

Arab Ali Khan alias Ashan Ali Khan - - - - *Appellant*

v.

Mahmud Ali Khan alias Agha Ali Khan and another - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 24TH JANUARY, 1922.

Present at the Hearing :

LORD BUCKMASTER.

LORD ATKINSON.

LORD CARSON.

MR. AMEER ALI.

SIR LAWRENCE JENKINS.

[*Delivered by* LORD ATKINSON.]

This is an appeal from a judgment and decree, dated the 10th November, 1915, of the High Court of Judicature at Allahabad, which reversed a judgment and decree, dated the 30th April, 1913, of the Additional Subordinate Judge of Cawnpore.

The action out of which the appeal has arisen was an ejectment brought by Arab Ali Khan, the appellant, to recover possession of certain property, described in a list attached to the plaint. The defendants filed separate written statements in the usual course. In addition to denying the plaintiff's claim, they pleaded (1) that the transaction embodied in a certain partition deed, dated the 13th March, 1889, was, on the part of his grand uncle Panah Ali Khan, a benami transaction; (2) that it was never acted upon or given effect to, and was void; and (3) that the plaintiff never had possession of the property in dispute and that his claim was barred by limitation and adverse possession. Several issues were framed upon these pleadings by the Additional Subordinate Judge of Cawnpore. Of these the two following are the most material

for the purposes of this appeal : (1) Whether the taksimnama, dated the 13th March, 1889, was an agreement by way of family settlement and was enforced ; (2) the compound issue whether or not the plaintiff was in possession of the property sued for within twelve years prior to the institution of the suit, whether the defendant and his predecessors have been in adverse possession of it for more than twelve years, and whether or not the suit is barred by limitation.

On the first issue this learned Judge found that—

“ The partition deed of the 13th March, 1889, was an agreement for consideration and was entered into by way of a family arrangement, and that it was substantially enforced by the parties thereto, although the oral will of Ummed Ali Khan mentioned in the deed might never have existed or was never made.”

On the second issue he found in favour of the plaintiff that his suit was not barred by time, and made a decree for possession of all the properties mentioned in the list B, annexed to the plaint, with the exception of one Chitaura, and as to another, Gurwal, he gave the plaintiff a decree for a 4-annas share. On appeal to the High Court of Judicature at Allahabad, the learned Chief Justice and the Hon. Muhammed Rafique Judge thereof held, apparently, that the deed of the 13th March, 1889, had been acted upon and was a valid instrument, but reversed the decree of the Subordinate Judge on the ground, as stated in their judgment, that it had been shown to their satisfaction that the plaintiff had never received any of the rents or profits of the land sought to be recovered, but that these were always received by Panah Ali Khan for his own use and benefit. They therefore allowed the appeal, set aside the decree of the Court below, and dismissed the plaintiff's suit with costs in both Courts.

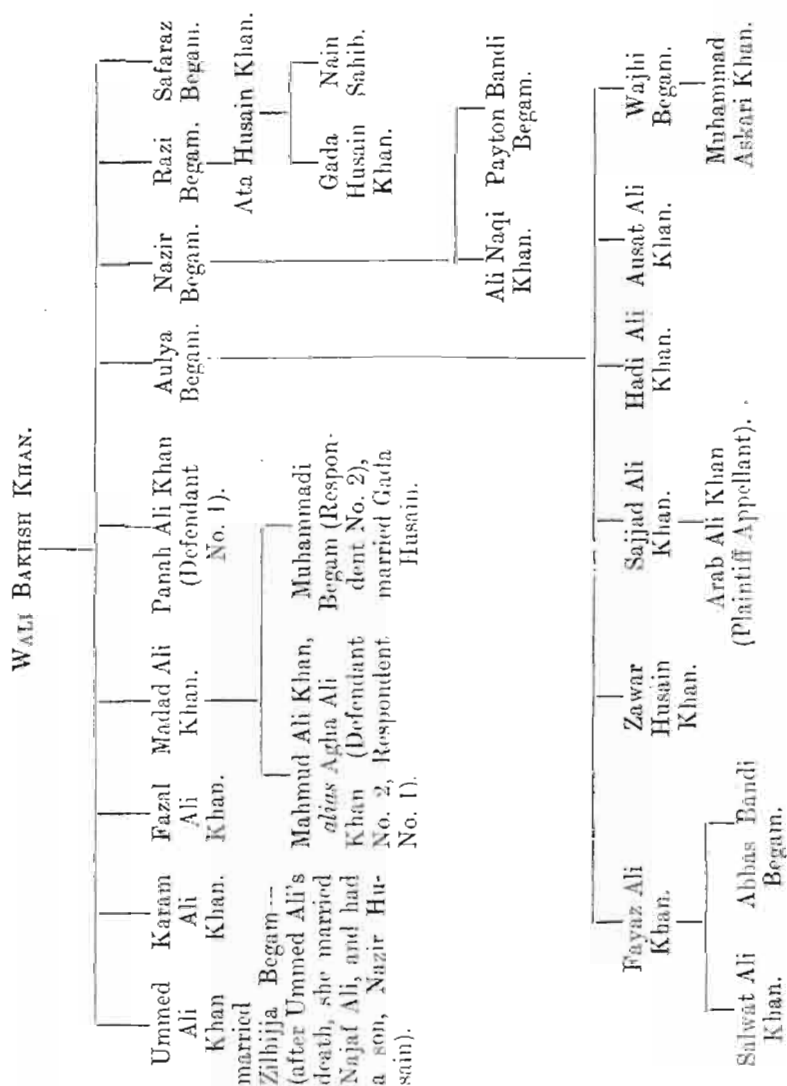
It is not very clear to their Lordships whether the learned Judges of the High Court meant to hold that the transaction carried out by the deed of the 13th March, 1889, was as between Panah Ali Khan and Arab Ali Khan a mere benami transaction, Arab Ali Khan being the benamidar ; or whether the plaintiff's right to recover the property in suit, even if he were the absolute owner of it under this partition deed, was, owing to the non-receipt of the rent and profits of it, barred by limitation.

From the following passage in their judgment their Lordships are inclined to think that they took the latter view :—

“ The defence cannot claim that the deed was never acted upon at all. It undoubtedly was acted upon fully with regard to Fazal Ali Khan and Madad Ali Khan, two of the brothers of Ummed Ali Khan. It was acted also in respect of the plaintiff Arab Ali Khan to this extent, that mutation of names was made in his favour in accordance with its terms. We think that this case should be decided in the plaintiff's favour if we can find on the evidence that he was in receipt of the rents and profits either directly or through Panah Ali Khan. On the other hand, we think that the plaintiff's suit should be dismissed if we come to the conclusion that he never received these rents and profits but that they were always received by Panah Ali Khan for his own use and benefit. It is not pretended that Panah Ali Khan stood in *loco parentis* to Arab Ali Khan. They may no doubt have been (and there is reason for believing that they were) on friendly terms. In fact the case of Panah Ali Khan was that Arab Ali Khan had agreed to

lend his name with a view to Panah Ali Khan getting a larger share in the estate of Ummad Ali Khan than he would have got under the Muhammadan Law. But Arab Ali Khan did not live with his uncle Panah Ali Khan. In his evidence he stated that he had lived with his 'mother, father and grandfather.' He also said that after the death of Ummad Ali Khan his business was done by Panah Ali Khan and Fazal Ali Khan. We mention this because if we had found that Arab Ali Khan lived more or less jointly with Panah Ali Khan, the receipt of the rents and profits by Panah Ali Khan might be said to be the receipt thereof for himself and Arab Ali Khan. This, however, is not the plaintiff's case."

With all respect to the learned Judges of the High Court, their Lordships are unable to concur with them in thinking that the evidence, when carefully examined, established either that Arab Ali Khan was by the deed of the 13th March, 1889, constituted in respect of the property in suit merely the benamidar of Panah Ali Khan, or that his right as plaintiff in this ejectment to recover that property was barred by limitation. The relation in which the parties to this deed stood to each other is shown by the following pedigree :—



Ummad Ali Khan, the eldest son of Wali Bakhsh Khan, died childless on the 26th February, 1888, leaving his three brothers him surviving. Aulya Begam, his sister, the grandmother of Arab Ali Khan, predeceased her brother, Ummad Ali Khan. The plaintiff was consequently not one of the heirs of the latter.

On the 11th January, 1889, the three brothers, Panah Ali Khan, Fazal Ali Khan and Madad Ali Khan, executed an agreement by which they granted a maintenance allowance to one, Najaf Ali Khan, and his heirs, and charged the property left by Ummad Ali Khan deceased with the payment of this maintenance allowance. On the 13th March, 1889, the same three brothers and Arab Ali Khan executed the deed of partition by which they divided amongst them this same property, a 4-annas share in Mause Mandauli part thereof being allotted to, Arab Ali Khan.

This is the property in suit.

It is not suggested on behalf of any person interested that Ummad Ali Khan deceased ever made a written will in favour of Arab Ali Khan, but, with a view possibly of gaining priority over the charge upon the property of the deceased imposed by the deed of the 11th January, 1889, it has been stoutly and persistently contended by Arab Ali Khan, and apparently by the brothers of the deceased, that the latter made an oral will whereby he, amongst other things, devised to Arab Ali Khan the property in suit. The deed of partition of the 13th March, 1889, purports to be made to carry out this oral will, but in neither this case nor in the several other suits referred to in this case has this story as to the making of an oral will been accepted. Several schedules, styled "Specifications," are attached to the partition deed of the 13th March, 1889. One of them deals with the enumerated annas of Mause Mandauli, with Gadhiwa Majhgawan, permanent and fluctuating, of Ummad Ali Khan, all situate in Pargana Ekdala, district of Fatehpur, with Paharpur Mahal Ummad Ali Khan Chak Teni, situated in Pargana Hatgaon, Khas Manpatti Adhar Singh Taraf Zorawar Singh, Ladhaura and Khairi Rawat, all in Pargana Hatgaon, and with Sichauli Paragana, district Fatehpur and Ranipur Pargana Dhata, district Fatehpur. These names become matters of importance in dealing with the accounts of income and expenditure for the year 1893, which have been given in evidence. The Government revenue of them is stated to be Rs. 2,082.4.0.

This schedule is headed thus :—

"Specification of the property which shall remain in proprietary possession of Fazal Ali Khan, Panah Ali Khan and Arab Ali Khan *alias* Ehsan Ali Khan without the participation of Madad Ali Khan, who shall have nothing to do with it."

Another schedule, dealing with property, the Government valuation of which is stated to be Rs. 1,044, is headed thus :—

"Specification of the property which shall remain exclusively in proprietary possession of Madad Ali Khan, and with which Fazal Ali Khan, Panah Ali Khan and Arab Ali Khan *alias* Ehsan Ali Khan shall have no concern."

A third, dealing with property the Government valuation of which is valued at Rs. 439.13.0, is headed thus :—

"Specification of the property which shall remain in proprietary possession of Fazal Ali Khan without the participation (of any person) and with which Madad Ali Khan, Panah Ali Khan and Arab Ali Khan *alias* Ehsan Ali Khan shall have no concern. This property was given to Fazal Ali Khan by Madad Ali Khan in his lifetime."

The parties interested in this transaction treated it in a most business-like way. In April, 1889, these three co-sharers presented a petition to the Assistant Collector of the District of Fatehpur, reciting that an order for the entry of the names of the petitioners, and of Madad Ali Khan, in place of the name of Ummed Ali Khan, had in the year then current been passed in respect of the village named in the title, *i.e.* Mandauli permanent Mahal Ummed Ali Khan Pargana Ekdala, that the mutual dispute had been settled under a compromise dated the 13th March, 1889; that the share of Madad Ali Khan had not been maintained in respect of this village and other villages with the exception of certain villages named thereafter; that only the three petitioners were in possession; and that therefore the application was presented. It is then prayed that the names of these petitioners might be entered in equal shares, and the name of Madad Ali Khan struck out. There is then added the note: "The Deed of Compromise is filed with the record of the case relating to Mause Mandauli." The names of the three petitioners are then given, and they are described as Zemindars in possession of the village. A blank is left for the name of the village because, presumably, it has been already stated.

On the 4th May, 1889, the Assistant Collector made an order on this petition by which after reciting amongst other things that Madad Ali Khan, Fazal Ali Khan, Panah Ali Khan and Arab Ali Khan had been summoned through the Collector of the Allahabad District for the 26th April, 1889; that accordingly Panah Ali Khan, for himself and on behalf of Fazal Ali Khan, and Ghazi-Bakhsh, General Attorney of Arab Ali Khan, Karim Bakhsh, General Attorney of Madad Ali Khan, presented themselves and stated that Madad Ali Khan was no longer in possession of the property named, that Fazal Ali Khan, Panah Ali Khan, and Arab Ali Khan were in possession of the property in equal shares, and that the names of these persons should be entered according to possession and the deed of partition; that none of the parties produced witnesses in proof of possession, but that it appeared from the registered document that possession had been delivered; that the term of notice had expired and no one had taken objection; and further reciting that the Assistant Collector was of opinion that according to the partition deed the name of Madad Ali Khan should be expunged and the names of Fazal Ali Khan, Panah Ali Khan, and Arab Ali Khan should be entered up against the aforesaid property, and that the record of the case should be sent to the pargana officer for proper orders. On the 23rd June, 1889, an order was made by the Assistant Collector directing the mutation to be effected.

Thus by the pronouncement of the three surviving brothers of Ummed Ali Khan deceased, Fazal Ali Khan, Panah Ali Khan, and Arab Ali Khan, were by these proceedings based upon the deed of the 13th March, 1889, treated as and represented to be the absolute duly registered owners in equal shares in possession

of this Mausa Mandauli. In the judgment of the Subordinate Judge at page 418 the following passage is to be found :—

“ It is conceded in argument, and cannot of course be denied, that so far as the three brothers of Ummad Ali Khan, namely, Fazal Ali Khan, Panah Ali Khan, and Madad Ali Khan, were concerned, the deed in question was a family settlement and was carried into effect, each brother taking possession of the property allotted to him under the deed.”

On the 20th June, 1889, Fazal Ali Khan and Arab Ali Khan executed a power of attorney appointing one Lala Har Pershad, their attorney, to, amongst other things, grant leases to their tenants in respect of their Zemindar property, make collections in and manage the same. In this document, which was duly registered by the Special Sub-Registrar of Allahabad on the 20th June, 1889, Fazal Ali Khan and Arab Ali Khan are described as Zemindars of villages in the district of Fatehpur, in Cawnpore, and Allahabad, while in the deposition of Panah Ali Khan, dated the 14th July, 1891, made in a suit instituted by him against Shririn Begam, he distinctly states that “ Ahsan Ali Khan (which is another name for Arab Ali Khan) is my co-sharer. My brother has given him a 4-annas share.” There is no suggestion in this deposition of Arab Ali Khan's being merely his benamidar in respect of this 4-annas share or any other share.

In the khewats of this Mausa Mandauli for the concluding portion of the year 1889 Fazal Ali Khan, Panah Ali Khan, and Arab Ali Khan are stated to be sharers in equal shares of the Mausa. In the column for remarks the dealings with the Mausa are set out in detail. It is stated that by order of the 23rd March, 1889, the name of Ummad Ali Khan deceased was struck out and the names of Madad Ali Khan, Fazal Ali Khan, Panah Ali Khan, and Arab Ali Khan were entered in equal shares by right of inheritance, and that by and under the second order, dated the 8th May, 1889, the name of Madad Ali Khan was struck off and the names of Panah Ali Khan, Fazal Ali Khan, and Arab Ali Khan were entered in equal shares *according to mutual agreement*. These are official documents, and weight must be given to them, at all events as to the reputed rights and interests of Arab Ali Khan in this Mausa.

In the judgment, delivered on the 13th July, 1906, of the Additional Commissioner of Allahabad on the application of Mahmud Ali Khan to have the name of Arab Ali Khan removed from the khewat in respect of his 5 annas and 4 pies of this Mausa, he states that Panah Ali Khan was then alive, and actually played the part of head of the family ; that Fazal Ali Khan was dead, leaving a widow, who had remarried ; that Madad Ali Khan was also dead, and had left a son, the applicant, who was a minor, Panah Ali Khan being his guardian ; and that until the suit in which judgment was given in September, 1904—*i.e.* for a period of sixteen years—the legality and genuineness of Arab Ali Khan's title was never doubted or impugned by any of the parties

concerned; and that Arab Ali Khan during all that time was recorded as a 5-annas 4-pies sharer, and that his title to be so recorded was never contested till the 4th September, 1904. The Additional Commissioner then proceeds to explain how Arab Ali Khan, being thus attacked, caused, on the 25th October, 1904, as a counter move, a suit against Panah Ali Khan, Sayed Karamat Husain the lambardar, Shirin Begam (the widow of Fazal Ali Khan), and Bakhsh Begum (the latter woman's second husband), to recover the sum of Rs. 277.14.6, the rents and profits of his share in Mause Mandauli; that this lambardar had purchased from Panah Ali Khan on the 30th November, 1895, the latter's share of 5 annas and 4 pies in the Mause; that the purchaser then became lambardar; while Panah Ali Khan was no longer recorded as co-sharer in the Mause.

This suit of Arab Ali Khan's was dismissed not at all on the ground that he was not the beneficial owner of his share of 5 annas and 4 pies in the Mause Mandauli, but because the lambardar proved that he had always paid the rents and profits of the Mause to Panah Ali Khan with the consent of Arab Ali Khan himself, and that therefore he could not be required to pay these sums twice over. Arab Ali Khan in this suit made a deposition in which he stated that after the death of Umed Ali Khan, Panah Ali Khan was managing member of the family and was appointed lambardar; that he continued to make collections, and paid him, Arab, the profits of his share, until September, 1904; that he did not remember if he ever got the profits of this very property in dispute (*i.e.*, the 5-annas 4-pies shares of Mandauli) from Panah Ali Khan, because he used to receive profits collectively. He received profits for the last time eight or nine months later, that is to say, May, 1905. This is a most important statement having regard to the accounts to which attention will be drawn presently. It will be observed that Panah Ali Khan took no steps to have Arab Ali Khan declared his lambardar for the 5-annas 4-pies share, to which the latter claimed to be entitled. He submitted to have his name removed from the register as one of the co-sharers, although, as he subsequently contended, he was then beneficially entitled, in addition, to the share registered in the name of Arab Ali Khan, his benamidar.

Their Lordships cannot quite concur in the view taken by the High Court as to the reasons assigned by Panah Ali Khan for having secured a grant in benami to be made to Arab Ali Khan. It was not merely, as they apparently supposed, for the purpose of securing for himself a larger share of the estate of his deceased brother than he would have got under the Muhammadan law. If the grant was made in benami at all it must have been made, their Lordships think, for the purpose of, by a mean and knavish trick, defrauding one or both of his brothers. If both of his brothers, Madad and Fazal, were aware of the alleged nature of the gift, then it was perfectly unnecessary to resort to a benami grant. The increased share Panah desired to secure could readily and would

naturally have been given to him expressly by the terms of the deed. There was not need for concealment or contrivance. If they did not know of his device then the brothers must, owing to their ignorance, have been defrauded of some portion of their rightful shares by the bringing in of the benami grantee. Owing to the conflict of evidence which exists upon these crucial points, Panah's conduct, as reflecting on his good faith and credibility, becomes a matter of importance. In a deposition made by him in a suit instituted in 1909 by the heirs of Najaf Ali Khan, Panah Ali Khan, Arab Ali Khan and Mahmud Ali Khan to recover the maintenance allowance originally granted to the deceased, he gives his own account of the transaction. He says that Arab Ali Khan was the son of his sister-in-law, his name was inserted in the deed of partition that he (Panah) might get a larger share, and again he says :—

“ Caused Arab Ali Khan's name to be entered in order that I might secure a larger share than those of my brothers. There was no dishonesty about it. It was a matter among brothers. I was the youngest of all the brothers. I had two brothers, Madad Ali Khan and Fazal Ali Khan. Madad Ali Khan had separate property. Fazal Ali Khan agreed that the name of Arab Ali Khan might be *recorded*. Madad Ali Khan took his share of the property and became separate one or two months after Ummad Ali Khan's death.”

Both Madad Ali Khan and Fazal Ali Khan were dead at the time this deposition was made. There is no record in any of the legal proceedings, which are proved in evidence in this case, that either of the brothers gave any evidence or made any statement corroborating this story of Panah Ali Khan's. If by the word “*recorded*” he meant recorded in the register, then it would go to show that Fazal Ali Khan thought that Arab Ali Khan was a genuine co-sharer with him, rather than a mere benamidar for his brother. If, on the other hand, he meant by *recorded*, inserted in the deed of partition, the story is scarcely credible, because if the brothers agreed that Panah should have a double share, nothing was easier than so to provide in the partition deed. If Arab Ali Khan was made a benamidar for Panah Ali Khan, it could only have been for the purpose of over-reaching one or both of his (Panah's) brothers, and secrecy was essential to effect that result. In addition, he stated in this deposition that Arab Ali Khan did not get any portion of the profits of the property, that he never gave him (Arab) a pie of the profits. Arab Ali Khan, however, says, on the other hand, as has been already pointed out, that he was paid these profits not distinctly and separately, but collectively.

There is no proof whatever in the mass of evidence produced in the case that Arab Ali Khan ever stood to Panah in any relation other than that of co-sharer with him in this Mause Mandauli, which could make Panah liable to pay him money. Yet in the statement of account given in evidence, considerable sums of money are taken credit for by the agent who furnished these accounts, as having been remitted to Panah Ali Khan and Arab Ali Khan. Most of these accounts deal with the income from

Chak Teni, but the interest of Ummad Ali Khan in the Mahal of Chak Teni is according to the specification already referred to, given by the deed of the 13th March, 1889, to the three co-sharers. The same remark refers to exhibit No. 1, an account dealing with the income from Khas Mau. It also is included in this specification. The credits in these accounts begin with a sum of Rs. 47.14.7, stated to be remitted to Arab Ali Khan and Panah Ali Khan. Next a sum of Rs. 58.12.7, next a credit of Rs. 338.15.6, next Rs. 41.2.6, all similarly described. The account in which these items appear is signed in autograph by Panah Ali Khan. The next is a sum of Rs. 58.12.7 similarly remitted. There are several other items of the same kind, and ultimately an entry of a sum or remittance to Panah Ali Khan and Arab Ali Khan of Rs. 3,208.8.0.

These accounts, embracing as they do the income derived from some of the properties granted to the three co-sharers, strongly corroborate Arab Ali Khan's statement that he was paid the income of his one-third share collectively. It is much to be regretted that accounts similar to those given in evidence covering the years from 1893 to 1904 were not produced and given in evidence; but Arab Ali Khan distinctly swears he was paid *collectively* the rent and profits of his share up to 1904, only seven years before the institution of the present suit.

On turning to the khewat for the closing period of the year 1889 of the Mandauli, Panah Ali Khan, Fazal Ali Khan and Arab Ali Khan are named as the co-sharers of this village in equal shares. Similar entries are made in the khewat for this Mausa for the year 1892 and subsequent years.

The burden of proving that the grant of a one-third share in this Mausa made to Arab Ali Khan was made to him as benamidar for his brother rested upon the respondents. In their Lordships' view they have utterly failed to adduce any satisfactory or reliable evidence to discharge that burden. Neither do they think that it has been satisfactorily shown that Arab Ali Khan, clothed as he had been with all the insignia of a beneficial ownership in possession of this one-third share, was before 1904, if even then, dispossessed of the possession of it, or that he has ceased to be in possession of it. Neither are they of opinion that the respondents or their predecessors have been in adverse possession of his share.

Neither the 142 nor the 144 article of the First Schedule of the Indian Limitation Act 1908 therefore applies, and the statutory period of twelve years prescribed by those enactments had not commenced to run (if at all) before the year 1904. The plaintiff's remedy is therefore not barred by effluxion of time. Their Lordships are accordingly of opinion that the decree appealed from was erroneous and should be reversed, that the decree of the Subordinate Judge was right and should be restored, and that this appeal should be allowed with costs here and below, and they will humbly advise His Majesty accordingly.

In the Privy Council.

ARAB ALI KHAN *alias* ASHAN ALI KHAN

v.

MAHMUD ALI KHAN *alias* AGHA ALI KHAN
AND ANOTHER.

DELIVERED BY LORD ATKINSON.

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