

Privy Council Appeal No. 39 of 1915.

Allahabad Appeal No. 39 of 1913.

Muhammad Abdul Aziz and Another - - *Appellants,*

v.

Mir Tasadduq Husain and Others - - *Respondents,*

FROM

**THE HIGH COURT OF JUDICATURE FOR THE NORTH-WESTERN
PROVINCES, ALLAHABAD.**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 1ST MARCH, 1917.

Present at the Hearing:

VISCOUNT HALDANE.

LORD SELW.

LORD PARMOOR.

SIR JOHN EDGE.

MR. AMEER ALI.

[*Delivered by* SIR JOHN EDGE.]

The plaintiffs in the suit in which this appeal has arisen are the appellants, and they seek by this appeal to have the decree of the High Court at Allahabad, dated the 18th February, 1913, which set aside the decree of the Subordinate Judge of Banda, dated the 18th September, 1911, and dismissed their suit, set aside, and to have the decree of the Subordinate Judge restored. The decree of the Subordinate Judge decreed part only of the claim of the plaintiffs and dismissed their suit as to the remainder of their claim. Their claim included movable and immovable property. This appeal does not raise any question as to that part of the claim of the plaintiffs which was dismissed by the Subordinate Judge. The respondents have not been represented at the hearing of the appeal, which has been heard *ex parte*.

The immovable property to which this appeal relates is three-fourths (12 annas out of 16 annas) of the immovable property of which one Buland Ali Khan died possessed on the 20th August, 1908. He was a Muhammedan of the Sunni sect. He died childless, leaving surviving him a widow, Musammet Akbari Begum, who died on the 16th May, 1909.

The one-fourth share of Buland Ali Khan's immovable property, which devolved upon his widow on his death, was claimed in the plaint, but is not in question in this appeal. This suit was brought in the Court of the Subordinate Judge of Banda on the 15th May, 1911. The plaintiff Muhammad Abdul Aziz claimed a moiety of the immovable property now in question as the heir of Buland Ali Khan. The other plaintiff, Muhammad Ismail, claimed to be entitled to the other moiety under a sale deed of the 19th April, 1911, which was executed in his favour by the plaintiff Muhammad Abdul Aziz, and in accordance with which this litigation, so far as the plaintiffs are concerned, has been financed. The defendants, who are the respondents, are in possession, and have denied that Muhammad Abdul Aziz is the heir of Buland Ali Khan.

In the plaint it was alleged that the plaintiff Muhammad Abdul Aziz was the son of the paternal uncle of Buland Ali Khan, and a genealogical table of the family was set out showing Buland Ali Khan as the son of Jamsheer Khan and Jamsheer Khan as one of two sons of Ali Sher Khan, and showing as the other son of Ali Sher Khan one Muhammad Sher Khan, who is shown as the father of the plaintiff Muhammad Abdul Aziz. That genealogical table also shows Musammat Munna as the wife of Muhammad Sher Khan, and as a daughter of Shamsheer Khan, who was a brother of Ali Sher Khan, who was the grandfather of Buland Ali Khan. If the pedigree of the plaintiff Muhammad Abdul Aziz and Buland Ali Khan is correctly shown in that genealogical table, the title of the plaintiff Muhammad Abdul Aziz as the heir to three-fourths of the immovable property of which Buland Ali Khan was at his death possessed is established.

The defendants in their written statement alleged, so far as is now material, that the plaintiff, Muhammad Abdul Aziz, was "not the legal heir of Buland Ali Khan"; that no right to inherit any portion of the property in dispute as the heir of Buland Ali Khan had devolved upon the plaintiff, Muhammed Abdul Aziz, "as against the defendants"; and that the genealogical table set out in the plaint was "wrong," that is, was not correct. The defendants in their written statement set out a genealogical table which they alleged correctly showed the names of the relations of Buland Ali Khan so far as they were "necessary for the purposes of this suit and the defence." Not content with a denial of the title of the plaintiff, Muhammad Abdul Aziz, as heir, the defendants alleged in their written statement that Buland Ali Khan had made an oral will of all of his property in favour of the defendant, Mir Tasadduq Husain, who, it was alleged, voluntarily, and out of his regard for the relationship of the parties, privately allotted the property in shares to himself, his brother, and the other defendants. The Subordinate Judge found that it was not proved that the alleged oral will had been made, and that finding apparently was not questioned in the High Court.

According to the genealogical table which had been set forth by the defendants as correctly showing the names of the relations of Buland Ali Khan so far as they were necessary for the purposes of the suit and the defence, neither the plaintiff Muhammad Abdul Aziz nor his alleged father Muhammad Sher Khan were related to Buland Ali Khan. Neither the name of Muhammad Sher Khan nor that of his wife Musammat Munna is shown in the pedigree set forth by the defendants, although Musammat Munna's father Shamsher Khan and some of his sons and daughters are shown in it. According to that pedigree Ali Sher Khan had only one son, Jamsher Khan, the father of Buland Ali Khan. As will presently appear the pedigree set forth by the defendants in their written statement was a false pedigree, false to the knowledge of all the defendants and intentionally false, with the object of excluding the plaintiff Muhammad Abdul Aziz from the inheritance which he claimed.

On the evidence there can be no doubt whatever that Muhammad Sher Khan and Jamsher Khan were brothers and were sons of Ali Sher Khan, nor can there be any doubt on the evidence that the wife of Muhammad Sher Khan was Musammat Munna. It is impossible that the defendants or any one of them could have been unaware of the fact that Muhammad Sher Khan was the paternal uncle of Buland Ali Khan and that his wife was Musammat Munna. The defendant Mir Tasadduq Husain was a son of Musammat Zainab who was a daughter of Shamsher Khan and a sister by the half-blood of Musammat Munna. The defendant Qamar-ud-din Khan was a son of Dilsher Khan who was the son of Shamsher Khan and a brother by the half-blood of Musammat Munna. The defendant Musammat Mehran was a daughter of Musammat Mariam who was a sister of Ali Sher Khan, grandfather of Buland Ali Khan. The defendant Musammat Mehran was, consequently, a first cousin of Muhammad Sher Khan. The remaining defendant Musammat Asghari Begum was the daughter of the defendant Musammat Mehran.

The only remaining question is: Who were the father and the mother of the plaintiff Muhammad Abdul Aziz? The Subordinate Judge found in effect that the plaintiff Muhammad Abdul Aziz was the son of Muhammad Sher Khan and his wife Musammat Munna. The High Court accepted as correct the finding of the subordinate Judge that Muhammad Sher Khan was a son of Ali Sher Khan, but as to the parentage of the plaintiff Muhammad Abdul Aziz the learned judges who heard the appeal in the High Court said: "It is quite possible that the real truth is that the claimant (Muhammad Abdul Aziz) was the son of Musammat Sundaria who was kept by Muhammad Sher Khan," and "after a careful consideration of the entire evidence, we are unable to say that we believe that the claimant was the son, far less the

legitimate son, of Muhammad Sher Khan," and accordingly they allowed the appeal and dismissed the suit.

There is strong and straightforward evidence on the record, which the Subordinate Judge accepted as reliable, and which their Lordships see no reason to doubt, according to which the plaintiff, Muhammad Abdul Aziz, was the son of Muhammad Sher Khan and his wife, Musammat Munna. The plaintiff, Muhammad Abdul Aziz, gave evidence on his own behalf. He was born at Kadora. His father, Muhammad Sher Khan, had been involved in the troubles of the Mutiny as a follower of Nawab Ali Bahadur Khan, of Banda, with whom he fled, but subsequently he came in and surrendered. Muhammad Abdul Aziz, through the interest of his cousin, Buland Ali Khan, obtained an appointment in the Police Department at Banda, from which later he was dismissed; he then became a *darwesh* (a fakir, a member of a religious brotherhood). Many years later, when at Nasirabad, in 1910, he heard from one Ramzan that his cousin, Buland Ali Khan, and his widow, Akbari Begam, had died, and on the 17th March, 1910, he wrote from Nasirabad to the Collector of Banda, giving the Collector notice that he was the only legal heir to the property which Buland Ali Khan had left, and asking that the property should be kept in safe custody by the Collector's Court until he could attend at Banda. On the 30th March, 1910, Muhammad Abdul Aziz again wrote to the Collector of Banda to the same effect. Subsequently Muhammad Abdul Aziz went to Banda, and discovered that the property of which Buland Ali Khan had died possessed had been taken possession of by the defendants, and in order to provide the means for this litigation in assertion of his rights, he executed the sale deed of the 19th April, 1911, in favour of the other plaintiff Muhammad Ismail.

The learned judges of the High Court were apparently influenced in the view which they took of the evidence on behalf of the plaintiff, Muhammad Abdul Aziz, as to his parentage, by the fact that the suit is being financed by the other plaintiff, who, except for the sale deed in his favour of the 19th April, 1911, would not be interested in the litigation, and they suggested that it was possible that Muhammad Abdul Aziz was a son of one Musammat Sundaria, who admittedly had been a mistress of Muhammad Sher Khan. It is to be observed that no question suggesting that Muhammad Abdul Aziz was a son of Musammat Sundaria was put to him or to any of his witnesses. If that was the defence upon which the defendants intended to rely Muhammad Abdul Aziz and those witnesses of his who spoke as to his paternity, should have had in cross-examination the question directly put to them as to whether Musammat Sundaria, not Musammat Munna, was his mother. That was not done. In order to lay a foundation for calling evidence to prove that Muhammad Abdul Aziz was a son of Musammat Sundaria, it was not sufficient for the defendants to ask the

plaintiff, Muhammad Abdul Aziz, or a witness or witnesses of his in cross-examination, whether Muhammad Sher Khan had a woman named Sundaria in his keeping as a mistress.

The defendants avoided putting the direct question as to the paternity, doubtless not willing to commit themselves to the defence that Sundaria, and not Musammat Munna, was the mother of the plaintiff, Muhammad Abdul Aziz. When the witnesses for the defendants were being examined some attempt was made to prove that the plaintiff, Muhammad Abdul Aziz, was the son of a woman named Sundaria, alleged to have been a mistress, not of Muhammad Sher Khan, of Banda, the son of Ali Sher Khan, but of a man who was described as Muhammad Sher Khan, a resident of Delhi and son of a man described as Sardar Khan, and an attempt was made to confound Muhammad Sher Khan, who was the father of the plaintiff, Muhammad Abdul Aziz, and who had a mistress named Sundaria, with a Muhammad Sher Khan, of Delhi, who may have been, and very possibly was, an imaginary person. The Subordinate Judge's comment on that part of the case of the defendants was: "The whole story is a pure concoction and is unworthy of credit." With that comment of the Subordinate Judge their Lordships agree.

In the opinion of their Lordships it was satisfactorily proved that the plaintiff, Muhammad Abdul Aziz was the son of Muhammad Sher Khan by his wife, Musammat Munna, and they will humbly advise His Majesty that this appeal should be allowed with costs, that the decree of the High Court should be set aside with costs, and that the decree of the Subordinate Judge should be restored.

In the Privy Council.

MUHAMMAD ABDUL AZIZ
AND ANOTHER.

v.

MIR TASADDUQ HUSAIN
AND OTHERS.

DELIVERED BY SIR JOHN EDGE.