Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Abdul Wahid Khan v. *Musammat Nuran Bibi and others, from the Court of the Judicial Commissioner of Oude; delivered 4th March* 1885.

Present:

LORD BLACKBURN.
SIR BARNES PEACOCK.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

The main question in this appeal arises upon the construction of an instrument of compromise, dated the 28th of April 1866, consisting of two parts, one part being executed by one and the other by the other of the parties to the compromise. It was made in a suit instituted in the Court of the Extra Assistant Commissioner, Settlement Department, in the district of Sultanpur. In order to construe it, it is necessary to see what was the position of the parties when it was made. Between 1821 and 1825 one Mouzzam Khan acquired the ilaka Audari, consisting of seven villages, now in the Rae Bareli, but formerly in the Sultanpur district, and about the year 1849 he purchased, in the name of his sons Abdul Rahman and Abdus Subhan, the ilaka Lewana, consisting of 11 villages, in the district of Partabgarh. Mouzzam Khan died on the 22nd of January 1850, leaving three widows, Gauhar Bibi, Musammat Chameli, and Musammat Bakhtawar, and two sons, Abdul Rahman, the son of

Chameli, and Abdus Subhan, the son of Bakhtawar. It was admitted that Gauhar Bibi was his lawfully married wife, but it was contended, on behalf of the Appellant, that Chameli and Bakhtawar were never married to him, and that their sons were therefore illegitimate. Musammat Bakhtawar had also a daughter, Musammat Nuran, the Respondent, who it was contended was not Mouzzam's daughter, having been born only three months after her mother first entered his harem. In 1855 or 1856, before the annexation of Oudh, a settlement of the whole estate was made with Gauhar Bibi, and a kabuliat executed in her name, and from that time until her death she remained in possession of it. In April 1858, shortly after Lord Canning's Proclamation on the 15th of March 1858, by which all the estates in Oudh were confiscated to the Government, a summary settlement of the estate was made with her. No sanad was granted to her, and her name is not entered in the list of persons who were to be considered taluqdars within the meaning of Act I. of 1869 (the Oudh Estates Act). On the 31st of January 1866, Abdus Subhan brought a suit in the Court of the Extra Assistant Commissioner, Settlement Department, against Gauhar Bibi, to recover one half of the village of Sarah Mahesa, one of the villages in Audari. In the plaint the tenure is described as talukdari without a sanad, and Gauhar Bibi is named as talukdar. The ground of the claim is stated to be, that Mouzzam Khan, during his lifetime, caused the kabuliat of the village in suit, together with the entire taluka, to be executed in the name of the Plaintiff and Abdul Rahman, so that in virtue thereof they continued in possession during their father's lifetime, and after their father's death they held continuous possession till 1263 F.; in the middle of 1263 F., when British rule was established, the entire taluka was settled with

strangers for non-payment of the arrears of Government revenues; after 1266 F. (1859), on the re-occupation of the province, the settlement of the entire taluka was made with the Defendant in the absence of the Plaintiff.

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

"Whereas the petitioner has instituted a suit in the Settlement Court against his mother, Musammat Gauhar Bibi, for proprietary right in half of taluka Sarai Mahesa, in pergana Rokha, in the Sultanpur district. Now, an amicable settlement having been made between the petitioner and his said mother, a deed of compromise is filed this day in the Settlement Court, therefore I, the declarant (mau mukir) commit to writing that (my) mother, Defendant, shall during her lifetime continue as heretofore (ba dastur) to hold possession of and be mistress of the taluka, and manage the estate through agents, but she shall not, without any special emergency, alienate any property so as to deprive me of my right, and that after her death I, the declarant (mau mukir), and my step-brother, Abdul Rahman, shall possess and enjoy each one half of the entire ilaka, situate in the districts of Sultanpur and Partabgarh, and that so long as the Defendant may be living I shall obey her."

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

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

The suit which is the subject of this appeal was brought on the 1st of November 1880, by Musammat Nuran Bibi, Sardar Prem Singh, and Mahomed Taha Khan, the latter two being said to be purchasers from Nuran Bibi of a share of the estate, against Abdul Wahid Khan, the husband of Muradi Bibi, Musammat Shaluka, one of the two widows of Abdul Rahman, and other Defendants who were mortgagees of the estate. The claim was to recover possession of 8 annas 7 pie share of the estate by virtue of inheritance from Abdul Rahman and Abdus Subhan, and the ground of it is stated to be that, by virtue of the transfer of the property effected by Mouzzam Khan in his lifetime, by causing a kabuliat to be executed, both the sons remained in proprietary possession of the estate down to 1262 F., and that under the deed of compromise, Abdus Subhan's right to one half of the estate and Abdul Rahman's to the other half having been admitted, it was settled that Gauhar Bibl should retain

possession of the estate during her lifetime, without power of alienation, and that after her death both the sons would take the estate half and half. The Respondents, in the reasons in their case in this appeal, put the same construction upon the compromise, and in the argument their Counsel contended that it was a recognition of right of inheritance in respect of what would have been the sons' rights, supposing they had succeeded in the suit.

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

giving his translations of the petitions, which substantially agree with those which have been quoted from the Record, he says,—

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

Further on, he says,—

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

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

Their Lordships do not take this view of the

compromise. In Musammat Humeeda *v.* Musammat Budlun, in which judgement was given by this Committee on the 26th March 1872, the High Court of Calcutta had held that, by an arrangement between the Plaintiff, a Mahomedan widow, and her son, an estate was vested in the Plaintiff for life, and, after her death, was to devolve on her son, by way of remainder, but their Lordships held that the creation of such a life estate did not seem to be consistent with Mahomedan usage, and there ought to be very clear proof of so unusual a transaction. They thought that expressions from which it might be inferred that the Plaintiff was to take only a life interest might be explained on the supposition that they may have been used to import that the property was to remain with the widow for the full term of her life, and that the son as her heir would succeed to it after her death. Their Lordships think this is the reasonable construction of the compromise in this case, and that it would be opposed to Mahomedan law to hold that it created a vested interest in Abdul Rahman and Abdus Subhan which passed to their heirs on their death in the lifetime of Gauhar Bibi.

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