PRIVY COUNCIL.

MAHOMED ABDUL KADIR AND OTHERS (DEFENDANTS) *v.* AMTAL KARIM BANU (PLAINTIFF).*

P. C. 1888 *March* 20 & 28 *April* 19, 21 & 24 *June* 23.

[On appeal from the High Court at Calcutta.]

Acquiescence—Ratification of transfer of Property—Limitation Act (XV of 1877), s. 10—Trust.

A solehnama in 1847, to which were parties the sons, daughters, and widow of a deceased Mahomedan proprietor, transferred the shares of two minor daughters in their father's estate, having been executed by their mother, the widow, on their behalf. On the question, whether the solehnama should be set aside, at the instance of the two daughters, on the ground of its having been beyond their mother's power to bind them, and of the instruments having been prejudicial to their interests, the evidence showed that it had been acted on and followed by possession, and that the daughters had, after attaining full age, allowed a lengthened period of twenty years to elapse without taking proceedings to dispute it; *Held* that, if the mother had exceeded her powers in executing the solehnama on their behalf, and if they might, at one time, have had it set aside, their long acquiescence was sufficient to show ratification of the transaction; and the solehnama was upheld.

As to limitation, it was not to be inferred from the evidence that the sons, by reason of their having managed their late father's estate, should be regarded as trustees, at the time of the execution of the solehnama, for the daughters; and, therefore, s. 10 of Act XV of 1877 was inapplicable. So that, as regarded the property included in the solehnama, suits instituted in 1882 by the daughters would have been barred by time.

CONSOLIDATED appeals from two decrees (13th April 1885) following one judgment of the High Court, varying two decrees (20th November 1883) following one judgment of the Subordinate Judge of Dacca in two suits, heard together.

The suits out of which these consolidated appeals arose were brought on the 7th July 1882 by two sisters against their two brothers, each sister suing separately and including the other sister as a co-defendant. The suits were heard together, and in the Courts below one judgment was given in both, the claims resting on similar grounds. The sisters were now severally respondents in the two appeals preferred by the brothers.

* *Present*: LORD HOBHOUSE, SIR B. PEACOCK, and SIR R. COUCH.

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The general question raised was, whether the respondents, daughters of a Mahomedan proprietor, deceased in 1845, were entitled to possession with an account of past profits of their respective shares in his estate against their two brothers, who, after the father's death, had received the rents and profits of the estate; the respondents having parted with the shares to the brothers by transfers which they now sought to have set aside.

The facts are stated in their Lordships' judgment.

On the death of the father Mahomed Idris Khan in 1845, the plaintiffs, their father's widow Khadija, mother of the latter, and two sons of the deceased by a former wife, also another daughter, represented on this record, became entitled to proportionate shares in his estate.

The question between the parties involved the right of Khadija's daughters to have set aside the following documents of transfer alleged to have been executed on their behalf. The first was a solehnama, or deed of settlement of disputes, dated 6th January 1847, executed by Khadija for herself, and as guardian of her then minor daughters, and by Abdul Kadir, the eldest son, on his own behalf, and on that of his then minor brother, and two other minor sisters.

The second was a daemi miras ijara, or perpetual hereditary lease, dated 26th August 1864, purporting to have been executed by a mukhtar, Pran Nath Chuckerbutty, on behalf of the sisters, now plaintiffs, in favour of their brothers, in consideration of receiving Rs. 600 a year each. This they did receive till 1881.

As to the plaintiff's right to have these instruments set aside, and to recover possession of their shares, and to have an account taken from the time of Mahomed Idris's death in 1845, the Courts below differed; the first Court holding that the instruments in question were binding on the plaintiffs, and that these suits were also barred by limitation; the High Court holding, on the contrary, that neither of these instruments had been established against the respondents, and that limitation did not bar the suits.

The High Court (FIELD and BEVERLEY, JJ.), as to the solehnama of 1847, were of opinion that Khadija's execution of it was not binding upon the minors: her interests being adverse to

theirs. As to the daemi miras potta, which purported to have been executed on 26th August 1864 by the mukhtar Pran Nath Chuckerbutty, the Court was not satisfied with the evidence of his having been duly empowered. That being so, the daemi miras potta must fall to the ground. The Court also held that, even if the authority to the mukhtar had been proved, the defendants had not shown that the sisters understood the transaction which the mukhtarnama authorized, or that they had proper advice before entering into the transaction, which was not for their benefit.

As regards limitation, the Judges were of opinion that, less than two years before the suits were brought, the defendants were, as agents and trustees on behalf of the plaintiffs, managing and in possession of the property, both before and after 1864. It was only when the plaintiffs endeavoured to obtain an increase of the Rs. 60 per annum each, that the defendants set up an adverse title based on the miras potta of 1864, of which instrument the plaintiffs were not aware till the month of Aughran preceding the institution of these suits; which, accordingly were not barred. The High Court directed an account of the plaintiffs' shares in Mahomed Idris's estate from the date of his death in 1845 to be taken.

On this appeal, Mr. *R. V. Doyne*, for the appellants, argued that the grounds on which the High Court had reversed the decision of the Subordinate Judge were insufficient.

The solehnama of 1849 had been executed by Khadija, as mother and guardian of her minor daughters, and the High Court had not drawn a correct inference from the evidence in finding that the daughters' interests had been injured. Whatever might have been urged at one time on behalf of the daughters against the instrument, their claim to set it aside could not be maintained after the lapse of twenty years from the time of their attaining full age. This long acquiescence amounted to a ratification by the daughters themselves. So also in regard to the daemi miras ijara of 1864, the plaintiffs had been for many years receiving the annuities for which it provided, and thus it was not a correct conclusion that the ijara must fall with the mukhtarname

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The plaintiff's knowledge of the nature of the then intended lease was established by the evidence, and the plaintiffs had not shown any sufficient reason for setting aside their own act. Again, the High Court had erred in considering the law of limitation to be inapplicable. The possession of the appellants as lessees under the ijara of 1864 for more than twelve years before the institution of these suits had been shown, and thus the suits were barred.

The High Court say that the appellants' possession and management rendered them agents and trustees on behalf of the sisters. But this is incorrect. In regard to the solehnama, at all events, by which the taluks were separated, the brothers had no charge whatever of the shares or interests of the sisters, each daughter had become entitled to her share, and the mother (not the brother) was her guardian. There was no trusteeship as between the brother and the sisters. The suits were barred by Act XV of 1877, unless it should be held that the provisions of s. 10, relating to trusts for specific purposes excepted them from the operation of the general law. But it was clear that no such trust was involved by the brothers having, as manager, collected rents; and money actually received by the managers for the plaintiffs' use must be sued for within three years: see Art. 62, which prescribed that period counting from the date of the receipt of the money. Reference was made to Arts. 109, 120, 123, 127 and 144. In order to constitute the manager a trustee within s. 10, the property must have been vested in him; but it was not vested in him, nor had he accepted any such trust. Reference was made to the introduction of this exception into the law of limitation; and Reg. III of 1793, Acts XIV of 1859, s. 2, IX of 1871, and XV of 1877, s. 10, were referred to. Also, it was not sufficient to show a bare fiduciary relationship. *Ahmed Mahomed Pattel* v. *Adjein Dooply* (1), *Khierodemoney Dassee* v. *Doorgamoney Dassee* (2), *Greender Chunder Ghose* v. *Mackintosh* (3), *Sarodapershad Chattopadhya* v. *Brojo Nath Buttacharjee* (4), *Manickavelu Mudali* v. *Arbuthnot & Co.* (5), *Arunachala Pillai* v. *Ramasamiya Pillai* (6), were cited in

(1) I. L. R., 2 Calc., 323.
(2) I. L. R., 4 Calc., 455.
(3) I. L. R., 4 Calc., 897.
(4) I. L. R., 5 Calc., 910, 915, 921.
(5) I. L. R., 4 Mad., 404.
(6) I. L. R., 6 Mad., 402.

refereuce to s. 10. Reference was made to Lewin on the Law of Trusts, Chap. XXX, s. 1, p. 863; Darby and Bosanquet on the Law of Limitation, p. 183.

Mr. *J. Graham*, *Q.C.*, and Mr. *J. H. A. Branson*, for the respondents, argued that, in accordance with the judgment of the High Court, which was correct, neither the solehnama of 1849, nor the daemi miras potta of 1864, should be maintained against them. In regard to the former, the mother was not entitled to convey as she had purported to do, nor was she authorized by her position with reference to her daughters to convey; and the transfer was in disregard of the interest of infants.

As to the miras potta, the finding of the High Court that there was no satisfactory evidence of the execution of the muktarnama authorizing Pran Nath Chuckerbutty to sign for the sisters, was correct. And both the Courts below had been right in finding that the nature of the transaction had not been explained to them as it should have been.

Again, the judgment of the High Court had correctly proceeded upon their opinion of the law of limitation being inapplicable. The collection of rents by the managing member of the family estates did, as soon as they were in his hands, constitute him a trustee on behalf of the sharers. He was liable to account to them in respect of their shares. He was their agent to collect for the family, and this relation once established, the liability to account followed.

As to what would establish a liability to account, reference was made to *Wall* v. *Stanwick* (1), *Hobbs* v. *Wade* (2), *Thomas* v. *Thomas* (3), *Hurroeomaree Dassee* v. *Tarine Churn Bysack* (4), *Durga Prasad* v. *Asa Ram* (5).

As to a suit against a managing member of a Hindu family, reference was made to *Obhoy Chunder Roy Chowdhry* v. *Pearee Mohun Gooho* (6).

(1) L. R., 34 Ch. D., 763.
(2) L. R., 36 Ch. D., 553.
(3) 2 K. & J., 79.
(4) I. L. R., 8 Calc., 766.
(5) I. L. R., 2 All., 361.
(6) 13 W. R., F. B., 75; 5 B. L. R., 347.

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As to the guardianship of the minor sisters, Macnaghton's Mahomedam Law, p. 62, and Tagore Law Lectures, 1873, p. 477, were referred to.

Mr. *R. V. Doyne* replied.

On June 23rd their Lordships' jugdment was delivered by

SIR R. COUCH:—These are consolidated appeals in two suits brought by the respondents respectively against the appellants, in which one judgment was given by the lower Courts and a similar decree made in each suit. The respondents (the plaintiffs) are the daughters of Moulvi Mahomed Idris, who died at Dacca in December 1845, by his second wife, Khadija, who survived him. The appellants, Abdul Kadir and Abdur Rahman, are his sons by his first wife, Biju, who died before him. By her he had also two daughters, Amatulla and Amtal Rahman, who survived him. At the time of their father's decease the respondents were living with him at Dacca, and, almost immediately afterwards, they left Dacca with their mother Khadija, and went to live at the house of their maternal grandfather, and continued to live there until Khadija married again. From there, soon after her second marriage, the respondents were removed by their brothers and were taken to the house of the brothers in Sylhet, where they lived until 1864. At that time, they being about 22 or 23 and 20 or 21 years of age, respectively, arrangements were made by their brothers for their marriages, and they were taken to Dacca, and, 15 or 20 days after their arrival there, were married to their present husbands. From the death of Mahomed Idris the property left by him was managed by the elder brother, the first appellant, and apparently by the younger, the second appellant, also, after he came of age, and the brothers received the rents and profits of the property.

In each of the suits the plaintiff claimed possession of a 1 anna 15 gundahs share of the immoveable properties mentioned in the schedules to the plaint, and to have an account taken and payment of the balance found due. The first schedule contained the properties left by Mahomed Idris, and the second contained properties alleged to have been acquired after his death from the profits of the properties left by him.

There were two grounds of defence. One, as to properties called in the plaint taluks Nos. 3 and 4, was founded upon a solehnama, dated the 6th of January 1847, made between Abdul Kadir for himself and as guardian of his minor brother Abdur Rahman and his minor sisters Amatulla and Amtal Rahman, and Khadija for herself and as guardian of her minor daughters Amtal Karim and Amtal Kadir. By this, after reciting that there was a dispute in respect of the immoveable property left by Mahomed Idris, for settling the dispute between them the parties made an amicable settlement to the effect that out of the taluks which were left by Mahomed Idris, and detailed in a schedule, the taluk No. 3, Alum Reza, bearing a jamma of Rs. 1,293-3-8, and jammai land with nankur and khanabari (homestead land) appertaining thereto, and taluk No. 4, Asadar Reza, bearing a jamma of Rs. 1,400-11-11, with jammai land and nankur khanabari appertaining thereto in Joar Baniachung, Zillah Nabigunge, and two annas share of the houses described, were given in lieu of a sum of Rs. 11,250, with interest, on account of the dower of the deceased mother of Abdul Kadir and his minor brother and sisters which was due to them from their father, by Khadija on her own account and as guardian of her daughters, and the said property was made over to them; and taluk No. 9, Mahomed Manwar, bearing a jamma of Rs. 343-12-3, and the jammai land and nankur khanabari in proportion to the aforesaid jamma, and taluk No. 11, Mahomed Mansoor, bearing a jamma of Rs. 168-1-8, with jammai land and nankur khanabari appertaining thereto in Pergunnah Langla which were covered by the kabinnama of Khadija, were given to her by Abdul Kadir, and other land in the taluks mentioned, was divided by giving to Abdul Kadir and his minor brother and sisters 10½ sixteenths as their share, and to Khadija and her daughters 5½ sixteenths as their share.

The other ground of defence was that the plaintiffs having been married and settled to live permanently at Dacca, they made a proposal to the brothers to give them a daemi mirasi ijara for ever, at a permanently fixed jamma, of their shares of the properties left by their father, and the brothers (the appellants) agreed to take it on the condition of paying Rs. 100 a month, Rs. 50 being paid to each of the plaintiffs.

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Their Lordships will first take the case of the solehnama. It is dated the 6th of January 1847, and thus was made two years after the death of Mahomed Idris. It was found by the Subordinate Judge to have been executed by Najumul Hossein, the father of Khadija, and that he had power to execute it on her behalf. It was argued by the learned Counsel for the respondents that Khadija had no authority to convey the shares of her daughters. In the view their Lordships have taken, it is not necessary to give an opinion upon this question, and the learned Counsel for the appellants having been relieved from replying upon this part of the appeal, he has not been heard upon this objection. The Subordinate Judge was of opinion that Khadija had had the benefit of good and independent advice, but that the defendants had failed to prove that the solehnama was beneficial to the plaintiffs. He held, however, that the plaintiffs having allowed 20 years to elapse, even after attaining their majority, without taking any steps to set it aside, it was too late for them to question the validity of the transaction on the ground of its having been prejudicial to their interest. The High Court, on appeal from the decrees which he made, held that the transaction was not binding on the plaintiffs, especially in the absence of evidence to show that it was the best arrangement which could under the circumstances be made in their interest.

In their Lordships' opinion, the High Court, in deciding that the solehnama did not bar the right of the plaintiffs, did not give proper effect to the lapse of time between 1847 and the bringing the suit in 1882, and the inference which should be drawn from the evidence in the suit that possession was had in accordance with it. That Khadija took possession was proved by her having subsequently made an alienation of part of the property assigned to her. There is, indeed, no direct evidence as to what the brothers did with the taluks Nos. 3 and 4, but it may be fairly inferred that they did not treat them as part of the joint property in which the plaintiffs had shares and that they received the rents of them as property which belonged only to themselves and their minor sisters. Assuming that Khadija had no power to transfer the plaintiffs' shares

or that they might have had the solehnama set aside, their making no objection to it for so many years after they attained majority is sufficient evidence that they ratified and adopted it. There was also the defence of the law of limitation. The High Court, in dealing with this, made no distinction between the taluks No. 3 and 4 and the other property. They said that up to a period less than two years before the institution of the suits the defendants were as agents and trustees in possession of and managing the property on behalf of the plaintiffs. This may have been the case after Khadija's second marriage and the plaintiffs being taken to the brothers' house, but there is no evidence that the brothers should be regarded as trustees for the plaintiffs at the time of the execution of the solehnama. Section 10 of Act XV, of 1887 is, therefore, not applicable, and it is unneccessary for their Lordships to put a construction upon this section. It appears to them, if it were necessary to decide it, that, as regards the property included in the solehnama, the suits are barred by the law of limitation.

The defence under the daemi miras ijara-potta, or perpetual lease, has now to be considered. The case of the defendants is that the plaintiffs executed a mukhtarnama, dated the 7th Bhadro 1271 (22nd August 1864), by which, reciting that they had inherited from their father 3½ annas share of the property named in it, and the same was being let out in perpetual miras ijara to the brothers Abdul Kadir and Abdur Rahman, they appointed Moonshi Pran Nath Chuckerbutty as a mukhtar for the purpose of signing their names on the perpetual miras ijara-potta and causing registration of the same. And that, on the 26th of August 1864, Pran Nath Chuckerbutty signed their names to a daemi miras ijara-potta of the taluks mentioned in the schedule to it, at an annual rent of Rs. 1,200, namely, Rs. 600 on account of the share of each, to be paid by instalments of Rs. 600, and the document was registered.

There is now no dispute as to the execution of the potta by Pran Nath Chuckerbutty. The material question is whether the mukhtarnama was executed by the plaintiffs. It is attested by five witnesses, of whom only two were examined, and the absence of the others was not in any way accounted for. Of one

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of the witnesses examined, Chamu Bibi, the Subordinate Judge said: "I find it difficult to believe that she could, without any assistance, recollect the execution of the mukhtarnama so circumstantially as it was described by her. It seems to me as very probable that her knowledge of the details was not derived entirely from her memory. That circumstance, together with the dependence of the witness on the defendants, makes her evidence unreliable, unless corroborated by other evidence." The other witness, Masudar Reza, had been in the service of the defendants for many years, but had left it five or six years before the trial, and did not appear to have then any connection with them. He said: "The Bibis put their marks on that mukhtarnama. I saw the aforesaid Bibis putting their marks. Remaining behind a screen they put their marks by extending their hands. I saw it. From respectable people there I ascertained and believed that the aforesaid Bibis put their marks. I do not recollect the names of the persons from whom I ascertained it." This witness is described in the attestation as resident of Kumartoli, and one of witnesses not examined is described as inhabitant of Kumartoli in Dacca. The potta is attested by nine witnesses, three of whom are described as of Kumartoli, and others as being at Dacca. If the mukhtarnama was really executed as described, it is singular that it was not attested by some of these persons or of "the respectable people there," of whom Masudar Reza spoke.

The other evidence to prove its genuineness consisted of an order, dated the 22nd of August 1864, signed by Mr. Pennington, Principal Sudder Amin, on the back of the mukhtarnama, stating that it had been produced "to-day" by Moonshi Giasuddin, Mohurir, and, as an inquiry was necessary, ordering the Nazir to make it; and a report of the Nazir, also on the back of it, dated the 23rd of August, which stated that he went to the residence of the plaintiffs, and that they were identified by their relations Khaja Abdulla, Khaja Abdul Wajed, and Khaja Abdul Nubbi, and admitted the execution of the mukhtarnama and agreed to its terms. Mahomed Yusuf, the Nazir, was examined, and said he did not recollect anything about the inquiry, and that the signature at the foot of the report resembled his writing,

but he could not swear it to be genuine or not. On the next day, the 23rd, the mukhtarnama was ordered to be given back to the man who presented it, namely, Giasuddin. As Principal Sudder Amin, Mr. Pennington had no authority to order the inquiry to be made. Giasuddin was a Mohurir of the Court of the First Subordinate Judge and general mukhtar of the defendants, and Mr. Pennington may have thought that the mukhtarnama was for business in the Court. The High Court properly held that the report was not by itself evidence of the facts stated in it. Khaja Abdulla and Abdul Wajed were examined. On the testimony of the former the Subordinate Judge said he placed little reliance. The latter deposed to seeing rent being paid and received on twelve or fourteen occasions, and that receipts were granted for it, and he saw them signed. It was said by Khaja Abdulla that Pran Nath Chuckerbutty was present when the mark signatures were put and when the Nazir made the inquiry, and yet he was not called as a witness, although he appeared to be living and might have been examined. Their Lordships are not satisfied that the Nazir ever made the inquiry.

It remains to notice a fact which, though possibly consistent with the truth of the defendants' case, raises a strong suspicion against it. A number of receipts were produced by the defendants appearing to be given by Amtal Kadir each for sums of Rs. 50. They contained a statement that she had given a lease in perpetuity to her brother Abdul Kadir and others in lieu of a salary or allowance of Rs. 50 as malikana money, and acknowledged the receipt of Rs. 50 as allowance for the month mentioned in the receipt. They seem to have been worded so as to support the case set up in the defendants' written statement. They were rejected by both Courts as not genuine. No other receipts were produced, nor any accounts showing that rent had been paid to the plaintiffs. Thus Abdul Wajed's evidence as to receipts being signed appeared to be false. The High Court, differing from the Subordinate Judge, said they were not satisfied that the defendants had succeeded in proving the execution of the mukhtarnama, and the evidence does not satisfy their Lordships that it was executed.

The Subordinate Judge found that certain properties in one of the schedules to the plaint did not appear to be covered by

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the miras potta, and he gave the plaintiffs a decree for those properties with proportionate costs, and dismissed the suits as regards the remainder of their claims. The High Court reversed that decree, and declared that, in addition to the shares of the properties decreed to the plaintiffs by the lower Court, they were entitled to shares of the remaining properties other than the taluks Nos. 9 and 11, which were allotted to Khadija by the solehnama, and had been sold and were in the possession of persons who were not parties to the suits, and they were also entitled to shares of such property or properties specified in the second schedule to the plaint as upon the making of the inquiry thereinafter directed might be found to have been purchased out of the surplus profits of the properties other than the said two taluks, and to a share of the surplus profits of the properties in the first schedule, other than the said two taluks, from December 1845 to the date of delivery of possession, and they ordered accounts to be taken from that date. As to the accounts, it appeared that the plaintiffs had, up to November 1881, been receiving Rs. 1,200 annually. Their Lordships think the evidence of Abdul Wahed, the husband of Amtal Karim, shows that this sum was agreed to be taken as the plaintiffs' share of the profits, and was so received by them until they asked, in November 1881, to have their allowance increased, from which time they refused to receive it. Their Lordships, therefore, consider that the accounts decreed by the High Court should only be taken from November 1881. The result is that, in their opinion, the decree of the High Court should be varied by omitting therefrom the taluks Nos. 3 and 4, which were included in the solehnama, and ordering the accounts to be taken from November 1881 instead of December 1845. They will humbly advise Her Majesty accordingly. As to the costs of these appeals, they think the partial success of the appellants does not entitle them to the costs, and they order that the parties bear their own costs.

Decree varied.

Solicitors for the appellants: Messrs. *Wrentmore* and *Swinhoe.*

Solicitors for the respondents: Messrs. *Watkins* and *Lattey.*

C. B.