PRIVY COUNCIL.

P. C.
1911
November 2.
1912
January 16.

MATA DIN (DEFENDANT) *v.* AHMAD ALI (PLAINTIFF).

[On appeal from the Court of the Judicial Commissioner of Oudh, at Lucknow].

Muhammadan law—Guardian—Construction of will—Alienation of property of minor by his brothers acting as executors of will and guardians of minor—Sale not binding on minor—Right of suit to redeem mortgage—Act No. XV of 1877 *(Indian Limitation Act), schedule II, articles* 44 *and* 144.

A Muhammadan testator by his will left all his property to his four grandsons (brothers), but did not expressly appoint any executors of his will or guardians of such of his grandchildren as might be minors at his death, nor was there in the will any intention to entrust the administration of the property to any particular individuals. The testator died in 1887; and on the 15th of June 1889 the three elder grandsons on their own behalf, and purporting to act also as the guardians of the fourth grandson, the respondent (plaintiff) then a minor, sold some of the property to the appellant (defendant). The appellant was a mortgagee of two villages on the estate under two mortgages executed by the testator on the 2nd of December 1885, and the 7th of August 1886 for ten years and seven years respectively; and the effect of the sale had been to pay off the later mortgage on the smaller village, and other debts, by selling the larger village to the mortgagee. The respondent attained his majority in 1892 or 1893, and treating the sale of the 15th of June 1889 as a nullity, and the mortgage as still subsisting, he tendered to the appellant the amount of mortgage money necessary to redeem the larger village, and on the appellant refusing to accept it, brought a suit for redemption on the 14th of September 1905.

Held that the elder brothers were not authorized either by the will or by the Muhammadan law to act as guardians of the minor, and that he was entitled on attaining his majority to treat the transaction of the 15th of June 1889 as being void as against him.

Held also that the possession of the appellant did not become adverse to the respondent until the expiry of the term of the mortgage of 1885, namely the 2nd of December 1895, and therefore the suit was not barred by the 12 years period provided by article 144 of schedule II of the Limitation Act (XV of 1877). Article 44, schedule II, of the same Act was not applicable, as the sale was made not by a guardian but by an unauthorized person.

APPEAL from a judgement and decree (7th August 1907) of the Court of the Judicial Commissioner of Oudh, which varied the decree (9th March 1907) of the District Judge of Lucknow, the latter decree having affirmed the decree (28th May 1906) of the Subordinate Judge of Lucknow.

The suit out of which this appeal arose was brought by the respondent for the redemption of a one-fourth share of a

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mortgage of a village called Kabirpur, dated the 2nd of December 1885. The appellant (the defendant) was in possession of the mortgaged property under a deed of sale, dated the 15th of June 1889, at which date the plaintiff was a minor.

The main question for decision on this appeal was whether the plaintiff was or was not bound by the deed of sale. All three Courts in India held that he was not so bound and consequently was entitled to succeed in his suit.

The facts giving rise to the litigation were that one Amir Haidar, a Muhammadan possessed of considerable property, including the village of Kabirpur, died on the 12th of August 1887 leaving a will, dated the 7th of December 1886, the provisions of which, so far as they are material for the purpose of this report, were as follows:—

"In respect of taluqa Gauria the following conditions will be observed—My four grandsons, i.e. Majid Husain, Ashraf Husain, Muhammad Ali and Ahmad Ali, will be the owners and possessors of the taluqa in equal shares after me and will manage it in union. The *sanad* of the taluqa shall be in the name of my eldest grandson, Majid Husain. After him in the name of every eldest in order of succession and the same order will continue in the family. After deducting the *lambardari* dues and proper and necessary expenses (which will be incurred in consultation of the four grandsons) the total profits and other entire incomes of *mal* and *sewai* will be divided equally. If the other grandsons make a request to the holder of the *sanad* for the partition, then it will be incumbent on him to divide (the property) in equal shares in spite of the *sanad*."

After devising the village of Dhakwa, an incumbrance on which was to be discharged by the four grandsons, to the testator's daughter, the will proceeded in paragraph 3:—

"Besides the property specified and detailed above, my four grandsons will be owners, in equal shares, of the property which is mine or which I may or will acquire."

Then after making provision for future expenses to be borne by the property the will concluded (paragraphs 8 and 9):—

"8. My four grandsons will divide equally among themselves, with the exception of the aforesaid village Dhakwa, all the single villages and detached plots of lands, which I took under mortgage and purchase in the fictitious names of my grandsons, and all the houses.

"9. The burden of the whole debt which may be found due from me after my death will be on my entire property movable and immovable, excepting the village Dhakwa, and my four grandsons will be responsible for its liquidation."

At the testator's death he left property of about the value of Rs. 7,000 a year and debts amounting to about Rs. 30,000

and the sale of Kabirpur to the defendant was for purpose of liquidating these debts.

The grandsons named in the will were the children of a son who predeceased the testator, and the present respondent Ahmad Ali, the youngest of them, was about 12 years old when the testator died. They formed one household, and enjoyed and managed the property jointly, the lands being registered in their joint names on their grandfather's death. No guardian was appointed for the minor brother.

The appellant was one of the creditors of the estate in whose favour the testator had executed the mortgage of fifteen-sixteenths of the village of Kabirpur on the 2nd of December 1885 for Rs. 13,000 and another mortgage of one-fourth of a village called Karora for Rs. 3,000 on the 7th of August 1886. The terms of these two mortgages were ten and seven years respectively. There was also due to the appellant on another account a sum which on the 7th of January 1889 amounted to Rs. 2,000. By a deed executed on that date by the grandsons who had attained majority, of whom one Ashraf Husain signed it for the respondent as well as for himself, the Rs. 2,000 balance was made a further charge on the property comprised in the mortgage of the 2nd of December 1885. On the village Karora arrears of revenue to the extent of Rs. 412 accrued and was paid by the appellant. Under the circumstances it appeared to be preferable to sell a portion of the property and pay off the mortgages rather than keep them up. Accordingly an agreement was made with the appellant that he should buy Kabirpur in consideration of the debts secured thereon and on Karora together with the sum of Rs. 412 and a small sum in cash altogether amounting to Rs. 18,500. This transaction was carried out by the deed of the 15th of June 1889, which was executed in the same manner as that of the 7th of January. The three mortgage deeds were returned and the appellant thereupon became possessed of the village of Kabirpur as owner.

The plaintiff (respondent) came of age in 1893, but it was not until September 1905 that, treating the mortgage of 1885 as still existing to the extent of his one-fourth share, he offered the appellant the sum of Rs. 4,500 for the redemption of his share,

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and on the appellant refusing to accept it, the suit out of which the present appeal arose was instituted on the 14th of September 1905, the plaintiff claiming to redeem the mortgage on Kabirpur to the extent of his one-fourth share.

The defence appears from the issues, which were (1) Is the plaintiff bound by the sale-deed, dated the 15th of June 1889? (2) Is the claim for redemption barred by limitation? (3) Is the plaintiff bound by the sale-deed, dated the 15th of June, 1889? (4) Is the plaintiff estopped from questioning the acts of Ashraf Husain relating to the property in suit? (5) Did the plaintiff make a legal tender on 11th September, 1905?

The Subordinate Judge decided the first, third and fourth issues in favour of the plaintiff, and on the second issue he found that sum payable by the plaintiff on redemption was Rs. 2,795.

On appeal by the defendant the District Judge affirmed the decision of the Subordinate Judge. He was of opinion that the grandsons were not appointed by the will either executors or guardians, and that assuming the adult grandsons could be considered executors it would still be incumbent on the defendant to show that the sale of the minor's share was made for his interest and for necessity. On this point he found, in accordance with the opinion of the Subordinate Judge, that although the brothers may have acted in perfect good faith it was not shown that the sale was inevitable or that the course adopted was the best and most beneficial. The District Judge further held that apart from the will the plaintiff could not be bound by his brothers' acts and that the deed of sale being a nullity as far as his interest was concerned no question of ratification or acquiescence arose. Finally he was of opinion that the suit was not barred by limitation.

The defendant then appealed to the Court of the Judicial Commissioner and the appeal was heard by MR. E. CHAMIER, Judicial Commissioner, and MR. R. GREEVEN, 2nd Additional Judicial Commissioner, who held that the fact of the brothers living in commensality like the members of a joint Hindu family was immaterial; that a *de facto* guardian of a Muhammadan minor cannot sell the minor's interest; and that under the

will the adult grandsons were not appointed executors or testamentary guardians. They were further of opinion that the transaction did not admit of being ratified; and on the question of limitation that the suit was not barred.

The judgement of the Court of the Judicial Commissioner will be found in the report of the case before that Court in (1908) 11 Oudh Cases, 1.

On this appeal :—

Kenworthy Brown and *A. P. Sen* for the appellant referring to the certificate of appeal granted by the Judicial Commissioner's Court on the ground that a question of law of public importance was raised namely, " whether the transfer of a Muhammadan minor's property by a person who was not his natural guardian but who was *de facto* his guardian should be upheld if made to discharge a debt payable by the minor," contended that in the circumstances of the case the executants of the deed of 15th June 1889, had power both under the will and under the Muhammadan law to sell the village Kabirpur including the respondent's interest therein. The respondent's brothers were, it was submitted, executors under the will, and were thereby appointed to be his guardians, and were his natural guardians and his guardians *de facto*. As to the powers of persons in that position the will showed that the estate was to be administered by the adult brothers: see Probate and Administration Act (V of 1881), sections 3 and 7, and *In the goods of Russell* (1); and as to the power of an executor reference was made to *In the goods of Indra Chandra Singh, Sarasati Dasi* v. *Administrator General of Bengal* (2), and the Probate and Administration Act (V of 1881, as amended by Act VI of 1889), section 90. As to the Muhammadan law on the powers of guardians reference was made to Ameer Ali's Muhammadan law (Ed. 1894) Vol. I, page 556; Baillie's Muhammadan law, page 632; Shama Charan Sarkar's Muhammadan law, page 90. [Lord MACNAGHTEN. What is a *de facto* guardian?] A person who is in the position of a guardian, whether or not he is legally so: in this case a person who has care of the property of a minor though without any special authority: See *Hari Saran Moitra v.*

(1) (1892) L. R., P. D., 880. (2) (1896) I. L. R., 23 Calc., 580.

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Bhubaneswari Debi (1) as to the power of a Hindu widow as natural guardian of her adopted son though not appointed guardian, and unauthorized by the Court to act on his behalf. As to the Muhammadan law the recent Calcutta and Allahabad cases were in favour of the appellant's contention. Reference was made to *Mafazzal Hosain* v. *Basid Sheikh* (2); *Ram Charan Sanyal* v. *Anukul Chandra Acharjya* (3); *Majidan* v. *Ram Narain* (4); *Hasan Ali* v. *Mehdi Husain* (5); and Ameer Ali's Muhammadan law (Ed. 1884), Vol. II, p. 496; *Hamir Singh* v. *Zakia* (6) which is against the appellant; *Harbai* v. *Hiraji Byramji Shanja* (7); the appellant contends here that the sale was for the respondent's benefit [Lord MACNAGHTEN referred to *Baba* v. *Shivappa* (8) and *Sita Ram* v. *Amir Begam* (9)]. It was submitted that the respondent's brothers having taken the property under the will had power to sell and pay creditors, as Sargent, C. J., said the mother in the case of *Baba* v. *Shivappa* might have done: as executors they can under Muhammadan law take care of the interests of a minor: *Abdul Khader* v. *Chidambaram Chettiyar* (10).

As to limitation, Ahmad Ali attained his majority in 1892, and the suit was not brought until September 1905. The suit was barred therefore both under article 44 and article 144 of the Limitation Act (XV of 1877).

DeGruyther, *K. C.* and *B. Dube* for the respondent contended that by the Muhammadan law the sale of the 15th of June 1889 was *ab initio* void so far as the respondent's interest was concerned, and conveyed no title to the appellant. Reference was made to *Bukshan* v. *Maldai Kooeri* (11), where it was held that sale of a minor's property was only permissible in urgent cases, and with clear advantage to the minor; and that an elder brother was not in the position of a guardian, and had no power as such over the property of the minor members of the family: *Moyna*

(1) (1888) I. L. R., 16 Calc., 40 (55); L. R., 15 I. A., 195(202).
(2) (1906) I. L. R., 34 Calc., 36.
(3) (1906) I. L. R., 34 Calc., 65 (67 bottom of page).
(4) (1903) I. L. R., 26 All., 22.
(5) (1877) I. L. R., 1 All., 533.
(6) (1875) I. L. R., 1 All., 57.
(7) (1895) I. L. R., 20 Bom., 116.
(8) (1895) I. L. R., 20 Bom., 199.
(9) (1886) I. L. R., 8 All., 324, (338).
(10) (1908) I. L. R., 32 Mad., 276.
(11) (1869) 3 B. L. R., A. C., 423.

Bibi v. *Banku Bihari* (1); *Bhutnath Dey* v. *Ahmed Hossain* (2); *Nizam-ud-din Shah* v. *Ananda Prasad* (3); *Mafazzal Hosain* v. *Basid Sheikh* (4). The general effect of the cases was that a person who assumes authority is held to have no power to deal with the property of a minor, but in cases where he has acted for the benefit of the minor the transaction has been allowed to stand. In the present case the sale was not for the benefit of the minor. *Ruttun* v. *Dhoomee Khan* (5); *Majidan* v. *Ram Narain* (6) where former Allahabad cases are referred to and distinguished; *Pathummabi* v. *Vittil Ummachabi* (7); *Durgazi Row* v. *Fakeer Sahib* (8); *Baba* v. *Shivappa* (9) and *Amba Shankar* v. *Ganga Singh* (10). If the sale cannot be justified under the Muhammadan law, it cannot be justified on the ground of necessity. It was altogether void.

As to limitation, the mortgage could not have been redeemed until 1895, and the suit having been brought within 12 years from that date was not barred.

Kenworthy Brown replied distinguishing the cases of *Nizam-ud-din Shah* v. *Ananda Prasad* (3) and *Pathummabi* v. *Vithil Ummachabi* (7).

1912, *January 16th* :—The judgement of their Lordships was delivered by Lord ROBSON :—

In this case the appellant has been unsuccessful, first, before the Subordinate Judge at Lucknow, next before the District Judge of Lucknow, and lastly before the Court of the Judicial Commissioner of Oudh. The Court of the Judicial Commissioner granted a certificate for an appeal to their Lordships' Board on the ground that the case raised a question of law as to whether the transfer of a Muhammadan minor's property by a person who was not his natural guardian should be upheld, if made to discharge a debt payable by the minor.

The facts of the case are these :—

Sheikh Ahmad Ali, the respondent, was the grandson of Amir Haidar, who, in his life-time, was possessed of two villages,

(1) (1902) I. L. R., 29 Calc., 473.
(2) (1885) I. L. R., 11 Calc., 417.
(3) (1896) I. L. R., 18 All., 373.
(4) (1906) I. L. R., 34 Calc., 36(40).
(5) (1868) 3 Agra, 21.
(6) (1896) I. L. R., 26 All., 22.
(7) (1902) I. L. R., 26 Mad., 734.
(8) (1906) I. L. R., 30 Mad., 197.
(9) (1895) I. L. R., 20 Bom., 199.
(10) (1905) 9 Oudh Cases, 97 (99).

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Kabirpur and Karora. Amir Haidar mortgaged a 15 anna share in Kabirpur to the defendant appellant on the 2nd December 1885, and on the 7th of August 1886 he executed another mortgage in favour of the same creditor of a 4 anna share in Karora. The mortgages provided that the mortgagee should take, (and he duly took), immediate possession of the mortgaged property for the purpose of realizing the agreed interest out of the annual profits, making over the surplus, if any, to the mortgagor. The terms of the said mortgages were for ten and seven years respectively.

Amir Haidar died on the 12th of August 1887, leaving a will, dated the 7th of December 1886, by which he bequeathed his entire estate to his four grandsons equally. The plaintiff was about 12 years old when his grandfather died. Afterwards, on the 15th of June 1889, the three elder grandsons, on their own behalf, and one of them, Ashraf Husain, purporting to act also as the guardian of the plaintiff, sold the village at Kabirpur to the appellant in consideration of the discharge by him of the debts secured thereon and on Karora, together with certain other smaller sums, making up a total of Rs. 18,500. The effect of this sale, if held good, was that the plaintiff lost his interest altogether in the village of Kabirpur, which was the larger and more important property, while the smaller village Karora was thenceforth free of the mortgage.

The plaintiff on attaining his majority in 1892 or 1893 made no attempt to impeach this transaction, though he knew of it, but in September 1905 he tendered to the defendant the amount of mortgage money necessary to redeem his share of the mortgage property, and on the defendant refusing to accept it, he brought this action for redemption.

He contends that the sale deed of the 15th of June 1889 is void, as against him, on the ground that his brothers had no authority under the grandfather's will to act as executors or to sell his share, and that Ashraf Husain, who purported to represent him in that transaction as his guardian was not entitled so to act. The appellant contends that the four grandsons were entitled to act as executors under Amir Haidar's will, but their Lordships

agree with the Courts below in finding that there is nothing in the will justifying that view.

The testator left the whole of his property (with certain unimportant exceptions) to his four grandsons in equal shares, and subject to equal obligations in respect of his debts and expenses, but he did not expressly appoint any executors of his will or guardians of his minor grandchildren. It was argued that an express appointment was not necessary if the testator had clearly shown by his will an intention to entrust its administration to particular individuals, but on a fair construction of this will no such intention can be gathered from it. He left his property to his grandsons so that each share thereof vested at once in the devisee, subject to the obligations attaching thereto, and there appears to be no necessity for any act of an executor to complete the operations of the will. No doubt the testator contemplated a partition by the grandsons themselves of the property devised to them, and in that case it would be necessary for his grandson, if still an infant, to have a guardian, but there is nothing whatever to show that he intended all or any one of the brothers to act in that capacity. So far as his intention is concerned, it may well have been that if, and when, the necessity for a guardian arose, the selection should be made by the Court.

The family were Muhammadans and were governed by the Muhammadan law relating to guardianship. According to that law, in the absence of duly appointed testamentary guardians the care of Ahmad Ali's property would devolve first on the father and his executor, next on the paternal grandfather and his executor, and failing these, the right of nomination of a guardian would "rest in the ruling power and its administration." (Macnaghten's "Principles of Muhammadan Law," 5th Ed., page 304.) The brothers had, therefore, no right whatever to act except under the authority of an appointment by the Court. Both they and the appellant seem to have had that fact in their minds when they executed the deed of the 15th June 1889 effecting the sale of Ahmad Ali's share in the land, for they stipulated that if Ahmad Ali at any time brought a claim on the ground of minority, and any dispute thereby arose in respect of Mata Din's

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possession, the three elder brothers should be answerable for the same together with costs.

It is urged on behalf of the appellant that the elder brothers were *de facto* guardians of the respondent, and, as such, were entitled to sell his property, provided that the sale was in order to pay his debts and was therefore necessary in his interest. It is difficult to see how the situation of an unauthorized guardian is bettered by describing him as a "*de facto*" guardian. He may, by his *de facto* guardianship, assume important responsibilities in relation to the minor's property, but he cannot thereby clothe himself with legal power to sell it.

There has been much argument in this case in the Courts below, and before their Lordships, as to whether, according to Muhammadan law, a sale by a *de facto* guardian, if made of necessity, or for the payment of an ancestral debt affecting the minor's property, and if beneficial to the minor, is altogether void or merely voidable. It is not necessary to decide that question in this case. To begin with, the appellant has not succeeded in showing that the disputed sale of 1889, although made for the payment of an ancestral debt, was made of necessity, or was beneficial to the minor. On the contrary, the Courts below have all found on the evidence that it was unnecessary and cannot be said to have been beneficial so far as Ahmad Ali was concerned.

It is next found as a fact (and their Lordships see no sufficient reason to find otherwise), that the plaintiff on coming of age never acquiesced in the transaction which he now seeks to impeach, and that there was nothing in his conduct on which the defendant's plea of estoppel could be justified against him. Unless, therefore, the plaintiff's remedy is barred by the Indian Limitation Act, XV of 1877, he is now entitled to the relief prayed for, as modified by the judgement of the Court of the Judicial Commissioner.

As to the plea of limitation, the appellant defendant placed reliance on articles 44 and 144 of the Indian Limitation Act, 1877.

Article 44 prescribes a period of three years within which a ward, who has attained majority, may set aside a sale made by his

guardian, the time running from the date of the ward's majority. This provision has no application to the present case, for the sale here was effected, not by a guardian, but by a wholly unauthorized person.

Article 144 deals with immovable property not otherwise specially provided for by the Act, and prescribes a period of 12 years from the time when the possession of the defendant becomes adverse to the plaintiff. In this case, the appellant was entitled under his mortgage to full possession of Kabirpur and receipt of its rents and profits for 10 years from the 2nd of December 1885. The respondent came of age on some date in 1892 or 1893. He was then certainly entitled to treat, (and by his subsequent tender of the mortgage money it is shown that he has in fact treated), the mortgage as subsisting, so far as he was concerned. Under these circumstances, the possession by Mata Din of Kabirpur did not become adverse to the respondent until the 2nd of December 1895, and as this action was begun in 1905, it was well within the period of limitation.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the appellant:—*T. L. Wilson & Co.*

Solicitors for the respondent:—*Barrow, Rogers & Nevill.*

J. V. W.

RAGHO PRASAD AND OTHERS (DEFENDANTS) *v.* MEWA LAL AND ANOTHER (PLAINTIFFS).*

P. C. 1911 *November*, 22 1912 *January*, 23.

[On appeal from the High Court at Allahabad.]

Civil Procedure Code (1882), *section* 411—*Suit for dower* in forma pauperis *by wife against her husband and his mortgagees—Suit pending execution of decree for sale upon mortgage—Decree dismissing suit against mortgagees and making husband solely liable—Execution of decree to recover court fees due to Government—Effect of sale of mortgaged property.*

The respondents obtained a decree for sale on their mortgage on the 17th of December 1895. Pending execution the wife of the mortgagor brought a suit *in forma pauperis* against her husband and his mortgagees for dower, alleging that it was a charge on the mortgaged property in priority to the mortgage lien. It was found that the dower debt was not charged on the property, and on the 11th of May 1897 her suit was dismissed as against the mortgagees, and a money decree

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Present:—Lord MACNAGHTEN, Lord ROBSON, Sir JOHN EDGE and MR. AMEER ALI.