

*Privy Council Appeal No. 10 of 1930.*  
*Patna Appeal No. 8 of 1928.*

**Bibi Aesha** - - - - - *Appellant*

*v.*

**Mohammad Abdul Kabir** - - - - - *Respondent*

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 26TH MARCH, 1931.

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*Present at the Hearing :*

LORD BLANESBURGH.

LORD ATKIN.

SIR LANCELOT SANDERSON.

[*Delivered by* SIR LANCELOT SANDERSON.]

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This is an appeal by Bibi Aesha, the plaintiff in the suit, against a judgment and decree dated the 19th of December, 1927, of the High Court of Judicature at Patna, which reversed a judgment and decree dated the 24th of September, 1926, of the Subordinate Judge of Patna.

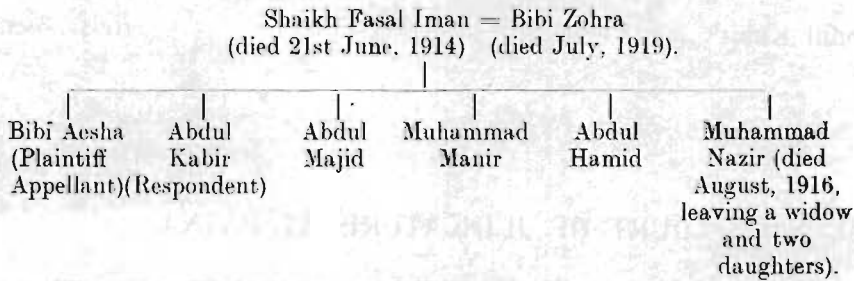
The suit was brought by the plaintiff to recover her share of the heritage of her father and mother. The claim included a prayer for a declaration that certain deeds named therein were inoperative, fraudulent and ineffective as against the plaintiff, and for confirmation of her possession, or in the alternative for possession of the properties mentioned in Schedule 6 of the plaint.

The defendants were her four brothers : (1) Abdul Kabir, (2) Abdul Majid, (3) Muhammad Manir, (4) Abdul Hamid, and (5), (6) and (7) the widow and two minor daughters of a deceased fifth brother, Muhammad Nazir. The minor daughters appeared through their mother. There were certain other defendants,

transferees from some of the defendants, and to whom detailed reference is not necessary.

The plaintiff is the daughter of one Shaikh Fasal Iman, a *Sunni* Moslem, and Bibi Zohra, his wife.

The following pedigree will be useful for reference :—



The material facts are as follows :—

Fasal Iman died in 1914, leaving Zohra his widow and the six children mentioned in the pedigree.

Nazir died in 1916 and Zohra died in 1919.

In 1915, when Nazir was alive, certain deeds were executed affecting the property, the result of which was that the plaintiff lost her share in the inheritance and her five brothers distributed it among themselves.

This suit was instituted on the 19th of January, 1923.

The plaintiff alleged that the said deeds were fraudulent and inoperative as against her, that the widow and daughters of her deceased brother Nazir had no share in the inheritance of her father and mother, that she and her four surviving brothers were the only heirs entitled to the heritage, that she was entitled to a one-ninth share, and she prayed for a declaration that her share in the estate was that specified in Schedule 6 of the plaint, which she alleged represented her legal share of one-ninth.

The suit was at first contested, but later it was compromised.

In the first instance a compromise petition, dated the 15th October, 1925, was presented by Abdul Kabir, who was the first defendant in the suit, and who is the only respondent to this appeal.

This petition dealt with a compromise between the plaintiff and Abdul Kabir, and is set out in the compromise decree, to which reference will presently be made.

Subsequently the learned Judge, before whom the suit was being tried, held that certain terms of compromise had been effected between the plaintiff and the defendants (2) to (5); he therefore made a decree, dated the 9th of February, 1926, which, with the petition upon which, in part, it proceeded is in the following terms :—

The humble petition of Mr. A. Kabir, defendant No. 1, in the suit.

Most respectfully sheweth :—

1. That inasmuch as the plaintiff is the sister of this defendant and a prolonged contest over this suit would be ruinous to both parties, the matter in suit has been amicably settled between the plaintiff and this defendant.

2. That this defendant admits the claim of the plaintiff in the above suit, with regard to her share out of the heritage of Haji Shaikh Fazal Iman and Musammat Bibi Zohra, deceased.

3. That the plaintiff has agreed to relinquish her claim for costs against this defendant, if any, in the event of a decree being passed in her favour.

It is accordingly prayed that the suit of the plaintiff may be decreed on admission as against this defendant, and this defendant may be exempted from any cost in this suit.

Dated the 15th October, 1925.

(Signed) Mohammad Abdul Kabir, Defendant No. 1, 15.10.25.

This suit coming on this 9th day of February, 1926, for final disposal before Babu Raj Narayan, Sub-Judge, 3rd Court, Patna, in the presence of M. Md. Ishaq, Maulvi Abdul Hakim, vakils, and Babu Bhup Bahadur, pleader for the plaintiffs, and M. Abdur Rahman, wakil, and M. Abu Zaffar, pleader for the defendants, it is ordered and decreed that the suit is decreed on compromise on the confession of defendant No. 1 as embodied in the petition dated 15.10.25. Besides, it is decreed also on compromise against defendants 2 to 10 in a modified way. The plaintiff will get a further decree for one-eleventh share out of the share of defendants 2 to 5 in the properties of Schedules 1, 2 and 3 of the plaint, the share of plaintiff and those of defendants 2 to 5 being specified in the schedule annexed herewith and which is a part of this decree. The deed of wakf and the deed of gift in favour of Zawahirul Huq will stand good and the plaintiff will get no share in those properties which are also specified in a separate schedule. The plaintiff will get no share in the residential houses in Ramzanpur, Kashi Chak, Gaya and Garbigha—a separate schedule of which is also annexed with this decree. On the expiry of two years from this date the plaintiff will give the following properties bearing tauzis Nos. 4059, 4066, 4065, 4063, 3230 and 277 and Garbigha to defendants 2 to 5 (*vide* details of these properties which are specified in a schedule attached hereto) and will take in exchange other properties of the same market value from them, and deed will be executed in pursuance of this term. If the parties fail to get this matter amicably settled among themselves, the matter will be settled by the Court in execution of this decree and the Court will decide after taking evidence what properties should be given by the defendants to the plaintiff. The parties will bear their own costs. Defendants 2 to 5 will deposit in Court to plaintiff's credit the sum of Rs. 10,886-3-9, which is found to be the mesne profits payable by defendants 2 to 5 to the plaintiff up to the date of this decree within a week from this day.

The effect of the last-mentioned compromise was that as between the plaintiff and the defendants (2) to (5) Nazir's widow and daughters retained the share to which they were entitled under the deeds in dispute. In return the plaintiff was to receive one-eleventh share out of the shares of the defendants (2) to (5) in certain properties specified in Schedules 1, 2 and 3 of the plaint.

The plaintiff then proceeded to execution of her decree, and she claimed to recover possession of one-ninth out of the share of the properties held by Kabir, and one-eleventh out of the shares already referred to of the defendants (2) to (5).

Thereupon Abdul Kabir presented a petition under Section 47 of the Civil Procedure Code, protesting against the execution petition of the plaintiff. Abdul Kabir submitted that the plaintiff had no right under the compromise decree to get possession of any portion of his share of the properties.

The Subordinate Judge of Patna heard the application and held that as an executing court he had only to interpret the compromise petition.

He decided that the effect of the two compromises taken together and considered in the light of the plaintiff's claim in the suit was that the plaintiff should get one-eleventh share in the whole heritage, including the share of Abdul Kabir.

The plaintiff appealed to the High Court, the main ground of appeal being that she was entitled to a one-ninth share out of the share in the possession of Abdul Kabir.

Abdul Kabir filed cross-objections claiming that the order under appeal should be varied by disallowing *in toto* the claim of the plaintiff to possession of any property as against him.

On the 19th of December, 1927, the High Court dismissed the appeal of the plaintiff and allowed the cross-objection of Abdul Kabir, and directed that the order of the Subordinate Judge should be varied by dismissing the execution case as against Abdul Kabir.

The learned Judges were of opinion that the compromise, which was made between the plaintiff and Abdul Kabir, amounted to no more than an admission that the above-mentioned deeds were inoperative as against the plaintiff, and that she was entitled to the share in the estate which she claimed, but that there was nothing to give the plaintiff any right to enter upon the share, which was in the possession of Abdul Kabir, especially as that share was less than he was legally entitled to, by reason of the admission of Nazir's widow and daughters to a share in the estate.

This is the decree against which the present appeal is directed.

Their Lordships are unable to accept the view adopted by the learned Judges of the High Court.

The question depends upon the construction of the compromise decree.

The portion of the decree which relates to the compromise between the plaintiff and Abdul Kabir is the following passage :—  
 “ It is ordered and decreed that the suit is decreed on compromise “ on the confession of defendant No. 1 ” (*i.e.*, Abdul Kabir), “ as “ embodied in the petition dated 15.10.25.”

On reference to the petition, it is found that Abdul Kabir admitted the claim of the plaintiff with regard to her share out of the heritage of her father and mother. There is no doubt that the plaintiff's claim was that the above-mentioned deeds were inoperative as against her, and that she was entitled to the share specified in Schedule 6 of the plaint, which she alleged represented her legal share of one-ninth. As already mentioned, the plaint in the suit included a claim that the plaintiff's possession of the properties specified in Schedule 6 of the plaint should be confirmed, and for possession of any of the said properties of which she might have been dispossessed.

The above-mentioned claims, therefore, were admitted by Abdul Kabir in his petition, which concluded with a prayer

that the suit of the plaintiff should be decreed on the above-mentioned admission as against Abdul Kabir.

Accordingly the above-mentioned decree was made.

In their Lordships' opinion, the meaning of the above-mentioned decree is that the plaintiff is entitled to recover her one-ninth share of the inheritance so far as the first defendant, Abdul Kabir, and the properties of which he obtained possession as his share, are concerned.

As the learned Subordinate Judge pointed out, if Abdul Kabir's contention were correct, and if it had been intended that the plaintiff should have no remedy against him and the property held by him as his share of the inheritance, the suit should have been dismissed as against him. It is, however, unnecessary for their Lordships to say more about this part of the case, than that the words of the decree and the petition, on which it is based, when the position of Abdul Kabir in the matter is borne in mind can, they think, have no less extensive meaning than that which they have attributed to them.

In their Lordships' opinion, the compromise which the plaintiff made with the other defendants and the decree which the plaintiff obtained against them in respect thereof did not affect the rights of the plaintiff under the decree against the first defendant, Abdul Kabir.

At the time the compromise between the plaintiff and Abdul Kabir was made, viz., the 15th October, 1925, the plaintiff and the other defendants had not come to terms.

The plaintiff and the other defendants apparently could not agree as to the terms of a compromise, which it was alleged had been arrived at on or about the 14th of November, 1925, and in the end the Subordinate Judge had to decide what were the terms of the compromise between the plaintiff and the defendants (2) to (10). He gave his decision on the 9th February, 1926, and thereupon he made the decree against Abdul Kabir, to which reference has already been made, and a "further" decree for one-eleventh out of the shares of defendants (2) to (5) in the properties of Schedules 1, 2 and 3 of the plaint.

It is true that the "further" decree was based upon a compromise which, according to the Subordinate Judge's finding, the plaintiff had made with defendants (2) to (10); but the fact that the plaintiff agreed to take from those defendants a less share in the properties held by them, cannot affect the construction of the decree against Abdul Kabir, or of the compromise which she had previously made with him.

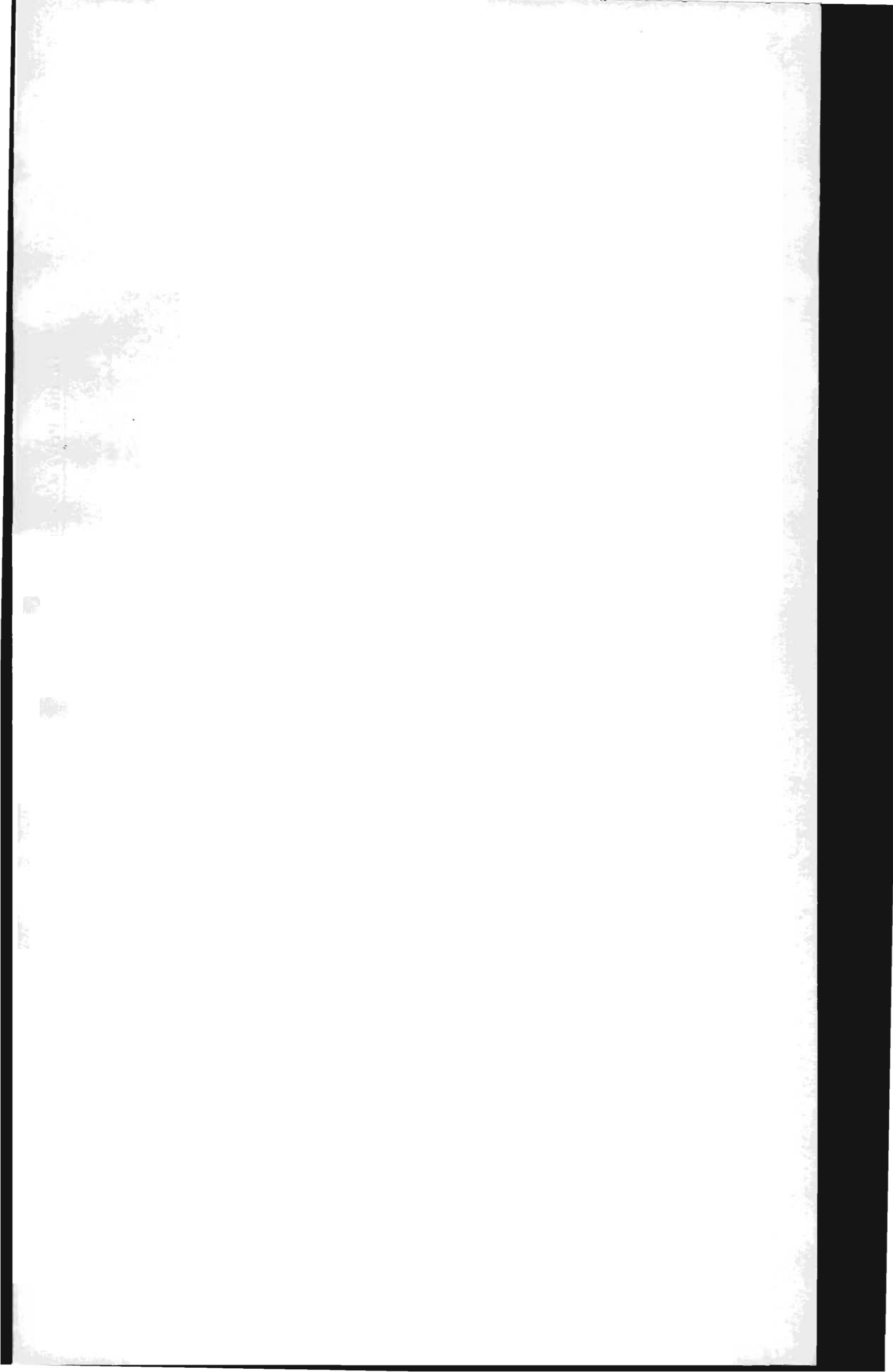
Nor can the fact, if it be the fact, that Abdul Kabir, by reason of his agreeing that the representatives of his deceased brother Nazir should take a share in the inheritance, had obtained a smaller share of the inheritance than he would have been otherwise legally entitled to, affect the construction of the compromise decree which was made against Abdul Kabir.

Their Lordships therefore are of opinion that the decree of the High Court dated the 19th of December, 1927, must be set aside. The judgment and decree of the Subordinate Judge dated the 24th of September, 1926, must be varied by declaring that the plaintiff is entitled as against Abdul Kabir to a one-ninth share out of the share of Abdul Kabir and as against the other defendants to a one-eleventh share out of the shares of the defendants (2) to (5) in the scheduled properties referred to.

It is not possible for their Lordships, on the materials now before them, to specify the properties in respect of which the plaintiff is entitled to the one-ninth and the one-eleventh shares, hereinbefore referred to. It will therefore be necessary for the High Court to remand the case to the Court of the Subordinate Judge in order that the claim of the plaintiff can be dealt with in accordance with this judgment.

The defendant Abdul Kabir must pay the costs of the plaintiff of the proceedings under Section 47 of the Civil Procedure Code in the Court of the Subordinate Judge at Patna, of the appeal and the cross-objections in the High Court, and of this appeal.

Their Lordships will humbly advise His Majesty accordingly.



In the Privy Council.

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BIBI AESHA

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MOHAMMAD ABDUL KABIR.

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DELIVERED BY SIR LANCELOT SANDERSON.

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