Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Kali Dutt Jha and others v. *Sheik Abdool Ali and another from the High Court of Judicature at Fort William, in Bengal, delivered* 19*th December* 1888.

Present:

LORD FITZGERALD.
LORD HOBHOUSE.
SIR RICHARD COUCH.
MR. STEPHEN WOULFE FLANAGAN.

[*Delivered by Sir Richard Couch.*]

The suit which is the subject of this appeal was brought by the Respondents to have it declared that a deed of sale, dated the 7th May 1862, executed by the Defendant Sheik Reazuddin Hossein, the father of the Plaintiffs, was invalid, and for possession of one anna share in Talook Wari, which was the subject of that deed.

Mahomed Ali, who died in November 1854, had two wives, Wasimunissa annd Fakirunnissa. By the former he had a daughter, Udulunnissa, and by the latter a son, Mahomed Hossein. Udulunnissa married the Defendant Reazuddin, and died on the 26th October 1861, leaving a son and daughter, the Plaintiffs. Talook Wari had been resumed as invalid Lakheraj in 1840, and from that time to its final settlement by the Collector had been temporarily let to various persons. Disputes arose and doubts existed as to the persons who were entitled to settlement, and the final settlement was not made until the

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19th May 1862. Between 1840 and 1862 there had been various dealings with the talook. It will be sufficient to mention those which affected the parties to this suit. On the 19th December 1856 Syed Sufdar Hossein executed a deed of sale of 1 anna 3 pie 11 cowris, plus a fraction (which may conveniently be called a 2-annas share) in the talook and its dependency Sosi Narhat, in favour of Bhuput Jha and Madhuri Jha in consideration of Rs. 2,250. On the 6th January 1857 Sufdar Hossein executed another deed by which, after stating the sale of the 19th December, and that owing to the inattention of the purchasers the mutual exchange of equivalents did not take place, and the deed of sale remained with him; and that Udulunnissa and Fakirunnissa had by their karpurdazes claimed the right of preemption by reason of having, previously to the sale to Bhuput Jha and Madhuri Jha, purchased other shares in the talook, Sufdar Hossein sold the 2-annas share to Udulunissa and Fakirunnissa for Rs. 2,250. On the 11th August 1856, the 4th December 1856, the 6th January 1857, the 29th January 1857, and the 23rd February 1857, purchases of other shares in the talook and its dependency were made by Udulunnissa and Fakirunnissa. These shares, together with the share sold to them on the 6th January 1857, made up 9 annas of the talook, half of which was declared to belong to each of them. On the 31st December 1861 five suits were instituted against Fakirunnissa and Udulunnissa by Surdhari Jha, the ancestor of some of the Defendants, to establish a right of preemption to the shares composing the 9 annas, and the Collector had before him these conflicting claims to the settlement.

It was in this state of things that the deed of the 7th May 1862 was executed by the duly empowered mokhtar on behalf of Reazuddin Hossein,

described as the father and guardian of the Plaintiffs, minor heirs of Udulunnissa, and on behalf of Fakirunnissa, mother and guardian of Mahomed Hossein, her minor son. By this, a 2-annas share of the 9 annas of the talook was sold for Rs. 6,235 to Bhuput Jha, Sardhari Jha, Madhuri Jha, and Ramdat Jha, described as the shareholding proprietors and inhabitants of the talook Wari. And it was stated that the Rs. 6,235 was for liquidating the debts due to Babu Gopal Das and Bunsi Lal, mahajuns. One anna was said to be purchased by Bhuput Jha and one by the other three. The books of the firm of Gopal Das and Bunsi Lal were produced. They contained accounts in the name of Mussummat Wasimunnissa, the grandmother of the Plaintiffs, who appeared to be possessed of considerable property, but had no interest in the Talook Wari. From various entries in these accounts they appeared to relate to this talook as as well as to the property and transactions of Wasimunnissa. In the account for the year 1269 (1861–62), under the native date corresponding with 16th May 1862, is the following entry :—

	R.	A.	P.
"The 3rd Jeyt Budi. Received on account of the consideration money of two annas of Talook Wari debited to Bhuput Jha, Sardhari Jha, Madhuri Jha, and Ramdat Jha - - -	6,325	0	0
"Deduct on account of the share of Fakirunnissa, which is debited to her - - -	3,117	8	0
"Remainder - - - Rs.	3,117	8	0

On the other side of the account, under a date corresponding with the 13th January,

among the entries of "paid on account of re-"venue into Collectorate," there is an entry "Wari, Rs. 181. 9," and under a date corresponding with the 29th March an entry "Wari "of Raja, Rs. 447. 15.," and on the date corresponding with the 26th May 1862 there is an entry, "Paid through Sheik Velait Hossein, in "order to defray the expenses of the settlement "of talook Wari Rs. 2,500." It appears from the proceedings of the Collector of Tirhoot, dated the 19th May 1862, in a suit for obtaining permanent settlement of Talook Wari, that a petition was filed on behalf of Bhuput Jha and Madhuri Jha, stating that they were the purchasers of A. 1. 3. 11 cowris and a fraction share, and subsequently on the 10th May 1862 a petition of withdrawal was filed on their behalf, stating that they withdrew from that claim filed previously, and praying that the deed of sale to them on the 19th December 1856 might be considered ineffective, and that the settlement might be effected with Fakirunnissa and others. And that subsequently, on the 12th May 1862, another petition was filed on their behalf with the deed of the 7th May 1862, praying that a settlement of the 2-annas share mentioned in that deed should be made with them. On the same 7th May 1862, consent decrees were made in the five pre-emption suits by which they were dismissed. Thus all opposition on the part of the Jhas as regards seven annas was withdrawn, and they claimed the settlement of only two annas under their new title. In the end the settlement was made with Fakirunnissa, described as mother and guardian of Mahomed Hossein, and Reazuddin described as father and guardian of the Plaintiffs, for seven annas of the nine, and with the Jhas for the remaining two annas. The allegation in the plaint that Reazuddin appropriated the consideration for the sale of the

7th May 1862 was not only not proved, but was disproved, and nearly the whole, if not the whole, of the consideration appeared to have been applied on account of the talook.

The Subordinate Judge held that the deed of the 7th May 1872 was valid, saying in his judgement that the pre-emption suits and the Defendants' claim case before the Collector were "impending dangers over Wari at that "time, and what might have been the conse-"quence of those objections cannot be now "determined at this distance of time, and he "should therefore think that Reazuddin acted "wisely in making a compromise with the De-"fendants by executing the disputed kobala so "soon as only eleven months after the death "of Udalunnissa, and thereby to avert that "danger." He dismissed the suit. The High Court set his decree aside, and made a decree for the Plaintiff, being, they said, "on the "whole of opinion that the Respondents (the "Defendants) failed to establish that any benefit "was conferred upon the Appellants by the "sale by their father of the disputed property." The statement in the deed, and in the petition to the Collector on the 12th May 1862 of Reazuddin and Fakirunnissa, asking that a settlement of the 2-annas share should be made with the Jhas, that the sale was for the purpose of liquidating debts due to the mahajans, is not correct, though, looking at Gopal Das's account and the large payment made by his bank on account of Wari three weeks afterwards, the parties may have thought that it was correct; but at all events their Lordships think it does not preclude the Defendants from proving the real nature of the transaction, and that it was a beneficial one to the minors.

It is not a case of a sale by a guardian of immoveable property of his ward, the title to

which was not disputed, in which case a guardian is not at liberty to sell except under certain circumstances. Macnaghten, Principles of Muhammadan Law, ch. 8, cl. 14. The right of Udulunnissa and Fakirunnissa to be purchasers of the nine annas was disputed. By the sale of the two annas the dispute was put an end to and thus a settlement obtained of the seven annas. Moreover, the Rs. 6,235 appeared to be a fair price for the two annas which had in December 1856 been sold by Sufdar Hossein for Rs. 2,250.

Their Lordships differ from the opinion of the High Court that the present Appellants, who were then Respondents, had failed to establish that any benefit was conferred upon the minors by the sale. They are of a contrary opinion, and looking at the whole transaction, they think it was within the power of the guardians to make the sale.

There is another ground upon which the Appellants are entitled to have the decree of the High Court reversed, and the decree of the Subordinate Judge dismissing the suit affirmed.

The case stated in the plaint is that Reazuddin had sold to the Defendants one anna out of four and a half annas, the property left by Udulunnissa in Talook Wari, and the Plaintiffs only got three and a half annas partitioned to them by the Collector. Now Reazuddin, as the husband of Udalunnissa, was entitled to one fourth share of her property, and consequently the Plaintiffs were in possession of more than they were entitled to by inheritance, their shares amounting to $3\frac{3}{8}$ annas. This objection was taken in the written statement of the Jha Defendants. It was attempted to be met by some loose evidence of Reazuddin being liable for dower and relinquishing his share to the Plaintiffs on that account. No document was produced, and the Subordinate Judge found as a fact that Rea-

zuddin did not relinquish his one fourth share. Their Lordships are of opinion, upon the evidence, that this finding was proper, and that the reason given by the High Court for not agreeing in it is insufficient. An admission of Reazuddin that he had relinquished his share, even if it was clearly made in the deed of sale, ought not to affect the other Defendants. He had been ordered to attend as a witness and did not do so, and the Subordinate Judge thought he was in collusion with the Plaintiffs. This was highly probable, and the suit appears to their Lordships to be a dishonest attempt to get back property for which the Plaintiffs had received full consideration and had had the benefit of it.

Their Lordships, will, therefore, humbly advise Her Majesty to reverse the decree of the High Court, to dismiss the appeal to the High Court, with costs, and to affirm the decree of the Subordinate Judge.

The Respondents will pay the costs of this appeal.