

1901

JAFRI
BEGAM
v.
SYED
ALI RAZA.

decree as regards the share of Ludhai, the costs of the appeal must be borne by the appellants.

Decree modified.

Solicitors for the appellants—Messrs. *Barrow, Rogers and Nevill.*

Solicitors for the respondent—Messrs. *T. L. Wilson and Co.*

P. C.
1901
May 1.
June 13.

MUHAMMAD MUMTAZ ALI KHAN (PLAINTIFF) v. FARHAT ALI KHAN (DEFENDANT) and MUHAMMAD MUMTAZ ALI KHAN (PLAINTIFF) v. SAKHAWAT ALI KHAN (DEFENDANT).

[Appeal from the Court of the Judicial Commissioner of Oudh.]

Act No. XVII of 1876 (Oudh Land Revenue Act), section 172—Power of Court of Wards—Assignment by Court of Wards of villages without consideration—Award in excess of question referred to arbitration—Right of suit by minor on attaining majority to recover villages (part of his estate) so assigned.

In a suit in 1865 in the Court of the Deputy Commissioner of Gonda, between persons representing the appellant and respondents (then all minors) in which those representing the latter claimed title on their behalf to succeed to an estate, an issue was referred to arbitrators, "whether the appellant could be the sole heir to the estate under the custom of the country, or whether respondents could also be successors to it; if they can, what is the portion to which they would be entitled?" The arbitration resulted in the right of succession to the whole estate being awarded to the appellant. The award, however, gave the respondents maintenance of Rs. 30 and Rs. 20 a month, respectively, and then, going beyond the terms of the reference, awarded that "the monthly stipend should continue for six years, after which time, when the children became capable of receiving education in a Government school, the Government would then propose what they should get for their support; that when both children are grown up and attain the age of discretion, they shall have villages separated for them according to their stipend after the deduction therefrom of Government revenue." The Deputy Commissioner, in December 1865, adopted the award as to the succession to the estate, and as to the maintenance, but not the portion of the award which related to matters not referred to arbitration. His decision was affirmed by the Commissioner of Fyzabad in 1866, and by the Judicial Commissioner of Oudh in 1867. In 1883 the respondents, who had then attained their majority, claimed arrears of maintenance from the then Deputy Commissioner representing the Court of Wards (in whose charge the estate had been since 1865), and the Deputy Commissioner, whilst allowing the claim, proposed that in future, in lieu of the cash allowance, a village should be assigned to each of the respondents for their maintenance.

*Present:—LORD HOBRHOUSE, LORD MACNAGHTEN, LORD ROBERTSON,
SIR RICHARD COUCH and SIR FORD NORTH.*

This proposal was sanctioned by the Chief Commissioner and by the Lieutenant-Governor, who ordered that villages yielding a profit of Rs 600 and Rs 400 per annum, respectively, after payment of the Government jama, should be given to the respondents, who were accordingly put into possession of the villages, though no deeds of conveyance were executed as directed by the Deputy Commissioner. In suits instituted by the appellant on attaining his majority in 1886 to recover the villages with mesne profits, the defence was that the suits were not maintainable with reference to section 172 of the Oudh Land Revenue Act (XVII of 1876), which enacts that "the Court of Wards shall have power to lease or farm any part of the immovable property under its charge and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors."

Held by the Judicial Committee (reversing the decision of the Court below) that the allotment of the villages to the respondents could not be supported. It was not authorized by any of the orders of the Court in 1865, 1866 or 1867, and the finding of the award on the subject was not within the reference to arbitration and was not adopted by the Court.

Nor was the allotment justified under section 172 of Act XVII of 1876. It was not for the benefit of the estate, and there was nothing to show that the question of benefit to the appellant or his estate had been considered in the allotment of the villages to the respondents, for which the only apparent ground was the *ultra vires* award.

It is not within the powers of a guardian to make a voluntary alienation in perpetuity of his ward's immovable property, and it is open to the ward on attaining majority to challenge the validity of such a transaction.

CONSOLIDATED appeals from the judgment and decree (19th May, 1898) of the Court of the Judicial Commissioner of Oudh reversing the decree of the Additional Civil Judge of Lucknow (18th July, 1895) and dismissing two suits brought by the appellant.

Raja Riasat Ali Khan, taluqdar of Utraula in Oudh, died in 1865, leaving him surviving a widow, Musammat Dan Bibi. Muhammad Mumtaz Ali Khan, the appellant, is the son of Riasat Ali Khan by Dan Bibi, and was born on the 6th of October 1865 after his father's death. On the Raja's death, his widow, Dan Bibi, obtained possession of the estate, but on the 23rd of August, 1865, a suit was instituted in the Court of the Deputy Commissioner of Gonda against her by Musammat Madaro Bibi as guardian of her two sons, Farhat Ali Khan and Sakhawat Ali Khan, the respondents, claiming the estate for them as legitimate sons of Riasat Ali, on the allegation that the Raja had married her. In that litigation a reference was made on the 27th of October, 1865, to arbitrators to

1901

MUHAMMAD
MUMTAZ
ALI KHAN
v.
FARHAT
ALI KHAN.

1901

MUHAMMAD
MUMTAZ
ALI KHAN
v.
FARHAT
ALI KHAN.

decide the following issue: "whether the son born of Dan Bibi can be the sole heir to the entire property left, under the custom of the country, or Farhat Ali Khan and Sakhawat Ali Khan, the two sons born of Madaro Bibi, can also be successors to the property? If they can, what is the portion to which they and Madaro Bibi would be entitled?"

An award, which however went beyond the terms of the reference, was made on the 18th of November 1865, the arbitrators deciding—

"That the son born of Dan Bibi, and Dan Bibi herself, are, according to the custom of the country, proprietors and heirs of the entire estate and property, movable and immovable, left by Raja Niasat Ali Khan, deceased; that Farhat Ali Khan and Sakhawat Ali Khan, born of Madaro Bibi, and Madaro Bibi herself, cannot share in the inheritance; that it is proper that Madaro Bibi should receive Rs. 60 per month in cash from Dan Bibi for maintenance and support during her life, on the proviso of her keeping herself in the house with honour and good conduct; that the monthly stipend just proposed for the maintenance and support of children should continue for six years, after which time, when the children became capable of receiving education in a Government school, the Government would then propose what they should get for their support; that when both these children are grown up and attain the age of discretion they shall have villages separated for them, according to their stipend, after deduction therefrom of Government revenue; that the monthly stipend will be given as follows:—Rs. 10 per month to Madaro Bibi, Rs. 30 per month to Farhat Ali Khan, and Rs. 20 per month to Sakhawat Ali Khan."

The case came on again before Major Ross, the Deputy Commissioner of Gonda, and he, on the 21st of December 1865, dismissed the claim to the estate, but decreed maintenance to Madaro Bibi and her two sons, Farhat Ali and Sakhawat Ali, in terms of the award, namely, Madaro Bibi, Rs. 10, Farhat Ali Rs. 30 and Sakhawat Ali, Rs. 20. His decree was on appeal confirmed by Mr. Reid, the Commissioner of Fyzabad, on the 11th of August 1866. He said—

"The lower Court has rejected so much of the award as related to matters not referred to arbitration. The proper course would have been to remit the award to the arbitrators; but the irregularity affected neither the merits of the case nor the jurisdiction of the Court. The order of the lower Court is affirmed and the appeal dismissed."

There was no reference in his judgment to the allotment of any villages to Farhat and Sakhawat Ali. Madaro Bibi preferred a further appeal to Mr. Tacker, the Judicial Commissioner of

1901

MUHAMMAD
MUMTAZ
ALI KHAN
v.
FARHAT
ALI KHAN.

Oudh, who, on the 2nd of January, 1867, rejected it, affirming the decision of the Commissioner.

The estate had been since the birth of Muhammad Mumtaz Ali Khan under the management of the Court of Wards and payments were made by way of maintenance, but not of the precise amounts decreed, the result being that in 1883 Farhat Ali and Sakhawat Ali claimed from the then Deputy Commissioner, Mr. White, as representing the Court of Wards, a sum of Rs. 3,271 as arrears due to them. On the 25th of May the Deputy Commissioner asked for orders and wrote as follows:—

“I have the honour to submit to you a proposal to pay to Farhat Ali and Sakhawat Ali, sons of the late taluqdar of Utraula, the sum of Rs. 3,271, arrears of maintenance, and to allot to each of them, instead of the cash allowances they have hitherto received, a village apiece as *guzara*. You will perhaps remember the circumstances of the case. On the death of the late taluqdar, one Bibi Madaro sued the Rani, Dan Bibi, for the estate, on the ground that having legitimate male issue by the taluqdar, and Musanmat Dan Bibi being childless, she was entitled to the possession. The latter was, however, successful in asserting herself to be with child, and in due course the present taluqdar, Raja Mumtaz Ali Khan, was born. The result of the litigation was that the Rani's boy was declared to be the heir and successor to the *taluqa*, and that Bibi Madaro was declared to be entitled to suitable maintenance. I extract as follows from the decision of Mr. Reid, Commissioner, dated the 19th of March 1866:—

‘(i.) As regards the allowances, so much as refers to the two boys, namely, Farhat Ali and Sakhawat Ali, should be paid until they are six years of age, after which, when they are fit to be educated, a suitable allowance should be made at the discretion of Government; (ii.) when the children, Farhat Ali and Sakhawat Ali, grow up, the allowance of Rs. 10 per mensem to Bibi Madaro should be continued for life, and the two lads should receive as subsistence, the lease of some village, only paying the Government *jama*; (iii.) detail of Rs. 60, subsistence:—Bibi Madaro Rs. 10, Farhat Ali Rs. 30, Sakhawat Ali Rs. 20.’ This decision was founded on the award of arbitrators, who were the taluqdars of Kamiar and Singha Chanda, and a third gentleman. But for some reason or other, which I have been unable to discover, this arrangement has not been observed, and the young men have, till lately, only received Rs. 17 per mensem. After deducting a sum of Rs. 2,000, granted to them for marriage expenses, they appear to be still entitled to draw the arrears amounting to Rs. 3,271, and they have applied to me for the early payment of such arrears. Their claim appears to me to be perfectly correct, and with your sanction I propose to make the payment at an early date. I also propose, in accordance with the decree of 1866, to put an end to the cash allowances for the future and assign to them a village a piece for maintenance. I would choose for the elder Farhat Ali, a village which would give him an allowance of Rs. 500 or Rs. 600 per annum, and for the younger, Sakhawat Ali, a village producing Rs. 350

1901

MUHAMMAD
MUMTAZ
ALI KHAN
v.
FARHAT
ALI KHAN.

or Rs. 400. Bibi Madaro, I may add, has been dead some years. She was the lawfully married wife of the late taluqdar by *nikaḥ* ceremony, and it is most unbecoming and inequitable that her sons should be excluded from their rights as decreed by the Civil Court."

The Lieutenant-Governor and Chief Commissioner, on the 7th of July, 1883, sanctioned these proposals and ordered that Farhat Ali and Sakhawat Ali "be given in lieu of the present monthly allowance two villages yielding a profit of Rs. 600 and Rs. 400 per annum, respectively, after the payment of the Government jama."

Therefore on the 6th of August 1883 the Deputy Commissioner passed the following order in the matter:—

"The tahsildar of Utraula should be informed of the issue of this order that a village, the income of which would amount to Rs. 600, is to be given to Farhat Ali Khan instead of maintenance allowance, and a village, the income whereof would be Rs. 400, is to be given for maintenance to Sakhawat Ali Khan. As to Government revenue, I think it would be proper to keep the taluqdar responsible. It appears from the perusal of the Annual Report that the above-mentioned villages are nearly of the same income; there might be others also: he should consult the Manager, summon the maintenance-holders, and, after hearing them, should soon come to the conclusion and report for sanction. The delivery of possession will be made from the beginning of 1291 Faslī, and the cash payment of maintenance allowance has been stopped from the 1st of July. It should be known to him that in the case of there being no such village, any two villages, the total income of which would be equal to the same amount, can be given, but care should be taken that no village is to be given which is apparently capable of yielding much profit; the village to be bestowed must be of the nature as not to yield much profit."

The manager of the estate, on the 19th of August, 1883, suggested the villages of Kasmara, yielding an income of about Rs. 640, and Pura Mirza, yielding about Rs. 400 as being suitable for the purpose. And on the 27th of November, 1883, the Deputy Commissioner sanctioned the proposal and ordered "that delivery of possession" of the two villages "be immediately made in accordance therewith." He also directed that "conveyance deeds" should be executed. No deeds were ever executed, but possession of the villages was given to Farhat Ali and Sakhawat Ali, and they had since been receiving the incomes from them. Muhammad Mumtaz Ali Khan attained his majority in October, 1886, and the estate was made over to him by the Court of Wards. He refused to recognize the possession of Farhat Ali

1901

 MUHAMMAD
 MUMTAZ
 ALI KHAN
 &c.
 FARHAT
 ALI KHAN.

and Sakhawat Ali, but offered to allow them maintenance of Rs. 30 and Rs. 20 per month, as has been decreed to them respectively. On their refusal to give up possession of the villages the plaintiff brought the suit, out of which these appeals arose, to recover possession of the two villages with mesne profits. The plaint stated that the villages were of greater value than had been sanctioned. The income of Kasmara village being about Rs. 900 per annum and of Pura Mirza about Rs. 600 per annum; that the benefit to him has not been considered in the bestowal of them on the defendants; that neither the Deputy Commissioner nor the Local Government had any power to give the villages in lieu of Rs. 30 and Rs. 20 a month respectively; and that their action gave no title in the villages to the defendants.

The defendants filed written statements in which they contested the plaintiff's allegations. The following paragraph of the written statements raised the main plea in the cases, and the only material question in this appeal—

“The defendant is the legitimate son of the real proprietor, Raja Riasat Ali Khan. The arrangement under which the Deputy Commissioner of Gonda, as Superintendent of the Court of Wards, granted to defendant the village in dispute (then yielding about Rs. 600 per annum) in lieu of the proper maintenance allowance, was in accordance with the arbitration award and decree of 1866, and was made in good faith, and for the benefit of the estate, and when the Local Government, as head of the Court of Wards, has confirmed this arrangement, the plaintiff has no right to institute such a suit, *vide* section 172 of Act XVII of 1876.”

The suits were tried together by consent.

For the plaintiff a qabuliat was put in (dated the 18th of June 1887) which showed that the defendant, Farhat Ali, had on that date leased village Kasmara for Rs. 800 odd per annum.

The defendant, Farhat Ali, stated in his evidence that when he and the defendant, Sakhawat, “applied to get our money, we told the Deputy Commissioner, on his inquiry, that we were going to sue for the maintenance on the basis of the *faislā panchayat* dated the 21st of December, 1865. The Deputy Commissioner told us it was no use suing. He would give villages in lieu of maintenance, according to the award of the *panchayat*.”

The Additional Civil Judge of Lucknow, on the 18th of July, 1895, decided the suits in favour of the plaintiff and gave him

1901

MUHAMMAD
MUMTAZ
ALI KHAN
-
FARHAT
ALI KHAN.

decrees for possession of the villages with mesne profits to be assessed in execution.

On appeal, the Judicial Commissioners, on the 19th of May 1898, reversed that decision and dismissed the suits with costs.

The material portion of their judgment was as follows:—

“The only question to be decided in these appeals is whether or not the Deputy Commissioner was acting within his powers as representing the Court of Wards in making over the villages to the defendants. The defendants had certainly a claim to maintenance when the villages were made over to them, and it was for the benefit of the minor that such claims should be settled. Section 172 of Act XVII of 1876 provided that ‘the Court of Wards shall have power to give such leases or farms of the whole or parts of the immovable property under its charge, and to mortgage or sell any part of such property, and to do all such other acts as it may judge to be most for the benefit of the property and the advantage of the disqualified proprietors.’ If the Court of Wards, therefore, honestly thought it was for the advantage of the estate that the defendants’ claims should be settled by making over the villages to them, the Deputy Commissioner acted within his authority when he did so. Had there been no award or decree,—as the estate is one of considerable importance and the defendants, as brothers of the taluqdar, had a claim on him for maintenance,—I do not think it could be held that the grant of the villages to them, in lieu of their claims, was not proper, or that it was not for the advantage of the estate and its owner that a reasonable and suitable provision should be made for them in accordance with the custom of the family.”

The plaintiff appealed in both suits, and the appeals were consolidated.

Mr. Leslie DeGruyther for the appellant: The Court of Wards in assigning the villages, as they have done, to the respondents have exceeded their powers under section 172 of Act No. XVII of 1876. Under section 161 of the Act the Court of Wards consisted of a combination of the Commissioner and the Deputy Commissioner, and not only one of them. The words “and to do all such other acts, &c.,” in section 172, mean all such other acts as are for the benefit of the property; they do not enable the Court of Wards to give away the property to the detriment of the minor and the estate. In exercising discretion as to what is beneficial there must be some conscientious act of judgment on the part of the Court of Wards, and anything done without such exercise of judgment is invalid. The case of *Ram Autar v. Muhammad Mumtaz Ali* (1) was referred to.

(1) (1897) L.R. 24 I. A., 107; I. L. R., 24 Calc., 853.

The respondents did not appear.

On the 13th of June, 1901, the judgment of their Lordships was delivered by SIR FORD NORTH:—

The appellant in these consolidated appeals is the taluqdar of Utraula, or Bilaspur, a posthumous son of the Raja Riasat Ali Khan, who died in the year 1865. Before the appellant was born Musammat Madaro, as guardian of her two sons, the respondents, took proceedings on their behalf to recover the estate of the late Raja, alleging that her sons were his legitimate children. After the appellant appeared upon the scene an agreement was drawn up, with the consent of the Court, by which it was left to arbitrators to decide an issue whether the appellant could be the sole heir to the late Raja's entire property under the custom of the country, or whether the respondents could also be successors to it; and, if so, what was the portion to which they and their mother would be entitled?

The arbitrators made an award, dated the 17th of December 1865, whereby they found that the appellant and his mother, Dan Bibi, were according to the custom of the country proprietors and heirs of the entire estate and property of the late Raja, and the respondents and their mother, Bibi Madaro, could not share in the inheritance; that the respondents' mother should receive Rs. 60 per month for maintenance, to be allocated thus:—

Rs. 10 per month to Bibi Madaro

Rs. 30 per month to Farhat Ali Khan, and

Rs. 20 per month to Sakhawat Ali Khan,

and that such payment should continue for six years, after which time the Government should propose what they should have for their support. And the arbitrators also awarded that when both the respondents were grown up and attained the age of discretion they should have villages separated for them according to their stipend, after deduction therefrom of the Government revenue.

On the 21st of December, 1865, the action came on again before Major Ross, the Deputy Commissioner of Gonda; and he, stating that the award appeared to him fair and equitable, dismissed the claim for the estate, but decreed maintenance to Bibi Madaro and the respondents on the terms of the award, *viz.* Bibi Madaro Rs. 10, Farhat Ali Rs. 30, and Sakhawat Ali Rs. 20, total Rs. 60.

1901

MUHAMMAD
MUMTAZ
ALI KHAN
o.
FARHAT
ALI KHAN.

1901

MUHAMMAD
MUMTAZ
ALI KHAN
v.
FARHAT
ALI KHAN.

This order was affirmed by the Commissioner of the Fyzabad Division on the 11th of August 1866, and by the Judicial Commissioner of Oudh on the 2nd of January 1867.

It will be observed that the award went beyond the reference, so far as relates to the allotment of two villages to the respondents. That portion of the award was not dealt with by the order of the 21st of December 1865; and the Commissioner, on the appeal, pointed out that the lower Court had rejected so much of the award as related to matters not referred to arbitration. This, however, cannot apply to the allowance of Rs. 60 per month for maintenance, which was expressly decreed by the order of the 21st of December 1865.

By reason of the infancy of the appellant his estates were from the first under the management of the Court of Wards; and on the 25th of May 1883, while he was still a minor, but after the death of Bibi Madaro, and the attainment of 21 by both the respondents, the then Deputy Commissioner of Gonda, Mr. White, wrote to the Commissioner of the Fyzabad Division, pointing out that certain arrears of maintenance were due to the respondents. He also proposed to put an end to the cash allowances they had theretofore received, and to assign to them each a village for maintenance; choosing for the elder, Farhat Ali, one which would give him Rs. 500 or 600 per annum, and for the younger, Sakhawat Ali, a village producing Rs. 350 or 400 per annum. The writer stated that this would be in accordance with the decree of Mr. Reid, the Commissioner, dated the 19th of March 1866, an extract from which he professed to give. There is not, however, any trace of such decision to be found; and the passage quoted is from the award itself. Mr. Reid was the Commissioner of the Fyzabad Division who, on the 11th of August 1866, affirmed the decision of Major Ross of the 21st of December 1865; and the reference to his reasons and his formal judgment (both set out in the record) show that the allotment of villages to the respondents was not referred to.

By a Government order dated the 7th of July 1883 the sanction of the Lieutenant-Governor and Chief Commissioner was given to the proposal that the respondents should be paid the arrears of maintenance due to them, and that they should be given

in lieu of the present monthly allowance two villages yielding a profit of Rs. 600 and 400 per annum, respectively, after the payment of the Government jama.

Further proceedings ensued before the Deputy Commissioner, which resulted in the village Kasmara, the income of which was about Rs. 640, being allotted to Farhat Ali Khan, and the village Pura Mirza, the income of which was about Rs. 400, to Sakhawat Ali Khan. The appellant's liability for the duty due to the Government in respect of those villages was, however, kept alive. By an order of the Deputy Commissioner, dated the 27th of November 1883, conveyances were directed which were to contain provisions that the respondents were always to remain well-wishers and obedient to the head of the family; and so long as they did not fail in their duty the property would remain, generation after generation, in their possession and occupation. The same order provided for payment of the arrears of maintenance, and immediate delivery of possession of the villages. This was done, and the respondents have ever since been in receipt of the income therefrom; and from a qabuliat dated the 18th of June 1887 it appears that Farhat Ali Khan succeeded in leasing the mauza Kasmara for five years at Rs. 800 a year, and the income has since further increased. The conveyances directed have not yet been executed: but this cannot prejudice the rights of the parties.

In October 1886 the appellant attained 21, and in 1889 he commenced an action against each of the respondents to recover possession of the village allotted to him. The two actions were tried together by consent, and the appeals have been consolidated; so the existence of separate actions need not again be referred to. The principal question in the Courts below was, and the only question here is, whether the allotment of the two villages to the respondents was within the powers of the Deputy Commissioner or the Court of Wards, and is binding upon the appellant. The Civil Judge at Lucknow, on the 18th of July 1895, decided in his favour, *viz.*, that he was entitled to recover possession, and to mesne profits; but this decree was on the 19th of May 1898 reversed in the Court of the Judicial Commissioner of Oudh, where the appellant's claim was dismissed.

1901

MUHAMMAD
MUMTAZ
ALI KHAN
s.
FARHAT
ALI KHAN.

1901

MUHAMMAD
MUMTAZ
ALI KHAN
v.
FARHAT
ALI KHAN.

The Court of Wards has of course all the ordinary powers of a guardian over a ward's property, supplemented by certain additional powers given by statute. By section 161 of the Oudh Land Revenue Act, 1876, it is provided that the Deputy Commissioners shall, subject to the control of the Commissioner and the Chief Commissioner, have the powers of a Court of Wards within their respective districts, for the superintendence of the persons and property of all persons who may become entitled as proprietors or under-proprietors, and who are disqualified for the management of their own estates; within which class minors are, by section 162, expressly included. Section 166 provides that the jurisdiction of the Court of Wards shall refer to the care and education of and management of the property, of persons subject thereto; and section 172 provides that "The Court of Wards shall have "power to give such leases or farms of the whole or parts of the "immovable property under its charge, and to mortgage or sell "any part of such property, and to do all such other acts as it "may judge to be most for the benefit of the property, and the "advantage of the disqualified proprietors."

Their Lordships are of opinion that the allotment of the two villages to the respondents cannot be supported. It is not authorised by any of the orders of Court made in the years 1865, 1866 and 1867; and the finding of the award on the subject was not within the reference to arbitration and was not adopted by the Court. It is not within the power of a guardian to make a voluntary alienation in perpetuity of his ward's real estate, and it is open to the ward on attaining 21 to challenge the validity of such a transaction. The letter of the 25th of May 1883, upon which the order of the 7th of July was based, contains a very misleading and incorrect account of what had taken place; and even that letter only proposed to provide the respondents with "subsistence" or "maintenance"; not to hand over to them part of the appellant's real estate that should remain theirs from generation to generation. Nor can the assignment of the villages to the respondents be justified under section 172 of the Act. Clearly it cannot, unless it comes within the final words, that the Court may do all such acts as it may judge to be most for the benefit of the property and the advantage of the infant. It was

1901

MUHAMMAD
MUMTAZ
ALI KHAN
v.
FARHAT
ALI KHAN.

not for the advantage of the appellant, or the benefit of his property, that two considerable portions of his estate should be disposed of without consideration. And there is not any trace throughout the proceedings of any thought having been taken as to what was beneficial to him or his estate. The respondent, Farhat Ali, gave evidence that he and his brother were going to sue for maintenance on the basis of the award of December, 1865, and that the Deputy Commissioner replied that it was no use suing, as he would give them villages in lieu of maintenance according to that award. So that this *ultra vires* award was apparently the sole ground for the appropriation of these villages, if that evidence can be trusted.

No question was raised here or in the Courts below as to any right of the respondents to maintenance out of the taluqdari estate independently of their claims to the absolute ownership of the two villages, and their Lordships abstain from expressing any opinion upon it. If any such right exists, effect can be given to it by way of set-off against the liability in the execution proceedings in respect of mesue profits, and, as regards maintenance after the delivery of possession, by a suit.

Their Lordships will therefore humbly advise His Majesty that the judgment of the 19th of May, 1898, should be reversed, and that of the 18th of July, 1895, should be restored, and that the respondents should be ordered to pay the costs of the appeal to the Judicial Commissioner. The respondents must also pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant :—Messrs. T. L. Wilson and Co.

SUKH DEI (DEFENDANT) v. KEDAR NATH, REPRESENTATIVE OF MADHO PRASAD (PLAINTIFF); SUKH DEI (DEFENDANT) v. RAM CHARAN (PLAINTIFF) AND SUKH DEI (DEFENDANT) v. BISHESHAR PRASAD (PLAINTIFF).

P. C.
1901
May 3.
June 22.

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

Will—Evidence and proof of will—Burden of proof—Suit for declaration that will is not genuine—Omission by party impeaching will to give evidence or cross-examine witnesses.

The defendants (widow and sister-in-law of a deceased taluqdar) set up a will under which they alleged they took all the property of the testator abso-

Present:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD ROBERTSON,
SIR RICHARD COUCH and SIR FORD NORTH.