

PRIVY COUNCIL

Jagdish Narain

Vs.

Nawab Said Ahmed Khan

P.C.A.No.72 of 1944

(Lord Thankerton, Lord Goddard and Sir John Beaumont JJ.)

12.12.1945

JUDGMENT

SIR JOHN BEAUMONT J.

1. This is an appeal from the judgment and decree of the High Court of Allahabad dated 29th April 1941, which modified a decree of the Subordinate Judge of Bareilly dated 2nd June 1936.
2. The plaintiffs (who are respondents in this appeal) claimed possession of two-third parts of Muafi property situate in Mauza Bahra Bikram. Their case was that on 8th January 1842, the Government made a grant of the lands in suit in favour of the heirs of Ahmad Khan, who had married Sayara Begum the daughter of Nawab Hafiz Rahmat Khan, who had rendered valuable services to the Government which the Government were minded to reward. The plaintiff alleged that the grant was made enjoyable in perpetuity generation after generation for the maintenance and help of the heirs of Ahmad Khan, and that each heir was to hold for life only and on the death of an heir the next heir of Ahmad Khan was to take as such heir and not as heir of his predecessor. The plaintiff further alleged that Ahmad Khan had no male or female issue, and that after his death Mt. Mohammadi Begum was his heir according to Muhammadan law and entered into possession of his estate.
3. In the written statement of the several defendants the title of the plaintiffs was denied, and it was alleged that Saraya Begum, the widow of Ahmad Khan, was the absolute owner of the property in suit, and that in 1841 she made a gift of the property to Mohammadi Begum; that in 1854 Mohammadi Begum mortgaged the property, and in 1856 it was sold by the Court in a suit instituted by the mortgagee and was purchased by the predecessors in title of the defendants, and that the defendants and

their predecessors have been in possession of the property ever since.

4. Both Courts in India held that the tenure of the land in suit was as claimed by the plaintiffs, and that each heir of Ahmad Khan held the property for life and on his death the next heir took. These findings have not been challenged before their Lordships, and it follows from such findings that limitation would start to run against an heir from the date when his title accrued on the death of the previous heir.

5. The Subordinate Judge held that the plaintiffs had proved that they were the heirs of Mohammadi Begum, but that they had not proved that Mohammadi Begum was the heir of Ahmad Khan, and accordingly dismissed the suit.

6. In appeal the High Court agreed with all the findings of the lower Court except with regard to the heirship of Mohammadi Begum. The Court held that Sayara Begum, as widow of Ahmad Khan, was one of his heirs according to Muhammadan law and inherited one-fourth of his property, and that it was not proved that Mohammadi Begum was the heir of Sayara Begum; but the Court held it proved that Mohammadi Begum was the heir of Ahmad Khan as to the remaining three-fourths of his property and accordingly they decreed the plaintiffs' suit as to three-fourths of the two-thirds of the property claimed.

7. The Subordinate Judge had held that the case of the plaintiffs failed because they had not proved that there were no male collaterals in the male line of descent or ascent of Ahmad Khan, or of his father, alive at the death of Ahmad Khan and that, as such male collaterals would succeed as heirs according to Muhammadan law in preference to Mohammadi Begum, the plaintiffs had failed to discharge the burden which rested upon them of proving their title. The High Court held that this defect in the title of the plaintiffs had not been pleaded by the defendants, and expressed the view that the Subordinate Judge had made out a case for the defendants which was not foreshadowed in the written statements and was not set up at the trial. Their Lordships are quite unable to agree with the High Court in this view. The plaintiffs were suing in ejectment, and they could only succeed on the strength of their own title. There was no obligation upon the defendants to plead possible defects in the plaintiffs' title which might manifest themselves when the title was disclosed. It was sufficient that in the written statements the defendants denied the plaintiffs' title, and under this plea they could avail themselves of any defect which such title disclosed.

8. The following pedigree which was handed in by counsel for the defendants and admitted by counsel for the plaintiffs, and which is substantially the pedigree proved

at the trial, shows the position of the family of Ahmad Khan :

PEDIGREE PUT FORWARD BY PLAINTIFFS Malik Said Khan Nawab Hafiz Rahmat Khan Malik Mohammad Khan Malik Ahmad Khan = Mt. Saira Nawab Mohammad D. about 1842. Begum D. 1845. Umar Khan (In fact died before 4th January 1842). Ahya Khan Ghulam Husain Ghulam Malik Mohammad Ali (Unmarried) Khan (Unmarried) Mohammad Khan predeceased Khan Malik Ahmad Khan Mt. Mohammadi = Nawab Begum D. 1882. Mohammad Khan Fazal-un-Nissa = Nawab Ali Mohammad Khan D. 1894. Mt. Munawwar-un-Nissa Nawab Ali Ahmed = Mt. Mohabbat-un- Begum, alive Khan, D. 6-1-23. Nissa Begum Mt. Shaukat Jahan Nawab Nabi Ahmad Nawab Wali Ahmed Khan, Plaintiff 1 Begum, Plaintiff 3 Khan, Plaintiff 2 (D. 21-5-37, now represented by Respondent 6. Respondent 5. respondents 1-4). Said Ahmad Khan, Respondent 1.

9. It will be observed that Ahmad Khan died about 1842, and his widow died in 1845. Mohammadi Begum was the daughter of one of the four sons of the only brother of Ahmad Khan, so that she was a great-niece of Ahmad Khan. It is in evidence that she was also the informally adopted daughter of Ahmad Khan and his wife. It will further be observed that Mohammadi Begum died in 1882 and that her only son died in 1894 leaving a son and daughter. The daughter, who inherited one-third of her father's property, is not a party to these proceedings. The son, who inherited two thirds of the property, died in 1928 and the original plaintiffs were his children; they filed their suit in 1934, 11 years and 11 months after the death of their father and so just within the period of limitation. The findings of the lower Courts that the plaintiffs were the heirs of Mohammadi Begum as to two-thirds of her property has not been challenged before their Lordships, and the only question which arises for decision is that upon which the Courts in India differed, namely, whether Mohammadi Begum was the heir of Ahmad Khan.

10. The plaintiffs called two witnesses who gave verbal evidence upon the question. Witness 1 was Said Ahmad Khan (respondent 1 who was the son of the original plaintiff 1). He stated that his information about the earlier history of the family was derived from his paternal grandfather who, as stated, had died in 1923. The grandfather can have had no personal knowledge of matters which occurred in 1842 and, as the source of his information as to matters which occurred before his birth or in early youth were not disclosed, his statement, which is admissible under section 32, Evidence Act, has little evidential value. Said Ahmad Khan alleged that the father of

Mohammadi Begum died during the lifetime of Ahmad Khan and the learned Subordinate Judge found that in that event Mohammadi Begum could inherit as heir of Ahmad Khan only if there were no male collaterals in the male line of descent or ascent of Ahmad Khan, or his father Said Khan, alive at the time of Ahmad Khan's death. This finding has not been challenged. The witness further stated that he did not know whether the father of Ahmad Khan had any, and if so how many, brothers. Witness 2 called by the plaintiffs was Basityar Khan who also stated that he did not know if Said Khan had any brother. This witness stated that he had seen a written pedigree of the family which was not produced, and this omission detracts from any value which might otherwise attach to his evidence. Their Lordships agree with the view of the learned Subordinate Judge that the verbal evidence produced by the plaintiff does not prove that Mohammadi Begum was an heiress of Ahmad Khan under Muhammadan law.

11. In addition to verbal evidence the plaintiffs also relied on certain documentary evidence, and the High Court attached great importance to one document which will be referred to later. Most of the documents produced were relevant on the question of tenure which is not now in question, and these documents need not be noticed. It may, however, be observed that Ex. "A," which is an extract from the Register re-transfer of Muafi lands, contains an entry of a deed of gift made on 4th January 1842, by Mt. Sayara Begum, wife of Ahmad Khan, in favour of Mohammadi Begum described as a daughter of the donor of Muafi land in Mauza Bahra. This suggests that the original possession of Mohammadi Begum was under the deed of gift, though from the terms of the tenure as defined by Government on 8th January 1842 (Ex. 14), it follows that Mohammadi Begum's title as donee would terminate on the death of Sayara in 1845. The document on which the High Court strongly relied in proof of the heirship of Mohammadi Begum is Ex. 22. This purports, to be a copy of an extract from a report regarding Muafi lands under an order dated 9th January 1882, taken from the record of Case No. 53/11, relating to enquiry and management of the muafi of Hafiz Rahmat Khan, disposed of on 29th September 1882. It relates to the jagir of Pilibhit and states:

"This Jagir belongs to Ahmad Khan. Mohammadi Begum, heir, came in possession. She sold it to the Nawab Saheb Bahadur of Rampur. The vendee is in possession by virtue of the purchase and Mohammadi Begum is a resident of mohalla Qela in Bareilly."

12. The author of the report is not shown, and the order of 9th January 1882, under which it purports to have been made, is not on the record. There is, however, a copy

order, Ex. 21, in case No. 68 directing the record-keeper with reference to the muafi register to make a note against every tract of land, showing whether the tract was then held as muafi or not, and directing that if it was held as muafi it should be ascertained whether the lawful heirs of the persons in whose name it was released were alive or not. On the assumption that the order of 9th January 1882, was in similar terms the important point to which the enquiry was to be directed was whether the heir was alive. No doubt, in case of disputed heirship this would involve an enquiry as to who was the heir, but any such enquiry would involve giving notice to possible claimants so that their case might be adjudicated upon. There is nothing to show that any such notice was given or that any enquiry as to who was the heir of Ahmad Khan was conducted by the officer who made the report. It may well be that, finding that Mohammadi Begum was a member of the family of Ahmad Khan and had been in possession for 40 years, the officer assumed her title as heir. The omission from the report of any reference to Sayara Begum who was certainly one of the heirs of Ahmad Khan, or to the deed of gift in favour of Mohammadi Begum, supports the view that no real enquiry was made as to Mohammadi Begum's title as heir. The report does not deal with the property in suit, though the property with which it does deal was probably held on a similar tenure. Their Lordships are unable to attach to the reference in this report to Mohammadi Begum as heir the importance which the High Court attached to it.

13. It was argued for the respondents that at this distance of time reasonable inferences should be drawn in favour of the plaintiffs and that to require them to eliminate from their pedigree possible heirs whose very existence is not proved is to impose an impossible burden upon them. But it must be remembered that though lapse of time may have prejudiced the chances of the plaintiffs in proving their case, it may well also have prejudiced the defendants in resisting the claim, and the lapse of time is certainly not due to any default on the part of the defendants or their predecessors. The respondents are not so free from criticism. The son of Mohammadi Begum made no effort to support his claim during the 12 years in which he survived her, and his son did nothing during the 29 years in which he survived his father, and the plaintiffs themselves did nothing until the expiration of nearly 12 years from the date when their alleged title accrued. Their Lordships see nothing in the circumstances of the case which would justify drawing any inference which might relieve the respondents of any part of the burden of proving their title. It was argued further that since Mohammadi Begum was left in possession after the death of Sayara Begum when her title as donee terminated, she must be assumed to have remained in possession as heir, and that the

fact that no claim was made by any collateral male heir should lead to an inference that no such collateral male heir existed. Their Lordships are unable to accept this argument. It is quite possible that a collateral male heir, not being a member of the immediate family of Ahmad Khan, may have known of the deed of gift in favour of Mohammadi Begum, and may not have known of the terms upon which the muafi lands of Ahmad Khan were held under Government grant.

14. In their Lordships' view the finding of the learned Subordinate Judge that the plaintiffs had failed to prove that Mohammadi Begum was an heir of Ahmad Khan was right. Their Lordships will, therefore, humbly advise His Majesty that this appeal, be allowed, that the judgment and decree of the High Court be set aside and the judgment of the Subordinate Court dismissing the plaintiffs' suit with costs be restored. The plaintiffs must pay the costs of the appeal to the High Court and to His Majesty in Council.

Appeal allowed.