

To be substituted for copy of Judgment previously issued ; please see alterations on pages 4 and 9.

*Privy Council Appeal No. 116 of 1930.*

*Oudh Appeals Nos. 10 and 11 of 1929.*

Sardar Nisar Ali Khan - - - - - *Appellant*

*v.*

K.B. Sardar Mohammad Ali Khan - - - - - *Respondent*

AND

K.B. Sardar Mohammad Ali Khan - - - - - *Appellant*

*v.*

Sardar Nisar Ali Khan - - - - - *Respondent*

*(Consolidated Appeals)*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 21ST APRIL 1932.

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*Present at the Hearing :*

LORD BLANESBURGH.

LORD TOMLIN.

LORD RUSSELL OF KILLOWEN.

SIR GEORGE LOWNDES.

SIR DINSHAH MULLA.

*[Delivered by LORD TOMLIN.]*

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These consolidated appeals are concerned with four properties, one in Oudh and three in the Punjab, of which at his death on the 28th October, 1923, the late Sir Fateh Ali Khan, K.C.I.E., was in possession.

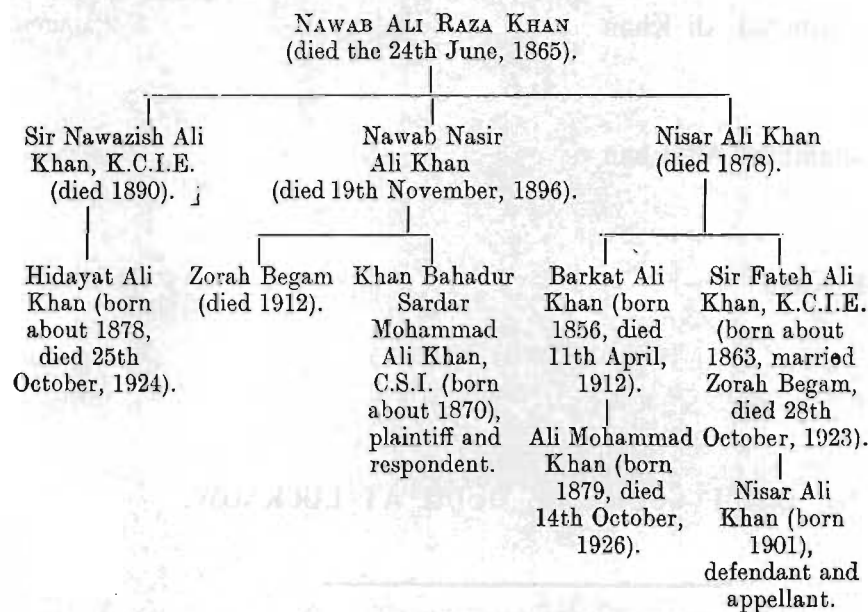
Nisar Ali Khan, who is the appellant in the first appeal and respondent in the second appeal, and is hereinafter called the appellant, is Sir Fateh's son.

Mohammad Ali Khan, who is the respondent in the first appeal and the appellant in the second appeal, and is hereinafter called the respondent, is a first cousin of Sir Fateh, being a son of Sir Fateh's uncle Nawab Nasir Ali Khan, who

died on the 19th November, 1896, in possession of the four properties.

On the death of Nawab Nasir, Sir Fateh entered into possession of the estates in question and remained in possession thereafter until his death.

The following pedigree sufficiently explains the descent of Sir Fateh and the positions in the family of the appellant and respondent respectively :—



The family are Shia Mohammadans of the Asna Ashari sect governed by the Imamia Law. By family custom women do not inherit.

Sir Fateh's grandfather, Nawab Ali Raza Khan, who died in 1865, was granted for distinguished service to the British Government a property in the Bahraich district of Oudh, described in the lists 1 and 5 attached to the Oudh Estates Act of 1869 as the estate of Nawabganj.

This property, being a Taluqa governed by the Act to which reference has been made, is held for a heritable and transferable estate. If the Taluqdar makes a will in accordance with the Act such will is valid irrespective of any personal law as to testamentary disposition to which he may be otherwise subject. Under section 8 of the Act intestate succession to the estate is regulated by the rule of primogeniture.

On his death Nawab Ali Raza Khan was succeeded in this property by his eldest son, Sir Nawazish Ali Khan. This property is hereinafter referred to as the Oudh property.

By a deed dated the 9th May, 1868, Government, after the death of Nawab Ali Raza Khan, made a grant to Sir Nawazish Ali Khan of a property in the Lahore district known as and hereinafter called the Rakh Khamba property.

The deed granted the property to Sir Nawazish Ali Khan for life, then to his next brother Nasir Ali Khan for life, and then to his youngest brother Nisar Ali Khan for life. It then provided that on the death of the survivor the estate "shall go and belong

to whichever of the lawful male heirs of the said Nawab Ali Raza Khan shall be chosen by the said male heirs as the fittest person to succeed to the said estate, his heirs and successors . . . and in the event of the said male heirs being unable to agree within a reasonable time then to such one of the lawful heirs of the said Nawab Ali Raza Khan as His Honour the Lieutenant Governor may consider fittest to succeed to the said estate, his heirs and successors." There were certain conditions attached to the Grant including conditions that the holder of the estate should make due provision for the maintenance of certain persons and that the Local Government might at any time require the holder to set aside from the proceeds of the estate such sum as it thinks necessary for that purpose.

Nisar Ali Khan, the youngest son of Nawab Ali Raza Khan, was the father of Sir Fateh, and died in 1878 in the lifetime of Sir Nawazish.

By a deed dated the 23rd September, 1871, there was conveyed to Sir Nawazish on a purchase by him from the Government a property in the Punjab called and hereinafter referred to as the Khalikabad property. This property was held for a heritable and transferable estate subject to the ordinary law of inheritance by which the family was governed.

By a deed dated the 25th April, 1886, Government granted to Sir Nawazish in full proprietary rights a property in Tahsil Lahore known as and hereinafter referred to as the Juliana property. This property was also subject to the ordinary law of inheritance by which the family was governed.

Sir Nawazish died in 1890, and on his death Nawab Nasir Ali Khan succeeded without dispute to all four properties—as to the Rakh Khamba property as the next tenant for life named in the grant, and as to the other three properties under a will of Sir Nawazish presumably in the case of the Khalikabad and Juliana properties with the consent of the heirs, as under the appropriate law only one-third of such properties could be disposed of testamentarily without such consent.

On the 1st January, 1892, Nasir Ali Khan was created an hereditary Nawab by a *sanad* granted by the Viceroy. After the death of Nasir Ali Khan Sir Fateh was recognised by the Government as his successor in the Nawabship.

On the 17th June, 1892, Nasir Ali Khan executed a deed of endowment and the Khalikabad property was included in the *wakf*. He named himself as the first trustee and provided that after him "the trusteeship would revert to that person who would be my successor and this office would devolve in future upon other successors in the same manner." On his death Sir Fateh entered into possession of the property as trustee and remained in possession until his death.

On the 15th July, 1896, Nasir Ali Khan made two wills, one relating to the Oudh property and the other relating to the



Juliana and Rakh Khamba properties. These wills were, with one exception, to which attention will be directed, identical *mutatis mutandis*.

Both wills were signed by the respondent and his sister, but both Courts below have held that they did not sign as witnesses but to show their assent to the provisions of the will. The will relating to the Oudh property, according to the translation accepted in the Courts below, was as follows :—

'In the name of Allah the most beneficent and the most merciful.

I am Haji Nawab Nasir Ali Khan, son of the late Nawab Ali Raza Khan, may God forgive him, caste Qizilbash, *malik* (owner) and Taluqdar of Nawabganj Aliabad, Bahraich district in the Province of Oudh, at present resident of Lahore—whereas the borrowed life is transitory, wherefor considering the appointment of an executor and my successor one of the necessities and a duty—while in possession of sound senses and stable intellect, without repugnance and compulsion—do hereby affirm and write that whereas the estate comprising Taluqdari Nawabganj Aliabad, parganas Charda and Bhinga, district Bahraich, and also situate in Bahraich city proper, in the province of Oudh along with all property and articles movable and immovable, and all internal and external rights and right of easement, which was given to me by my elder brother the late Sir Nawab Haji Nawazish Ali Khan Sahib, may God forgive him, by means of the registered will dated 14th February, 1882 A.D. made under section 11 of Act I of 1869 A.D. and subsequently in 1889 A.D. the said Sir Nawab Sahib in his lifetime having got this very above-mentioned Taluqdari estate, with all rights and interests, mutated in my name made me like himself owner without anyone else's partnership, *bila shirkat ghair*e—accordingly I have been continuously and am still in possession (*qabiz*) and owner (*malik*) of this very Taluqdari estate from the date of mutation till to-day. Now, under section 11 of Act I of 1869 A.D. I, by means of this will, do hereby appoint Nawab Fateh Ali Khan, son of my late brother Nawab Nisar Ali Khan, may God forgive him, my executor and successor of all this Taluqdari estate with all the rights and interests aforesaid and do hereby authorise the legatee that whatever Taluqdari powers over the above-mentioned Ilaqa and over all the properties movable and immovable I the said declarant have, my legatee, to wit, Nawab Fateh Ali Khan, after my lifetime shall have like myself (*misl maire*), the very same powers with powers of possession and enjoyment as owner (' *wohi ikhtiarat ba qabz-o-tasarruf-e-malikana* ') provided he be alive. Similarly after the lifetime of the legatee Nawab Fateh Ali Khan, my son Nawab Mohammad Ali Khan, shall, if alive, be his successor. He shall also have the very same powers as have been bestowed on Nawab Fateh Ali Khan by means of this deed of will. After the lifetime of my son Nawab Mohammad Ali Khan, Nawab Hidayat Ali Khan, son of the late Sir Nawab Haji Nawazish Ali Khan Sahib shall be his successor, provided he be alive. After all these three successors the fit amongst the descendants of the successors shall succeed. The last legatee shall have power to nominate his successor anyone whom he considers fit from amongst the descendants of each of the three successors; and if the last legatee die without nominating a successor the male descendants of each of the three successors shall have power to appoint as successor whomsoever they consider fit and superior amongst themselves.

The line of successors shall continue according to this very rule. In the event of disagreement the Government shall have power to appoint as successor anyone amongst the descendants of each of the three successors whom it considers the fittest. And if anyone amongst our family claims maintenance contrary to the wishes of the Taluqdars, to wit, my successors,

he shall, in no way, be entitled as of right to get maintenance. The successors shall have power to give or not (?) maintenance in the event of good conduct and obedience. And if anyone of our family or heirs makes any claim of proprietary rights in respect of the said Ilaqa or any movable or immovable property whether in whole or in part, as against the successors, it shall then be invalid and unentertainable. I, therefore, execute this deed of will under section 11 of Act I of 1869 A.D., so that it may remain a 'Sanad' (documentary proof) and may be of use in case of necessity."

In the will relating to the Punjab properties instead of the phrase "that whatever Taluqdari powers over the above-mentioned Ilaqa and over all the properties movable and immovable I the said declarant have" and the phrase "contrary to the wishes of the Taluqdars to wit my successors" there were substituted respectively the phrase "that whatever powers I, the declarant, have in respect of the said movable and immovable properties" and the phrase "contrary to the wishes of the grantee and owner (*muafidar* and *malik*) to wit my successors."

Nawab Nasir died on the 19th November, 1896, and the *soem* or third day ceremony after his death took place on the morning of the 21st November, 1896. In the afternoon of the same day the *dastarbandi*, or tying of the turban ceremony, took place.

There was at the trial a serious conflict of evidence as to what took place at this afternoon ceremony, it being alleged on the one hand by the appellant that Sir Fateh was then elected to succeed to the Rakh Khamba property in accordance with the terms of the grant, and on the other hand by the respondent that Sir Fateh, the respondent, and Sir Nawazish's son, Hidayat Ali Khan, were recognised by the family as successors to all four properties in accordance with the terms of Nawab Nasir's wills.

At any rate Sir Fateh entered into possession of all four properties, but in the case of the Khalikabad property as trustee and remained in possession until his death on the 28th October, 1923.

On the death of Sir Fateh his eldest son, the appellant, took possession of the four properties, and on the 9th December, 1925, the respondent instituted in Oudh the suit out of which these appeals arise.

The trial Judge held that upon the true construction of the wills Sir Fateh took a life interest only and that after his death the respondent succeeded to the properties which the wills affected either as next tenant for life or as heir of Nawab Nasir. He also held that so far as was necessary for the disposition of the entirety of any property affected by the wills the heirs of Nawab Nasir had assented to the wills. His conclusion therefore was that the respondent had made out his title to the Oudh and Juliana properties.

With regard to the Rakh Khamba property the learned judge took the view that having regard to the terms of the grant Nawab Nasir had no power of testamentary disposition that there had

been no election of a successor in accordance with the terms of the grant but that Sir Fateh had been recognised by the family as succeeding to this property under the will and that the defendant was estopped from denying that he had so succeeded.

As to the Khalikabad property the learned judge held that he had jurisdiction (which the appellant questioned) to decide the matter and that the respondent having succeeded to the Rakh Khamba property must be treated as successor of Sir Fateh and therefore trustee of the *waqf*.

The learned judge therefore made a declaration of the respondent's right to possession of all four properties.

On appeal to the Chief Court of Oudh the judgment below was affirmed as to the Oudh and Juliana properties, but reversed as to the Rakh Khamba, and Khalikabad properties. As to the Rakh Khamba property the Chief Court took the view that Sir Fateh had been selected either by the heirs or by the Government in accordance with the terms of the grant to succeed to the Rakh Khamba property, and therefore that the appellant as his heir was entitled to this property.

As to the Khalikabad property the Court was of opinion that whoever succeeded to the hereditary Nawabship would be entitled to be trustee of the *waqf*, but that as no selection for the Nawabship had been made the respondent could show no title and the suit must fail against the appellant who was in possession. Both parties appealed to His Majesty in Council.

Before their Lordships' Board it was argued by the appellant that the Courts below were wrong with regard to the Oudh and Juliana properties because the wills of Nawab Nasir upon their true construction conferred a series of absolute interests, and therefore that Sir Fateh took absolutely as the taker of the first absolute interest, all subsequent interests and provisions being repugnant and bad.

It is a matter of difficulty to determine from translations the true effect of testamentary instruments framed in the vernacular by persons with customs and habits of mind differing widely from the customs and habits of mind of testators in this country, and it would be unwise to adhere too rigidly to rules of construction formulated for the interpretation of instruments created in a different environment.

Their Lordships have been referred to a number of decisions of the Board with reference to the word *malik*, and these decisions are in their Lordships' minds in arriving at their conclusions upon the wills in the present case.

Their Lordships are of opinion that there is no substantial difference between the two wills and that it would not be possible to give to one a meaning which the other would not bear. The dominant intention of the testator as displayed by each of the wills is in their Lordships' judgment an intention that the property should pass to three persons in succession and thereafter to some one or more persons selected in a specified manner. This



intention is inconsistent with the idea of a series of absolute interests and could only be given effect to with such a series if each taker voluntarily denied himself the exercise of all power of alienation, *inter vivos*, and disposed of the property testamentarily to the next taker in accordance with the testator's scheme.

Without a succession of limited interests, the dominant intention cannot have effect and regarding each will as a whole their Lordships are of opinion that life interests only are conferred. This view receives additional support from the fact that the gift to each subsequent taker is expressed to be to him if alive or provided he be alive and after the lifetime of the previous taker and that the testator refers to all three named takers as his successors.

The gift in the Oudh will of Taluqdari powers and in the Punjab will of the same powers as the testator had, must in their Lordships' opinion be read as a gift of such powers so far as is consistent with the subsequent provisions of the instrument.

The appellant's appeal therefore fails as upon this construction their Lordships are of opinion that the respondent was entitled on Sir Fateh's death to succeed to the Oudh and Juliana properties as next tenant for life, both Courts below having held that the will was assented to by Nawab Nazir's heirs so far as was necessary to comply with Mahommadan law in regard to the Juliana properties.

Their Lordships express no opinion as to the effects of the wills after the death of the respondent the third tenant for life being already dead.

The respondent on his own appeal seeks to restore the order of the trial Judge in regard to the Rakh Khamba and Khalikabad properties.

With regard to the Rakh Khamba property it is not sufficient for the respondent to displace the title of the appellant who is in possession. He must establish substantively a better title in himself. He sought to do so before their Lordships' Board by alleging some agreement between members of the family either in the life of Nawab Nazir or on his death that effect should be given to the Punjab will in regard to this property. There seems to their Lordships to be three fatal objections to this case, namely, (1) it has not been pleaded or proved, (2) the defendant was not born at the time and would not be bound by any such agreement, and (3) effect could not be given to the agreement at any rate as against the Government as it is inconsistent with the terms of the grant.

He further alleged that there was in the circumstances some estoppel against Sir Fateh which bound the appellant and precluded him from denying that the Punjab will had effect in regard to the Rakh Khamba property.

The following passage occurs in para. 9 of the amended plaint:—

“Nawab Sir Fateh Ali Khan enjoyed full benefits given him by the wills and the deed of *waqf* aforementioned and it is not now open to the defendant to assert a title inconsistent with the terms of the said deeds.”

Except for this passage their Lordships do not find that any case of estoppel was hinted at in the pleadings, but issue No. 12 was settled in the following terms: "Is the defendant estopped from claiming that any portion of the wills of 1896 is invalid?" and the learned trial Judge found that both by acceptance of the wills as a whole and by assertions which led the respondent to suppose that he was the accepted heir, Sir Fateh created an estoppel to the present claim of his son that one portion of the property, namely, the Rakh Khamba property, came to him by some means other than the will on which his original title was based.

Their Lordships are unable to accept the view that the assertions to which the trial Judge refers even if they were sufficient to estop Sir Fateh could create an estoppel against the appellant.

It was, however, said that Sir Fateh in fact went into possession under the wills and that upon the principle of the decisions in *Board v. Board*, L.R. 9 Q.B. 48, and *Dalton v. Fitzgerald*, [1897] 1 Ch. 440 and [1897] 2 Ch. 86, the appellant is estopped from disputing the title of the remaindermen under the wills.

Now the argument proceeds on the basis that there was no selection of Sir Fateh in accordance with the terms of the grant. Obviously if such a selection was proved, that fact would be inconsistent with the allegation that Sir Fateh went into possession under the wills.

*Ex hypothesi*, therefore, Sir Fateh had no title at all, and although if he went into possession under the wills he might be estopped from denying the remaindermen's title, their Lordships are unable to see upon what principle the appellant entering into possession after his father's death without any title at all because his father had nothing to pass to him can be affected by any estoppel.

In each of the cases cited the entrant into possession under the invalid instrument had acquired a good title from another source and his purchaser or devisee of that good title was not allowed to set it up, because as such purchaser or devisee he was a privy of him who was estopped by having entered under the invalid instrument.

Here on the hypothesis of no selection the appellant takes nothing through his father, and the mere fact that he would have succeeded as heir to his father if his father had left an heritable estate does not make him a privy of his father for the purposes of the rule in *Board v. Board*. He can rely on his own possession as a squatter.

It follows therefore in their Lordships' judgment that the respondent's appeal in respect of the Rakh Khamba property must fail, whether he proves or fails to prove that Sir Fateh entered under the wills. If he fails to prove it he has no basis for his plea of estoppel from which alone he seeks to evoke a title for



himself. If he does prove it, he cannot in their Lordships' opinion for the reason already indicated support the plea of estoppel against the appellant.

In these circumstances it is unnecessary for disposing of this appeal to determine the issue of fact whether or not there was any selection of Sir Fateh to succeed to the Rakh Khamba property in accordance with the terms of the grant, and this issue will therefore remain open to be adjudicated upon on some future occasion should circumstances so require.

There remains the question of the Khalikabad estate. Here the respondent cannot succeed unless he shows that under the terms of the deed creating the *waqf* he is the trustee. That question depends upon the construction of the deed. It is a separate and different cause of action from those which found the proceedings in respect of the other three properties.

Their Lordships are unable to find any justification for bringing the suit in respect of this property elsewhere than in the Court of the district where the property is situate. Such justification cannot in their Lordships' judgment be found in section 17 of the Code of Civil Procedure upon which the respondent relied.

There were certain *ex parte* applications made by the respondent at an early stage of the suit as the result of which he determined to combine and did in his plaint combine his claims in respect of all four properties in one suit in the Court in Oudh. The appellant in his written statement at once took objection to the jurisdiction so far as the claim in respect of the Khalikabad property was concerned.

There was nothing in what occurred in connection with the respondent's *ex parte* applications to render the appellant's objection to the jurisdiction inadmissible. That objection has been properly considered in the Courts below, and is proper to be adjudicated upon before their Lordships' Board. The objection in their Lordships' judgment succeeds and is fatal to the respondent's appeal in respect of the Khalikabad property.

It becomes therefore unnecessary to consider the true effect of the grant creating the *waqf*, and their Lordships must not be taken as expressing any views upon the conclusions reached on this matter in the Courts below.

A number of minor issues were considered and dealt with in the Courts below but were not debated before their Lordships' Board.

In the result therefore both appeals fail and should be dismissed, and their Lordships will humbly advise His Majesty accordingly.

There will be no costs on either side except that as regards K.B. Sardar Mohammad Ali Khan's petition for the discharge of a receiver K.B. Sardar Mohammad Ali Khan will pay to Sardar Nisar Ali Khan his costs of that petition as directed by Order in Council of the 23rd July, 1931.

In the Privy Council.

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SARDAR NISAR ALI KHAN

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