Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Jafri Begam and Another v. *Syed Ali Raza (a Minor by his next Friend and Guardian Syed Mahomed Raza), from the Court of the Judicial Commissioner of Oudh; delivered 9th March* 1901.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD LINDLEY.
SIR RICHARD COUCH.

[*Delivered by Lord Lindley.*]

This is a family dispute between a daughter and a grandson of a Shiah Mahomedan named Syed Ashik Ali who died on the 15th January 1885. He left two widows, Mussammats Ajabunissa and Najbunissa, and two daughters by the former, viz.:—Jafri Begam, the Appellant, and Abbasi Begam, the mother of the Respondent. In or about the year 1881, Jafri Begam married Tasadduk Husain, the other Appellant, and about three years later Syed Mahomed Raza married Abbasi Begam. At the time of Ashik Ali's death, Tasadduk Husain and Mahomed Raza were respectively about 25 and 18 years of age. Ashik Ali had no children by his second wife.

After the death of Ashik Ali disputes arose between his daughters and on the 19th January 1885 they agreed to refer these disputes to the arbitration of a friend of the family named Saiyed Mahfuz Ali; and on the same day he made his award.

His decisions were, so far as is material, as follows : —

1. That mutation of names of all the property left by the deceased should be effected in the names of the two daughters of the deceased in equal shares, and that the management of the said estate should be entrusted to the Appellant Saiyed Tasadduk Husain, who was to manage the said estate, and render to the two daughters half-yearly accounts of such management.

2. That the said Tasadduk should look after the education of the said Saiyed Mohammed Raza, and support and maintain him.

3. That the two widows of the said Saiyed Ashik Ali should be treated with due respect, and properly provided for.

4. That the two daughters were the owners of, and had full authority over, all the property left by the deceased, except that which was in possession of the widows which would be theirs for their lives, and that the two daughters were to see to proper provision being made for the said widows.

The 5th Clause of the said award was as follows (Rec. 75, l. 6) :—

5. That since the partition and subdivision of an integral estate belonging to a well-known gentleman, is calculated to lead to its ruin and destruction, the principle of partition should not be considered legal (*i.e.*, eligible) in this estate, so that the constitution of the estate should continue as usual, and there may be no occasion for the mischief-monger to raise troubles.

This award was signed by the arbitrator the two widows and by both the daughters and their husbands.

The said award was presented to the Sub-Registrar of the district for registration on the said 19th January 1885, and he sent the said award back to the arbitrator to specify the property dealt with by such award.

The arbitrator accordingly drew up a list of the property, and the award and the list were afterwards registered.

One of the properties which had belonged to the said Saiyed Ashik Ali, was a share in the village Kukargoti; of this share it was stated in the said specification of the property (Rec. 76, column 3), that its extent was 8 biswas 5 biswansis, and in the 4th column, under the heading "remarks," was the following note :—

"Out of 8 biswas 5 biswansis of village "Kukargoti entered in this list, 5 biswas was "given by the ancestor as dower to his elder "daughter Musammat Jafri Begam, in respect "of which mutation of names should be effected "in favour of the said lady. The remaining "3 biswas 5 biswansis should be entered in "the names of both the daughters in equal "shares."

On the 26th January 1885, the said document with the said specification of property was registered (Rec. 78, l. 1), and the Appellant Tasadduk took upon himself the management of the said estate under the said award.

On the 18th August 1885 the names of the two daughters were substituted for the name of their father in the Revenue registers and later in pursuance of an order dated the 28th September 1885 the entry of the name of Jafri Begam alone was sanctioned in respect of 20 biswas. These 20 biswas represented the 5 biswa share of Kukargoti already mentioned. This change in the register appears to have been procured by Tasadduk Husain as manager of the property and without the knowledge of the Plaintiff's mother.

Tasadduk Husain's management gave rise to disputes. The right of his wife to the 5 biswas in Kukargoti was denied by her sister and some land in Ludhai which Tasadduk Husain said he

had bought with his own money was claimed by his sister-in-law as part of Syed Ashik Ali's estate on the ground that it had been paid for out of income of such estate.

On the 20th March 1890 the present suit was instituted by the Plaintiff's mother Abassi Begam against Jafri Begam and her husband Tasadduk Husain. The Plaintiff's mother died shortly after the suit was instituted, indeed on the same day, but it was revived in May 1890 by her son Ali Raza the present Plaintiff and Respondent. For all practical purposes therefore the suit may be regarded as an original suit by him and it has been so treated in the Indian Courts. The suit is for partition and for the removal of Tasadduk Husain as manager and for an account of his receipts and payments. The suit is based upon the award of Mahfuz Ali but the Plaintiff disputes the validity of the 5th clause prohibiting partition so far at any rate as it applies to him; he also disputes the title of Jafri Begam to the 5 biswa share of Kukargoti; and he claims the land in Ludhai as joint property.

The Defendants filed a long written statement of defence. The material defences are:—

(1.) That the suit was in effect to set aside the award and was barred by limitation.

(2.) That by special family custom, the widows of the deceased excluded the daughters from inheritance.

(3.) That the award prohibited partition and the removal of Tasadduk Husain as manager.

(4.) That five biswas in Kukargoti constituted the separate property of Jafri Begam, both by the award and by reason of a gift made to her on her marriage.

(5.) That the share in Ludhai was acquired by Tasadduk Husain from his separate funds.

The District Judge fixed 18 issues raising these, and a number of other questions.

On the 21st April 1892, he delivered judgment, and decided that the Plaintiff was entitled to a half share in the estate, but not to partition, that sufficient cause had not been shown to remove Tasadduk Husain from his position as manager, and decreed Plaintiff one half of the profits, the amount to be determined at the time of execution of the decree. The Judge said nothing about the five biswa share of Kukargoti nor about the Ludhai property.

From this decree the Plaintiff appealed, and the Judicial Commissioners remanded the case for another trial and the determination of the other issues.

Further evidence was taken and the District Judge found :—

(1.) That the suit was not barred by limitation.

(2.) That the custom relied on by Defendants had not been established.

(3.) That the five biswas in dispute in Kukargoti had been given by Ashik Ali to Jafri Begam as dowry, but that the award in regard thereto was not binding, because the arbitrator was *functus officio* at the time of expressing his opinion.

(4.) That Tasadduk Husain had purchased the share in Ludhai from his private funds.

On these findings, the Judicial Commissioners passed final judgment. They confirmed the findings that the suit was not barred by limitation, and that the alleged custom had not been proved. They also agreed with the District Judge that the arbitrator had exceeded his powers in attempting to decide that Jafri Begam was the owner of five biswas in Kukargoti, but came to the conclusion that the gift of this

property to Jafri Begam had not been established, and that Ludhai had been purchased from the profits of Ashik Ali's estate. They also held that the clause in the award in restraint of partition was invalid, and that Tasadduk Husain could be removed from the post of manager. In the result the Plaintiff obtained a decree for everything he claimed with costs.

From this judgment the present Appeal is brought by Jafri Begam and her husband Tasadduk Husain.

As regards the defence that the suit is barred by limitation of time their Lordships are of opinion that the suit is based on the award and is not a suit to set it aside. No doubt the Plaintiff contends that the 5th clause prohibiting partition is invalid or at any rate is not binding upon him; and that the arbitrator having made his award was then *functus officio* and had no jurisdiction to make the entry which he afterwards did make respecting the 5 biswa share of Kukargoti. But these contentions do not bring the case within Art. 91 Sched. 2 of the Indian Limitation Act 1877. Under that Act a suit to cancel or set aside an award must be brought within three years from the time when the facts entitling the Plaintiff to have it cancelled or set aside became known to him. It is obvious that this limitation has no application to the controversy respecting the five biswas of Kukargoti. A Plaintiff who contends that an arbitrator has no power to make an unauthorised addition to an award already made and sought to be enforced by him is not in any sense seeking to cancel or set aside the award. Neither does the contention that the 5th clause is *ultra vires* and invalid bring the case within the Act. The Plaintiff disputes the legal effect of that particular clause, but does not seek to

cancel or set aside the award. On the contrary he seeks to enforce it so far as it is operative in point of law. As regards the effect of the 5th clause their Lordships agree with the Judicial Commissioners that it affords no defence to the present action. It may have bound the parties who agreed amongst themselves to abide by it. But as against the present Plaintiff the clause has no effect whatever. The arbitrator had no power to alter the course of legal devolution in a mode at variance with the ordinary principles of Mahomedan law in the absence of a special custom prevailing in the family. He had no power to make property which was divisible by law, indivisible for ever.

As regards the alleged family custom by which the widows of Syed Ashik Ali excluded his daughters from the inheritance it is sufficient to say that the award excludes its application and that even if it did not the alleged custom is not proved. Both Courts below have found against the existence of the custom; and the evidence in support of it is far too inconclusive to induce their Lordships to differ from the Courts below on this matter and to depart from their general rule not to disturb a finding of fact concurred in by two Courts who have investigated it.

The claim of Jafri Begam to a 5 biswas share of Kukargoti rests upon an alleged gift to her by her father Syed Ashik Ali on his marriage.

It is for the Defendants to prove that this gift was made and they called several witnesses who say that many years ago Ashik Ali gave her this property as her dowry. But no entry of the gift was made in his lifetime; no change of possession is proved; no separate receipt of rents is proved. Nothing in fact is proved sufficient to turn a loose verbal expression of.

a gift actual or intended into a completed gift or into a clear and distinct trust in favour of the daughter. Having carefully considered the evidence upon this part of the case their Lordships have come to the conclusion that the alleged gift is not proved. It is hardly necessary to add that the entry made by the arbitrator in the schedule of property after he had made his award is no part of his award and cannot confer any title on the Defendants.

There remains the share of Ludhai, purchased by the Defendant Tasadduk Husain, in September 1885 for Rs. 4,000. If the Defendant bought this out of his own money he of course will not be entitled to credit in respect of it on taking the accounts of Ashik Ali's estate. On the other hand if he paid for this share out of money for which he has to account he will get credit for the amount so paid, but then the share of Ludhai will belong to that estate. Until the accounts of Ashik Ali's estate are taken, and the application by the Defendant of the moneys he has received from it has been ascertained, it is difficult, indeed it is impossible, to determine out of what funds the purchase money of the Ludhai share was paid. At present the case stands thus, there is no direct proof that Tasadduk Husain in fact bought the Ludhai share out of moneys which came to his hands as manager of Ashik Ali's estate. He has given no account of the application of his receipts. He has adduced evidence in order to show that he had in September 1885 means of his own sufficient to pay for the Ludhai share, but there is no satisfactory proof that he had; and no evidence that he did in fact pay for the share out of his own money. The District Judge thought that he had means to pay for it and found the share to be his. The Judicial Commissioners

took a different view; they were not satisfied that in September 1885 Tasadduk Husain had means of his own sufficient to enable him to pay Rs. 4,000, and in the absence of any statement by him of the application of the revenues of Ashik Ali's estate, they held the Ludhai share to belong to that estate. Their Lordships consider the evidence insufficient to come to any satisfactory decision on this point one way or the other; and they are of opinion that its decision should be postponed until the accounts are taken.

The result therefore will be that they will humbly advise His Majesty that the decree appealed from, should be varied by inserting a declaration that if on taking the accounts under the decree it shall appear that the whole or any part of the Ludhai share was paid for by the Defendant Tasadduk Husain out of his own separate property, then such share or such part thereof as may be found to have been so paid for is to be treated as his separate property.

Their Lordships are of opinion that in substance the Appeal has failed, and that notwithstanding the modification in the decree as regards the share of Ludhai, the costs of the Appeal must be borne by the Appellants.