

**(1938) 10 BOM CK 0007**

**Bombay High Court**

**Case No:** None

Mahbub Singh

APPELLANT

Vs

Abdul Aziz Khan

RESPONDENT

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**Date of Decision:** Oct. 31, 1938

**Citation:** (1939) 41 BOMLR 668

**Hon'ble Judges:** Wright, J; Romer, J; Porter, J; George Rankin, J

**Bench:** Full Bench

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### **Judgement**

Porter, J.

The plaintiffs in this suit, who are also appellants, are the nearest reversioners of their uncle, one Chaudri Mangal Singh, who died on October 29, 1928. It is common ground that they are entitled to inherit his estate if on his death he was a Hindu and not a Mahomedan: if, however, he died a Mahomedan, whoever may be entitled to his estate, the appellants have no claim to the inheritance.

2. The appellants contend that the deceased man, who was a Hindu by birth, had never been converted to Mahomedanism, whereas the respondents maintain that he was not only a Mahomedan at his death but that he had become a Mahomedan some thirty years earlier and remained of that faith.

3. Mangal Singh died in the house of the respondent and it was said that twenty-two years earlier he had made an oral waqf or charitable disposition of his property substantially in the terms afterwards embodied in a formal document dated October 25, 1928, and had appointed himself mutawalli or trustee thereof.

4. After the death of Mangal Singh the first-named respondent, who will be referred to as the respondent hereafter, and against whom, the suit was primarily brought (the other defendants being merely impleaded pro forma) claimed the estate as mutawalli. The appellants, however, as heirs claimed mutation of their names in respect of the landed property left by the deceased. The Assistant Collector, to whom the claim was referred in due course, thought that the suit could not,

properly, be disposed of on the basis of possession and decided summarily that the respondent was prima facie entitled to the property, leaving the appellants to bring an action in the Courts if so advised. Accordingly on July 21, 1930, the present appellants brought an action against the respondent in the Court of the Subordinate Judge of Muzaffarnagar.

5. The substantial controversy before this Board turned upon the question whether Mangal Singh had embraced the tenets of Islam and continued in that faith until his death.

6. In the action before the Subordinate Judge the appellants relied upon their title as reversioners, alleged that Mangal Singh always was and remained a Hindu, denied the making of any waqf and asserted that the deceased man either did not understand what he was doing, or if he did understand what he was doing, acted under undue influence at a time when he was suffering from maraz-ul-maut, or mortal sickness.

7. The respondents, in answer, maintained that Mangal Singh became a Mahomedan more than thirty years before the initiation of the suit and had made according to Mahomedan law an oral waqf of all his property twenty-two years before that date. They further alleged that he had written out two documents containing the essential terms of the waqf one long before his death and a fair copy shortly before that time and that he had executed a formal document four days before his death to the like effect. In any case they pleaded he had died a Mahomedan and the appellants had therefore no title to his estate.

8. It appears that Mangal Singh had become seriously ill by the middle of October, 1928, and was attended from the 18th of that month until his death by a Dr. Verma, who was at that time Civil Surgeon at Muzaffarnagar.

9. On October 20, Dr. Verma, acting as he said at Mangal Singh's request, fetched Mr. Rule Milner-White, the Collector and District Magistrate, to the bedside of Mangal Singh. Mr. Milner-White was absent on leave at the time of the trial, but his deposition used in the mutation proceedings was admitted in evidence.

10. He deposed that Mangal Singh informed him at once that he was and had for a long time been a Mussalman and handed him a draft and fair copy of a document relating to the disposition of his property.

11. Mr. Milner-White took down a brief abstract of the conversation from which it appears that the document was read over to Mangal Singh who signed it and the rough draft, saying that he had drafted the contents of the document from fifteen to twenty years before and had recently made a fair copy, that the document was in his, own handwriting throughout and represented his wishes completely. After it had been signed the document was entrusted to and taken away by Mr. Milner-White. The documents referred to were produced to the Court and

comprised (1) the rough draft and (2) a fair copy of a so-called deed of gift from which it appeared that Mangal Singh purported to have disposed of all his property by way of waqf many years before.

12. Unfortunately documents (1) and (2) were lost whilst in the possession of the Court. There is no reason to suppose that this loss is attributable to either of the parties, nor are their Lordships of opinion that their loss would be of benefit to one rather than the other.

13. At the trial of the suit the respondents produced a certified copy of one of these documents. Some difference of opinion arose between the Court of first instance and the appellate Court as to which of the documents the copy represented. Save for the existence of this difference of opinion their Lordships think the question immaterial, but they will refer to it at a later stage of the judgment in considering the conflicting views of the two Courts.

14. On further consideration Mr. Milner-White thought it would be advisable for the deceased man to deal with his property by will and in a letter of October 23, written to Mangal Singh, but addressed to the respondent, he suggested that course. A reply to this communication was received from Mangal Singh in which he pointed out that as he had already made a waqf of the property he could no longer dispose of it by will, but that he had decided to get the document registered as soon as the Court opened. He also asked that the document should be sent to him by the hand of the vakil who brought the letter. In answer to this request Mr. Milner-White appears to have sent back one or both of the documents entrusted to him.

15. On the same date a waqf deed appears to have been written out from a draft supplied by Mangal Singh. This deed differs in form and wording but not greatly in essence from the earlier document. After it had been prepared Mr. Milner-White on October 25, 1928, was again asked to visit the deceased man.

16. The formal deed had either been signed previously or was signed in his presence by Mangal Singh, and, after he and others had signed it as marginal witnesses, was handed to the Sub-Registrar and ultimately registered.

17. It is plain that if Mangal Singh understood the contents of the documents and was not acting under undue influence in preparing or signing them, or if his oral statement to Mr. Milner-White is to be taken at its face value, the appellants cannot succeed.

18. So far as undue influence is concerned, the onus is upon the appellants to prove that the documents signed by Mangal Singh, viz. (1) the rough draft, (2) the fair copy handed to Mr. Milner-White on October 20 and returned by him on the 23rd, and (3) the formal document of October 25 were signed under the undue influence of the respondent or others acting on behalf of the Mahomedan community. There is very little evidence of any such influence.

19. It is spoken to by the dead man's cook, Musammat Choto, and by two of his relatives, but the cook alleges that Dr. Verma was one of the principals in urging the making of the waqf, an allegation which is categorically denied by the doctor : and the evidence of the relatives seems rather to suggest that Mangal Singh was willing to admit that he was a Mahomedan but objected to saying that he had become a member of that faith many years before.

20. Their Lordships think the appellate Court right in holding that undue influence had not been proved.

21. So far as the deceased man's state of mind is concerned, evidence was given by Dr. Verma and Mr. Milner-White and other witnesses.

22. There is no doubt that from October 18, when Dr. Verma first attended him until his death, Mangal Singh was seriously ill, at times he was comatose and no doubt, as the events showed, he was suffering from mortal illness, but both the witnesses mentioned by name say that he was] in a sound state of mind and quite normal, and the doctor adds he was capable of understanding whatever he was doing at the time of registration, i.e. on October 25. Moreover the doctor gave a certificate in writing to that effect on the same day.

23. In their Lordships' view this evidence establishes that Mangal Singh was of sound mind on both the occasions on which he saw Mr. Milner-White and fully understood what he was doing, and that his statement that he was a Mahomedan is to be believed.

24. In view of these findings the appellants must fail, whatever the date be at which Mangal Singh embraced the Muslim faith and whether the waqf be established or not. If the waqf was made during Mangal Singh's mortal illness, it is conceded that the respondents not only defeat the present claim but also establish a right to one-third of the property, and if it was made before his final illness the respondents would be entitled to the whole of his estate. The two latter points, however, do not directly arise in the present proceedings, and beyond saying that in their Lordships' view Mangal Singh's conversion took place some time before Dr. Verma first saw him in October, 1928, the Board does not propose to make any final pronouncement upon them.

25. A great deal of evidence, both oral and documentary, was given with a view to showing on the one hand that at any rate up to the time of his last illness he remained a Hindu, and on the other that he had become a Mahomedan some thirty years before that date and had made an oral waqf about eight years after his conversion.

26. The learned Judge in the Subordinate Court has subjected this evidence to a careful and elaborate analysis and has come to the conclusion that the evidence for the respondents is not to be believed and further has found that the deceased man

lived and died a Hindu and never made a waqf save under undue influence during his mortal illness.

27. This latter finding their Lordships, as they have indicated, cannot accept.

28. The appellate Court have given equally elaborate reasons for rejecting the appellants' case and evidence.

29. Though they accept the finding of the appellate Court upon the main issue, their Lordships regret that that Court should in their judgment have cast imputations upon the motives and reasoning of the Subordinate Judge. Indeed if their Lordships had found it necessary to consider which of the two lost documents produced by Mangal Singh to Mr. Milner-White on October 20 the copy produced to the Court represented they would be inclined both from the internal and external evidence to agree with the Subordinate Judge rather than with the appellate Court,

30. As to the oral evidence, their Lordships see much to criticize in some of that given by both sides. Though they think that that given on behalf of the respondents is more worthy of credence, in their view a Judge might honestly take the opposite view and they deprecate the use of criticism of and imputations upon the honesty of an inferior Court expressed in language which may tend to prevent that Court from forming and expressing an independent view of the result of the evidence brought before it.

31. In reaching their conclusion their Lordships do not think it necessary to determine whether the performance of any ceremony is essential before a

convert can be said to have embraced the Moslem faith. No point as to ceremonial was taken in the Courts below and their Lordships do not think that the appellants are entitled to raise the question at this stage of the proceedings.

32. In accordance with their views expressed above, their Lordships will humbly advise His Majesty that the appeal should be dismissed and that the appellants should bear the costs of the appeal.