

*Judgment of the Lords of the Judicial Committee
of the Privy Council on the Appeal of Meethun
Babee v. Busheer Khan and others, from the High
Court of Judicature of Bengal; delivered on the
8th March, 1867.*

Present:

SIR JAMES W. COLVILLE.

SIR EDWARD VAUGHAN WILLIAMS.

HON. SIR R. T. KINDERSLEY.

SIR LAWRENCE PEARL.

THE Appellant is the widow of Agha Jan Khan, a native of Canbul, who died domiciled at Cuttack in July 1857. Her father was one Burkhordar Khan, also probably a Pathan by origin, who, after carrying on some kind of business at Cuttack, is said to have gone into the Dekhan with elephants, horses, and other merchandise, and to have died there in the early part of the present century. He left a widow, Fatima; the Appellant, his only daughter; and a son named Hossein Khan. The Appellant married first an Afghan named Omar Khan, who died some time in the year 1824; and very shortly after his death she married his near relation Agha Jan Khan. By Omar Khan she had a son, Timour Khan, who died in 1829. In the year 1831 there appeared at Cuttack one Ismail Khan, who claimed to be the brother of Omar Khan, and, as such, entitled to share in that portion of his estate which had descended to his son Timour Khan. Agha Jan Khan and the Appellant compromised this claim for a sum of Rs. 300, and the release of a debt of Rs. 721. After that transaction Agha Jan Khan carried on business at Cuttack, became the registered and ostensible proprietor of the Zemindary Talook, which is the principal subject of dispute in this cause, and the

apparent owner of the other property which the Courts below have found to have belonged to him at the time of his death.

The Respondents claim to be the co-sharers and residuaries, who, according to the Mahomedan law, are entitled to divide the estate of Agha Jan Khan with his widow. They contend that Koolee Khan, the common ancestor, had two sons, of whom Morad Khan was the father of Agha Jan Khan, and of the female Respondent, Bukht Banoo; and the other, Nidda Khan, was the father of the before-mentioned Omar Khan and Ismail Khan; and that Ismail Khan was the father of the Respondents, Busheer Khan and Moneer Khan, and of one Goolmer Khan, who is dead. Claiming under this title, they instituted the present suit for the recovery of their respective shares of the Zemindary and other property alleged to have belonged to Agha Jan Khan at the time of his death from his widow, who was in possession of it.

The Appellant has contested their title to sue; she has claimed the sum of Rs. 20,000 as due to her from the estate of Agha Jan Khan as the stipulated amount of her Dainmohr, and, on the grounds which will be hereafter considered, has denied that any part of the property claimed belonged to her late husband. The first two questions may be very shortly disposed of.

Their Lordships, in the course of the argument, intimated that they considered the title of the Respondents to be established.

It has been affirmed by the concurrent judgment of the two Courts below, which, the issue being one of fact, their Lordships, according to the ordinary course of this Committee, would not disturb unless they were satisfied that it was wrong. They believe, however, that it was right. It was, no doubt, difficult for the Appellant to disprove the pedigree of a family whose domicil was in Afghanistan; and the omission of Ismail Khan to mention in the petition, which is in evidence, his relationship to Agha Jan Khan, may be a circumstance of suspicion. But it was not necessary for him to state that relationship in order to make out the title, which he was then asserting, as co-heir of Omar Khan's son; and on the other hand, we have

indisputable evidence that Agha Jan Khan received into his family, and recognized as kinsmen, first Goolmer Khan, and afterwards the Respondent, Moneer Khan. The identity of that Goolmer Khan with the Goolmer Khan of the pedigree might be disputed; but there can be no doubt as to the identity of Moneer Khan. The persons, therefore, who are entitled to share the estate of Agha Jan Khan have been correctly ascertained. Again, both the Courts below have held that the Appellant has failed to establish her claim to the Dainmohr; and nothing has been urged on the present Appeal which induces their Lordships to doubt the correctness of that conclusion. Therefore the only substantial question on this Appeal is, to what extent, if any, is the property which is the subject of the decrees in the Courts below to be treated as the estate of Agha Jan Khan.

The Respondents, relying mainly on the ostensible ownership, insist that the whole of it is to be so treated. The case of the Appellant is, that no part of it, in fact, belonged to her husband; that it was acquired from the proceeds of a business carried on with funds left by her father Burkhordar Khan; that those funds and that business belonged to herself, her mother, and her brother, as the co-heirs of Burkhordar Khan; and that her late husband, though the 'gerent' of the business, and the ostensible purchaser and registered holder of the Talook, was a mere manager and trustee for her and her family.

Of the issues recorded in the suit by the Court of First Instance, the second and the fourth both related to this question of title to the property. Under the first of these, the Respondents had to prove that "the whole of the disputed property was the own property of Agha Jan Khan." Under the other, the Appellant had to establish that "the Zemindary and other property claimed had been inherited by her from her father's, mother's, and brother's estate, and belonged to her; and that Agha Jan Khan had no right thereto."

Both the Courts below have held, and in their Lordships' opinion properly held, that the Appellant has failed to prove this last issue, and to substantiate the case set up by her. She relied mainly on the oral testimony of witnesses whom both Courts

have pronounced to be untrustworthy. Of their evidence, some part was directed to prove the wealth of Burkhordar Khan and of his family, and the poverty of both the husbands of the Appellant, and of their family; other parts went to show that the Zemindary was purchased with funds supplied by Fatima, and even that she was recognised as Zemindar, and received the rents. There is a failure of proof that the property of Burkhordar Khan (and it is very uncertain what was the amount of it) furnished the capital on which Agha Jan Khan traded; there is no proof that the business carried on by Burkhordar Khan was an established, continuing business. His dealing in horses and elephants seems to have been something distinct and of a different nature from the money-lending business, in which, as some of the witnesses state, his widow engaged after his death. And, lastly, the case set up by the Appellant, and sought to be established by her witnesses, is inconsistent with her acts and conduct. For though Fatima predeceased Agha Jan Khan, Hossein Khan is stated by some of the Appellant's witnesses to have survived him, and appears by the Appellant's written statement to have left a daughter. Yet, on the death of her husband, the Appellant claimed to be entitled to the whole of the property; and procured, by petition to the Collector, the registration of the Talook in her sole name. No suggestion that either Hossein Khan or his daughter had any interest in the property was then made.

It may be said on the other hand, and probably with truth, that the oral testimony adduced by the Respondents is hardly more trustworthy than that on the part of the Appellant. Such as it is, it is directed to prove the poverty of Fatima and her family; and that Agha Jan Khan, at the date of his marriage, had some, though not very ample means. The Respondents are, however, entitled to rely on the presumption resulting from his ostensible ownership of the property, until that is satisfactorily rebutted. There is documentary evidence in the cause which shows that other real property was bought and sold by him. Some of the proceedings which are in evidence, and the fact of his taking into the house first one cousin and then

another, tend to the conclusion that he was the master of his family, and head of his own house. It is not likely that he, who was obviously the active man of business of the family, would have submitted to occupy for thirty years the dependent position which the Appellant's case assigns to him. Nor is there any strong antecedent improbability in the hypothesis that by means of successful traffic during that period he had been able to realize, from however small beginnings, the property of which he died ostensibly possessed. Therefore, of the two cases set up by the parties, the weight of evidence seems to be in favour of that of the Respondents.

But between these two cases lies the theory adopted by the Principal Sudr Ameen. That intermediate theory is that the property was acquired from the proceeds of a trade carried on by the Appellant and her husband in partnership, the original capital of the Appellant being derived, not from her own family, but from the estate of her first husband, Omar Khan; and that the shares of the parties in this joint concern, being undisclosed, must be assumed to have been equal.

If this case had been established by satisfactory evidence, the Principal Sudr Ameen, in dealing with the second issue, might properly have adopted and acted upon it. It appears, however, to their Lordships, as it appeared to the High Court of Calcutta, not to be so established. The theory of a partnership, properly so called, between the Appellant and her husband is not only inconsistent with her case as first launched; but has been indignantly repudiated by her throughout the proceedings in the suit, and particularly by her petition of appeal to the High Court. None of the witnesses attempt to prove it. There is, no doubt, some evidence of partnership dealings between Omar Khan and Agha Jan Khan. But that evidence points rather to some joint adventures, than to a regular partnership in a continuing and established business. Again, there is evidence that Omar Khan died worth some few thousand rupees. The sum at which the residue of his estate is estimated in the petitions of Ismail Khan is less than 4000 Rs. But as Mr. Pontifex argued, there is no proof that this sum, or any other property of the Appellant, entered into the capital on which Agha

Jan Khan traded. Had that been her case, she might have proved it by the books of the business, which are presumably in her power and custody, the evidence of Gomashtas or the like. If the Principal Sudr Ameen thought that his hypothesis was according to the truth of the case, and the real rights of the parties, he should have established it by pursuing the inquiry, and by calling for the production of proper proof. Meer Dowlut's testimony falls very far short of such proof. And the conclusion of the Principal Sudr Ameen as to the partnership seems to rest principally on his own knowledge and belief, or public rumour,—grounds upon which no Judge is justified in acting.

Their Lordships are, therefore, of opinion that upon the facts alleged and proved in this case the Judgment of the High Court, which, varying the Decree of the Principal Sudder Ameen, dealt with the property in dispute as wholly that of Agha Jan Khan, is right. They feel, however, considerable doubt whether that Judgment, partly owing to the nature of the suit, and partly to the very unsatisfactory manner in which it has been conducted, has not failed to do complete justice between the parties. The suit is not an administration suit, in which the assets of the deceased, and the charges and incumbrances thereon in the shape of debts or otherwise are ascertained by proper inquiry. It is a suit for the recovery of certain shares in specified property assumed to have belonged to the deceased. Again, the excessive claim of the Appellant may have prevented her from getting that to which she is really entitled. Her own property may have been mixed up with her husband's. Their Lordships do not feel at liberty to reopen the litigation in this suit. But whilst they humbly recommend her Majesty to dismiss this Appeal with costs, they will add a recommendation that the order be without prejudice to any proceedings on the part of the Appellant to establish any debt, other than her claim for Dainmohr, against her husband's estate, or any lien, in respect of such debt upon that estate.