

Privy Council Appeal No. 107 of 1930.

Oudh Appeal Nos. 1 and 2 of 1930.

Raja Mohan and others - - - - - *Appellants*

v.

Nisar Ahmad Khan and another - - - - - *Respondents*

Same - - - - - *Appellants*

v.

Same - - - - - *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 12TH JANUARY, 1933.

Present at the Hearing :

LORD WRIGHT.

SIR GEORGE LOWNDES.

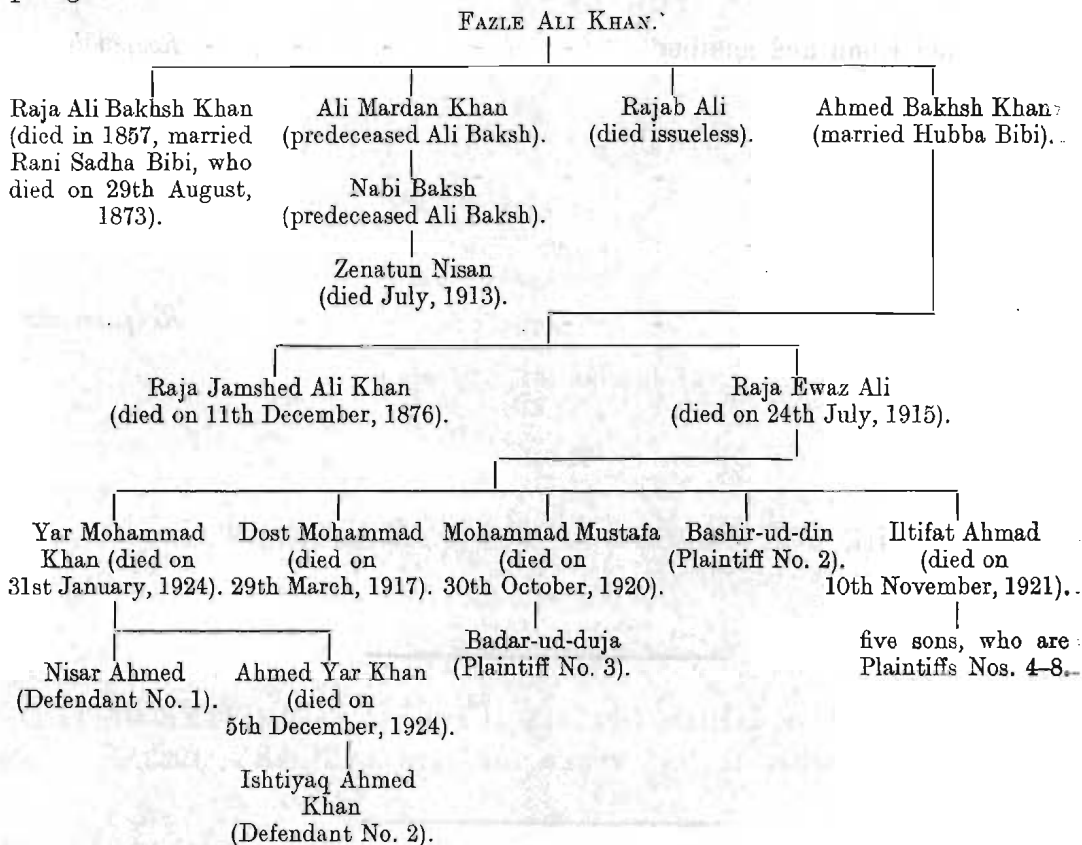
SIR DINSHAH MULLA.

[Delivered by LORD WRIGHT.]

These are consolidated appeals from two decrees of the Chief Court of Oudh, dated the 15th October, 1929, which affirmed two decrees of a Single Judge of that Court dated the 8th October, 1928, passed on suits Nos. 1 and 2 of 1928 respectively. The main point for decision in the appeals is whether appellants (plaintiffs) Nos. 2 to 8 were entitled to succeed as Sunni Mohammadans to a share in the property left by Mohammad Ewaz Ali Khan, taluqdar of Mahona who died on the 24th July, 1915. Appellant No. 1 who had a financial interest in the property and was financing the action may be disregarded herein as his claim was not pressed in this appeal, having been rejected by the Courts below. Respondent No. 1, who alone appeared on the appeal, claims the property

as having descended to him as single heir of Ewaz Ali, either in virtue of Act No. 1 of 1869 or according to family custom.

The relationship between the parties is shown in the following pedigree :—



Suit No. 1 related to the property left by Dost Mohammad on his death in 1917 ; Suit No. 2 related to the entire property left by Ewaz Ali on his death in 1915 ; the appellants claimed in their respective proportions a three-fifths share in the latter property and a one-fourth share in the former.

The estate in question was known as the Mahona estate and had been for some generations in the family of Raja Ali Bakhsh Khan ; he was killed after the end of the Mutiny in November, 1858. The Government were then proceeding with the second summary settlement of the entire land of Oudh which they had annexed, and they were inviting applications from the existing proprietors. Shortly after her husband's death, the widow, Rani Sadha Bibi, executed the form of application Form A : on that form the names of the Malguzars were stated to be those of herself, Jamshed Ali and Ewaz Ali. The Rani stated that the estate was a Raj, without pattidars or co-sharers, and ancestral property, having been long in the possession of the family. She claimed the settlement with herself on the ground that she was the owner, in her husband's place ; she stated that the two nephews lived with her and under her control ; she asked that Ewaz Ali should succeed her as owner. This application appears to have been provisionally granted, but on the 15th March, 1859, it was ordered by the settlement authorities that the settlement should be with the Rani and the two nephews jointly and a

patta be granted accordingly. On the same day the patta was granted in the names of all three and a kabuliyat was executed by all three. The summary settlement was originally temporary in character, being limited to three years, but as the taluqdars were apprehensive that their tenure might be uncertain and it was desired to dispel these fears, a letter was published by the Government of India declaring that "every taluqdar with whom a summary settlement has been made since the re-occupation of the Province, has thereby acquired a permanent hereditary and transferable proprietary right, namely, in the taluqa for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the taluqa." The letter went on to provide for the preparation of a list of taluqdars upon whom a proprietary right had thus been conferred and for the preparation of sanads to be issued to them. This letter constituted an act binding on the Government and as applied to the persons in question here, constituted the Rani and her two nephews, tenants-in-common of the taluqa and a sanad ought to have been issued to them accordingly. But in fact when the sanad for the taluqa was issued on the 11th April, 1862, it was in the name of the Rani alone, and when lists were prepared under the Act No. 1 of 1869, the name inserted was that of the Rani alone in lists I and II as the taluqdar. The main contention in this case has been that the succession to the property was governed by the Act, that is, that the Rani was taluqdar of the estate, and that the succession as under list II was that of devolution upon a single heir: hence, it was claimed that Jamshed Ali as single heir succeeded his aunt in 1873, then he was succeeded, as he had no issue, by his only brother Ewaz Ali as heir, on whose death in 1915 the estate passed to his eldest son as heir, and finally to the latter's eldest son, the 1st respondent. The appellants contended that the estate was outside the Act altogether, and hence they were entitled to succeed in accordance with the Sunni Mohamadan law both in respect of the estate possessed by Ewaz Ali at his death and also in respect of that portion of the estate which before his death he had transferred to his second son Dost Moham-mad; before their Lordships the former item was modified and it was admitted that one third portion of the Mahona estate was within the Act as being the property of the Rani under the settlement, she being the registered taluqdar in respect of that share; the claim was therefore limited to the two-thirds portion which was outside the Act. The 1st respondent while claiming that the whole estate was within the Act and that the Rani was the registered taluqdar, alternatively claimed that by the custom of the family, succession was on the basis of single heirship and hence that in any case the estate of Ewaz Ali descended as he claims. Both the Single Judge and the Chief Court in appeal have decided in favour of that latter contention. A question was raised whether the relevant custom of the family was that of the family of the Rani's father or that of her husband. But her sole claim was

to her husband's estate as representing his family, and whatever grant was made to her by the Government was on that basis : all such grants were made by the Government as of lands which the Government had annexed as absolute owners, and though in the main the grants were made to former proprietors, the grantees held solely under the new title given by the Government. Their Lordships think that the Courts below were right in holding that the relevant custom, if material to be considered, was that of the Rani's husband's family. It is immaterial whether the nephews are to be regarded as her husband's heirs or her own since as both Courts have held, they were not only his, but also her heirs, being the sons of her own sister and nearest surviving relatives.

It is necessary to trace as shortly and in as summary a form as possible the material events subsequent to the Government's letter of the 10th October, 1859, whereby as at that stage the estate was jointly vested in the three persons as taluqdars, and to ascertain by what circumstances and with what consequences it came about that not only was the sanad granted to the Rani alone, but she alone was registered as taluqdar under Act I of 1869. The history has been examined with great care and completeness in the Courts below, especially by the Chief Judge, and may be summarised here. The Rani, as she had claimed at the outset to be owner of the estate, still persisted in that claim and resisted any attempt by her nephews, who were 24 and 21 years old respectively, to assert their rights or to acquire a share in the management or control. The settlement authorities seem from time to time to have been perplexed as to the position ; at some periods they proceeded on the basis that all three persons were taluqdars, and at other times they treated the Rani as sole taluqdar, subject to her providing due maintenance for her nephews and guaranteeing their succession as heirs. But on the 23rd August, 1861, all three parties came to an arrangement, eventually sanctioned by the Government, under which the Rani was to pay the nephews Rs. 1,200 a year and put them in possession of certain land as sir. On the basis, as it seems to their Lordships, of that arrangement the sanad was granted to the Rani in her sole name : it was dated the 8th April, 1862. The Rani remained in possession though various disputes and contentions arose between her and her nephews between that date and the date of making up the lists under the Act I of 1869. No more than a reference to certain crucial matters during that period need here be made. Thus in 1864, the nephews were claiming to have the management taken away from the Rani but without success. Then in 1868 comes a very important document, a deed of the Rani dated the 28th April, 1868, registered at Lucknow, in which describing herself as taluqdar of Mahona she agreed that if the estate were left undivided in her possession as it was settled with her in the late summary settlement under the Government sanad in her name alone, she would never alienate the estate by

will or otherwise during her lifetime and after her death the estate should remain in force with the nearest male heir or heirs as it might be decided. When the Act No. 1 of 1869 was passed and it became necessary to draw up the lists, the settlement authorities were in some doubt how to deal with the question of the Mahona estate. The authorities seem to have heard all the three parties who appeared before them, and it was eventually recorded on the file that a settlement of the disputes had been arrived at, so that the parties were all of one mind and that before entering the Rani's name under list I under the Act, the succession of the nephews had been provided for. In fact the Rani's name was entered in respect of the Mahona estate in List I and List II, and she continued in full possession till her death on the 27th August, 1873. When that happened, Jamshed Ali Khan applied for possession but his claim was contested by the younger brother, Ewaz Khan, on the ground that Jamshed Ali had agreed to give way to his brother: the dispute, however, was compromised on the terms that Jamshed Ali should have possession for life but without power to alienate, on condition of making certain allowances to Ewaz Ali, who was to have in remainder a life estate, which was to become an absolute estate in the event of Jamshed Ali dying without issue but Ewaz Ali leaving issue. These events in fact happened. On the 1st February, 1875, Jamshed Ali was entered as taluqdar of Mahona in succession to the Rani. Jamshed Ali died on the 11th December, 1876, and Ewaz Ali was duly entered as succeeding, as he in fact did, to the taluqa. He died on the 24th July, 1915, and was succeeded by his eldest son Yar Mohammad Khan who died on the 31st January, 1924, and was in turn succeeded by his eldest son, Nisar Ahmed Khan, the 1st respondent herein. In July, 1927, the suits Nos. 1 and 2 were commenced.

The numerous cases already decided by this Board in regard to the Oudh settlement do not afford any complete parallel to the problems raised in the present appeal. Act No. I of 1869 defines a taluqdar as any person whose name was entered in the first of the lists mentioned in section 8 of the Act: the Rani's name was so entered. Section 10 provides that no persons should be considered taluqdars, except persons so entered and that the entry should be conclusive evidence of the fact. Hence the Rani must be considered as having been a taluqdar under the Act. Section 3 provided that every taluqdar with whom a summary settlement of the Government revenue was made between the 1st April, 1858, and the 10th October, 1859, and to whom before the passing of the Act, and subsequently to the 1st April, 1858, a taluqdari sanad had been granted should be deemed to have thereby acquired a permanent heritable and transferable right in the estate named in the list attached to the agreement or *kābuliyāt* executed by such taluqdar when such settlement was made. The Rani fulfilled all these requirements, but the appellants rely on the fact that the summary settlement

was made with her not as sole proprietor but as proprietor jointly with the two nephews: hence they claim that her rights were limited to that third which they now admit, though they previously denied, became vested in her in accordance with the Act: as to the remaining two-thirds interest in the estate they claim that that interest never fell within the Act at all, but was and remained the property of the nephews under the summary settlement as confirmed by the Government's letter of the 10th October, 1859, so that its descent was never affected by the statutory rules prescribed in section 22 of the Act or by the statutory presumption based on the placing of the estate in list II under section 8, read with section 10 of the Act. They claim that the rights so vested in the nephews could not be affected by the fact that the sanad was issued in respect of the whole estate in the name of the Rani alone, or by the fact that her name alone was entered in the lists under the Act. They contend that the sanad could not cancel rights already conferred by the Government and that the Act could not divest rights which had already been granted before it was passed. The latter contention, stated in the abstract, cannot be controverted: the principle is clearly laid down by the Board, though in regard to very different facts, in the case of *Mohammad Abdussamad v. Kurban Husain* (31 I.A. 30), though even in that case it had to be considered whether, in Lord Lindley's words, there had been "some family arrangement to the effect that the entries in question (that is in the statutory lists) should have been made and that the succession should be changed." What the 1st respondent contends is that in the present case there was a family arrangement between the Rani and the two nephews, to the effect that notwithstanding the terms of the settlement of 1859, the sanad should be granted to her as sole owner and she alone should be entered in the lists under the Act as taluqdar on condition that she should not in her lifetime alienate the estate but leave it to descend to her nephews as her heirs under the Act and meantime in her lifetime pay them maintenance. It was on this basis, the 1st respondent contends, that the sanad was granted to the Rani alone, and her name alone was entered in the statutory lists. Their Lordships are of opinion that this contention, as an inference of fact, is justified by the history of the events summarised in the earlier portion of this opinion. The legal position thereby constituted may, their Lordships think, be shortly stated to be that the full title conferred by the sanad and the entry in the statutory lists became vested in the Rani, but subject to the obligation under which she held that title, and in consideration of which the nephews withdrew their opposition and the Government did what otherwise they certainly would not have done, that is, granted the sanad and made the statutory entry in a form which was inconsistent with the summary settlement. It is not necessary to determine whether the obligation so assumed by the Rani is to be deemed to constitute a declaration of trust or a

covenant. It was, as their Lordships think, acted upon by the nephews and was binding on the Rani. The title conferred under the Act did indeed give the registered taluqdar the absolute legal title as against the State and adverse claimants to the taluqa, but it did not relieve the taluqdar of any equitable obligations, to which, with a view to the completion of the settlement, he might have subjected himself by his own valid agreement. Numerous decisions of this Board have recognised and enforced as against a registered taluqdar trusts or obligations of this character: as instances reference may be made to such authorities as *Thukrani Sookraj v. Government* (14 Moo. I.A. 112) and *Hasan Jafar v. Muhammad Askari* (26 I.A. 229). The latter case shows that such a trust may be constituted by the undertaking or agreement of the grantee together with the fact that it was on such agreement or undertaking that the Government made the grant: as Lord Macnaghten said at p. 233:—

“Whatever Karam Ali took under the summary settlement and the sanad which followed it he took as a gift from the Government. It was, of course, competent for the Government when making the gift to impose on the recipient of their bounty any term they pleased not inconsistent with the law. If the intention of the Government is clear, it cannot make the least difference whether the terms were imposed by the Government of its own motion, or suggested by the grantee and assented to by the Government.”

There the sole grantee had given assurance that he would admit his former co-sharers and he was held to be a trustee accordingly. In the present case, in their Lordships' opinion, the Government made their final grant on the terms of the Rani's registered deed of the 28th April, 1868, and she was bound accordingly. Indeed she never disputed that. In this case, however, the real difficulty is that the grant to the Rani alone constituted by the sanad and entries in the lists under the Act of 1869 conflicted with the title conferred under the letter of the 10th October, 1859. According to that latter title the Rani was co-sharer with her two nephews; the case therefore differs from the cases previously decided where consistently throughout the grant has been to the single donee who has then been held bound by a trust in favour of the co-sharers in their due shares. Such a case was *Kedar Nath v. Ratan Singh* (37 I.A. 161). The converse case of a discrepancy between the title under the summary settlement and that under the sanad and Act of 1869 is afforded by the authority already cited herein of *Mohammad Abdumassad v. Kurban Husain*: it was held on the facts of that case that entries in the lists of Act I of 1869 had not changed the succession, which depended on the settlement of 1859, but Lord Lindley, as already noted in this opinion, was prepared to contemplate that the entries would have changed the succession if made in accordance with a family arrangement to that effect. This is exactly what the 1st respondent contends has happened in this case. Indeed, from the standpoint of the co-

sharers it does not appear to make any practical difference whether the family arrangement was made before the summary settlement or after the summary settlement but before the grant of the sanad or the making of the entries under the Act, though no doubt it is material from the standpoint of the Government, who would not change from the terms of the summary settlement of 1859 unless convinced that a relevant family arrangement had been arrived at. In the present case, as their Lordships have already explained, the Government were convinced of that fact at the two crucial epochs, that is on the issue of the sanad and the making of the entries under the Act, though it is true that in the various intervening disputes and discussions there were periods when occasional confusion and uncertainty existed in the minds of the settlement authorities.

On the whole their Lordships conclude that the settlement of 1859 was duly varied in accordance with a family arrangement and the effect of the sanad of 1862 and of entry in the lists under the Act No. I of 1869 was to vest the whole estate in the Rani as taluqdar under the conditions of the Act, though subject to beneficial rights in the nephews to receive from her the agreed maintenance and to succeed to the estate in the agreed order of succession, and to be guaranteed that she would not alienate the estate. All this was duly carried out and when the estate came to Ewaz Ali the beneficial rights had become merged and had expired and the absolute title both legal and equitable, vested in him as taluqdar under the Act with succession to a single heir. In due course the respondent succeeded as single heir to his father. It follows that the claim of the appellants fails in regard to Suit No. 2. The same result follows in Suit No. 1. The property there in question was part of the taluqdari estate and was transferred by Ewaz Ali when taluqdar to his younger son Dost Mahommad. When the latter died, the property followed the same line of devolution to a single heir under Section 14 of Act I of 1869 as amended by the United Provinces Act III of 1910, and thus in due course became vested in the respondent.

This conclusion renders it unnecessary to consider the alternative case set up by the 1st respondent, viz., that if he failed in his contention that the succession was governed by the Act he was still entitled to claim the same rights as heir on the ground of the custom of the family. Their Lordships will only say that if, contrary to their opinion, Act No. 1 does not govern the succession they are in full accord with the reasoning of the Chief Judge that the respondent has established a custom of the family of descent to a single heir. Their Lordships need not repeat the Chief Judge's careful analysis of the evidence which, in their opinion, is sufficient to establish the custom quite apart from the presumption given effect to by the Board in *Murtzaza Husain Khan v. Mahommad Yasin Ali Khan* (43 I.A. 269), that on the death of a taluqdar, property outside the taluqdari estate

descends in the same way as the taluqa, in this case to a single heir under list II. On any view Ewaz Ali must have been deemed, if their Lordships had accepted the appellant's main contention, to have been a registered taluqdar, holding as taluqdari estate the one-third share of Mahona, of which in that view the Rani was registered taluqdar, and hence the presumption would apply to the residue of the property which he possessed on her death. It is true that this presumption is rebuttable, but the appellants called no evidence to rebut it. The custom would apply to the property which was the subject of Suit No. 1.

In the result, their Lordships are of opinion that the appeal fails on all points, and should be dismissed with costs, the decrees of the Chief Court of Oudh being affirmed.

They will humbly so advise His Majesty.

In the Privy Council.

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DELIVERED BY LORD WRIGHT.

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