Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Mussumat Ameroonissa Khatoon (Widow and Representative of Moulvie Abdool Ally) and others v. *Mussumat Abedoonissa Khatoon (Widow of Moulvie Wahid Ally) and others (No.* 486, *of* 1864), *from the High Court of Judicature at Fort William, in Bengal; delivered* 30*th January*, 1875.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

Sir Lawrence Peel.

THIS suit was brought in the Civil Court of Dacca by Moulvie Wahid Ally against his father, Moulvie Abdool Ally, in his own right, and as the heir of his deceased wife Eftekhuruunissa, and as the husband of another wife, Ameeroonnissa, to set aside three ikrarnamahs, or agreements, on the allegation that they were forged. These ikrars, if genuine, modified the operation of three hibbanamahs, or deeds of gift, two purporting to be executed by his father, and one by his mother Noorunissa, containing, ostensibly, absolute gifts to Wahid Ally of various properties of considerable value. The plaint also prayed that Wahid Ally might be put into possession of these properties, and that the decree of the Magistrate in a suit under Act IV. of 1840, maintaining his father in possession, might be set aside. Mr. Barry and others claiming under pottahs from the father, were also made Defendants. Their title must stand or fall with Abdool Ally's; and they did not appear on the hearing of this Appeal.

The questions in the suit relate to the genuineness and validity of the three hibbanamahs and the three ikrars. Each of them was on some ground impeached.

The Judge of Dacca dismissed the suit (except as to an 8 anna share of some property of the Plaintiff's mother Noorunissa, which it was admitted he was entitled to), holding that the first alleged hibbanamah of the father was not proved, and that the second and third from the father and mother, respectively, were invalid by Mahomedan law, there being, as he found, no delivery and acceptance of the gifts, or change of possession. He also held that the ikrars were genuine and valid.

The High Court reversed this Decree, and the grounds and nature of their own Decree, which is the subject of the present appeal, are thus stated at the conclusion of their judgment. "Our Decree will proceed on the basis of the validity of the three Deeds of gift, and the invalidity of the later documents (the ikrars). We shall declare that Moulvie Wahid Ally was in his life-time, and that those who are now by law his heirs and representatives, are entitled to a Decree for setting aside the documents relied upon by the Respondents, and for the recovery of the property sued for."

Wahid Alley died before the Decree appealed from, and the father subsequently. The parties to this appeal are their respective representatives.

It appears that at the date of the alleged hibbanamahs Abdool Ally had two wives, Noorunissa, the mother of Wahid Ally, and Eftekhurunissa. Wahid was his only son, and he had one, or at most, two daughters. Abdool afterwards married a third wife, Ameeroonnissa, and the third ikrar purports to be made on the occasion of this marriage.

The first hibbanamah in order of time is dated the 14th Magh, 1254, and purports to convey, by way of gift from the father, some lakhiraj lands charged with religious trusts belonging to the Kuddum Russool Durgah at Noabaree, and to appoint his son Mutwallee of the Durgah in his place. The document also contains an appointment by the father of Moonshee Kolumoodeen Mohomed to be the guardian of his son for the business of the Durgah during his minority.

The original of this deed was not produced; and

their Lordships, during the argument, declared their opinion that its non-production was not sufficiently accounted for to allow of secondary evidence being given of its contents. It appeared upon the Plaintiff's evidence that the original deed had been delivered to the guardian Moonshee Kolumoodeen, but this person was not called as a witness, nor was his absence explained. It is to be observed that, although the document tendered as evidence, viz., what purported to be a copy of the deed from the Registry, showed that the instrument, if really executed, was signed by numerous subscribing witnesses, none of them were called to prove its existence and execution. Supposing, therefore, that secondary evidence had been admissible, neither of the two conditions required to make the copy statutory evidence of the deed by virtue of Regulation XX, 1812 (sec. 2, cl. 5), was complied with. It was not shown that the original was "lost, destroyed, or not forthcoming," that is to say, its non-production was not satisfactorily accounted for, nor was there any proof by any of "the subscribing witnesses" that the original had been duly executed.

No doubt, although the statutory proof failed, other secondary evidence might have been given of the contents if the non-production had been duly accounted for. It was suggested that the deed may have remained with the father, but this suggestion is opposed to the evidence; and further, the custody of the father would not be, according to the supposed terms of the deed, the proper custody. In their Lordships' opinion, therefore, no sufficient foundation was laid for the admission of secondary evidence.

Objections made with the view of excluding evidence are not received with much favour at this Board, but it is sometimes necessary for the right decision of the merits of the controversy between the parties to give effect to them. In the present case the surrounding circumstances raised no presumption of the existence of the deed, and the question of the custody bore materially on the issue to be determined.

The execution of the two other hibbanamahs by Abdool Ally and Noorunissa respectively is not denied. The first of them is dated 19 Assim, 1256, and purports to be a gift from Abdool Ally to

his son of certain jumma lands, viz., his 10-anna share of the zemindaree of Noroollapore, and shares of other zemindaries. This deed, which recites that Abdool Ally had only one son, Wahid, and a daughter, Sremootee Fukhurunissa, who was well provided for by her husband; that he had already bestowed some of his property on his wife, Noorunissa, and that he wished to prevent quarrels at his death and to enable his son to live well, contains an absolute and present gift from the father to the son of the above-mentioned properties.

The deed from the mother, Noorunissa, is dated 24 Joiste, 1258, and purports to be a present and absolute gift to her son of certain shares of the zemindaree of Pergunnah Boro Bajoo, and of other zemindaries. Some of these properties originally belonged to Noorunissa in her own right, and others had been transferred to her by her husband. The deed states that the son being a minor, the father, as his guardian, had acknowledged the gift.

These two hibbanamahs were duly registered, but no mutation of names was made.

It has been found by the High Court that Wahid became of full age, viz., 18, in 1261; consequently, at the date of the hibbanamah from the father he was a child only 10 or 11 years old.

The Courts below substantially agree in their conclusions of fact upon the evidence with regard to the possession and management of the properties. They both find that although all proceedings relating to the estate were subsequently to the hibbahs in the son's name, the father remained in actual possession and receipt of the profits of the properties, and in the uncontrolled management of them.

The Principal Sudder Ameen was of opinion, on these facts, that the transfers to the son were "purely nominal," and that the father did not intend that any property should pass by them, or at least whilst he lived; and he further held that the gifts were invalid by Mahomedan law for want of acceptance and seisin by the donee.

The High Court, however, came to the conclusion that the transfers were not colourable, but intended to operate as real gifts. They also held that "when the guardian of a minor is himself the donor,

and in possession of the property, no formal delivery and seisin is required," citing in support of this exception to the general law "Macnaughten's Principles of Mahomedan Law," chap. 5, secs. 9 and 10.

It was not denied by the learned Counsel for the Appellants that the High Court had on this last point taken a correct view of the law, nor do their Lordships doubt that where there is, on the part of a father or other guardian, a real and *bonâ fide* intention to make a gift, the law will be satisfied without change of possession, and will presume the subsequent holding of the property to be on behalf of the minor.

It was, however, strongly insisted by the Appellant's Counsel that the Principal Sudder Ameen was correct in considering that the transfers were colourable, and only with the view of making the son the ostensible owner; or, if not purely *beenamee*, that they were not intended to operate exclusively for the son's benefit, but were made subject to a future family settlement. It is enough for their Lordships in this place to say there are circumstances in the case which favour this contention, at least as regards the transfer from the father, but they do not think it necessary to go at large into this question, for, having come to the conclusion, for reasons to be hereafter stated, that the three ikrars alleged to be executed by the son are genuine documents, they think the rights of the parties must be determined on the basis of the combined operation of the hibbas and ikrars. It is clear also that the father, who set up in his defence to this suit these ikrars as valid instruments, cannot now be allowed to aver that the hibbas to which they relate were intended to have no operation and effect.

A legal objection to the validity of these gifts was made in the High Court on the ground that the gift of Mushâ, or an undivided part in property capable of partition, was, by Mahomedan law, invalid. This point appears to have been taken for the first time in the High Court, and was argued at this Bar. That a rule of this kind does exist in Mahomedan law with regard to some subjects of gift is plain. The Hedaya gives the two reasons on which it is founded: First, that complete seisin being a necessary condition in cases of gift, and this being impracticable with respect to an indefinite part of a

divisible thing, the condition cannot be performed; and, secondly, because it would throw a burden on the donor he had not engaged for, viz., to make a division. (See Book XXX, c. 1, 3 vol., 293.) Instances are given by text writers of undivided things which cannot be given, such as fruit unplucked from the tree and crops unsevered from the land. It is obvious that with regard to things of this nature separate possession cannot be given in their undivided state, and confusion might thus be created between donor and donee which the law will not allow.

In the present case the subjects of the gift are definite shares in certain zemindaries, the nature of the right in them being defined and regulated by the public Acts of the British Government. The High Court, after stating that the shares "were for revenue purposes distinct estates, each having a separate number in the Collector's books, and each being liable to the Government only for its own separately assessed revenue," and further, that the proprietor collected a definite share of the rents from the ryots, and had a right to this definite share and no more, held that the rule of the Mahomedan law did not apply to property of this description.

In their Lordships' opinion this view of the High Court is correct. The principle of the rule and the reasons on which it is founded do not in their judgment apply to property of the peculiar description of these definite shares in zemindaries, which are in their nature separate estates, with separate and defined rents. It was insisted by Mr. Leith that the land itself being undivided and the owners of the shares entitled to require partition of it, the property remained Mushâ. But although this right may exist, the shares in zemindaries appear to their Lordships to be, from the special legislation relating to them, in themselves and before any partition of the land, definite estates, capable of distinct enjoyment by perception of the separate and defined rents belonging to them, and therefore not falling within the principle and reason of the law relating to Mushâ.

Mr. Cowie, in his argument, contended that the rule only applied to cases where the donor himself retained some share of the property, and not to those where the owner gave all his own interest in undivided shares to the donee. The authorities on

Mahomedan law do not seem to be agreed on this point; and after the opinion they have just expressed, their Lordships need not enter upon the consideration of it. Indeed, but for the great practical importance of the question they would have thought it unnecessary to express their opinion on the subject-matter of the gift, since if the hibbas are to be construed, as they think they should be, by the light reflected upon them by the ikrars, absolute and pure gifts of the property were not intended; and therefore the principles of law governing such gifts are not applicable to the transaction.

Their Lordships will now proceed to consider the ikrars. The first two are dated on the 29th Falgoon, 1259. One is addressed by Wahid to his father, Abdool; the other to his mother, Noorunissa.

That from Wahid Ally to his father recites the hibba of the 19th Assim, 1256, and that his father, mother, and "half-mother" being alive, full brothers and sisters, and half brothers and sisters might be born to him. After further reciting that Abdool, by reason of his gift to Wahid, was unable to make suitable arrangements for their maintenance, it became incumbent on him to do so out of the property received by him in gift. It then contains an agreement by Wahid to maintain his sister Koreemunissa and any other sisters or half brothers to be afterwards born, in joint mess during their minority, and on their becoming of age, to allow them certain fixed stipends for maintenance. He also agreed, in case any full brothers should afterwards be born, that he and they, subject to such allowances, should enjoy the properties in equal shares. These words follow this disposition: "And thus I do make my brothers and sisters co-shares in the property received by me in gift, and the profits thereof." The ikrar concludes by declaring that during the father's lifetime, the whole of the property named in it will remain in the father's charge, and under his management and control.

The ikrar to the mother contains analogous dispositions by Wahid in respect to the property contained in her hibba of the 24th Joistee, 1258, except that the provisions for maintenance and shares are confined to his uterine sister Koreemunissa, and any uterine brothers and sisters to be afterwards born. It also contains a provision for the payment

of 250 rupees per mensem to his mother for her life. This ikrar concludes, like that to the father, by declaring that, as long as his father lived, he will have the entire management of the property named in it, of the collection of the rents, &c., and of all business connected therewith.—"I shall not interfere with it."

The High Court do not apparently dissent from the finding of the Principal Sudder Ameen that these ikrars were executed by Wahid. They say: "We should very reluctantly interfere with the finding of the Lower Court that these ikrars are genuine. They were registered when made. It is not probable they remained unknown to the Plaintiff until the year 1864, as we understand him in effect to allege in his plaint." But they declined to give effect to them on the grounds, apparently, that the son was a minor, and that they were obtained by undue influence.

It is to be observed that neither the plaint nor the issues distinctly raise these points. The plaint alleges that the ikrars were forged, and the only issue directed to these instruments is in the following terms:—"Are the three ikrars said to have been given by the Plaintiff to the Defendant genuine and valid Deeds?" Granting that the objection that the ikrars were obtained by undue influence might, if the previous proceedings had raised it, be held to be comprehended in the word "valid" in the issue (although their Lordships think such an issue ought always to be raised in a more pointed form), the question does not seem to have been in fact raised before the Principal Sudder Ameen, nor was it taken in the grounds of appeal against his judgment. In their Lordships' opinion, therefore, it was too late to set up this defence for the first time before the High Court, especially as the evidence does not seem to have been directed to it, which would certainly have been the case if the parties had originally intended to make it an issue in the cause.

The disability of Wahid Ally arising from his being a minor when the first two ikrars were given depends on the question whether his minority is in this case to be determined by the Regulations of 1793. As regards the fact, it was admitted by the Respondent's Counsel that Wahid, when he made these ikrars, was fifteen, the age at which, by the

general Mahomedan law, he would have been competent to act for himself; but they denied that he was then eighteen, and their Lordships are satisfied that the High Court were right in their conclusion of fact from the evidence that he did not reach eighteen, the age fixed for the minority of Mahomedan proprietors of estates paying revenue to Government by Regulation 26 of 1793, section 2, until 1261, which was subsequent to the date of the two ikrars.

If it had been necessary for their Lordships to determine whether the period of minority was governed by this Regulation, they would be strongly disposed to hold that it was. In dealing with these ikrars, Wahid must be assumed to be the proprietor of the revenue-paying estates referred to in them; and inasmuch as they contain dispositions of such estates, the period of his minority, at least for this purpose, would seem to be within the policy and terms of the Regulation and governed by it. But this point becomes immaterial, since their Lordships are of opinion upon the evidence that the principal Sudder Ameen was right in finding that the third ikrar, which refers to the two earlier ones, and in substance confirms them, is a genuine instrument.

It is not denied that this ikrar, if genuine, was executed after Wahid was of the full age of eighteen, and the most disputed, and obviously the most important question of fact in the cause is, whether it is genuine, or was, as Wahid alleges, forged by his father.

This ikrar bears date the 16th Aughran, 1263, and was made, as before observed, upon the occasion of Abdool's marriage with a third wife, Ameerunissa. After reciting the two hibbas from the father and mother, it thus refers to the two former ikrars:—"That I, being your only son, and on account of your having no other son, possessed of all your affections, you had, so as to prevent that any disputes could arise with any one in future, bestowed upon me, by your favour, and through the execution of a deed of gift, dated the 19th Assin, 1256, your ancestral zemindaries specified in the Schedule, and situated within the Collectorate of Zilla Dacca, viz., a 10 as. 13 gs. 1 c. 1 k., share of pergunnah Noroollahpore, and your 7 annas share of pergunnah Idrakpore, situated within Zillah Backergunge. Besides this, having

settled upon my late mother, Noorunissa Khatoon Saheba, as her marriage dower your zemindary of Tuppah Awalee Jehanabad, situated within the Collectorate of the aforesaid Zillah Dacca, and your talooks, &c., my mother aforesaid, as the owner *thereof*, bestowed them upon me through a deed of gift dated the 25th of Joistee, 1258, and I, being the owner and in possession of that property, worth, in accordance with the deed of gift, 80,000 rupees, I did formerly give and execute, as addressed to you and to my mother, the aforesaid Khatoon Saheba, separate ikrars (agreements) to the effect that all the properties named in the schedule of the aforesaid deeds of gift and other properties should, during your lifetime, remain under your control and in your possession. That I did not possess the right of sale and gift over that property, and that, should uterine brothers to me be born, the property received in gift from my mother should be enjoyed by all of us in equal shares, and promising, should I have sisters, or half-brothers and sisters, to make monthly allowances to them." It then recites that the father had contracted a marriage with Ameerunissa, who is stated to be a lady of good family, that provision had been made for the children of the former marriages by the earlier ikrars, and that it was proper to make some for her and any children to be born of the intended marriage. It then states an agreement by Wahid to make allowance to the daughters of the marriage, his half-sisters, and that, should any sons be born, they, his half-brothers, should enjoy the property with him in equal shares, adding, "and thus I constitute my brothers and sisters sharers in the property and in the profits thereof." Wahid then grants an allowance to Ameerunissa of 150 rupees per month for her table and 500 rupees a year for her clothes. The ikrar contains a statement that the father was in possession of the property by virtue of the former ikrars, and concludes by declaring that it will remain in his control and management during his lifetime, and that neither Wahid nor his heirs should interfere or lay any claim thereto.

This ikrar was registered soon after its date. It is sealed with Wahid's seal, but not signed. Five witnesses, two of whom were cited by both sides, deposed that the seal was affixed to the ikrar by Wahid himself in their presence, and there is no

opposing evidence. Wahid was not called to negative the personal execution of the ikrar attributed to him by the witnesses; and their Lordships cannot but think, whilst making due allowance for the dislike of Mahomedans of rank to give evidence in the Courts, that it was his duty if the instrument had been forged to give the Judge the opportunity of hearing his own evidence. His not having done so naturally conduces to the belief that the witnesses who proved his execution of the ikrar have spoken the truth. The Principal Sudder Ameen gave credit to them, and the High Court, who overruled his finding, which affirmed the genuineness of this ikrar, appear to rest their decision partly on the want of Wahid's signature to the ikrar, but mainly on the improbability that, under the circumstances, he should have made the arrangement it contains.

The signature was not necessary; but no doubt its absence made it proper that the proof of the affixing of the seal should be clear and convincing. This evidence, it seems, was supplied; five witnesses, to whom the Principal Sudder Ameen gave credit, having proved that the seal was affixed to the document in their presence by Wahid Ally himself.

In considering the improbability that the son would make such an ikrar, the High Court seem to assume that there was at its date dissension beween the father and the son; but it would seem from the evidence that this did not occur until after the father's marriage with Ameerunissa, and no proof was given that Wahid was opposed to this marriage. His own mother, Noorunissa, was then dead. Undoubtedly domestic quarrels afterwards arose, which led to a separation of the son from the father's house, and from that time the relations of the parties were hostile.

Supposing, then, the father and the son to have been on good terms at the date of the ikrar, there would seem to be, according to Mahomedan family usage, and having regard to the disposition of the property under the previous hibbas and ikrars, nothing really unjust or improbable in the arrangement. Wahid had only one uterine sister, Fukeeroonissa, and his own mother being dead, he could have no more brothers or sisters of the full blood. His father's second wife, Eftekhurunissa, appears to have had no children, and it was probably thought she

would have none. In this state of the family, it would seem just and reasonable that the son, who held the bulk if not all the family property under the hibbas, should join in making some provision for his father's new wife and the possible children of the marriage. It is true that in this ikrar he agrees to make his half-brothers of this marriage equal sharers with himself, whereas in the former ones only his brothers of the full blood were so to share; but his mother was living when the former ikrars were given, and it was then possible he might have had uterine brothers.

Granting, however, that the arrangement in the last ikrar may have been too disinterested to have been altogether probable, if the property had been unquestionably the son's; it does not follow that there is the same or any want of probability in it when his title was only derived from the hibbas, and his father was still in actual possession and enjoyment of the property.

The High Court assumes that the father really intended to denude himself of his property and to make an absolute gift of it to his son, although he had two wives living, and probably contemplated marrying, as he afterwards did, a third; and on this assumption they regard the arrangements of the last ikrar to be improbable.

Their Lordships, however, in considering the probability of its execution, are disposed to adopt the opinion of the Principal Sudder Ameen that an absolute gift was not intended, and that the transaction was either purely benamee, or, more probably, to be followed by a family settlement. In this view of the case the improbabilities relied on by the High Court vanish, and the direct evidence of the execution of the instrument ought to prevail.

The result of establishing the third ikrar will be to confirm and give effect to the two former ones, which must be construed with it. The rights of the parties ought, therefore, in their Lordships opinion, to be governed by the provisions contained in the hibbas of the 19th Assim, 1256, and the 12th Joistee, 1258, and in the three ikrars, read and construed as a whole; and may be declared and enforced, if necessary, in a suit properly framed for that purpose.

The form of the present suit does not allow of these rights being so declared in it. The only prayer in the plaint is to have the ikrars set aside as fabricated, and the Plaintiff put into possession of the properties claimed with mesne profits. Their Lordships being of opinion that the ikrars are genuine, the prayer to set them aside cannot, of course, be granted, nor can the father's possession be treated as wrongful, so as to justify the claim of the son to remove him from it. The ikrars clearly provided that the father should have the possession and control of the property during his life; and any rights, therefore, which others may have under them to any share of the profits accruing in his lifetime could only be enforced in a suit charging him in the character of manager. The present suit which treats him as a trespasser liable to mesne profits cannot be sustained.

For these reasons their Lordships will humbly advise Her Majesty that the decree of the High Court ought to be reversed, and that of the Principal Sudder Ameen, which dismissed the suit except as to 8 annas share of the mother Noorunissa's property, affirmed.

The Respondents must pay the costs of this Appeal.

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