*Privy Council Appeal No.* 40 *of* 1958

**Saif Bin Sultan Hussain Al'Quaiti and others** – – – – *Appellants*

*v.*

**H. H. Sultan Awad Din Sultan Sir Saleh Bin Ghalib and others** – *Respondents*

**and**

**H. H. Sultan Awad Din Sultan Sir Saleh Bin Ghalib and others** – *Appellants*

*v.*

**Saif Bin Sultan Hussain Al'Quaiti and others** – – – *Respondents*

**(Consolidated Appeals)**

FROM

**THE COURT OF APPEAL FOR EASTERN AFRICA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST FEBRUARY 1962

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*Present at the Hearing:*

LORD KEITH OF AVONHOLM.

LORD MORRIS OF BORTH-Y-GEST.

LORD HODSON.

[*Delivered by* LORD HODSON]

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These are an appeal and cross appeal from the Court of Appeal for Eastern Africa dated the 6th April, 1957 allowing in part an appeal [and a cross appeal] from the judgment of the Supreme Court of Aden dated the 6th September, 1955.

The action is an interpleader suit instituted by the Financial Secretary of the Colony of Aden in pursuance of the provisions of the Sultan of Shihr and Mukalla's Fund Ordinance, 1945.

By the Ordinance the Supreme Court was empowered (by section 6) " to hear and determine all claims to the fund " subject to the right of any claimant to appeal, and directed (by section 5) to order notice in writing to be given to those who in the opinion of the judge of the Supreme Court may " have a claim to any part of the fund, or any interest in the disposition thereof ".

The fund came into existence by the payment on the 1st August, 1903 of a sum of 2,14,500 rupees to the National Bank of India in Aden by Sultan Awadh bin Omer to whom their Lordships will refer as Awadh.

The claimants to the fund are, on the one hand, the heirs of Awadh, who were made defendants in the interpleader proceedings and are the respondents to this appeal, and, on the other hand, the heirs of Sultan Hussain bin Abdullah and of Sultan Munasser bin Abdulla to whom their Lordships will refer as Hussain and Munasser. The heirs of Hussain and Munasser were plaintiffs in the interpleader proceedings and the heirs of Hussain only are the appellants in this appeal.

Each side claims the whole of the fund with all accretions.

The history of the fund may be summarised as follows:—

Awadh, Hussain and Munasser were descendants of Omer I who in the 19th century was head of the Qu'aiti family and ruled over part of the Hadhramaut in Arabia. He also rendered military service to the Nizam of Hyderabad and became an Hyderabad noble. For his service he was granted by the Nizam certain Crown grants of land in Hyderabad known as " Jaghirs " and " Mukhtars ". Omer I died in 1865. He left a son

Abdullah, who was the father of Hussain and Munasser, and a son Awadh. By his will be created a " wakf " of one-third of his property for the benefit of the provinces in Hadhramaut over which he had ruled, the property to be managed by Abdullah, Awadh and another son Saleh. This property comprising the wakf expressly included the Mukhtars and Jaghirs. The remaining two-thirds of Omer's property was, after allowing for widow's portion and provision for two other sons, inherited under Sharia law by Abdullah, Awadh and Saleh.

In 1866 the Jaghirs and Mukhtars which their father had enjoyed were re-granted to Awadh and Saleh. These two continued to live, as they had before, in Hyderabad. Abdullah was not mentioned in the re-grant. He continued as he had before, to live in Arabia administering the family property and exercising the power of government there.

In 1873 Abdullah, Awadh and Saleh entered into an agreement providing for ownership in common in equal third shares of their properties in Arabia and Hyderabad, referred to as the partnership property.

Meanwhile the possessions of the family in Arabia were enlarged by conquest and came to be known as the Quaiti Sultanate.

In 1878, probably without the knowledge of Hussain and Munasser, Abdullah sold by deed to Awadh for the sum of 186,000 Maria Theresa dollars his share in the partnership property excluding his share in the original possessions in the Hadhramaut. At the time of the sale 46,000 dollars was paid leaving 140,000 dollars still unpaid when Abdullah died in 1888. Saleh died in 1880, and his heirs, having received their share of the partnership property in 1886, disappear from the scene.

In 1896 Awadh relying upon the deed of sale claimed the Qu'aiti Sultanate, deprived Hussain and Munasser of power and installed his son Ghalib in their place giving money allowances to Hussain and Munasser.

Hussain and Munasser when they got to know of the deed of sale did not accept it as genuine and did not abandon their claims to both the sovereignty and the property.

In 1900 the dispute between Awadh and his nephews Hussain and Munasser was referred to the arbitration of a " Mansab ". The submission to arbitration was joined in by Hussain and Munasser who never withdrew their submission before the Mansab gave his award in May, 1903. They had however rebelled against their uncle Awadh and were removed in July, 1902 from the Sultanate by the Political Resident of Aden who took them back with him to Aden in a warship. They were never allowed to return to the Sultanate and by an Act of State Awadh was thereafter in undisputed possession of the lands and government of the Sultanate.

The claims to the fund which came into existence following upon the award of the Mansab fall to be decided on this appeal.

By his award the Mansab held that Abdullah had sold to Awadh his own share of the partnership property except for the excluded share of the Hadhramaut properties. He decided that Awadh should pay to the heirs of Abdullah three sums: first 140,000 dollars being the balance of the purchase price under the deed of sale; secondly 70,000 dollars as compensation for their share of the Hadhramaut properties; and thirdly 50,000 dollars as " a matter of sympathy and mercy ". This total sum of 260,000 dollars was to be divided among the heirs of Abdullah in the following shares: three-eighths (97,500 dollars) were due to Abdullah's daughters: of the remaining five-eighths (162,500 dollars) one-eighth was due to Abdullah's widow, two-eighths to Hussain and two-eighths to Munasser. These 162,500 dollars were the equivalent of Rs. 2,14,500. This sum was paid into the National Bank of India at Aden on 1st August, 1903 by Awadh and is the origin of the fund the claims to which are in issue.

The fund has been added to over the years by accretions of interest and as the result of investment; on the 15th August, 1955 the market value of the securities representing the fund amounted to Rupees 9,87,808.12.0. Since

that date there have no doubt been further accretions and the argument has been directed not only to the original fund but to the accretions which naturally far exceed the value of the original fund.

In the Aden Court the heirs of Hussain and Munasser were awarded the entire fund including all accumulations subject to a deduction of Rs. 1,82,000 in name of damages to the heirs of Awadh. The Court of Appeal for Eastern Africa varied the Aden judgment holding that the heirs of Hussain and Munasser and through them the appellants were entitled to the fund only as from 7th April, 1942 when the appellants first made an unconditional demand for payment with the consequence that they were only entitled to accretions as from that date and that the accretions attributable to the period 1903 to 1942 were due to the heirs of Awadh, the respondents. The Court of Appeal for Eastern Africa made the same deduction as was made by the Supreme Court of Aden, not as damages, but in respect, as they held, of unjust enrichment.

Hussain's heirs alone are prosecuting this appeal but any success they achieve will of course enure to the benefit of the heirs of Munasser also.

It is necessary to show how the deduction came to be made in favour of the respondents, for the appellants contend that the Aden Court acted without jurisdiction in making it having regard to the nature of the proceedings and the terms of the Ordinance of 1945 and further that the deduction was made in respect of Crown grants of Jaghirs and Mukhtars which were not subject to the Mansab's award.

The deduction was made because Hussain and Munasser had claimed from the Nizam of Hyderabad by succession through their father Abdullah to be entitled to a share in the Crown grants, Jaghirs and Mukhtars which had been held by their grandfather Omer I. The proceedings in Hyderabad dragged on for many years and various advisers to the Nizam submitted opinions thereon. The final result was that Hussain and Munasser failed to establish any claim as of right but were granted allowances as a matter of grace taking into account the fact that their pecuniary circumstances were daily becoming more difficult. These allowances were charged on the Jaghirs and Mukhtars held by the heirs of Awadh who had died in 1910 during the course of the Hyderabad proceedings. In making their claim and receiving these allowances in face of the award the trial Judge held that they were in breach of contract and the Court of Appeal for Eastern Africa held that they had flouted the award and had unjustly enriched themselves at the expense of Awadh and his heirs so that a deduction should be made from any sum awarded. This was quantified by agreement at Rupees 1,52,771.6.

Moreover Awadh and his heirs had been put to expense in resisting the claim of Hussain and Munasser in Hyderabad and the expenses were quantified, again by agreement, at Rupees 30,000.

The deduction therefore totalled Rupees 1,82,771.6. It will be necessary to refer to this hereafter.

The rival claims must be considered subject to any relevant statutory provision in light of the relevant law as to which there was no dispute.

There had been a submission to the arbitration of a Mansab, a Moslem Holy Man, and the agreement was made and the award concluded within the Sultanate of Shihr and Mukalla. " Sharia " law is the law of the Sultanate. By articles 9 and 10 of a Sultanate Decree (No. 5 of 1940) it is provided: " The law of Islam is and is hereby confirmed to be the fundamental law of our Dominion by the application of which decree our courts shall be guided by and have regard to the general principles of the law of Islam and to any tribal laws, customs or usages not repugnant to Islam justice equity and morality ".

The learned trial Judge had the advantage of being assisted by counsel on each side who had held office in the Sultanate as Judges and were agreed that the only principle of law which can be derived from the Sharia in deciding the

issues arising in this case is that the decision arrived at must be just and reasonable in all the circumstances and in accordance with natural justice equity and morality.

English authorities therefore will be of assistance in so far as they deal with situations which have a resemblance to that under consideration but are of no more than persuasive authority. Likewise any references to the law relating to the formation and discharge of contract and to the law relating to trusts must be read in the light of the overriding consideration that the Sharia law is to be applied.

The original sum was paid into the bank by Awadh accompanied by a letter dated 1st August, 1903 of which the material parts are:—

> " As per the Resident's instructions I beg to send you per bearer Rs. 2,14,500/- . . . . The amount being the shares of my nephews Munasser bin Abdulla and Hussein bin Abdulla and Husein's mother, as per the Munsab's decision and agreed to by the Government of India. Kindly receive the same and deposit in their name. The said sum may not be disposed of without the order of the Political Resident, Aden."

On the same day the bank manager acknowledged the receipt of the money as follows:—

> " Received from H. H. The Sultan of Mukalla, the sum of Rs. 2,14,500/- . . . for credit of the Political Resident, Aden on account of Munasser bin Abdulla and Hussain Bin Abdulla."

The account was opened and on the 8th August, 1903 the Political Resident informed Hussain and Munasser of the deposit of the money in the bank saying that it was the share which the Mansab had fixed for them and for the mother of Hussain and asking when and how they would like to receive the same.

Using the language of trust there was a trust created of ascertained property with a defined purpose for named beneficiaries and the trust was accepted by the Political Resident when he appropriated the fund to the beneficiaries by his letter of 8th August, 1903. It was therefore appropriately described as " the Sultan of Shihr and Mukalla's Nephews Trust ".

In these circumstances their Lordships are of opinion in agreement with the trial Judge that in making the payment as he did Awadh divested himself of all interest in the fund and thereafter it was held unconditionally for Hussain and Munasser and their heirs.

It is true that Hussain and Munasser would never accept either the award or the money and maintained the same attitude all their lives.

At an interview with the Political Resident on the 26th May, 1903 they declined even to receive a copy of the award for consideration and thereafter resolutely refused to accept the money. It was not until 7th April, 1942 after their death that their heirs through their attorney made claim to the fund by letter to the Aden Government. Notwithstanding the delay of the appellants in putting forward the claim their Lordships are in agreement with the learned trial Judge in arriving at the conclusion that the appellants are entitled not only to the original sum of money deposited but also to the accretions which have resulted from the investment of the fund on their behalf.

Various contentions were put forward to the contrary; that which was accepted by the Court of Appeal for Eastern Africa was that the Political Resident held the money on behalf of Awadh with irrevocable authority to pay to the heirs of Abdullah but only on condition that they should accept the award and receive the money in full discharge of Awadh's obligations under it. It followed therefore in the judgment of the Court that until 1942 when the heirs of Abdullah indicated they were willing to accept the money due under the award the fund and its accretions belonged to Awadh or his heirs. No such condition was expressed nor in the opinion of their Lordships is there any necessity to imply such a condition. This contention is not only inconsistent with the contemporary documents but is in any event insufficient

to deprive the heirs of Hussain and Munasser of their claim to the accretions. Once they accepted the award they became entitled to the fund including all accretions for the fund represented the balance of the purchase price paid for Abdullah's properties. Awadh and his heirs have enjoyed the rents and profits of the properties from 1903 onwards and it is manifestly unjust that they should have the benefit of nearly 40 years interest on the purchase price.

To use the language of Vice Chancellor Bacon in *Rhys* v. *Dare Valley Railway Company*, L.R. Equity (1874/5) page 95, referring to the general rule that a purchaser taking possession of property and retaining the purchase money must pay interest to the vendor—this is " common sense, honesty and justice ". It is no answer to this claim that afterwards Awadh's title was confirmed by the British Government and thenceforth the possession of Awadh and his heirs was derived from an Act of State not from the deed of sale.

Other contentions were put forward by the respondents; for example it was argued that the money was offered as a gift or tendered so that it was returnable if not accepted and no interest should be attached to it until acceptance. It was further suggested that if there was in truth a trust in favour of Hussain and Munasser the trust failed and there was a resulting trust in favour of Awadh. All these contentions fall, in the opinion of their Lordships, to be rejected for the reasons that have been given against accepting the grounds of the Court of Appeal.

Lastly by cross appeal the respondents based a claim for a payment to them of the whole fund on the fact that they had by letter dated 24th January, 1924 demanded payment thereof, thus, as they say, accepting the repudiation of the award by Hussain and Munasser. This argument was not strongly pressed and must fail for the submission to arbitration was binding upon both parties and no question of repudiation of contract arises by reason of the failure of Hussain and Munasser to accept the benefits due them under the award during their lifetime.

Returning to the deduction, it was submitted by the appellants that this being an interpleader action brought pursuant to the ordinance of 1945 there was no jurisdiction to entertain any claim except a claim to the fund itself so that any demand to be reimbursed in respect of the Hyderabad claims brought by Hussain and Munasser must be the subject of a separate action. The learned trial Judge was impressed with this difficulty but came to the conclusion that in the interests of justice and finality it was clearly desirable that he should deal if he could with all outstanding matters. Their Lordships do not dissent from this view. By section 5(1) of the Ordinance notice was directed to be given to each and every person who may in the opinion of the Judge have a claim to any part of the fund or any interest in the disposition thereof. The respondents have such an interest having regard to the fact that Hussain and Munasser did, if the Jaghirs and Mukhtars were subjects of the award of the Mansab, obtain from another source the equivalent of part of the fund. It is on the above hypothesis unjust that they should claim the whole fund and so receive part of the same thing twice over and the objection to the jurisdiction of the Aden Court is not on this footing sustainable.

Their Lordships do not regard this as raising any question of breach of contract or unjust enrichment which might found a separate right of action. It involves merely recognition, on just and equitable grounds, of a plea that the appellants cannot claim the whole fund without refunding what they have taken out of property which the fund in part represents.

The question remains whether the Jaghirs and Mukhtars were ever the subject matter of the Mansab's award. These are Crown grants and not strictly assignable property but nevertheless there was, as the learned Judge said, some evidence that in practice these grants were bought and sold. Moreover Omer I by his will did purport to dispose of them. It appears therefore that the grants of Jaghirs and Mukhtars can fairly be described as property if the award by its terms purported to deal with them. These grants

are not referred to by name in the award but both Courts have held and their Lordships agree that the language of the award covering as it did " property in the direction of Hyderabad " is wide enough to cover grants of both kinds.

The deduction ought therefore to be made as a matter of justice both in respect of the allowances received by Abdulla's heirs and of the expenses incurred in resisting the claim. As has been noted Hussain's heirs alone are appellants in this appeal and so far as their success has been of benefit to the other plaintiffs it is only just that these should share part of the costs to which the appellants have been put in prosecuting the appeal in so far as these are not recoverable from the other side.

Their Lordships will therefore humbly advise Her Majesty to allow the appeal and dismiss the cross-appeal; to set aside the order of the Court of Appeal for Eastern Africa (except paragraph (vi) thereof, which provides for the costs of the Financial Secretary, Aden and of the Government of Mukalla); to restore the order of the Supreme Court of Aden with the variation that the words " representing the damages " contained therein be deleted and with the further variation that the sums to be paid to the respective parties out of the fund under the said order (including the defendants) be paid to them with accretion of interest at the rate that shall have accrued on the fund from the date of the said order until payment; and subject further to a direction that before the balance is payable to the plaintiffs Nos. 1 to 20 there shall be payable out of such balance three-quarters of the costs incurred by the appellants in the consolidated appeal (on a solicitor and client basis) less the costs recovered from the appearing respondents in the consolidated appeal.

There shall be paid by the appearing respondents to the appellants in the appeal three-quarters of their costs of the consolidated appeal as between party and party and three-quarters of their costs of the appeal and cross-appeal in the Court of Appeal for Eastern Africa as between party and party.

(84786) Wt. 8233/71 100 3/62 Hw.

# In the Privy Council

SAIF BIN SULTAN HUSSAIN AL'QUAITI AND OTHERS (APPELLANTS)

*v.*

H. H. SULTAN AWAD DIN SULTAN SIR SALEH BIN GHALIB AND OTHERS (RESPONDENTS)

and

H. H. SULTAN AWAD DIN SULTAN SIR SALEH BIN GHALIB AND OTHERS (APPELLANTS)

*v.*

SAIF BIN SULTAN HUSSAIN AL'QUAITI AND OTHERS (RESPONDENTS)

(CONSOLIDATED APPEALS)

DELIVERED BY

LORD HODSON

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