JAFRI BEGAM AND ANOTHER, DEFENDANTS, APPELLANTS *v.* SYED ALI RAZA, PLAINTIFF, RESPONDENT.

P. C.
J. C.
1901
February 19.
March 9.

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

Powers of arbitrator—Suit upon an award—Award partly inoperative—Limitation—Act No. XV of 1877, *Schedule II, Article* 91.

An arbitrator's award that two daughters of a Shiah Muhammadan should inherit in equal shares the estate of their deceased father contained directions that they should not partition and that a manager appointed by the award should not be displaced.

The award was sent by the arbitrator to the Sub-Registrar of the district for registration. It was returned for a specification of the property. The arbitrator then added thereto a decision that part of the estate dealt with belonged exclusively to one of the daughters in virtue of a gift from their father to her.

This suit, which was based on the award, was filed by the other daughter, and claimed partition, the removal of the manager and an account from him. On the death of the plaintiff the suit was revived on behalf of her son.

The defence was that the claim was barred by Article 91 of Schedule II, Limitation Act (XV of 1877).

Held, that the suit was not barred thereby, not being brought to cancel, or set aside the award, but brought for effect to be given to it, so far as it was in conformity with law. Against the son the direction in restraint of partition was inoperative. The arbitrator had no power to alter the course of the legal devolution of the estate in a mode at variance with the ordinary principles of law. A family custom, which had been alleged to disentitle daughters to succeed during the lives of widows, had not been found proved by the award, nor was it proved by the evidence. The decision that had been added by the arbitrator after completing his award was without legal effect, as his powers were ended before the addition.

The valid objection taken to this part of the award did not bring the case within the operation of Article 91, any more than the other matters.

APPEAL from a decree (29th January 1897) of the Court of the Judicial Commissioner varying a decree (21st April 1892) of the District Judge of Sitapur, and decreeing the respondent's suit.

The first question on this appeal was whether objections to matters in an arbitrator's award went so far towards impugning its general effect as to bring this suit which raised those objections within the meaning of Article 91, Schedule II, Limitation Act, 1877, as being a suit to cancel or set aside an award, thereby occasioning the bar of this suit by time.

Present :—LORDS MACNAGHTEN, DAVEY, and LINDLEY, and SIR RICHARD COUCH.

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The plaintiff respondent, Syed Ali Raza, was the son of Abbasi Begam, who died after filing this suit on the 20th March, 1890. She was one of the two daughters of the Nawab Syed Ashiq Ali who died on the 15th June, 1883. His other daughter was the defendant appellant, Jafri Begam, wife of Tasadduq Husain, co-defendant and appellant with her. Two widows of Ashiq Ali survived him. The family were of the Shiah sect. On the death of Ashiq Ali questions arose as to the rights of the sisters to inherit, and a reference, to which they and their husbands, with the widows, were parties, was made to the arbitration of Mahfuz Ali, a brother of the deceased Ashiq.

The award was made on the 19th January 1885, containing the following:—(1) that the two sisters should be absolute owners of the whole estate in equal shares, (2) that neither should have the right to claim partition, (3) that Tasadduq Husain should be manager of the entire property, that he should render half-yearly accounts to each sister, and that he should not be dismissed.

Tasadduq Husain accordingly began the management, causing entry of names in place of Ashiq Ali as to the lands forming the inheritance. Among these were included at one time 5 biswas 5 biswansis in a village named Kukargoti afterwards claimed to have been given to Jafri Begam by her father on her marriage. Disputes arose resulting in this suit, which, after having been filed by Abbasi Begam against her sister and the husband of the latter, who was the manager, was revived, on the death of Abbasi, on behalf of her son, Ali Raza, then a minor, suing through his father, Syed Muhammad Raza, in May 1890. The suit was upon the award for separate possession, upon partition, of a one-half share of the whole inheritance with mesne profits. This was alleged to include a share of village Kukargoti which had been irregularly attempted to be entered in the award after it had been completed, as being exclusively the property of Jafri Begum. Also was claimed to be part of the divisible inheritance a share of a village, Ludhai, to which Tasadduq had wrongly asserted a title by purchase on his own account. The validity of clauses against partition, and against the removal of the manager, was denied.

The principal points in the defence were (1) that the suit was barred by limitation under Article 91 of schedule II of Act No. XV of 1877, (2) that by special family custom the daughters could not inherit during the lives of the widows, (3) that the plaintiff could not claim any title under the award giving a daughter a right to partition, and a title, independent of the retention of Tasadduq Husain as manager, (4) that a 5 biswa share in Kukargoti constituted the separate property of Jafri Begam, and (5) that the share claimed in Ludhai was acquired by Tasadduq Husain from his own separate funds.

The District Judge fixed issues raising the questions indicated by the above; and on the 21st April 1892 decided that the plaintiff was entitled to a half share in the estate; that it was inadvisable to partition; that sufficient cause had not been shown for the removal of Tasadduq Husain from his position as manager: and the Judge decreed to the plaintiff one-half of the profits, the amount being determinable in execution.

On an appeal by the plaintiff the Judicial Commissioners remanded the case for the disposal of questions raised and not decided. The District Judge then found—

(1) that the suit was not barred by limitation;
(2) that the custom alleged by the defendants had not been established;
(3) that the 5 biswas of Kukargoti had been given by Ashiq Ali to Jafri Begam as dowry, but that the award in reference thereto had been an attempted addition after the completion of the award;
(4) that Tasadduq Husain had purchased the share in Ludhai from his own resources.

Return having been made to the remand, the Judicial Commissioners confirmed the judgment of the first Court on the question of limitation, and the finding that the alleged custom of the family had not been proved to exist. They agreed with the District Judge that the arbitrator had exhausted his powers before deciding that Jafri Begam had received the gift of the 5 biswas. They came to the conclusion, however, that this gift had not been established as having taken effect. Also they decided that the evidence was that the share in Ludhai, claimed by the manager,

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had been purchased from the profits of Ashiq Ali's estate. They also held that the clause in the award in restraint of partition was invalid, and that Tasadduq Husain could, and should, be removed from the office of manager. In the result a decree for separate possession of one-half of the estate in suit was made in favour of the plaintiff, together with mesne profits.

On this appeal Mr. *J. H. A. Branson*, for the appellant, argued that the suit, being in effect one to set aside an award made and acted upon more than three years before the suit was brought, was barred by limitation under the provisions of Article 91, Schedule II, of the *Limitation Act*, 1877. The object of the plaint was to alter the conditions on which the award was based to an extent that in effect would be to set it aside. It was also contended that the arbitrator had not exceeded his powers, as the appellate Court below had held, in his reply to the Sub-Registrar as to the properties with which his award dealt. The Sub-Registrar was entitled to have the list of the properties awarded supplied to him in conformity with section 21 of Act No. III of 1877. The arbitrator rightly complied in specifying what was comprised in his award, and the specification was accepted by the parties and acted on by the Revenue Court in granting mutation. On the evidence the arbitrator was right in finding that the 5 biswas of Kukargoti had been given to Jafri as her dowry by her father at her marriage, and on this there was error in the appellate Court in reversing the decision of the first Court. This reversal had been arrived at by the appellate Court on insufficient grounds, as also had been their decision in regard to Ludhai. The question of evidence that had arisen as to the property therein, the 2½ biswas share of that mauza, should have been decided in favour of Tasadduq, the second appellant.

Mr. *L. DeGruyther*, for the respondent, argued that the Judicial Commissioners had rightly decreed to the plaintiff the separate possession on partition of a one-half share in the whole estate of the deceased. The suit was not barred by limitation, not having been brought for the cancellation, or setting aside, of the award within the meaning of Article 91. It was rightly brought to enforce the award as dealing with specified interests. So far as the award might operate in restraint of partition, and to prevent the

discharge of the manager on good grounds, the directions were not a part of the award essential to its due operation as declaring title. For the latter purpose the award remained valid. The arbitrator having awarded definite interests, as empowered by the terms of the reference, had erroneously made the directions against partition and against the displacing the manager. These should be taken as having no operation. The addition attempted by the arbitrator after the return of the award by the Sub-Registrar for the specification of the properties, was not binding, as it was in excess of his powers. It was correctly decided below that the arbitrator's authority having once been completely exercised, according to the terms of the reference, was at an end. He was not at liberty after executing the award to alter it in any particular. As a matter of evidence the Court below had rightly found that the 5 biswas of mauza Kukargoti had not been proved to have been made over to Jafri Begam by a completed gift from her father. Also Tasadduq's alleged purchase had been rightly disallowed. Both these properties were part of the entire succession.

Mr. *J. H. A. Branson* replied.

Afterwards, on the 9th March, 1901, their Lordships' judgment was delivered by LORD LINDLEY:—

This is a family dispute between a daughter and a grandson of a Shiah Muhammadan named Syed Ashiq Ali, who died on the 15th June 1883. He left two widows, Musammats Ajab-un-nissa and Najb-un-nissa, and two daughters by the former, *viz.* Jafri Begam, the appellant, and Abbasi Begam, the mother of the respondent. In or about the year 1881, Jafri Begam married Tasadduq Husain, the other appellant, and about three years later Syed Muhammad Raza married Abbasi Begam. At the time of Ashiq Ali's death, Tasadduq Husain and Muhammad Raza were respectively about 25 and 18 years of age. Ashiq Ali had no children by his second wife.

After the death of Ashiq Ali disputes arose between his daughters, and on the 19th January, 1885, they agreed to refer these disputes to the arbitration of a friend of the family named Syed Mahfuz Ali; and on the same day he made his award.

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His decisions were, so far as is material, as follows:—

(1) That mutation of names of all the property left by the deceased should be effected in the names of the two daughters of the deceased in equal shares, and that the management of the said estate should be entrusted to the appellant, Syed Tasadduq Husain, who was to manage the said estate, and render to the two daughters half-yearly accounts of such management.

(2) That the said Tasadduq should look after the education of the said Syed Muhammad Raza, and support and maintain him.

(3) That the two widows of the said Syed Ashik Ali should be treated with due respect, and properly provided for.

(4) That the two daughters were the owners of, and had full authority over, all the property left by the deceased, except that which was in possession of the widows, which would be theirs for their lives, and that the two daughters were to see to proper provision being made for the said widows.

The 5th clause of the said award was as follows:—

(5) That since the partition and sub-division of an integral estate belonging to a well-known gentleman, is calculated to lead to its ruin and destruction, the principle of partition should not be considered legal (*i.e.* eligible) in this estate, so that the constitution of the estate should continue as usual, and there may be no occasion for the mischief-monger to raise troubles.

This award was signed by the arbitrator, the two widows, and by both the daughters and their husbands.

The said award was presented to the Sub-Registrar of the district for registration on the said 19th January, 1885, and he sent the said award back to the arbitrator to specify the property dealt with by such award.

The arbitrator accordingly drew up a list of the property, and the award and the list were afterwards registered.

One of the properties which had belonged to the said Syed Ashiq Ali, was a share in the village Kukargoti; of this share it was stated in the said specification of the property (column 3), that its extent was 8 biswas 5 biswansis, and in the 4th column, under the heading "remarks," was the following note:—

"Out of 8 biswas 5 biswansis of village Kukargoti entered in "this list, 5 biswas was given by the ancestor as dower to his

"elder daughter, Musammat Jafri Begam, in respect of which "mutation of names should be effected in favour of the said lady. "The remaining 3 biswas 5 biswansis should be entered in the "names of both the daughters in equal shares."

On the 26th January, 1885, the said document with the said specification of property was registered and the appellant Tasadduq took upon himself the management of the said estate under the said award.

On the 18th August, 1885, the names of the two daughters were substituted for the name of their father in the Revenue regsters, and later, in pursuance of an order, dated the 28th September 1885, the entry of the name of Jafri Begam alone was sanctioned in respect of 20 biswas. These 20 biswas represented the 5 biswa share of Kukargoti already mentioned. This change in the register appears to have been procured by Tasadduq Husain as manager of the property and without the knowledge of the plaintiff's mother.

Tasadduq Husain's management gave rise to disputes. The right of his wife to the 5 biswas in Kukargoti was denied by her sister, and some land in Ludhai, which Tasadduq Husain said he had bought with his own money, was claimed by his sister-in-law as part of Syed Ashiq Ali's estate on the ground that it had been paid for out of income of such estate.

On the 20th March, 1890, the present suit was instituted by the plaintiff's mother Abbasi Begam against Jafri Begam and her husband, Tasadduq Husain. The plaintiff's mother died shortly after the suit was instituted, indeed on the same day, but it was revived in May 1890 by her son, Ali Raza, the present plaintiff and respondent. For all practical purposes, therefore, the suit may be regarded as an original suit by him, and it has been so treated in the Indian Courts. The suit is for partition and for the removal of Tasadduq Husain as manager and for an account of his receipts and payments. The suit is based upon the award of Mahfuz Ali, but the plaintiff disputes the validity of the 5th clause, prohibiting partition, so far at any rate as it applies to him; he also disputes the title of Jafri Begam to the 5 biswa share of Kukargoti; and he claims the land in Ludhai as joint

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property. The defendants filed a long written statement of defence. The material defences are—

(1) that the suit was in effect to set aside the award and was barred by limitation;

(2) that by special family custom, the widows of the deceased excluded the daughters from inheritance;

(3) that the award prohibited partition and the removal of Tasadduq Husain as manager;

(4) that 5 biswas in Kukargoti constituted the separate property of Jafri Begam, both by the award and by reason of a gift made to her on her marriage;

(5) that the share in Ludhai was acquired by Tasadduq Husain from his separate funds.

The District Judge fixed 18 issues, raising these and a number of other questions.

On the 21st April 1892 he delivered judgment, and decided that the plaintiff was entitled to a half share in the estate, but not to partition; that sufficient cause had not been shown to remove Tasadduq Husain from his position as manager, and decreed plaintiff one-half of the profits, the amount to be determined at the time of execution of the decree. The Judge said nothing about the 5 biswa share of Kukargoti, nor about the Ludhai property.

From this decree the plaintiff appealed, and the Judicial Commissioners remanded the case for another trial and the determination of the other issues.

Further evidence was taken, and the District Judge found—

(1) that the suit was not barred by limitation;

(2) that the custom relied on by defendants had not been established;

(3) that the 5 biswas in dispute in Kukargoti had been given by Ashiq Ali to Jafri Begam as dowry, but that the award in regard thereto was not binding, because the arbitrator was *functus officio* at the time of expressing his opinion;

(4) that Tasadduq Husain had purchased the share in Ludhai from his private funds.

On these findings, the Judicial Commissioners passed final judgment. They confirmed the findings that the suit was not barred by limitation, and that the alleged custom had not been proved. They also agreed with the District Judge that the arbitrator had exceeded his powers in attempting to decide that Jafri Begam was the owner of 5 biswas in Kukargoti, but came to the conclusion that the gift of this property to Jafri Begam had not been established, and that Ludhai had been purchased from the profits of Ashiq Ali's estate. They also held that the clause in the award in restraint of partition was invalid, and that Tasadduq Husain could be removed from the post of manager. In the result the plaintiff obtained a decree for everything he claimed with costs.

From this judgment the present appeal is brought by Jafri Begam and her husband, Tasadduq Husain.

As regards the defence that the suit is barred by limitation of time, their Lordships are of opinion that the suit is based on the award and is not a suit to set it aside. No doubt the plaintiff contends that the 5th clause probibiting partition is invalid or at any rate is not binding upon him; and that the arbitrator having made his award was then *functus officio* and had no jurisdiction to make the entry which he afterwards did make respecting the 5 biswa share of Kukargoti. But these contentions do not bring the case within Article 91, Schedule II of the Indian Limitation Act, 1877. Under that Act a suit to cancel or set aside an award must be brought within three years from the time when the facts entitling the plaintiff to have it cancelled or set aside became known to him. It is obvious that this limitation has no application to the controversy respecting the 5 biswas of Kukargoti. A plaintiff who contends that an arbitrator has no power to make an unauthorized addition to an award already made and sought to be enforced by him is not in any sense seeking to cancel or set aside the award. Neither does the contention that the 5th clause is *ultra vires* and invalid bring the case within the Act. The plaintiff disputes the legal effect of that particular clause, but does not seek to cancel or set aside the award. On the contrary he seeks to enforce it so far as it is operative in point of law. As regards the effect of the 5th clause, their Lordships agree with

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the Judicial Commissioners that it affords no defence to the present action. It may have bound the parties who agreed amongst themselves to abide by it. But as against the present plaintiff the clause has no effect whatever. The arbitrator had no power to alter the course of legal devolution in a mode at variance with the ordinary principles of Muhammadan Law in the absence of a special custom prevailing in the family. He had no power to make property which was divisible by law, indivisible for ever.

As regards the alleged family custom by which the widows of Syed Ashiq Ali excluded his daughters from the inheritance, it is sufficient to say that the award excludes its application, and that even if it did not, the alleged custom is not proved. Both Courts below have found against the existence of the custom; and the evidence in support of it is far too inconclusive to induce their Lordships to differ from the Courts below on this matter and to depart from their general rule not to disturb a finding of fact concurred in by two Courts who have investigated it.

The claim of Jafri Begam to a 5 biswas share of Kukargoti rests upon an alleged gift to her by her father, Syed Ashiq Ali, on her marriage.

It is for the defendants to prove that this gift was made, and they called several witnesses who say that many years ago Ashiq Ali gave her this property as her dowry. But no entry of the gift was made in his lifetime; no change of possession is proved; no separate receipt of rents is proved. Nothing in fact is proved sufficient to turn a loose verbal expression of a gift actual or intended into a completed gift or into a clear and distinct trust in favour of the daughter. Having carefully considered the evidence upon this part of the case, their Lordships have come to the conclusion that the alleged gift is not proved. It is hardly necessary to add that the entry made by the arbitrator in the schedule of property after he had made his award is no part of his award, and cannot confer any title on the defendants.

There remains the share of Ludhai, purchased by the defendant, Tasadduq Husain, in September, 1885, for Rs. 4,000. If the

defendant bought this out of his own money, he of course will not be entitled to credit in respect of it on taking the accounts of Ashiq Ali's estate. On the other hand, if he paid for this share out of money for which he has to account, he will get credit for the amount so paid, but then the share of Ludhai will belong to that estate. Until the accounts of Ashiq Ali's estate are taken, and the application by the defendant of the moneys he has received from it has been ascertained, it is difficult, indeed it is impossible, to determine out of what funds the purchase money of the Ludhai share was paid. At present the case stands thus, there is no direct proof that Tasadduq Husain in fact bought the Ludhai share out of moneys which came to his hands as manager of Ashiq Ali's estate. He has given no account of the application of his receipts. He has adduced evidence in order to show that he had in September 1885 means of his own sufficient to pay for the Ludhai share, but there is no satisfactory proof that he had; and no evidence that he did in fact pay for the share out of his own money. The District Judge thought that he had means to pay for it and found the share to be his. The Judicial Commissioners took a different view; they were not satisfied that in September, 1885, Tasadduq Husain had means of his own sufficient to enable him to pay Rs. 4,000, and in the absence of any statement by him of the application of the revenues of Ashiq Ali's estate, they held the Ludhai share to belong to that estate. Their Lordships consider the evidence insufficient to come to any satisfactory decision on this point one way or the other; and they are of opinion that its decision should be postponed until the accounts are taken.

The result, therefore, will be that they will humbly advise His Majesty that the decree appealed from, should be varied by inserting a declaration that if on taking the accounts under the decree it shall appear that the whole or any part of the Ludhai share was paid for by the defendant, Tasadduq Husain, out of his own separate property, then such share or such part thereof as may be found to have been so paid for is to be treated as his separate property.

Their Lordships are of opinion that in substance the appeal has failed, and that notwithstanding the modification in the

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decree as regards the share of Ludhai, the costs of the appeal must be borne by the appellants.

Decree modified.

Solicitors for the appellants—Messrs. *Barrow, Rogers and Nevill.*

Solicitors for the respondent—Messrs. *T. L. Wilson and Co.*

P.C. 1901 *May* 1. *June* 13.

MUHAMMAD MUMTAZ ALI KHAN (PLAINTIFF) v. FARHAT ALI KHAN (DEFENDANT) and MUHAMMAD MUMTAZ ALI KHAN (PLAINTIFF) v. SAKHAWAT ALI KHAN (DEFENDANT).

[Appeal from the Court of the Judicial Commissioner of Oudh.]

Act No. XVII of 1876 (Oudh Land Revenue Act), section 172—Power of Court of Wards—Assignment by Court of Wards of villages without consideration—Award in excess of question referred to arbitration—Right of suit by minor on attaining majority to recover villages (part of his estate) so assigned.

IN a suit in 1865 in the Court of the Deputy Commissioner of Gonda, between persons representing the appellant and respondents (then all minors) in which those representing the latter claimed title on their behalf to succeed to an estate, an issue was referred to arbitrators, "whether the appellant could be the sole heir to the estate under the custom of the country, or whether respondents could also be successors to it; if they can, what is the portion to which they would be entitled?" The arbitration resulted in the right of succession to the whole estate being awarded to the appellant. The award, however, gave the respondents maintenance of Rs. 30 and Rs. 20 a month, respectively, and then, going beyond the terms of the reference, awarded that "the monthly stipend should continue for six years, after which time, when the children became capable of receiving education in a Government school, the Government would then propose what they should get for their support; that when both children are grown up and attain the age of discretion, they shall have villages separated for them according to their stipend after the deduction therefrom of Government revenue." The Deputy Commissioner, in December 1865, adopted the award as to the succession to the estate, and as to the maintenance, but not the portion of the award which related to matters not referred to arbitration. His decision was affirmed by the Commissioner of Fyzabad in 1866, and by the Judicial Commissioner of Oudh in 1867. In 1883 the respondents, who had then attained their majority, claimed arrears of maintenance from the then Deputy Commissioner representing the Court of Wards (in whose charge the estate had been since 1865), and the Deputy Commissioner, whilst allowing the claim, proposed that in future, in lieu of the cash allowance, a village should be assigned to each of the respondents for their maintenance.

Present:—LORD HOBHOUSE, LORD MACNAGHTEN, LORD ROBERTSON, SIR RICHARD COUCH and SIR FORD NORTH.