

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Haidar Ali and another v. Tassaduk Rasul Khan and others, from the Court of the Judicial Commissioner of Oudh; delivered 15th March 1890.*

Present:

LORD HOBHOUSE.

LORD MACNAGHTEN.

SIR BARNES PEACOCK.

SIR RICHARD COUCH.

[*Delivered by Sir Richard Couch.*]

The Plaintiff and Appellant Haidar Ali is the elder brother of Raja Farzand Ali Khan, talukdar of Jehangirabad, who died without leaving any male issue. He held a sanad for the estate of Jehangirabad, and his name was entered in list No. 2, prepared according to Act 1 of 1869. He left four kinds of property:—

1. The talukdari estate conferred by the sanad.
2. Landed property acquired by him from other talukdars.
3. Immoveable property acquired from persons other than talukdars.
4. Moveable property, money, and debts.

The Plaintiff Haidar Ali claimed to be the Raja's sole heir and successor, and entitled to the first and second classes of property, and to so much of the fourth as might be held to be heirlooms under the provisions of Sections 14

and 22 of Act 1 of 1869, and to a fourth share, according to Muhammadan law, of the third class of property and of the fourth, exclusive of heirlooms. The other Plaintiff and Appellant is a purchaser of part of Haidar Ali's interest. The Defendants, the Respondents, were in possession, and had obtained mutation of names in their favour in the Revenue Department. Their grounds of defence will be conveniently noticed as the case with regard to each class of property is considered.

As to the first class, the defence of Tassaduk, who was in possession of it, was founded on a document, dated the 6th April 1860, and a formal will of the Raja dated the 19th August 1879. The first of these is a statement by Raja Farzand Ali in reply to inquiries by the Government under Circular Orders regarding the succession of talukdars. It is as follows:—

“I am Raja Farzand Ali Khan Bahadur, talukdar of Jehangirabad, &c. Whereas the Government has been pleased to confer upon me the proprietary rights in this estate, to be enjoyed from generation to generation, I do hereby request that after my death my estate may be maintained intact and without partition according to Raj Gaddi custom, and that, owing to my not having a male issue, Zebunnissa, who is my daughter by Rani Abbas Bandi, daughter of Raja Razzak Bakhsh, shall be considered entitled to succession and inheritance. But as I have taken Tassadduk Rasul from my brother Mardan Ali Khan, and have commenced to bring him up and educate him as my son, if he finishes his education during my lifetime and is married to Zebunnissa, he shall after me succeed to my estate as my adopted son.”

The Raja made other replies about the same time, the taluq being in three districts, in which no reference was made to his daughter or

Tassadduk Rasul, and it was contended that the reply of the 6th April was not intended more than the others to be testamentary; but in a letter from the Raja to the Deputy Commissioner, dated the 20th June 1877, in reply to questions that had been asked, he said in reply to the fourth question, which was to give the name and title of any boy who might be his successor, whether his begotten or adopted son, "The reply to this question refers to the will which has been submitted to the Lucknow District through the tahsil of Kursi on 6th April 1860." This shows that he intended that to be his will. Their Lordships are of opinion, following the judgment of this Board in *Hurpurshad v. Sheo Dyal*, 3 I. A., 259, that it is a will within the definition in Section 2 of Act I. of 1869. It is therefore a complete answer to the Plaintiff's claim to Jehangirabad.

It was contended that it was revoked by the will of the 19th August 1879, the Raja having in that said that no document of any sort purporting to be a will or petition, the context whereof is wholly or partly repugnant to it, should be deemed to be admissible. But it is not repugnant. In this the Raja says that having adopted Tassadduk Rasul Khan as his son he has appointed him his successor, and he is to be the owner of his entire property estate and raj, as a Raja and Talukdar, and as he is married to his daughter the estate shall successively "descend to devolve" on the descendants of the daughter. Also the will of 1879 was not registered in accordance with Section 20 of Act I. of 1869, and consequently as regards the talukdari estate is invalid. It cannot, therefore, operate as a subsequent will to revoke the will of 1860, nor was that will revoked by the Act of 1869 as was also contended.

There is, however, another defence to this

part of the claim, which also applies to the second class of property if it was acquired according to Section 14 of the Act. The pedigree, which is admitted by all parties to be correct, shows that Haidar Ali was not the eldest brother of Farzand. There were two elder brothers, Sahib Ali and Mardan Ali, who died before Farzand, both leaving sons, and the sons of Sahib were not parties to the suit. Tassadduk is a son of Mardan Ali, and Nawab Ali, who died pending the appeal, the father of the Respondent Naushad Ali, was his eldest son.

The Plaintiff claims, as the elder brother of Farzand, to be his sole heir and successor under Section 22 of Act I. of 1869. The section begins by saying that if a taluqdar or grantee whose name shall be inserted in the 2nd, 3rd, or 5th of the lists mentioned in Section 8, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, and then there are eleven sub-sections forming a scheme of descent. The Plaintiff claims under Sub-section 6, but in construing that the whole of the sub-sections should be looked at. The first says the estate shall descend to the eldest son of the taluqdar and his male lineal descendants. The second says that if such eldest son shall have died in the lifetime of the taluqdar leaving male lineal descendants, the estate shall descend to his eldest and every other son successively according to their respective seniorities and their respective male lineal descendants. The third says that if such eldest son shall have died in his father's lifetime without leaving male lineal descendants, the estate is to descend to the second and every other son of the taluqdar successively according to their respective seniorities and their respective male lineal descendants. That male lineal descendants here are intended

to include the descendants of a son dying in his father's lifetime is apparent from Sub-section 4. That is, "Or in default of such son or descendants," then to such son of a daughter as has been treated by the taluqdar in all respects as his own son and to the male lineal descendants of such son. The estate is to go to the daughter's son only in default of male lineal descendants of a second or other son. In Sub-section 4 male lineal descendants of a daughter's son must have the same meaning as in Sub-section 3, for by Sub-section 5 the estate is to descend to a person adopted by the taluqdar only in default of such son or descendants, viz., a daughter's son or his male lineal descendants. The 6th section says, in default of an adopted son the estate is to descend to the eldest and every other brother of the taluqdar successively according to their respective seniority and their respective male lineal descendants. The words here should, in their Lordships' opinion, be held to have the same meaning as they have in Sub-sections 3 and 4. In Sub-section 7 the words are, "in default of any such brother" to the widow omitting "descendants," but their Lordships cannot think it was intended by this omission to postpone the succession of male lineal descendants of brothers who died in the taluqdar's lifetime till after the persons mentioned in Sub-sections 7, 8, 9, and 10, and only to allow such male lineal descendants to succeed under Sub-section 11 according to the ordinary law to which the taluqdar is subject. It is the reasonable construction that the brothers were intended to take in the same manner as sons. It therefore appears to their Lordships that the Plaintiff has no title to Jehangirabad or to the property which, by virtue of Section 14, was subject to the same rules of succession.

This also disposes of the suit as regards the second class of property, which the Plaintiff claimed under the same title as the first class. It was objected by Mr. Mayne, on behalf of Naushad Ali, who claimed to be entitled to it under a codicil of the 1st November 1879, that the property was not proved to have been acquired according to Section 14. The question does not appear to have been raised in the Lower Courts. Apparently it was assumed to be so acquired, possibly because it was known it could be proved by official documents, of which the Court was bound to take judicial notice. There is indeed some evidence of it in the record at p. 199, where there is what is called a list of villages held by Naushad Ali Khan, out of the villages purchased by Raja Farzand Ali Khan from sanad holding talukdars. The validity of the codicil was in issue, but there is no finding upon that in either of the lower Courts. It would, however, be invalid as regards property acquired under Section 14, for want of registration. But if this property is not within Section 14 it is in the same condition as to succession as the property in Classes 3 and 4. Haidar Ali claimed one fourth of these classes, excluding heirlooms, as one of the heirs of Farzand Ali, according to the Muhammadan law, and alleged that the Defendants did not acquire any rights to it under the will of the 1st November 1879. This will has been found by both the Lower Courts to be genuine, and it excludes Haidar Ali. It is therefore an answer to his claim as heir.

But the Defendants also relied upon a custom of the Shaikh Kidwai tribe, to which the Rajas Razzak Bakhsh and Farzand Ali Khan belonged, that sons, adopted sons, and daughters succeed in preference to and in exclusion of other heirs,

by which the Plaintiff's claim in opposition to Zebunnissa, the daughter, must fail. It was not disputed that the Rajas belonged to that tribe. Both the Lower Courts have found that there is such a custom among the Shaikh Kid-wais, and their Lordships see no reason in this case for departing from the settled practice of this Committee where there are concurrent judgments of the Courts below upon a question of fact. There is therefore a good defence to the whole of the Plaintiffs' claim, and the suit has been properly dismissed. Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner which dismissed the appeal to him from the decree of the District Judge dismissing the suit, and to dismiss this appeal. The Appellants will pay the costs of it.

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