.

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Narayan Jagganath (1) the Court set aside the proceedings of the lower Courts made under s. 327 of Act VIII of 1859, on the ground that the guardian of the minor defendant had no certificate under Act XX of 1864. In the case cited from Marshall's Reports, the widow was held to have been sued in her representative capacity (see I. L. R., 4 Calc., 146). In the present case the plaintiff may be put in possession of the property in dispute, and the defendant referred to a suit on his mortgage. He will then have an opportunity to show that the mortgage is forged, as alleged by him in the plaint. The Judge has not gone into the question of the genuineness of that document.

JUDGMENT.

WESTROPP, C.J.—The plaintiff by this suit seeks to recover certain immoveable property (a house and piece of land) which had belonged to his father Govinda, and now is in the possession of the defendant Jatha Naik. The plaintiff alleges that the defendant Jatha Naik forged a mortgage-bond (dated 2nd April, 1856) purporting to be executed by Govinda and to mortgage to Jatha Naik the property above mentioned. That defendant commenced a suit (No. 374 of 1861) upon the mortgage-bond against Govinda in 1861. Previously to any decree being made in that suit, Govinda died. Thereupon his widow was substituted as defendant, and on the 28th June, 1862, a decree was made against her *ex parte*, which was after her death set aside on the application of Manji, the sister of Govinda, upon the ground of want of due service of process upon him and his widow. Manji being substituted as defendant in that suit, the Munsif, on the 31st January, 1865, made a decree in her favour, which was, however, reversed by the District Court, and on the 29th November, 1865, a decree was made by it in favour of Jatha Naik, *viz.*, that in default of payment, by the defendant, of Rs. 300 and costs, he should recover that amount from the mortgaged premises. The Rs. 300 consisted of Rs. 258 principal, and Rs. 42 interest. The mortgaged premises were sold under that decree to Jatha Naik himself for Rs. 250. The certificate of sale, dated the 18th March, 1871, was headed thus: "Jatha Naik, son of Lakshmi, plaintiff; Govinda, son of Naga, deceased, supplement or (substitute) his sister, Manji, defendant." It then proceeded as follows: "The property mentioned [19] below was attached and put to auction as the property of the said defendant in execution of the decree on appeal obtained against the said defendant by the plaintiff Jatha Naik on the 29th of January, 1865, in the District Court of Kanara." After describing the mortgaged premises in detail, it certifies that the plaintiff had purchased for Rs. 250 "all the right, title and interest which the said defendant had in the said property."

The order of the Secretary of State for India in Council, annexing Kanara to this Presidency of Bombay, was dated 28th February, 1862. The proclamation of the Governor-General in Council announcing that annexation was dated 15th April, 1862, and Bombay Act III of 1863, introducing the Bombay Regulations and Acts into North Kanara from and after the 16th March, 1862, received the assent of the Governor-General on the 25th March, 1863.

Neither under Madras Reg. V of 1804 (ss. 2, 19, 23), nor under Act XX of 1864, was Manji appointed guardian of the person of the present plaintiff, or administratrix of his estate, nor was she appointed

(1) 9 B.H.C.R. 289.

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his guardian *ad litem* in the mortgagor's suit, although throughout it, and until quite recently, he has been a minor. Nor is there any mention whatever in that suit that Govinda, the mortgagor, left a son surviving him. His existence was ignored by both parties, so far as the proceedings and decrees in that suit are concerned; although he, on the death of his father Govinda, was his sole heir, and accordingly the equity of redemption in the mortgaged premises then vested in him (the plaintiff). The widow of Govinda would have been entitled to maintenance only out of his estate, and Manji (his sister) had not any share or interest whatever in it. The inheritance, therefore, was wholly unrepresented when the decree of the District Court of the 29th November, 1865 against Manji and the sale in virtue of it were made. It is impossible to say, in the language used in some of the cases which have been cited, that the inheritance was "substantially represented." In *Ishan Chunder Mitter* v. *Buksh Alli Soudagur* (1), which has been strongly relied upon for the defendant Jatha Naik, it appeared on the plaint in the suit in which the sale took place "that Juggomohun (the judgment-[20]debtor) had given a bond for Rs. 999, which amount he promised to pay at the end of the year, and that he died leaving Ishan Chunder, his minor son, as his heir, under the guardianship of his mother Shubatra, the widow" of Juggomohun, and the suit was brought against Shubatra, as being in possession of the estate of Juggomohun (2). In the advertisement of sale, although in one column the property to be sold was described as the estate of Shubatra, in another column it was stated to be the rights and interests of the debtor (Juggomohun) that were to be sold. So that it was evident that the widow was only sued in her representative capacity. That case differs materially from the present case, inasmuch as in the suit on the mortgage by Jatha Naik the existence of the present plaintiff (then a minor) was ignored. In *Assamathem Nesa Bibi* v. *Roy Luchmeeput Singh* (3) the omission of one only of several heirs of a deceased Mahomedan mortgagor was by a Full Bench held fatal to a sale in a mortgage suit so far as the sale affected that heir. That case is not in conflict with *Gopey Mohun Thakoor* v. *Sebun Cower* (4), because in the latter, the mortgagor, a Hindu, having died without a son, the equity of redemption vested in the mortgagor's widow; and she fully represented it, albeit that her power of alienation may be limited (5). How particular the Courts of Equity in England are that the mortgagor's heir should be before the Court, whenever the equity of redemption may be affected, will be seen from the cases collected in *Vithaldas Narotamdas* v. *Karsandas Keshavdas* (6).

Under the above circumstances there must be a new trial to ascertain whether or not the mortgage-bond in the plaint mentioned was executed by Govinda, the father of the plaintiff, and, if that question be determined in the negative, the plaintiff will be entitled to recover possession of the property, the subject of this suit. But, if that question be determined in the affirmative, the plaintiff cannot recover the property without redeeming the mortgage by paying the amount due upon it, there not being any allegation that the mortgage-debt was incurred by Govinda for illegal [21] or immoral purposes. For, although by reason of Govinda's death and the absence of his heir (the present plaintiff) from the suit of Jatha Naik for sale and foreclosure, the decree for sale and the sale itself made

(1) Marshall, Calc. Rep. 614.
(2) *Vide* S.C. W.R. Special Number, p. 119.
(3) 4 C. 142.
(4) East's Notes No. 64; 2 Morley Dig. 105.
(5) See the cases cited in 8 B.H.C.R. O.C.J. at p. 156.
(6) 5 B.H.C.R. O.C.J. 76.

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in that suit cannot stand as against the present plaintiff, yet, on the hypothesis that the mortgage was executed by Govinda, and not for illegal or immoral purposes, it would bind the mortgaged property as against Govinda's son (1): *Girdharilall* v. *Kantoo Lall* (2). Jatha Naik being (on the hypothesis of the due execution of the mortgage-bond) now at the least a mortgagee in possession, the present plaintiff cannot be permitted to recover that property without redeeming the mortgage, and, if under such circumstances he had been a defendant in Jatha Naik's suit for sale and foreclosure, he (the present plaintiff), could not have averted a decree for sale and foreclosure, except by paying off the mortgage.

The point of limitation made by the defendant in the Courts below was abandoned in this Court.

We reverse the decree of the District Judge, and remand this cause for a new trial by him to ascertain whether the mortgage-bond in the plaint mentioned was executed by Govinda, the father of the plaintiff. If that question be determined by the District Judge in the negative, he should make a decree that the plaintiff do recover the property, the subject of this suit, from the defendant with costs of this suit and of both appeals therein. But if the said question be determined by the District Judge in the affirmative, he should make a decree that the plaintiff do pay to the defendant the sum of Rs. 300, together with interest on Rs. 258 from the 29th November, 1865, until the date of payment; such interest is to be at the rate prevalent at the date of the said mortgage in the district (wherein it was executed) as stipulated in the said mortgage, and such rate is to be ascertained by the District Judge; but he, in fixing the total amount to be paid in respect of such interest, shall allow credit to the plaintiff for the rents and profits received by the defendant from the time he was put into possession of the said mortgaged premises (after the sale [22] thereof to him in the former suit) in respect thereof, but deducting from the said rents and profits all allowances which should be justly made to the defendant in respect of land revenue, cess-taxes, repairs and other expenses (if any) properly incurred by him in respect of the said mortgaged premises during the period of his possession. If the defendant has not been in receipt of rents and profits of the said premises, but has been in personal occupation thereof, the account of what should be debited to the defendant in respect of the said premises should be taken by charging him with a fair and reasonable occupation rent in respect thereof during the period of such personal occupation. The balance due from the plaintiff to the defendant in respect of the said sum of Rs. 300 and interest, after crediting the plaintiff with such rents or profits or occupation rent as aforesaid, but deducting such allowances as aforesaid, should be notified by the District Judge to the plaintiff or his authorized agent or pleader as soon as may be, and the District Judge should make a decree that if the plaintiff do not pay to the defendants such balance and the costs of this suit and of both of the appeals therein within four calendar months after such notification as aforesaid, the plaintiff shall be for ever barred and foreclosed from redeeming the said mortgage or recovering the said mortgaged premises or any part thereof, and that the plaintiff do pay to the defendant the costs last aforesaid.

Decree reversed and case remanded.

(1) Dig. Bk. I, ch. v, pl. clxvii.
(2) 1 I.A. 321 and see *Surai Bunsi* v. *Sheo Prashad*, 6 I.A. 88 (104) *per* Sir J. Colvile.