
(1909) 06 AHC CK 0024
In the Allahabad High Court

Fayazul Rahman

APPELLANT

Vs

Muhammad Usman and Others

RESPONDENT

Date of Decision : 14-06-1909

Acts Referred:

Contract Act, 1872 — Section 23

Citation : 2 Ind. Cas. 865

Hon'ble Judges : Munshi, J;Karamat Husain, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

1. One Abdullah owned among other parties the following:

(a) Nizamuddinpur 10 out of 20 biswas.

(b) Tayabpur 171/2 biswas out of 20 biswas.

2. Abdullah's wife Mubarak-un-Nissa brought an action against him for her dower. The suit was compromised and the terms of the compromise were embodied in the decree dated the 29th August, 1889. The portions of the decree bearing on this appeal are: "The defendant (Abdullah) gives the whole of the undermentioned properties to the plaintiff (Mubarak-un-Nissa) in lieu of Rs. 10,00) the dower claimed by her. Now the plaintiff is the owner of the said properties but the defendant will retain possession over 10. biswas of Nizamuddinpur alias Manwala for his life. The income of it will be appropriated by the defendant and he, in case of urgent necessity, may hypothecate, pledge or sell his life-estate (dakhal keen hayatee) in the 5 biswas out of the said 10 biswas.

On the death of the plaintiff those who may be the heirs of both the plaintiff (Mubarak-un-Nissa) and the defendant (Abdullah) will be the owners of the properties." Mubarak-un-Nissa died on the 25th of May, 1894, and Abdullah on the 19th" April 1897, executed a usufructuary mortgage in favour of defendant

No. 1. The properties mortgaged were:

(a) 4 biswas out of 5 biswas of Nizamuddinpur.

(b) 2 1/2 biswas of Tayabpur.

3. On the 2nd April 1899, Abdullah sold to the plaintiff 3 3/4 out of the 5 biswas of Nizamuddinpur of which according to his construction of the decree No. 97 of 1889 dated the 29th of August, 1889, he was the owner and 1 1/4 biswas out of the other 5 biswas of Nizamuddinpur which he alleged to have inherited from his wife Mubarak-un-Nissa. Abdullah died in 1899. The plaintiff on the 14th June 1907 brought an action for the redemption of the property mortgaged by Abdullah under the mortgage deed dated the 2nd April 1889.

4. He impleaded the mortgagee (defendant No. 1) and the heirs of Mubarak-un-Nissa and Abdullah (defendants Nos. 2 to, 13). The mortgagee expressed his willingness to allow redemption and prayed for costs. The pleas raised by the heirs of Mubarak-un-Nissa and Abdullah in defence inter alia were as follows:

(a) On a right interpretation of decree No. 97 of 1889, Abdullah had only a life-estate in 10 biswas of Nizamuddinpur and the decree gave him power in case of emergency to transfer his life-interest in the 5 biswas out of the 10 biswas. The interest of the plaintiff in those 5 biswas came to an end with the death of Abdullah.

(b) Abdullah according to the terms of the decree relinquished his chance as an heir-apparent to Mubarak-un-Nissa in her estate inasmuch as he agreed with her that only those who may be the heirs of both Mubarak-un-Nissa and himself would be the owners of her property on her death. Thus he himself could not be one of the class for he could not be an heir to himself.

5. The learned Munsif dismissed the suit holding that under the compromise incorporated in the decree dated the 29th August, 1889, Abdullah got only a life-estate in the 10 biswas and that he relinquished his right of inheritance to his wife as to the properties comprised in the decree. The plaintiff appealed to the lower appellate Court against the whole decree. It was admitted in that Court that Abdullah on a correct interpretation of the decree had only a life-interest in 10 biswas share in Nizamuddinpur. It was, however, contended that Abdullah on the death of Mubarak-un-Nissa inherited 2 1/2 out of the other 10 biswas. The lower appellate Court put the same construction on the decree as the first Court and holding that Abdullah renounced his share in the 10 biswas which belonged to his wife upheld the decree of the Munsif. The plaintiff has preferred a second appeal to this Court, His learned vakils contend that, on a right construction of the compromise embodied in the decree, Abdullah is the absolute owner of 10 biswas and that he has not given up his chance as an heir-apparent" to succeed Mubarak-un-Nissa.

6. He further contends that granting the interpretation put by the Respondents to be right Abdullah and Mubarak-un-Nissa could not by compromise divide the

property into a life-estate and vested remainder for that is unknown to the Muhammadan Law¹ (see Abdul Wahid Khan v. Nuran Bibi 11 C. 597 : 12 I. A. 91 that Abdullah's compromise to relinquish his chance as an heir-apparent to Mubarak-un-Nissa was unlawful see Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin 31 B. 165 Rebat Mohan Das v. Ahmed Khan 9 C.L.J. 50 : 1 Ind. Cas. 590 and that the decree passed on the unlawful compromise was, in consequence of its being passed without jurisdiction, a nullity see Lakshmana Swami Naidu v. Rangamma 26 M. 31. Regarding the interpretation of the decree the learned Counsel for the respondents says that the natural and reasonable construction of the decree dated the 29th August, 1889, is that Abdullah got only a life-interest in the 10 biswas of Nizamuddinpur that he relinquished his chance as an heir-apparent in the property of Mubarak-un-Nissa that he and his representatives are bound by the compromise for there is nothing either in the Hanafi law or the law of British India to make the compromise whereby a Muhammadan gives up his expectancy of inheriting to another void and that Abdullah being a party to the decree by which he was benefited he and his representatives are bound by that decree irrespective of the fact that the compromise incorporated in the decree is void or valid.

7. In support of the proposition that a Muhammadan may enter into a compromise where by he may relinquish his chance as an heir-apparent to succeed the estate of another, the learned Counsel for the respondents relies upon two unreported rulings of this Court. They are:

S.A. No. 415 of 1907 decided on the 3rd December, 1908, and S.A. No. 548 of 1907 decided on the 23rd April, 1908:

I have carefully gone through the compromise in vernacular and have without the slightest doubt to come to the conclusion that the interpretation which the appellant seeks to put upon it is unnatural opposed to the express terms of the promise. It confers upon Abdullah only life-estate in 10 biswas in Nizamuddinpur and does not make him the absolute owner in fee simple thereof. The clause that " the defendant (Abdullah) will retain possession over the 10 biswas of Nizamuddinpur for his life" conclusively establishes that the compromise and the decree in which it was incorporated made him a tenant for life and not a tenant in fee simple,, The clause that "in case of urgent necessity he (Abdullah) may hypothecate, pledge or sell his life-estate" in 5 biswas out of the 10. biswas is also conclusive in showing that Abdullah got only a life-estate and no more. On the relinquishment of the expectancy to inherit Mubarak-un-Nissa the terms of the decree are also very clear. Abdullah in express terms agrees that on the death of Mubarak-un-Nissa only those persons will be the owners of the properties specified in the decree who may be the heirs of Mubarak-un-Nissa and Abdullah both and as it is impossible for Abdullah to be an heir to himself he must be taken to have deliberately relinquished his chance as an heir-apparent to Mubarak-un-Nissa in her life-time.

8. This leads me to deal with the questions of. law involved in this appeal. They

are:

1. Could Abdullah and Mubarak-un-Nissa by means of a compromise divide 10 biswas of Nizamuddinpur into a life-estate and a vested remainder and give the former to Abdullah and the latter to Mubarak-un-Nissa,

2. Could Abdullah enter into an agreement for a lawful consideration with Mubarak-un-Nissa to relinquish his chance as an heir-apparent in her estate during her life?

3. Was the decree incorporating the relinquishment binding on Abdullah?

9. The first case on the first point is *Musammat Humeeda v. Musammat Budlun* 17 W.R. 525 in which their Lordships of the Privy Council remark that the creation of a life-estate with a vested remainder did not seem to be consistent with Muhammadan usage and that there ought to be a very clear proof of transaction so unusual and so improbable amongst Muhammadans." The remarks would seem to indicate that in case of very clear proof of such a transaction it would be allowed to land.

10. The second case is *Abdul Wahid Khan v. Nuran Bibi* 11 C. 597 : 12 I. A. 91 in which their Lordships hold "that it is not consistent with Muhammadan Law to limit an estate to take effect after the determination on the death of the owner of a prior estate by way of what is known to English Law as a vested remainder so as to create an interest which can pass to a third person before the determination of the prior estate."

11. This case, it is to be noticed, goes a step further than the first case and makes vested remainders altogether inconsistent with Muhammadan Law. It is also to be noticed that the compromise between Gauhar Bibi and Abdussubhan by which they attempted to divide the estate in dispute into a life-estate and a vested remainder was to be governed by the law of British India and not by the pure Hanafi Law but their Lordships deemed it fit to construe the compromise with reference to the pure Hanafi Law.

12. The third case is that of *Umes Chunder Sircar v. Musammat Zahur Fatima* 17 I.A. 201 : 18 C. 164.

13. The following is the extract from its head-note.

Where by a Muhammadan deed of settlement a husband granted the lands in suit to his wife on condition that if she has a child by him the grant should be taken as perpetual mokarrari and in case of no child being born as a life mokarrari with remainder to the settlor's two sons. Held, that the two sons took definite interest under the deed similar to vested remainder though liable to be displaced and that such interests were liable to attachment not being mere expectancies within the meaning of CPC Section 266.

14. So far as I am aware this is the latest" pronouncement of law on this point by their Lordships of the Privy Council. It is in complete harmony with the

principle that the owner of a property subject to a few limitations imposed by law, ought to have an absolute freedom to deal with his property in any way he chooses. Moreover, there is nothing unlawful or against public policy in allowing a Muhammadan by a compromise to carve out of land a life-estate for one person and to give the vested remainder to another. Following *Umes Chunder Sircar v. Musammat Zahur Fatima* 17 I.A. 201 : 18 C. 164 I hold that the compromise between Mobarak-un-Nissa and Abdullah which gave Abdullah a life-estate in 10 biswas of Nizamuddinpur was a valid and binding compromise and that he under it took only a life-estate in 10 biswas.

15. The first case on the second question is *Musammat Khanam Jan v. Musammat Jan Bibi* 4 S.D.A. (1827) 210 . The following passages are from its head-note.

Renunciation of inheritance in life-time of, ancestor is null and void, claim to which may be preferred at any subsequent period without limitation." The reply of Mufti Abbas Ali to the question about renunciation was as follows:

Renunciation implies the yielding up a right already vested or the ceasing or desisting from prosecuting a claim maintainable against another. It is evident that during the life-time of the mother, the daughters have no right of inheritance and their claim on that account is not maintainable against any person during her life-time. It follows, therefore, that, this renunciation during the mother's life-time of the daughters' shares is null and void, it being in point of fact giving up that which had no existence. Such act cannot consequently invalidate the right of inheritance supervenient on the mother's death or be any bar to their claim of the estate left by her. The omission to advance a claim for nearly 12 years is no legal bar to the ultimate admission of such claim." *Musammat Khanam Jan v. Musammat Jan Bibi* 4 S.D.A. (1827) 210

16. In *Macnaughten's Muhammadan Law* p. 89 the opinion of Abbas Ali is quoted to show that such a renunciation is void and the following note is appended:

Fatwas similar in purport to the above were delivered on this occasion by the Cauzee of the Provincial Court and the Mooffee of the City Court of Patna : but a contrary opinion was delivered by the Mooftee attached to the Zilla Court of Shahabad to whom also the point was referred. He maintained that the execution of the deed for which a consideration had been received by the obligors was binding against them although the right parted with was not in existence at the time. The question, however, having been ultimately referred to the law officers of the Sadder Diwani Adalat and other learned authorities it was satisfactorily ascertained that the opinion of majority was a correct exposition of the law." *Macnaughten's Muhammadan Law* p. 90.

17. Their Lordships of the Privy Council in *Musammat Hurmut-ool-Nissa Begum v. Allahdia Khan* 7 W.R. 108 remark that "according to the Muhammadan Law there may be a renunciation of the right to inherit and that such a renunciation need not be express but may be implied from the ceasing or desisting from a claim

maintainable against another." The remarks do not show whether their Lordships are speaking of a renunciation in the life-time of the ancestor or after his death. According to the Muhammadan Law a renunciation of the right to inherit after the death of the ancestor is valid but a renunciation in his life-time is void:

The next case on this point is that of Kunhi Mamod v. Kunhi Moidin M 176. In that case it was held that a renunciation by a Muhammadan of his claim on the estate of his mother in consideration of Rs. 150 in her life-time was binding on him." The case in Musammatt Khanam Jan v. Musammatt Jan Bibi 4 S.D.A. (1827) 210 was brought to the notice of the learned Judges but they remarked: "We have referred to the report itself and are of opinion that the case is not one of any great authority." They also said: "Prima facie there is nothing illegal in the transaction and in the absence of clear proof that it is forbidden by Muhammadan Law we think plaintiff should be held to be bound by it.

18. The third case is that of Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin 31 B. 165 . The case is an authority for the following propositions:

(a) That the chance of an heir-apparent succeeding to an estate is under the Muhammadan Law neither transferable nor releas:

(b) That it is only by the application of principle that equity considers that done which ought to be done that such a chance can, of at all, be bound.

(c) That the principle is not applicable for its application would defeat the provisions of the law i.e., Section 6 (a) of the Transfer of Property Act.

(d) That though there is no direct authority that a Muhammadan may not bind his chance as an heir-apparent this view is supported by what has-been said and decided in reference to a Hindu reversioner who occupies an analogous position in Sham Sunder Lal v. Achhan Kunwar 25 I.A. 183 : 21 A. 71 : 2 C.W.N. 729.

19. The fourth case is that of Rebati Mohan Das v. Ahmed Khan 9 C.L.J. 50 : 1 Ind. Cas. 590 Mukerji, J. following Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin 31 B. 165 remarks:

I entirely agree with the opinion expressed by Sir Lawrence Jenkins that a Muhammadan cannot any more than a Hindu bind his chance as an heir apparent and in support of this view it is sufficient to refer to the decision of their Lordships of the Judicial Committee in Sham Sunder Lal v. Achhan Kunwar 25 I.A. 183 : 21 A. 71 : 2 C.W.N. 729 in which it was held that a Hindu could not bind his expectant rights. This principle is to" some extent supported by the case of Abdul Wahid Khan v. Musammatt Nuran Bibi 11 C. 597 : 12 I.A. 91 and was adopted by this Court in the case of Nund Kishore Lal v. Kanee Ram Tewary 29 C. 355 in which the learned Judges dissented from the contrary view adopted in the case of Brahmadeo Narayan v. Harjan Singh 25 C. 778. I reserve, however, my opinion upon the other question discussed in the judgment of Sir Lawrence Jenkins, namely, whether the - effect of Section 6 Clause (a) of the Transfer of Property Act is not merely to except specially the chance of an heir-apparent

from the category of transferable property but also to make the principle that equity considers that done which ought to be done entirely inapplicable. p. 52.

20. The review of the case law shows that there is a conflict of authority on the power of a Muhammadan to relinquish his chance or to bind it. The Saddar Diwani, the Calcutta and the Bombay High Courts hold that a relinquishment by a Muhammadan of his chance is void. The Madras High Court has taken a contrary view holding that a relinquishment by a Muhammadan of his right to inherit during the life-time of his ancestor is binding on him. This view taken by the Madras High Court is in direct opposition to the well-settled rule of the Hanafi Law and can, if at all, be defended on the principle that equity looks on that as done which ought to have been done. Before applying that principle I have to see if that principle is applicable to a relinquishment by a Muhammadan of his chance to succeed. That principle can apply if its application does not defeat the provisions of the law. The determination of the question whether its application does or does not defeat the provision of the law turns upon the construction to be put upon Section 6 (a) of the Transfer of Property Act. The clause runs as follows:

The chance of an heir-apparent succeeding an estate, the chance of a relation obtaining a legacy on the death of a kinsman or any other mere possibility of a like nature cannot be transferred." If the expression "cannot be transferred" is taken to mean that the chance of an heir-apparent is "unassignable" both in law as well as in equity then the principle that equity looks on that as done which ought to have been done will not apply to a relinquishment by a Muhammadan of his chance to succeed, because its application will defeat the provisions of Section 6 (a) of the Transfer of Property Act. If the clause "cannot be transferred" is taken to keep alive the distinction between what is assignable at law and what is assignable in equity and to render contract for valuable consideration valid, the principle will apply. Sir Lawrence Jenkins is of opinion that Section 6 (a) obliterates the distinction between what is assignable in law and what is assignable in equity and makes the chance" altogether untransferable. He says:

But if the chance of an heir-apparent is neither transferable nor releaseable according to Muhammadan 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 *Ives v. Medcalfe* (1737) 1 Atk. 64; *Heron v. Hecon* (1741) 2 Atk. 160 .

21. 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 movable on immovable".

22. Section 5, the first Section of the chapter, provides that In the following section "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."

23. 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, to one or more.

24. 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.

25. 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* (1747) 2 Atk 616 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."

26. Future property in general is not expressly excepted from the operation of the Act, but only that class of future property 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 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* (1805) 3 Mer 667 at p. 671 saying that the expectancy of an heir-apparent was not capable of being made the subject of assignment.

27. 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." *Sumsuddin Goolam Husein v. Abdul Husain Kalimuddin* 31 B. 165

28. The construction placed by Sir Lawrence Jenkins on Section 6 (a) of the Transfer of Property Act, in my opinion, is very sound. It simplifies the law of British India and places it on a firm and certain footing saving much of litigation.

29. Mukerji, J. in *Rebati Mohan Das v. Ahmed Khan* 9 C.L.J. 50 : 1 Ind. Cas. 590 though agrees with Sir Lawrence Jenkins in holding that a Muhammadan cannot bind his chance as an heir-apparent reserves his opinion on the question whether Section 6 (a) of the Transfer of Property Act makes the principle that equity considers that done which ought to have been done entirely inapplicable. With due respect to the learned Judge the conclusion arrived at by him that a Muhammadan cannot bind his chance as an heir-apparent to succeed does not follow from the rule that such a chance is untransferable unless Section 6 (a) is taken to make the principle that equity considers that done which ought to have been done inapplicable by giving the term "untransferable" a meaning which will include unassignable in equity. If that principle, notwithstanding Section 6 (a), continues to be applicable, valid contracts for valuable considerations relating to expectancies will have to be upheld by the Courts in British India as Courts of Equity and a relinquishment by a Muhammadan of his chance for valuable consideration will be binding upon him. To hold that a Muhammadan may not bind his chance depends upon holding that the application of the principle defeats the provision of law and that that principle is, therefore, not applicable to such a relinquishment. The learned Judge himself remarks that the cases of *Hobson v. Trevor* (1723) 2 P. Win 191 : 24 E.R. 695 and *Holroyd v. Marshall* (1862) 10 H.L.C. 191 : 11 E.R. 991 undoubtedly laid down that a contract made with respect to the sale or mortgage of future acquired property is capable of specific performance and transfers the beneficial interest in the property as soon as it is acquired [see also *Flowers v. Fuller* (1880) 15 Ch. D. 665; *Hindi v. Blake* (1846) 3 Beav 234; 49 E.R. 91 a similar view was adopted by Mr. Justice Phear in *Ram Chunder Tantra Doss v. Dhurmo Narain* 7 B.L.R. 341 : 15 W.R. 17 (F.B.). "How far this doctrine may have application in spite of the provisions of Section 6 of the Transfer of Property Act may require examination when the question arises. It is sufficient for the purposes of this case to hold that the deed of 1886 by which Ayesha Bibi released or abandoned all her prospective rights in her husband's estate must be treated in law as inoperative" pp. 52,53. The above remarks show that there are cases which lay down that future acquired properties are assigned as soon as they are acquired in pursuance of a valid contract. That being so unless Section 6 (a) is taken to render the principle that equity considers that done which ought to have been done inapplicable the deed of 1886, by Ayesha if valid in other respects will bind her prospective rights in the estate of her husband. To draw a distinction between expectancies and other future properties and to hold that the doctrine of equity alluded to applies to other future properties but not to expectancies is without foundation.

30. There is no direct authority for the proposition that a Muhammadan may not bind his chance as an heir-apparent but as has been remarked by Sir Lawrence Jenkins in *Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin* 31 B. 165 this view is supported by what has been decided in reference to Hindu reversioners who occupy analogous position."

31. Thus in *Sham Sunder Lal v. Achhan Kunwar* (1805) 3 Mer. 667 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 Halas 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 takes 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 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."

32. 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* 29 C. 355 and *Manickam Pillai v. Pamalinga Pillai* 29 M. 120. While in the earlier case of *Balkrishna Trimbak Tendulkar v. Savitribai* 3 B. 54 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 life-time, still on the death of the adoptive father intestate he was entitled to claim by inheritance in priority to the widow" *Sumsuddin Goolam Husein v. Abdul Husein Kalimuddin* 31 B. 165

33. Following the view taken by Sir Lawrence Jenkins and other Judges I hold that Abdullah by his compromise which was incorporated in the decree of the 29th August 1889 could not relinquish or bind his chance to succeed the estate of Mubarak-un-Nissa and that his relinquishment was void under the Hanafi law as well as according to Section 6 (a) of the Transfer of Property Act and must, therefore, be treated as a nullity.

34. In *Kaniz Fatima v. Abbas Ali A.W.N.* (1887) 84 there are certain remarks which show that an expectancy is not transferable and that a compromise relating to it before it vests does not affect it. They are: -"A purely contingent interest was thereby created in the nature of an expectancy which would not be capable of seizure in execution--see Clause (k) of Section 266 of the CPC nor could it be transferred either under the Muhammadan law (or) according to the provisions of Clause (a) Section 6 of the Transfer of Property Act" p. 88. "I, therefore, do not think that in respect of the right which did not vest in her until her mother's death the plaintiff is in any way affected by her compromise of September 14th 1868" p. 88.

35. The two unreported rulings of this Court relied on by the learned Counsel for the respondents have no bearing on the question that a relinquishment by a Muhammadan of his chance to succeed to an estate is void or valid. In S.A. No. 415 of 1907 decided on the 3rd December, 1908 the suit was by the heirs of Amjadullah Khan in the property left by his wife Rahmat Jahan against her son on the allegation that on the death of Rahmat Jahan her husband became entitled to 1/4 and that they, as his heirs, were entitled to their shares. Formerly there was a dispute between Amjadullah and Rahmat Jahan. The matter was referred to arbitration. The intention of the arbitrator (as it appears from the award) was that "All the property in dispute should be given to Rahmat Jahan and that her son should inherit her part." The following passage is also to be found in the award "After Amjadullah Khan Musammat Rahmat Jahan the first party or her representative will be competent to exercise all sorts of powers in respect of mouza Jalalabad." The award was made a rule of Court. A division Bench of this Court on the construction of the award held that the intention of the arbitrator was to depart from the ordinary rules of succession under the Muhammadan law, that Rahmat Jahan's representatives were to succeed to mouza Jalalabad, that the plaintiffs could in no sense be considered as the representatives of Musammat Rahmat Jahan, that the only-heirs of Rahmat Jahan according to the plaintiffs were Amjadullah Khan and the defendant and that after Amjadullah the defendant was her only representative and dismissed the suit.

36. In S.A. No. 548 of 1907 decided on the 23rd April 1908, an award was made which provided that an annuity of Rs. 100 be given to Nasir Ali Khan which after his death should be payable to the descendants and not to other relatives of his. A decree was passed in the terms of the award. The father of the minor was a party to that decree. Nasir Ali Khan died childless and his father as an heir of Nasir Ali Khan brought an action for the annuity awarded to Nasir Ali Khan. A Division Bench of this Court held that the plaintiff was not entitled to the annuity. The following are the remarks in the judgment of the High Court "Whether he (Nasir Ali's father) was entitled according to the Muhammadan law to object to the award or not is a matter with which we have no concern. The matter in difference have passed into a decree and according to that decree the plaintiff is not entitled to the annuity." Each of the two unreported cases as it appears from the above remarks deals with an award which was made a rule of Court and the law governing;,,compromise embodied in a decree stands on a different footing than the law governing an award which is made a rule of Court. In the case of a compromise the Court has no jurisdiction to pass a decree in accordance with the compromise unless that compromise is lawful. In the case of an award made on a reference without the intervention of a Court the illegality of which is apparent upon the face of it the Court has power u/s 526 of the CPC (Act No. XIV of 1882) if no ground as is mentioned or referred to in Section 520 or Section 521 be shown against the award, to order it to be filed and to pass a decree in the terms of the award. That being the case the unreported rulings do not touch the

questions involved in the present appeal. The relinquishment by Abdullah during the life-time of Mubarak-un-Nissa of his chance to succeed her being void both under the Hanafi Law and the Transfer of Property Act the fact" that it was incorporated in a decree to which Abdullah was a party will not render that decree binding upon Abdullah or his representatives. Under the provisions of Section 375 of the CPC (Act XIV of 1882) a Civil Court has jurisdiction to pass a decree only when the suit has been adjusted by "lawful" agreement or compromise. If the compromise is unlawful the Court has no jurisdiction to pass a decree on its basis and there can be no doubt that the compromise by Abdullah to relinquish his Chance to succeed Mubarak-un-Nissa was void and, therefore, unlawful, hence the decree, which incorporates the compromise, is a waste paper and the parties thereto are not bound by it. The learned Judges who decided *Lakshmana Swami Naidu v. Ramaswami Naidu* 26 M. 31 remark "Under Section 375 of the CPC the Court has no jurisdiction to pass a decree on a compromise unless it was a "lawful" compromise. Any terms of a compromise which are opposed to public policy are invalid and will not be enforced by the Court. So far as the decree embodied unlawful terms of a compromise it is inoperative and will not be enforced." p. 33. I entirely agree with the above remarks and may add that anything which is not lawful "within the meaning of Section 23 of the Indian Contract Act is unlawful "for the purposes of an agreement or compromise and is sufficient when incorporated in a decree to render it a nullity. That a decree without jurisdiction is a nullity has been stated in *Rangasami Naicken v. Tirupati Naicken* 14 M.L.J. 413 in these terms" If a decree is passed by a Civil Court which had absolutely no jurisdiction to pass it even a party to the proceeding may impeach it as a nullity though it had not been set aside in appeal or otherwise." p. 414. The case of *Khiali Ram v. Raghunath Prasad* A.W.N. 1906 214 is to the same effect. In that case by a compromise and decree thereunder a house was transferred subject to a condition that the transferee should not alienate without obtaining the consent of the transferor and it was held that the restriction was void and not binding on the parties to the decree. The above ruling follows *Bhairo v. Parmeshri Dayal* 7 A. 516 in which the dispute was not between the parties to the decree.

37. The result is that the decree dated the 29th August 1889 so far as it debars Abdullah from inheriting his share in the assets of Mubarak-un-Nissa is a nullity and that Abdullah's representative in interest is not bound by it. I, therefore, hold that Abdullah on the death of Mubarak-un-Nissa did inherit 2 1/2 biswas out of 10 biswas of Nizamuddinpur that the plaintiff as a private purchaser thereof along with other property under the sale-deed dated the 2nd April 1899 is entitled to redeem the entire mortgage. The appeal is decreed with costs including the fees in this Court on the higher scale, the decree of the lower appellate Court upholding the decree of the Court of first instance is set aside and the plaintiff's claim for redemption of the entire mortgage is decreed. The case under Order 41 Rule 23 is sent down to the first Court through the lower appellate Court for the trial of the remaining issues.