

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Muhammad Umar Khan, since deceased (now represented by Muhammad Fakhar Din Khan) and another, v. Muhammad Niaz-uddin Khan, from the Chief Court of the Punjab ; delivered the 14th December 1911.

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD ROBSON.

SIR JOHN EDGE.

MR. AMEER ALI.

[DELIVERED BY SIR JOHN EDGE.]

This is an Appeal from the Decree of the Chief Court of the Punjab, dated the 18th of April 1906, reversing the Decree of the District Judge of Jullundur, dated the 13th of January 1902, which had decreed the Plaintiff's claim.

The Plaintiffs brought this suit on the 11th of May 1900 to obtain possession of certain immovable property, lands and houses, in Basti Danishmandan, in the Punjab, which they claimed as their ancestral property. In their plaint they alleged that the property in question had been held for her life by Mussammat Zainab, by virtue of a gift made to her by her father Sarfraz Khan, an uncle of the Plaintiffs, and that on her death on the 4th of May 1899 the right of inheritance in the property devolved upon them as reversionary heirs. They also alleged in their plaint that Mussammat Zainab had not,

in fact, transferred the property to the Defendant, and that if she had transferred the property to him such transfer was, by law, according to the custom of the tribe to which the parties belong, and the *Riwaj-i-Am*, null and void as against the Plaintiffs as reversionary heirs.

The Defendant by his pleadings alleged title as owner in himself by gift from Mussammat Zainab, alleged that Mussammat Zainab was entitled to the full estate in the property in question, and not merely to an estate for her life, denied that the Plaintiffs had any right to the estate, denied that the property was ancestral, denied that any law or tribal custom existed which made the gift to the Defendant unlawful or void, and amongst other things alleged that he had been adopted as her son by Mussammat Zainab.

The parties to the suit are Sheikh Ansaris of a Pathan tribe of Punjab Muhammadans. The Defendant is in possession of the property in dispute under a gift from Mussammat Zainab made to him in her lifetime. The Plaintiffs' case, the only case on which they could have succeeded, is that, according to a custom which they alleged to be existing and binding in their family, no woman could take by gift more than a mere interest for her life without any power of alienation in any ancestral property of the family, and consequently that the gift by Mussammat Zainab to the Defendant was void. Many issues, some of which, in the view which their Lordships take of this case, were immaterial or irrelevant, were raised by the parties, and much evidence was recorded. The District Judge of Jullundur gave the Plaintiffs a Decree for possession. From that Decree the Defendant appealed to the Chief Court of the Punjab. The Judges in the Chief Court mainly directed their attention to a question of acquiescence, which their Lordships consider did not arise on the facts, and to the

alleged adoption of the Defendant by Mussammat Zainab, which was an immaterial issue, and having apparently, although somewhat uncertainly, found that Mussammat Zainab had adopted the Defendant, they applied Article 118 of the Second Schedule of the Indian Limitation Act, 1877, to the case, allowed the Appeal, and dismissed the Suit with costs.

Although their Lordships consider that the question of an adoption was an immaterial issue, they think it advisable to say that the omission to bring within the period prescribed by Article 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact, took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakur Tirbhurwan Bahadur Singh v. Raja Rameshar Bakhsh Singh* (33 I. A. 156). Under the general Muhammadan law an adoption cannot be made; an adoption, if made in fact by a Muhammadan, could carry with it no right of inheritance.

It may be further observed that, even if an adoption by a Muhammadan was permissible by any valid custom in the Punjab, the Chief Court found that it had not been proved that the parties to the suit belonged to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply.

In order to understand the material evidence in this case it is necessary to refer to the pedigree of the Plaintiffs. Muhammad Ali Sher, the common ancestor of the Plaintiffs and Mussammat Zainab, had three sons, one of whom, Jehangir Khan, had by his wife, Mussammat Fatima, a daughter, Mussammat Maryam, who married her cousin, Sarfraz Khan. Alamgir, another son of Muhammad Ali Sher, had three sons, one of whom was Sarfraz Khan, who married his cousin Mussammat Maryam; another son of Alamgir was

Shahbaz Khan ; and the other son of Alamgir was Siraj-ud-Din, otherwise called Sheraz-ud-Din Khan, who was the father of the Plaintiffs. Another son of Muhammad Ali Sher was Sarwar Khan, who had two sons, one of whom was Muhammad Said ; the other son of Sarwar Khan was Muhammad Bahadur Khan. Sarfraz Khan had by his wife Mussammat Maryam, a daughter Mussammat Zainab, who married Ghulam Mohy-ud-Din *alias* Baghe Khan. The Defendant is a son of Jamal-ud-Din, who was a son of a sister of Sarfraz Khan. Jamal-ud-Din Khan was a brother of Mohy-ud-Din *alias* Baghe Khan.

On the 3rd Ramzan 1248 A.H., Jehangir Khan, by his deed of gift, gave to his daughter Mussammat Maryam, wife of Sarfraz Khan, absolutely all his one-third share of the property of his ancestors which had fallen to his lot according to law, in lieu of the dower of her mother Mussammat Fatima. Mussammat Maryam obtained possession of the property which had been given to her by her father Jehangir Khan, and remained in possession for 15 years, when she gave that property to her husband Sarfraz Khan, who took possession on her death. Mussammat Maryam died in 1846 or 1847. After her death Sarfraz Khan's right to the possession of the property which had come to him from Mussammat Maryam was challenged by Muhammad Said Khan and Muhammad Bahadur Khan, sons of Sarwar Khan, and Sheraz-ud-Din Khan, the father of the Plaintiffs, who contested the alienation to Sarfraz Khan, alleging that by custom daughters had no right of succession. Sarfraz Khan brought a suit for maintenance of possession in the Court of the Deputy Collector against Muhammad Bahadur Khan, Muhammad Said Khan, and Sheraz-ud-Din. In that case Sheraz-ud-Din Shahbaz Khan, and Muhammad Bahadur Khan, proved that Mussammat Maryam had been

in possession of the property, and had, through the agency of her husband Sarfraz Khan and his brother Sheraz-ud-Din, received the rents of the land together with zamindari dues, and had paid the Government revenue. In that case Muhammad Said Khan testified to the facts of the gift and delivery of possession to Mussammat Maryam, and Sheraz-ud-Din admitted that a deed of gift had been executed and that possession had been delivered to Mussammat Maryam. Several other witnesses, including the marginal witnesses to the deed of gift, proved that the property had remained in the possession of Mussammat Maryam for her lifetime, and had, after her death, passed to Sarfraz Khan, her husband. On the 16th of May 1849 the Deputy Collector ordered that a decree for Sarfraz Khan's claim be passed to the effect that Sarfraz Khan should retain possession of the land then in suit. From that order of the Deputy Collector Muhammad Bahadur Khan appealed to the Settlement Officer, who, on the 3rd of August 1849, dismissed the Appeal, holding that the inquiry before the Deputy Collector had established Sarfraz Khan's possession, occupation of, and title to the land, and that if Muhammad Bahadur Khan had any claim to the land he was at liberty to lodge a suit in a Civil Court. No suit was brought in a Civil Court to contest the right or title of Sarfraz Khan to the land which had come to him from Mussammat Maryam. The facts above referred to afford, in their Lordship's opinion, strong evidence that there was no custom applying to this family which limited the estate in ancestral lands which came to a daughter by gift to a mere life estate, and which prevented a daughter alienating such lands by gift in her life time.

On the 15th of December 1851 Sarfraz Khan, who was then in possession of the lands which had come to him by gift from his wife Mussammat Maryam, and was also in possession

of his own third share of three shares in the ancestral property which had come to him by lot according to law, made a deed of gift by which he gave to his daughter Mussammat Zainab absolutely his entire property of every kind, and gave her possession. To that deed Shahbaz Khan, son of Alamgir, was one of the witnesses. Sarfraz Khan died on the 10th of May 1852, and on that day the Patwari of Basti Danishmandan, on enquiry of Mussammat Zainab, was directed by her to enter the entire share of Sarfraz Khan, which had come to her, in the official papers in the name of her husband Ghulam Mohy-ud-Din, whose name was accordingly entered on the 10th of May 1852. In or about 1859 Muhammad Bahadur Khan and Muhammad Said Khan brought a suit in the Revenue Court of the extra Assistant Commissioner of Jullundur against Ghulam Mohy-ud-Din, in which they claimed possession of the lands which had come through Mussammat Maryam and Sarfraz Khan to Mussammat Zainab. The Plaintiffs in that suit alleged that Sarfraz Khan had not executed the deed of gift in favour of Mussammat Zainab ; that the property in suit could not have passed through his wife Mussammat Zainab to Ghulam Mohy-ud-Din, and that as Sarfraz Khan had died without a son the property had vested in them, Muhammad Bahadur Khan and Muhammad Said. In that suit the Patwari of Basti Danishmandan was examined as a witness, and in reply to the question—“ In Basti Danishmandan what custom “ prevails in respect of an estate left by a sonless “ proprietor? ” said—

“ The following custom prevails :—The estate of a proprietor dying childless goes to his daughters. Should he “ make a gift of his property during his lifetime in favour “ of his daughters, they succeed to their father’s estate. If “ he does not make a gift in favour of his daughters during “ his lifetime, his brothers and brothers’ sons succeed to his “ estate.”

Ghulam Mohy-ud-Din gave evidence in that suit; he claimed no title in himself; he said that his wife Mussammat Zainab was the proprietor, and that she had full authority to have her own name inserted in the official papers or to allow the entry in his name to stand. Many other witnesses were examined in that suit, and on the 25th of June 1859 the extra Assistant Commissioner of Jullundur dismissed the suit. From that order dismissing the suit Muhammad Siraj-ud-Din (Sheraz-ud-Din Khan), who had apparently come into the suit as a Plaintiff, Muhammad Bahadur Khan, and Muhammad Said Khan, appealed to the Deputy Commissioner, who on the 31st of December 1859 rejected the appeal, but holding that as Mussammat Zainab alone was the proprietor, directed that her name should be entered in the column of owners. From the order rejecting their appeal Muhammad Siraj-ud-Din (Sheraz-ud-Din Khan), Muhammad Bahadur Khan, and Muhammad Said Khan, appealed to the Commissioner of Jullundur, who on the 25th of February 1860 dismissed their appeal.

On the 6th of May 1887 Baghe Khan (Ghulam Mohy-ud-Din) executed a deed in which he stated that he had adopted Niaz-ud-Din when he was two years old and that he and his wife had brought him up. Niaz-ud-Din, who is mentioned in the deed, is Muhammad Niaz-ud-Din Khan the Defendant in this suit.

On the 22nd of May 1888 Ghulam Mohy-ud-Din Khan and his wife Mussammat Zainab executed a deed of settlement by which Ghulam Mohy-ud-Din gave certain property of his in Basti Danishmandan, which is not in dispute in this suit, to Muhammad Niaz-ud-Din Khan, and Mussammat Zainab gave to Niaz-ud-Din Khan the property which is in dispute in this suit. In that deed it is stated that Muhammad Niaz-ud-

Din Khan had been placed in possession. An application was made to enter the name of the Defendant Muhammad Niaz-ud-Din Khan in the column of proprietors in respect of the property in dispute in this suit, and Mussammat Zainab having stated to the Tahsildar that Muhammad Niaz-ud-Din Khan was in possession, and no objector appearing, the Tahsildar sanctioned the mutation of names, and the name of Muhammad Niaz-ud-Din Khan was accordingly entered in the column of proprietors.

In 1895 and 1896 the principal lands which had been held in unpartitioned shares by Muhammad Niaz-ud-Din Khan, Muhammad Umar Khan, and Muhammad Pirdad Khan, were by agreement between them partitioned, each having allotted to him lands which represented his share. Muhammad Niaz-ud-Din's shares in the partition represented shares which had come to him by the gift of Mussammat Zainab. Mussammat Zainab was then alive; she died on the 4th of May 1899.

Their Lordships consider that these partition proceedings between Muhammad Umar Khan, Muhammad Pirdad Khan, and Muhammad Niaz-ud-Din Khan, who were the original parties to this suit, afford very strong evidence in favour of Muhammad Niaz-ud-Din, who is the Defendant in the suit, and Respondent in this Appeal. The evidence which was given on behalf of the Plaintiffs to prove that a custom existed and applied to this family, by which a female could take only a life interest in the ancestral property which had come to her by gift from her sonless father, and had in such property no power to alienate it by a gift in her life-time, was of the most shadowy description and failed to prove the custom alleged by them. Evidence as to the limited rights by custom of a widow in her deceased husband's property was not evidence

from which the custom alleged by the Plaintiffs in this suit could be inferred. Nor was evidence that a Muhammadan father had been prevented by some local custom from giving the bulk of his property to one of his sons, evidence which had any bearing on the issue in this case. The evidence, to which reference has been made by their Lordships, relating to the devolution of Jehangir Khan's share to Mussammat Zainab, is entirely inconsistent with the existence of the custom which has been alleged by the Plaintiffs.

Their Lordships find that not only have the Plaintiffs failed to prove the custom alleged by them, but the alleged custom has been disproved. They also find that Mussammat Zainab had a full proprietary estate in the property in dispute, and that she made a valid gift of that property to the Defendant.

Their Lordships will humbly advise His Majesty that the Decree of the Chief Court of the Punjab dismissing the suit of the Plaintiffs should be affirmed and this Appeal be dismissed with costs.

In the Privy Council.

MUHAMMAD UMAR KHAN, SINCE
DECEASED (NOW REPRESENTED
BY MUHAMMAD FAKHAR DIN
KHAN), AND ANOTHER

v.

MUHAMMAD NIAZ-UD-DIN KHAN.

DELIVERED BY SIR JOHN EDGE.

LONDON :

PRINTED BY EYRE AND SPOTTISWOODE, LTD.,
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1911.