

Ghulam Mohammad Vs. Ghulam Husaln and Others

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Court : Privy Council

Decided On : Dec-14-1931

Judge : Lords Thankerton, Salvesen, Sir Lancelot Sanderson & Sir George Lowndes

Appeal No. : Privy Council Appeal No. 75 of 1929 (From Allahabad: Allahabad Appeal No. 5 of 1928)

Appellant : Ghulam Mohammad

Respondent : Ghulam Husaln and Others

Advocate for Pet/Ap. : B. Dube, for Appellant; L.De. Gruyther and H.R. Majid, for Respondents. Solicitors for Appellant, Hy. S.L. Polak; Solicitors for Respondents, Francis and Harker

Judgement :

Sir George Lowndes:

One Khadim Husain, a Mahomedan, governed by the law of the Hanafi school, died on 21st August 1901, Two days before his death he made a will in the following terms :

"I, Shaikh Khadim Husain, son of Munshi Aman Ullah, deceased, resident, jagirdar and talukdar of Ganeshpur, District Basti, declare as follows :

" I own and possess movable and immovable property of every description (such as) houses, groves, etc., in the Districts of Basti, Gorakhpur and Fyzabad, and it is in my possession and enjoyment as a proprietor without the participation of anyone else. The immovable property consists of three kinds of property : one is that which is meant for maintenance of disciples and female slaves [under a will, dated 25th November 1866, my father, Maulvi Shaikh Aman Ullah, deceased, gave (this property) to me alone]. This property which he had, under a will, dated 13th June 1837, got from his father for maintenance of the disciples and the female slaves as proprietor, is the panchmi share in the entire taluka of Ganeshpur. My father, having included a panchmi share in his self-acquired property to that property, conferred it on me as proprietor under the said will. Accordingly, after the death of my father, I, the executant, entered in possession and occupation thereof under the said will. The second kind of the immovable property is that which has devolved it upon me from my deceased father and the other persons ; the third is that which I, the executant, myself have acquired. I have two sons. Shaikh Ghulam Husain and Shaikh Ghulam Muhammad, minors; three daughters. Mt. Roshanunnissa, Mt. Khairunnissa and Mt. Mumtazunnissa, and one wife, Mt. Amna Bibi. who is now alive. As there is no certainty of life, I, the executant, also think it proper to make a will in conformity with the custom of my family in order that no dispute may arise in future among my heirs. My elder son, Ghulam Husain, minor, shall remain in proprietary possession of the panchmi share in taluka Ganeshpur, together with the panchmi property acquired by my deceased father given to me under the will. dated 5th November 1866, for maintenance of the disciples and the female slaves in accordance with the conditions laid down in the will made by my father; and a one-fifth share acquired by me, the executant, Shaikh Ghulam Husain aforesaid, should, from the income thereof, maintain the disciples and the female slaves, who are alive now, or in future those who may be increased in their generations. (Paper torn). The disciples and female slaves have no proprietary right in the said property. They are entitled to food and clothing only. If any of them disobey or refuse to render service or take up service at another place, then Shaikh Ghulam Husain aforesaid is empowered to discontinue his maintenance. Both my sons, Shaikh Ghulam Husain aforesaid and Sheikh Ghulam Muhammad aforesaid, who is born now,

shall after me be the owners in possession of all the property which I have, by right of inheritance, received from my deceased father, Maulvi Shaikh Aman Ullah, and the other persons, and which I have myself acquired, and out of which property four-fifths share has been saved. So long as they live jointly, they shall appropriate the profits jointly, and after separation they should divide the profits of the said property half and half. Both the sons should, out of the profits of the same property, pay Rs. 600 a year to their mother, Mt. Amna Bibi, and Rs. 800 a year to each of my daughters, namely, Mt. Roshanunnissa, Mt. Khairunnissa and Mt. Mnmtazunnissa, after their marriage, generation after generation. The said Mussammats have no proprietary power in the property. If Shaikh Ghulam Husain and Shaikh Ghulam Muhammad fall to pay the fixed amount to the said Mussammats, the latter are empowered to recover their annual amount by bringing a suit. When both the brothers become separate, they should, out of the profits of the property in their respective possession, continue to make payment to my wife and daughters. Both my sons are still minors. God forbid, if I die before they attain majority, their mother, Musssammat Amna Bibi, shall be their guardian during their minority. After attaining majority my both sons shall themselves be the owners in possession and abide by the conditions of the will and make management. This will shall come into force after me, the executant. As long as I am alive, no one has power to cause interference. Both the sons shall be the owners of the moveable property and the houses half and half.

In line 15 the word "milkiatan" written above the line is correct.

Hence I have executed these few presents by way of a will in order that it may serve as evidence. Dated 19th August 1901.

Signature of Shaikh Khadim Husain

(The will executed by me is correct, in autograph). "

The principal question in this appeal is as to the construction of the will so far as regards what is referred to therein as the "panchmi" property. The appellant, the younger of the two sons of the testator, sued to establish his right, under the events which had happened since his father's death, to a moiety of this property.

Respondent 1 denied his brother's right to any share at all, though it is not clear how far he claimed the property for himself. The trial Judge decided in favour of the appellant, but gave him a quarter share only. Both parties appealed to the High Court (their appeals being numbered respectively 139 and 164 of 1928), with the result that the suit was dismissed. These appeals were heard jointly with two other appeals in suits instituted by one of the daughters of Khadim Husain, but in which no appeal has been taken to His Majesty in Council, and with which therefore the Board are not concerned. The other respondents are alienees from respondent 1 and have taken no part in the proceedings, It is not disputed that under the Hanafi law, if the effect of the will was to confer a beneficial interest in the panchmi property upon respondent 1, it was invalid unless consented to by the other heirs after the testator's death. The first question therefore is whether this was the true effect of the will. The trial Judge held that it was the High Court, on the other hand, took the view that respondent 1 was a mere trustee with no beneficial interest in the property.

The decision no doubt concerns directly only the will of Khadim Husain, but the references by the testator to the will of his father Amam Ullah, and the trend of the arguments in the case, make it necessary to consider the terms of his will also, and this in turn brings in the will of Kadir Baksh, the grandfather of Khadim Hussain, under which the panchmi property originated.

The will of Kadir Baksh is dated 13th June 1837. He in effect divided his estate into five shares, bequeathing one-fifth to each of his four sons, and setting aside the remaining fifth

"for the expenses of the male and female slaves and the other dependants, etc., who are at present in addition to the sons and who may survive hereafter."

This share he made over to his youngest son, Aman Ullah. The slaves and dependants were to remain in his control; they were to get from him their necessary expenses for food and clothing, but were not to be in possession of the land, and if they were disobedient they were to get nothing. It is admitted by counsel for respondent 1 that this bequest was, as indeed, the terms of the will show, confined to slaves and dependants living at the testator's death. It is also

clear, their Lordships think, that they took no interest in the corpus of the share, and that the will made no express disposition of it as such.

The will of Aman Ullah followed much the same lines. It is dated 26th September 1866. It recites the will of Kadir Baksh, and after referring to the one-fifth made over to him (Aman Ullah) for the maintenance of the slaves and dependants, continues:

"Under the terms of the will executed by the ancestor and admitted by his heirs, two fifths of the whole of the taluka (meaning evidently the one-fifth for the slaves and his own personal one-fifth) was settled to be my own share and property of which I am in possession and occupation by virtue of private partition."

He goes on to state that he also has four sons who are "heirs and owners of my estate and property," and that following the ways of his ancestor, he has made "a will regarding, and division of, my estate." He then makes over to Khadim Hussain, his eldest son,

"the one-fifth share which my ancestor has given, to me for the maintenance of the dependent slaves boys and girls, as well kb one-fifth of all my self-acquired villages (subject to all the conditions laid down in the will of my ancestor, dated 18th June 1837), together with the slave boys and girls that are alive at present and that may be born hereafter."

He repeats that the slaves are to be entitled to maintenance only; that they are to have "no concern with the possession of the lands"; and that if disobedient they will forfeit their rights. The balance of his estate he divides equally among his sons. It appears that some years before the date of this will there had been litigation between the brothers, Miran Baksh, the second son of Kadir Baksh, suing for partition, and claiming that the panchmi share was divisible with the rest of the property left by his father. The principal Sadar Amin of Gorakpur, by a judgment dated 28th August 1860, held against the plaintiff's claim in respect of the panchmi villages, and gave him a decree for partition of his share only in the other property. The issues raised the question directly whether Kadir Baksh's will established that the panchmi villages "solely belonged to the contesting defendant," i. e., Aman

Ullah, and their Lordships think that the decision must be regarded as having answered this question in the affirmative. They have very little doubt that Aman Ullah's will was based upon this decision, and that he regarded himself as the owner of the panchmi villages, subject only to the obligation of maintaining the slaves.

The construction of Kadir Baksh's will again raised in 1898; after the death of the last of the stoves, the claimant on this second occasion being Karamat Bibi, a daughter of Zahur Uddin, the eldest son of Kadir Baksh. Aman Ullah was then dead, and Khadim Baksh was the principal defendant to the suit. The case went up to the High Court on second appeal, the sole question for decision being the construction of the will with reference to the panchmi share. The learned Judges, by their judgment dated 8th August 1901, held that there was a gift of this share to Aman Ullah,

"but a gift burdened for the time being with the necessity of making provision, suitable and lifelong, for the slaves and slave girls who might survive the testator."

They thought that the assignment of the share "was as regards time unconditional," and they accordingly affirmed the dismissal of the suit which the District Judge had decreed. It will be observed that this decision was in substantial accord with that of the Sadar Amin in 1860.

Turning now to the will of Khadim Husain, with which the present appeal is more directly concerned, their Lordships note that it was made very shortly after the decision of the High Court above referred to, and they think that its terms must have been influenced by that decision. The testator begins by stating that he is

"in possession and enjoyment as a proprietor without the participation of anyone else,"

of immovable properties which include both the original and increased panchmi shares. He affirms that these shares were conferred upon him as proprietor under his father's will and that he had been in possession and occupation of them since his father's death, He then proceeds to declare that respondent 1

"shall remain in proprietary possession of the panchmi share in taluka Ganeshpur together with the panchmi property acquired by my deceased father given to me under his will."

Apart from any question of a wakf which has been put forward for the first time on the argument of this appeal, and with which their Lordships will presently deal, they think that Aman Ullah took under the will of his father Kadir Baksh a beneficial interest in the original panchmi share, subject to the maintenance of the slaves during their lives. The slaves clearly took no interest in the corpus of the share, or in the surplus income as the life interests dropped out, and the only reasonable construction of the will would seem to be that arrived at by the High Court in 1901, which as between the parties to that suit was clearly *res judicata*.

Whether Khadim Husain took a similar interest under Aman Ullah's will may be more doubtful, but reading the will as a whole in the light of the surrounding circumstances, their Lordships think that the intention of Aman Ullah was to pass on to his son the same quality of interest in the now increased panchmi share as that which he himself had taken under his father's will. The exact date of Aman Ullah's death seems to be uncertain. It was probably not long after the date of his will, and must in any event have occurred before July 1871, as is shown by the proceedings in a suit which went up to the High Court in 1872. Khadim Husain was therefore in possession of the villages for at least 30 years and their Lordships have no doubt that he regarded himself as the owner, subject only to the maintenance, at his discretion, of the slaves. The only persons interested to deny his proprietorship would be the other heirs of Aman Ullah, who seem to have taken no steps to assert a claim, and they are not parties to or in any way represented in the present litigation.

Khadim Husain's will, in their Lordships' opinion, clearly purported to pass on to respondent 1 a proprietary interest, in the panchmi property, now again increased by the addition of one-fifth of the other estate of the testator, subject to similar obligations. The learned Judges of the High Court would attach little, if any, weight to the references in the will to "proprietorship " and "proprietary" rights. Their Lordships are unable to take this view of the expressions employed by the

testator. They regard them as used in their ordinary acceptance, and as intended to make it clear that respondent 1 was to be the owner of the villages, subject to provision for the slaves. The latter were to be maintained out of the income only and were to have no proprietary interest in the property: whatever surplus income there might be and, the reversionary interest in the corpus was to go to respondent 1.

Their Lordships take no exception to: the view of the High Court that there was a trust for the slaves. They think: that this is probably a more correct way of looking at the bequest than to refer to it as an onerous gift : it would, they think, clearly come within the definition of a trust under the Trusts Act 1882, by which the will of Khadim Husain would be governed. But in the view their Lordships take, the learned Judges were wrong in thinking that the proprietorship conferred upon respondent 1 by the will was a bare trusteeship accompanied by no interest of a beneficial nature.

In their Lordships' opinion therefore the will of Khadim Husain did purport to confer a beneficial interest in a part of his estate upon respondent 1, who was one of his heirs, and it would seem to follow that (apart from any question of consent by the appellant) the will was invalid under the Mahomedan law.

But it has been contended before the Board that the setting apart of the panchmi share under each of the three wills, to which reference has been made, was in reality the creation of a wakf, and that so considered it must be presumed that there was a dedication of the whole interest of the testator in each case to charitable purposes, leaving nothing to which the devisee could be beneficially entitled, his position being that merely of the muttwali or manager of the charity, No case of wakf was made by respondent 1 in his defence to the suit, nor was it suggested in his memorandum of appeal to the High Court, and there is no trace of such a contention having been raised in the judgments, No one of the three wills purports to create a wakf nor is there in any of them anything that could be regarded as a gift of the ultimate residue to charitable purposes, and no suggestion of wakf was made in any of the previous suits. It is admitted that a trust for slaves and dependants is not within the terms of the Wakf Validating Act 6 of

1913, and it is therefore unnecessary to consider the effect of Act 33 of 1931, which purports to give retrospective effect to the Act of 1913. The argument which has been addressed to their Lordships on this point is in reality only an attempt to reopen the controversy which was finally settled by decisions of this Board nearly 40 years ago : see *Mahomed Ahsanulla v. Amarchand* (1); *Abdul Gafur v. Nizamudin* (2) *Abdul Fata Mahomed Ishak v. Russumoy Dhur* (3) Under these circumstances, their Lordships think it sufficient to say that the contentions of respondent 1 on this part of the case must necessarily fail.

Unless therefore the appellant can shown to have consented to the terms of his father's will it cannot be binding upon him.

At the time of Khadim Husain's death both respondent 1 and the appellant were minors. The former attained his majority in 1915 and the latter in 1919. Before the trial Judge an attempt was made to prove that the appellant upon attaining majority consented to the terms of the will. It was held that his consent was not proved. The High Court makes no reference to this contention, and before their Lordships no serious attempt has been made to support it.

In the High Court however it was contended for respondent 1 that the appellant was in effect bound to the terms of the will by what was said to be a "family arrangement" embodied in a registered instrument dated 11th March 1910. The learned Judges accepted this contention, and their finding has been supported before the Board: if it is correct, the appellant necessarily fails.

The document in question was executed, during the minority of the contesting parties to this appeal, by their mother on her own behalf and purporting to not as guardian of her sons, The other parties were their sisters, the three daughters of Khadim Husain, who disputed the validity of his will. Shortly put, the effect of this arrangement was that the mother gave up, in favour of her sons, a claim to dower amounting to about a lakh of rupees, taking for herself only a life annuity of Rs. 600 out of the estate, while the sisters accepted perpetual annuities of Rs. 400 each charged upon specified immovable properties. Elaborate schedules of the various properties were annexed to the document, the first of which, referring to the panchmi properties, was headed:

"List of property which belongs exclusively to Shaik Ghulam Husain (i. e., respondent

1) and with the income of which the slaves and slave girls will be maintained according to the conditions and restriction laid down in the wills of the ancestor."

The learned Judges of the High Court thought that this should be read as an agreement made by the mother, acting on behalf of the younger son, with herself, action on behalf of the elder son, that the latter should be the owner of the panchmi properties, and that it was binding upon the appellant. But quite apart from the question whether the mother could legally bind the appellant by such an agreement, their Lordships are unable to hold that this was either the intention or the effect of the document. The only object of the arrangement was, they think, to get rid of the daughters' claims, leaving the landed estates for the sons. Apart from the heading to the schedule of the panchmi properties, there is nothing to suggest that the rights of the sons inter se were considered. There was, and indeed could be, no dispute between them at their then ages, and the mother was evidently upon the terms of the document acting for them both jointly: Their Lordships must accordingly hold that the appellant was, when he came of age free to dispute the validity of Khadim Husain's will, and to claim his share according to the Mahomedan law in the panchmi properties.

The last line of respondent 1's defence was limitation: it was contended first that the deed of March 1910, should be read as having effected a transfer of the panchmi properties by the mother, acting on behalf of the appellant, to respondent I and that therefore the suit fell under Art. 44, Sch. 1, Limitation Act, which as follows :

The trial Judge held that this article has no application on the ground that there was no transfer by the deed: the High Court took the opposite view, It is manifest, on the construction which their Lordships have put upon the deed, that the trial Judge was right.

Alternatively, it was argued that the suit was barred by 12 years' adverse possession under Art. 144. Both the Courts in India have negatived this

contention, and their Lordships have no doubt that they were right. Respondent 1 only attained majority in 1915, and the suit was instituted in July 1924. Until 1915 the mother was in possession of all the immovable properties of the estate on behalf of both her sons, and it would be impossible to hold that her possession was adverse to the appellant.

Before the Board it was for the first time suggested that the suit in reality fails under Art. 123, which applies to a suit

"for a legacy or for a share of a residue bequeathed by a testator, or for a distributive share of the properties of an intestate."

The period of limitation in such a case is 12 years from the date "when the legacy or share became payable or deliverable." It is said that on the contentions of the appellant, Khadim Husain must be deemed to have died intestate, and that what the appellant is claiming is a distributive share in his estate. There is however a long series of decisions in India, dating at least from 1882, that this article only applies where the suit is brought against an executor or administrator or some person legally charged with the duty of distributing the estate : *Issur Chunder v. Juggutt Chunder* (4); *Keshar Jagannath v. Narayan Sakharam* (5), *Umardaraz Ali Khan v. Wilayat Ali Khan* (6), *Khadersa Hajee Bappu v. Puthen Veetil* (7) and see *Mahomed Riasat v. Hasin Banu* (8).

Counsel for respondent 1 drew their Lordships' attention to a decision of this Board reported as *Maung Tun Tha v. Ma Thit* (9), where Art. 123 was apparently applied in a suit by a Burmese-Buddhist son for his suit in the paternal estate. No reference was made to the Indian case law on the subject, and the main question debated was as to whether the son was bound under the Burmese law to elect within a reasonable time after his father's death.

Their Lordships have referred to the record of this case, and they find that in the Courts of Burma no issue was raised as to limitation, and that there was no discussion as to the article of the Act which should be applied. There had been at least one previous decision in the Lower Burma Court that Art. 133 was applicable to such a case, and it seems to have been assumed on all hands that it must

equally apply in the case then under consideration. After the decision in *Tun Tha v. Ma Thit* (9) it appears to have been considered in one case in the Bombay High Court that the Indian authorities had been overruled [*Shrinbai v. Ratanbhai* (10)], but in two later cases the same High Court refused to apply Art 128 to claims by Mahomedan heirs ; see *Nurdin Najbudin v. Bu Umrao* (11). The specific question was considered by a Full Bench of the Allahabad High Court in 1928 [*Rustam Khan v. Janki* (12)] another case between Mahomedan heirs, when the same conclusion was come to as in *Nurdin Hajbuidin v. Bu Umrao* (11) the article applicable being held to be Art. 144 and not Art. 123.

Their Lordships have no doubt that it was not intended by the judgment in *Maung Tun Tha v. Ma Thit* (9) to overrule the decisions to which they have referred, and they think that, at all events in cases from the Indian Courts, these authorities should be followed. They are therefore of opinion that the present case does not fall within Art. 123, and that the appellant's suit was not barred by limitation.

It only remains to consider whether the trial Judges was right in holding that the appellant was entitled to recover a quarter share only, and not a half, of the panchmi property, and it is to be noted that upon this point the learned Judges of the High Court were in agreement with him.

The appellant's share in his father's estate under the Mahomedan law would be one-quarter only, but he contends that the widow and daughters having surrendered their rights in exchange for annuities which were charged upon the whole estate, he was entitled to share equally with his brother in all the residue.

The view taken by the Indian Courts was that the allocation of the panchmi property to respondent 1 was an integral term of the arrangement under which the surrenders were made, and that if the appellant refused to be bound by this allocation he could claim no benefit from the surrenders.

In their Lordships' opinion, this view is based upon a misinterpretation of the deed of March 1910. They think that the rights of the widow and daughters, being in effect bought out by payments from the general estate, their interest enured for the benefit of the other heirs irrespective of their rights inter se; and that the whole

subject to the annuities so charged and the debts (which were considerable) became divisible equally between the two sons. If the annuities and the debts had been made payable out of respondent 1's share only, and in consideration of this the panchmi property had been allotted to him, the position would have been different but this was not the effect of the deed.

Their Lordships are therefore of opinion that the appellant is entitled to share equally with respondent 1 in the panchmi properties, and that a decree should have been entered in his favour for possession of a moiety thereof. This would, of course, be without prejudice to the rights of any persons claiming as slaves or disciples under the will of Khadim Husain. They are not parties to the present litigation, and such rights as they may be entitled to assert are not affected by it.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decrees of the High Court in Appeals Nos. 132 and 164 of 1925 should be set aside, and that in lieu thereof a decree should be made in favour of the appellant for the shares in the several panchmi villages claimed by him in his plaint. Respondent 1 must pay the costs of the appellant in the High Court and before this Board, but, having regard to the order for costs made by the trial Judge, and to the fact that the appellant had raised issues on which he failed, their Lordships think that justice will be met by ordering respondent to pay only half of the appellant's costs in the Court of first instance.

Appeal allowed.

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