Privy Council Appeal No. 114 *of* 1926.

Oudh Appeal No. 12 *of* 1923.

The Deputy Commissioner of Bara Banki, Manager of the Estate of Chaudhri Mujtaba Husain - - - - - - *Appellant*

v.

The Receiver in Bankruptcy of the Estate of Chaudhri Shafiq-uz-zaman and others - - - - - - - - *Respondents*

AND

Privy Council Appeal No. 113 *of* 1926.

Oudh Appeal No. 11 *of* 1923.

Chaudhrain Zarif-un-nisa Bibi and others - - - - - *Appellants*

v.

Chaudhri Shafiq-uz-zaman Khan and others - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST MAY, 1928.

Present at the Hearing:

LORD PHILLIMORE.
LORD CARSON.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD PHILLIMORE.]

One Sarfraz Ahmad, taluqdar of Oudh, was possessed of the talukas of Khanpur and Sikandarpur and Bhilwal with Hasanpur. His name was in List 2 of the Oudh Estates Act, 1869, in respect of Bhilwal and Khanpur and in List 5 in respect of Sikandarpur. He died in 1870, having made a will which, however, was not executed or registered sufficiently long before his death to be protected by the exception in Section 13 of the Act, and which would, therefore, be only operative in respect of legacies to persons

qualified by the earlier paragraphs of the same section. He left surviving him a brother, Murtaza Husain, a widow, Bechan-un-nisa, and a daughter, Zainab-un-nisa, who was married, and had a young son, who was alive at the time of the testator's death. He purported to deal with the talukdari estates in the following terms :—

> "The Taluqa Hasanpur and Bhilwal in Pargana Haidergarh and the Taluqa Khanpur in Pargana Subeha, which are ancestral and hereditary, and the Taluqa Sikandarpur in Pargana Simrautha, granted by the Government, are in my proprietary possession and occupation without the coparcenership of any one; and under the sanad granted by the Government, I have every power to mortgage, sell, gift and transfer (the same). Therefore, after me, the settlement be made, in the first place, with my wife, Musammat Bibi Bechun, after her, with my daughter, Musammat Zainab-un-nisa, and after her, with her issue, whether male or female, and my brother Murtaza Husain in respect of each Taluqa, as it is recorded, according to the detail given herein (and they) be considered owners and successors in my place."

Then follow certain special directions concerning the properties, of which the material portions are as follows :—

> "Taluqa Bhilwal, Hasanpur, etc.—This Ilaqa was acquired by my father-in-law, Chaudhri Lutf-ul-lah, without any co-parcener. After me, the owner thereof will be my wife Musammat Bibi Bechun. The settlement and the *lambar* thereof should stand in her name. After her, Musammat Bibi Zainab-un-nisa, her only daughter, will be the owner and successor, and after her, her issue, whether male or female. The male issue should be the Lambardar and representative and the daughters be entitled to maintenance."
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> * * * * * * *
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> "Taluqa Sikandarpur, granted by the Government.—Settlement be made in respect of half with my wife and her issue and in respect of half with my brother, Murtaza Husain. Rs. 500 be allowed every year to my sister, Musammat Bibi Sughra.
>
> "Taluqa Khanpur.—After me, the *lambar* should stand in the name of my wife and my brother, Murtaza Husain. Villages Sharifabad and Alapur, with the villages appurtenant thereto, should remain in the possession and occupation of my wife, and after her, in that of her issue, male or female. They should pay the revenue assessed by the Government, and they should live upon the profits thereof.
>
> "It should be better that whatever Ilaqa remains of that half, the management thereof should remain with Murtaza Husain, and the expenses relating to the door and the payment of parole debts should rest with him,—the rendition of accounts to be made yearly. When the grandson (*nawasa*), Mohammad Rafi-uz-zaman, attains the age of discretion, he may take the management in his own hands. During the lifetime of Murtaza Husain this would be a better (arrangement). The rest lies with the heirs."

Upon his death a dispute arose between the brother and the widow. Each claimed to have his or her name put on the register, and mutation proceedings were begun accordingly.

It should be stated that besides the question of the validity of the bequests there were further disputes as to whether each of the legatees should be entered on the register in respect of his or her share, or whether the brother should be entered in respect of the whole,

and also as to the force and effect of a clause in the will purposing to restrain alienation.

When serious litigation seemed imminent the parties were persuaded by a Government officer to submit their disputes to arbitration, and they entered into a submission in the following terms :—

"IN THE COURT OF THE DEPUTY COMMISSIONER, BARA BANKI.

"We are Chaudhri Murtaza Husain, son of Chaudhri Husain Bakhsh, and Musammat Bibi Bechan-un-nisa, Taluqdar of Taluqa Khanpur, etc., Pargana Haidergarh, District Bara Banki. Whereas by mutual consent (expressed) in the presence of Mr. William Glynn, Deputy Commissioner of Bara Banki, for removing disputes between me, the declarant, and the Chaudhrain, widow of (my) brother Sarfaraz Ahmad deceased, according to the clauses given in the will of (my) brother and (in respect) of property not given in the said will, (we) have appointed Chaudhri Ghulam Farid, Taluqdar (of) Barai, Pargana Rudauli, and Raghunath Singh, Taluqdar (of) Pali, referees. We agree and duly execute this agreement in accordance with Act XVIII of 1869 (to the effect) that, after perusing the clauses given in the will and (considering) other matters, in whatever way our referees will decide and remove our mutual disputes, we accept now and hereafter. Thereafter we shall not raise any objection to that award or deviate therefrom. Wherefore we reduce these few presents to writing by way of an agreement so that it may serve as an authority and be of use when required.

"Dated 14th February, 1871."

Thereupon there were lengthy proceedings in the arbitration which has been brought before their Lordships' notice. The brother at first contended that the bequests in the will were invalid, but during the course of the arbitration he agreed that the will should be treated as valid, and the arbitrators recorded what may be called a secondary submission in the following terms :—

"After a long discussion the parties have agreed to this that they give up their different causes of action, viz., claim for partition according to Mohammadan law and inheritance based on custom and statutory law, but are agreed that the contents of the will which are disputed by them be construed and explained, that in other respects the will be upheld, but a decision be given with regard to such properties as are not mentioned in the will, for instance, such villages which are separate from Taluqas Bhilwal and Khanpur, not mentioned in the will, as also in moveable property in possession of Chaudhrain Sahiba ; and a specification of debts and *dastgardan* (simple debt) be made to ascertain as to how much should be paid by each party."

The arbitrators thereupon stated certain issues which they would consider, and the parties were heard thereupon, and finally an award was made on the 16th March, 1871. This is a very elaborate and reasoned document, and contains various statements showing the desire of the arbitrators to affirm the provisions of the will, but to make the devolution of the testator's whole property follow as nearly as possible the devolution which would take place on an intestacy under the Mohammedan law, and generally to do justice between the two parties having regard, among other things, to the fact that the taluk of Bhilwal with Hasanpur came to the deceased in right of his wife—now the widow—from her father.

The arbitrators had also to deal with the fact that there were certain villages not originally part of any of the taluks, but acquired by the deceased out of his savings and as investments, and that neither these nor the personal property of the deceased, which was of considerable value, had been disposed of by the will, but were now to be dealt with by the arbitrators as part of the estate of the deceased.

In the result they divided the taluks of Khanpur (with the exception of two villages which they considered belonged really to Bhilwal) and Sikandarpur between the parties, awarded Bhilwal with Hasanpur to the widow, divided the after-acquired villages between them, and divided the personal property in such a manner as to bring the ultimate acquisitions in the combined kinds of property nearly equal as between the two lines.

It would be observed that the only parties to the award were the brother and the widow, and that the daughter and her issue were not parties.

The probable explanation of this is that though the arbitration ultimately took a wider range, the dispute started on the question which of the two should be entered on the register, and that the daughter, as her estate was not a present one, would in no circumstances be put on the register.

It may be also that the parties were impressed with the general Mahommedan law according to which it is said that no notice is taken of an attempt to limit an estate in land to the grantee for life with remainder over, but that all such gifts are treated as gifts out and out to the first taker; or, finally, it may be that the dispute was considered as one between the two lines, and so the daughter and her issue were deemed for this purpose to be sufficiently represented by the widow.

This absence of the daughter has given rise to a good deal of discussion in the course of the case, but their Lordships think it immaterial for the purpose of either of these appeals, because as regards that which will be first dealt with (that is the claim on behalf of the brother's line) all the opponents can deduce title through the widow, and, therefore, are bound by the award, and entitled to avail themselves of its provisions.

This being so, for the purposes of the first appeal their Lordships have only to determine whether the award was binding or not, and if binding what is its true construction.

At first sight it would appear somewhat remarkable that Murtaza Husain, whose original contention was that the will was invalid, should have, during the proceedings in the arbitration, admitted its validity; but the explanation may be that he would have been exposed to another danger if the will had been invalid, because Zainab-un-nisa's son did actually put forward a claim to be treated as if he were his grandfather's adopted son, or, in the language of Section 22 (4) of the Oudh Estates Act "in all respects as his own son."

After the award had been published the widow desired to make it a rule of court. The brother opposed this, and gave various reasons why the award should not be considered effective, and he fought the case up to the Privy Council, when it was finally decided against him, and the award was established and made a rule of court. The case in the Privy Council is reported in 3 I.A. p. 209.

Murtaza Husain died in 1880, and was succeeded by his son, Mustafa Husain, and finally by his grandson, Mujtaba, and the Court of Wards on behalf of Mustafa, is the plaintiff in the suit first to be dealt with, and the grandson Mujtaba appellant in that suit to His Majesty.

The widow died in 1895, and was succeeded by her daughter, who died in 1907, leaving a son, not the one who was in being at the time of the original testator's will, but an after-born one, Shafiq-uz-zaman, who, and whose representatives are, respondents in both appeals.

The Court of Wards on behalf of Zainab-un-nisa, the daughter, obtained mutation of names upon her mother's death in her favour. The application was contested by Mustafa Husain, but he failed, and the Court, on behalf of Zainab-un-nisa, remained in possession of the estate till her death, which occurred on the 30th August, 1907.

On her death the Court, on behalf of her son, Shafiq-uz-zaman, obtained mutation of names in his favour without any objection made at the time.

In November, 1908, the Court released the property to Shafiq, who proceeded to dissipate it, borrowing large sums of money on mortgage, and eventually being adjudicated insolvent in 1914.

In 1919 the suit which should be first dealt with (though it is second in order of date as a suit) and the appeal in which has been described as the first appeal was launched, as already stated, by the Court of Wards on behalf of Mustafa Husain, the son of Murtaza Husain, claiming possession of the talukas and shares of taluka which had been awarded to the widow.

The case made was that the dispositions in the will in favour of the children of Zainab-un-nisa were illegal, and incapable of taking effect, and that upon her death the plaintiff became entitled under the will and the award and under the general law governing the devolution of the estate.

The case made by the defendants was that upon the true construction of the will the widow had been given the estate in absolute ownership, and that there was no remainder or reversion to accrue to the brother's line, and that even if this were not so provided by the will the parties by their submission to arbitration had left the matter to the arbitrators, who had determined plump and plain, as between the two lines, that so much of the property went to the brother and the rest to the widow, and that however much this might have been complained of by the daughter

as a third party or by her issue, it could not be rejected by the brother and those claiming under him, and that on the other side Shafiq and those claiming in his right could deduce their title from the widow and could avail themselves of the position given to her by the award.

And this, in their Lordships' view, is sound.

Then it was said first that this was not the true construction of the award, secondly, that if it was the true construction the award was bad, and thirdly, there was a sort of composite argument that such a construction would make the award so patently wrong that it ought not to be accepted.

The District Judge held that upon the true construction of the award the brother was entirely excluded from any interest in the property awarded to the widow, and that at any rate, as far as he was concerned, it must be taken that the widow got the absolute ownership of the property awarded to her, and this view was confirmed by the Court of the Judicial Commissioner which has now become the Chief Court.

There is an abundance of reasons for holding that this view is correct. First as to the taluk of Bhilwal with Hasanpur, there can be little doubt that the arbitrators intended the widow to have an absolute estate in this, which was property coming through her father. Secondly the villages not included in the will were divided between the two parties by virtue of the power given to the arbitrators to decide generally upon matters in dispute between the parties, and as they unquestionably gave half of these villages to the brother for an absolute estate, so they must have intended to give away the other half for a corresponding estate. Otherwise the reversion in one half was not provided for. Thirdly, the debts on the whole property were divided half and half, which would be an unreasonable division if on the one side there was an absolute estate and on the other one for life only. Fourthly the widow had a claim for dower which has been wiped out, but in respect of which some compensation would naturally be expected. And, lastly, it must be remembered that the arbitrators had all along before their eyes the idea of complying, when possible, with the Mahommedan law, and that law, as already stated, would confer an absolute estate upon the first taker.

Their Lordships are of opinion that the view taken by the Courts in India on the construction of the award was correct.

As to the contention that the arbitrators had not the power to decide against the will, and that the award, if construed in the ways suggested, would be against the will, their Lordships see no force in it. The only respect in which the arbitrators could be said to have made an award against the will would be that they had excluded, or apparently excluded, the daughter and her issue. As to them the question is unimportant, because they were not parties to the arbitration and were not bound by the award, which is no concern of theirs.

As between the two parties to the award there was nothing contained in it which could be construed as anything more than a decision upon the various questions which the parties submitted to them. It should be remembered that in the original submission power was given to the arbitrators to consider other matters beside the will, and that when they recite the second submission they state that as regards the properties left by the will they are merely construing and explaining matters which are in dispute concerning the will. As was said by the Judicial Commissioners, the arbitrators must be deemed to have had full authority to put such interpretation on the clauses of the will as they thought proper.

To this it may be added that, as already stated, the brother attacked the award and carried his complaints up to the Privy Council, when the award was finally confirmed, and that it does not appear that he took the objection that the award travelled outside the submission, but if he did take it this objection was overruled.

Their Lordships are therefore of opinion that the case made on behalf of the appellant, the grandson of the brother, by the manager of the Court of Wards fails.

If their Lordships had been of a contrary opinion they would have required to hear the further defences set up by the respondents under the Limitation Act and the Transfer of Property Act. These defences, which were supported by the District Judge and by the Court of the Judicial Commissioner, were also attacked by the appellant. Their Lordships, during the course of the argument, formed so clear an opinion upon the principal point in the case that they deemed it unnecessary to hear argument on these questions. But one of them will come into consideration in respect of the second appeal. This first appeal fails.

The second appeal (namely, 113 of 1926) relates to a suit brought by a sister of Shafiq, and the representatives of a deceased sister claiming against him and his transferees shares in the property as having descended from their mother according to the rules of Mahommedan law.

The case is shaped in this way. Bechan-un-nisa made a will in favour of her daughter, Zainab-un-nisa, and her grandson, Shafiq-uz-zaman. But this will was inoperative under Mahommedan law because it was made in favour of one of the heirs without the consent of the others.

This proposition may be assumed for the purpose of the present decision.

Then the plaintiffs say that Bechan-un-nisa came into the property not by virtue of succession to her husband Sarfraz Ahmad according to the provisions of the Oudh Estates Act, but by the operation of the award which must be treated as a transfer under Section 15 of the Act to a person not qualified by Section 13, and that so the property got outside the Act, and its succession would in future be regulated by the rules which would govern the succession to property bought from an outsider.

They deny that there was any family custom as to succession, and say that the succession devolved according to the ordinary law applicable to Mahommedans. And though it is nowhere definitely stated they may perhaps be taken as saying further that if there was or is any family custom of descent this custom ceased whenever the property was taken out of the Oudh Act.

If, then (they say), the statutory entail was destroyed and there either was no family custom or that custom was destroyed, the daughter Zainab would have under Mahommedan law succeeded to a share in her mother's estate, and the other shares would have gone to two collaterals. But these latter made no claim, and Zainab was put into possession of the whole property through the Court of Wards, and remained in possession and acquired a title by adverse possession to the shares of the collaterals, and so held the whole property, and the succession to her estate should devolve according to Mahommedan law, upon her son and her daughters.

Dealing with the point as to the succession of Bechan-un-nisa their Lordships notice that the Judges in the Court of the Judicial Commissioner agreed with the contention of the appellant that the effect of the will and of the award was to bring into operation Section 15 of the Oudh Act, and to take the property out of the limitations or entail prescribed by that Act, because the brother and not the widow was the person who would have conformed to Sub-section 1 of Section 13 as the only qualified legatee, and a daughter is no heir at all under the Act. This is apparantly the inference which should be drawn from recent decisions of the Board such as that in *Balraj Kunwar* v. *Rae Jagatpal Singh* (31 I.A. 132).

But the taking of an estate out of the statutory entail does not *per se* render inoperative a statement made in the Act that this particular estate descended by custom in a particular manner. Their Lordships have, therefore, supposing the plaintiffs to be right in their first contention, to see if there was a family custom applicable to these properties.

In these cases there are two ways in which a custom may attach. There might be a custom applicable to all descendants from some common ancestor (Iman Baksh is suggested) in respect of all estates, or the custom might be limited to the capital or principal estate, as, for instance, where there is a gaddi. This is well stated in the judgment of the Subordinate Judge.

Now the talukdar Sarfraz Ahmad is entered in the second list in respect of these very talukas (except Sikandarpur), and it is declared by Section 8 that as to these very estates there is a family custom (not created by the Act but recited in the Act) by which these talukas descend to a single heir.

The mass of evidence, therefore, offered on behalf of the plaintiffs to show that there was no family custom need not be discussed. As to these talukas the Act renders such an enquiry idle.

Their Lordships were reminded that the statement in the Act is conclusive only as to the estates mentioned in the Act, as was stated in the case, *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan* (43 I.A., p. 269), but these estates are all mentioned in the Act.

Their Lordships therefore agree with the Courts in India that the custom was proved as to the estates in question other than Sikandarpur.

Then it is said for the plaintiffs that the will and the award made the estates pass otherwise than according to the custom. This breach of the custom, however, in a particular instance, supposing it to have happened, need not destroy it for all time, and if there was a departure made by the exclusion of the brother it was done with his consent, and the cession of the immediate heir in favour of the next heir cannot be deemed to make a breach in the custom. As was well observed by the Judges in the Court of the Judicial Commissioner the incidents of succession applicable to the estate, as laid down by the statute, ceased to be applicable, but the family customs governing the succession to the estate continued to be applicable.

Their Lordships have still to determine the position as to the villages which were not part of the original talukas, but which were acquired by Sarfraz Ahmad, and half of which were assigned by the award to Bechan, and as to the half of the taluka of Sikandarpur, which was similarly assigned to her.

As to the villages the Courts in India have treated them as incorporated with the talukas, and no complaint is made of this.

As to the half of Sikandarpur it may be treated in the same manner. Or it may be looked at in this way: The sanad, which gave the limitation of primogeniture and brought the talukas into List 5 of the Act, was not deprived of all effect by the voluntary cession of the brother of Sarfraz Ahmad, and when the half taluka is found in the possession of Zainab at her death (however it got there) it should descend to her only son *secundum formam doni*.

In the opinion of their Lordships the case for the plaintiffs-appellant fails, and it would not be necessary to go further.

There was, however, a further matter which formed a ground of defence for all those defendants who have appeared as respondents before their Lordships; though probably not open to some of the respondents who have not appeared. The point has been discussed at length before their Lordships, and they think it right to express their opinion upon it. It turns upon section 41 of the Transfer of Property Act IV of 1882, which is in the following terms:—

> "Where, with the consent, express or implied, of the persons interested in immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it: provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith."

The Subordinate Judge thought that this section did not afford protection to any of the defendants, but the Judicial Commissioners thought otherwise and in their Lordships' view rightly.

Upon the death of Zainab-un-nisa on the 30th August, 1907, possession was taken of the estates on behalf of Shafiq by the Court of Wards on the 29th November, 1907. In November, 1908, as already stated, the Court of Wards released the estates to Shafiq, and this suit was not instituted till the 2nd June, 1914, some months after Shafiq had completed his spendthrift career by being adjudged insolvent.

It is said that the claimants were women; but both of them had husbands, and one husband was in an official position and understood business. They were not ignorant of the state of the family and of the descent of the property and of such claims as they might have to share in the succession. In fact, one of them had some discussion and negotiation on the subject with Shafiq. The wives, and after the death of one, her representatives were receiving allowances from the Court of Wards, such as are usually made to junior branches when the estate vests in one heir. It is difficult to suppose that they were entirely ignorant of the way in which Shafiq was encumbering the estate. This seems to their Lordships to satisfy the first condition of the section. Shafiq was allowed to be the ostensible owner of the property with the implied consent of the claimants.

As regards the second condition the Bank which took the principal mortgage certainly took reasonable care to ascertain that the "transferor had power to make the transfer."

Then the other respondents who purchased under arrangements made for realising parts of the property in order to discharge part of the encumbrance of the Bank, must equally be held to have taken reasonable care.

Both appeals fail. In the appeal brought on behalf of Mujtaba Husain, their Lordships will humbly advise His Majesty that it should be dismissed with costs, and that the three sets of respondents who appeared separately are entitled to their several costs.

As to the appeal brought by Zarif-un-nisa Bibi and others, their Lordships will humbly advise His Majesty that it should be dismissed with costs.

In the Privy Council.

THE DEPUTY COMMISSIONER OF BARA BANKI, MANAGER OF THE ESTATE OF CHAUDHRI MUJTABA HUSAIN

v.

THE RECEIVER IN BANKRUPTCY OF THE ESTATE OF CHAUDHRI SHAFIQ-UZ-ZAMAN AND OTHERS

AND

CHAUDHRAIN ZARIF-UN-NISA BIBI AND OTHERS

v.

CHAUDHRI SHAFIQ-UZ-ZAMAN KHAN AND OTHERS.

DELIVERED BY LORD PHILLIMORE.

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