

Privy Council Appeal No. 70 of 1935

Oudh Appeals Nos. 18 & 19 of 1931

Bhaya Mohammad Azim Khan and others - - - *Appellants*

v.

Raja Saadat Ali Khan and others - - - *Respondents*

Same - - - *Appellants*

v.

Mumtaz Ali Khan since deceased (now represented by
Rani Huzur Ara Begum and another) and others - *Respondents*

(Consolidated Appeals)

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 17TH MARCH, 1939

Present at the Hearing :

LORD ROMER
LORD PORTER
SIR GEORGE RANKIN

[Delivered by SIR GEORGE RANKIN]

This appeal is brought from two decrees of 22nd December, 1930, made in the exercise of the original jurisdiction conferred upon the Chief Court of Oudh by section 7 of the Oudh Courts Act, 1925, an Act of the Local Legislature of the United Provinces of Agra and Oudh. By these decrees Nanavutty J., as trial Judge, after a protracted hearing, dismissed two suits (numbered respectively 11 and 12 of 1928), which had been instituted on the 2nd November, 1928. The two suits were tried together and one judgment was given covering the issues in both. They came on for hearing on 15th July, 1929. Evidence both oral and documentary was adduced in great quantity: the hearing continued until 2nd August, 1929, when the case was postponed until 13th February, 1930: thereafter the case was heard on a number of dates in February, March and April of that year. Sixteen issues in one case and fourteen in the other had been framed and in a lengthy judgment the learned Judge considered and decided a number of important and difficult questions both of fact and of law.

Suit No. 11 was brought by 16 persons, now appellants, and may be summarily described as brought to establish

the right of the first plaintiff to the taluqdari estate of Nanpara and the rights of some or all of the plaintiffs to certain non-taluqdari property—villages, houses and moveables—in succession to Raja Mohammad Siddique Khan, who had died on 30th December, 1907 (and who is herein referred to as the late Raja). The first defendant in that suit (now respondent No. 1) was Raja Saadat Ali Khan: he was a son of the late Raja's sister, but he claimed to have been adopted by one of the late Raja's widows, Saltanat Begum, under the Oudh Estates Act (I of 1869) and in accordance with the provisions of the late Raja's will, whereby he left successive life estates and power of adoption to each of his four widows in a certain order. In November, 1925, the Court of Wards had given possession of the Nanpara estate to this defendant. The second defendant, Mumtaz Ali Khan (who died in 1934 while these suits were pending) was Raja of Utraula (another taluqdari estate): he had married Mohammad Kaniz Begum, sister to the late Raja of Nanpara and on her death in 1919 had come into possession of some of the suit properties under a compromise made in 1910 which need not here be detailed. The third defendant was Rani Qamar Zamani Begum, who had been the first of five ladies whom the late Raja of Nanpara had married and who had been given a certain interest in his estate for her life by the compromise already mentioned.

In this suit the plaintiffs' case involved several different inquiries. In the first place, they had to displace the adoption of Saadat Ali. In the second place they had to prove their pedigree so as to connect themselves with the admitted pedigree of the late Raja of Nanpara. This required that they should establish that an ancestor of the late Raja of Nanpara called Jehan Khan, who lived in the middle of the seventeenth century, had besides his eldest son Mohammad Khan a second son called Mahmud Khan, and that this second son was father to one Mahabat Khan, ancestor of the plaintiffs. Thirdly, the plaintiffs had to show that certain specified individuals among them were the persons entitled to succeed on an intestacy, by proving that there was a custom of male lineal primogeniture or a custom to exclude females from succession. On all these points, and on others, the learned trial Judge found against the plaintiffs.

Suit No. 12 was brought by the same 16 plaintiffs together with two other persons of whom no mention need here be made. The first defendant was Mumtaz Ali Khan, Raja of Utraula, and Saadat Ali Khan was the second defendant. The plaintiffs' claim in this suit was laid as the nearest male agnates of Mohammad Kaniz Begum, the first defendant's wife, who had died in 1919. The claim was that the plaintiffs were entitled, as her heirs under the Oudh Estates Act (I of 1869), to 17 villages, part of the taluqdari estate of Utraula which had been transferred to her by her husband, the first defendant: also that three pattis which had been purchased by her had descended to one or other of the plaintiffs as non-taluqdari property governed by a

custom of male lineal primogeniture. The main defences in this case were four, *first*, that the deeds of gift executed in his wife's favour by the Raja of Utraula had been purely *benami* and colourable transactions not intended by either party to be operative but only to shield the property from creditors: *secondly*, that the pedigree put forward by the plaintiffs to connect themselves with the lady was false: *thirdly*, that none of the plaintiffs was her heir, and *fourthly*, limitation. On these points the finding of the trial Judge was against the plaintiffs.

It is not necessary to set out in any fuller detail the circumstances or subject-matter of the litigation in order to make clear that it covered a wide area of disputed fact, and that unless the plaintiffs' claims could be dismissed on facts *in limine* they involved a number of important legal questions both as regards the application to Muslims of the right of adoption conferred by the Oudh Estates Act and other aspects of the law and custom of succession.

The first question for consideration by the Board is presented by the fact that their Lordships are asked to act as a Court of first appeal from the decision of a learned Judge of the Chief Court sitting at first instance. In a case of importance and complexity involving fact and law special to the province of Oudh, the experience and judgment of an appellate Bench of the Chief Court would contribute greatly to clarify the matter in dispute and the principles of law applicable to Oudh families and taluqdari estates: indeed it is only to be expected that some at least of the issues of fact would have been settled by concurrent findings of the Indian Courts.

The learned trial Judge having pronounced judgment on the 22nd December, 1930, and signed the two decrees on the 16th February, 1931, the plaintiffs on the 18th May, 1931, filed in the Chief Court applications under sections 109 and 110 and Order XLV of the Code of Civil Procedure asking for a certificate that the case was fit to be taken on appeal to His Majesty in Council. Two days later (20th May, 1931), they presented to the Chief Court a further application asking that if the Court should hold that their request for a certificate could not be granted their application therefor might be treated as a memorandum of appeal to an appellate Bench of the Chief Court. On 21st September, 1931, a Bench of the Chief Court (Wazir Hasan C.J. and Srivastava J.), refused the certificate on the ground that an appeal to His Majesty from the decree of the trial Judge did not lie under section 109 of the Code, and on the application of the 20th May, 1931, an order was passed in the following terms: "This application is not pressed and is therefore rejected." The next step taken by the plaintiffs was to apply for special leave by a petition lodged on the 9th March, 1932, where it was contended that the opening words of subsection (1) of section 12 of the Oudh Courts Act, 1925—"except as otherwise provided by any enactment for the time being in force"—gave them a right

to appeal from the trial Judge direct to His Majesty under section 109 (b) of the Civil Procedure Code and that in any event the former Act being an Act of a local legislature could not repeal the rights given by an Act passed by the Indian legislature. This petition having been heard by the Board on 5th April, 1932, in the absence of anyone appearing for the respondents, though not without notice to them, by an Order in Council dated 9th April, 1932, it was ordered that leave ought to be given to the petitioners to enter and prosecute their appeal and that the respondents ought to be at liberty upon the hearing of the appeal to take the objection that special leave to appeal ought not to have been granted. Their Lordships have before them a transcript of a few observations made at the conclusion of the hearing of the application for leave, but they are unable to interpret these as intended to restrict the discretion of the present Board after hearing full argument upon the effect of the Indian enactments. Indeed they are not of opinion that the question whether special leave ought to have been granted can be confined to a bare question of jurisdiction or can otherwise be regarded as made up of separate and distinct questions of which some are, but others are not, before the present Board. They observe, however, with some concern, that though this preliminary point was specially reserved by the Order in Council some seven years ago, no party took any steps to bring it expeditiously as a preliminary point before the Board so as to avoid useless expenditure of time and money in preparing the case for hearing on the merits, should the Board be of opinion that special leave should not have been granted. This failure to take such steps is, in their Lordships' opinion, difficult to justify and much to be regretted, and it cannot be permitted to influence the decision of the Board on the question whether special leave ought to have been granted.

The definition of "High Court" given by clause (24) of section 3 of the General Clauses Act (X of 1897) and sections 4 (1) 109, 110, 111 and 112 (1) of the Civil Procedure Code are as follows:—

" 3.—(24) 'High Court,' used with reference to civil proceedings, shall mean the highest Civil Court of appeal in the part of British India in which the Act or Regulation containing the expression operates.

(C.P.C.) " 4.—(1) In the absence of any specific provision to the contrary, nothing in this Code shall be deemed to limit or otherwise affect any special or local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or under any other law for the time being in force.

" 109. Subject to such rules as may, from time to time, be made by His Majesty in Council regarding appeals from the Courts of British India, and to the provisions hereinafter contained, an appeal shall lie to His Majesty in Council—

" (a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction;

" (b) from any decree or final order passed by a High Court in the exercise of original civil jurisdiction; and

“(c) from any decree or order, when the case, as hereinafter provided, is certified to be a fit one for appeal to His Majesty in Council.

“110. In each of the cases mentioned in clauses (a) and (b) of section 109, the amount or value of the subject-matter of the suit in the Court of first instance must be ten thousand rupees or upwards, and the amount or value of the subject-matter in dispute on appeal to His Majesty in Council must be the same sum or upwards,

or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value,

and where the decree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

“111. Notwithstanding anything contained in section 109, no appeal shall lie to His Majesty in Council—

“(a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861, or of one Judge of a Division Court, or of two or more Judges of such High Court, or of a Division Court constituted by two or more Judges of such High Court, where such Judges are equally divided in opinion and do not amount in number to a majority of the whole of the Judges of the High Court at the time being; or

“(b) from any decree from which under section 102 no second appeal lies.

“112.—(1) Nothing contained in this Code shall be deemed—

“(a) to bar the full and unqualified exercise of His Majesty's pleasure in receiving or rejecting appeals to His Majesty in Council, or otherwise howsoever, or

“(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

The Oudh Courts Act (U.P. Act IV of 1925) was passed to amend and consolidate the law relating to the Courts in Oudh. Before 1925 the highest Court in Oudh was the Court of the Judicial Commissioner: the system of land tenure obtaining in the province under the Oudh Estates Act (I of 1869) gave rise to complex litigation, and suits to establish rights of succession to valuable taluqdari estates were tried at first instance by a Subordinate Judge and went on appeal to two judges of the Judicial Commissioner's Court. By the Act of 1925 the legislature of the province set up a Chief Court. It gave to the new Court jurisdiction as the highest civil and criminal court of appeal and revision (ss. 8 and 9), thus making it a High Court within the definition clause of s. 3 of the General Clauses Act. It also conferred upon the new Court an exclusive original jurisdiction which might be exercised by a single Judge, unless statute or rule otherwise provided. This original jurisdiction was not a local jurisdiction confined to the precincts of the chief town or any other town, but was a jurisdiction over all suits valued at five lakhs of rupees or over. It was not confined to suits in respect of taluqdari estates: on

the other hand it is not in doubt that these were the suits for which the new jurisdiction was mainly designed.

By the Lower Burma Courts Act, 1900 (VI of 1900), the Indian legislature had established a Chief Court for Lower Burma with original jurisdiction within the town of Rangoon. Sections 14 and 15 of that Act, which were followed in their wording by sections 12 and 13 of the Oudh Act of 1925, began with the same opening words—"except as otherwise provided by any enactment for the time being in force". And the Punjab legislature used the same opening phrase in the parallel sections (9 and 10) of the Punjab Courts Act, 1914 [Punjab Act III of 1914]. Section 12 (1) of the Oudh Act was a condensed version of its predecessors and section 13 introduced little variation save for the reference to section 98 of the Code which was new.

"Lower Burma Courts Act, 1900 (Lower Burma Act VI of 1900).

14. Except as otherwise provided by any enactment for the time being in force, an appeal from any decree made by a single Judge of the Chief Court or from any order made by a single Judge of the Chief Court when an appeal from such order is permitted by any law for the time being in force—

(a) in the exercise of its original jurisdiction as the principal Civil Court of original jurisdiction for the Rangoon Town, or

(b) in the exercise of its original jurisdiction with respect to insolvent debtors and their creditors, or

(c) in the exercise of its original jurisdiction in cases withdrawn from other Courts under section 25 of the Code of Civil Procedure, or

(d) in the exercise of any other original jurisdiction of a civil nature to which the Chief Court may by rule extend this section,

shall lie to a bench of the Chief Court consisting of two other Judges of the Chief Court.

15. Except as otherwise provided by any enactment for the time being in force—

(a) where there is a difference of opinion among the Judges composing any bench of the Chief Court, the decision shall be in accordance with the opinion of the majority of those Judges;

(b) if there is no such majority, then—

(i) if the bench is a full bench, the decision shall be in accordance with the opinion of the Senior Judge of the bench;

(ii) in other cases, the bench before which the difference has arisen shall refer it to a full bench, and shall dispose of the case in accordance with the decision of the full bench.

"Punjab Courts Act, 1914 (Punjab Act III of 1914).

9. Except as otherwise provided by any enactment for the time being in force, an appeal from any decree or order made by the Chief Court—

(a) in exercise of its original jurisdiction in cases withdrawn from other Courts under section 24 of

10. Except as otherwise provided by any enactment for the time being in force—

(1) when there is a difference of opinion among the Judges composing any bench of the Chief Court the decision shall be in accordance with the

the Code of Civil Procedure or section 48 of this Act, or

(b) in exercise of any other original jurisdiction of a civil nature to which the Chief Court may by rule extend this section.

shall lie in the cases and in manner following (that is to say):—

(1) if the decree or order is made by a single Judge, the appeal shall lie either to a bench consisting of two other Judges, or to a Full Bench, as the Court may, by general rule or special order, direct;

(2) if the decree or order is made by a bench of Judges not being a Full Bench, and the Judges differ in opinion, the appeal shall lie to a Full Bench.

“ Oudh Courts Act, 1925 (U.P. Act IV of 1925).

12.—(1) Except as otherwise provided by any enactment for the time being in force, an appeal from any original decree or from any order against which an appeal is permitted by any law for the time being in force, made by a single Judge of the Chief Court, shall lie to a Bench consisting of two other Judges of the Chief Court.

(2) Except as otherwise provided by any enactment for the time being in force, an appeal from any appellate decree made by a single Judge of the Chief Court shall lie to a Bench consisting of two other Judges of the Chief Court, if the Judge who made the decree declares that the case is a fit one for appeal.

opinion of the majority of those Judges;

(2) if there is no such majority, then—

(a) if the bench is a Full Bench, or is exercising original civil jurisdiction, the decision shall be in accordance with the opinion of the Senior Judge;

(b) in other cases the bench before which the question has arisen shall refer the question to a Full Bench, and shall dispose of the case in accordance with the decision of the Full Bench.

13. Except as otherwise provided by section 98 of the Code of Civil Procedure, 1908, or any other enactment for the time being in force—

(i) where there is a difference of opinion among the Judges composing any Bench of the Chief Court the decision shall be in accordance with the opinion of the majority of those Judges;

(ii) if there is no such majority then—

(a) if the Bench is a full Bench, the decision shall be in accordance with the opinion of the senior Judge;

(b) in other cases the Bench before which the difference has arisen shall either refer the question to a full Bench and dispose of the case in accordance with the decision of the full Bench or refer the whole case for decision to a full Bench.

No decisions on these sections of the Act of 1900 or 1914 have been cited in argument and their Lordships have no knowledge of any difficulty having been occasioned in Burma or the Punjab by their terms in the years before 1922 and 1919 respectively when the Chief Courts became

High Courts: or of any attempt to claim that the duties of a court of first appeal from original decrees were thereby cast upon the prerogative whether exclusively or at the option of the appellant in each case. The Civil Procedure Code of 1882 applied to British Burma in 1900 and the Code of 1908 applied to the Punjab in 1914, but it does not follow that the effect of the words of exception as they appear in the three Acts was necessarily the same, and their Lordships will make no assumption on that point. In any case the words of exception which introduce each part of section 12 and section 13 of the Act of 1925 were found in Oudh to produce somewhat surprising results. They nullified altogether the meaning of section 13 and gave rise to contentions upon section 12 that rent suits as a class were outside sub-section (2) and that appeals notwithstanding sub-section (1) lay direct to His Majesty from the decisions of a single judge. Accordingly at the instance of the Chief Court a bill was introduced into the local legislature in 1934 and passed (U.P. Act XIV of 1934) to substitute for the words of exception words of different and indeed contrary significance. "Notwithstanding any provision to the contrary contained in any enactment for the time being in force" are now the opening words of both sub-sections of section 12, and section 13 now begins: "Notwithstanding anything contained in section 98 of the Code of Civil Procedure, 1908, or in any other enactment for the time being in force." It does not appear, however, that there is anything in the Act of 1934 to say that it should operate retrospectively, nor is it clear whether section 219 of the Government of India Act, 1935, has any effect to bring the Chief Court of Oudh under the provisions of section 111 of the Code.

Apart from the Federal Court established by the Government of India Act, 1935, there is no Court in India having jurisdiction over the courts of the various provinces in a manner comparable to the jurisdiction of the Supreme Court of Canada over the Provinces of Canada or the High Court of Australia over the States of Australia. Moreover from the decisions of the Supreme Court or High Court on appeal from the courts of a Province or State an appeal to His Majesty does not lie save by special leave. The alternative right to appeal either to His Majesty in Council or to the Supreme or High Court of the Dominion or Commonwealth affords no parallel whatever to the right which would accrue to an appellant from Oudh if he could come under sections 109 and 110 of the Code either after going first on appeal to an appellate bench or by omitting that tribunal as he chose.

Indeed it is only with great difficulty that such a state of things could be regarded in India as either orderly or practicable. In the particular circumstances of Oudh, apart altogether from Act XIV of 1934, the intention to introduce such a system could hardly without paradox be imputed to a provincial legislature. That this should be held to be within the intendment of general words of saving is yet more

difficult. If intended at all it must have been intended as a new departure and a noticeable deviation from accepted methods.

Their Lordships, however, have to construe the Act of 1925 as it stood originally. Many cases not affected by Act XIV of 1934 have been decided by an appellate Bench on appeal and a substantial number have thereafter come before the Board. Their Lordships were not asked by learned counsel for the appellants to hold that an appeal to an appellate Bench would be incompetent in a case, such as the present, where the requirements of section 110 of the Code as to value are satisfied; and they think it right to state expressly that they cast no doubt upon the competence of such an appeal. The opening clause of sub-section 1 of section 12 makes the section give way only to a provision which negatives in the particular case either (a) the existence of any right to appeal or (b) the right to go to the particular tribunal mentioned, viz., a Bench of the Chief Court.

Where the Code or the Oudh Act says "an appeal shall lie" to a named tribunal it is not easy to say with confidence whether a negative implication is or is not part of the intention of the phrase—that is whether the phrase means only that an appellant can go to the named tribunal or that if he appeals at all he must go to that tribunal and to no other. If no other appeal be provided there can be no difficulty. Hitherto alternative or optional jurisdiction in appeal has never been a feature of the Indian system of judicature. On the other hand their Lordships have difficulty in regarding sections 109 and 110 of the Code as directed to prohibiting an appeal being brought within a Chief Court in like manner as a Letters Patent appeal is brought within a Chartered High Court. The two sections taken together seem rather to be intended to provide an appeal to His Majesty on the footing that no further appeal in India is provided. Moreover, if these sections negative any other forum of appeal save that mentioned therein, the opening words of section 12 of the Oudh Act must either be taken with some unexpressed qualification or they lead in effect to the result that the appeal provided for within the Chief Court is limited in the case of original decrees and final orders to cases under Rs.10,000 in value. It is not, of course, impossible that in a suit valued at five lakhs—even a suit claiming a taluq—an appeal may be brought over some matter that is in value under Rs.10,000 but whatever is meant by section 12 it is not, in their Lordships' view, an attempt to provide for that.

This may indeed be further demonstrated by a reference to clause (c) in section 109 of the Code and to the passage in the middle of section 110: "or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount or value."

There is nothing in the objection that an Act of the Local Legislature could not repeal a provision of the Code [*cf.* s. 80A of the Government of India Act], and this

objection was not repeated at the hearing of the appeal; but their Lordships do not propose to base the advice which they will tender to His Majesty upon any decision to the effect that the language of section 12 is effective to exclude the provisions of section 109 of the Code. They wish to minimise neither the difficulty which the opening words of section 12 place in the way of any reliance upon sub-section (1) of section 4 of the Code nor the ambiguity which lurks in the phrase "an appeal shall lie." They have to give effect in a matter of practical and indeed constitutional importance to general words of exception which have been used by the provincial legislature in circumstances which make it difficult to define their scope with complete exactness.

If the right to appeal to an appellate Bench of the Chief Court has by this provincial legislation been given to the appellants without excluding them from the terms of section 109 or bringing them within section 111, their Lordships before advising that His Majesty in Council should at the appellants' option assume the duties of a concurrent court of first appeal for the province of Oudh as regards cases brought in the Chief Court, may reasonably be expected to examine with some care the nature of the right asserted to have been vested in the appellants by section 109 of the Code. To define the jurisdiction vested in His Majesty in Council and expound the principles which govern the exercise of the prerogative in reviewing the decisions of the Courts in different parts of the Empire is a task not lightly to be undertaken; and as the appellants stand upon the terms of section 109 it will suffice for their Lordships to call attention to the fact that this section is qualified not only by its opening words and by section 111 but also by section 112. It is plain from the terms of the Code that the Indian legislature was not claiming or proposing to abridge or extend the prerogative and their Lordships have no reason to suppose that the legislature of the United Provinces was not fully aware in 1925 of the constitutional position when it was setting up a Chief Court for Oudh. The discretion which section 112 affirms and maintains applies to the rejecting as well as to the receiving of appeals and the prerogative is not wholly or finally concluded for either purpose by the provisions of section 109. Their Lordships would certainly be more slow to impair than to extend provisions of this character: but the former power can be evoked by an occasion which requires it. By the express statement of the right which they assert the appellants are disabled from maintaining that His Majesty in Council is obliged at their option to function as a concurrent court of first appeal from the Chief Court of Oudh; and before such new obligations are accepted their Lordships have a duty to see that a proper exercise of the prerogative requires them to be accepted. In the present case they consider that they have a full discretion in the matter and they have considered the circumstances of the case with due

regard to the undoubted right of the provincial legislature to give powers to the new Chief Court or withhold them, and to the interests of the administration of justice in the province, which in their Lordships' view would be detrimentally affected by any procedure under which the appellate functions of the Chief Court were eliminated or ignored.

By the terms of the Order in Council of 9th April, 1932, they have to consider whether special leave to appeal ought to have been granted and upon an examination of the various enactments they have reached a conclusion adverse to the appellants. If the appellants can still claim to come before an appellate Bench of the Chief Court nothing is here said to prejudice their claim, but their Lordships must humbly advise His Majesty that special leave to appeal to His Majesty in Council ought not to have been granted and that this consolidated appeal should accordingly be dismissed. The appellants must pay one set of costs to be divided equally between Raja Saadat Ali Khan and Raja Mumtaz Ali Khan's representatives.

In the Privy Council

BHAYA MOHAMMAD AZIM KHAN
AND OTHERS

2.

RAJA SAADAT ALI KHAN
AND OTHERS

SAME

2.

MUMTAZ ALI KHAN SINCE DECEASED
(NOW REPRESENTED BY RANI HUZUR
ARA BEGUM AND ANOTHER)
AND OTHERS

DELIVERED BY SIR GEORGE RANKIN

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