

*Privy Council Appeal No. 29 of 1942*

Sardar Abdul Rahman Khan - - - - - *Appellant*

*v.*

Sardar Mohd. Ashraf Khan and others - - - *Respondents*

FROM

**THE COURT OF THE JUDICIAL COMMISSIONER,  
NORTH WEST FRONTIER PROVINCE**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 15TH NOVEMBER, 1943

*Present at the Hearing:*

LORD ATKIN

LORD ROMER

LORD PORTER

LORD CLAUSON

SIR GEORGE RANKIN

[*Delivered by LORD CLAUSON*]

This is an appeal from a decree of the Court of the Judicial Commissioner, North-West Frontier Province, dated 20th January, 1941, which reversed a decree of the Senior Subordinate Judge, Hazara, dated 28th November, 1939.

The question for decision is as to the devolution, on the death on the 8th January, 1938, of Mir Abdullah, of the ownership of three villages, Koklia, Dingi and Jhar. It is contended on the one side by Abdul Rahman, the present appellant, eldest son of Abdul Jabbar (who was the eldest son of Mir Abdullah but predeceased his father) that the villages in suit have in the special circumstances of the case devolved on him, while the respondents, Ashraf and Ilahi, two younger sons of Mir Abdullah, and Begum Jan, widow of Mir Abdullah, contend that the villages have devolved upon them as the persons entitled according to the ordinary Muslim law of succession to the property of Mir Abdullah.

In order to clarify the contentions of the parties their Lordships find it necessary to go back to the year 1871 when Muqaddam Ahmad, the great grandfather in the direct male line of primogeniture of Mir Abdullah was still alive. Muqaddam Ahmad's position in regard to the villages in suit was as follows: he was in possession of the three villages: he was also jagirdar of the three villages, that is to say he was the beneficiary of the right to receive the land revenue of these three villages without any liability to account to government for it. He died on the 27th August, 1871, and on his death litigation took place in the Civil Court before Captain Wace, who was not only Judge of the Civil Court but was also in fact the Settlement Officer dealing with the Settlement of this District. In this litigation Captain Wace on the 9th April, 1874, delivered an elaborate judgment which dealt at length with the history of the family and resulted in a declaration that the three villages devolved in entirety with the Chiefship of the family, and that the member of the family to whom the Government at each succession award the jagir (i.e. the right to receive the land revenue of the three villages) is to be held to be the Chief: and the decree awarded

to Mir Ahmad (who was the eldest son of the deceased, and had been appointed jagirdar in succession to his father) those shares of the three villages of which he was not already in possession. From this decision there was an appeal to the Court of the Commissioner of the Division, and that Court, on the 23rd October, 1874, dismissed the appeal, pointing out that Captain Wace's decision had not been arrived at agreeably to the Muhammedan law, but was based on custom. A further appeal was presented to the Financial Commissioner but was withdrawn.

The question before Captain Wace was governed by the Punjab Laws Act, 1872, the following being the relevant sections:—

5. In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision shall be—

(1) any custom of any body or class of persons, which is not contrary to justice, equity and good conscience, and has not been declared to be void by any competent authority,

(2) the Muhammedan law, in cases where the parties are Muhammedans, and the Hindu law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is referred to in the preceding clause of this section.

6. In cases not otherwise specially provided for, the Judges shall decide according to justice, equity and good conscience.

In argument before their Lordships it was suggested on behalf of the appellant that the effect of the declaration was not to declare an existing custom, but to decide that the three villages were not the property of Muqaddam Ahmad, but were the endowment of the Chiefship, and fell to be treated as in the nature of property belonging to a corporation sole. It is however to be observed that Captain Wace was bound by law to apply the ordinary Muhammedan law to the question before him, save in so far as it was excluded by the family custom, and his decision cannot in their Lordships' view be treated as other than as a finding, whether correct or not, that there was a binding custom in the terms which he states governing the inheritance to the three villages on the death of each successive owner: and the Commissioner's Court on appeal plainly took this view of the judgment. Their Lordships are satisfied that the alternative view suggested on behalf of the appellant is unfounded and that the decision recognizes the three villages as the property of Muqaddam Ahmad, though subject by custom to a special rule of inheritance on his death.

It appears that about this period the jagir, or right to receive the land revenue was transferred from the three villages in suit to other family property at Kot Najibullah and thenceforward Mir Ahmad was owner of the three villages subject to liability to pay land revenue, his exemption from land revenue in respect of his jagir existing in respect of the property at Kot Najibullah. There is however no question before their Lordships as to the title to the jagir. The dispute before them is confined to the question of the ownership of the three villages.

Mir Ahmad died in 1880, and his eldest son, Ghulam, who was recognized as jagirdar in respect of Kot Najibullah in his father's place, succeeded without contest to the ownership of the three villages.

Ghulam died in 1904, and his eldest son, Mir Abdullah, was recognized as jagirdar in his father's place, and he succeeded without contest to the ownership of the three villages.

In or about 1930 Mir Abdullah transferred one of the three villages to the present respondents (his two younger sons and his wife). The validity of this transfer was disputed by his grandson the present appellant, who on the 27th February, 1934, obtained from the Court of the Senior Subordinate Judge of the District a declaration that the three villages appertain to the Chiefship of the family for the time being and that the transfer was void and inoperative as against the interests of that member of the family to whom the Government should award the jagir on the death of Mir Abdullah. This judgment was affirmed on the 16th April, 1935.

This judgment is binding on the parties to the present appeal as *res judicata*, but their Lordships do not propose to examine the grounds of the decision. The question is whether the appellant can rely on that decision to support his present appeal in view of the subsequent action of the legislature.

On the 6th December, 1935, the Muslim Personal Law (Shariat) Application Act, 1935, came into force. The preamble to that Act declares it expedient to make provision for the application of Muslim Personal Law (Shariat) in the North-West Frontier Province, and sect. 2 enacts as follows:—

" 2. In questions regarding succession, special property of females, betrothal, marriage, divorce, dower, guardianship, minority, bastardy, family relations, wills, legacies, gifts or any religious usage or institution including Waqf (trust and trust property) the rule of decision shall be the Muslim Personal Law (Shariat) in cases where the parties are Muslims."

An exception follows which however was not suggested to be relevant to the present case.

After the law had been thus altered, viz. on the 8th January, 1938, Mir Abdullah died. The present appellant has been recognized by the Government as succeeding to the jagir, and it is not disputed that he has thus become Chief within the meaning of that term as used in Captain Wace's judgment of the 9th April, 1874, and no question as to the jagir or the position of the appellant as jagirdar or as Chief is before their Lordships. Nor is it disputed that if the law had remained as it stood before the enactment of the Act of 1935, the appellant as jagirdar and accordingly Chief would, in view of the previous judgments, have had a good title to the three villages, subject however to the payment of land revenue, the jagir having been transferred from the three villages to Kot Najibullah. Further it is not in dispute that if the devolution of the three villages is governed by the Muslim personal law they devolve upon the respondents to the exclusion of the appellant.

The present action was initiated by the present respondents on the 7th June, 1939. By their plaint they claim that the succession to the three villages is, by reason of the Act of 1935, governed by the Muslim personal law, and that the villages accordingly devolved upon them upon the death of Mir Abdullah. The contrary contention pleaded by the present appellant is that the Act does not govern the matter; he suggests that the three villages were not the property of Mir Abdullah, but that Mir Abdullah possessed the villages by reason of his being Chief. This contention found favour with the Senior Subordinate Judge who on the 28th November, 1939, dismissed the suit on the ground, as he states in his judgment, that the villages were not the property of Mir Abdullah, but were property appertaining to the Chiefship, and that the Chief for the time being is in the position of an amin (trustee) of the property.

The matter came on appeal to the Court of the Judicial Commissioner, and was heard by the Judicial Commissioner and Mr. Justice Kazi Mir Ahmad. The latter learned Judge delivered the judgment of the Court reversing the decision of the Subordinate Judge, and granting the plaintiffs, the present respondents, the declaration sought by them that the villages devolved upon them upon the death of Mir Abdullah. The learned Judges recognized that the rule as to the devolution of the villages laid down by Captain Wace under custom would have governed the case but for the intervention of the legislature, but they held that the Act had altered the course of succession in so far as to make the ordinary rule of the Mohammedan law applicable, and to exclude the operation of custom. Their Lordships agree with the learned Judges below that this is the clear effect of the Act. The learned Judges dealt with the suggestion that the three villages were not individual property and pointed out that there was no ground whatever to justify it. Here again their Lordships find themselves in agreement with the learned Judges below.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed and that the appellant be ordered to pay the costs of the appeal.

In the Privy Council

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SARDAR ABDUL RAHMAN KAHN

v.

SARDAR MOHD. ASHRAF KHAN  
and OTHERS

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[DELIVERED BY LORD CLAUDSON]

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