Judgement of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeals of Moulvi Abu Mahomed Abdool Kader and others, v. *Srimati Amtal Karim Banu and Srimati Amtal Kader Banu, from the High Court of Judicature at Fort William, in Bengal; delivered* 23rd *June* 1888.

Present:

LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

These are consolidated appeals in two suits brought by the Respondents respectively against the Appellants, in which one judgement 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 Abdool Kader and Abdool 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

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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 talooks Nos. 3 and 4, was founded upon a solehnama, dated the 6th of January 1847, made between Abdool Kader 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 Kader. 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 talooks which were left by Mahomed Idris and detailed in a schedule, the talook No. 3, Alum Reza, bearing a jumma of Rs. 1,293. 3. 8, and jummai land with nunkur and khanabari (homestead land) appertaining thereto, and talook No. 4, Asadar Reza, bearing a jumma of

Rs. 1,400. 11. 11, with jummai land and nunkur khanabari appertaining thereto in Joar Baniachung, Zillah Nabigunge, and 2 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 Abdool Kader 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 talook No. 9, Mahomed Manwar, bearing a jumma of Rs. 343. 12. 3, and the jummai land and nunkur khanabari in proportion to the aforesaid jumma, and talook No. 11, Mahomed Mansoor, bearing a jumma of Rs. 168. 1. 8, with jummai land and nunkur khanabari appertaining thereto in pergunnah Langla which were covered by the kabinnama of Khadija were given to her by Abdool Kader, and other land in the talooks mentioned, was divided by giving to Abdool Kader 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 jumma, 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.

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 talooks 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 them-

selves 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 talooks 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 unnecessary 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 pottah, or perpetual lease, has now to be considered. The case of the Defendants is that the Plaintiffs executed a mokhtarnama, 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 Abdool Kader and Abdur Rahman, they appointed Moonshi Pran Nath Chuckerbutty as a mokhtar for the purpose of signing their names on the perpetual miras ijara pottah 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 pottah of the talooks 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 pottah by Pran Nath Chuckerbutty. The material question is whether the mokhtarnama 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 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 mokhtarnama so circum-"stantially as it was described by her. It "seems to me as very probable that her know-"ledge 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 mokhtarnama. 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 the witnesses not examined is described as inhabitant of Kumartoli in Dacca. The pottah

is attested by nine witnesses, three of whom are described as of Kumartoli, and others as being at Dacca. If the mokhtarnama 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 mokhtarnama, 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 Abdoolla, Khaja Abdool Wajed, and Khaja Abdool Nubbi, and admitted the execution of the mokhtarnama 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 mokhtarnama 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 mokhtar of the Defendants, and Mr. Pennington may have thought that the mokhtarnama 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 Abdoolla and Abdool 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 Abdoolla 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 Kader each for sums of Rs. 50. They contained a statement that she had given a lease in perpetuity to her brother Abdool Kader 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 Abdool 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 mokhtarnama, 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 the miras pottah,

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 talooks 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 therein-after directed might be found to have been purchased out of the surplus profits of the properties other than the said two talooks, and to a share of the surplus profits of the properties in the first schedule, other than the said two talooks, 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 Abdool 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 talooks 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.