

Privy Council Appeals Nos. 103 and 104 of 1917.
Allahabad Appeals Nos. 28 and 29 of 1913.

Muhammad Wali Khan - - - - - *Appellant*

v.

Muhammad Mohi-ud-din Khan and others - - - - - *Respondents.*

Same - - - - - *Appellant*

v.

Same - - - - - *Respondents.*

(Consolidated Appeals)

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 23RD JUNE, 1919.

Present at the Hearing :

VISCOUNT HALDANE.

LORD BUCKMASTER.

LORD DUNEDIN.

[*Delivered by* LORD DUNEDIN.]

Allah Baksh, a Mohammedan, died in 1863. He left a widow, Amir-un-nisa, and two sons, Ali and Wali, and three daughters. On his death, under Mohammedan law, each son became entitled to 42/96ths of his property and his widow to 12/96ths. Wali being an infant of one year old, the whole properties were managed by Ali, whose name, along with that of his infant brother, was entered in the Government registers.

In 1902, Wali being then past majority, a submission was entered into between the two brothers for a division of the property. An arbitration was accordingly held and the properties divided. The final award specified the names of the properties dealt with, and contained a statement that the properties were the

whole properties which were subject to division and that nothing more fell to be divided. It apportioned the various properties *nominatim* to each son respectively, exhausting the whole list, and added a maintenance allowance to be paid by each son to the mother in money. The award was signed by each of the parties and was made a decree of Court.

In 1904 Ali died. He left a widow, Zainab, and two sons, Mohi-ud-din and Moin-ud-din, and other children who need not be specified by name. His mother, Amir-un-nisa, being still alive, she, by Mohammedan law, became entitled to 7/96ths of Ali's property. In 1907 Amir-un-nisa died and her sole surviving son, Wali, became her sole heir.

The present suit was raised in 1908 by Wali against the family of Ali, and claimed :—

- (A) A half of four specified villages in his own right ;
- (B) Whether (A) was granted or not, 12/96ths of the four villages as in right of his mother in respect of her right as widow to her share of the property of Allah Baksh ;
- (C) 7/96ths of three villages as in right of his mother in respect of her right to her share of the property of Ali ;
- (D) 12/96ths of the other properties belonging to Allah Baksh and dealt with in the arbitration ;
- (E) 7/96ths of the property of Ali as in right of his mother in respect of her succession to Ali.

It is convenient to deal with these claims separately.

(A) The four villages in question were purchased by Ali after his father's death but before the arbitration and were put by him into the name of his eldest son as a provision for him. Now to make out his claim to a share of these the plaintiff must show that the villages were either the property of Allah Baksh, which is impossible, as they were not purchased till after his death, or that they were purchased out of what was joint undivided property. But, in the first place, as pointed out by the learned Subordinate Judge, there is no presumption in the case of a Mohammedan such as exists in the case of a Hindu joint family. The succession of a Mohammedan is an individual succession. *Primâ facie*, therefore, in the absence of other evidence, property bought by Ali would be property bought with his own money. But there is much more than that. There is the arbitration, which recites that it dealt with all the property of Allah Baksh which fell to be divided, and specified the various elements of that property, and these villages are not mentioned. Both the learned Subordinate Judge and the Court of Appeal held this view, and their Lordships agrée with them.

(B) The villages are, as stated, entered in the register as the property of Mohi-ud-din. In order to get a right as in right of his mother, the plaintiff must, therefore, show that this transaction was *benami*. Now there are concurrent findings of both Courts that it was not *benami* but was made as a provision for his eldest son, and it cannot be said that there is no evidence on which to base this finding. The plaintiff, therefore, here again fails.

(C) The three villages. There must be here made a further subdivision between the case of one of the villages and that of the other two. The one was bought by Ali after the date of the arbitration and settled on his second son Moin-ud-din as a provision. The only question, therefore, as to this was whether this was *benami*. The Subordinate Judge and the Court of Appeal both found that it was clearly not. These concurrent findings end the matter. The other two villages are in a different position. They also were settled on Moin-ud-din by Ali, but they were villages which originally formed part of the estate of Allah Baksh. In the arbitration they had been allotted to Wali, but they had become the property of Ali by exchange, he having given other villages to Wali. The Subordinate Judge thought that, though this also was not *benami*, and consequently the claim for the 7/96ths as in right of the mother's succession to Ali was bad, yet that, as the mother was no party to the arbitration, her right to 12/96ths of these villages, and also to 12/96ths of the other properties dealt with in the arbitration—this being Claim (D)—still survived and passed to Wali as her heir. He decreed accordingly. The Court of Appeal reversed this part of the decree. Their Lordships agree with the Court of Appeal. They consider that in this matter Wali is estopped by his own proceeding in the arbitration. He received his full half of the whole properties belonging to Allah Baksh upon the footing of the exclusion of the mother, and entered into possession of his share. He cannot now be allowed to come back and say he will take as heir to his mother what was by his own act not allotted to her but was divided between himself and his brother.

(E) The plaintiff got a decree for 7/96ths of the property of Ali, but was not allowed immediate possession as the property was held by the widow Zainab in respect of a dower unpaid. The only question as to this, which is admitted to be otherwise correct, is as to the amount of the dower. As to this, which is a pure question of fact, there are concurrent findings of both Courts.

Their Lordships will therefore humbly advise His Majesty to dismiss the appeals with costs.

In the Privy Council.

MUHAMMAD WALI KHAN

v.

MUHAMMAD MOHI-UD-DIN KHAN AND
OTHERS.

SAME

v.

SAME.

(*Consolidated Appeals.*)

DELIVERED BY LORD DUNEDIN.