
Mohammad Waheed Khan and others Vs Nabi Ahmad Khan and others

First Appeal No. 519 of 1935

Court: Allahabad High Court

Date of Decision: May 7, 1942

Acts Referred:

Crown Grants Act, 1895 " Section 2, 3

Hon'ble Judges: Verma, J; Allsop, J

Bench: Division Bench

Advocate: Sir Wazir Hasan, M.A. Aziz, B.N. Misra, C.B. Agarwala and C.S, Sarans, for the Appellant; P.L. Banerji, Mushtaq Ahmad and Waheed Ahmad Khan for Respondents, for the Respondent

Final Decision: Dismissed

Judgement

Verma, J.

This is an appeal by the Defendants in the suit which was for the recovery of possession of the entire 20 biswas of a village

described as mauza Murshidabad Gauntara alias Gauntia and for mesne profits for the three years preceding the suit and for pendente lite and

future mesne profits un to the date of possession. The Court below has decreed the suit as prayed, the amount of mesne profits having been fixed

at Rs. 900 per annum in accordance with a statement made by the parties before the Court on the 18th of September, 1935. The following

pedigree will be of assistance in appreciating the facts of the case:

Nawab Ali

Akbar Chan

(Died in

1895)

Sardar Sultan HazabbarAliHamid AliMst. Iqbal

MohammadMohammadKhan. (DiedKhan. Begum

Khan. (Died Khan. issueless) (Died (Died on

on 9-9- (Died issueless). 27-11-

1930). issueless). 1924).

Nabi Zafar Mst. Mst. Hijab

Iqbal Ali

Ahmad Mohammad Hidayat Begum (P.

Khan (P.

Khan (P. Khan (P. Begum (P. 4).

5).

1). 2). 3).

The two sons and the two daughters of Sirdar Mohammad Khan and the son of his sister, Mst. Iqbal Begum, are the first five Plaintiffs in the suit.

The sixth Plaintiff, Ahmad Hasan Khan, is a person to whom the first five Plaintiffs have, with the object of raiding funds for the litigation, sold a half

share in the interest which they allege they have in the property in dispute. According to the Plaintiffs, Ali Akbar Khan was the grandson of one

Nawab Hafiz Rahmat Khan who was the last of the Rohilla chieftains and died in 1774. The village in question is situated in that part of these

provinces which is known as Rohilkhand and is alleged to have formed part of the territories over which Rahmat Khan is said to have ruled. The

Nawab Wazir of Oudh acquired Rohilkhand some time in the eighteenth century. In 1801 the Nawab Wazir ceded Rohilkhand to the East India

Company. By certain Regulations passed in the years 1802 and 1803 the East India Company granted certain concessions to the descendants of

Rahmat Khan for the purpose of maintenance. It was also declared by those Regulations that certain concessions of which the descendants of

Rahmat Khan were already in enjoyment would continue to be enjoyed by them. This state of affairs continued up to the year 1842. In that year a

grant was made by Lieutenant-Governor of these provinces to the descendants of Rahmat Khan. It is on the interpretation of this document that

the decision of this appeal depends. The case of the Plaintiffs is that this was a grant in perpetuity to successive generations of the heirs of Rahmat

Khan, according to the Mohammedan Law of descent, that each holder or group of holders was entitled to hold the property thus granted only for

his or their life or lives, that no alienation of any portion of the property by any holder or holders for the time being could, under the terms of the

grant, be operative beyond the life or lives of the alienor or alienors, that each successive generation of descendants acquired under the grant itself

an independent title to possess the estate during their life-time, that such right therefore accrued to the first four Plaintiffs on the death of Sardar

Mohammad Khan on the 9th September, 1930 and to the fifth Plaintiff on the death of Mst. Iqbal Begum on the 27th November, 1934 that Ali

Akbar Khan had in 1853 sold the village in question to one Karim Baksh, that Karim Baksh's heir, Ahmad Baksh, had in the year 1903 sold it to

Ismail Khan who was the predecessor-in title of the Defendants and that the Plaintiffs, by virtue of the right which, according to them, was

conferred on them by the grant of 1842, were entitled to recover possession of the property from the Defendants, the suit, instituted on the 22nd of

December, 1934, being within 12 years of the deaths of Mst. Iqbal Begum and Sardar Mohammad Khan.

2. Three separate written statements were filed by the Defendants, one by the first Defendant, another by the second Defendant and the third by

Defendants 3 and 4. The Defendants denied every single allegation made by the Plaintiffs. They also pleaded the bar of limitation, but the ground

on which the plea was based was not quite the same in different written statements. The following issues were framed for trial in the Court below:

1. Whether the property in suit is part of a heritable, perpetual and inalienable Crown grant to Nawab Ali Akbar Khan?

2. Are Plaintiff Nos. 1 to 5 heirs of Nawab Ali Akbar Khan and have they any right to sue?

3. Whether the grant, if any, was of land revenue only? If so, whether the Court has any jurisdiction to try the suit?

4. Whether the suit is barred by Article 144 of the Limitation Act and under 60 years" rule of limitation?

5. Whether the Plaintiffs are entitled to any mesne profits, if so, how much?

3. The Court below answered all the issues in favour of the Plaintiffs and decreed the suit as.

4. In the memorandum of appeal grounds have been taken challenging every finding of the Court below. At the commencement of the arguments

before us, however, the points involved in the second and the third issues mentioned above were abandoned and Sir Wazir Hasan, who appeared

for the Appellants, stated that the Appellants wished to confine their submissions to the questions raised by the 1st and the 4th issues framed by

Court below. In other words, the only point argued is the point of limitation, the decision of which depends on the interpretation of the grant made

in 1842. So far as issue No. 5 is concerned, the right of the Plaintiffs to recover mesne profits depends on their right to recover possession and the

amount of mesne profits has been fixed by the agreement as has been already stated. Thus, of the grounds taken in the memorandum of appeal,

only the 2nd, 3rd, 5th and 6th have been pressed before us.

5. The question that has been raised is as to the nature of the estate that was created by the grant of 1842. The document in question is a letter,

bearing date the 8th of January, 1842, from the officiating Secretary to Government, N.W.P. to the Secretary to the Board of Revenue, conveying

to the Board the orders of the Lieutenant-Governor--in other words, the Government,--regarding the rent-free lands held by the descendants and

dependants of Hafiz Rahmat Khan in the districts of Bareilly, Pilibhit and Moradabad. We are concerned with the district of Bareilly and village

Gauntia, out of which village Murshidabad has been carved, is at serial No. 35 among the properties of this district. The relevant portion of this

document, on the construction of which the decision of the case depends, is contained in paragraph 2 and is in these words:

The Lieutenant Governor considers that all the tenures now in the possession of the family, viz. from Nos. 1 to 43,...must be declared released in

perpetuity to heirs general, under the Mohammedan Law of descent, with a distinct proviso that no tenure now declared released in perpetuity can

be alienable by an incumbent for any period longer or beyond his individual life.

6. Before proceeding further, I consider it desirable to quote Sections 2 and 3 of the Crown Grants Act (XV of 1895). They are as follows:

2. Nothing in the Transfer of Property Act, 1882, contained shall apply or be deemed ever to have applied to any grant or transfer of land or of

any interest therein heretofore made or hereafter to be made by or on behalf of Her Majesty the Queen Empress, her heirs or successors, or by or

on behalf of the Secretary of State for India in Council to, or in favour of, any person whomsoever; but every such grant and transfer shall be

construed and take effect as if the said Act had not been passed.

3. All provisions, restrictions, conditions and limitations over contained in any such grant or transfer as aforesaid shall be valid and take effect

according to their tenor, any rule of law, statute or enactment of the Legislature to the contrary notwithstanding.

7. It is clear therefore that grants made by the Crown are not in any manner affected by the rules which govern transfers of immoveable property

made by persons other than the Crown and are entirely independent of those rules. The nature of the estate created by a Crown grant has therefore

to be determined in the interpretation of the words used in the document embodying the grant and not by reference to the rules which govern other

transfers of property.

8. Sir Wazir Hasan has sought to construe the document with which we are concerned in the light of the rules prevailing in England and has used

technical terms of English law, such as "estate of inheritance", "words of limitation", "fee simple", "life tenant", etcetera. He has even pressed into

service the rule laid down in Shelley's case 1 Rep. 93(b) and has relied on the explanation of that rule to be found in Lord Davey's opinion in Van

Grutten v. Foxwell (1897) A.C. 658 (684-5). It may be pointed out that the rule in Shelley's case was abolished in England by Section 131 of the

Law of Property Act of 1925 as the provisions of Section 60 of that Act removed the necessity for the rule. He has contended that the estate

taken under the grant in 1842 by AH Akbar Khan, who was the descendant of Rahmat Khan then in being, was an "estate of inheritance" or an

estate "in fee simple" and that the words in the grant, "heirs general under the Mohammedan Law of descent", are "words of limitation" and not

words of purchase". I do not propose--indeed, I do not consider it desirable--to get involved in these highly technical terms of English law. As was

pointed out by their Lordships of the Privy Council in Subhan Ali v. Imami Begum (1925) 52 Ind. App. 294 (301). "Such analogies are rarely

helpful and very frequently they are misleading." I shall therefore construe the document in question according to its plain tenor.

9. Sir Wazir Hasan's first argument is that a "complete estate of inheritance" was conferred on Ali Akbar Khan by the grant of 1842. In other

words, the contention is that Ali Akbar Khan took an, absolute estate under the grant. In fact, the actual words used by Sir Wazir were: "This is a

case of a clear fee simple being granted." The object of this argument was to show that Ali Akbar Khan, being absolute owner of the property, had

an absolute power of disposal and that therefore the sale-deed of 1853 conferred upon the vendee, Karim Bakhsh, an indefeasible title and that, at

all events upon the expiry of 12 years from the date of the sale, the title of Karim Bakhsh and his successors could not be questioned by any body.

This, however, is clearly an untenable contention. By the very terms of the grant, none of the tenures, declared "released" in perpetuity by it, could

be alienated by an incumbent "for any period longer or beyond his individual life". Thus, neither Ali Akbar nor those who were to come after him

were given an unrestrained power of alienation, which is of the very essence of an estate of inheritance or in fee. The first argument of the Learned

Counsel cannot therefore be accepted.

10. The second argument put forward on behalf of the Appellants is this. It is urged that, even if a series of life-tenancies be taken to have been

created--which, it is made clear, is not admitted,--each life tenant took by inheritance from the last life-tenant, in other words, each life estate came

to the successor as an heir of the last life estate holder and not by any independent right in himself. It is argued that adverse possession, therefore,

commenced at the moment of the transfer. The contention is that Ali Akbar lost his right to sue in 1865 and even his sons and daughter never had

any right to sue, much less their descendants I am unable to accept this argument. The moment it is admitted that a series of life-tenancies was

created, it becomes impossible to argue that any heir--or group of heirs--got the right to come into possession of the property by inheritance to the

heir or group of heirs immediately preceding, in other words, that any heir or group of heirs claims through the preceding heir or group of heirs. The

possession of Ali Akbar's vendee could not therefore be adverse to those who, under the terms of the grant, were to become entitled to come into

possession of the property upon the death of Ali Akbar. The argument that the right to sue did not accrue to the sons and daughter of Ali Akbar

when the latter died in 1895, as the right had become extinguished for all time to come in 1865, is not correct.

11. It is then argued--and this is the last argument--that even if a right to sue did accrue to the sons and daughter of Ali Akbar on his death in

1895, those sons and daughter having admittedly never exercised that right during their lives which lasted for more than 12 years after 1895, the

right became extinguished, not only so far as the son and daughter of Ali Akbar were concerned, but also so far as their descendants are

concerned. This argument also is, in my opinion, unsound and my reasons for this view are the same as those given in connection with the second

argument of Sir Wazir Hasan. Unless it can be held that the present Plaintiffs claim through their father and mother, it is not in my judgment possible

to hold that the failure of their father and mother to sue has extinguished their right to recover possession of the property.

12. These are the three grounds on which Sir Wazir Hasan has based his contention that the suit was barred by time.

An analysis of the second paragraph of the grant yields the following results:

(a) that the properties mentioned in the document were granted in perpetuity to the descendants of Rahmat Khan, the person in existence at the

time of the grant being Ali Akbar Khan

(b) that in order to find out the person or persons entitled to possession of the property on the death of a holder, it must be seen who the heirs of

the last holder are under the Mussalman law;

(c) that each successive holder--or group of holders--shall be entitled to remain in possession only for his life or their lives; and

(d) that if any holder of the property makes an alienation of any portion of the property in his or her possession, such alienation shall cease to be

operative upon the death of the alienor.

13. In my judgment the grant created a succession of independent life estates beginning with Ali Akbar. I am not using the expression "life estate"

in any technical sense, but merely in the sense of an estate which is only enjoyed by the holder thereof during his life and which cannot be

transferred by him for any period beyond his life. The successive life estate holders were nominated by words of description. Each successive life

estate holder derived title, not from or through the previous holder, but directly from the grant. He has, of course, to answer to the description

given in the grant which happens to be that he should be an heir according to the personal law by which the family was governed.

14. The intention of the Government in making this grant must, in my opinion, be taken to have been to keep the property in the family of Rahmat

Khan for the maintenance in perpetuity of his descendants and to prevent strangers from coming in.

15. The argument which has been strongly pressed on behalf of the Appellants is this. It is said that, if the construction contended for by the

Plaintiffs is placed upon the grant, the result would be that a transferee from any particular holder of the property would be liable to be ejected

after the lapse of many decades, may be centuries, even though successive generations of descendants of Rahmat Khan have come and gone,

without assailing the transfer. In the present case itself, it is pointed out, the transfer was made as far back as 1853 and one generation of the

descendants did not attack that transfer. All this is quite correct. The question remains, however, whether these considerations can justify a refusal

to recognise the right which the grant, if the construction placed by me upon it is correct, confers upon the Plaintiffs. In my judgment they cannot. In

the first place, there can in my opinion, be no doubt that the Crown has the right to create any kind of estate unfettered by the rules which apply to

ordinary transfers. In the second place, any one who chooses to take a transfer from a person whose right to make the transfer is limited does so

with his eyes open and deliberately runs the risk of being ejected at the suit of those who have the right to eject him. The fact that certain person,

who also had the right to eject him, failed to do so cannot enlarge the right of the transferee, provided, of course, that those who do ultimately seek

to eject him have the right to do so.

16. I am satisfied that if the Appellants' contention is accepted the very object of the grant will be defeated.

17. Learned Counsel for the parties have referred to a number of decided cases. Sir Wazir Hasan, besides citing Shelley's case Rep. 93(b) and

the case of Van Grutten v. Foxwell (1897) A.C. 658 (684-5) already mentioned, has cited the judgments of the Judicial Committee in Mir Subhan

Ali v. Imami Begum, (1925) 52 Ind. App. 294 (301) Daivasikhamani v. Periyaran 1936 A.W.R. 975 : 1936 A.L.J. 977, Suraj Kunwar v. Deo

Singh 1938 A.W.R. (PC) 109 : 1938 A.L.J. 301, Debi Baksh Singh v. Chandra Bhan Singh (1910) 37 I.A. 168 and Lal Ram Singh v. Deputy

Commissioner of Partabgarh (1923) 50 I.A. 256 : AIR 1923 P.C. 160. He has also referred to the decision of the Chief Court at Lucknow in

Rani Abadi Begum v. Mohammad Khalil Khan AIR 1938 Oudh 481 and to that of the Bombay High Court in Tuka v. Ganu (1930) 55 Bom 21 :

AIR 1931 Bom 24, None of these, cases in my opinion affords any assistance in the decision of the case before us. It is not possible to construe

the document which we have to construe in the light of the construction placed upon another document, in another case, or in the light of

observations made in cases which were concerned with the interpretation of the sections of the Oudh Estates Act or with debutter or watan

properties.

18. Mr. P.L. Banerji for the Plaintiffs-Respondents has, in the first instance, placed reliance on four judgments of this Court in cases which related

to properties covered by this very grant. Two of those judgments are on the record of this case and are printed at pages 104 and 120 of the paper

book. They are both Bench decisions, the first being in second appeal No. 290 of 1921 and the other in second appeal No. 1110 of 1929.

Learned Counsel has read the judgments of the other two cases from copies which he had with him. One of them was the decision of a learned

single Judge on the 19th January, 1939, in second appeal No. 236 of 1937 and the other a decision by a Bench on the 29th April 1941 in first

appeal No. 262 of 1936. The contention is that these judgments embody rulings bearing on the question which we have to decide. An examination

of these judgments, however, revealed--and Learned Counsel agreed--that the first three of the four cases mentioned above--namely, the

decisions in the three second appeals--did not deal with the precise question which has arisen before us. The judgment dated the 29th April, 1941

in first appeal No. 262 of 1936 does deal with this matter. The conclusion at which I have arrived is in accord with the view taken in that case.

19. The Respondents have also cited the following cases:

Vidya Varuthi v. Balusami (1921) 48 I.A. 302 : AIR 1922 P.C. 123, Naurangi Lal and Others Vs. Ram Charan Das, , AIR 1933 75 (Privy

Council) , Skinner v. Skinner (1904) 31 All 239, Skinner v. Nati Nihal Singh (1913) 35 All 211 P.C. Skinner v. Nau Nihal Singh (1929) 51 All

159 All 367 : AIR 1929 P.C. 158, AIR 1935 44 (Privy Council) and Pedder v. Hunt 18 Q.B.D. 565. It does not, however, seem to me that any

of these cases is really in point.

20. It has been argued on behalf of the Appellants that, if the decree of the Court below is upheld, the result will be that the statute of limitation can

never apply to a claim, brought by a descendant of Rahmat Khan for recovery of possession over any of the properties covered by this grant,

against a transferee. This is correct in one sense and not correct in another. If any such descendant does not within 12 years of his becoming

entitled to possession on the death of the last preceding incumbent, attack a transfer made by any of his predecessors, his right to recover the

property for himself will be barred. But that will not bar the right of any of those coming after him.

21. My conclusion is that the decree passed by the Court below is correct. I would therefore dismiss the appeal with costs.

Allsop, J.

22. The question in this appeal is whether the Government intended to grant a heritable estate to Ali Akbar Khan with a provision against absolute

alienation or whether it intended to grant a series of independent life estates to him and his heirs and their heirs and so on for ever without creating

an absolute remainder in anybody. If the Government had the latter intention the title to the estate must for ever remain in doubt because no judicial

decision or rule of limitation can bind each succeeding generation. The Government can doubtless make a grant of any kind but I must confess to

some reluctance in accepting their intention to produce an effect so manifestly contrary to public policy.

23. On the other hand it must be admitted, if the former was the intention, that any holder of the estate could defeat the provision against alienation

by the simple expedient of acquiescing in a trespass, unless a trespasser could be held to be prescribing only for the alienable life estate in which

event the distinction between the two possible estates would lose its importance.

24. My learned brother has found that the Court below is right and he is supported by a decision of two other Judges of this Court in a parallel

case arising out of the same grant. In these circumstances I cannot differ from him and I concur in the order which he proposes to pass.

25. The appeal is dismissed with costs.