Privy Council Appeal No. 4 of 1933.
Oudh Appeal No. 11 of 1930.

Ejaz Ali Qidwai and others - - - - - - - *Appellants*

v.

The Special Manager, Court of Wards, Balrampur Estate, and others - - - - - - - - *Respondents*

FROM

THE CHIEF COURT OF OUDH AT LUCKNOW.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH DECEMBER, 1934.

Present at the Hearing:

LORD ATKIN.
LORD ALNESS.
SIR SHADI LAL.

[*Delivered by* SIR SHADI LAL.]

On the 29th October, 1914, one Asghar Ali and his cousin Muzaffar Ali granted a mortgage by conditional sale of the entire estate of Ambhapur, popularly known as the *taluqa* of Gandara, and of certain other villages, to the then Maharaja of Balrampur for Rs. 926,000. The mortgaged property was situate in the District of Bahraich in the Province of Oudh, and was fully described in a schedule attached to the instrument of mortgage. Asghar Ali died in January, 1915, and his eldest son Iqbal Ali with Muzaffar Ali created in favour of the mortgagee, on the 10th August, 1915, a further charge on the same property for the sum of Rs. 216,425. The mortgagee brought an action to enforce his rights under both the deeds, and obtained, on the 20th February, 1922, a final decree for foreclosure. In execution of that decree he got possession of the property in April, 1922.

Thereupon the sons of Asghar Ali, other than Iqbal Ali, commenced the present action for the recovery of their share of the mortgaged property on the ground that it was the absolute property of their father, and that on his death it devolved on all

the persons who were his heirs under the Mahommedan law. They challenged Iqbal Ali's right to mortgage the whole of the estate, and impeached the mortgage transactions on various other grounds. The widow and the daughters of Asghar Ali were impleaded as *pro forma* defendants to the action, but the Court subsequently allowed them to be added as co-plaintiffs, with the result that the property sought to be recovered amounted to 8/9ths of the mortgaged estate, the remaining 1/9th being the share of Iqbal Ali. The claim was resisted mainly on the ground that the succession to the estate was governed by the rule of primogeniture: and that, according to that rule, the whole of the estate descended, first to Asghar Ali, and, after his death, to his eldest son, Iqbal Ali. It was urged that Asghar Ali and Iqbal Ali were competent to make the alienations in question, and that the plaintiffs had no right to contest them. The Trial Judge, as well as the Court of Appeal, upheld this defence, and negatived the claim. On this appeal preferred by some of the plaintiffs it was admitted on their behalf that the only question, which required determination, was whether the succession to the property was regulated by the rule of primogeniture or by the Mahommedan law.

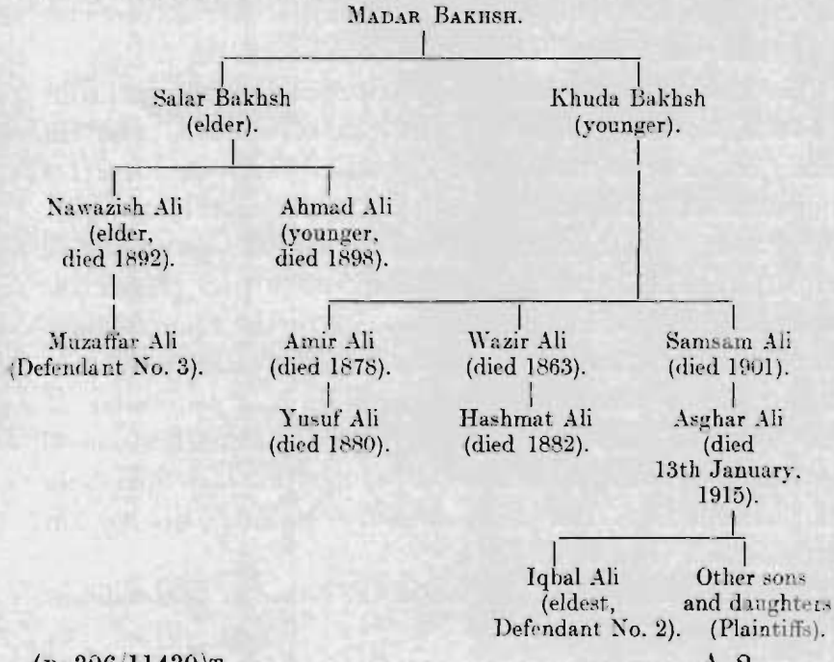
The history of the *taluqa* of Ambhapur, in so far as it is material to the issue, may be shortly stated. On the conquest and re-occupation of the Province of Oudh after the Sepoy Mutiny of 1857, the British Government issued a proclamation in March, 1858, confiscating, with certain exceptions, "the proprietary right in the soil of the Province," and reserving to itself the power to dispose of "that right in such manner as to it may seem fitting." On the 10th October, 1859, the Government of India declared that "every *taluqdar* with whom a summary settlement has been made since the re-occupation of the Province has thereby acquired a permanent, hereditary and transferable proprietary right, namely, in the *taluqa* for which he has engaged, including the perpetual privilege of engaging with the Government for the revenue of the *taluqa*." In pursuance of this declaration, Wazir Ali, with whom a summary settlement of the *taluqa* had already been made, was granted a *sanad* which conferred upon him "the full proprietary right, title and possession of the estate of Ambhapur." An important condition of this grant related to the succession to the estate, and was in the following terms: "In the event of your dying intestate or any one of your successors dying intestate, the estate shall descend to the nearest male heir, according to the rule of primogeniture."

It appears that doubts subsequently arose as to the nature of the rights of the *taluqdars* in their estates, and as to the course of succession thereto. In order to remove such doubts the Indian Legislature enacted the Oudh Estates Act, I of 1869. In the first list framed under Section 8 of that Act Wazir Ali's name was entered among the persons who were considered to be *taluqdars* within the meaning of the Act; and in the second list

he was mentioned as one of the *taluqdars* " whose estate, according to the custom of the family on or before the 13th day of February, 1856, ordinarily devolved upon a single heir." These lists were, no doubt, prepared after the death of Wazir Ali, which took place in 1863 : but as observed by this Board in *Thakur Sheo Singh* v. *Rani Raghubans Kunwar and another*, 32 I.A. 203, " it is a matter of familiar knowledge that such entries of dead men's names in the lists were not uncommon." As declared by section 3 of the statute, Wazir Ali had already acquired " a permanent, heritable and transferable right in the estate " and was, therefore, a *taluqdar* as contemplated by the legislature : and his death before the promulgation of the statute made no difference in his status or in his rights ; *Murtaza Husain Khan* v. *Mahomed Yasin Ali Khan*, 43 I.A. 269.

The Courts are enjoined by Section 10 of the Act to take judicial notice of the lists of the *taluqdars* and to regard them as conclusive evidence that the persons named therein were *taluqdars* within the meaning of the Act. There can, therefore, be no doubt that Wazir Ali was recognised as the *taluqdar* of Ambhapur, and that succession to it was governed by the rule of primogeniture.

It appears that this rule was not followed when, on Wazir Ali's death, the *taluqa* was mutated in favour of his cousin Nawazish Ali, though the deceased had left him surviving a son, Hashmat Ali, who was a minor at that time. The question arises whether the possession of Nawazish Ali was adverse to the true heir, and ripened into ownership by prescription, with the consequence that the succession to the estate ceased to be governed by the rule of primogeniture, and was, thereafter, regulated by his personal law. In order to appreciate the arguments presented to their Lordships by the learned counsel for the parties, it is necessary to set out the following pedigree table, which shows the relationship of Nawazish Ali to Wazir Ali and to the other persons who were interested in the estate :—



After the death of Wazir Ali in 1863, Nawazish Ali was, as stated above, recorded to be the owner of the *taluqa* ; and he also obtained possession thereof. But in 1882, immediately after the death of Wazir Ali's son, Hashmat Ali, the latter's uncle, Samsam Ali, entered into the joint possession of the property with Nawazish Ali, and this joint possession continued until 1892, when Nawazish Ali died and Samsam Ali was recorded as the sole owner of the estate. It is significant that Nawazish Ali's son, Muzaffar Ali, in his statement during the mutation proceedings, not only expressed his consent to the mutation of the estate being effected in favour of Samsam Ali ; but also explained that, according to the usage of the family, the senior member of the family was recorded to be the owner of the estate. Samsam Ali died in 1901, and was succeeded by his son, Asghar Ali. In the mutation proceedings, which were then taken, Muzaffar Ali repeated his previous statement as to the usage of the family ; and a similar declaration was made by Asghar Ali.. The latter was, however, anxious that Muzaffar Ali should be recorded as a co-owner of the estate with him ; but it was not until October, 1914, only about a fortnight before the date of the first mortgage concerned in this case, that he succeeded in inducing the revenue officer to make an entry in the revenue record that both the cousins were proprietors of the estate. This entry was admittedly inspired by the desire of Asghar Ali to remove the doubts entertained by the prospective mortgagee as to Asghar Ali's right to mortgage the whole of the estate.

In support of their plea of adverse possession the appellants rely, not only on the possession of Nawazish Ali after the death of Wazir Ali in 1863 and thereafter, but also on certain proceedings taken in civil and criminal courts in which Nawazish Ali was described as the owner of the *taluqa*. It is, however, obvious that, when he was entered in the revenue records as the sole proprietor of the estate, he alone, and nobody else, would ordinarily represent it in all the cases which did not involve any enquiry into the title of Hashmat Ali or Samsam Ali.

The case for the appellants depends entirely upon the nature of Nawazish Ali's possession. It would be observed that the shifting character of the title to the estate from one branch of the descendants of Madar Bakhsh to another branch, as shown by the various mutation entries, does not warrant the conclusion that Nawazish Ali's possession was adverse to the person who was entitled to the inheritance according to the rule of primogeniture. If his possession had been hostile to Hashmat Ali, or Samsam Ali, the estate, on his death, which took place after the expiry of more than twelve years from the commencement of that possession, should have devolved upon his heirs under the Mahommedan law. But neither his son Muzaffar Ali nor any other heir succeeded to it.

The succession of Samsam Ali to the estate in 1892 militates

against the theory of adverse possession invoked by the appellants. Indeed, the possession of the *taluqa* by Nawazish Ali is attributed to the family usage which allowed one member of the family, who was considered to be the most senior and competent, to be recorded as the owner of the *taluqa* and to manage it on behalf of the whole of the family. This explanation, which was accepted by the Court of Appeal in India, receives ample support from the admissions made on various occasions by the predecessors of the plaintiffs. Moreover, in 1863, when Wazir Ali died, his son Hashmat Ali was an infant of tender years, and was unable to manage the estate. There was, therefore, an additional reason why Nawazish Ali, who satisfied the requirements of the family usage, should be entrusted with the management of the *taluqa*. There can be little doubt that he obtained possession with the consent of all the persons interested in the estate, and his possession was, at its inception, merely permissive. It is not suggested that there was any subsequent change which converted it into adverse possession. The principle of law is firmly established that a person, who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. This onus the appellants have failed to discharge. Neither the entry of Nawazish Ali's name in the revenue records as the owner of the *taluqa*, nor his possession thereof, could, in the circumstances of the case, affect the title of the person or persons who had the right to inherit it. The acquisition of title by adverse possession was the only point urged in support of the appellants' claim to a share in the villages constituting the *taluqa*, and in their Lordships' opinion that issue has been rightly decided against them.

Their Lordships have still to determine the question of succession to the villages which, though not forming part of the original *taluqa*, were included in the mortgage deeds. These villages were acquired by the holders of the *taluqa* on various occasions, and it was argued that they, being non-taluqdari property, descended on the death of Asghar Ali, not to Iqbal Ali alone, but to all the persons who were the heirs of the deceased according to the Mahommedan law. As laid down by the twenty-third section of the Oudh Estates Act, succession to such property is regulated by the ordinary law, but the expression "ordinary law" includes such custom as may be found to exist. Now, the Courts in India have concurred in holding that the custom of the devolution of *non-taluqdari* property upon a single heir has been established, and their Lordships can see no valid reason for dissenting from that conclusion.

The second list framed under Section 8 of the Act contains a recital of the family custom by which the estate is inherited by a single heir, but this recital is conclusive evidence only as to the *taluqdari* property. As regards the other property, it

merely raises a presumption in favour of the existence of the custom, but the presumption can be rebutted. The appellants, however, did not offer any evidence to show that the descent of the property other than the *taluqa* was regulated by a different rule. No distinction appears to have been made between the *taluqa* and the other property in the matter of succession, and both of them were treated in the same manner.

Their Lordships agree with the Courts in India that the succession to the *non-taluqdari* villages as well as to the *taluqa* of Ambhapur was governed by the rule of primogeniture. The appeal accordingly fails, and their Lordships will humbly advise His Majesty that it should be dismissed with costs.

Their Lordships observe with regret that the books printed for this appeal contain a very large number of documents which are not material to the question raised before them. The documentary evidence covers more than 800 pages of the printed record, but there were scarcely one hundred pages to which reference was made in the course of the arguments. It appears that unnecessary documents were printed in India, but it does not follow that they should be included in the books bound up for their Lordships. As observed by this Board in *Sonaton Pal* v. *Galstaun*, 54 I.A. 118, "it is the duty of the solicitors in this country to make a selection of the necessary documents. The other papers should be ready at hand in case they should be required. In cases of doubt the solicitor should take the advice of counsel on this point."

Their Lordships trust that the attention of the High Courts in India will be directed to the subject with a view to exclude immaterial documents from the transcripts printed in India.

In the Privy Council.

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v.

THE SPECIAL MANAGER, COURT OF WARDS, BALRAMPUR ESTATE, AND OTHERS.

DELIVERED BY SIR SHADI LAL.

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