PRIVY COUNCIL

Ahmad Khan

Vs.
Mt. Channi Bibi

Privy Council Appeal No. 74 of 1924
(Viscount Finlay, Sir John Edge, J. Mr.Ameer Ali and Mr. Justice Duff JJ.)

28.7.1925

JUDGMENT

MR. AMEER ALI J.

1.This appeal arises out of a suit brought by the respondent Mt. Channi Bibi in the Court of the District Judge at Attock, for the establishment of her title in respect of certain lands which she claimed by right of succession to her deceased brother Ali Waris Khan.

2. The following table will show the relationship of the parties in these proceedings.

3. Both trace their descent from one Zulfikar Khan through his son Mahmud Khan. Mahmud had two wives, named respectively Sataro and Gohar Bano. By Sataro he had three sons, respectively named Ahmad Khan, Amir Khan and Mohamed Khan. By Gohar Bano he had also three sons named Khan Mulak, Baland Khan and Hidayat Khan.

4. It is in evidence that Mohamod Khan died in 1902, leaving him surviving two widows : Mt. Ilahi Khanam and Mt. Nur Jehan. The latter died in 1905. By Ilahi Khanam, who lived until 1915, Mohamed Khan had a son, Ali Waris and a daughter, the plaintiff in this case. Ali Waris died in 1904" and the litigation relates to his inheritance.

5. The defendants are the descendants of the brothers and half-brothers of Mohamed Khan.

6. The parties belong to one of the agricultural tribes of the Punjab, called the Khattar.

7. The plaintiff whilst admitting the existence in her tribe of a custom under which a daughter or a sister is excluded in favour of collateral's from inheritance in respect of

"ancestral" property, denies its application to "self-acquired property."

8. She states that there is no special or general custom prevailing in the Khattar tribe under which collateral's like the defendants deprive a daughter or a sister of the right of succession to property acquired by the father or brother.

9. The defendants plead that by the custom prevailing in the tribe or in the family females are excluded from succession irrespective of the character of the property whether it was ancestral or self-acquired. The parties went to trial on that issue.

10. There are two properties in dispute, one called Surag Salar, the other Kharala. The Senior Sub-Judge of Attock before whom the case came for trial, found as a fact that Surag Salar was "self-acquired property" within the meaning of the custom alleged by the plaintiff, and that Kharala, save and except 416 Kanals of land, was "ancestral." But as regards the plaintiff's claim he held that she had failed for absence of specific instances to establish satisfactorily the custom under which she claimed her brother's inheritance. He accordingly dismissed her suit in respect of both the properties.

11. The High Court of Lahore, on the plaintiff's appeal, have given her a decree in respect of Surag Salar and the 416 Kanals of Kharala which appears to have been admittedly purchased by Mohamed Khan, and dismissed her suit regarding the ancestral village of Kharala.

12. The appeal to this Board is by the defendants the collateral's who claimed the succession of Ali Waris in preference to Chanui Bibi the sister.

13. The two points that have been raised before their Lordships really form the kernel of the case.

14. The first is : does Surag Salar, as has been found by the Courts in India constitute in fact "self-acquired property" within the meaning of the custom alleged? The question whether Surag Salar was the "self-acquired" property of the plaintiff's father turns upon the construction of the revenue settlement which began in 1852 and was completed in the year 1863. The settlement was in fact made with Amir Khan and Baland Khan representing the two branches of Mahmud Khan's family.

15. The settlement papers make it perfectly clear that prior to the settlement of 1863, the family of Mahmud Khan had no right in Surag Salar. That about the close of the Sikh rule his sons had forcibly ousted another family that had been settled at Surag Salar for over 40 years. As already stated they had no title in the property" they had

installed themselves there by force, and on the establishment of British rule in the Punjab, when settlement proceedings were begun, they applied for settlement with them on the strength of certain advances or payments they had made to the Sikh Government. The settlement proceedings lasted several years and concluded only in 1863.

16. In the course of the proceedings a thorough inquiry was made as to title and possession. In the Punjab the Settlement Officer in the early days of British rule combined in his person both judicial and administrative functions. He had to investigate into the actual conditions of the occupation of lands in respect of which the settlement proceedings were instituted and to give effect to ascertained facts in accordance with the result of his enquiry whether the occupation was by virtue of any right or title. There can hardly be any dispute that whilst the settlement proceedings were proceeding Mahmud Khan had died, for the settlement was made with his sons. Before the Settlement Officer there were two parties arrayed against each other as claimants to the property of Surag Salar. Ghazan Khan represented the family which had been in possession of Surag Salar for over 40 years. They were placed in the category of plaintiffs : whilst Amir Khan and Baland Khan representing the family of Mahmud Khan were the defendants. Both belonged to the tribe of Khattar.

17. It is not necessary in this judgment to refer in detail to the proceedings which culminated in the settlement" it is enough to state the result of the enquiry embodied in Robakar Ex. F. 7. It runs thus :-

> "There is no doubt that the village ori ginally belonged to the plaintiffs. The defendants' possession is of 22 years standing. The defendants suffered a loss of thousands of rupees. If they had not made the village abaci, it would have been totally ruined. Now the point for determination is whether the plaintiff's suit is entertainable or not owing to their ejectment which took place 22 years ago. So it is clear that the plaintiff's suit has been pending since 1852, i.e., for the last 11 years. In other words, the defendants' possession in considered to have existed since 11 years before the institution of the suit. The period is a period during which such a suit is cognisable. It is less than 12 years. Under these circumstances, the plaintiffs suit is cognisable. The plaintiffs are original proprietors of the village. As a matter of fact the defendants have no concern with the inheritance. The plea of the defendants that they purchased the village is worthless. They produce a sale-deed which is also worthless because they previously made no mention of the sale, nor is there any proof in respect

thereof, nor yet as to their possession before Sam bat 1898. The plaintiffs were continuously in proprietary possession before the said Sambat. The opinion of Munshi Hukam Chand, Extra Assistant Commissioner, is that either Rs. 10 per cent. should be fixed for the plaintiffs as taluqdari dues or the village held the parties' property in equal half shares."

"It is, therefore, ordered that the cultivated land of one-half of the village be considered as the property of Plaintiff No. 1 and that of the other half as the property of the defendants. The objection raised by Plaintiff No. 2 as to two wells, that they were separately sunk by the plaintiffs, and that they should be given to them or to Plaintiff No. 1, is worthless, because, if the defendants had not made them abad, while they were in possession (of the village), they would have totally been ruined and useless. They are in working order. They should, therefore, remain the property of Plaintiff No. 1 and the defendants in equal half-shares."

18. Again, the proceedings before the Court of the Settlement Officer (Ex. P. 8) are instructive:

"The plaintiff's ancestors again made the village abad after it had become desolate. They are, therefore, considered owners. Only the defendants' possession, which is of 20 years standing" is to be taken into consideration. But it is not worth consideration, because the plaintiff's suit has been pending since the beginning of the British rule. An appeal was filed therein in the Commissioner's Court which remanded the case to the District Court for further enquiry which was made in this case. Under these circumstances, the ejectment for 12 years during the British rule is not worth consideration, because if a complete enquiry had been made at that time, the plaintiffs would have got their right. The defendants' possession is considered to have existed since 8 years before the British rule. The Extra Assistant Commissioner has made two proposals to me. One of them is that the plaintiffs should get Rs. 10 per cent. as taluqdari dues. Under the above circumstances, I consider the plaintiffs' right to be superior thinking that the defendants had been in actual possession since 8 years before the British rule. The other proposal of the Extra Assistant Commissioner is that, in view of the fact that the defendants shared profit and loss, the village should be given to both the parties in equal half-shares."

19. The final decision of the Settlement Officer concerning the half-share settled with Mahmud's family is contained in Ex. D-39, as follows :

"The proprietors descended from Zulfikar Khan and Fateh Khan will collect the produce of the entire land cultivated by them and by the tenants, distribute it among themselves according to the shares shown in the Khewat papers, and pay the Government revenue according to ancestral shares in addition to Rs. 17 per cent. on account of ceases as under."

20. In their Lordships' judgment, the Settlement Officer, having regard to the conflicting claims of the plaintiff's on one side and of the defendants on the other, made an equitable division of the property between the two sets of claimants. The plaintiff's (Ghazan's people) had the original title by long occupation" the defendants had ousted them to a considerable extent and had undertaken some liabilities in respect of the payment of revenue, etc. The Settlement Officer, therefore, came to the conclusion that it would be equitable to settle half of the lands with the descendants of Khazan Khan who were the plain tiffs in the proceedings, and give the other half to the descendants of Zulfikar Khan. Surag Salar was thus in no sense ancestral property" it had not been acquired by their ancestor Zulfikar or Mahmud Khan and handed down to their successors. The settlement was effected in fact with Amir Khan and Baland Khan as representing the family of Zulfikar Khan and the title of proprietors was declared to be with them for the family. The direction contained in document D. 39, page 180, shows the character of the settlement with the defendants' family.

21. Their Lordships are clearly of opinion that the judgment of the Subordinate Judge and of the learned Judges of the High Court with regard to Surag Salar is right.

22. As regards the custom in respect of which the two Courts in India have differed, their Lordships think the Sub ordinate Judge was in error in putting aside the large body of evidence on the plaintiff's side merely on the ground that specific instances had not been proved. They are of opinion that the learned Judges of the High Court are right in holding that a custom of the kind alleged in this case may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognisant of its existence and its exercise without controversy.

23. There is a large body of oral evidence establishing the custom, wholly unrebutted by the defendants who have relied exclusively on the Riwaj-i-Aam. The Judges of the High Court have commented on these documents, and their Lordships see no reason to differ from them.

24. The Judges of the High Court have referred to the evidence of Sirdar Mohammed

Hyat Khan, a distinguished officer of the Government, which, if admissible, would be conclusive in the case" but it is urged by the appellants' counsel that it cannot be put in evidence as it is not in compliance with the requirements of the Indian Evidence Act I of 1872. Their Lordships are not prepared to say that in the circumstances of the case it was erroneously admitted : but assuming it is inadmissible it forms only one item in the mass of evidence on which the plaintiff relied and which has been thoroughly examined by the High Court.

25. On the whole, their Lordships are of opinion that this appeal should be dis missed and they will humbly advise His Majesty accordingly. The appellants will pay to the respondent the costs.

Appeal dismissed.