Privy Council Appeal No. 18 of 1945

Sardar Nawazish Ali Khan - - - - - - *Appellant*

v.

Sardar Ali Raza Khan - - - - - - - *Respondent*

Sardar Ali Raza Khan - - - - - - - *Appellant*

v.

Sardar Nawazish Ali Khan - - - - - - *Respondent*

Consolidated Appeals

FROM

THE CHIEF COURT OF OUDH

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH AND 26TH FEBRUARY, 1948

Present at the Hearing:

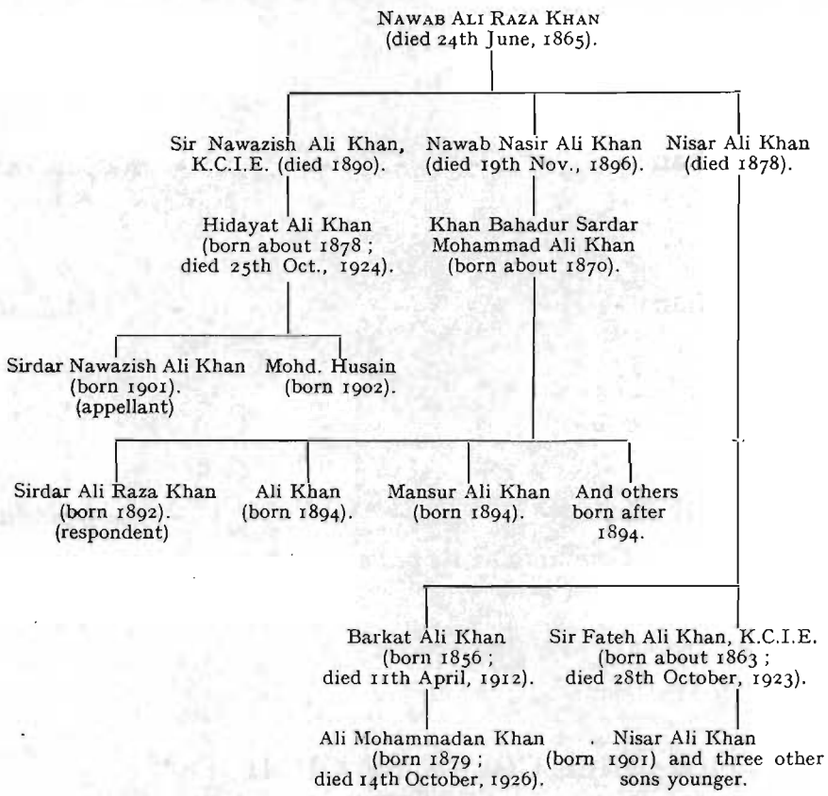
LORD UTHWATT
LORD OAKSEY
SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

These are consolidated appeals from a judgment and decree of the Chief Court of Oudh, dated the 12th January, 1943, which modified a decree of the said Court in its original civil jurisdiction, dated the 30th October, 1937. Sardar Nawazish Ali Khan will be referred to hereinafter as " the appellant ", and Sardar Ali Raza Khan as " the respondent ".

The family to which the parties belong are Shiah Mohammadans of the Ashna Ashari Sect governed by the Imamia law.

The litigation which led up to these appeals arose out of the wills of Nawab Sir Nawazish Ali Khan and Nawab Nasir Ali Khan, who were related to the parties to these appeals as shown in the pedigree following:—



The estates, the title to which is contested in these appeals, are first an estate in Oudh (hereinafter called "the Oudh estate") known as the Nawabganj Aliabad estate in the Babraich District which was granted to Nawab Ali Raza Khan, and was shown as No. 151 in List I. of the lists in the Schedule to the Oudh Estates Act, 1869, and No. 39 in List V., so that under Section 8 of that Act, the intestate succession was regulated by the rule of primogeniture, and in accordance with the scheme laid down in Section 22 of the Act. Secondly, an estate in the Punjab called the Rakh Juliana estate (hereinafter called "the Juliana estate") which was granted by the Government of India to Sir Nawazish Ali Khan.

Both these estates were owned by Sir Nawazish Ali Khan. He transferred the Juliana estate to his brother Nasir Ali Khan in his lifetime. By his will dated the 14th February, 1882, he bequeathed the Oudh estate to his said brother under the power conferred by Section 11 of the Oudh Estates Act, 1869, which enabled him to make such a bequest, notwithstanding that under his family law he could only bequeath one-third of his property.

At the date of his death in 1890 Sir Nawazish Ali Khan had a son Hidayat Ali Khan, who would have succeeded to the Oudh estate under the Act of 1869, if Sir Nawazish Ali Khan had died intestate. This is relevant in connection with the descent of the Oudh estate.

On the 15th July, 1896, Nasir Ali Khan executed two wills, one disposing of the Oudh estate, and the other of the Juliana estate and another estate in the Punjab. It is common ground that the heirs assented to the wills.

These wills are in substantially the same form. It will be sufficient to quote the material provisions of the will with regard to the Oudh estate:

> "Now, under Section 11 of Act 1 of 1869, I, by means of this will, do hereby appoint Nawab Fateh Ali Khan son of my late brother Nawab Nisar Ali Khan, my executor and successor of all this Taluqdari estate with all the rights and interest aforesaid and do hereby authorize the executor that whatever Taluqdari powers over the above-mentioned ilaqa and over all the properties moveable and immoveable I the said declarant have, my devisee, to wit, Nawab

Fateh Ali Khan, after my lifetime shall have like myself the very same powers including the power of possession and enjoyment as owner provided he be alive. Similarly after the lifetime of the devisee 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 Saheb 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 devisee shall have power to nominate as his successor any one whom he might consider fit from amongst the descendants of each of the three successors and if the last devisee 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."

On the death of Nawab Nasir Ali Khan on the 19th November, 1896 (before the birth of the appellant), Sir Fateh Ali Khan entered into possession of both properties. On his death on the 28th October, 1923, his son Nisar Ali Khan took possession thereof. Hidayat Ali Khan died in 1924. On the 9th December, 1925, Mohammad Ali Khan (who will be referred to hereinafter as " Mohammad ") instituted a suit claiming both the properties. This litigation was eventually taken in appeal to the Privy Council (*Nisar Ali Khan* v. *Mohammad Ali Khan*, 59 I.A.268) where it was decided that Fateh Ali Khan and Mohammad took life estates under the wills. The Privy Council refused to consider what would happen after Mohammad's death.

As a result of this litigation Mohammad got possession of the Oudh estate and the Juliana estate.

By a document dated the 30th June, 1934, Mohammad, after reciting the wills of Nasir Ali Khan, declared as follows:—

" Whereas according to the decision of the Privy Council, I the declarant, also in accordance with the said will, have been in possession of the property left by the late Nawab Nasir Ali Khan and on account of the death of the late Sirdar Hidayet Ali Khan Saheb son of the late Haji Sir Nawazish Ali Khan I, the declarant, in accordance with the will am the last legatee and am in every manner, subject to the said will, entitled and competent to nominate successor; whereas I the declarant have reached my full age and consider it proper and necessary to abide by the said will executed by the late Nawab Nasir Ali Khan in order to remove future domestic disputes. I the declarant therefore, in my unimpaired five senses, without repugnance and force, nominate as successor Nawabzada Nawazish Ali Khan son of late Sardar Hidayet Ali Khan, for this reason that although, by the grace of God each of the three legatees mentioned in the will dated 15th July, 1896, has male issues still, among all of them the said Nawabzada Nawazish Ali Khan is in every way, fit to be preferred for succession. . . . The said Nawabzada Nawazish Ali Khan shall also be bound to continue to pay to the descendants of the family of Nawab Nasir Ali Khan and Nawab Nawazish Ali Khan, deceased subject to (their) obedience, maintenance at the scale mentioned in section 25 Act I of 1869.

" Therefore I have with my own will and consent executed this document appointing successor according to the provision of schedule 1.

Article 7 of the Stamp Act by way of (appointment in execution of a power) so that it may serve as an authority and be of use when needed. Dated 30th June, 1934—The scribe of the deed is Syed Hidayet Husain Vakil, Said Wara Bahraich."

Mohammad died on the 3rd February, 1935, and on his death the appellant obtained possession of both estates.

On the 25th September, 1935, the respondent instituted in the Chief Court of Oudh against the appellant the suit out of which these appeals arise. By his plaint the respondent claimed a decree for possession of the Oudh estate, the Juliana estate and other estates with which this appeal is not concerned, and consequential relief.

The questions which were argued on this appeal were:—

(1) Is it competent for a Shia Mohammadan governed by Imamia law by will to leave property to a person for his life and after his death to such members of a class as such person may appoint? Or, to state the question in more general terms, does Shia law recognise powers of appointment of a character with which English law is familiar?

(2) If the answer to the first question is in the affirmative can such power be exercised in favour of a person not born in the lifetime of the testator though born before the power is exercised?

(3) Is the document executed by Mohammad on the 30th June, 1934, a will? If so does it comprise property of which Mohammad was absolute owner?

(4) What relief, if any, is the respondent (plaintiff in the action) entitled to?

A question was raised, but not seriously pressed, upon the construction of the wills of Nasir Ali Khan. It was suggested that the power to appoint a successor was given to the last of the three named tenants for life, namely Hidayat Ali Khan. Their Lordships feel no doubt that the courts in India were right in holding that the power was given to the last survivor of the three life tenants, and in the events which happened the power, if validly created, was vested in Mohammad.

Both the courts in India held that the power of appointment given by the wills of Nasir Ali Khan was valid according to Shia law, but that its purported exercise in favour of the appellant, who who not born in the life-time of the testator, was invalid under the personal law so far as the Juliana estate was concerned, but valid so far as the Oudh estate was concerned under the Oudh Estates Acts. Both courts held that the document of the 30th June, 1934, executed by Mohammad was a will. The trial judge held that it gave to the appellant one third of the Juliana estate to which Mohammad was entitled as heir at law of Nasir Ali Khan. The Chief Court in appeal held that the will was not intended to affect, and did not affect, property of which the testator Mohammad was the absolute owner. With regard to the relief claimed in the suit the trial judge dismissed the suit of the respondent on the ground that it was a suit in ejectment and the respondent had not proved his title to the whole of the property claimed. In appeal the Chief Court varied the decree of the lower court by giving the respondent a decree for possession of one-fifth of the Juliana estate, the proportion of the estate to which he was entitled as one of the heirs of Mohammad.

The first question arising in this appeal, as to the validity of the power of appointment conferred by the wills of Nasir Ali Khan, is one of general importance in Islamic law. Both the courts in India based their opinion that such a power is valid under Muslim law on the decision of the Privy Council in *Bai Motivahoo* v. *Bai Mamoobai* (L.R. 24 I.A. p. 93). In that case the Board upheld a power of appointment conferred by the will of a Hindu holding that the question for consideration was whether there was anything against public convenience, anything generally mischievous or anything against the general principles of Hindu law, in allowing such a power. Applying a similar test in the present case the courts in India held that a power of appointment can be conferred under Muslim law.

Their Lordships are not satisfied that this is the correct test to apply in a case relating to the will of a Muslim. The origin of testamentary capacity in the case of Muslims is quite different from that in the case of Hindus. The Hindu texts make no reference to wills and this is natural since the normal state of Hindu society in ancient times was the joint family, and on the death of a member the property in which he had an interest passed by survivorship to the other members of the family. It was only after partition, and the acquisition of self-acquired property, became common that the necessity to make wills arose, and testamentary power amongst Hindus has been based on long usage and judicial decision (see Tagore's case, I.A. Sup. 1. p. 67). On the other hand wills have been recognised under Muslim law from the earliest times. " Wills are declared to be lawful in the Quran and the traditions, and all our doctors, moreover, have concurred in this opinion " (Hamilton's Hedaya, Vol. 4, p. 468). It would however appear that the Prophet was not in favour of unlimited testamentary power. It is recorded in the Hedaya (Vol. 4, p. 469) that he said to a follower when asked his opinion, " You may leave a third of your property by will: but a third part, to be disposed of by will is a great portion; and it is better you should leave your heirs rich than in a state of poverty, which might oblige them to beg of others "; and at page 472 of the same volume there is a saying attributed to the Prophet, " God has allotted to every heir his particular right ". Their Lordships have not been referred to, and are not aware of, any work on Mohammadan law, or any judicial decision in support of the view that powers of appointment, so special a feature in English law, are recognised in Muslim law. The matter seems never to have been discussed. In such circumstances, and at this date, to add to the testamentary capacity of Muslims the right to create powers of appointment might seem to encroach on the sphere of the legislature.

Their Lordships however would be very reluctant to differ from the courts in India solely on the ground of lack of precedent, and they propose therefore to consider the question whether the grant of such a power of appointment as was contained in the wills of Nasir Ali Khan conflicts with the general principles of Muslim law.

The Chief Court in appeal took the view that under the wills of Nasir Ali Khan the estate vested after his death in the three successive tenants for life; that on the exercise of the power of appointment it would pass immediately to the appointee; that there was no period during which the estate would be in abeyance; and that the rights of the heirs of the testator were not affected or prejudiced. In their Lordships' opinion this view of the matter introduces into Muslim law legal terms and conceptions of ownership, familiar enough in English law, but wholly alien to Muslim law. In general, Muslim law draws no distinction between real and personal property, and their Lordships know of no authoritative work on Muslim law, whether the Hedaya, or Baillie or more modern works, and no decision of this Board which affirms that Muslim law recognises the splitting up of ownership of land into estates, distinguished in point of quality like legal and equitable estates, or in point of duration like estates in fee simple, in tail, for life, or in remainder. What Muslim law does recognise and insist upon, is the distinction between the corpus of the property itself (ayn) and the usufruct in the property (manafi). Over the corpus of property the law recognises only absolute dominion, heritable, and unrestricted in point of time; and where a gift of the corpus seeks to impose a condition inconsistent with such absolute dominion the condition is rejected as repugnant; but interests limited in point of time can be created in the usufruct of the property and the dominion over the corpus takes effect subject to any such limited interests. " If a person bequeath the service of his slave, or the use of his house, either for a definite or an indefinite period, such bequest is valid; because as an endowment with usufruct, either gratuitous or for an equivalent, is valid during life, it is consequently so after death; and also, because men have occasion to make bequests of this nature as well as bequests of actual property. So likewise, if a person bequeath the wages of his slave, or the rent of his house, for a definite or indefinite term, it is valid, for the

same reason. In both cases, moreover, it is necessary to consign over the house or the slave to the legatee, provided they do not exceed the third of the property, in order that he may enjoy the wages or service of the slave, or the rent or use of the house during the term prescribed, and afterwards restore it to the heirs." (Hedaya Vol. 4, p. 527, chap. 5, entitled " Of Usufructuary Will ",) . This distinction runs all through the Muslim law of gifts—gifts of the corpus (hiba), gifts of the usufruct (ariyat) and usufructuary bequests. No doubt where the use of a house is given to a man for his life he may, not inaptly, be termed a tenant for life, and the owner of the house, waiting to enjoy it until the termination of the limited interest, may be said, not inaccurately, to possess a vested remainder. But though the same terms may be used in English and Muslim law, to describe much the same things, the two systems of law are based on quite different conceptions of ownership. English law recognises ownership of land limited in duration; Muslim law admits only ownership unlimited in duration, but recognises interests of limited duration in the use of property.

There is a full discussion of the law on this subject in the judgment of Sir Wazir Hasan in the case of *Amjad Khan* v. *Ashraf Khan,* I.L.R.4 Lucknow 305. That case challenged the doctrine accepted by Hanafi lawyers that a gift to " A " for life conferred an absolute interest on " A "; a doctrine based on a saying of the Prophet (Hedaya Bk. III, p. 309). " An amree or life grant is lawful to the grantee during his life and descends to his heirs. The meaning of amree is a gift of a house (for example) during the life of the donee, on condition of its being returned upon his death. An amree is nothing but a gift and a condition and the condition is invalid; but a gift is not rendered null by involving an invalid condition ". Sir Wazir Hasan in his judgment examined the appropriate texts and all the relevant decisions of the Privy Council. He pointed out the distinction in Muslim law between the corpus and the usufruct, between the thing itself and the use of the thing. On the construction of the deed which was in question in the case before him, he came to the conclusion that the donor intended to confer upon his wife not the corpus, but a life interest only, that such life interest could take effect as a gift of the use of the property and not as part of the property itself, and that there was nothing in Muslim law which compelled him to hold that the intended gift of a life estate conferred an absolute interest on the donee. This case was taken in appeal to the Privy Council and is reported in 56 I.A., p. 213. The Board agreed with Sir Wazir Hasan on the construction of the deed in question that only a life interest was intended, and held that if the wife took only a life interest it came to an end on her death and the appellant who was her heir took nothing, and if the life interest was bad the wife took no interest at all and the appellant was in no better case. There is also a discussion of the basis upon which a life interest under Hanafi law can be supported in the 3rd edition of Tyabji's Muhammadan Law at pp. 487 et seq: That book, as the work of an author still living, cannot be cited as an authority, but their Lordships have derived assistance from the discussion.

Limited interests have long been recognised under Shia law. The object of " Habs " is " the empowering of a person to receive the profit or usufruct of a thing with a reservation of the owner's right of property in it . . . I have bestowed on thee this mansion . . . for thy life or my life or for a fixed period " is binding by seizin on the part of the donee. (Bail: II 226). See also *Banoo Begum* v. *Mir Abed Ali* I.L.R. 32 Bom at p. 179. Their Lordships think that there is no difference between the several Schools of Muslim law in their fundamental conception of property and ownership. A limited interest takes effect out of the usufruct under any of the Schools. Their Lordships feel no doubt that in dealing with a gift under Muslim law, the first duty of the Court is to construe the gift. If it is a gift of the corpus, then any condition which derogates from absolute dominion over the subject of the gift will be rejected as repugnant; but if upon construction the gift is held to be one

of a limited interest the gift can take effect out of the usufruct, leaving the ownership of the corpus unaffected except to the extent to which its enjoyment is postponed for the duration of the limited interest.

It remains to construe the wills of Nasir Ali Khan and to apply to them the rules of Muslim law. On the death of the first life tenant his son and heir claimed that the gift to his father was of the corpus, relying on the use of the word " owner " (malik), and that all subsequent limitations were repugnant and void. This argument failed in all the courts, and it was held that the will created three successive life interests. As the will contained no gift of the corpus, that descended to the heirs of the testator subject to the interests of the life tenants in the usufruct. On the death of the surviving tenant for life, two alternative constructions of the wills have been suggested. First that the person to take under the power of appointment was to take absolutely. Secondly that the sentence in the wills " The line of successors shall continue according to this very rule " means that the person to take under the power was to take for life and to possess a power of appointing a successor similar to that given to the survivor of the three tenants for life named in the wills, and that this arrangement was to continue for ever. If this be the meaning of the wills the power if valid would operate on the usufruct, but the question would arise whether under Shia law as administered in India and in the light of public policy it is competent for a testator to provide in perpetuity for a succession of tenants for life not born in his lifetime taking under successive powers of appointment. Their Lordships do not find it necessary to decide this question, because they are satisfied that the first suggested construction of the wills is the right one, and that the person nominated under the power was to take an absolute interest. The words of the sentence quoted above are vague and not capable, their Lordships think, of bearing the extended meaning sought to be attributed to them. They appear to be words of emphasis and repetition merely. The testator is saying that the line of succession which he has laid down, namely to three successive tenants for life and then to the successor appointed under the power, is the line which is to continue from his death. If the successor is to take absolutely the power operates upon the corpus, and in their Lordships' view is clearly inconsistent with principles of Muslim law. It would interfere with the Muslim law of succession, and would involve that the heirs took the corpus of the property for a term, not merely of limited, but of uncertain, duration. The Chief Court found some support for its view that the power of appointment was valid in analogies drawn from wakfs. In their Lordships' opinion no such analogy exists in a case like the present which is not founded on trust. In wakfs the property is vested either notionally in Almighty God, or in the wakif or his heirs, and all beneficial interests take effect out of the usufruct.

For the above reasons their Lordships hold that the power of appointment contained in the wills of Nasir Ali Khan is invalid under Muslim law.

The next question for consideration is as to the nature and effect of the document of 30 June 1934 executed by Mohammad, which both Courts in India held to be a will. No doubt in point of form it might be a will. But it is to be noticed that it purports only to exercise the power conferred by the wills of Nasir Ali Khan and to dispose of the property subject to the power. It contains no appointment of an executor, no gift of any property belonging to the testator, and no suggestion of revocability; it was stamped under an article of the Stamp Act relating to appointments made by any writing not being a will and it is called a deed at the end of the document. In all the circumstances their Lordships think that the document was a deed and not a will. But if it be a will, their Lordships agree with the lower appellate court that the document did not pass property which Mohammad took as heir of his father. It was one thing to choose the appellant, who was the senior male member of the senior branch of the family, to succeed to the leadership of the family and to the family estates, but quite another thing to decide that the appellant was better suited than Mohammad's own children to inherit Mohammad's own property. There is nothing to shew that Mohammad ever considered that question.

This disposes of the appeal of the appellant relating to the Juliana estate which belongs to the heirs of Mohammad under his personal law.

The cross-appeal of the respondent relates to the Oudh estate. The courts in India were of opinion that, apart from Muslim law, a power of appointment can be created under the wide power of disposition conferred by Section 11 of the Oudh Estates Act, 1869, which applies to all Taluqdaris, Hindu as well as Muslim. As against this view the respondent points out that neither the Act of 1869 nor the amending Act of 1910 mentions powers of appointment, and that Sections 78 and 79 of the Succession Act, 1855, which relate to powers of appointment, are not included amongst the sections incorporated in the Act of 1869. Their Lordships do not find it necessary to decide this question because they are satisfied for the reasons now to be stated that if a power of appointment can be created under the Oudh Estates Act, the power sought to be conferred by the wills of Nasir Ali Khan does not fall within the Acts. The position is as follows.

Estates in List V. descend on intestacy under the law of primogeniture in accordance with the scheme laid down in Section 22 of the Act of 1869. Under Section 11 of the Act the holder of such an estate might however dispose of the estate, either in his lifetime or by will.

The estate in the hands of a person taking it by such a disposition only remained under the Act (so as to be capable of being dealt with or pass under the Act and not under the personal law) if the transferee was a person who would have succeeded according to the provisions of the Act, if the transferor had died intestate. This was provided for by Sections 14 and 15 of the Act of 1869, which were (so far as material) as follows:—

> " 14. If any Taluqdar or Grantee or his heirs or legatee hereafter transfer or bequeath the whole or any portion of his estate to another Taluqdar or Grantee or to such a younger son as is referred to in section thirteen, clause two, or to a person who would have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transferee or legatee and his heirs and legatees shall have the same rights and powers in regard to the property, to which he or they may have become entitled under or by virtue of such transfer or bequest, and shall hold the same subject to the same conditions and to the same rules of succession as the transferor or testator.
>
> " 15. If any Taluqdar or Grantee or his heirs or legatee shall hereafter transfer or bequeath to any person not being a Taluqdar or Grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transfer of and succession to the property so transferred or bequeathed shall be regulated by the rules which would govern the transfer of, and succession to, such property if the transferee or legatee had bought the same from a person not being a Taluqdar or Grantee."

It was held by the Judicial Commissioners of Oudh in *Rae Jagatpal Singh v. Thakurain Balraj Kuar*, 3 O. C. 120, that any person mentioned in Section 22 as a possible heir might be said to be " a person who would have succeeded according to the provisions of the Act to the estate." On this construction of the Act, Nasir Ali Khan would have had power to dispose of the estate under Section 11 of the Act. But it was decided by the Privy Council in *Thakurain Balraj Kunwar v. Rae Jagatpal Singh*, 31 I. A. 132, that on the true construction of Section 14 of the Act of 1869, the expression " a person who would have succeeded according to the provisions of the Act " is equivalent to " the person or one of the persons to whom the estate would have descended according to the provisions of the special clause of section 22 applicable to the particular case "; and does not include any person mentioned in section 22 as a possible heir in a line of succession not applicable to the particular case.

It was admitted in the Chief Court on appeal and before the Board that, as a result of this decision, the Oudh estate was taken out of the Oudh Estates Act, 1869, by the will of Sir Nawazish Ali Khan. He gave the estate by will to Nasir Ali Khan. Nasir Ali Khan was the brother of Sir Nawazish Ali Khan and Sir Nawazish Ali Khan left a son surviving him. Accordingly Nasir Ali Khan was not the person to whom the estate would have descended, if the Testator had died intestate.

The position when the amending Act was passed was that under the will of Nasir Ali Khan there were three successive tenants for life with a purported power of appointment in the survivor which was invalid under the personal law, and subject thereto the estate was vested in Mohammad as the heir of Nasir Ali Khan. Then came the amending Act which by section 7 substituted a new section for section 14 of the Act of 1869, the effect of which was to restore the law to the state in which it was supposed to have been before the decision of the Judicial Committee in 31 I. A. 132. By section 21 section 7 was made retrospective, but with this important reservation:—

> " nothing contained in the said section shall affect suits pending at the commencement of this Act, or shall be deemed to vest in or confer upon any person any right or title to any estate or any portion thereof, or any interest therein which is at the commencement of this Act vested in any other person, who would have been entitled to retain the same if this Act had not been passed, and the right or title of such other person shall not be affected by anything contained in the said section."

Assuming that the effect of the retrospective operation of section 7 of the Act of 1910 was to bring the Oudh estate again within the purview of the Act of 1869, so that the estate would descend according to the rule of primogeniture and not under the personal law, it is clear that to impose upon the interest of Mohammad a valid power of appointment the exercise of which would deprive him of his estate and which might be exercised by himself or others as future events might determine, would vest in other persons a right and title to the estate vested in him at the commencement of the Act of 1910. Their Lordships therefore are of opinion that the power of appointment contained in the Oudh will of Nasir Ali Khan was inoperative in relation to the Oudh estate.

As the power of appointment was invalid and ineffective as to both the Juliana estate and the Oudh estate, it is unnecessary to consider whether it could be exercised in favour of a person not born in the lifetime of the creator of the power.

The question then arises to what relief the respondent is entitled. With regard to the Juliana estate the respondent claimed the whole estate for himself, relying on a custom which he failed to prove. Their Lordships agree with the Courts in India that it would be wrong to grant to the respondent an order for possession on behalf of himself and his co-heirs. The suit was neither framed nor fought as a representative suit. The Chief Court, as already noted, granted the respondent a decree for possession of one fifth of the estate, a decree which their Lordships think would be difficult to enforce, and which ought not to be enforced, because, as appears from the judgment of the Chief Court, the respondent has sold his share in the Juliana estate. Their Lordships, however, think that the position can be dealt with by a declaratory order under Section 42 of the Specific Relief Act.

With regard to the Oudh estate the respondent contended before the Board that it passed under the Oudh Estates Act 1869 to himself as the eldest son of his father under the rule of primogeniture established by the Act. It appears that in the appeal to the Chief Court the respondent contended that the estate passed under the personal law and not under the Act, the argument being directed against the view which had prevailed in the trial court that under the Act, though not under the personal law, the power of appointment could be exercised in favour of a person unborn in the life-time of the testator. Before this Board the appellant contended that the Oudh estate did not pass under the Act, but the argument advanced

on his behalf failed to satisfy their Lordships that this was the effect of sections 7 and 21. The question is of interest to the appellant only as bearing on the proper form of order and their Lordships do not feel called upon to express a considered opinion as to the construction of the Act which would affect other parties. Their Lordships think that as between the parties to this appeal the respondent has shown his right to possession of the Oudh estate and an order can be made accordingly for possession of that estate, but such order will be without prejudice to any claim the heirs of Mohammad under the personal law other than the respondent may choose to make.

Their Lordships therefore will humbly advise His Majesty that the appeal of the appellant be dismissed, that the cross-appeal of the respondent so far as it relates to the Oudh estate be allowed and that the decree passed by the Chief Court in appeal on the 12th January, 1943 be set aside and that the decree passed by the said court on its original side dated the 30th October, 1937 also be set aside. That there be a declaration that the power of appointment given by the two wills of Nasir Ali Khan to Mohammad as the survivor of the successors appointed by those wills was invalid both in respect of the Juliana estate and in respect of the Oudh estate; and that the Juliana estate descended on the death of Mohammad to his heirs according to his personal law. That in respect of the Oudh estate there be an order that the appellant deliver up possession to the respondent, but that such order be without prejudice to any claim which the heirs of Mohammad under his personal law other than the respondent may choose to make to the Oudh estate.

With regard to the costs the appellant has failed in his appeal, and the respondent has succeeded substantially in his cross-appeal. Under the decree of the Chief Court parties were given proportionate costs throughout. The respondent as plaintiff claimed to be entitled to the whole of both estates, and according to the learned trial judge the respondent wasted much time in producing a large number of witnesses whose evidence was not referred to in the course of the argument, and which has not been included in the record before their Lordships' Board. It is clear that the respondent largely increased the costs of the trial by raising a question on which he failed. Their Lordships think that, as the case leaves this Board, an order for proportionate costs would be difficult to work out. On the whole they think a fair order as to costs will be that the appellant Sardar Nawazish Ali Khan pay his own costs throughout and that he pay the respondent Sardar Ali Raza Khan half his costs throughout.

The claim to mesne profits raised by the respondent in his plaint was not dealt with by the Courts in India, since, in the view they took of the case, that matter did not arise. The claim will be referred back to the trial court for disposal according to law.

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In the Privy Council

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v.

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Consolidated Appeals

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