Privy Council Appeal No. 12 *of* 1932.
Oudh Appeals Nos. 22, 23 *and* 25 *of* 1930.

Abdul Latif Khan and others - - - - - *Appellants*

v.

Musammat Abadi Begam and others - - - - *Respondents*

Same - - - - - - - - - *Appellant*

v.

Mohammad Khalil Khan and others - - - - *Respondents*

Rani Abadi Begam and another - - - - *Appellants*

v.

Mohammad Khalil Khan and others - - - - *Respondents*

(*Consolidated Appeals.*)

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JUNE, 1934.

Present at the Hearing:

LORD THANKERTON.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* SIR JOHN WALLIS.]

These are consolidated appeals from the judgment and decrees of the Chief Court of Oudh on appeal from the judgment and decrees in two suits tried together by Nanavutty J. sitting in the exercise of the Court's original jurisdiction. Both suits concerned the succession to the estate of Raja Shamsher Bahadur, a taluqdar included in list 2 mentioned in section 8 of the Oudh Estates Act 1 of 1869. He died on the 18th April, 1883, leaving a will dated the 26th March, 1883, by which he bequeathed one half of his property to his senior wife, Musammat Aulia Begam and their only surviving child, Jani Begam and the other half to his junior wife, Musammat Barkat-un-nissa Begam who was childless. Aulia Begam died in 1897 and Barkat-un-nissa Begam on the 27th April 1927.

In the first of these suits, O.S. No. 5 of 1928, Abdul Latif Khan claimed that the will was invalid, and that, as grandson of the Raja's eldest daughter, Nawab Begam, who had predeceased him, he was entitled to succeed to the whole of the estate on death of Barkat-un-nissa the last surviving widow: or that, if the will was valid, it conferred only life

estate on the widows and he was entitled, on Barkat-un-nissa's death to succeed to her half share of the estate. In the event of the will being held to be invalid, Plaintiffs 2 to 5 in this suit alleged that Barkat-un-Nissa was a Shia, and that under the Shia law they were entitled to succeed to her share. It was found by both Courts that she was not a Shia, and this claim therefore failed.

The first defendant, hereinafter referred to as the defendant, was Abadi Begam, the elder daughter of Jani Begam. She had obtained a mutation order in her favour and was in possession of the entire immoveable property left by Barkat-un-nissa, and also of a part of the property left by Aulia Begam. The other defendants were transferees from Aulia Begam, with the exception of defendants 4 and 5, Khalil Khan and Fida Ali Khan, who were the heirs of Barkat-un-nissa under the Hanafi law and of defendant 9 who was a transferee from defendants 4 and 5 and were the plaintiffs in suit No. 8 of 1928.

In her written statement the first defendant, Abadi Begam, denied that the first plaintiff was the Raja's heir either under the Oudh Estates Act or the Raja's sanad, and alleged that the will was invalid or at most had conferred a life estate on Barkat-un-nissa and that she had succeeded to a life estate under clause (8) of section 22 of the Oudh Estates Act. She alleged that she herself and not the plaintiff was the Raja's rightful heir under the Sunni law to which the Raja and all his family belonged, and that on the death of his widow, Barkat-un-nissa she became entitled to succeed to his taluqdari estate under clause (11) of section 22 of the Act. The 4th 5th and 9th defendants in suit No. 5 were the plaintiffs in suit No. 8. They set up that the will was valid and that Barkat-un-nissa took an absolute estate under it, and that on her death they as her next heirs under the Sunni law were entitled to succeed to it.

Both the lower Courts found that, as regards the bequests to the two widows, the will was valid and conferred on them an absolute estate in their shares. They also found that the plaintiffs in suit No. 8 were Barkat-un-nissa's heirs, according to the law of the Sunni sect to which the family belonged. The finding that the will conferred absolute estates on the widows also disposed of the claim of the plaintiff in suit No. 5 to recover the properties bequeathed to them, and had the effect of restricting his claim in that suit to the share bequeathed to Jani Begam, the Raja's only surviving daughter.

At the hearing of the appeal their Lordships decided to dispose in the first place of the questions arising under the will, and they will now briefly give their reasons for concurring with the lower courts in holding that the widows took absolute estates under the will and in dismissing the claim of the plaintiff in suit No. 5 as to the properties bequeathed to them and in decreeing suit No. 8 brought by the heirs of Barkat-un-nissa to recover the properties which had fallen to her share.

The following is a translation of the will accepted by all parties in the Chief Court and ordered to be brought on the record :—

"I by this writing after the declaration of this fact that if by the grace of God I regain health and recover from the present ailments then the entire cash and moveable and immoveable property (and) everything shall remain in my ownership and possession in the same way as I have up to this time been the absolute owner (thereof); and (but) if God forbid I do not recover from the illness then I make a will that after me whatever cash and silver and gold articles I have accumulated and got prepared during the whole of my life time all that be sent to Mecca and Medina and spent in such a way as may benefit me in the next world; the remaining property moveable and immoveable of every kind which is owned and possessed by me that same, my heirs *i.e.* Musammat Jani Begam, daughter, and Musammat Aulia Begam daughter of Mirza Tegh Bahadur, resident of Aurangabad, first party, and Musammat Barkat Begam, daughter of Amir Ali Khan, resident of Shahjahanpur, second wife, second party, shall get half and half in equal shares and will take in their respective dowers and be benefited (delighted) by the same. Musammat Umrao Begam shall get the sum of Rs. 150 per year which has been fixed by Court for Musammat Aladei, and the house in Mohallah Mahmand Jalalnagar at Shahjahanpur which I have already given to her (she will) retain in her possession and ownership. And Gauri Shankar Karinda shall remain the servant of the estate.

Wherefore (I have) executed this will so that it may serve as an authority and be of use. Finis.

Dated 26th March 1883. (Sd.) RAJA SHAMSHER BAHADUR."

Section 19 of the Oudh Estates Act, 1869, makes certain sections of the India Succession Act X of 1865, including section 82, applicable to the wills of taluqdars. It is provided by section 82 that "where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him." Their Lordships agree with both the lower Courts that there is nothing in the terms of this will which in any way restricts the interest bequeathed to the daughter and widows under the will.

The next objection taken was that these bequests, being made in favour of persons who were heirs on intestacy, is invalid under the Hanafi law, which governs Mohammedans of the Sunni sect. This is admitted, but under that law the invalidity is cured by the consent of the heirs; and according to the concurrent findings of both Courts, the two widows and the surviving daughter were the heirs under the Mohammedan law and consented to the will.

The remaining objection was that the will, having been made within three months of the testator's death, was invalid under section 13 of the Act as regards the bequest to the junior widow Barkat-un-nissa, because as the junior widow she was not a person who under the provisions of the Act or under the ordinary law of the testator's tribe and religion would have "succeeded to such estate or to a portion thereof or to an interest therein" if the testator had died intestate. It is contended that as the

senior widow would have taken a life interest under clause 7 of section 22 if the testator had died intestate, the junior widow did not take an interest within the meaning of the section. As to this objection, it is sufficient to say that it was decided by this Board in the judgment delivered by Lord Macnaghten in *Indar Kunwar* v. *Jaipal Kunwar*, 15 I.A. 127, that in these circumstances the junior widow takes an interest within the meaning of the section, and that their Lordships are bound by that decision.

The result is that the bequests in favour of both widows were valid and conferred absolute estates upon them. It follows that both the Courts in India were right in dismissing the plaintiffs' suit No. 5 in so far as it relates to the bequests to the widows and in decreeing the claim of Barkat-un-nissa's heirs in suit 8 to succeed on her death to the properties bequeathed to her by the will. This substantially disposes of the appeals in suit 8, and also of the appeal in suit 5 except in so far as it relates to the 4 annas share bequeathed to the testator's daughter Jani.

Both the Courts in India dealt with this part of the case on the footing that the bequest to Jani Begum was invalid under section 13 of the Act already mentioned, and that the succession to it was governed by section 22 of the Act, which provided that, if any taluqdar whose name should be inserted in the second, third or fifth of the lists mentioned in section 8 should die intestate, his estate should descend in the manner therein prescribed. Under this section the senior widow became entitled to an estate for life, and on her death in 1897 the junior widow became entitled to a similar estate. On her death in 1927, Abdul Latif, the plaintiff in suit 5, and Abadi Begum, the first defendant, each claimed to succeed under clause (11) of section 22 as the next heir "under the ordinary law to which persons of the religion and tribe are subject." List 2, in which the deceased Raja's name was included, was a list of taluqdars whose estates before the Mutiny, "according to the custom of the family, ordinarily devolved upon a single heir," that is to say, were impartible. Lists 3 and 5 were lists of other taluqdars and of grantees who had accepted sanads making their estates descendable "to the nearest male heirs according to the rule of primogeniture." Many of the taluqdars in List 2, and among them the deceased Raja, had accepted sanads in the same terms.

It was held in *Brij Indar Bahadur* v. *Janki Koer* (1877, 5 I.A. 1) that in such a case the sanad was superseded by the section and that under clause (11) the estate descended to the deceased taluqdar's daughter under the Mitakshara law, that being the ordinary law of the religion and tribe within the meaning of the clause. Following this and other cases, the Trial Judge held that in this case the defendant Abadi Begum was entitled to succeed under clause (11) as the deceased taluqdar's nearest heir under the Mahommedan law. In *Debi Baksh Singh* v. *Chandrabhan* (1910, 37 I.A. 265), as regards succession to a

taluqdar who had been included in List 3, it had been held that effect must be given to the rule of succession prescribed in the sanad as part of the ordinary law of the religion and tribe within the meaning of clause (11). In view of certain observations in *Badri Narain Singh* v. *Harman Kuar*, 1922, 49 I.A. 276 as to the difficulty of reconciling these two decisions, the Chief Court were of opinion that *Brij Indar's* case must be treated as overruled, and that in the present case the succession must be governed by the sanads. If so, both Courts were of opinion that the case of the plaintiff Abdul Latif, the grandson of the deceased Raja's elder daughter Nawab Begum, must fail, as he traced his descent through a female and was not a male heir within the meaning of the sanad.

Their Lordships agree with the Courts in India that the limitation in the sanads to the nearest male heirs is a limitation to males claiming through males, or, in other words, to male agnates. This has been held from very early times in the case of a limitation to the heirs male of the body which creates an estate in tail male, and would also have had the same effect in the case of a limitation to male heirs generally, if that limitation had not been held to create an estate in fee simple descendible according to the ordinary law.

In their Lordships' opinion, however, the Courts in India were wrong in basing their decision on the terms of the sanad instead of on the new provisions made for the purpose of putting an end to the difficulties which had arisen as to the interpretation of clause 11 of section 22 of the Oudh Estates Act 1869 by the Oudh Estates Amendment Act 3 of 1910, which was passed through the Legislature of the United Provinces in 1909 while the appeal from the judgment of the Judicial Commissioner, which was affirmed in *Debi Baksh's* case, was pending before the Board. A new section 22 was substituted for the former section. In the new section the limitation in clause (10) in favour of descendants by unequal alliances was omitted and a new limitation was inserted in favour of " the nearest male agnate according to the rule of lineal primogeniture." As already pointed out, this limitation to male agnates gives statutory effect to the limitation in the sanad as to collateral succession. There can, therefore, no longer be any question of bringing in the limitations in the sanad under clause (11) as part of the ordinary law of the religion and tribe, and clause (11) must be restricted to other heirs such as females and those claiming under them who, but for the earlier limitations in the section, would have been entitled to succeed to an impartible estate under their personal law.

Whilst dealing with this succession, which opened in 1927, as governed by the amended Act, the Courts in India apparently lost sight of the new clause (10) of section 22 and only referred to the amendment in section 3 omitting the conditions " relating to succession " from the conditions in the sanad under which these estates are held under that section. Moreover, they differed

as to the effect of this amendment read with an explanation in the following terms which was added to the section :—

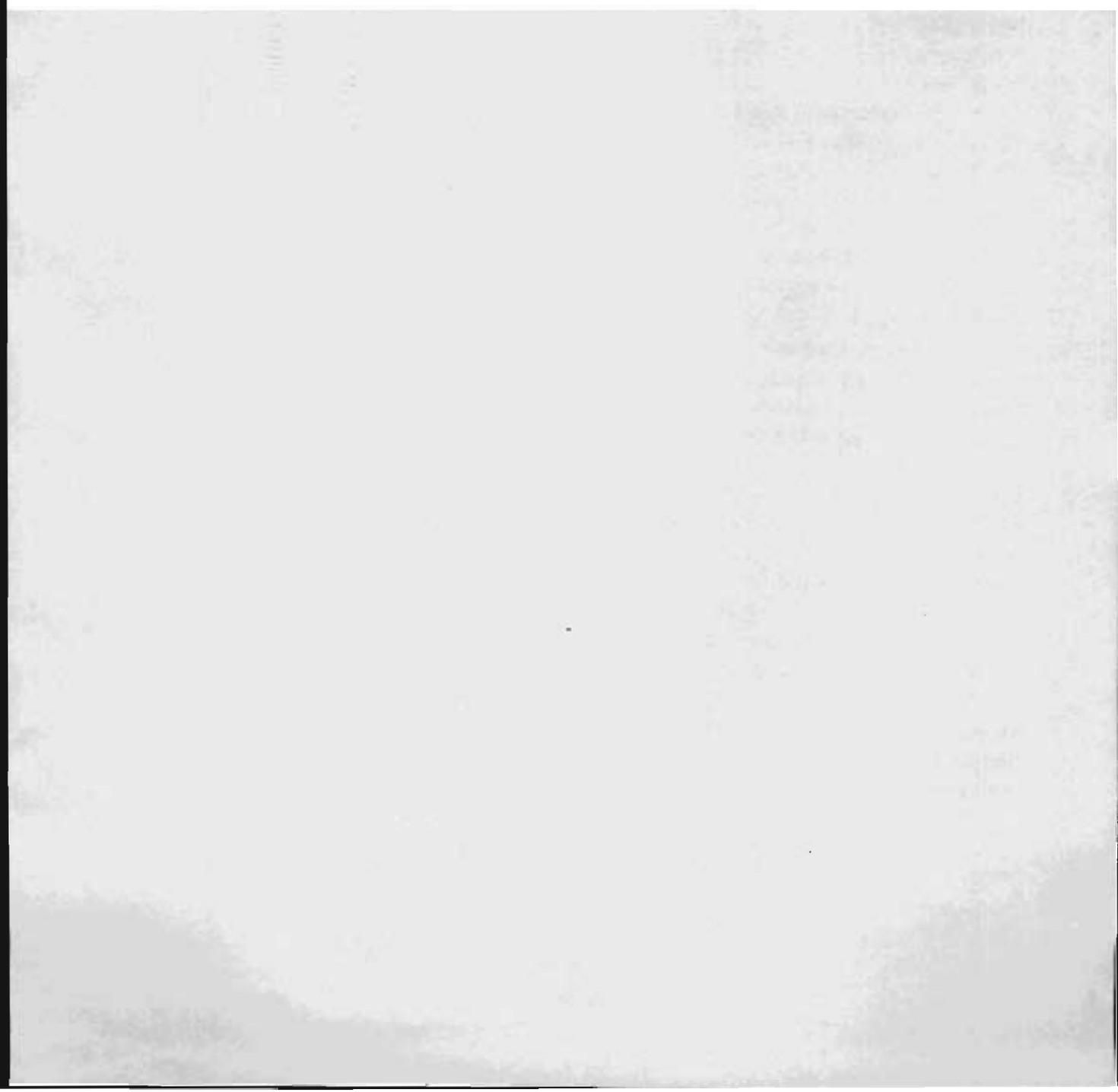
> " EXPLANATION. Notwithstanding anything in the Crown Grants Act XV of 1895, the conditions of the sanad relating to succession in so far as they are inconsistent with the provisions of this Act, shall not apply to the estate."

In their Lordships' opinion this explanation was inserted *ex abundanti cautela* because of a groundless apprehension that the Crown Grants Act, 1895, which provides that all such grants shall operate according to their tenor, might be held to have nullified the provisions of section 22 in so far as they depart from the terms of the primogeniture sanad and also the amendment introduced into section 3 by the amending Act; and they agree with the Trial Judge that it in no way affects the amendment made in the body of section 3, which appears to have been made with a view of further securing that succession to these impartible estates should be governed exclusively by the terms of section 22 and that the limitation in the sanads should be wholly superseded.

For these reasons their Lordships are of opinion that the appeal of Abdul Latif Khan, the appellant in Oudh appeal No. 22, fails, as he is not a male agnate within the meaning of clause (10), and under clause (11) the respondent, Abadi Begam, who is in possession, is a nearer heir under the Mahommedan law.

As already stated, Oudh appeals Nos. 23 and 25 in suit No. 8 must also be dismissed. The Chief Court, in consequence of an objection raised *suo motu*, had directed that the appeal from the judgment of the Trial Judge in this suit should be dismissed except in so far as that the decree of the Court of first instance for a one-fourth share in favour of Bunyat Husain should be set aside. Bunyat Husain was the third plaintiff, and it was alleged in paragraph 21 of the plaint that the plaintiffs 1 and 2 had sold him a four annas share to raise money for this litigation. Mr. Upjohn, who appeared for the plaintiffs (respondents) in suit No. 8, did not think it necessary to support this alteration in the decree of the first Court, and the decree of the first Court will accordingly be restored.

In the result their Lordships will humbly advise His Majesty that the appeal in suit 5 be dismissed and that as regards the appeals in suit 8 the decree of the Chief Court be varied by restoring the provisions of the decree of the first Court in favour of the third plaintiff, Syed Bunyat Husain, and that otherwise the appeals be dismissed. As regards the costs of these consolidated appeals Mohammad Khalil Khan and Mohammad Fida Ali Khan, the heirs of Begam Barkat-un-nissa, who are respondents in Oudh appeals 23 and 25, and Bunyat Husain, who lodged a joint case with them, will recover one set of costs from the appellants in these appeals, Abdul Latif Khan and Rani Abadi Begam and Mirza Musttaq Ahmad. Rani Abadi Begum and Mirza Musttaq Ahmad, respondents in Oudh appeal No. 22, will recover four-fifths of one set of costs of the consolidated appeals from Abdul Latif Khan.



In the Privy Council.

ABDUL LATIF KHAN AND OTHERS

v.

MUSAMMAT ABADI BEGAM AND OTHERS.

SAME

v.

MOHAMMAD KHALIL KHAN AND OTHERS.

RANI ABADI BEGAM AND ANOTHER

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(*Consolidated Appeals.*)

DELIVERED BY SIR JOHN WALLIS.

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