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HA'JI ESSA
SULLEMA'N
v.
DAYA' BHAI
PARMA' NAN-
DA'S.

think that such fraud can be inferred as a conclusion of law, and we, therefore, answer this question in the negative.

The fourth question is whether the mortgage-deed, dated 4th January, 1871, which is in the possession of Jackaria Moosa, is a document by the deposit of which an equitable mortgage of the property could be created having regard to the fact that a decree in High Court Suit No. 170 of 1875 was passed upon the said mortgage and a certificate of sale issued to the said Dayabhai on his purchasing the said property under the said decree.

The answer to this question depends upon whether or not the alleged deposit was made before the decree. If it was, the deposit would effect, of course, an equitable mortgage; and, even if made after the decree, it would be effectual if the deposit were made without informing the intended equitable mortgagee of the decree.

The fifth question is whether, having regard to the said decree and certificate, the said mortgage is extinguished so as to cease to be a document of title by the deposit of which an incumbrance could be created. Our observations on the fourth question sufficiently answer this question also.

Attorneys for the plaintiff:—Messrs. *Brown and Moir*.

Attorneys for the defendants:—Messrs. *Edgelow and Gulabchand*.

APPELLATE CIVIL.

Before Mr. Justice Jardine and Mr. Justice Ránade.

VA'SUDEV MORBHAT KA'LE (ORIGINAL PLAINTIFF), APPELLANT, v. KRISHNA'JI BALLA'L GOKHALE AND OTHERS (ORIGINAL DEFENDANTS), RESPONDENTS.*

Minor—Guardian—Act XX of 1864, Sec. 2—Decree to bind minors—Debts contracted for immoral and improper purposes—Burden of proof not shifted by proof of immoral habits.

In execution of a decree against the estate of Vishnu Bhikáji his estate was sold and it ultimately came into the hands of the plaintiff as purchaser, who sued for partition. It was contended that two of the defendants, parties to the suit in which the decree was passed, being then minors were not properly represented by their

*Second Appeal, No. 737 of 1891.

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mother, Gangabai, also a party defendant to the suit, she not having obtained a certificate of administration under Act XX of 1864, and that the decree did not, therefore, bind them, and also that the decree was in respect of debts contracted by Vishnu Bhikaji for immoral and improper purposes.

Held, that section 2 of Act XX of 1864 did not apply, as though Gangabai had not obtained a certificate she did not claim charge of the estate.

Vijkor v. Jijibhai⁽¹⁾ and *Jaddow v. Chhagan*⁽²⁾ followed.

Held, also that an issue having been raised and determined in the suit in which the decree was passed that Gangabai did represent the minors as guardian for the suit, and as the decree expressly named them as sued by Gangabai, their guardian, the minors were expressly made parties and were properly represented by Gangabai.

Hari v. Narayan⁽³⁾ and *Hari Saran v. Bhubaneswari*⁽⁴⁾ followed.

Held, also, that proof of immoral habits in the debtor did not throw the *onus* on to the plaintiff and oblige him to prove that the debt was not incurred for an immoral or illegal purpose.

Chintamanrao v. Kashinath⁽⁵⁾ followed.

SECOND appeal from the decision of J. FitzMaurice, Acting District Judge of Ratnagiri, in Appeals Nos. 332 and of 333 of 1889.

On 31st August, 1876, one Vishnu Babaji Joglekar obtained a money decree against the estate of one Vishnu Bhikaji Gokhale, deceased. In that suit the minor sons of the deceased (respondents Nos. 2 and 3) represented by their mother and guardian Gangabai (respondent No. 4) were defendants, but Gangabai had not at the date of the decree obtained a certificate of administration of the minors' estate.

In execution of that decree the estate of the deceased was sold at a Court-sale on 7th September 1877, and it ultimately came into the hands of the plaintiff as purchaser. He now sued for partition.

The defendants contended that they were not bound by the decree in Suit No. 105 of 1875, inasmuch as their guardian Gangabai (respondent No. 4) had not then obtained a certificate of administration. They also contended that that decree was passed for debts contracted by their father, Vishnu Bhikaji, for immoral purposes and not for the benefit of the family.

(1) 9 Bom. H. C. Rep., 310.

(2) I. L. R., 5 Bom., 306.

(3) I. L. R., 12 Bom., 427.

(4) L. R., 15 I. A., 195.

(5) I. L., 14 Bom., 320.

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The Subordinate Judge of Rájápur awarded the plaintiff's claim. On appeal the District Judge reversed the decree of the Court of first instance with costs in both the Courts on plaintiff. From this decision the plaintiff preferred this second appeal to the High Court.

Setlur (with *Náráyan Vishnu Gokhale*) for the appellant.

Macpherson (with *Mánekhsháh Jehángírsháh*) for the respondents.

JARDINE, J.:—The District Judge has held that the defendants Nos. 2 and 3, who were minors at the time decree was passed in Suit No. 105 of 1875, are not bound by that decree, because they were not properly represented by their mother Gangábái (now defendant No. 4) who was a defendant in that suit.

She had not obtained a certificate, but as she did not claim charge of the estate, section 2 of Act XX of 1864 did not apply—*Vijkor v. Jijibhái*⁽¹⁾; *Jádow v. Chhagan*⁽²⁾.

It appears also that although Gangábái in her written statement in Suit No. 105 of 1875 disclaimed to represent or to be responsible for the minors, an issue was solemnly raised and determined at that trial that she did represent them as guardian for the suit. The decree expressly names them as sued by Gangábái, their guardian. It is thus clear that these minors being expressly made parties, the case is stronger against them than against the minors in cases where they have not been made parties expressly but have been substantially parties represented virtually by guardian. Such are *Hari v. Náráyan*⁽³⁾, *Natesayyan v. Narasimmayyar*⁽⁴⁾ and *Hari Saran v. Bhubaneswari*⁽⁵⁾. In the last of these cases their Lordships of the Privy Council take notice that the suit in which the decree was obtained "was substantially brought against the minor," and that the trying Court had treated the mother as his guardian. These authorities are sufficient, as argued by Mr. Setlur, to show that the District Judge is wrong in holding that the minors were not represented in Suit No. 105 of 1875.

There is no finding that the debt incurred by the deceased father was for an immoral or illegal purpose. The *onus* of proving that it was not

(1) 9 Bom. H. C. Rep., 310.

(3) I. L. R., 12 Bom., 427.

(2) I. L. R., 5 Bom., 306.

(4) I. L. R., 13 Mad., 480.

(5) L. R., 15 I. A., 195; S. C. I. L. R., 16 Cal., 40.

was not shifted on to the plaintiff by proof of immoral habits
—*Chintámanráv v. Kásináth*⁽¹⁾.

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For the above reasons the Court reverses the decree of the District Judge and restores that of the Subordinate Judge. In the District Court the respondents to bear their own costs, and the respondents with the exception of Dhákta bin Soma Shinda to bear those of the appellant. The respondents in this Court to bear the whole cost of this appeal.

(1) I. L. R., 14 Bom., 320.

APPELLATE CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Parsons,

BHA'NU TUKA'RA'M SHET AND ANOTHER (ORIGINAL PLAINTIFFS), APPELLANTS, *v.* KA'SHINATH PA'NDSHET AND OTHERS (ORIGINAL DEFENDANTS Nos. 1, 2 AND 3), RESPONDENTS.*

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June 12.

Civil Procedure Code (Act XIV of 1882), Sec. 32—Practice—Procedure—Right of action—Suit by plaintiff having no interest in subject-matter—Joinder of a party co-plaintiff having interest.

If a plaintiff at the time he brings his suit has no interest in the subject-matter thereof, the joinder of a person as co-plaintiff who has an interest cannot alter the plaintiff's position or confer on him any right of suit.

SECOND appeal from the decision of T. Walker, Assistant Judge of Ratnágiri, reversing the decree of Ráo Bahádur Náro Mahádeo Thosar, First Class Subordinate Judge of Ratnágiri.

This action was originally instituted by plaintiff No. 1 praying for an account. He alleged that a certain shop at Ratnágiri belonged to him and his undivided cousin Dnyánoba, father of defendant No. 8 (Bhiku), till Dnyánoba's death on the 4th March, 1886; that defendant No. 1 was the gumásta of the shop and had managed it till Dnyánoba's death; that defendant No. 2 was joined because he had obtained a certificate of administration of the estate of defendant No. 8 (Bhiku), who was a minor, and that defendant No. 3 had colluded to injure the interest of defendant No. 8 and the plaintiff.

*Second Appeal, No. 561 of 1893.