

Mohammad Din and others - - - - - Appellants

v.

Imam Din and another - - - - - Respondents

FROM

THE HIGH COURT OF JUDICATURE AT LAHORE

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 24TH JULY, 1947.

Present at the Hearing :

LORD SIMONDS
MR. M. R. JAYAKAR
SIR JOHN BEAUMONT

[*Delivered by LORD SIMONDS*]

This appeal from a judgment and decree of the High Court of Judicature at Lahore affirming a decree and judgment of the Senior Subordinate Judge at Lyallpur raises questions of some importance in regard to the powers of the executive authorities under the Colonisation of Government Lands Act of 1912.

The facts are simple and not in dispute. The lands in question in the case, which are situate in the district of Lyallpur, were at some date not made known to their Lordships granted under the Colony Act, 1893, to one Mokham on what is described as the usual colony tenancy. He died and was succeeded by a son named Jhanda who died without issue and was in turn succeeded by his mother Musammat Hayat Bibi, the widow of Mokham. At some date, which also does not clearly appear, the widow made an oral gift of the land to her son Imam Din. If she had full proprietary rights, she was competent to do so. Her competence has been challenged by the appellants all of whom are collaterals of Mokham under the circumstances which will now be stated.

On the 27th November, 1940, the widow being then the tenant of the land in dispute upon the terms of the tenancy grant applied in accordance with its conditions in the Court of the Collector Lyallpur for the acquisition of proprietary rights therein on payment of the Zar-i-Milkiat or proper purchase money. The Collector who must be regarded as having acted as a Deputy Commissioner made the order asked for and the widow paid the purchase money. The appellants, though it has not been made clear to their Lordships what right they had to be present, appear to have attended before the Collector and opposed the application. And being dissatisfied with his order they appealed to the Commissioner of Multa Division who on the 29th May, 1941, varied the order by imposing the condition that the land should not be alienated during the tenure of the widow "without the concurrence of the reversioners" i.e. the appellants. From this order the respondents in turn appealed to the Financial Commissioner of the Punjab, who on the 4th March, 1942, affirmed the Commissioner's order and rejected the appeal. He observed that the Deputy Commissioner (i.e. the Collector who acted as Deputy Commissioner) ought not to have given permission to acquire proprietary rights but he agreed with the Commissioner that, as the proprietary rights had

actually been paid for and the transaction was complete, its repudiation at that stage might involve unnecessary complications. He further said that in the grounds of appeal it had been urged that the Commissioner had acted *ultra vires* in attaching the condition in regard to alienation but that this point had not been argued before him. He thought however that as the Government was not under any obligation to grant proprietary rights it was equally competent to grant proprietary rights subject to conditions and under the Crown Lands Grants Act such conditions were binding on the grantee.

The widow having, as already stated, made a gift to her son Imam Din in the course of the proceedings, he and she on the 23rd March, 1942, commenced the suit, in which this appeal arises, in the Court of the Senior Subordinate Judge Lyallpur against the present appellants claiming a declaration that he was the full owner of the land in dispute. This claim, as already pointed out, depended for its validity upon the plea that she had full proprietary rights including an unfettered power of alienation. This could only be so if the Commissioner had no power to vary the Deputy Commissioner's order by imposing the condition already mentioned.

In the suit a number of issues were raised, but in effect only two were argued before their Lordships, viz.:—(1) whether the Civil Court had jurisdiction to try the suit and (2) whether the condition against alienation "without the concurrence of the reversioners" was *ultra vires* the Commissioner.

Their Lordships have no doubt that the Civil Court has power to entertain a suit, in which the question is whether the executive authority has acted *ultra vires*. They need do no more than refer to the recent exposition of this subject in L.R. 72 I.A. 271.

The more difficult question is that which they now proceed to discuss, whether the imposition of the condition in question was *ultra vires* the Commissioner. But before doing so, they will state the course of the suit in the Courts in India. The Subordinate Judge Lyallpur first held, and, as their Lordships think, rightly held, that the Civil Court had jurisdiction to try the suit. At a later stage after hearing evidence, to which it is not necessary to refer, he decided that no appeal lay from the order of the Deputy Commissioner to the Commissioner or the Financial Commissioner and that the condition imposed by the Commissioner and upheld by the Financial Commissioner was clearly in excess of their power and *ultra vires*. He held therefore that the widow was competent to dispose of the property and made the declaratory decree as asked.

From this decision the present appellants preferred an appeal to the High Court of Judicature at Lahore. It appears from the judgment of the learned Chief Justice of that Court that at the hearing of the appeal one point only was taken by counsel for the appellants, viz., that the Subordinate Judge was wrong in holding that no right of appeal existed from the order of the Deputy Commissioner. Upon this point the Chief Justice thought that the appeal was well-founded, holding that an appeal from an order granting permission to acquire proprietary rights lay to the superior executive officers. But he thought further that, even if such an appeal lay, the question still had to be decided whether such a condition could be imposed upon the grant of proprietary rights, and upon a consideration of the question came to the conclusion that the condition was not warranted by the Colony Act or any rules made thereunder and must be treated as void. The decision of the Subordinate Judge was therefore affirmed.

With this conclusion their Lordships agree. They have not had the advantage of seeing the original grant but assume that the Financial Commissioner was correct where he said "The Commissioner has rightly pointed out that the original grant was made on conditions that made no provision for the acquisition of proprietary rights." If so, it would seem that the effect of the Act of 1912 and the Rules issued under it by the Punjab Government under the description "Rules prescribing the conditions on which tenants holding land in the Chenab Colony under statements of conditions issued under Act III of 1893, other than tenants

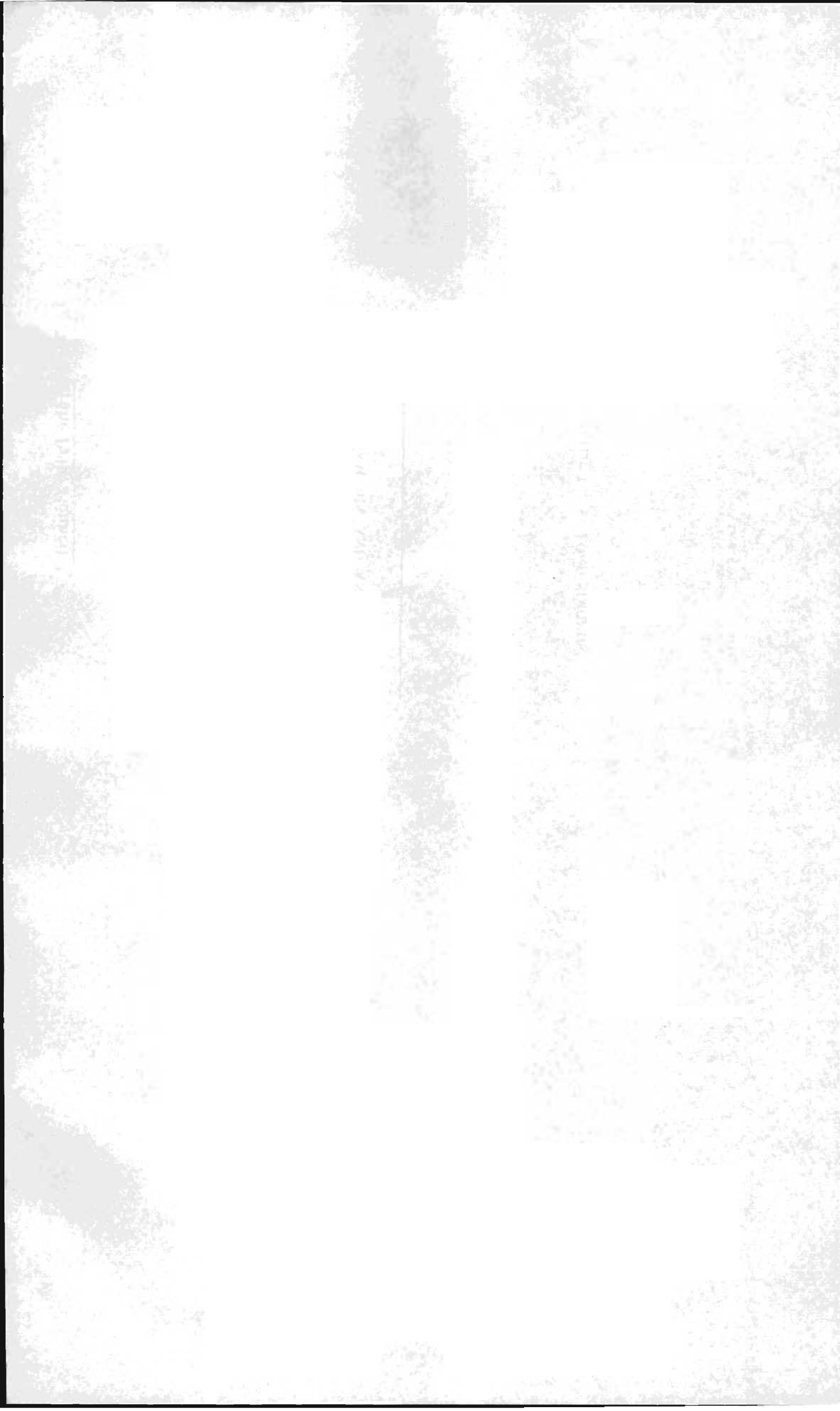
holding on service conditions, may acquire proprietary rights in their holdings" was to give to the executive officer the absolute right to grant or to refuse to grant proprietary rights to such a tenant. Their Lordships observe that Rule V of the cited Rules is in these terms: "An appeal shall lie to the Commissioner from an order of a Deputy Commissioner under these rules refusing to grant proprietary rights. All proceedings under these rules shall be subject to the control of the Financial Commissioner and the Local Government." The first part of this Rule suggests that the decision of the Deputy Commissioner is of a judicial character, and further suggests that upon the principle "*expressio unius exclusio alterius*" no appeal lies from an order of the Deputy Commissioner granting proprietary rights. But this is not easily reconcilable either with the second part of the Rule which submits all proceedings to the control of the Financial Commissioner and the Local Government or with the general executive character of the proceedings. Their Lordships do not for the reasons presently appearing think it necessary to express any final opinion upon this point. They observe however that a very good reason for giving a right of appeal, where a grant has been refused, but saying nothing about the case, in which it has not been refused, would be that the executive authority would not itself want to appeal from the grant which its own officer had made and that it was never contemplated that third parties would be cited and be concerned to appeal from any order. The conclusion cannot be avoided that in this matter the boundary, often difficult to maintain, between executive and judicial function has not been carefully observed and some confusion has resulted.

But, however this may be, the substantial question, as the Chief Justice observed, still remains, whether the executive authority could lawfully superimpose upon the grant of proprietary rights such a condition as was here imposed. Upon this question their Lordships concur in the reasoning and conclusion of the Chief Justice. They would not lay too much stress on the fact that the widow had in fact paid a purchase-price based on the acquisition of full proprietary rights whereas the result of the condition was that she got something different and less valuable. They would assume that the executive authority would not hold her to such a bargain but would, if she wished, repay her the money and restore her to her former position. The real question is whether it was competent for the executive authority under the form of granting proprietary rights to grant something very different and in fact to create an estate of a kind unknown to the law. For the result of a grant with such a condition is to deprive the grantee of proprietary rights of an essential right of property, viz., the free power of disposition, and moreover to fetter it not by an absolute bar against alienation nor by such a bar except with the consent of a particular person, but by a bar against alienation "except with the concurrence of the reversioners," a body of persons presumably altering from time to time and perhaps at no time easily ascertainable. Their Lordships do not find any justification for such a condition in the Act or any Rules that have been brought to their notice.

It was urged on behalf of the appellants that such a condition was justified by Section 3 of the Crown Grants Act (Act XV of 1895). Their Lordships will assume without deciding the question, which is at least arguable, that that Act applies to the acquisition of proprietary rights under the Colony Acts. Section 3 is undoubtedly very general in its terms. It provides that "all provisions restrictions conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect according to their tenor, any rule of law statute or enactment of the Legislature to the contrary notwithstanding." But for the reasons given by the Chief Justice this does not appear to justify a grant with such a condition imposed. For here the specific subject matter of the grant is "the proprietary rights." That and nothing else may be granted or refused. To purport to grant "proprietary rights" but to withhold an essential proprietary right, viz.: the free power of alienation, is neither the

one thing nor the other. The withholding of such a right may be referred to as a condition, but its effect, as already stated, is to create an estate unknown to the law and to grant not "proprietary rights" but something less which is not susceptible of terms of legal definition. Their Lordships think that the original grant by the Deputy Commissioner, who clearly acted within his competence, should stand and the so-called condition imposed by the superior executive authority, which was in their view incompetent, should be disregarded.

For these reasons they are of opinion that this appeal should be dismissed and they will humbly advise His Majesty accordingly. The appellants must pay the costs of this appeal.



In the Privy Council

MOHAMMAD DIN AND OTHERS

2.

IMAM DIN AND ANOTHER

DELIVERED BY LORD SIMONDS

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