Privy Council Appeal No. 116 *of* 1936
Oudh Appeals Nos. 7 *and* 8 *of* 1934

Nawab Mirza Mohammad Kazim Ali Khan and another *Appellants*

v.

Nawab Mirza Mohammad Sadiq Ali Khan and others *Respondents*

Nawab Fakhr Jahan Begam and others - - - *Appellants*

v.

Nawab Mirza Mohammad Sadiq Ali Khan - - *Respondent*
(*Consolidated Appeals*)

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW

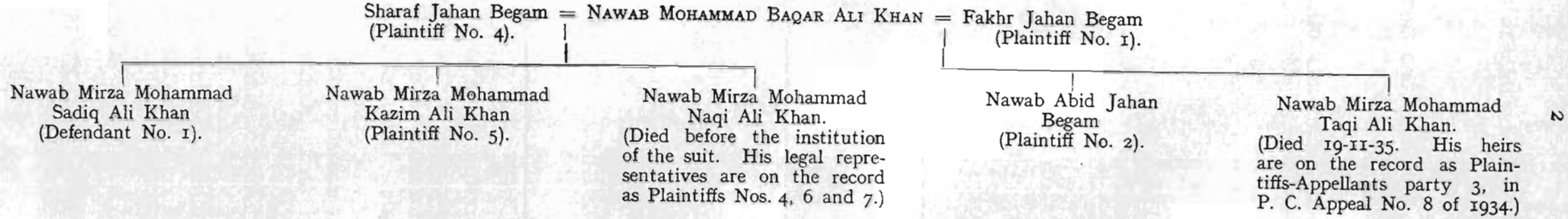
JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH APRIL, 1938.

Present at the Hearing:

LORD WRIGHT.
SIR SHADI LAL.
SIR GEORGE RANKIN.

[*Delivered by* SIR GEORGE RANKIN.]

In this case two appeals by separate sets of plaintiffs have been brought from a decree of the Chief Court of Oudh dated 14th March, 1934, setting aside the decree of the Subordinate Judge, Lucknow, dated 1st September, 1932, and dismissing with costs a suit for contribution. In both appeals the sole contesting respondent is the defendant in the suit Nawab Mirza Mohammad Sadiq Ali Khan (herein called Sadiq Ali) who is the taluqdar of Makanpur Rahimabad in the district of Sitapur. The parties are Shia Mahomedans and the questions in dispute have reference to the administration of the estate of Nawab Mohammad Baqar Ali Khan (herein called the late Nawab) who died on the 17th January, 1921. The relationship of the parties to him and to each other is shown by the pedigree hereunder:—


Sharaf Jahan Begam
(Plaintiff No. 4).
NAWAB MOHAMMAD BAQAR ALI KHAN
Fakhr Jahan Begam
(Plaintiff No. 1).
Nawab Mirza Mohammad Sadiq Ali Khan
(Defendant No. 1).
Nawab Mirza Mohammad Kazim Ali Khan
(Plaintiff No. 5).
Nawab Mirza Mohammad Naqi Ali Khan.
(Died before the institution of the suit. His legal representatives are on the record as Plaintiffs Nos. 4, 6 and 7.)
Nawab Abid Jahan Begam
(Plaintiff No. 2).
Nawab Mirza Mohammad Taqi Ali Khan.
(Died 19-11-35. His heirs are on the record as Plaintiffs-Appellants party 3, in P. C. Appeal No. 8 of 1934.)

The late Nawab left two widows and a family by each. The property of which he was possessed at his death comprised the taluqa of Makanpur Rahimabad, an estate which had been entered under section 8 of the Oudh Estates Act (I of 1869) in List II as an estate which according to the custom of the family ordinarily devolved upon a single heir. In addition thereto, however, he was possessed at his death of other properties. Litigation to determine whether any or all of his properties were partible or were impartible took place from 1921 to 1931 between his heirs. In 1931 it was decided by this Board that the taluqa descended to Sadiq Ali alone but that the other properties were not governed by any special family custom and that they descended according to the ordinary principles of the Shia school of Mahomedan law: *Mohammad Sadiq Ali Khan v. Fakhr Jahan Begum* (1931) L.R. 59, I.A. 1. The value of the taluqdari property at the date of the death is estimated by the plaintiffs at Rs.25,62,800 and the value of the partible estate at Rs.8,90,314.

On the 31st October, 1921, the late Nawab's senior widow Sharaf Jahan Begum brought a suit for her dower against her own three sons, her co-widow Fakhr Jahan Begum, and the latter's son and daughter. These six defendants were impleaded as being with the plaintiff herself the heirs of her husband in possession of his property. The claim was for five lakhs of rupees as dower, and on the 3rd January, 1923, the Subordinate Judge "ordered that the plaintiff's claim be and is hereby decreed for three lakhs of rupees with proportionate costs against the entire estate of Nawab Baqar Ali Khan deceased." An appeal by Sadiq Ali to the Court of the Judicial Commissioner was on the 4th March, 1924, dismissed.

Thereafter by various execution proceedings the senior widow Sharaf Jahan Begum as decree-holder realised out of the partible or non-taluqdari property of her late husband sums sufficient to satisfy her dower decree, amounting to Rs.3,06,855. It is not necessary to detail these proceedings, which took place at different dates between 1924 and 1930. It may, however, be noted that in May, 1924, the first application made by her was against her son, the taluqdar, and asked for attachment and sale of certain taluqdari villages. Such property is protected by the provisions of the Oudh Laws Act, 1876, and by rules made under section 68, C.P.C. The sales officer having submitted the case to the Local Government for sanction of an execution sale was informed that as the taluqdar had non-taluqdari property from which the decree could be fully realised the proceedings to sell in the first instance the ancestral taluqdari villages did not seem proper. This execution application came accordingly to nothing.

On 29th April, 1931, the suit out of which the present appeals arise was brought by the junior widow, her son and daughter against Sadiq Ali. Originally the senior widow, her two sons, and the representatives of her third son Naqi

Ali (who had died) were impleaded as defendants in this suit, but they were afterwards made plaintiffs, leaving Sadiq Ali, the taluqdar, as sole defendant. The main contentions of the plaintiffs were to the effect that both taluqdari and non-taluqdari properties were liable for the dower debt; that as the dower decree was satisfied from the non-taluqdari property alone the taluqdari estate should be made to contribute according to its value. The defendant, among other pleas, denied that any right to claim contribution arose to the plaintiffs upon the facts alleged. The Subordinate Judge thought it right to deal with certain of the issues before taking evidence upon disputed questions of fact. He found in favour of the plaintiffs that they had a right to contribution in respect that the taluqdari property was liable for the debts of the deceased taluqdar along with the partible property: and that the values of taluqdari and partible properties should be estimated as at the date of the death. His findings on other points need not here be mentioned.

The Chief Court reversed this decision and dismissed the suit. On the main question of the plaintiffs' right to contribution the view of the learned Judges (Wazir Hasan C.J. and Smith J.) was that as the heirs of a Mahomedan were only entitled to the residue of his partible estate left after the payment of funeral expenses, debts and legacies, the plaintiffs' claim involved the assertion of a right to share in the impartible estate. In their opinion even had the entire partible estate been exhausted in satisfaction of debts due by the deceased, no right would have arisen to any of the heirs to rehabilitate their shares by means of contributions from the impartible estate. As their Lordships read the joint judgment of the Chief Court, the learned Judges did not doubt that the taluqdari property of the late Nawab was liable for his debts just as much as the partible property. They regarded it as the plaintiffs' misfortune that execution proceedings were taken against the latter. But they held that "the fact that the result of that action was a benefit to the defendant inasmuch as it saved the impartible estate intact does not create in equity or otherwise in favour of the plaintiffs a right to share in that benefit." Their Lordships postpone mention of certain other findings of the Chief Court and proceed to consider the correctness of the view that the suit for contribution was not maintainable.

The claim of the senior widow Sharaf Jahan Begum for dower was that of an ordinary unsecured creditor against the estate of her late husband. She was not in possession of any property of his in lieu of her dower, still less had she any charge upon any part of his estate. On the other hand, the fact that the debt was for dower did not make it different from any other simple contract debt so far as the taluqdari property was concerned. Sharaf Jahan Begum impleaded all the heirs of her late husband in her suit for dower and obtained a decree against all. It is not necessary now to consider whether the decree which she obtained was in a form to which she was entitled. It was

apparently contended in the suit that the proper form of decree would have been against each heir of her late husband to the extent only of a part of the debt proportionate to that heir's share in the estate. There is some difference of opinion among the High Courts of India upon the proper form of decree in a suit by the creditor of a deceased Mahomedan against one or more of his heirs. In the present case the matter was complicated by the facts that the line or lines of succession to the late Nawab's property were uncertain and in all probability governed only in part by the Mahomedan law; and that the lady was minded to contend that the taluqdari property was liable to answer her claim. The reference in the decree to " the entire estate " shows that Sadiq Ali was not being sued merely as a person entitled to share in the partible estate: otherwise their Lordships attribute no importance to it. Being heiress as well as creditor, the senior widow might doubtless have sued for a declaration that as between partible and impartible estates the latter should bear its proportionate share of the debts, but she did not ask for or get relief in that form. She brought her suit as a creditor in the manner provided by the Code impleading all the heirs as legal representatives (section 2 (11), C.P.C.) and she obtained, as the Chief Court has noticed, a judgment of the character contemplated by section 52 of the Code. In *Mussumat Mulleeka* v. *Mussumat Jumeela* (1872) L.R. Sup. I.A. 135, this was held by the Board in a suit for dower to be the right form of decree; and in the present case that form of decree was granted, and no appeal was taken therefrom. Each of the defendants to that suit became liable as explained by Sir Barnes Peacock in the case just cited (p. 142) for the whole debt to the extent of assets received by him and the decree could be executed by the attachment and sale of as much as necessary of the property of the deceased in the hands of any or all of the defendants. If any defendant was shown to have been in possession of property of the deceased, but to have parted with it, his own assets could be made liable to a like extent unless he proved that he had " duly applied " the property of the deceased. Such a decree is only a step towards the administration of the deceased's estate and does not complete the administration as between persons whose rights are postponed to creditors. In the ordinary case of a Muslim whose whole property descended according to his personal law it would be impossible to suggest that an heir was without remedy against his co-heirs if by the action of the judgment creditor under such a decree, he was left with less than his proper share of the nett estate of the deceased. His right to contribution would be plain. As a beneficiary he would have the right that the deceased's estate should be duly administered, that it should be cleared of debts and valid legacies, and that he should be given possession of his share therein. For this purpose his suit could take various forms according to the circumstances of the case. It might be denominated an administration suit or a suit for partition or a suit for contribution, but the basis of his

claim would be the same in each case, viz., the right to have due administration of the deceased's estate. This right might also be enforced in a proper case by an application for the appointment of an administrator under section 218 of the Indian Succession Act, 1925.

The question raised by the present case is whether the plaintiffs as heirs having an interest in a portion of the property left by the deceased and entitled to a due administration of his estate cannot claim to have the debts of the deceased provided for rateably out of the partible and impartible properties which are equally liable for such debts. The estate of the late Nawab was between 1921 and 1931 in a difficult position, since it was doubtful whether any substantial portion of it was divisible or indivisible, and the claim of the senior widow was a heavy claim. That such an estate should be administered by the crude method of leaving it exposed to execution sales at the creditor's choice, is, it may be hoped, unusual. Had there been an executor or administrator in charge or a receiver appointed by the Court it would have been his duty to take proper measures to pay off the dower debt, and he could not possibly have claimed to saddle either the taluqdari or the non-taluqdari property with the whole of the dower. It would have been the plain right of the plaintiffs to object to any more than a proportionate part of the debt being taken from the partible estate. The view of the Chief Court is that the creditor having levied on partible assets the loss must lie where it has fallen. This, in their Lordships' judgment, is contrary to the rights of the parties: it would, moreover, open wide the door to chicanery and fraud. A proper administation of the deceased's estate involves and requires a proper allocation of the debts as between properties to which different rules of descent apply. The plaintiffs are not claiming to share in the taluqdari property, because they ask for a proper allocation of the debts as between the partible and the taluqdari properties.

That the right of an heir under the Mahomedan law is a share in the estate after debts and valid legacies have been provided for is undeniable. It is laid down no less than three times in the fourth Sura of the Koran. The principle is not disputed by the plaintiffs or by anyone. Indeed it lies at the root of the plaintiffs' case: *because* an heir is only entitled beneficially to a share in the residue after payment of debts he is bound to contribute towards debts properly paid by his co-heirs to the extent of his interest. If the Mahomedan law governed the whole matter the plaintiffs' difficulties would be at an end. The Mahomedan law as to legacies is highly special and need not now be considered; but in providing that the heir takes a share in the nett estate after deduction of the debts of the deceased, the Mahomedan law is in line with other laws including the Hindu law and the second chapter of the Indian Succession Act, 1925. The single heir under Act I of 1869 also takes subject to debts. So far as their Lordships are aware the particular problem presented by the circumstance that part

of the deceased's property does not descend according to Koranic principles at all is not dealt with by any of the classical authorities such as the Hedaya, Fatawa Alamgiri or Shuraya. From the standpoint of orthodoxy, such a contingency might well appear not as one to be provided for but as one to be rejected. In any case neither the dicta nor the authorities referred to by the Chief Court are addressed to any such matter. In the cases envisaged by these authorities there is no need to ask what debts shall be discharged out of the property before division into shares as prescribed by Mahomedan law. As all the property would descend by that law all the debts must be first provided for. But here some property, though liable for debts, is not divisible at all and descends upon different principles unknown to the Mahomedan law: hence the need to ask how much of the debts should be satisfied out of each class of property. Had the authorities cited been relevant to this question and conclusive to the effect that Mahomedan law provided no remedy in such a case as the present, it by no means follows that a British Indian Court would not afford a remedy.

In the case cited by the Chief Court, *Jafri Begum* v. *Amir Muhammad* (1885) I.L.R. 7, All. 822, 844, it was pointed out by Mahmood J. that "the *lex fori* regulates all matters going to the remedy, *ad litis ordinationem*." In his view "upon the death of a Mahomedan owner, his property . . . immediately devolves upon his heirs in specific shares; and if there are any claims against the estate, and they are litigated, the matter passes into the region of procedure, and must be regulated according to the law which governs the action of the Court" (p. 882). In that case, as is well known, the Full Bench of the High Court at Allahabad, while holding that a decree passed against some only of the heirs did not bind other heirs so as to convey their interest to the auction purchaser in execution, agreed that in such a case the heirs who were not parties to the decree could not recover their shares from the auction purchaser without paying their proportionate share of the ancestor's debt for which the decree was passed. This is a particular application of the right to contribution as between co-heirs in respect of the debts of the deceased. It was treated as not depending upon any rule peculiar to the Mahomedan law, but on the general principles of equity.

In the present case the Court, having granted to the creditor a decree which enabled her to levy at her choice upon the partible and the impartible estates, cannot as between the defendants refuse to carry the administration beyond that point.

The principle or method of which section 52 of the Code is an expression has always been so operated as not to prejudice the rights *inter se* of beneficiaries or legatees over whom the creditor has priority. Indeed by its doctrine of marshalling, equity, in days when debts were of different

priority and assets were of different classes, ensured that the order in which the assets of a deceased person were answerable for his debts was ultimately enforced as between persons beneficially interested in the estate [*cf.*, Williams on Executors, Vol. II, pp. 1119-20, 12*th* ed. 1930]. Creditors may generally resort to any portion of the estate but the judgment of Lord Eldon in *Aldrich* v. *Cooper* (1803) 8 Vesey Jun. 381, may be pointed to as showing how this principle has of old been limited and controlled to avert injustice: —

> " The simple contract creditor therefore has (not) in law any claim against the freehold estate. . . . But the Court has said the caprice or election of a bond creditor shall not operate to the prejudice of the simple contract creditor. . . ." (p. 394.) " In the cases of legatees against assets descended a legatee has not so strong a claim to this species of equity as a creditor. But the mere bounty of the testator enables the legatee to call for this species of marshalling: that, if those creditors having a right to go to the real estate descended will go to the personal estate, the choice of the creditors shall not determine whether the legatees shall be paid or not. . . . Both are in law liable to the creditors, and therefore by making the option to go against the one they shall not disappoint another person who the testator intended should be satisfied." (p. 395.)

The rights of the plaintiffs cannot be concluded by the choice of the execution creditor. Their claim to their proper share in the partible estate of the late Nawab makes them co-beneficiaries with Sadiq Ali in respect of assets all of which are answerable for the debts of the deceased and the fact that different portions of the assets devolve on different principles in no way defeats the plaintiffs' right to contribution.

It is not necessary that the plaintiffs should found upon an actual or implied promise in seeking contribution from the defendant in the events which have happened. Whether or not sections 69 and 70 of the Indian Contract Act are wide enough to cover the case, the root of the plaintiffs' claim is their right to a due administration of the estate of the deceased. " The reason given in the books is that *in aequali jure* the law requires equallity: one shall not bear the burden in ease of the rest" (*Deering v. Earl of Winchelsea* (2 Bos. & Pul. 270 and 1 Cox 318). " The principle established in the case of *Deering* v. *Earl of Winchelsea* (*supra*) is universal, that the right and duty of contribution is founded on doctrines of equity; it does not depend upon contract." *Ramskill* v. *Edwards* (1885) L.R. 31, C.D. 100, 109. This has been settled law in India since *Rambux Chittangeo* v. *Modhoosoodun Paul Chowdhry* (1867) 7 W.R. 377, a Full Bench decision of the High Court at Calcutta in Sir Barnes Peacock's time which contains a careful exposition of the matter from an Indian standpoint.

A further decision of the Chief Court remains to be considered. Sadiq Ali made an application under section 3 of the Oudh Settled Estates Act, 1917, and on 21st December, 1923, having obtained the necessary permission, he duly declared by deed that a certain portion of the taluqa was

in future to be held subject to the provisions of the Act. Section 15 of the Act is as follows:—

> " Except as otherwise provided by this Act, no person entitled to a settled estate shall have power to transfer, dispose of, alienate, convey, charge, encumber or lease the same or any part thereof, or the profits thereof, for any greater or larger interest or time than during his life, nor shall a settled estate, or any part thereof, or the profits thereof, be held by any Court to be or to have vested in such person for any larger or greater interest or time than for his life."

The Subordinate Judge has held that for the purpose of a rateable allocation of the debts of the late Nawab as between taluqdari and non-taluqdari property the value of his interest in the taluqa is to be taken as it stood at the date of his death in 1921. The Chief Court have held that the portion comprised in the declaration of 1923 is to be valued as a life interest only. In their Lordships' view it would be contrary to a sound construction that the words " to be or to have vested " in section 15 should be interpreted as operating retrospectively upon rights accrued to third parties in the administration of the property of the deceased. On this point their Lordships agree with the view of the Subordinate Judge that the respective values of partible and impartible properties should be ascertained as at the date of the death. They express no opinion upon the *quantum* of the interest which would be saleable in execution under any decree passed in the present suit.

No question arises now upon any of the other matters dealt with by the Courts in India. It may be noted, however, that on 24th July, 1934, Sharaf Jahan Begum petitioned the Chief Court to the effect that she had parted with her interest in the subject matter of this consolidated appeal to her son Nawab Kasim Ali Khan. This allegation was disputed and the Chief Court did not act upon it as the learned Judges considered that they were *functi officio*. The lady has not been represented before their Lordships. When His Majesty's order is received in India the Chief Court will deal with her application before sending the case back to the Subordinate Judge's Court.

Their Lordships will humbly advise His Majesty that these two appeals be allowed, that the decree of the Chief Court be set aside, that the decree of the Subordinate Judge be restored and that the case be remanded to the trial Court for final disposal. The respondent Nawab Mirza Mahammad Sadiq Ali Khan must pay the appellants' costs in the Chief Court and one set of costs as between the appellants in the two appeals which have been consolidated in the present case.

(48988—3A) Wt. 8168—30 200 4/38 P. St. G. 338

In the Privy Council

NAWAB MIRZA MOHAMMAD KAZIM ALI KHAN AND ANOTHER

v.

NAWAB MIRZA MOHAMMAD SADIQ ALI KHAN AND OTHERS

NAWAB FAKHR JAHAN BEGAM AND OTHERS

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(*Consolidated Appeals*)

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