Privy Council Appeal No. 59 *of* 1927.

Oudh Appeal No. 9 *of* 1926.

Nawab Sadiq Ali Khan and others - - - - - *Appellants*

v.

Jai Kishori and others - - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 22ND MARCH, 1928.

Present at the Hearing:

LORD CARSON.
LORD SALVESEN.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD SALVESEN.]

This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, dated the 27th May, 1925, reversing a decree dated the 30th April, 1924, of the Subordinate Judge of Lucknow.

The first respondent, who alone appeared in the appeal, is the mortgagee under a mortgage dated the 18th April, 1908, and the appellants are the representatives by succession or purchase of two persons named Baqar Ali Khan and Ali Ahmad Khan.

The mortgage was executed by the two persons last mentioned in security of a sum of Rs. 7,000 loaned by the mortgagee for a term of five years in the first instance and bearing interest at the rate of 14 annas per cent. per mensum. It is in the ordinary form, and provision is made for interest being accumulated at compound rates in the event of non-payment, and for the period of payment of the principal sum and interest being extended beyond the stipulated period in the option of the mortgagee.

The mortgagors were two of the family of a certain Qasim Ali Khan, originally the zemindar of the village of Jamwasi and the owner of certain other heritable properties. Qasim Ali Khan had as far back as the year 1892 executed a deed of gift in favour of his wife, Mussamat Rais-un-nisa, of the entire village of Jamwasi,

and on the 10th August, 1899, he executed another deed of gift in her favour of his house property in Lucknow.

On the 21st June, 1902, she in her turn gifted the village Jamwasi and the house property to her three sons and one daughter, excluding, however, from the gift the sir lands in the village, extending to some 27 acres or thereabouts. From that time onwards the four children, who were described as minors in the deed, were registered as the proprietors of the properties in question. They remained in the peaceable occupation of the lands until the present suit was started in 1923, in which the plaintiff (now the first respondent) sought a decree for Rs. 32,632-7-9, and in default of payment, sale of the lands mortgaged in her favour.

The case has been decided on the issue whether the two mortgagors were minors at the date when they executed the mortgage in question. On this question of fact the Courts below have differed. The Subordinate Judge held that the executants were minors on that date, but his judgment was reversed by the Court of the Judicial Commissioner. Their judgment is summed up in the following passage :—

> " We have given our careful attention to all the evidence which weighed with the Court of trial, but we are not satisfied that the two executants were minors at the time of execution. On the contrary, we think it is quite probable that they were majors. This finding of fact is sufficient to dispose of the appeal, and it becomes unnecessary to consider the questions of law which would arise if we were to find in fact that the executants were minors."

It is noteworthy that the learned Judges did not consider themselves in a position to affirm that the executants of the mortgage were in fact majors at the time of its execution, and it may be inferred from this that the judgment really proceeded on the footing that the appellants had failed to discharge the onus of proof which the Court held rested upon them.

Their Lordships are in agreement with the learned Judges when they say: " Where a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority." If, therefore, the case depended upon the oral evidence alone, they would not have been disposed to hold that it was so convincing as to entitle the appellants to a finding in their favour. But the documentary evidence which the appellants have adduced and the proceedings instituted in relation to the two mortgagors, Baqar Ali Khan and Ali Ahmad Khan, are so weighty that, if they stood alone and were unchallenged, they would conclusively establish the fact of minority. The first document is a deed of gift dated 21st June, 1902, in favour of her four children by their mother, who is therein described as aged about 28 years, and the four children are described as minors. Taking the age as approximately correct, Rais-un-nisa would be born in or about the year 1874. Following on this deed, Qasim Ali Khan, on the 14th February, 1903, presented an application for guardianship of his minor children. In this application, as required by the Act, he set forth the

dates of birth of the four children in question. Baqar Ali Khan is stated to have been born on the 11th February, 1891, and Ali Ahmad Khan on the 19th December, 1892. The ground of the application is that the applicant being the father is the natural guardian of the minors and has no interest adverse to them, and that he had transferred the property mentioned to the minors subject to a prior charge which he wished to pay off by a sale of a portion of the property. It is not strictly correct that the father had transferred the property to the minors directly, for it was transferred by his wife to them; but he had originally been the owner and had made her the gift which she was able to pass on to her children. Their Lordships do not attach any importance to this inaccuracy. The application was granted, and on the 9th November, 1903, a certificate was issued by which Qasim Ali Khan was appointed guardian to the persons and property of his four children during the period of their minority, to wit, until the 11th February, 1912, in the case of Baqar Ali Khan and the 19th December, 1913, in the case of Ali Ahmad Khan.

Qasim Ali Khan seems to have managed the property for several years without requiring to make any application to the District Judge. On the 28th November, 1907, however, in consequence of the marriage of his eldest son, which had already taken place, he applied for the sanction of the Court to pay the expenses incurred to the amount of Rs. 1,580-8, and to charge the same against the property of the minor. The age of Baqar is stated to be approximately 16 years according to the certificate of guardianship. His next application, of date the 7th November, 1908, in the suit of guardianship, was one to authorise him to resign the office of guardian. Qasim Ali Khan was permitted to resign, and on the 16th November of the same year Rais-un-nisa, his wife, applied to be appointed guardian in his place. In this application the dates of birth of her children are stated in accordance with the certificate.

An order was made granting the application, and on the 16th December, 1908, the certificate of guardianship was issued in favour of Rais-un-nisa. It will be observed that these last-mentioned proceedings took place after the mortgage had been executed.

In May, 1909, the Court of Wards assumed the charge of the persons and property of the minors under the Court of Wards Act. Notification in the United Provinces Gazette was duly made on the 21st May of this fact. The Deputy Commissioner of Bara Banki was put in charge, and although there is no evidence on the subject, it may be assumed that this was done at the instigation of one or both of the parents of the alleged minors. He, in fact, lodged certain objections in a suit which had been brought to charge the sir lands which had been transferred to the minors at the same time that the mortgage in question was executed with a view to protecting these lands in their interests from being charged with a debt of Rais-un-nisa. He failed in his objections

on the ground that the alleged purchase by the minors was a simulate transaction and that the property really belonged to the mother, who was the debtor. Incidentally it may be mentioned here that the major part of the sum borrowed from the mortgagee was ostensibly applied in order to meet the purchase price, Rs. 4,000, of the sir lands that then stood in the name of Rais-un-nisa's agent. As these lands were subsequently disposed of by her, the mortgagors derived no benefit from the alleged purchase, and the remainder of the loan was applied in payment of debts due by Qasim.

The position of matters accordingly at the date when the mortgage was granted was that Baqar Ali Khan and Ali Ahmad Khan were still, on the face of the Court records, under the guardianship of their father as minors, the age of majority being 21 according to the law applicable where there has been an appointment of guardian. Baqar Ali Khan, according to the certificate, would then be 17 years of age and his brother $15\frac{1}{4}$. They were accordingly disqualified from acting except through their guardian, and in the mortgage no reference is made to the fact of guardianship. The proceedings which related the registration of the mortgage indicate that it was assumed that the ordinary age of majority, 18, was the only one with regard to which the Registrar had to satisfy himself. Had the certificate of guardianship been brought under his notice, it is reasonably certain that the transaction would not have been completed. The proceedings which were taken after the mortgage itself was granted contained a re-iteration both by the appellants and by the Deputy Commissioner that all the children of Qasim Ali Khan were still in minority.

In their Lordships' view this evidence is sufficient to satisfy the *onus* of proof which rested upon the appellants in the first instance. The first respondent, however, contended that the proceedings of Qasim Ali Khan in getting himself appointed guardian in 1903 were part of a fraudulent scheme on his part to secure the management of the estates which had been transferred to his children for a longer period than would fall to him as their natural guardian. Her case is that he deliberately underestimated the ages of the children by from five to six years for this purpose, and they have led some evidence to show that the marriage of Qasim Ali Khan and Rais-un-nisa took place as early as 1883 or 1884. This would make the eldest child of the marriage born when the mother was only $9\frac{1}{2}$ or 10 years if the statement of her age in the deed of gift and consistently repeated thereafter was approximately correct.

Their Lordships are unable to discover any motive that Qasim Ali Khan had in 1903 for wilfully misrepresenting the ages of his children. If there was a fraudulent scheme on his part to do so, his wife Rais-un-nisa must also have been a party to it. The properties in question were already protected against Qasim's obligations by being vested in his wife, and the only effect of her transferring the properties to his children was to make it impossible

for Qasim to exercise the same control over them as he might have done by influencing his wife. There is not a trace of evidence that Qasim Ali Khan was embarrassed in 1902, and assuming that he acted in good faith in presenting the application for guardianship, he and his wife would probably be the only persons who had knowledge of the dates, whether approximate or otherwise, of the birth of their children. It is not until 1908, when the mortgage was executed, that any fraud can be attributed to Qasim Ali Khan, and even then, if the first respondent's statement is correct that his two sons were both young men of 21 and upwards, the only thing that can be attributed to him was that he had unfairly induced his two elder sons to pledge their share of the properties which they had received originally by gift from him through their mother for payment of his debts. This would not be a fraud upon the mortgagee at all. The most probable explanation of the mortgage being effected was, in their Lordships' opinion, that Qasim Ali Khan thought that by concealing the guardianship proceedings from the mortgagee and passing off his sons as majors of 18 or upwards he could induce the mortgagee to furnish the money which he then required to meet his liabilities without affecting the rights of his minor children in the family estate. That was no doubt a fraud upon the mortgagee, but it affords an intelligible motive for the execution of the mortgage. This theory, however, postulates that his two sons were still below 21 years of age, otherwise his schemes would have failed to have the effect which he no doubt desired of protecting the estate for them while at the same time obtaining the money he urgently required for his own purposes. It cannot reasonably be held to affect the *bona fides* of the statements made in 1903 when the application for guardianship was made.

The only part of the oral evidence which has caused their Lordships some difficulty is that of Mohammad Jafar Husan Khan, who produced the nikahnama of the marriage of his son with the only daughter of Qasim, which took place on the 12th November, 1903. He states that at that time his daughter-in-law was 15 years old and that after 1½ years she gave birth to a daughter. After an interval of 20 years this evidence cannot be held to be conclusive as to the age of the daughter-in-law or as to the period that elapsed before her first child was born. The Mohammedan age of puberty is nine, and a nikahnama might well be executed some considerable time before the girl went to her husband. Evidence leading to an exactly contrary conclusion is given by Abbas Mirza for the appellants, who impressed the Subordinate Judge favourably. While it is impossible to reconcile the statements of the witnesses, allowance must be made for the lubricity of testimony depending upon recollection extending back for long periods, and such evidence is always far less reliable than contemporaneous statements such as those made by the parents of the parties in this case without, as their Lordships think, any possible motive for misrepresenting the facts.

Their Lordships are the more disposed to reach the same decision as the Judge of first instance because of the delay that has taken place in bringing this suit. For 15 years the mortgagee appears to have made no claim for payment of interest or repayment of the capital sum advanced. No doubt this is not an unusual feature where money is advanced on a mortgage with the ultimate object of the mortgagee acquiring the lands hypothecated by suddenly putting forward a claim of such magnitude that it almost necessarily involves a sale. But the present case is rather special inasmuch as the intervention of the Court of Wards involved a degree of publicity which, if it came to the knowledge of the first respondent's advisers, might well have suggested to them the desirability of postponing any demand. Further, the evidence of the respondent's first witness that he had told the mortgagee's agent at the time of the execution of the mortgage that the mortgagors were in fact minors was allowed to remain uncontradicted, although this agent or the mortgagee herself might have gone into the box. Be this as it may, the long delay has, in fact, deprived the appellants of the direct evidence of three of the principal witnesses on whom they could have relied, viz., the father and mother of the mortgagors and their eldest son, all of whom were dead before the suit was brought, while the other son had ceased to have any interest in the properties hypothecated as he had sold his share for what appears to have been a full price.

On the whole matter, their Lordships are of opinion that the Subordinate Judge came to the right conclusion. The fact of minority being established at the date of the execution by the mortgagors of the deed founded on is sufficient for the decision of the case ; such a deed executed by minors being admittedly a nullity according to Indian law, and incapable of founding a plea of estoppal.

They will therefore humbly advise His Majesty that the appeal should be sustained, and that the suit should be dismissed with costs here and below since the date of the judgment of the Subordinate Judge.

In the Privy Council.

NAWAB SADIQ ALI KHAN AND OTHERS

v.

JAI KISHORI AND OTHERS.

DELIVERED BY LORD SALVESEN.

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