Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeals of Raja Mohammad Mumtaz Ali Khan v. *Sakhawat Ali Khan* and *Raja Mohammad Mumtaz Ali Khan* v. *Farhat Ali Khan* (*Consolidated Appeals*), *from the Court of the Judicial Commissioner of Oudh; delivered* 13*th June* 1901.

Present at the Hearing:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD ROBERTSON.
SIR RICHARD COUCH.
SIR FORD NORTH.

[*Delivered by Sir Ford North.*]

The Appellant in these Consolidated Appeals is the Talukdar of Utraula, or Bilaspur, a posthumous son of the Raja Reyaset 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 estates 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 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 21st 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. 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 the Bibi Madaro, and the attainment of 21 by both the Respondents, the then Deputy Commissioner at 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 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 a 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 Kasmora, 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 wellwishers 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 kabuliat dated 18th June 1887, it appears that Farhat Ali Khan succeeded in leasing the Mauza Kasmora 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 sepa-

rate 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 of 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.

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, 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 "immoveable 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 generration. 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 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 Talukdari 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 mesne 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.