Privy Council Appeal No. 89 *of* 1931.

Gafur Mohammad - - - - - - - - *Appellant*

v.

Mohammad Sharif and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE CENTRAL PROVINCES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 10TH MAY, 1932.

Present at the Hearing:

LORD BLANESBURGH.
LORD RUSSELL OF KILLOWEN.
SIR DINSHAH MULLA.

[*Delivered by* LORD BLANESBURGH.]

This is the defendant's appeal from a decree of the Court of the Judicial Commissioner, Central Provinces, of date the 22nd November, 1927, decreeing the plaintiffs' suit against him, and reversing a decree of the 28th September, 1925, of the Subordinate Judge at Balaghat who had dismissed it. The plaintiffs although served did not appear before the Board.

The object of the proceedings was to obtain a decree, such as has been made by the Court of the Judicial Commissioner, setting aside a *lakh* and *parsadi* lease of the mauza Saheki in the District Balaghat granted to the appellant on the 2nd November, 1916. Of that mauza Saheki, Mohammad Kasam, father of the respondents, had been up to his death the owner. It was his self-acquired property. By his will of the 9th December, 1915, made a few days before he died, Mohammad Kasam bequeathed Saheki in shares to his sons—the three respondents, and a fourth son Hasam, since dead, and he appointed his eldest son, the respondent Sharif, to be guardian of his (Sharif's) three younger brothers all then infants. The financial position of the testator

at the time of his death has been a subject of discussion in the Courts in India. He himself apparently regarded it unfavourably. "At present," he says in his will, "I have no cash or grain in balance, but I have to repay debts to the creditors amounting to rupees two thousand." He died six days later, on the 15th December, 1915, survived by his four sons, some daughters, his widow Musammat Masumbi, mother of Sharif and Hasam, and his widow Musammat Ladli Begam, mother of the respondents Kadar and Latif. There are to be found in the record traces of some rivalry between widow Masumbi and her sons on the one hand and widow Ladli Begam and her sons on the other. In that connection it is not perhaps irrelevant to note that both of the testator's widows and all of his sons were parties to the lease sought to be impeached.

On the application of Sharif and his three minor brothers on the 7th January, 1916, mutation of names in their favour was effected and by Tahsildar's order of the 22nd March, 1916, Sharif was appointed Sub-Lambardar of the mauza *vice* his father. It may be observed in passing that plainly Sharif then represented himself to be and was regarded as being adult.

In that state of the title to Saheki the lease of the 2nd November, 1916, was granted. To its terms attention must presently be directed. But before that is done it will be convenient to ascertain the relation in which it stands to an earlier registered *lakh* and *parsadi* lease of the same Saheki which on the 26th May, 1905, had been granted by the testator to one Birakhbhan.

That lease for which, incidentally, Rs. 1,500 was given, was for a term of 22 years, expiring on the 6th May, 1927, and was therefore current at the testator's death and for $11\frac{1}{2}$ years thereafter. The lease of the 2nd November, 1916, opens with a reference to this earlier lease of 1905, averring that by it the *lakh* and *parsadi* of the culturable and Khudkasht land of Saheki had not been given. On that narrative it proceeds to grant to the appellant for a term expiring on the 2nd November, 1966, a *lakh* and *parsadi* term in Saheki as to the trees on the culturable and Khudkasht lands commencing from its date, and as to the trees upon the rest of the area from the expiry of the term therein granted by the lease of 1905. Now, a comparison of the two leases leaves it more than doubtful whether the initial assertion in the lease of 1916 is correct. On examination it appears that the area expressed to be covered by the earlier lease was not less than but was in effect the same as that expressed to be covered by the later lease; 1,245·74 bighas in the 1905 lease; 1,246 bighas in that of 1916; while the *jama* for which the area comprised in the demise is held is in each lease stated to be Rs. 400. The conclusion induced by reason of the areas included being in fact the same, that the lease of 1916 was in its totality reversionary is borne out first by the fact that it is so alleged in the respondents' plaint, and reiterated in their reply; next, by the fact that in both Courts below it was apparently so

assumed; while nowhere in the record is there any trace that the appellant had so far ever been in possession or enjoyment of anything under his lease. This last circumstance, of course, may be attributable to the possibility that the trees on the culturable and Khudkasht lands of Saheki were not separately worth tapping. But taken in conjunction with the other matters just referred to and in particular with the respondents' own assertion on the subject, their Lordships feel justified in also adopting the assumption on which both Courts proceeded that the lease of 1916 was entirely reversionary expectant on the expiration of that of 1905.

The grantors of the lease of 1916 were, as has been said, the respondent Sharif, his three brothers and the testator's two widows. On its face Sharif is once more treated as adult, and his three brothers, acting through him as their guardian, are stated to be aged 9 years, 8 years and 7 years respectively. The lease, in view of the real facts as above stated, is a curious piece of conveyancing: the lessors are treated as having been the grantors of the 1905 lease: as being the persons who had become indebted: as if, in fact, the testator had never been connected with the property at all. The consideration for the lease was Rs. 4,000. Rs. 2,000 were retained by the appellant to pay with interest four named creditors of the lessors to that amount. Rs. 1,000 is expressed to have been paid to the lessors, and the remaining Rs. 1,000 was to be paid to them within three months. Although all this was so expressed in the lease it seems to have been common ground at the trial that the debts for Rs. 2,000 were the testator's debts of that amount mentioned in his will, while the other payments were in fact made to and received by Sharif. The record contains receipts for advances by the appellant to Sharif, subsequently made from time to time, with particulars of a suit brought by him to recover these advances, and finally of a decree against Sharif for Rs. 7,920, of the 16th April, 1924. On the 17th July.1924, three months after that decree, but seven and a half years after the lease of 1916, the action to set that lease aside, out of which this appeal arises, was commenced. It need hardly be said that this sequence of events has not been lost sight of by the appellant. The two widows with Hasam were by this time dead. The interest of Hasam had on his death passed to one or other of the respondents, who as the remaining grantors of the lease, were plaintiffs—Kadar, with his age strangely enough given as 14, and Latif, with his age even more strangely given as 8, each suing by a so-called "guardian brother," Rahimdadkhan.

The plaint, after correctly stating the title of the plaintiffs and the grant of the lease of the 2nd November, 1916 (describing it as already stated as a lease in all respects reversionary), by paragraph 6 alleges that the plaintiff Sharif was born on the 6th September, 1899, that at the date of the lease he was still a

minor about 17 years of age; that being a minor he could not under any circumstances act as guardian of his two co-plaintiffs and Hasam and that the contract was void according to law; that even if Sharif was then major he was not the lawful guardian of his younger brothers whose rights could not be affected by the contract.

By paragraph 7 it is further alleged that the appellant obtained the lease for many years and for very little price by taking advantage of the tender age of Sharif and by putting pressure on him; that there was no necessity for giving the lease because the debts of the testator could have been satisfied out of the considerable income of the mauza; that the three younger brothers of Sharif had obtained no benefit from the lease and it could not affect their rights. In the respondents' oral pleading the undue influence alleged was said to be due to the fact that the appellant was able to dominate the will of Sharif as he was a distant relative and Sharif was a boy of tender age; that he took undue advantage of that position and exercised undue influence. On these allegations the claim was that if Sharif were a minor at its date the lease should be set aside on repayment of Rs. 2,000; that whether he were major or minor it should be set aside as against his younger brothers. Separately if Sharif was major, the lease should be cancelled on the ground of undue influence.

The respondents' case at the trial was mainly based on the allegation that Sharif was minor at the date of the lease. Witness after witness was called to depose to this. The allegation was found by both Courts to be false. Some evidence was directed to the allegation of inadequate consideration but there was no evidence of undue influence then adduced. Sharif was not even a witness on his own behalf. He was at the close produced for cross-examination by the appellant. And his evidence was quite unequivocal. His conduct throughout had been blameless. He was no gambler, he said, whatever debt he incurred, he incurred it for joint family purposes. The most he would say about undue influence was that he had signed the lease at the instance of the appellant. But he had never reported to the police that any pressure was brought to bear upon him, and he did not even then say so. By the appellant the suggestion of undue influence was in evidence repudiated. Distantly related to the respondents' family he had throughout acted with generosity towards both them and Sharif.

And there was no evidence to the contrary of all this. And here it may be noted that although the plaint seeks to distinguish in some aspects of it the case of Sharif from that of his co-plaintiffs, no attempt was made at the trial to make that position good by evidence. At the trial all the plaintiffs made common cause, and after a prolonged hearing the learned Subordinate Judge arrived at conclusions which in effect are thus summarised by the learned Judicial Commissioners.

(*a*) That Sharif's age was approximately 22 when the lease in suit was executed;

(*b*) That the appellant was not then in a position to dominate the will of Sharif;

(*c*) That the consideration was adequate and that the transaction was a fair one into which undue influence did not enter;

(*d*) That Sharif was appointed guardian to his minor brothers under the will of the testator and duly executed the lease in this capacity being *de facto* guardian and manager as well; and

(*e*) That the lease was given for purposes beneficial to the family and that the appellant had made due inquiry before entering into it.

Their Lordships associate themselves with these findings. A perusal of the record shows that they were each of them fully warranted by the evidence or by the lack of evidence which the learned Judge had to take into account. For example, upon the question of Sharif's age at the date of the lease, the evidence is overwhelming to establish that his allegation of infancy at that date (the Respondents' main contention at the trial and later in the Court of the Judicial Commissioner) was entirely false. The learned Subordinate Judge, having seen Sharif, notes that in appearance he was much older than he represented himself to be. But his irresistible conclusion to the same effect resulted from authentic documents and proved transactions. The testator in his will of 1915 treated Sharif as then adult; in the mutation proceedings of 1916, as already stated, he held out himself as adult. In evidence he admitted that as early as 1914 he was acting as agent of his mother, and that in February, 1916, he engaged a pleader and executed a power in his favour. In 1915, in a Revenue case he is found stating on affirmation that he was then 23; in a statement recorded in 1917 he gave his age as 24; in December, 1923, he is found in a Revenue case giving his age as 30. The learned Subordinate Judge is well justified in his statement that this allegation of infancy at the date of the lease was not *bona fide* made. To their Lordships it seems to disclose almost incredible effrontery. But for this, its striking characteristic, they would not have troubled with it, for the Court on appeal agreed as will be seen with the finding on this point, so that it is now concurrent. But the baselessness of the allegation upon which so much was made to depend throws upon the whole claim a sinister light instructing caution in dealing with the other issues raised by the respondents which, if their Lordships may so far anticipate, was absent from the judgment of the Judicial Commissioners.

With regard to findings (*b*) and (*c*) there was no evidence adduced to support the contrary view that the appellant was at the date of the lease in a position to dominate the will of Sharif. He did not even in his own evidence at the trial suggest that he had been the victim of any undue influence whatever.

Finding (*d*) has not since been adversely criticised, and may be passed over now. But some comment may here be conveniently made on findings (*c*) and (*e*). While there was evidence which in their Lordships' view fully justified these findings, they are more open to criticism than are the others.

First of all it may be conceded that the lease of 1916 bears on its face the appearance of a highly speculative transaction—it is the disposition of the entire revenue derivable from *lakh* from the mauza over the long term of 40 years, expiring 50 years thence, and all for a payment of Rs. 4,000 down. But this *prima facie* impression does not survive an examination of the circumstances surrounding the lease. The testator himself has in his will placed on record the position of his estate at the time of his death. A year later the debts for Rs. 2,000 were still unpaid, and they were carrying interest. Other payments were maturing, while the respondents are content to leave, as being completely justified, the Rs. 25,000 debt which Sharif, administering the estate, has incurred.

Again, the fact that the whole payment for the lease was made in one initial sum was apparently in no way unusual. That was an incident of the lease of 1905 granted by the testator himself, and is characteristic of similar leases referred to by witnesses at the trial. Next the consideration seems in no respect to have been inadequate. Perhaps little importance is to be placed on the fact that the declared annual value—Rs. 80—of the *lakh* was small. But, even if the fact that the appellant derived no benefit from the lease until 10 years had elapsed be also ignored, the Rs. 4,000 for this lease represented a much larger payment proportionately than that obtained by the testator himself for the lease of 1905. Again, by the course adopted, Rs. 4,000 was obtained without for 10 years any loss of revenue to the lessors, and merely by a continuance after that date of a position which, initiated by the testator, would then have been existent for 27 years. It seems, however, that the most serious criticism levelled against the lease is that it was made when the price of *lakh* was rising and that during the years of the war it had risen to Rs. 100 per maund in place of from Rs. 15 to Rs. 20 its price at the date of the lease. It is, however, not clearly emphasised in these criticisms that no benefit accrued to the appellant from this rise in price. It is not remembered that it was to the lessee under the lease of 1905 that it accrued exclusively. Nothing has been said as to the value of *lakh* in and since 1927. It will be surprising if it has not shared the fate, in the matter of price, of nearly all other commodities. But if once the lease of 1916 can be justified as at its date—and it has been so justified—these fluctuations in value, whether up or down, appear to their Lordships to have small bearing on the present issue. Moreover, the Board would point out that except in its relevance in a remote sense to the case of undue influence the question of the adequacy of the payment made by the

appellant for the lease cannot affect its validity in his hands. This, as it has developed, is not an action by the infant respondents against Sharif to make him responsible for mal-administration of their affairs. It is an action in which they are all making common cause as lessors to set aside a lease of which they are all equally free or by which they are all equally bound. Their Lordships would also point out that until it has been established that the appellant was "in a position to dominate the will of" Sharif, no assistance on the issue of undue influence is available to the respondents from section 16 (3) of the Indian Contract Act. That issue, in other words, remains with its burden of proof on them. The burden must be discharged if the issue is to be found in their favour. It will be seen in a moment that these last two considerations become of importance when the course of the case in the Court of the Judicial Commissioner comes to be dealt with, as their Lordships now proceed to do.

The learned Subordinate Judge, upon his findings, dismissed the suit, and the respondents, the plaintiffs, appealed.

The judgment of the Court on appeal was delivered by the Judicial Commissioner and the Assistant Judicial Commissioner on the 22nd November, 1927. As already stated, these learned Judges were in agreement with the Subordinate Judge on the question of Sharif's age, but that finding introduced no reserve in their treatment of the other issues of the case, all of which were stressed strongly against the appellant—so strongly indeed that while setting aside the lease and ordering the return to the appellant of the Rs. 4,000 which he had paid $7\frac{1}{2}$ years before, the learned Judges saw no reason for allowing him any interest thereon, although he in the interval had had no benefit whatever from the demise.

The learned Judges begin their judgment by observations on the testator's lease of 1905 which seem to indicate that in their view it was more and not less favourable to the estate than the lease of 1916. The following later passages in their judgment explain themselves.

The appellant "admits that he has been making money by taking *lakh* contracts and he must be assumed to be a man with so to speak expert knowledge of the *lakh* market. At the time the lease was taken the price of the *lakh* was on the up grade. . . . The transaction on the very face of it from its own internal evidence was obviously a catching bargain of a typical kind. Mohammad Sharif must at the time have been an utterly inexperienced lad and there has been no proof whatever of any pressure on the estate to justify the first plaintiff entering into the extraordinary transaction he did on the date in question. It is true that his father left a debt of some Rs. 2,000 but the family property was quite a valuable one and it is almost impossible to suppose that arrangements less disastrous to the future of the family property could not have been made for paying off the debt in question. . . That it was the beginning of the downward

path for Mohammad Sharif in his management of his estate, is also evidenced by the fact that he has since borrowed Rs. 6,000 more from the same defendant-respondent . . . evidence shows that in 1925 the estate had been mortgaged for Rs. 25,000 more, this mortgage having apparently been executed partly in order to pay off a decree of the present defendant-respondent who had attached the village share. . . . Proof of undue influence, like proof of fraud, cannot ordinarily be obtained by direct evidence. It must be essentially a matter of inference. . . . When we take into account the fact that Gafoor Mohammad is an elderly man and a relation of the youthful plaintiffs and that he is, so to speak, admittedly an expert in *lakh* contract work, the inevitable conclusion arises that this was a catching bargain of a very pronounced type, and the circumstances, in our opinion, lead to the irrefragable conclusion that the lease in question was one executed as a result of undue influence brought to bear on the first plaintiff by the defendant-respondent . . . the lease in question must be held to be void . . . the plaintiffs must refund the total consideration of Rs. 4,000 received by them, but we see no reason to allow interest on this amount."

The answer which their Lordships would make is to be found in the earlier portion of this judgment. Summarised, it is that the conclusions of the learned Judges where they are not directly opposed to the evidence are in no way supported by it. Their conclusions are based on mere conjecture with countervailing considerations ignored; such a method of reasoning is not judicially permissible. Their Lordships, upon the actual evidence in the cause are far from suggesting that the judgment and conclusions of the learned Judges could be supported, even if, under section 16 (3) of the Indian Contract Act, the burden of showing that the lease of 1916 had not been induced by undue influence lay upon the appellant. They are clear, however, that with the burden of the affirmative resting upon the respondents, the judgment cannot stand.

Their Lordships accordingly are of opinion that the appeal should be allowed, the decree of the Court of the Judicial Commissioner being discharged, and that of the Subordinate Judge restored.

And they will humbly advise His Majesty accordingly.

The respondents must pay to the appellant his costs of their appeal to the Court of the Judicial Commissioner and the costs of this appeal.

In the Privy Council.

GAFUR MOHAMMAD

v.

MOHAMMAD SHARIF AND OTHERS.

DELIVERED BY LORD BLANESBURGH.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1932.