(1890) 03 PRI CK 0004

Privy Council

Case No: None

Haidar Ali and Another		APPELLANT
	Vs	
Tassaduk Rasul Khan and others		RESPONDENT

Date of Decision: March 15, 1890

Citation: (1891) 18 ILRPC 1 : (1890) 17 IndApp 82

Hon'ble Judges: Hobhouse, Macnaghten, Barnes Peacock, Richard Couch, JJ.

Judgement

Richard Couch, J.

1. The Plaintiff and Appellant Haidar Ali is the elder brother of Rajah Farzand Ali Khan, talookdar of Jehangirabad, who died without leaving any male issue. He held a sanad for the estate of Jehangirahad, and his name was entered in list No. 2, prepared according to Act I. of 1869. He left four kinds of property:

1. The talookdari estate conferred by the Sanad.

2. Landed property acquired by him from other talookdars.

3. Immoveable property acquired from persons other than talookdars.

4. Moveable property, money, and debts.

2. The Plaintiff Haidar Ali claimed to be the Rajah''s sole heir and successor, and entitled to the first and second classes of property, and to so much of the fourth as might be held to be heirlooms under the provisions of Sections 14 and 22 of Act I. of 1869, and to a fourth share, according to the Mahomedan law, of the third class of property and of the fourth, exclusive of heirlooms. The other Plaintiff and Appellant is a purchaser of part of Haidar All''s interest. The Defendants, the Respondents, were in possession, and had obtained mutation of names in their favour in the Revenue Department. Their grounds of defence will be conveniently noticed as the case with regard to each class of property is considered.

3. As to the first class, the defence of Tassaduk, who was in possession of it, was founded on a document, dated the 6th of April, 1860, and a formal will of the Rajah, dated the 19th of August, 1879. The first of these is a statement by Rajah Farzand Ali in reply to inquiries by the Government under Circular Orders regarding the succession of talookdars. It is as follows:

I am Rajah Farzand Ali Khan Bahadur, talookdar of Jehangirabad, &c. Whereas the Government has been pleased to confer upon me the proprietary rights in this estate, to be enjoyed from generation to generation, I do hereby request that after my death my estate may be maintained intact and without partition according to Raj Gaddi custom, and that, owing to my not having a male issue, Zebunnissa, who is my daughter by Rani Abbas Bandi, daughter of Rajah Razzak Baksh, shall be considered entitled to succession and inheritance. But as I have taken Tassaduk Rasul from my brother Mardan Ali Khan, and have commenced to bring him up and educate him as my son, if he finishes his education during my lifetime and is married to Zebunnissa, he shall after me succeed to my estate as my adopted son.

4. The Rajah made other replies about the same, the talook being in three districts, in which no reference was made to his daughter or Tassaduk Rasul, and it was contended that the reply of the 6th of April was not intended more than the others to be testamentary; but in a letter from the Rajah to the Deputy-Commissioner, dated the 20th of June, 1877, in reply to questions that had been asked, he said in reply to the fourth question, which was to give the name and title of any boy who might be his successor, whether his begotten or adopted son, "The reply to this question refers to the will which has been submitted to the Lucknow district through the tahsil of Kursi on the 6th of April, 1860." This shows that he intended that to be his will. Their Lordships are of opinion, following the judgment of this Board in Hurpurshad v. Sheo Dyal Law Rep. 3 Ind. Ap. 259, that it is a will within the definition in Section 2 of Act I. of 1869. It is therefore a complete answer to the Plaintiff''s claim to Jehangirabad.

5. It was contended that it was revoked by the will of the 19th of August, 1879, the Rajah having in that said no document of any sort purporting to be a will or petition, the context whereof is wholly or partly repugnant to it, should be deemed to be admissible. But it is not repugnant. In this the Rajah says that, having adopted Tassaduk Rasul Khan as his son, he has appointed him his successor, and he is to be the owner of his entire property, estate and raj, as a rajah and talookdar, and as he is married to his daughter the estate shall successively "descend to devolve" on the descendants of the daughter. Also the will of 1879 was not registered in accordance with Section 20 of Act I. of 1869, and consequently as regards the talookdari estate is invalid. It cannot, therefore, operate as a subsequent will to revoke the will of 1860, nor was that will revoked by the Act of 1869, as was also contended.

6. There is, however, another defence to this part of the claim, which also applies to the second class of property if it was acquired according to Section 14 of the Act. The

pedigree, which is admitted by all parties to be correct, shows that Haidar Ali was not the eldest brother of Farzand. There were two elder brothers, Sahib Ali and Marian Ali, who died before Farzand, both leaving sons, and the sons of Sahib were not parties to the suit. Tassaduk is a son of Mardan Ali, and Nawab Ali, who died pending the appeal, the father of the Respondent Naushad Ali, was his eldest son.

7. The Plaintiff claims, as the elder brother of Farzand, to be his sole heir and successor under Section 22 of Act I. of 1869. The section begins by saying that if a talookdar or grantee whose name shall be inserted in the second, third, or fifth of the lists mentioned in Section 8, or his heir or legatee, shall die intestate as to his estate, such estate shall descend as follows, and then there are eleven sub-sections forming a scheme of descent. The Plaintiff claims under sub-Section 6, but in construing that the whole of the sub-sections should be looked at. The first says the estate shall descend to the eldest son of the talookdar and his male lineal descendants. The second says that if such eldest son shall have died in the lifetime of the talookdar leaving male lineal descendants, the estate shall descend to his eldest and every other son successively according to their respective seniorities and their respective male lineal descendants. The third says that if such eldest son shall have died in his father''s lifetime without leaving male lineal descendants, the estate is to descend to the second and every other son of the talookdar successively according to their respective seniorities and their respective male lineal descendants. That male lineal descendants here are intended to include the descendants of a son dying in his father''s lifetime is apparent from sub-Section 4. That is, "Or in default of such son or descendants," then to such son of a daughter as has been treated by the talookdar in all respects as his own son, and to the male lineal descendants of such son. The estate is to go to the daughter''s son only in default of male lineal descendants of a second or other son. In sub-Section 4 male lineal descendants of a daughter''s son must have the same meaning as in sub-Section 3, for by sub-Section 5 the estate is to descend to a person adopted by the talookdar only in default of such son or descendants, viz., a daughter''s son or his male lineal descendants. The 6th section says, in default of an adopted son the estate is to descend to the eldest and every other brother of the talookdar successively according to their respective seniority and their respective male lineal descendants. The words here should, in their Lordships'' opinion, be held to have the same meaning as they have in sub-Sections 3 and 4. In sub-Section 7 the words are, "in default of any such brother" to the widow, omitting "descendants"; but their Lordships cannot think it was intended by this omission to postpone the succession of male lineal descendants of brothers who died in the talookdar''s lifetime till after the persons mentioned in sub-Sections 7, 8, 9, and 10, and only to allow such male lineal descendants to succeed under sub-Section 11 according to the ordinary law to which the talookdar is subject. It is the reasonable construction that the brothers were intended to take in the same manner as sons. It therefore appears to their Lordships that the Plaintiff has no title to Jehangirabad or to the property which, by

virtue of Section 14, was subject to the same rules of succession.

8. This also disposes of the suit as regards the second class of property, which the Plaintiff claimed under the same title as the first class. It was objected by Mr. Mayne, on behalf of Naushad Ali, who claimed to be entitled to it under a codicil of the 1st of November, 1879, that the property was not proved to have been acquired according to Section 14. The question does not appear to have been raised in the Lower Courts. Apparently it was assumed to be so acquired, possibly because it was known it could be proved by official documents, of which the Court was bound to take judicial notice. There is, indeed, some evidence of it in the record, where there is what is called a list of villages held by Naushad Ali Khan, out of the villages purchased by Rajah Farzand Ali Khan from sanad-holding talookdars. The validity of the codicil was in issue, but there is no finding upon that in either of the Lower Courts. It would, however, be invalid as regards property acquired under Section 14, for want of registration. But if this property is not within Section 14, it is in the same condition as to succession as the property in classes 3 and 4. Haidar Ali claimed one-fourth of these classes, excluding heirlooms, as one of the heirs of Farzand Ali, according to the Mahomedan law, and alleged that the Defendants did not acquire any rights to it under the will of the 1st of November, 1879. This will has been found by both the Lower Courts to be genuine, and it excludes Haidar Ali. It is therefore an answer to his claim as heir.

9. But the Defendants also relied upon a custom of the Sheikh Kidwai tribe, to which the Rajahs Razzak Bakhs and Farzand Ali Khan belonged, that sons, adopted sons, and daughters succeed in preference to and in exclusion of other heirs, by which the Plaintiffs'' claim in opposition to Zebunnissa, the daughter, must fail. It was not disputed that the Rajahs belonged to that tribe. Both the Lower Courts have found that there is such a custom among the Sheikh Kidwais, and their Lordships see no reason in this case for departing from the settled practice of this Committee where there are concurrent judgments of the Courts below upon a question of fact. There is, therefore, a good defence to the whole of the Plaintiffs'' claim, and the suit has been properly dismissed. Their Lordships will humbly advise Her Majesty to affirm the decree of the Judicial Commissioner which dismissed the appeal to him from the decree of the District Judge dismissing the suit, and to dismiss this appeal. The Appellants will pay the costs of it.