

*Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Muhammad Ismail Khan v. Mussamats Fidayat-ul-Nissa and others from the High Court of Judicature at Allahabad, North-Western Provinces of India; delivered February 10th, 1886.*

Present :

LORD BLACKBURN.

LORD MONKSWELL.

LORD HOBHOUSE.

SIR RICHARD COUCH.

THE Appellant in this case is the only surviving son of Ghulam Ghaus Khan, who died on the 6th of November 1879, and the Respondents are his three daughters who it is not disputed were legitimate. The suit was brought by the three Respondents, together with one Nanhi Begum, who was alleged to be a wife of Ghulam Ghaus Khan, and her children, who were alleged to be legitimate. It has been found by the High Court that Nanhi Begum was not the wife of Ghulam Ghaus Khan, and that her children were illegitimate, and there is no question as to them in this Appeal.

The plaintiff claimed on the part of the Plaintiffs that they were entitled to 82 parts of the estate of the deceased, the whole being divided into 96 parts, that being the shares which they would be entitled to under the Mahomedan law supposing all were entitled. The Subordinate Judge gave a decree in favour of all the Plaintiffs for the 82 parts. The only part of the defence set up by the present Appellant which it is now material to consider was that there was a family custom

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by which the eldest son was entitled to succeed to the whole of the property of the deceased. The Subordinate Judge found that this custom was not proved. The present Appellant, who was Defendant, appealed to the High Court. The High Court coming to the conclusion that Nanhi Begum and her children were not entitled to any share of the property, modified the decree of the lower Court and made a decree in favour of the Appellant and the three Respondents, dividing the property, as it then became necessary to do, in a different way. The property was divided into 35 parts, and 21 of these were given to the Respondents, the Plaintiffs, and the remainder to the present Appellant, the Defendant, the property being divided according to the Mahomedan law. The High Court also found, as the Subordinate Judge had found, that the family custom had not been proved.

The Defendant has appealed to Her Majesty in Council, and the ground of appeal taken is that the High Court was wrong in finding that the custom was not proved. Objections have been taken to the Judgement of that Court, but when they are examined they appear to their Lordships to amount only to this, that they contest the propriety of the finding of the Court on the construction of the evidence. The principal argument turns upon the contents of what is called a *Wajib-ul-arz*, which does not appear properly to be a document entitled to that name, but rather a document in the nature of an administration or testamentary paper by which Ghulam Ghaus Khan indicated the way in which he should like the property to be enjoyed after his death. It seems to be rather an attempt on his part to make a disposition of his property contrary to the Mahomedan law.

The case appears to their Lordships to come within the rule that when there is a concurrent

Judgement of the two lower Courts upon a question of fact, it ought not to be disturbed ; and their Lordships will therefore humbly advise Her Majesty to dismiss the Appeal and affirm the decision of the High Court. There will be no order as to costs.

