Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mata Din v. *Sheikh Ahmad Ali, from the Court of the Judicial Commissioner of Oudh; delivered the 16th January* 1912.

PRESENT AT THE HEARING:

LORD MACNAGHTEN.
LORD ROBSON.
SIR JOHN EDGE.
MR. AMEER ALI.

[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 Haider, who, in his lifetime, was possessed of two villages, Kabirpur and Karora. Amir Haider mortgaged a 15 annas share in Kabirpur to the Defendant-Appellant on the 2nd December 1885, and on the 7th August 1886 he executed another mortgage in favour of the same creditor of a 4 annas 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 realising the agreed interests 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 Haider died on the 12th August 1887, leaving a will dated the 7th 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 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 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 Haider'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 operation 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 ad- "ministration." (Macnaghten's "Principles of Mahomedan 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 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 unauthorised 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 15 of 1877, he is now entitled to the relief prayed for, as modified by the judgment 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 3 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 unauthorised 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 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 circum-

stances, the possession by Mata Din of Kabirpur did not become adverse to the Respondent until the 2nd 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.

In the Privy Council.

MATA DIN

v.

SHEIKH AHMAD ALI.

DELIVERED BY LORD ROBSON.

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