

accompaniment extraneous to the application, as a condition precedent to further action by the Court executing the decree.

The Limitation Act as an enactment of a restrictive character, must be strictly construed: *Umishankar v. Chhotalal*<sup>(1)</sup>. We must take the darkhast now in question to be in time, if the previous darkhast was in accordance with law, notwithstanding that certain accompaniments, accessories or extraneous details may have been wanting and that there may have been a failure to comply with the requirements of rules not strictly affecting the application itself.

For these reasons we reverse the decree of the lower appellate Court and return the case to that Court, in order that it may be proceeded with according to law.

Costs to follow event.

*Decree reversed.*

R. R.

(1) (1875) 1 Bom. 19.

## ORIGINAL CIVIL.

*Before Sir Lawrence Jenkins, K.C.I.E., Chief Justice, and Mr. Justice Beaman.*

SUMSUDDIN GOOLAM HUSEIN AND ANOTHER (ORIGINAL PLAINTIFFS) v. ABDUL HUSEIN KALIMUDDIN AND ANOTHER (ORIGINAL DEFENDANTS).\*

*Mahomedan Law—Spes successionis—Non-transferable and non-releasable—Transfer of Property Act (IV of 1882), sec. 6 (a)—Deeds executed by par-dānashīn lady—Burden of proof.*

The chance of an heir-apparent succeeding to an estate is under Mahomedan Law neither transferable nor releasable. It is only by an application of the principle that equity considers that done which ought to be done that such a chance can, if at all, be bound.

It was not intended by section 6 (a) of the Transfer of Property Act to establish and perpetuate the distinction between that which according to the phraseology of English lawyers is assignable in law and that which is assignable in equity.

\* Appeal No. 1431, Original Suit No. 830 of 1901.

1906.  
 SUMSUDDIN  
 v.  
 ABDUL  
 HUSEIN.

In the case of deeds executed by *pardánashin* ladies it is requisite that those who rely on them should satisfy the Court that they had been explained to and understood by those who executed them.

*Sudisht Lal v. Massummat Sheobarat Koer*,<sup>(1)</sup> *Shambati Koeri v. Jago Bibi*<sup>(2)</sup> followed.

APPEAL from Chandavarkar, J.

The facts giving rise to this suit were as follows :—

One Kalimuddin Amiruddin had two sons, Abdul and Abdula (defendants 1 and 2) and a daughter, Fatmaboo (plaintiff).

On the 25th October 1895 Kalimuddin obtained from his daughter a Gujaráti writing whereby, in consideration of a sum of Rs. 9,000 which he agreed to credit to her in his books, she relinquished and released all her right, title and interest—present or future—by way of inheritance or otherwise in all the properties of Kalimuddin wheresoever situated. The writing provided for payment of interest alone to Fatmaboo at certain rates and on certain terms and conditions mentioned in the deed. The deed was executed at Cambay and was not registered in British India.

The writing is fully set out in the judgment of Jenkins, C. J.

On the 9th June 1897 Kalimuddin executed two Gujaráti writings whereby he dedicated his immoveable properties at Cambay to certain charities.

On the 9th September 1897, Kalimuddin made a deed of settlement, *wakfnámáh*, in respect of his immoveable properties at Bombay and Cambay. It confirmed the Gujaráti writings dated the 9th June 1897 and the one dated 25th October 1895.

Kalimuddin died on the 25th June 1900.

Fatmaboo filed this suit on the 1st December 1904, praying, among other things, that the Indenture, dated the 9th September 1897, be construed by the Court: and alleging that the release, dated the 25th October 1895, being unregistered, was not admissible in evidence against her and was not binding on her.

Abdul Husein (defendant 1) contended in his written statement that the plaintiff had no interest in the estate of Kalimuddin and could not therefore maintain the suit.

(1) (1881) L. R. 8 I. A. 39 at p. 43.

(2) (1902) 29 Cal. 749.

During the pendency of this suit Fatmaboo died on the 21st April 1905. At her death her son Sumsuddin and her husband Gulam Husein were added as plaintiffs on the 17th July 1905.

The Advocate-General was added as defendant No. 3, representing the charity.

Chandavarkar, J., dismissed the suit with costs, including the cost of the Advocate-General, on the grounds that the transaction in question did not amount to either a transfer or a renunciation by Fatmaboo of her expectant interest but was rather a family arrangement between Fatmaboo and her father by which she agreed to take on his death specific property instead of her legal share and to make no other claim on his estate or against his other heirs taking it. He also found that if the said agreement had been voidable Fatmaboo confirmed and acted under the same and obtained part payment of the consideration thereof both before and after the death of Kalimuddin and that the agreement was by such conduct of Fatmaboo made binding upon the plaintiffs. The consent of Fatmaboo to that agreement was not obtained by the undue influence of Kalimuddin nor was the latter at the time of obtaining the said agreement in a position to dominate the will of Fatmaboo. Against this decision the plaintiffs appealed.

*Set aside with Inverarity* for the appellants (plaintiffs).

The deed in question is void as a nullity, because thereby Fatmaboo relinquished her expectant interest in her father's property, which interest at the date of the execution of the deed was a mere *spes successionis*, and such interest, both according to the Mahomedan Law and the Transfer of Property Act, cannot be the subject of a valid transfer: *see* case No. XI cited in the "Precedents of Inheritance" at page 89 of MacNaghten's Principles and Precedents of Mahomedan Law and *Mussummaut Khanum Jan v. Mussummaut Jan Beebee*.<sup>(1)</sup> *See* also Transfer of Property Act, section 6 (a). To the same effect is the decision of the Judicial Committee of the Privy Council in *Sham Sunder Lal v. Achhan Kunwar*.<sup>(2)</sup>

(1) (1827) 4 S. D. A. (Beng.) 210.

(2) (1898) 25 I. A. 183.

1906.

SUMSUDDIN

v.  
ABDUL  
HUSEIN.

1906.

SUMSUDDIN  
v.  
ABDUL  
HUSEIN.

The contract, if any, is voidable on the ground of undue influence. The transaction was between a daughter and her father and there is a presumption that the father had an influence over the daughter. Fatmaboo was a strictly *pardánashin* lady. The deed was not explained to her. She did not understand the legal nature and effect of her act. She executed the deed without any independent legal advice and without having all the materials regarding the value of the property put before her. The consideration moving from the father was grossly inadequate.

They also quoted *Johnson v. Johnson*,<sup>(1)</sup> *Tailby v. Official Receiver*,<sup>(2)</sup> *Coombe v. Carter*,<sup>(3)</sup> *Holroyd v. Marshall*,<sup>(4)</sup> *Abdul Wahid Khan v. Mussumat Nuran Bibi*.<sup>(5)</sup>

*Strangman* with *Padshah* for the respondents supported the judgment.

JENKINS, C. J.—Before us the suit has been treated as one brought by Fatmaboo to establish her right as one of the heirs of her deceased father Kalimudin Amirudin, who died on the 25th of June 1900.

Kalimudin's heirs at his death were his two sons, the first and second defendants, and his daughter, the original plaintiff Fatmaboo. He left no will, so that, if the case rested there, Fatmaboo's claim would be unanswerable. But it is pleaded that by a document of the 25th of October 1895, exhibit F, her rights as one of her father's heirs were extinguished, and the only question argued before us has been as to the soundness of this plea.

Exhibit F is addressed to Kalimudin, and it runs as follows:—

To Mulla Kalimudin Amirudin, an inhabitant of Horwad at Cambay . . . .  
Written by Bai Fatmaboo Kalimudin, wife of Gulam Husein Abdulali, an inhabitant of the aforesaid place. To wit: You are my respected father. You have two sons besides myself. And as to whatever immoveable and moveable properties (and) household furniture belonging to you there are at Cambay,

(1) (1841) 4 Beav. 318.

(3) (1887) 36 Ch. D. 348.

(2) (1888) 13 App. Cas. 523.

(4) (1862) 10 H. L. C. 191.

(5) (1885) 12 I. A. 91 at p. 101.

Bombay and Bakha and Bassein and other places, and as to what property there may be at your death after additions and deductions shall have been hereafter made to and from the same during your lifetime, thereto I have a right by way of inheritance according to the Mahomedan Law. And my mother had directed (you) to give (me) ornaments. For all (my) rights including the said right, you, having agreed by the agreement (herein) below mentioned to pay me Rs. 9,000, namely, nine thousand of Bombay currency, have credited (the same) to my account from this day. Consequently, I, having, in consideration of the said sum, relinquished all my rights and claims, have given this release in writing and have agreed as follows :—As to any property (belonging to you) that there may be either in (this) country or in any other country, *i. e.*, wherever (the same be situate) at your death, I have no right or claim whatever thereto. Only the abovementioned amount which has been fixed in consideration of all my rights I have caused to be credited (to me). I am to receive only that (amount) by the undermentioned agreement.

1. The moneys mentioned in this release have been caused to be credited to my account, at your place. In consideration of the interest thereon, I am, or my children that there may be, are to receive Rs. 250, namely, Rupees two hundred and fifty of Bombay currency, every year up to your lifetime. (I or my children) have no right to receive the principal amount during your lifetime but when at your death, I or my children may demand the principal amount for the purpose of purchasing a property yielding income or of depositing the same at interest at the place of someone, at that time your heirs, whoever they may be, are bound to pay the same. As long as we do not withdraw the said money so long we are, after your death, to receive interest at the rate of eight annas.

2. On your death taking place we may purchase a property yielding income or we may deposit the principal moneys either with your heirs or at some other *sáhkár's* (*i. e.*, a banker's). I or my children are to use the income or the interest in respect of the said amount and I or my heirs can withdraw (moneys) out of principal amount for urgent purposes (but) we cannot make an improper use of the same. And if I or my children or any one of their progeny be not alive, and if anything out of the property mentioned in this release should have remained due to us, (then) the ownership thereof belongs to your heirs.

3. Prior to this release, Abdul Husein had taken from me in writing a document in respect of my right. The same is cancelled and (I) have given this release in writing. Consequently the responsibility in respect of the said document is on your head. And in future even if I should not be living at the time of your death, you or your heirs are bound to pay the abovementioned sum to my children.

4. You can give your heirs your property including the charge in respect of the aforesaid moneys mentioned in (this) release, that is to say, those (persons) who may become your heirs are to enjoy your property after paying off the

1906.

SUMSUDDIN  
o.  
ABDUL  
HUSEIN.

1906.

SUMSUDDIN

v.

ABDUL  
HUSEIN.

incumbrance in respect of the abovementioned sum, that is to say, your heirs or the persons taking your property are bound to pay the abovementioned sum.

I have given this release in writing of my free will and pleasure (and) while in a conscious state, and under such a distinct agreement that any contention on my part or on the part of my children on the score of (your) giving your other heirs (your) property except the abovementioned sum or on the score of (their) getting (the same) shall not prevail. The same is agreed to and approved of by me and my heirs. The 7th of Kártik Sud of Samvat 1952, Friday the 25th day of October in the Christian year 1895.

The document was signed by Fatmaboo alone and the place of execution was Cambay.

There is now annexed to it a schedule of property, but that was subsequently added without Fatmaboo's authority or assent.

In the plaint as originally framed it was contended that as the document was not registered it could not be used against Fatmaboo, but as the result of a decision in another suit this contention was abandoned and the plaint was amended by the addition of paragraph 4 (a) which runs as follows:—

The plaintiffs say that the said document of the 25th of October 1895 was treated by the said Fatmaboo when she filed this suit both as void in law *ab initio* and as voidable by her by reason of undue influence. The document was inoperative both according to Mahomedan Law and otherwise and according to the law of British India, since by it the said Fatmaboo purported to release and give up a mere expectancy. The same was also voidable by her by reason of undue influence, inasmuch as the consideration mentioned therein was so grossly inadequate as to be unconscionable, having regard to the value of the property of the said Kalimudin, and inasmuch as the act of obtaining the benefit if any of the said document from his daughter Fatmaboo who was an ignorant Mahomedan *pardanashin* female was a misuse of his parental authority by the said Kalimudin.

In the end the parties went to trial on the twenty-three issues set forth at pp. 30 to 33 of the printed appeal book, and Chandavarkar, J., dismissed the suit with costs.

From this decree the present appeal has been preferred by Sumsuddin Gulam Husein and Gulam Husein Abdulali, who on Fatmaboo's death were substituted as parties in her place.

At the date of exhibit F. Fatmaboo had no vested interest in her father's estate; all she had was the chance as an heir-apparent of succeeding to a share in it.

If that chance is not bound by what she has done, then on her father's death she succeeded to that share; and if on his death she did not so succeed, that can only be because in her father's life she, by exhibit F, bound that chance and thus extinguished her right of succession on its accrual.

The case has been argued throughout as though it were governed by the law of British India, and it is therefore on that basis that I propose to proceed.

By the Transfer of Property Act it is provided that the chance of an heir-apparent succeeding to an estate cannot be transferred (section 6 (a)). It is true that in section 2 (d) it is enacted that nothing in the second chapter of the Act shall be deemed to affect any rule of Mahomedan Law, but so far from there being any rule that conflicts with this provision, such a transfer would seem to be opposed to the principles of Mahomedan Law: see the opinion of the majority of the Law Officers in *Mussumaut Khanum Jan v. Mussumaut Jan Bibi*<sup>(1)</sup> and *Abdul Wahid Khan v. Mussumat Nuran Bibi*.<sup>(2)</sup>

And in the absence of clear proof to the contrary I certainly am not prepared to hold that there is any rule of Mahomedan Law that sanctions the transfer of an expectancy.

By parity of reasoning I come to the further conclusion that there could not be a release of such a chance: compare *Kemp v. Kelsey*<sup>(3)</sup>.

But if the chance of an heir-apparent is neither transferable nor releasable according to Mahomedan Law, then, as it seems to me, it is only by an application of the principle that equity considers that done which ought to be done that such a chance can, if at all, be bound: see *Ivès v. Medcalfe*,<sup>(4)</sup> *Heron v. Heron*.<sup>(5)</sup>

(1) (1827) 4 S. D. A. (Beng.) 210.

(3) (1720) Prec. Chan. 545.

(2) (1885) 12 I. A. 91 at p. 101.

(4) (1737) 1 Atk. 64.

(5) (1741) 2 Atk. 160 at p. 161.

1906.

SUMSUDDIN

v.  
ABDUL  
HUSEIN.

1906.

SUMSUDDIN

v.  
ABDUL  
HUSEIN.

But is that principle applicable in the circumstances of this case? Clearly not, if it would defeat the provisions of the law.

The provision which prohibits the transfer of the chance of an heir-apparent succeeding to an estate is contained in Chapter II of the Transfer of Property Act, and the heading of that chapter is "Of Transfers of Property by Act of parties," and the heading of that division of the chapter, in which the prohibition is contained, is "Transfer of Property whether moveable or immoveable."

Section 5, the first section of the chapter, provides that "In the following sections 'transfer of property' means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself and one or more other living persons; and 'to transfer property' is to perform such act."

There is no definition in the Act of "convey" or of "property," but it is to be noticed that a transfer means a conveyance of property not only in present but also in future.

Then we come to section 6 which provides that property of any kind may be transferred except as otherwise provided by the Act, and the first exception named is the chance of an heir-apparent.

But this implies that but for the exception the chance of an heir-apparent would be property that might be transferred under the Act. An English lawyer would not regard the chance as property or as assignable at law, but it may be that the Indian legislature had regard to the fact that such a chance is frequently described as assignable, and in illustration of this I may refer to *Chauncy v. Graydon*<sup>(1)</sup> where it is said: "Though in law a possibility is not assignable, yet in equity, where it is done for a valuable consideration, it has been held to be assignable."

Future property in general is not expressly excepted from the operation of the Act, but only that class of future property

(1) (1743) 2 Atk, 616 at p. 621.

which is described in clause (a) of section 6. And looking at the whole scope of the Act I see no reason to suppose that it was intended to establish or perpetuate the distinction between that which according to the phraseology of English lawyers is assignable in law and that which is assignable in equity. If this be so, and it was the intention of the legislature that the chance of an heir-apparent should not be transferable, the exception is not only justified but necessary. But this exception cannot be by reason of the future character of this chance: it must be because it was thought undesirable that it should be capable of transfer. There is nothing fantastic in this: though future property could be bound in equity, yet we find Lord Eldon in *Carleton v. Leighton*<sup>(1)</sup> saying that the expectancy of an heir-apparent was not capable of being made the subject of assignment.

Having regard then to the fact that the chance of an heir-apparent is thus specially excepted from the category of transferable properties I am of opinion that the principle that equity considers that done which ought to be done has no application, and that we ought not to treat exhibit F as having extinguished the right of succession that Fatmaboo admittedly possessed apart from that document.

Though there is no direct authority that a Muhammadan cannot *bind* his chance as an heir-apparent, this view is supported by what has been said and decided in reference to Hindu reversioners who occupy an analogous position. Thus in *Sham Sunder Lal v. Achhan Kunwar*<sup>(2)</sup> Lord Davey, in delivering the judgment of the Judicial Committee, says: "What was the position of the parties at the respective dates of the execution of these two bonds? At the date of the bond of 1877 Hulas Kuar, as the heir of Khairati Lal, was the owner of his estate, but with a restricted power of alienation. Achhan Kunwar was next in succession, and would, if she survived her mother, become her father's heir, and take the estate subject to the same restriction. Enayet Singh was one of the two male heirs next in succession to the restricted estates who would be full owners

1906.

SUMSUDDIN  
v.  
ABDUL  
HUSAIN.

(1) (1805) 3 Mer. 667 at p. 671.

(2) (1898) 25 I. A. 183 at p. 189.

1906.  
 SAMSUDDIN  
 v.  
 ABDUL  
 HUSEIN.

in the event of their surviving their grandmother and mother. Enayet was, moreover, a minor. At the date of the bond of 1881 Achhan Kunwar was owner of the property for a daughter's estate with restricted power of alienation, and Enayet Singh was one of the heirs-apparent. At both dates Enayet Singh was living in his father's house and dependent upon him. In 1877 neither Achhan Kunwar nor Enayet Singh (even if he had been of age) could by Hindu Law make a disposition of or bind their expectant interests, nor does the deed apply to any but rights in possession; and in 1881 Enayet Singh was equally incompetent to do so, though the deed purports to bind future rights."

Here then we have Lord Davey's opinion that a Hindu reversioner not only could not dispose of, but could not bind his expectant rights. It is said that this is only a *dictum*, but it is the *dictum* of the highest judicial authority, and in at least two later cases has effect been given to this expression of opinion: *Nund Kishore Lal v. Kanee Ram Tewary*<sup>(1)</sup> and *Manickam Pillai v. Ramalinga Pillai*<sup>(2)</sup>. While in the earlier case of *Balkrishna Trimbak Tendulkar v. Savitribai*<sup>(3)</sup> it was held by a Division Bench of this Court that though a Hindu for valuable consideration relinquished his share in the property of his adoptive father and agreed not to claim it in that father's lifetime, still on the death of the adoptive father intestate he was entitled to claim by inheritance in priority to the widow.

But there is in my opinion another reason why the principle, that the Court regards that as done which ought to be done, cannot be applied in the circumstances of this case.

It is necessary to consider what was the position of the parties to the transaction evidenced by the document of the 25th October 1895.

Fatmaboo was a *pardnashin* lady; she was an expectant heir dealing with her chance of succession; and the person with whom she was so dealing was her father.

(1) (1902) 29 Cal. 355.

(2) (1905) 29 Mad. 120.

(3) (1878) 3 Bom. 54.

But in the case of deeds executed by *pardánashin* ladies it is requisite that those who rely on them should satisfy the Court that they had been explained to and understood by those who executed them: *Sudisht Lal v. Mussummat Sheobarat Koer*,<sup>(1)</sup> *Shambati Koeri v. Jago Bibi*<sup>(2)</sup>.

What direct evidence is there that exhibit F was so explained and understood? Chandavarkar, J., says that both Mohanlal and Kikabhai depose that it was explained; but this is admittedly erroneous as to Kikabhai.

What then is the evidence of Mohanlal? He is a copying clerk in the service of Maganlal Dulabhdas & Co., who carry on business as Vakils at Cambay. His age in February 1906 was somewhere between thirty and thirty-three and his pay Rs. 150 a year. It was he who wrote out the draft of exhibit F and the document itself.

Though his employer Chunilal was there, it was, according to his evidence, he (Mohanlal) who read over and explained the draft to Fatmaboo. He says that he also read over the fair copy.

Nowhere does he say that it was explained to Fatmaboo by Chunilal, the Vakil employed in the transaction, or by anyone else. How far then is Mohanlal's evidence deserving of credence, and how far does it establish such an explanation as the law requires?

That Mohanlal is not a witness on whom implicit reliance can be placed is apparent from the conflict between his deposition in suit 460 of 1904, exhibit A 19, and his evidence in this case as to the pressure of Abdul Hoosein. This conflict can hardly be attributed to oversight, for in the earlier deposition he not merely speaks to Abdul's presence but goes on to explain how it was he did not sign. While in the second he positively denies his presence. And if the document was explained is it likely that this youthful copying clerk, as he then was, would have been selected for the responsible work of explanation? I think not.

1906.

---

SAMSUDDIN  
c.  
ABDUL  
HUSEIN.

(1) (1881) 8 I. A. 39 at p. 43.

(2) (1902) 29 Cal. 749.

1936.

SUMSUDDIN

v.  
ABDUL  
HUSEIN.

No doubt it is some time since exhibit F was executed, but it cannot be said that all sources of information have been exhausted, for Rahmatally, who was present and attested, has not been called, though he was summoned as a witness for the defence and was actually in Court. It is said that he was not called, because he was friendly to Fatmaboo; but there is no evidence of this; and even if it be so, I do not think we should assume that his friendliness would prevent his speaking truthfully.

Chandavarkar, J., seems to have thought that the evidence justifies the conclusion that Fatmaboo had independent legal advice at or shortly before the execution of the document for he was satisfied that Chunilal acted as her Vakil as well as her father's.

But Mohanlal's evidence is directly opposed to this view and his is the only direct evidence on the point—as he declares that “for this transaction Chunilal was Kalimuddin's Vakil. Before that he had been the Vakil of both Kalimuddin and Fatmaboo. Chunilal was Kalimuddin's general Vakil.”

This is how the evidence stands as to the explanation of exhibit F, and after duly weighing it and keeping in mind the circumstances to which I have alluded it fails to convince me that exhibit F was duly explained.

But after all explanation is only material as a means of ensuring that the transaction should be understood. So it is necessary to consider whether the circumstances appearing on the record show that Fatmaboo did actually understand exhibit F.

As establishing the affirmative of this, Mr. Strangman has relied on the fact that this was not an isolated transaction, but had been preceded by other arrangements designed to extinguish Fatmaboo's right of succession to her father, and also on the fact that she claimed and received substantial benefits under the document.

It is true that there had been earlier arrangements, but I cannot from this draw an inference unfavourable to the plaintiffs. On the contrary it shows a settled scheme on Kalimuddin's part to obtain from Fatmaboo a renunciation of her right of

succession, and when it is borne in mind that this dates back to the time when she was still a minor and her father manifestly was in a position to dominate her will, the inference that suggests itself is that this last attempt too may have been the result of similar influences.

But the strongest point in the defendant's favour is that Fatmaboo has received benefits that are in accordance with the provisions contained in exhibit F.

Before any conclusion can be drawn from the facts of this part of the case, they require close examination.

Though in exhibit F it is recited that Rs. 9,000 had been credited to her account and it was agreed that she was to receive Rs. 250 a year, no such credit was entered nor was she paid this Rs. 250 for over four years.

On the 6th of December 1899, no doubt, a letter exhibit No. 3 was written in her name demanding payment of the arrears. But it is to be noticed that no reference is there made to exhibit F, on the contrary her right to the Rs. 9,000 is referred to the fact that Kalimuddin is her "respected father." And if the demand made by the letter be examined, it will be seen that it is in excess of her rights under exhibit F, for it is said "Therefore it is my intention also not to let the principal sum remain (deposited) at your place so you will do me the favour to pay off that also." But under exhibit F she had no right to demand the Rs. 9,000 during her father's life-time, and in any event her right to the Rs. 9,000 was not absolute but was expressed to be conditional on her or her descendants surviving her father.

Can it then be said that exhibit No. 3 shows that she understood her position under exhibit F? I think not.

The interest demanded was no doubt paid, and that is a fact in the defendant's favour.

In addition to this reliance is placed by the defendants on the subsequent payments that were made and the correspondence that passed.

As to the payments there is no question, but it is significant that throughout no mention is made by Fatmaboo of exhibit F.

1906.

SUMSUDDIN

v.  
ABDUL  
HUSEIN.

1906.

SUMSUDDIN

v.  
ABDUL  
HUSEIN.

This correspondence opens with exhibit No. 4, a letter from Fatmaboo to Abdul Hoosein of the 3rd of June 1901, in which she intimates her intention of drawing a hundi for Rs. 400 on account of interest, which she asks him to accept.

By exhibit 5, which is dated the 23rd of November 1901, Fatmaboo says she intends to draw a hundi for Rs. 200. By his reply exhibit 24, dated the 24th of November 1901, Abdul requests Fatmaboo not to draw this hundi for the present.

On the 26th of November Fatmaboo writes that she is in want of money and states that she will draw the hundi.

The next day Abdul replied enclosing an order to Parikh Damodardas Mathuradas for Rs. 200.

On the 3rd of March 1902 Fatmaboo writes to Abdul that she required Rs. 2,000 for ornaments, clothes and expenses (exhibit No. 7).

On the 5th of the same month Abdul sends his reply, exhibit No. 27, stating in effect that Kalimuddin had made a *Wakf* which cancelled Fatmaboo's right to the principal of the Rs. 6,000 the balance of the Rs. 9,000 remaining unpaid after deducting the Rs. 3,000 already paid. At the same time *to preserve peace and harmony* he expresses his willingness to pay the Rs. 6,000 if her Vakil convinces him that he will not thereby incur any risk.

This elicits a protest against Abdul's statement as to the Rs. 3,000, for on the 17th of March a letter exhibit No. 8 is written on her behalf stating in effect that the Rs. 3,000 had been given her in accordance with the order of her father on the occasion of the marriage of her son to Abdul's daughter, and not out of the Rs. 9,000.

On the 26th of March Abdul again writes (exhibit No. 28) expressing his willingness to pay over the balance if it could be shown that he could do it with safety.

On the 12th of May Abdul writes an order on Parikh Damodardas Mathuradas (exhibit No. 9) to pay Fatmaboo Rs. 1,000 stating therein that by virtue of the release an account of Rs. 9,000 had been opened. Fatmaboo's receipt is endorsed on the back.

On the 3rd of September 1903 (exhibit No. 10) Fatmaboo writes that she was going to draw a hundi for Rs. 400 and on the back of this document is endorsed Abdul's reply of the 5th of September in which he states that by virtue of the release out of the Rs. 9,000 she had received Rs. 4,000.

The original of this reply is not produced, but Abdul has proved that the endorsement is a true copy and it is in the circumstances admissible as secondary evidence.

We find therefore that at no time does Fatmaboo mention exhibit F though a release is twice mentioned by Abdul as the basis of this claim for Rs. 9,000.

This brings me to the letter, exhibit No. 11, written by Fatmaboo's attorneys prior to suit in which they demand payment of interest; no reference however is made even here to exhibit F, and the claim is rested on a deed of Trust of the 9th of September 1897.

This deed calls for a word of explanation. It purports to be a Wakfnama, and the suit as originally framed sought to have it construed and its trusts carried into effect.

By this deed it is expressly provided that neither Fatmaboo nor her descendants shall be entitled to receive the sum of Rs. 9,000, or any portion of it, but should only have a charge for the interest thereon.

In this suit all parties are agreed that this *Wakfnama* was inoperative, but still the fact remains that Kalimuddin did thereby attempt to deprive Fatmaboo and her descendants of their rights to the Rs. 9,000, and after his death Abdul, as the correspondence shows (see exhibits Nos. 27 and 28), suggested that Fatmaboo's rights were thereby barred and merely expressed his willingness to pay the balance "to preserve peace and harmony."

And then as I have pointed out it was on this deed that Fatmaboo's claim was ultimately rested.

Can it then be said when regard is had to the whole correspondence and the accompanying circumstances, that the deficiency in the evidence as to the explanation of exhibit F

1906.

---

SUMSUDDIN  
v.  
ABDUL  
HUSEIN.

1906.

SUMSUDDIN

v.  
ABDUL  
HUSAIN.

is supplied and that it is shown Fatmaboo understood the transaction?

I think not; for having regard to Fatmaboo's status, the nature of the rights she purported to renounce, and the fact that the scheme originated with Kalimuddin and that she had no independent advice it ought to be shown beyond all reasonable doubt that she understood the transaction, and that, I think, has not been done.

The conclusion then to which I come is that though Fatmaboo may have known that by exhibit F she purported to relinquish her rights as one of her father's heirs I am not convinced that she realised she had but a conditional right to the Rs. 9,000 and so it cannot (in my opinion) be said that the evidence shows she understood the transaction.

But the case does not rest there: it is not merely that Fatmaboo is not shown to have understood the limitations on her right to the Rs. 9,000, but there is absolutely no evidence that she had any idea of the value of what she was purporting to give up. We now know that the share coming to her under an intestacy is about Rs. 25,000 and this as well as such claim (if any) as she might have to the ornaments mentioned in the release she purported to relinquish for a qualified right in Rs. 9,000.

How far Kalimuddin was legally bound to observe the terms of the release has not been discussed before us, but this at any rate is clear that the document was not signed by him, and the terms of the Wakfnama suggest the inference that he regarded himself as still free to modify the terms of exhibit F in relation to the Rs. 9,000.

Then again can it be said that the transaction was a prudent one? It is true that, subject to the qualifications I have indicated, the Rs. 9,000 was secured to Fatmaboo or her descendants, but I am not convinced that the transaction was a provident one. Even according to Mohanlal it was Fatmaboo's contention that she should receive 11 or 12 thousand rupees, nor is there anything that suggests that she knew her right to the money should not be absolute,

In justification of the arrangement it is suggested that it probably was an object to Fatmaboo to get an immediate income; but if that influenced her, the expectation was not realised, seeing that for over four years Kalimuddin paid her nothing by way of interest.

Then again I think this was eminently a case where Fatmaboo should have had independent legal advice. This it is not shown she ever received.

That Fatmaboo needed protection is shown by the fact that she actually signed a receipt endorsed on exhibit C to the effect that she had received Rs. 500, though that sum was never paid to her, and it is a matter exciting comment that such a receipt should have been taken from her.

Finally it cannot be disregarded that exhibit F originated with Kalimuddin, was prepared by Chunilal, his Vakil in the transaction, and was prompted by a determination evidently long formed that Fatmaboo should not succeed to a share in Kalimuddin's property as one of his heirs.

Having regard to all these facts I am of opinion that they afford an additional ground for holding that the principle that equity considers that done which ought to be done is not applicable in the circumstances of this case.

I have not overlooked the fact that Fatmaboo has received sums of money which may be attributed to exhibit F, but it is conceded that they should be debited against her or her representatives. It is however urged that this does not take into account the fact that by exhibit F her right to the Rs. 9,000 was converted into certainty. But if any further legal damage has been thereby suffered it may be that it can be recovered in some other proceedings, for in withholding the equitable principle, the relief (if any) in damages is untouched.

And this is the answer to the objection that it is too late now to have exhibit F set aside on the ground of undue influence. In holding that Fatmaboo's rights were not thereby extinguished we in no sense set aside the transaction: all we do is to say that in the circumstances, those that set up the release cannot

1906.

---

SUMSUDDIN  
v.  
ABDUL  
HUSEIN.

1906.

SUMSUDDIN  
v.  
ABDUL  
HUSEIN.

claim that it secures to them the position that would flow from the principle that equity considers that done which ought to be done.

Exhibit F still stands, and if it entitles Abdul to any relief beyond that which depends on the equitable principle, it is not affected by the conclusion to which I have come.

It follows then from what I have said that exhibit F is no bar to the plaintiffs' claim that Kalimuddin's property should be divided between them and the first and second defendants according to the provisions of Mahomedan Law.

There is no dispute as to the shares in which the heirs inherited, but this Court has no jurisdiction to make any declaration in respect of the immoveable properties situated at Cambay.

We must therefore reverse the decree under appeal and direct that the case go back for determination on such of the issues not covered by this judgment as are still in contest between the parties.

The appellants' costs of this appeal must be borne by the respondents, but the costs in the first Court will be reserved and dealt with by the Judge who tries the rest of the suit.

*Decree reversed. Case sent back.*

Attorneys for appellants :—*Messrs. Bhaishankar, Kanga & Girdharlal.*

Attorneys for respondents :—*Messrs. Payne & Co. and Little & Co.*

B. N. I.

---