PRIVY COUNCIL.

ABDUL WAHID KHAN (DEFENDANT) *v.* NURAN BIBI AND OTHERS (PLAINTIFFS).

P. C.* 1885 *Feb.* 18, 17, *March* 4.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Mahomedan Law—Deed of Compromise—Construction—Estate limited to take effect in favor of a person after another's death.

It is not consistent with Mahomedan law to limit an estate to take effect after the determination, on the death of the owner, of a prior estate by way of what is known to English law as a vested remainder, so as to create an interest which can pass to a third person before the determination of the prior estate.

The parties to a *solenamah* or compromise were, on the one side, the widow of a Mahomedan, she being in possession of villages in Oudh, which had belonged to him, and of which the summary settlement of 1858 had been made with her; and, on the other side, two brothers, alleged to be his sons. By the compromise, which was made in the course of proceedings at regular settlement, it was agreed that the widow should, during her lifetime, continue to hold possession, and remain proprietor, without power of alienation, and that after her death the two sons should possess each one-half of the property.

Held, that on the true construction of the compromise, the title of the sons to succeed was contingent upon their surviving the widow, and that no interest passed to their heirs on their deaths in her lifetime.

APPEAL from a decree (24th August 1882) of the Judicial Commissioner of Oudh, reversing a decree (30th June 1881) of the District Judge of Rae Bareli.

The decree of the District Judge, Sayyid Mahmud, dismissed this suit which was to obtain possession of a share (8 annas 7 pies) in talukas Aidari, in the Rae Bareli district, and Lewari, partly in that district and partly in that of Partabgarh, formerly belonging to Mouazzam Khan, who died on the 22nd of January 1850, leaving a widow named Gauhar Bibi, and also Abdus Subhan and Abdul Rahman, who claimed to be his legitimate sons. With Gauhar Bibi, who was in possession at the annexation of Oudh (13th February 1856), the summary settlement was made, and after the general confiscation (15th March 1858),

* *Present:* LORD BLACKBURN, SIR B. PEACOCK, SIR R. P. COLLIER, SIR R. COUCH, and SIR A. HOBHOUSE.

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followed by the restoration, and the summary settlement of that year, the settlement of the villages was again made with her. She continued in possession till her death on the 18th October 1875.

In the course of proceedings at the regular settlement, litigation took place between the alleged sons on the one side, and Gauhar Bibi on the other, resulting in a compromise contained in petitions filed on the 28th of April 1866 in the Court of Pandit Madho Pershad, Extra Assistant Commissioner of Settlement in the Sultanpur district. This gave rise to the main question on this appeal which turned on its construction.

Abdus Subhan died in 1868, and Abdul Rahman in 1874. Gauhar Bibi, before her death, made a gift, dated 30th April 1874, of the talukas to the daughter of Abdul Rahman, named Muradi Bibi, who remained in possession till her death in January 1881; her husband Abdul Wahid Khan, the present appellant, becoming her representative.

Nuran Bibi, the principal plaintiff in the suit, claimed as the sister of Abdus Subhan, and half-sister of Abdul Rahman, alleging that these brothers were among the heirs of Mouazzam, having been in possession down to 1262 F., or 1854 A.D., the *kabuliat* having been made out in their names, and that afterwards, in 1263 F., "as a step suggested by the exigencies of the times the *kabuliat* for the estate was executed in the name of Gauhar Bibi." The plaint also alleged that by the compromise of 28th April 1868, the brothers' rights, each to one-half of the estate of Mouazzam Khan, had been admitted, and that it had been agreed that Gauhar Bibi should retain possession during her lifetime, without power of alienation, and that after her death the sons should share the estate equally. The cause of action had arisen on the death of Gauhar Bibi, the termination of the *kabza haiati* or life possession, the interests of the two brothers having passed on their deaths to Nuran Bibi. The defence, among other defences, besides disputing the legitimacy of Nuran Bibi, was that the compromise of 1866 created only rights contingent upon the brothers' surviving Gauhar Bibi; whereas they had died before her, so that no estate had passed to Nuran Bibi.

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Two issues to the following effect, besides others on other points, were fixed in the Court of first instance, *viz.*, "what rights, if any, did the brothers possess in the estate; was their interest vested or contingent; and did the fact of their dying in the lifetime of Gauhar Bibi divest their heirs of all right to inherit?" Also, "was the deed of 30th April 1874 executed by Gauhar Bibi in favor of Muradi Bibi valid?"

For the purposes of this report, the position of the co-plaintiffs and the co-defendants, as well as the previous litigation, sufficiently appear in their Lordships' judgment.

The District Judge was of opinion that, this being a suit relating to succession, it must be decided according to the rules of the Mahomedan law, as required by s. 3 of the Oudh Laws' Act XVIII of 1876; also that the parties being Sunnis, the law of the Hanifeea School was applicable. He translated in his judgment the petitions, dated 28th April 1866, which set forth the terms of the compromise. Abdus Subhan's was as follows, as translated in the judgment:

"I, executant, put it down in writing that my mother, the defendant, may remain during her lifetime, as hitherto, proprietor and possessor of the said taluka, and may manage the *ilaka* through *karindas* (agents). But without necessity with the especial view of destroying my rights she may not alienate any property, and after her death I, executant, and my elder brother Abdul Rahman, may become possessors and appropriators of the *ilaka*, situate in the districts of Sultanpur and Partabgarh. And during the life of the defendant I shall not disobey her in any way."

And Gauhar Bibi's as follows:

"I, executant, with a view of foresight, have settled in this manner that during my lifetime, I myself continue possessor and proprietress as hitherto, and manage the said taluka through *karindas* (agents)*; and without necessity, with a special view of destroying the rights of these two young men, I may not alienate any property of the *ilaka* situate in the districts of Sultanpur and Partabgarh. After my death the two young men, Abdul Rahman Khan and Abdus Subhan Khan, are both heirs

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and owners of the whole *ilaka;* they may both become in half shares possessors and appropriators."

Upon these, the District Judge decided that Gauhar Bibi's rights were not so far qualified as to divest her of the proprietorship, and that any interest given to Abdus Subhan and Abdul Rahman must be regarded as contingent upon the event of their surviving Gauhar Bibi; and that, under the Mahomedan law, the expectant right of an heir-apparent was not regarded as a vested interest, and could not pass to a third party, so long as it had not actually come into operation by the death of the existing owner.

This principle of Mahomedan law was uniform in its application to matters of succession, whether in virtue of bequest, or inheritance, or family arrangement. His finding, then, was that both Abdul Rahman and Abdus Subhan, having died in the lifetime of Gauhar Bibi, they never acquired any vested rights in the estate, such as, under the Mahomedan law, could form the subject of inheritance. He added his opinion that the deed of gift, executed by Gauhar Bibi on 30th April 1874, was valid, having been followed by actual possession.

On appeal the Judicial Commissioner reversed this decree giving his reasons as follows:—

"It appears to me that the effect of the compromise was to give Gauhar Bibi a life interest in the estate. The District Judge has held that under the Mahomedan law the expectant right of an heir-apparent cannot pass by succession, but this is the case to a limited extent only. A son's son, for instance, cannot succeed if there are sons alive, but if there are no sons alive, the son's son does succeed, and the expectant right of the son has passed to the grandson. On the death of Abdul Rahman and Abdus Subhan their heirs took their place, and had a right to the property on Gauhar Bibi's death. I cannot agree with the District Judge that, on the death of Abdul Rahman and Abdus Subhan, the family arrangement lapsed, and Gauhar Bibi became sole owner."

Mr. *J. T. Woodroffe* and Mr. *H. Cowell*, for the appellant, contended that the judgment of the District Judge was correct, and that the suit should be dismissed. The Judicial Commissioner had erred in holding that the compromise of 1866 had cut

down Gauhar Bibi's rights in the talukas to a life-estate. The settlement of 1858 having been made with Gauhar Bibi (all previous titles to the talukas having been swept away by the effect of the confiscation of Oudh lands in that year), from Gauhar Bibi descent would have had to be traced, if this had been a question of proving title by descent. This was material, although the main point for consideration was what construction was to be put on the *solenamah* of 1866; for it must be construed with reference to the position of the parties, as well as with regard to Mahomedan law. Under the compromise, Abdus Subhan and Abdul Rahman took no transferable interest, unless and until they should survive Gauhar Bibi. But they had died before Gauhar Bibi's interest in the talukas came to an end, and had never received any immediate, or present, estate—that alone being the kind of estate that could pass by inheritance to any sharer claiming through them. It followed that Nuran Bibi took no share through the brothers. The Mahomedan law disallowed the creation of transferable estates dependent as to their coming into operation upon events uncertain as to the time of their happening. Any uncertainty attending the transfer of property, as to the time when possession should be taken, was contrary to the spirit of the Mahomedan law. Reference was made to Hedaya (Hamilton), Vol. III, book 26, (of Sulh, or Composition), chap. 1; Macnaghten's Principles of Mahomedan Law, p. 124, also Precedents, p. 21; Hedaya (Hamilton), Vol. II, book 16, (of Sale), chap. 15; Baillie's Digest of Mahomedan Law; Hanifeea Code, Law of Sale, chap. 1; *Jeswunt Singjee Ubby Singjee* v. *Jet Singjee Ubby Singjee* (1); *Ranee Khujooroonissa* v. *Mussamut Roushun Jehan* (2); *Nawab Mulka Jahan Sahiba* v. *Deputy Commissioner of Lucknow* (3). Also in regard to the question of the sons' position in the family, to *Khajah Hidayutoolah* v. *Rai Jan Khanum* (4).

Mr. *T. H. Cowie, Q.C.*, and Mr. *C. W. Arathoon*, for the respondent, argued that the true effect of the compromise was to admit, on the part of Gauhar Bibi, the existence of an estate in Abdul Rahman and Abdus Subhan, they conceding to her the right of

(1) 3 Moo. I. A. 245.
(2) L. R., 3 I. A. 291.
(3) L. R., 6 I. A. 63.
(4) 3 Moo. I. A. 295.

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possession during her life. The widow, stipulating that she should remain in possession for life, admitted the right of the brothers to inherit as co-sharers in the paternal inheritance; and unless that right could not pass to their heir, or representative, Nuran Bibi's title was made out. It was, however, a right sufficiently definite to pass by inheritance. Moreover, as to the argument that Gauhar Bibi was entitled to the talukas, as the settlement had been made with her, the rights of a talukdar were not vested in her, and she did not come within the provisions of the "Oudh Estates Act," I of 1869, afterwards enacted. The settlement only indicated her undisputed right to possession. The result of the compromise of 1866 was that she, being left in possession, agreed to be content with it for her life, recognizing the sons' right to succeed after her death by a title which they had never abandoned.

Mr. *J. T. Woodroffe*, in reply, argued that the sons' rights being as they were stated to be by the compromise, the admission in favour of the widow must be construed with reference to the antecedent rights which she possessed. Gauhar Bibi, by the effect of the settlement made with her of these few villages (probably too few to rank as the taluka of a talukdar), was in the position of a talukdar without a *sanad*; and although she was not a talukdar within the meaning of Act I of 1869, (the Oudh Estates Act, 1869, s. 3) still she came within the scope of the letter dated 10th October 1859, in the schedule to that Act. In the settlement proceedings of 1858 the Government restored the lands of Oudh, the amnestied owners and claimants coming in upon their old titles.

Reference was made to *Prince Mirza Jehan Kudr Bahadur* v. *Nawab Afsur Bahu Begum* (1), and also to *Zohoorodeen Sirdar* v. *Baharoolah Sircar* (2); the latter case showing that according to Mahomedan law, a gift was held invalid where the donor was to remain in possession during his lifetime.

Their Lordships' judgment on a subsequent day (March 4th), was delivered by

(1) L. R. 6 I. A. 76.
(2) W. R. (for 1864) p. 185.

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SIR R COUCH.—The main question in this appeal arises upon the construction of an instrument of compromise, dated the 28th of April 1866, consisting of two parts, one part being executed by one, and the other by the other of the parties to the compromise. It was made in a suit instituted in the Court of the Extra Assistant Commissioner, Settlement Department, in the district of Sultanpur. In order to construe it, it is necessary to see what was the position of the parties when it was made. Between 1821 and 1825 one Mouazzam Khan acquired the *ilaka* Aidari, consisting of seven villages, now in the Rae Bareli, but formerly in the Sultanpur district, and about the year 1849 he purchased, in the name of his sons, Abdul Rahman and Abdus Subhan, the *ilaka* Lewana, consisting of eleven villages, in the district of Partabgarh. Mouazzam Khan died on the 22nd of January 1850, leaving three widows, Gauhar Bibi, Mussamat Chameli, and Mussamat Bakhtawar, and two sons, Abdul Rahman, the son of Chameli, and Abdus Subhan, the son of Bakhtawar. It was admitted that Gauhar Bibi was his lawfully married wife, but it was contended, on behalf of the appellant, that Chameli and Bakhtawar were never married to him, and that their sons were therefore illegitimate. Mussamat Bakhtawar had also a daughter, Mussamat Nuran, the respondent, who it was contended was not Mouazzam's daughter, having been born only three months after her mother first entered his harem. In 1855 or 1856, before the annexation of Oudh, a settlement of the whole estate was made with Gauhar Bibi, and a *kabuliat* executed in her name, and from that time until her death she remained in possession of it. In April 1858, shortly after Lord Canning's Proclamation on the 15th of March 1858, by which all the estates in Oudh were confiscated to the Government, a summary settlement of the estate was made with her. No *sanad* was granted to her, and her name is not entered in the list of persons who were to be considered talukdars within the meaning of Act I of 1869 (the Oudh Estates Act). On the 31st of January 1866, Abdus Subhan brought a suit in the Court of the Extra Assistant Commissioner, Settlement Department, against Gauhar Bibi, to recover one-half of the village of Sarai Mahesa, one of the villages in

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Aidari. In the plaint the tenure is described as talukdar without a *sanad*, and Gauhar Bibi is named as talukdar. The ground of the claim is stated to be, that Mouazzam Khan, during his lifetime, caused the *kabuliat* of the village in suit, together with the entire taluka, to be executed in the name of the plaintiff and Abdul Rahman, so that in virtue thereof they continued in possession during their father's lifetime, and after their father's death they held continuous possession till 1263 F. In the middle of 1263 F., when British rule was established, the entire taluka was settled with strangers for non-payment of the arrears of Government revenues; after 1266 F. (1859), on the re-occupation of the province, the settlement of the entire taluka was made with the defendant in the absence of the plaintiff.

The plaintiff did not rely upon any title in the sons as heirs of their father. He relied upon the *kabuliat*, and the possession under it, as evidence that their father in his lifetime made them real owners of the estate, and that they were not *furzidars*. He would have had to prove this, there being, according to the law in India, no presumption in their favour from the fact of their being sons of Mouazzam. It does not appear in the record of the present suit what defence was made by Gauhar Bibi. Possibly no formal defence was made before the compromise was come to. Her case would be that in 1855 or 1856 a settlement of the estate was made with her and a *kabuliat* executed in her name, and she had ever since been in possession of it; and, further, that in April 1858, after the confiscation, the Government had made a summary settlement with her. The compromise was made by two petitions to the Settlement Court, one by Abdus Subhan, and the other by Gauhar Bibi. The former is in these words:—

"Whereas the petitioner has instituted a suit in the Settlement Court against his mother, Mussamat Gauhar Bibi, for proprietary right in half of taluka Sarai Mahesa, in pergunnah Rokha, in the Sultanpur district. Now, an amicable settlement having been made between the petitioner and his said mother, a deed of compromise is filed this day in the Settlement Court, therefore I, the declarant (*mau mukir*) commit to writing that (my) mother, defendant, shall during her lifetime continue as heretofore (*ba dastur*) to hold possession of and be mistress of the taluka, and manage the estate

through agents, but she shall not, without any special emergency, alienate any property so as to deprive me of my right, and that after her death I, the declarant (*mau mukir*), and my step-brother, Abdul Rahman, shall possess and enjoy each one-half of the entire *ilaka*, situate in the districts of Sultanpur and Partabgarh, and that so long as the defendant may be living I shall obey her."

The petition of Gauhar Bibi is similar to this, with the addition, after the names of Abdul Rahman and Abdus Subhan, of the words, "shall become successors to and proprietors of the said *ilaka*." Thereupon the Court, on the 28th of April, made an order dismissing the suit.

Abdus Subhan died on the 25th of February 1868, and Abdul Rahman on the 10th of March 1874, leaving a daughter, Muradi Bibi. On the 30th of April 1874, Gauhar Bibi executed a deed of gift in favour of Muradi Bibi, and on the 18th of October 1875 Gauhar Bibi died, leaving Muradi in possession of the entire estate. There had been some litigation between Mustafa Khan, the nephew of Mouazzam, and Gauhar Bibi, but it is not necessary to notice those suits, nor a suit brought by him against Muradi Bibi after Gauhar Bibi's death.

The suit which is the subject of this appeal was brought on the 1st of November 1880, by Mussamat Nuran Bibi, Sardar Prem Singh, and Mahomed Taha Khan, the latter two being said to be purchasers from Nuran Bibi of a share of the estate, against Abdul Wahid Khan, the husband of Muradi Bibi, Mussamat Shaluka, one of the two widows of Abdul Rahman, and other defendants who were mortgagees of the estate. The claim was to recover possession of 8 annas 7 pie share of the estate by virtue of inheritance from Abdul Rahman and Abdus Subhan, and the ground of it is stated to be that, by virtue of the transfer of the property effected by Mouazzam Khan in his lifetime, by causing a *kabuliat* to be executed, both the sons remained in proprietary possession of the estate down to 1262F., and that under the deed of compromise, Abdus Subhan's right to one-half of the estate and Abdul Rahman's to the other half having been admitted, it was settled that Gauhar Bibi should retain possession of the estate during her lifetime, without power of alienation, and that after her death both the sons would take the estate half and half. The respondents, in the reasons in their

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case in this appeal, put the same construction upon the compromise, and in the argument their counsel contended that it was a recognition of right of inheritance in respect of what would have been the sons' rights, supposing they had succeeded in the suit.

Their Lordships are of opinion that the compromise cannot be construed as admitting the right which was claimed by either of the parties. In Abdus Subhan's petition it is stated that Gauhar Bibi sued for proprietary right, and if she is to be considered as admitting the proprietary right which the sons sued for, they must be equally considered as admitting her proprietary right. These rights are inconsistent, and, as both could not have been admitted by the compromise, neither can be considered as having been. Further, Gauhar Bibi is not merely to have possession of the estate during her life; she is to be mistress (or, as the District Judge has translated the petition, proprietor) of the taluka. During her life, the whole interest in the estate is to be in her. Then comes the question: What is the interest which is given by the compromise to the sons? To give the plaintiffs a title to the estate it must be a vested interest which, on the death of the sons, passed to their heirs, and is similar to a vested remainder under the English law. Such an interest in an estate does not seem to be recognized by the Mahomedan law. The suit was tried in the first instance by the District Judge of Rae Bareli, a Mahomedan, who held that the interest, if any, created by the compromise must be regarded as future, and contingent upon the event of Abdul Rahman and Abdus Subhan surviving Gauhar Bibi. After giving his translations of the petitions, which substantially agree with those which have been quoted from the Record, he says:—

"From these words in the application it is clear, to my mind, that the parties to the compromise intended that Gauhar Bibi should continue to be the proprietress and possessor of the estate as before, and without any limitations or restrictions which would divest her of ownership during her lifetime. The words *ba dastur malik wa kabiz*, which occur in both applications, leave no doubt upon this point."

Further on, he says,—

"But it is clear to me that her (Gauhar Bibi) proprietary rights were not qualified in any such manner as to divest her, wholly or partially, of the

incidents of ownership. The arrangement contained in the compromise would be called by the Mahomedan lawyers 'a tauris,' or 'making some stranger an heir,' and cannot be regarded as creating a present or vested interest. The words of the compromise do not bear any such construction, as the plaintiffs seek to put on them, and if they do create any interest, such interest must be regarded as future, and contingent upon the event of Abdul Rahman and Abdus Subhan surviving Gauhar Bibi. Under the Mahomedan law, a mere possibility, such as the expectant right of an heir apparent, is not regarded as a present or vested interest, and cannot pass by succession, bequest, or transfer so long as the right has not actually come into existence by the death of the present owner. This principle of Mahomedan law is uniform in its application to matters of bequest, inheritance, or otherwise."

There was an appeal from this decision to the Judicial Commissioner, who reversed it, holding that on the death of Gauhar Bibi the estate became the property of the heirs of Abdul Rahman and Abdus Subhan, that Gauhar Bibi had not the absolute right to alienate the estate, and that her gift to Muradi Bibi was invalid. He said it appeared to him that the effect of the compromise was to give Gauhar Bibi a life interest in the estate, and, on the death of Abdul Rahman and Abdus Subhan, their heirs took their place and had a right to their property on Gauhar Bibi's death. He seems to have thought that this was in accordance with the Mahomedan law, but it is not clear that he did so.

Their Lordships do not take this view of the compromise. In *Mussamut Humeeda* v. *Mussamut Budlun* (1), in which judgment was given by this Committee on the 26th March 1872, the High Court of Calcutta had held that, by an arrangement between the plaintiff, a Mahomedan widow and her son, an estate was vested in the plaintiff for life, and, after her death, was to devolve on her son, by way of remainder, but their Lordships held that the creation of such a life estate did not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction. They thought that expressions from which it might be inferred that the plaintiff was to take only a life interest might be explained on the supposition that they may have been used to import that

(1) 17 W. R., 525.

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the property was to remain with the widow for the full term of her life, and that the son as her heir would succeed to it after her death. Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest in Abdul Rahman and Abdus Subhan which passed to their heirs on their death in the lifetime of Gauhar Bibi.

It is unnecessary to consider the other questions raised in this appeal, and their Lordships will humbly advise Her Majesty to reverse the decree of the Judicial Commissioner, and to order the appeal to him to be dismissed with costs. And the respondents will pay the costs of this appeal.

Appeal allowed.

Solicitors for the appellant: Messrs. *Barrow and Rogers.*

Solicitor for the respondents: Mr. *T. L. Wilson.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

1885 *April* 8.

NOOR ALI MIAN KHONDKAR (DEFENDANT) *v.* ASHANULLAH (PLAINTIFF.)*

Notice, Substituted service of—Beng. Act VIII of 1869, *s.* 14—*Regulation V of* 1812, *s.* 10—*Evidence of substituted service, Nature of—Burden of proof.*

Proof of the validity of substituted service required by s. 10, Regulation V of 1812, is stricter than that necessary under the terms of s. 14 of Bengal Act VIII of 1869.

Ram Chunder Dutt v. Jogesh Chunder Dutt (1), distinguished.

Where the only evidence in support of substituted service was the statement of the serving peon that he had searched for the tenant and could not find him; *held*, that such evidence was sufficient, under the terms of s. 14 of the Rent Act, to throw the onus upon the defendant to show by cross-examination or otherwise that the search was not properly made.

* Appeal under s. 15 of the Letters Patent against the decree of Mr. Justice Field, one of the Judges of this Court, dated the 20th of June 1884, in Appeal from Appellate Decree No. 782 of 1883, against the decree of Baboo Rajendra Coomar Bose, Additional Sub-Judge of Mymensing, dated the 16th of January 1883, reversing the decree of Baboo Khetter Pershad Mukherji, First Munsiff of Attiah, dated the 19th of March 1882.

(1) 19 W. R., 353; 12 B. L. R., 229.