

náma filed by Váman Trimbak in the suit gave him authority to present the application for execution for recovery of the costs, the Subordinate Judge was of opinion that the vakil had authority under section 39 of the Civil Procedure Code (Act XIV of 1882); still as the section was not explicit on the point, he submitted the following questions:—

“(1) Whether the execution of the *darkhásts* is a proceeding in the original suits within the meaning of section 39 of the Civil Procedure Code (Act XIV of 1882)?

(2) Whether the pleader in the original suits has authority to present those *darkhásts* and to seek the execution of the decree to which they relate without filing a fresh vakalatnáma?”

FULTON, J. :—We are of opinion that both questions must be answered in the affirmative. Under section 39 of the Civil Procedure Code the vakalatnáma shall be considered in force until all proceedings in the suit are ended so far as regards the client. Applications for execution of the decree are proceedings in the suit—see section 4 of Act VI of 1892, and the decision of the Privy Council in *Thakur Parshád v. Fakir-ul-láh*<sup>(1)</sup>.

*Order accordingly.*

(1) Appeal from the High Court, Allahabad, not yet published. See Rulings of the Privy Council, dated 24th November, 1894.

## APPELLATE CIVIL.

*Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Fulton.*

BA'BA, A MINOR (ORIGINAL DEFENDANT No. 2), APPELLANT,  
v. SHIVAPPA (ORIGINAL PLAINTIFF), RESPONDENT.\*

*Mahomedan law—Minor—Guardian—Mother of minor—Power to sell property of minor.*

According to Mahomedan law a mother, not being the legal guardian of her minor child, cannot do any act relating to the property of the minor so as to bind him.

SECOND appeal from the decision of C. G. W. Macpherson, District Judge of Belgaum.

\* Second Appeal, No. 497 of 1893.

1895.

SADA'SHIV  
GANPATRA'O  
v.  
VITHALDA'S  
NA'NCHAND.

1895.

January 14.

1895.

BÁLA  
SHIVÁPPA.

Suit for possession. The land in question had been the property of one Rahimán, the father of the appellant (defendant No. 2), and was mortgaged by him. After his death his widow Husenbi (defendant No. 1) on the 16th July, 1881, sold it to the plaintiff in order to pay off the mortgage and other debts of her deceased husband.

The plaintiff now sued her and the appellant (defendant No. 2), who was her minor son, for possession and for mesne profits. Husenbi (defendant No. 1) did not appear. The minor son (defendant No. 2) pleaded that by Mahomedan law his mother had no authority to sell the land, and that he was not bound by the sale.

The Second Class Subordinate Judge of Saundátti (Ráo Sáheb G. V. Patvardhan) found that the sale to plaintiff was proved, and that the minor defendant No. 2, Bála, was bound by it. He, therefore, allowed the claim.

On appeal by Bála the Judge confirmed the decree. Defendant No. 2 filed a second appeal.

*Gāngarām B. Rele* for the appellant (defendant No. 2):—According to Mahomedan law a mother is not the legal guardian of her minor son, and the first defendant, therefore, had no authority to sell the property to the plaintiff.—*Sitá Rám v. Amir Begam*<sup>(1)</sup>; *Hamir Singh v. Musammat Zakia*<sup>(2)</sup>; *Hasan Ali v. Mehdi Husain*<sup>(3)</sup>; *Mussamat Bukshun v. Mussamat Doolhin*<sup>(4)</sup>. Under Mahomedan law there are two classes of guardians, near and remote. The near guardians are fathers, paternal grandfathers, their executors and the executors of such executors. The remote guardians are the more distant paternal kindred. The near guardians only have control over the property—Macnaghten's Mahomedan Law, pp. 62, 63, 64. The mother, not being included in the list of the near guardians, cannot alienate the property of her minor son.

[FULTON, J.:—Husenbi had a share in her husband's property. Therefore, the sale by her would be good to the extent of her share in the land.]

The plaintiff did not claim a share in the land. He did not make out that case in the plaint.

(1) I. L. R., 8 All., 324 at 338.

(3) *Ibid.*, 553.

(2) I. L. R., 1 All., 57.

(4) 12 W. R., 337.

1895.

BABA  
v.  
SHIVAPPA.

*Gokuldás K. Párekh* for the respondent (plaintiff):—The position of the parties and the circumstances of the case must be considered in order to decide upon the effect of the rule. Husenbi was in possession of all the property left by her husband. She dealt with the property as ostensible owner. The plaintiff purchased the property *bond fide* and for valuable consideration. The property was sold to us for a necessity, namely, to pay off the husband's debt. According to Mahomedan law, the discharge of debts is a matter of necessity, and the heirs of a deceased person acquire their right as such after the debts due by the deceased are discharged. Both the lower Courts have found that the transaction was beneficial to the minor and that the course adopted by Husenbi was the best for him.

SARGENT, C. J.:—The mother not being the legal guardian of her minor child according to Mahomedan law cannot do any act relating to the property of the minor so as to bind him—*Sitá Rám v. Amir Begam*<sup>(1)</sup>. If, therefore, the sale in this case by defendant No. 1 can be supported, it can only be on the ground that, by Mahomedan law, the mother, as one of the heirs in possession of the property of her husband, had the right to sell to pay off creditors. As to this, it may be that an heir who has possession of the entire property may sell in execution of a decree obtained against him by creditors—see the judgment of the Allahabad High Court in *Hamir Singh v. Musammat Zakia*<sup>(2)</sup>—but here the sale was in discharge of debts which had not been adjudged; nor have any special circumstances been found by the Courts below such as led the Allahabad High Court, whether rightly or wrongly, in *Hasan Ali v. Mehdi Husain*<sup>(3)</sup> to give effect to the sale by the mother.

We must, therefore, reverse the decrees of the lower Courts and dismiss the plaint, as the plaintiff seeks to recover the whole of the property, but without prejudice to the plaintiff's right to sue to recover the mother's share (if any) in the land in question. Appellant to have his costs throughout.

*Decree reversed.*

(1) I. L. R., 8 All., 324 at 338.

(2) I. L. R., 1 All., 57.

(3) *Ibid.*, 553.