1880

BANSIDHAR v. BU ALI KHAN.

doubt if any Court of Equity would allow itself to be made the medium to enforce terms so monstrous. On the contrary it seems to us that, were the decision of the case referred before this Court, our plain duty would be to hold that, looking at the entire instrument, the parties intended, when they spoke of interest, a penalty for each day's default in payment of the principal sum; for it must be admitted that one rupee per diem for failure to repay Rs. 50 is, as interest, an extortionate amount, for which no adequate consideration is shown, and which no man would contract absolutely to pay.

Holding this view, and as an answer to the fourth question, we think that the amount of interest mentioned in the promissory note is in the nature of a penalty, and may be so treated by the Officiating Judge in disposing of the plaintiff's claim.

P. C. *
1880
June 30 & *July* 1.

PRIVY COUNCIL.

KAMAR-UN-NISSA BIBI (PLAINTIFF) *v.* HUSSAINI BIBI (DEFENDANT).

[On appeal from the High Court for the North-Western Provinces at Allahabad.]

Gift—Possession—Dower.

On an issue whether an oral gift of an estate, consisting of certain taluquas and mauzas, had been made by a Muhammadan proprietor in favour of his wife, the gift having been stated to have been made in consideration of a dower of a certain amount, which remained unpaid, it was not necessary to affirm in the decision that that amount of dower had been agreed upon prior to the marriage. It is not necessary to constitute dower, by Muhammadan law, that the dower should be agreed upon before marriage; it may be fixed afterwards.

The possession of the estate, which was the subject of gift, having been changed in conformity with the gift, that change of possession would have been sufficient to support it, even without consideration.

Held, on the evidence, that the gift was effectively made.

APPEAL from a decree of the High Court of the North-Western Provinces (2nd March, 1877), reversing a decree of the Subordinate Judge of Jaunpur (25th February, 1876).

The question on this appeal was whether or not an oral gift had been made by the appellant's uncle, Mehdi Ali, in favour of the

* *Present:* SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

1880

KAMAR-U NISSA BI v. HUSSAIN BIBI.

respondent, Hussaini Bibi, his wife. The gift comprehended the whole of the revenue-paying lands of Mehdi Ali in Jaunpur and Azamgarh, and the principal questions which arose below were: Was Mehdi Ali of mental capacity to make a valid gift at the alleged date, *viz.*, the 1st May, 1870? If so, did he make it understanding what he was doing and intending to transfer his estate to the respondent? Was possession transferred by Mehdi Ali to the respondent? Was there any such consideration as was alleged, *viz.*, the satisfaction of a due dower of Rs. 51,000.

The Court of first instance held that Mehdi Ali, though of very weak intellect, was not proved to be incompetent at that time to make a valid disposition of his estate; and in this view the High Court on appeal substantially concurred. As to the second of the above questions, the opinion of the Subordinate Judge was one that involved his finding against the gift;—*viz*, that Mehdi Ali had no knowledge of it, and that all the circumstances, connected with the allegation of it, threw suspicion on its authenticity. As to the third question, the Subordinate Judge held that no transfer, or change of possession, in Mehdi Ali's lifetime, was proved. As to the fourth question, he held that no dower was shown to be then due.

The High Court, differing from the first Court on the second and third questions, was of opinion that Mehdi Ali made the oral gift, understanding what he was doing, and that he then transferred the possession to the respondent. As to the fourth question, relating to dower, the High Court held that they were not called upon to decide it, but that there was some confirmation of "the plaintiff's allegation as to Rs. 51,000 being the real amount."

On this appeal,

Mr. *R. V. Doyne* appeared for the appellant,

Mr. *J. F. Leith*, Q.C., and *Mr. C. W. Arathoon*, for the respondent.

The facts are stated in their Lordships' judgment which was delivered by

SIR MONTAGUE SMITH.—The suit out of which this appeal arises was brought by Kamar-un-nissa Bibi, one of the heirs, and a

1880

AMAR-UN-ISSA BIBI v. HUSSAINI BIBI.

niece of Mehdi Ali, who died on the 24th of April, 1873, to recover a landed estate described in the plaint as the half of certain talooks and mauzas in the districts of Jaunpur and Azamgarh, against the widow of Mehdi Ali, who claims to hold the estate under a gift made to her by her husband in his lifetime. Mehdi Ali died childless. The state of the family, so far as it is material, is this: The father of Mehdi Ali was Shere Ali, who died on the 20th of December, 1830, leaving two sons and a daughter; the sons being Ali Naqui and Mehdi Ali, and the daughter Amani Bibi. The appellant, Kamar-un-nissa, is the only daughter of Naqui. It appears that the daughter of Shere Ali, Amani Bibi, had three children—all daughters. Two of the daughters were living at the time of the commencement of the suit; the other was dead, leaving a son, Muhammad Hassan. The Court thought it right that those three persons should be made defendants in the suit, Kamar-un-nissa remaining the sole plaintiff. The addition of these defendants, however, did not change the main issue, which is, whether Mehdi Ali made a gift of the estates in question, or of his share of those estates, to his wife. On the part of the plaintiff, the fact of the gift is denied. It was alleged to be made orally, and the plaintiff asserts that no such gift was ever made. But the plaintiff further contends that, if it were made, Mehdi Ali was in a state of mind in which he could not comprehend the full effect of the act he was doing, and that, in fact, he was imposed upon by his wife, and by her brother, Ghulam Abbas, who, it appears, had for some time managed the estate.

Before going to the evidence relating to the gift itself, it may be convenient to refer to what appears upon the record as to the state of Mehdi Ali's mind. Undoubtedly, it appears that at one time, if not a lunatic, he was treated by his family as being one, and that he was confined in a lunatic asylum at Benares, his mother, Chand Bibi, being appointed guardian. That state of things continued during the lifetime of Ali Naqui, his brother, who managed the whole estate until his death. Upon the death of Ali Naqui it appears that the Government took charge of the property. It does not appear that there was any regular attachment, but it was taken into the charge of an officer of the Government. Mehdi

1880

KAMAR-UN-NISSA BIBI v. HUSSAINI BIBI.

Ali complained of his being kept out of possession of his share of the property. It may be as well here to state that Shere Ali had in his lifetime made a gift of his property to his two sons, Naqui and Mehdi, in equal shares. On finding the Government in charge, Mehdi Ali petitioned the Government, and prayed that he might be allowed to go and live upon his estate; and thereupon an investigation was made by Mr. Best, the Judge of the district. The following is his report of an interview he had with Mehdi Ali:—"To-day Syud Mehdi Ali, and Jai Mangal Lal, his karinda, having appeared, caused their respective statements to be taken down. It does not appear *primâ facie* from the manner of Syud Mehdi Ali's conversation that he is unable to do his work, though his intellect, owing to his retirement, may not be mature and keen, like the intellect of those who are continually engaged in transacting worldly business." That being his finding, he comes to this conclusion: "As it is necessary to inquire under what law the Revenue Court has thus interfered, it is ordered that a copy of this proceeding be sent to the Officiating Collector, with a request that he will inform me of this after inquiring into the matter. After inspecting the house, he should make such arrangements for the residence of Mehdi that he may not be subjected to any inconvenience." It appears that he was permitted to take possession of his property, and to reside in his own house. Mehdi Ali then applied for a mutation of names; to which the present appellant objected, stating that he was of unsound mind; but the Officiating Collector, and the Commissioner upon appeal to him, ordered the mutation as prayed. The present appellant then appealed to the Sudder Board of Revenue, who made this order: "The Board observe that the report of the Commissioner received lately shows that each party is at liberty to manage that portion of the estate of Syud Ali in respect of which his name has been entered in the proprietary column. Kamar-un-nissa has no right to manage the estate of Mehdi Ali, because, under Act XXXV of 1858, no application has been filed to prove that he was not qualified to manage his estate." The appellant, upon that, took no further steps: but Muhammad, the great nephew of Mehdi, and grandson of his sister, took proceedings under Act XXXV of 1858 to obtain a certificate of his lunacy. Without going into the evi-

1880

QAMAR-UN-NISSA BIBI v. HUSSAINI BIBI.

dence that was then given as to the state of his mind,—indeed, our attention has not been called to it by Mr. Doyne, who evidently felt that any Court which had now to decide upon the question of sanity would be very much guided by the reports then made,—their Lordships will proceed to consider what it was that was found upon these inquiries.

The first investigation was made by Mr. Currie. After going through the history of the case, he says:—"On the evidence before it, the Court cannot adjudge Syud Mehdi Ali to be a lunatic and incapable of managing his affairs; and this application is, therefore, rejected." Muhammad, not satisfied with Mr. Currie's decision, appealed to the High Court; and the High Court directed a further investigation, which was made by Mr. Edwards, the then Judge of the district. In his judgment, Mr. Edwards enters very fully into the evidence, describes an interview with Mehdi Ali, and gives the result on his own mind of the evidence, and of his interview with Mehdi Ali. The material part of his judgment is this:—"It is clear from the statements of the witnesses that they had free access to him, yet the only acts they speak to are very trivial, and would be taken as idiotcy rather than insanity; and that he is no idiot is fully proved by reports of both medical men who had full opportunity of judging. No one who saw Mehdi Ali could ever declare him to be an idiot. Agreeing in the suggestion in the proceeding of the High Court, I directed the attendance of the alleged lunatic at my house for a personal interview. The civil surgeon was present. I conversed with Mehdi Ali for a considerable time on various subjects, avoiding those on which he was likely to have been tutored. Neither in appearance, manner, nor conversation did he show any unsoundness of mind. He talked sensibly and to the purpose on any subject introduced, and replied to questions in a way which showed he fully understood them. His memory is evidently good, as he described matters which took place many years ago, such as Mr. William Frazer's murder at Delhi, as well as matters of later date. He is now an old man, of upwards of 60 years of age, I believe; and though he may have no pretensions to be an able or clever man, he is assuredly not a lunatic, nor is he in any way

to be termed incapable of managing his own affairs." That is a very strong opinion, not only that Mehdi Ali was at the time of sound mind, but that, though he was not of strong capacity, he was competent to manage his affairs and was fairly intelligent upon the subjects on which he had spoken. It is to be observed that their Lordships' attention has been called to no evidence which in any way contravenes this report. It may be that at an earlier period of his life he was a lunatic, but he had apparently recovered at the time of his brother's death, and in the early part of 1869 he appears to be a man, if not of strong mind, yet competent to deal with the ordinary affairs of life. The sub-registrar who took his acknowledgment of the mukhtar-nama, to be hereafter referred to, describes him as whimsical. It appears that he lived a secluded life; that he was a great student of the Koran; and that he did not attend to the practical management of his affairs, but left them very much to be conducted by his managers, the last of whom appears to have been Ghulam Abbas, his wife's brother. On the whole, their Lordships have come to the conclusion that he was perfectly able to comprehend such a transaction as a gift of his property to his wife.

We now approach the transaction in question. It is said that on the 1st of May, 1870, Mehdi, in the presence of seven witnesses, made, in the most formal way in which a verbal gift could be made, a gift of the property in question to his wife, who was present at the time. It is said that the words of gift were repeated three times—that is said by some of the witnesses, though not by all,—and the wife in a formal manner expressed her acceptance of the gift. The words said to have been used are formal, and probably were purposely formal. It is not alleged that, if what is said to have passed really took place, the gift was not a valid one, supposing that there was either consideration for it, or a transfer of possession. But the fact of the gift was denied, and it was strongly contended that, if it had been intended by Mehdi Ali to give what is, no doubt, a considerable property to his wife, he would have taken the proper and ordinary precaution of having some document in writing as evidence of the gift, and that the fact that there was no such instrument was in itself a strong cir-

1880

KAMAR-UN-NISSA BIBI v. HUSSAINI BIBI.

cumstance against the probability of the gift having been made. It was also said that no relatives were present, and that none of the neighbours in an independent position were called in to witness and sanction the transaction. However, there were seven persons present, including two mukhtars and some karindas. These persons were, no doubt, more or less dependent on the family, but no serious effort was made to impeach their evidence, except so far as the credibility of it is affected by their position. Their Lordships are quite prepared to agree with the Subordinate Judge that the Court is bound to watch with the greatest care, perhaps even with suspicion, the case of a verbal gift set up after the alleged donor's death; and if the case had rested upon the oral testimony alone, their Lordships probably might not have had this appeal before them. It may have been that, in that case, the High Court would not have dissented from the view of the oral evidence which had been taken by the Subordinate Judge. But the case does not rest on this evidence alone, and it is not a case where an oral gift is set up, after a man's death, which had not been heard of in his lifetime. An instrument was executed by Mehdi Ali, a mukhtar-nama, to carry the gift into effect; and publicity was given to the fact of the gift having been made, which drew forth, from the present appellant and others, opposition in the lifetime of the donor. The gift was made on the 1st May, 1870, and about six weeks afterwards a mukhtar-nama was executed which contains a reference to the gift, and appoints a mukhtar to effect a mutation of names. The terms of the mukhtar-nama, and the way in which the gift is referred to, are worthy of great consideration. The gift is not cursorily mentioned, but is described so much in detail, that if the document was read to Mehdi Ali, and if he had intelligence enough to comprehend it, it is impossible that he should not have known that it was intended to carry into effect the gift which it alleged that he had made a short time before. The recital in the instrument is this:—"Whereas I have made a final verbal gift of all my estates mentioned above, which are my own property and possession, without the partnership of any other person, to Mussummat Hussaini Bibi *alias* Mehdi Bibi, my lawful wife, with all the rights appertaining thereto, and subject to all the liabilities for debts due to the creditors and chargeable on the

said property; and whereas I have caused the said donee to be put in proprietary possession of the whole of the said property as my representative, under the managership of Syud Ghulam Abbas, my manager and general attorney and brother of the said Mussummat; it is necessary that my (the executant's) name should be expunged from the Government papers, and that the said Mussummat be entered therein as proprietor and possessor of the said property. I, accordingly, for the purpose of filing petitions for the mutation of names in respect of the above-mentioned properties, hereby appoint Lala Jassoda Nand, a vakil of the Court and revenue agent, and Mir Sabit Ali, revenue agent, my mukhtars," in order to obtain the mutation of names. This document is proved in as satisfactory a manner as one can possibly expect. The writer of it is examined as a witness. One of the attorneys mentioned in it, who is also called, is a vakil of the Court, and is treated by the High Court as a respectable man. He proves that the mukhtar-nama was executed. The sub-registrar went to the house of Mehdi Ali, and obtained from him verification of the instrument. His evidence has also been given. The respondent did not rely upon the formal endorsement of registration on the document, but examined the sub-registrar, who proved the manner in which it was taken, and in his evidence states :—" The document was read to him by me; he heard it, and said 'Yes, I have executed it.' His conduct at that time did not show that he was not in his senses. I stayed only so long as was necessary for the purpose of registration. Mehdi Ali himself signed the registration endorsement; he did so after having read it." Unless it be held that the sub-registrar is not entitled to credit, or that Mehdi Ali was a man incompetent to understand what he heard and read, it is impossible not to perceive that this document confirms, in the strongest way, the evidence of the witnesses who say that the gift was made.

The gift is stated to have been made in consideration of a dower of Rs. 51,000, which remained unpaid. It is said that that dower is exorbitant, and there is positive evidence that the dower actually agreed upon at the time of the marriage was a much less sum; indeed, of a sum which appears to be almost

1880

I KAMAR-UN-NISSA BIBI v. HUSSAINI BIBI.

nominal, little more than Rs. 100. In the first place, the Courts do not appear to have given credit to the witnesses who have stated that the dower was settled at that small sum; and if the persons who proved the gift are worthy of credit, they are entitled to receive credit as to what they prove to have passed with reference to the consideration, as well as with reference to the gift itself. Their Lordships cannot come to the conclusion that dower was not mentioned, or that the sum which the witnesses state was not that which was mentioned. It is unnecessary to affirm that that amount of dower had been agreed upon prior to the marriage. It may be that Mehdi Ali, though the dower might be only nominal at the time of his marriage, may have chosen to declare this large dower to be the consideration for the gift. He may have thought that it would give validity to the gift to declare that the dower was of that amount. It is not necessary by Muhammadan law that dower should be agreed upon before marriage: it may be fixed afterwards. Again, the sum itself, although a large one, is not excessive compared with the property of the donor. That some dower had been agreed upon is acknowledged; and the precise amount, as the High Court says, is not material to sustain the gift, because any amount would be a sufficient consideration for that purpose. No doubt, if their Lordships were satisfied that Mehdi Ali had not mentioned that sum of Rs. 51,000, it would go far to destroy the credit of the witnesses as to the rest of the transaction. They cannot, however, come to the conclusion that that sum was not mentioned by Mehdi Ali, whether it was the real amount of dower which had been previously agreed upon or not. But if the possession was changed in conformity with the terms of the gift, that change of possession would be sufficient to support it, even without consideration.

It appears that the application for mutation of names was opposed by the present appellant, and that ultimately there was an appeal to the Board of Revenue. The appellant in that appeal was the present respondent, the revenue officers having decided against her. The opinion of the Board of Revenue is this:—"The point to be decided is—Is appellant in possession or not? It appears to me that the proofs of her possession are many and strong.

She has filed dakhilas for payment of Government money given in her name as far back as November, 1870. She paid income tax in 1871 and 1872, for which she holds receipts. She sued a tenant for ejectment in 1871, and obtained a decree. The Civil Court of Jaunpur, on the 19th February, 1869, found that her husband was of sound mind," and so on. The Board allowed the appeal. Then the present respondent granted a zur-i-peshgi lease of part of the property to secure a sum of Rs. 2,000, which she did as owner, and being dealt with as owner. Their Lordships have come to the clear conclusion that there was a change of possession, which, even without consideration, would be sufficient to support the gift.

Various proceedings afterwards took place upon the objection of the appellant. The officers, perhaps with reasonable suspicion, declined to effect the mutation of names unless Mehdi Ali came before them and authenticated the mukhtar-nama, and petitions presented in his name praying that the mutation might be made. While, undoubtedly, an inference might not unnaturally arise from his non-appearance, either that he did not choose to come forward to support the gift, or that those who had put forward a false gift prevented his appearing, there are circumstances which may explain his absence without making an inference so hostile to the case of the respondent. It is evident that Mehdi was an infirm man, and that he suffered from a painful complaint which made any exertion difficult to him; and, in addition to his physical ailment, he was a man of retired and secluded habits, who would be very reluctant to come before a Court and be examined. On the whole, therefore, their Lordships think that no inference sufficient to overturn the strong case which has been made on the part of the respondent in favour of the gift arises from Mehdi not having appeared before the officers when summoned on the application referred to. It is further to be observed that there is nothing improbable in the fact that Mehdi Ali should make a gift of his property to his wife in his lifetime. His father had made such a gift to his two sons, and Naqui, his brother, had given his property in his lifetime to his wife. Moreover, it was natural that Mehdi should prefer that his property should go to his wife rather than

1880

KAMAR-UN-NISSA BIBI v. HUSSAINI BIBI.

to the members of his own family who had taken or sanctioned the proceedings in lunacy against him.

For these reasons, their Lordships think that the judgment of the High Court is right; and they will therefore humbly advise Her Majesty to affirm it, and with costs.

Solicitors for the appellant: Messrs. *W* and *A. Ranken Ford.*

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

1880
November 8.

CIVIL JURISDICTION.

Before Mr. Justice Pearson and Mr. Justice Straight.

GAURI SHANKAR (PLAINTIFF) *v.* SURJU (DEFENDANT).*

Registered Bond for the payment of money—Suit for compensation for the Breach of a Contract in writing registered—Act XV of 1877 (Limitation Act), sch. ii, Nos. 66, 116.

The defendant, having borrowed money from the plaintiff, gave him a bond, dated the 4th July, 1872, for the payment of such money, with interest, within two years, or on certain contingencies contemplated and defined in such bond. Such bond did not specify a day for payment. It was duly registered. On the 30th June, 1880, the plaintiff sued the defendant, stating in his plaint that he had lent the defendant such money; that it was payable on the 4th July, 1874; that on that day he had demanded payment; that the cause of action arose on that day, as the defendant did not pay; and that he claimed such money accordingly. The plaint did not make any mention of such bond. *Held* that the suit was not one which fell within the scope of No. 66 of sch. ii of Act XV of 1877, but one to which No. 116 of that schedule was applicable, and it might proceed on the plaint without any amendment thereof.

THIS was a reference to the High Court by Mr. R. D. Alexander, Judge of the Small Cause Court at Allahabad, under s. 617 of Act X of 1877. The facts which gave rise to this reference were as follows:—On the 4th July, 1872, one Sarju executed a bond for Rs. 200 in favour of one Gauri Shankar and one Mata Prasad, the terms of which were to the following effect:—"I, Sarju, son of Gopal Pathak, by caste *prágwál*, resident of mohalla Daraganj at Allahabad, having borrowed and brought into use the sum of Rs. 200 of the current coin, half of which sum is Rs. 100,

* Reference, No. 7 of 1880, by R. D. Alexander, Esq., Judge of the Small Cause Court, Allahabad.