Privy Council Appeal No. 34 *of* 1930.
Oudh Appeal No. 1 *of* 1929.

Mohammad Ejaz Husain and another - - - - *Appellants*

v.

Mohammad Iftikhar Husain and others - - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER, 1931.

Present at the Hearing:

VISCOUNT DUNEDIN.

SIR LANCELOT SANDERSON.

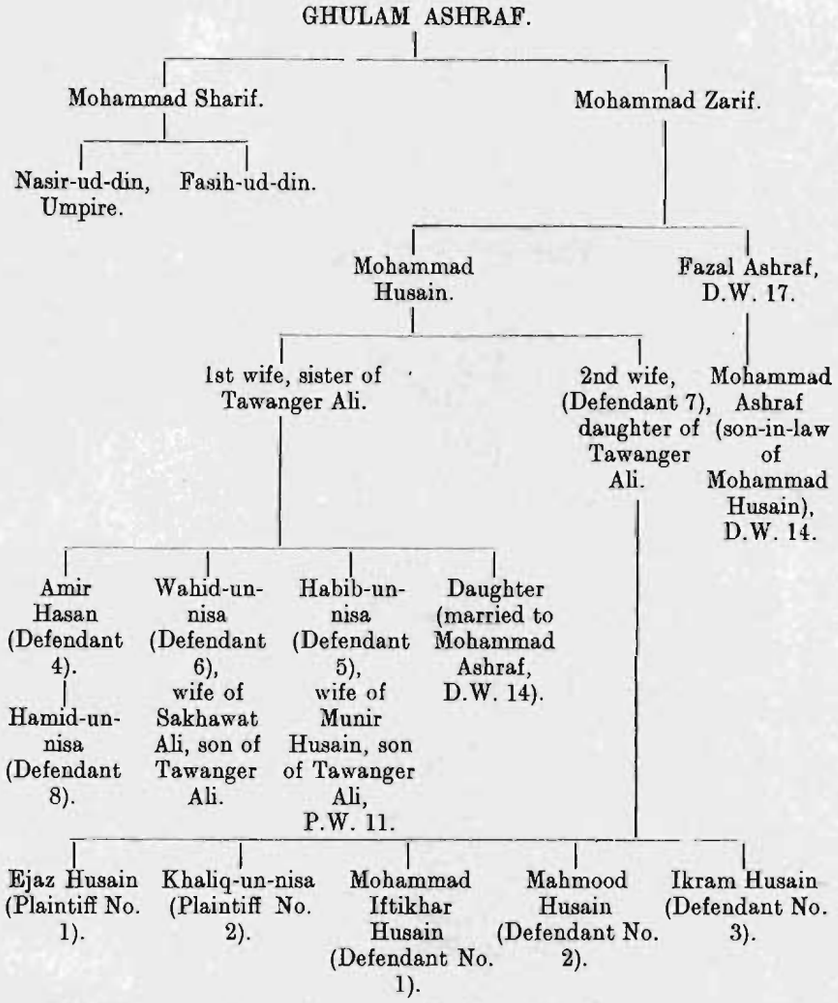
SIR GEORGE LOWNDES.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by the plaintiffs in the suit against a judgment and two decrees of the Chief Court of Oudh, dated the 18th October, 1928, which reversed the decree of the Subordinate Judge dated the 17th January, 1928, as amended by his order dated the 8th March, 1928.

The suit was brought by Mohammad Ejaz Husain and his sister Khaliq-un-nisa against their full and half-brothers and sisters, their mother Faiyaz-un-nisa and Hamid-un-nisa, the wife of Amir Hasan, the defendant No. 4.

The relationship between the parties to the suit appears from the pedigree which was attached to the judgment of the Chief Court, and which is as follows :—



The suit was brought for a declaration that an agreement dated the 25th March, 1912, and an award dated the 2nd April, 1912, were null and void and inoperative and for a partition of certain properties alleged to have been the properties of the plaintiffs' father, Mohammad Husain.

The learned Subordinate Judge, who tried the suit, made a decree in the plaintiffs' favour : this decree was subsequently amended on an application for review, and it was thereby directed that the plaintiffs should get from the defendant No. 4 (*i.e.*, Amir Hasan) a 21/104th share, first, out of the sum of Rs. 25,526, being the capitalised value of a factory, and, secondly, a declaration of their rights to that extent out of the property No. 10 of the plaint list A, in so far as it was left :—

> " . . . after meeting claims of the original owners and the acquisition by the Improvement Trust, and also out of the property No. 20 of the list, which is a family graveyard. Possession over the share-out of the property No. 10 can be obtained only after redemption of the mortgage assigned to the defendant 4 (*vide* Exhibit 11), the trust compensation money being taken to have satisfied *pro rata* a part of this mortgage debt.
>
> " Plaintiffs shall further get interest on the amount under the first head at the rate of Rs. 12 per cent. per annum from 4th March, 1912, to the date of realisation. Costs on parties. A preliminary decree for partition to be prepared in those terms."

From this decree both Amir Hasan, defendant No. 4, and the plaintiffs appealed to the Chief Court of Oudh.

The learned Judges of the Chief Court allowed the appeal of Amir Hasan and dismissed the appeal of the plaintiffs. The result was that the plaintiffs' suit was dismissed, the Chief Court directing that the parties should bear their own costs in both Courts.

These are the decrees from which the plaintiffs have appealed to His Majesty in Council.

Amir Hasan has died since the decree of the Chief Court was made, and his representatives are now on the record, and they are the only respondents contesting this appeal.

The material facts are as follows :—

Mohammad Husain, the father of the plaintiffs and of the defendants Nos. 1 to 6, died on the 4th of March, 1912.

On the 25th March, 1912, an agreement of reference to arbitration was executed by Amir Hasan (the fourth defendant), his two sisters (defendants Nos. 5 and 6), and Faiyaz-un-nisa (defendant No. 7), who was the surviving widow of Mohammad Husain, and the mother of the plaintiffs and the defendants Nos. 1, 2 and 3.

The plaintiffs and the defendants Nos. 1, 2 and 3 were minors at the date of the agreement, and their mother purported to execute the agreement for herself in person and as guardian in the capacity " of the real mother " on behalf of the plaintiffs and her other minor children. By the said agreement all matters in dispute were referred to two arbitrators and an umpire, who were named in the said agreement.

One of the issues raised at the trial was as follows :—

> " (1) Did Mohammad Husain constitute the defendant No. 7 as guardian of the person and property of plaintiffs as well as of defendants Nos. 1 to 3. If so, with what effect ? "

This issue was answered in the negative by the learned Subordinate Judge, and his decision in this respect was approved by the Chief Court.

It has not been argued before the Board that these findings were wrong, and the appeal must therefore be decided upon the assumption that Faiyaz-un-nisa was not appointed by Mohammad Husain guardian of the person and property of the plaintiffs.

Further, it is to be noted that at the date of the said agreement Faiyaz-un-nisa had not been appointed guardian of the person and property of her minor children by the Court.

On the 3rd of April, 1912, the arbitrators, with the concurrence of the umpire, made their award in writing. They decided :—

> " (1) That the properties acquired by the deceased in the name of his wife, Faiyaz-un-nisa, defendant No. 7, belonged to her as her separate properties and that she was entitled to those properties ; (2) that the properties acquired by the deceased in the name of Amir Hasan, defendant

No. 4, were his separate properties and that he was entitled to them; (3) that the factory known as the Victor Ice and Flour Mills, situate at Bagh Sherjang, City Lucknow, was given to Amir Hasan by the deceased during his lifetime and the same belonged to him, and (4) that the remaining properties should be distributed among the several heirs according to their legal shares under the Mohammadan law."

The award was carried out and acted upon until the filing of this suit.

On the 18th July, 1912, Faiyaz-un-nisa filed an application in the Court of the District Judge of Lucknow under Section 10 of the Guardians and Wards Act (VIII of 1890), praying for a certificate of guardianship of the person and property of her minor children, including the plaintiffs.

On the 18th September, 1912, the certificate was issued.

The plaintiff, Mohammad Ejaz, attained his majority on the 21st October, 1923.

The plaintiff, Khaliq-un-nisa, attained her majority on the 8th October, 1925.

The suit was instituted on the 20th October, 1926, just within three years from the date on which the first plaintiff attained his majority.

In the suit many issues were raised, but it is not necessary to refer to them all. Both the Courts in India held that the properties acquired by Mohammad Husain in the names of Faiyaz-un-nisa and Amir Hasan belonged to the two last-mentioned persons respectively, and on these matters they agreed with the decision of the arbitrators. No question arises in this appeal with respect to these properties.

It is material, however, to note that at the time of the arbitration the interest of Faiyaz-un-nisa and that of her minor children were not identical with respect to the properties standing in her name, for if the arbitrators had come to the conclusion that Faiyaz-un-nisa was holding these properties *benami* for her husband, as alleged, the minor children would have been entitled to their respective shares therein.

Both Courts in India decided the issue as to the factory known as the Victor Ice and Flour Mills in the plaintiffs' favour. Disagreeing with the award in this respect, they held that the alleged oral gift of the factory by Mohammad Husain to Amir Hasan had not been established. The concurrent findings in respect of this issue have not been disputed in this appeal. It must therefore be taken for the purposes of this appeal that the said factory was part of the estate of Mohammad Husain at the date of his death and that, subject to the question hereinafter to be considered, the plaintiffs, as two of his heirs, are entitled to their respective shares in the said factory.

There is no dispute as to the shares to which the plaintiffs are entitled in the properties of their father, viz., 14/104ths in respect of the first plaintiff, and 7/104ths in respect of his sister, the second plaintiff.

The main issue raised in the Court of the Subordinate Judge was whether Faiyaz-un-nisa, acting on behalf of her minor children, the plaintiffs, was competent to refer to arbitration the matter of the division of the assets of Mohammad Husain and questions connected therewith, and consequently whether the plaintiffs were bound by the award.

The Subordinate Judge decided this issue in favour of the plaintiffs, on the ground that Faiyaz-un-nisa, the mother of the plaintiffs, had no authority to refer, so as to bind the plaintiffs.

He was of opinion that otherwise the award did not appear to be perverse, unfair or influenced by any corruption or misconduct of the arbitrators.

The learned Judges of the Chief Court agreed with the conclusion of the Subordinate Judge on this issue and held that the agreement to refer to arbitration executed by Faiyaz-un-nisa on behalf of her minor children could not be considered binding on them and that the award, if looked at from that point of view, must be held to be an inoperative document.

The learned Judges of the Chief Court, however, were of opinion that the scheme of distribution promulgated in the award, and which the learned Subordinate Judge had found to be in no way perverse or unfair or influenced by any corruption or misconduct of the arbitrators, and which had been followed without any objection whatever for a long period extending over fourteen years, could well be recognised as a family settlement, and they stated that they were extremely reluctant to disturb the arrangement arrived at so far back as April, 1912.

Their Lordships appreciate the reluctance felt by the learned Judges, in view of the time which had elapsed since the arbitration and award. But the plaintiffs, on the death of their father, became entitled to their respective shares in his estate, and in view of the findings of both Courts in India it must now be taken that the above-mentioned Ice and Flour Factory was part of the immoveable property of Mohammad Husain, in which the plaintiffs were entitled to share, and yet by the award it was allotted to Amir Hasan as being his own property. The award in this respect, when carried out, amounted to an alienation of the plaintiffs' shares in that property, to which being infants they could not consent, and unless Faiyaz-un-nisa, their mother, had authority to act on their behalf and was competent to enter into the alleged arrangement by which the said alienation was effected, the infant plaintiffs' shares in the said property could not be affected.

The learned Judges held that Faiyaz-un-nisa, although she was at the time of the agreement the " de facto " guardian of the plaintiffs, who were then minors, had no power to deal with their property, and consequently that she had no authority to enter on their behalf into the agreement to refer the disputes to arbitration, which, if acted upon, would necessarily affect the immoveable property of the infant plaintiffs.

If Faiyaz-un-nisa was not competent to deal with the immoveable property of the plaintiffs, by referring the disputes relating to the distribution of their father's estate to arbitration, and if the award made on such arbitration was not binding on the plaintiffs, it is difficult to see how Faiyaz-un-nisa could be competent to effectuate that distribution and to make the provisions of the award binding upon the infant plaintiffs merely by calling that which was contained in the agreement and the award a family arrangement.

Their Lordships are of opinion that if Faiyaz-un-nisa was not competent to enter into the agreement of reference so as to bind the plaintiffs, who were minors at the time, with respect to their share in the immoveable property of their father, it must follow that she was equally incompetent to agree to the disposal of the infant plaintiffs' share in any part of the immoveable property of their father by adopting the award and by calling the transaction a family arrangement.

It is therefore necessary to consider the question whether Faiyaz-un-nisa had authority to enter into the agreement of reference on behalf of the plaintiffs who were minors at the time.

It has already been stated that Faiyaz-un-nisa was not appointed guardian of the person and property of the minor children by Mohammad Husain, and that at the date of the agreement of reference she had not been appointed guardian by the Court.

At the time, therefore, of the agreement to refer she was not the legal guardian of her infant children, but merely the custodian of them. The provisions and principles of the Mahomedan law which govern this matter were stated in the judgment of Mr. Ameer Ali when delivering the decision of this Board in *Imambandi* v. *Mutsaddi*, 45 I.A. 73. At page 83 the following passage is to be found :—

> " It is perfectly clear that under the Mahomedan law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian ; the father alone, or, if he be dead, his executor (under the Sunni law) is the legal guardian. The mother has no larger powers to deal with her minor child's property than any outsider or non-relative who happens to have charge for the time being of the infant. The term ' de facto guardian ' that has been applied to these persons is misleading ; it connotes the idea that people in charge of a child are by virtue of that fact invested with certain powers over the infant's property. This idea is quite erroneous, and the judgment of the Board in *Mata Din* v. *Ahmed Ali* (L.R. 39, I.A. 49) clearly indicated it."

At pages 84 and 85 there are other material passages, which are as follows :—

> " As already observed, in the absence of the father, under the Sunni law, the guardianship vests in his executor. If the father dies without appointing an executor (*wasi*) and his father is alive, the guardianship of his minor children devolves on their grandfather. Should he also be dead and have left an executor, it vests in him. In default of these *de jure* guardians, the duty of appointing a guardian for the protection and pre-

servation of the infants' property devolves on the judge as the representative of the Sovereign : Baillie's Digest (ed. 1875), p. 689 ; Hamilton's Hedaya, vol. 4, bk. 52, c. 7, p. 555. No one else has any right or power to intermeddle with the property of a minor, except for certain specified purposes, the nature of which is clearly defined. But the powers of even the *de jure* guardians are confined within legal limits. For example, whilst an executor-guardian (*wasi*) may 'sell or purchase movables on account of the orphan under his charge either for an equivalent or at such a rate as to occasion an inconsiderable loss,' dealings with his immovable property are subjected to strict conditions : Baillie's Digest, p. 687.

* * * * * *

" When the mother is the father's executrix, or is appointed by the judge as guardian of the minors, she has all the powers of a *de jure* guardian. Without such derivative authority, if she assumes charge of their property of whatever description and purports to deal with it, she does so at her own risk, and her acts are like those of any other person who arrogates an authority which he does not legally possess. She may incur responsibilities, but can impose no obligations on the infant."

Mr. Ameer Ali then referred to certain exceptions provided for the protection of a minor child who has no "*de jure*" guardian, which were classified under three heads : it is clear that the present case does not fall within any of the stated exceptions.

The decision in the above-mentioned case was acted upon by Teunon and Beachcroft JJ. in *Mohsiuddin Ahmed* v. *K. Ahmed*, I.L.R. 47, Cal. 713, the head note of which is as follows :—

" The mother, as the *de facto* guardian of minors, is not competent, under the Mahomedan law, to enter on their behalf into an agreement to refer to arbitration any dispute, even where there is no *de jure* guardian of the minors, such agreement being one which will necessarily, if acted upon, involve dealings with the immovable properties of the minors."

" *Imambandi* v. *Mutsaddi* referred to."

Adopting the principles of Mahomedan law as stated by this Board in *Imambandi* v. *Mutsaddi*, their Lordships have no doubt that the Courts in India were right in holding that Faiyaz-un-nisa had no authority to enter into the agreement of reference on behalf of the plaintiffs, who were minors at the time, so as to make the award binding upon them as to their share in the immoveable property of their father.

They are also of opinion that Faiyaz-un-nisa had no power or authority to enter into an arrangement whereby the plaintiffs' share in the immoveable property of their father would be affected, in view of the fact that at the time of the said agreement she was not their legal guardian, and she cannot be clothed with the necessary authority by calling the transaction a family arrangement.

Their Lordships' attention was drawn by learned Counsel for the respondents to several reported cases : in their opinion, it is not necessary to deal with them in detail. It is sufficient to say that none of them covered the point which is now under consideration.

Reliance was placed by the learned Counsel for the respondents upon the fact that on the 18th September, 1912, Faiyaz-un-nisa

was appointed by the Court guardian of the person and property of the minors, including the plaintiffs, and that therefore it should be taken that the Court, by appointing Faiyaz-un-nisa guardian, must have approved the arrangement evidenced by the agreement of reference and the award. There is, however, no evidence that the District Judge was made aware of the said arrangement. Indeed, it was admitted that if an application had been made to him before the agreement to refer was executed, and if he had been informed that the interest of the mother with regard to some of the properties was not identical with that of the minors, as was the fact, the Judge would in the ordinary course have appointed some person, other than the mother, as guardian of the minors. It is obvious that the District Judge did not consider the question which is now before their Lordships, and the mere fact that the Court subsequently found the mother a fit person to act for the minors would not validate the arrangement, which in its inception was invalid.

A further point was raised by the learned Counsel for the respondents, viz., that the plaintiff Ejaz Husain could not maintain the suit because he had ratified the alleged family arrangement as to part of the estate allotted to him by the award.

It appears that certain mortgage deeds had been executed in favour of Mohammad Husain and these were included in the shares awarded to the plaintiff and his brothers. A suit on the mortgages was instituted on the 13th October, 1922, by Iftikhar Husain after attaining majority, and his three brothers, of whom Ejaz Husain was one, as minors, under the guardianship of their mother.

A preliminary decree was obtained on the 11th October, 1923, and an application was made for a decree absolute on the 22nd September, 1924, and the decree was made absolute on the 1st November, 1924—Ejaz Husain was of age when the application for decree absolute was made, and signed it as a major.

Their Lordships do not consider that this is sufficient to prevent Ejaz Husain from maintaining the present suit. Proceedings in the mortgage suit had been begun when he was a minor, and when the time came for application for a decree absolute the mother had no longer any authority to act for him, as he had attained majority, and Ejaz being a party to the suit his signature to the application was necessary to bring the proceedings to a conclusion in the interest of all concerned.

The learned Counsel for the plaintiffs contended that they were entitled to an account of and a share in all the profits made by Amir Hasan in respect of the Ice and Flour Factory.

Their Lordships are unable to accept this contention.

It appears that Amir Hasan managed the business of the factory in his father's lifetime and continued so to do after his death. The old factory has gone, most of the machinery being worn out, and modern factories were erected by him in its place.

These and other facts stated by the learned Subordinate

Judge, which need not be mentioned in detail, are sufficient to show that this is not a case for mesne profits. The rights of the plaintiffs in this respect are fully met by the allowance of interest at the rate of 12 per cent. per annum made by the Subordinate Judge. It is worthy of note that the plaintiff-appellants in their case did not ask for mesne profits, but submitted that the decree of the learned Subordinate Judge should be restored, and that Rs. 25,000, the amount fixed by the Chief Court, should be substituted for Rs. 25,526, which was the sum decreed by the learned Subordinate Judge as the capitalised value of the factory.

For the above-mentioned reasons their Lordships are of opinion that the appeal must be allowed, the decrees of the Chief Court dated the 18th October, 1928, must be set aside, and the decree of the Subordinate Judge dated the 17th January, 1928, as amended by the order of the 8th March, 1928, be restored, but that the sum of Rs. 25,000 be substituted for the sum of Rs. 25,526 mentioned in the said decree of the Subordinate Judge.

The respondents, the heirs of the deceased respondent, Sheikh Amir Hasan, must pay the costs of the plaintiffs of this appeal, and of the appeals to the Chief Court. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

MOHAMMAD EJAZ HUSAIN AND ANOTHER

v.

MOHAMMAD IFTIKHAR HUSAIN AND OTHERS.

DELIVERED BY SIR LANCELOT SANDERSON.

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