

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of
Musammat Rashid-un-nisa v. Muhammad
Ismail Khan and others, from the High
Court of Judicature for the North-Western
Provinces, Allahabad; delivered the 30th
July, 1909.*

Present at the Hearing :

LORD ATKINSON.

LORD COLLINS.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Andrew Scoble.*]

Muhammad Sardar Khan, the father of the Appellant, died on the 1st May, 1888, possessed of a half-share in Mouzah Gaisupur and other property, and leaving as his heirs according to Mahomedan law (1) Ulfat-un-nisa, an adult daughter by his first wife ; (2) the Appellant Rashid-un-nisa, aged four years, daughter by his second wife ; and (3) a brother named Mauladad Khan. Each of them was entitled to a third share in the estate. He also left an illegitimate son, named Abdul Majid Khan, for whom he made provision in his lifetime, by a gift of a share in his Mouzah of Gaisupur, leaving nine biswas of that property to be divided among his legitimate heirs at the rate of three biswas apiece.

At the time of his death, Sardar Khan was indebted to the following persons :—

(1) to Fateh Chand, for Rs. 8,280.11, under a decree dated the 18th December, 1882 ;

(2) to Achal Das for Rs. 2,500, under a bond dated the 31st January, 1882 ;

(3) to Sant Lal and Moti Lal, for Rs. 2,294.1.0, under a decree dated the 17th January, 1883 ; and

(4) to his brother Mauladad Khan, under a possessory mortgage deed for Rs. 14,000, dated the 18th May, 1886.

On the 9th May, 1888, Mauladad Khan filed an application for mutation of names in respect of Gaisupur, in favour of the three legal heirs of the deceased. This application was opposed by Ulfat-un-nisa, on the ground that Abdul Majid (who was then a minor and as to whose illegitimacy she was silent) was entitled to half the estate, to the exclusion of the brother, Mauladad Khan. And the matter was referred to the arbitration of one Abdul Karim Khan, who made his award under date the 12th January, 1889, whereby he gave the largest share of the property to Abdul Majid, and reduced the share of the Appellant Rashid-un-nisa from 3 to $2\frac{1}{4}$ biswas. In this arbitration, Ulfat-un-nisa represented herself as acting as guardian of the minors, Abdul Majid and Rashid-un-nisa, and her general attorney, one Siraj Ahmad, signed the award on their behalf. This award seems to have been so far acted on that mutation of names was ordered to be made in conformity with it.

While these proceedings were pending Ulfat-un-nisa, on the 18th July, 1888, applied to the District Judge of Meerut for a certificate of guardianship under Act 40 of 1858, in regard to both minors, and her application was opposed by Mauladad Khan, as regards Rashid-un-nisa, on various grounds, one being that the minor

was married to his son, Niaz Muhammad Khan, and that he "maintained and looked after" her. He therefore asked that a certificate of guardianship might be granted to himself. His petition is dated the 2nd August, 1888; and by an Order of the District Judge of Meerut, dated the 13th April, 1889, it appears that Ulfat-un-nisa had withdrawn her claim, and a certificate of management of the girl's estate was granted to Mauladad; but, as "the uncle cannot properly be constituted guardian of the girl's person," the Judge directed that she should "remain in charge of her half-sister Ulfat-un-nisa."

Meanwhile, Mauladad was actively engaged in settling the claims against Sardar Khan's estate. On the 6th April, 1889, he purchased, in the name of his four sons, the decree held by Sant Lal and Moti Lal, for the sum of Rs. 2,500; and on the 8th April, 1889, he purchased, in the same names, the claim of Achal Das for the sum of Rs. 3,000. On the 10th June, 1889, he purchased, in his own name, the decree held by Fateh Chand for the sum of Rs. 12,842.2. He thus became the sole creditor of Sardar Khan's estate. He died on the 22nd July, 1893, and the present Respondents are two of his sons, and the representatives of a third son.

The fourth son, Niaz Muhammad Khan, who, as has already been stated, is the husband of the Appellant, instituted the present suit on behalf of his wife, then a minor of fourteen years of age, on the 21st September, 1898. The object of the suit is to obtain a declaration that two decrees and three sales in execution affecting her share in her father's estate are invalid as against the Appellant, who was a minor and not legally represented in the proceedings from which they resulted; and, for the same reason, that the submission to arbitration, and consequent award,

reducing her share from 3 to $2\frac{1}{4}$ biswas, are not binding on her.

It was not seriously contended before their Lordships that these arbitration proceedings, so far as the Appellant's interest is concerned, could be supported. She was then about four years of age, and her consent seems to have been taken for granted to what was no doubt considered a fair family arrangement. But it has never been ratified by her, and is inoperative as regards her interest in her father's property. It is true that, in the award, her sister Ulfat-un-nisa is described as acting "for herself and as guardian of Abdul Majid Khan and Rashidan, minors"; but at the date of the award, the 12th January, 1889, an application was actually pending in her name in the Court of the District Judge of Meerut for a certificate of guardianship of these minors, and this application was rejected by the above-mentioned Order of the 13th April, 1889. The statement in the award was therefore unjustified, and the Appellant is entitled to the declaration which she seeks, that the award is a nullity, as far as she is concerned.

Mauladad Khan, as has already been stated, had in 1889 got into his own hands all the then existing claims against Sardar Khan's estate, and after a short interval, he proceeded to realize them. On the 23rd April, 1891, he applied for execution of Fateh Chand's decree, and in his application the Appellant is described as "Musammat Rashidan, minor, under the guardianship of her sister Musammat Ulfat-un-nisa." On the 16th May, 1891, a similar application was made, in the name of his four sons, for execution of Sant Lal's decree, and in it the Appellant is described as "minor . . . under the guardianship of Mauladad Khan," and there is no room for doubt that, though the sons were the nominal applicants, Mauladad was the person really interested in the

application. In the sales which followed on these applications, the decree holders were, in both cases, the purchasers. On the 26th May, 1891, Mauladad brought a suit to recover interest on the mortgage which he himself held, and in the Plaint, the Appellant is described as "under the guardianship of her sister Ulfat-un-nisa," who, he states, is "certificated guardian of her person," and "has been made guardian *ad litem*." In this case the decree was made in the absence of both the female defendants. No step appears to have been taken to enforce the bond to Achal Das until after Mauladad's death, which occurred on the 22nd July, 1893. On the 4th January, 1894, his four sons put the bond in suit, and obtained an *ex parte* decree on the 28th August, 1894. In this case also the Appellant is described as "under the guardianship of her sister," who, by order of the Court, dated 10th March, 1894, was appointed guardian *ad litem*. The possessory mortgage in favour of Mauladad Khan is admittedly still in force.

The learned Subordinate Judge found that the proceedings impeached in the Plaint failed as against the Plaintiff (Appellant), because she was not properly represented in them. He held that Ulfat-un-nisa, as a married woman, could not have been appointed guardian *ad litem*, and that Mauladad, whose sons were merely *benami* purchasers on his behalf, had an interest adverse to that of the minor, and was therefore disqualified. The High Court on appeal set aside his decree, and dismissed the suit upon the ground that

"the decrees upon which the execution proceedings were founded are not in any way impeached in the suit, nor could they be. The impeached transactions were proceedings on those decrees in execution, and, this being so, it was the proper course for the Plaintiff, if she had any objection to make to the execution of the decrees, to raise these objections under the provisions of Section 244 of the Code of Civil Procedure, and not by a separate suit."

With all respect to the learned Judges of the High Court, Their Lordships are unable to agree with this conclusion. Section 244 of the Civil Procedure Code applies to questions arising between parties to the suit in which the decree was passed, that is to say, between parties who have been properly made parties in accordance with the provisions of the Code. Their Lordships agree with the Subordinate Judge that the Appellant was never a party to any of these suits in the proper sense of the term. Her sister, Ulfat-un-nisa, was a married woman, and therefore disqualified under Sec. 457 of the Code from being appointed guardian for the suit, and Mauladad's interest was obviously adverse to that of the minor. An ingenious argument was put forward by Counsel for the Respondents to the effect that as Sec. 53 of the Guardians and Wards Act (Act VIII. of 1890) gives a preference to the appointment of the guardian of the person of a minor as guardian for the suit, and as Ulfat-un-nisa was guardian of the person of her minor sister, she could properly have been appointed her guardian *ad litem* in these proceedings. But this argument is open to the obvious objection that the later enactment leaves Sec. 457 of the Code untouched, and that the effect of the two Statutes, read together, is that a proper guardian of the person of a minor may, if properly qualified, be preferred as his or her guardian *ad litem*.

For these reasons Their Lordships will humbly advise His Majesty that this Appeal should be allowed, that the Decree of the High Court should be discharged with costs, and that, subject to the payment, or allowance on account, by the Appellant of any sum that may be found to be due by her in respect of the possessory mortgage of the 18th May, 1886,

the Decree of the Subordinate Judge should be restored.

The Respondents must pay the costs of the Appeal.

