

Mauladad Khan, since deceased (now represented by Ghulam Jan
and others) - - - - - *Appellant*

v.

Faizullah Khan and others - - - - - *Respondents*

FROM

THE COURT OF THE JUDICIAL COMMISSIONER OF THE
NORTH-WEST FRONTIER PROVINCE.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 16TH NOVEMBER, 1933.

Present at the Hearing :

LORD MACMILLAN.

SIR JOHN WALLIS.

SIR GEORGE LOWNDES.

[*Delivered by* LORD MACMILLAN.]

This is an unusual and a most unfortunate case. It began ten years ago with a suit filed for partnership accounts. The suit was instituted in the Court of the District Judge of Dera Ismail Khan, but was transferred by him to that of the Subordinate Judge, by whom a preliminary decree was passed on the 22nd October, 1923, declaring the shares of the parties in the partnership and ordering accounts to be taken. There was no appeal against this decree.

On the 24th March, 1924, the Subordinate Judge passed a final decree under which a sum of Rs. 19,991 was found due to the present appellant, Mauladad Khan (who was the first-defendant in the suit) by the other parties, who are the respondents before the Board. Appeals followed to the Judicial Commissioner. He set aside the decree of the 24th March, 1924,

and by his order of the 7th May, 1925, remanded the suit to the District Judge for re-trial by him, but directed in effect that on the re-trial the respondents would only be entitled to dispute the liability for Rs. 19,991, which had been laid on them by the Subordinate Judge, and would not be entitled to claim that any additional sums were payable to them. This restriction was based on an alleged deficiency in the Court Fee paid by them.

Against this part of the order of the 7th May, 1925, the respondents filed two separate appeals to His Majesty in Council. These came on for hearing before the Board in February, 1929. The judgment of the Board was delivered by Lord Shaw on the 15th March following (*see* 56 I.A. 232), and the advice tendered to His Majesty was that the order of the Judicial Commissioner of the 7th May, 1925, should be set aside and the case remanded to the Court of the Subordinate Judge for fresh trial and decision on the merits. An Order in Council was duly drawn up to this effect and dated the 1st March, 1929.

In the meantime, however, the case had gone on in India as if no such appeal were pending. The District Judge acted on the remand order of the Judicial Commissioner, accounts were taken by Commissioners, their report was considered by the District Judge, and on the 14th January, 1927, he delivered a judgment finding considerable sums due from Mauladad to the various respondents. The judgment was stated to be "contingent upon the reversal of the Judicial Commissioner's Order dated 7th May, 1925, by the Privy Council." No formal decree was drawn up, but notwithstanding this all the parties except the original plaintiff No. 2 appealed against the "judgment" to the Judicial Commissioner. These appeals were still pending in March, 1929, when the Order in Council above referred to was promulgated.

On receipt in India of the Order in Council the first plaintiff and defendants Nos. 2 and 3 applied to the Judicial Commissioner asking that the District Judge should now draw up a decree in pursuance of his judgment of the 14th January, 1927, and that their appeal should be proceeded with. This was opposed by Mauladad, who contended that the proceedings taken in the District Court on the Judicial Commissioner's order of the 7th May, 1925, were void as the order on which they were based had been set aside. The Judicial Commissioner declined to deal with this contention at the time and ordered the District Judge to complete his proceedings by drawing up a decree. This was done. A decree was drawn up in accordance with the judgment and dated the 14th January, 1927/18th September, 1929. All three appeals were then heard by the Judicial Commissioner, who after an elaborate examination of the items in dispute varied the District Judge's decree and held Mauladad liable to plaintiff No. 1 in Rs. 57,925, to plaintiff No. 2 in Rs. 2,249, and

to defendants Nos. 2 and 3 in Rs. 4,310 with interest in each case at six per cent. from the 1st April, 1920, to realisation.

Against the decrees, which were duly drawn up in accordance with this judgment and dated the 21st June, 1930, Mauladad has appealed to His Majesty in Council. The first point taken on his behalf is that having regard to the terms of the Order in Council of the 1st March, 1929, all the proceedings in the District Judge's Court following on the remand order of the 7th May, 1925, and the appeal from his decree were without jurisdiction and void, and that following upon the Order in Council there should have been a fresh trial before the Subordinate Judge and a decision by him on the merits of the case.

In answer to this contention counsel for the respondents points out that in the first appeal to His Majesty in Council the only question was as to the limitation placed upon the right of the plaintiff and defendants Nos. 2 and 3 to recover upon the remand substantive sums against Mauladad. Upon reference to Lord Shaw's judgment this certainly appears to have been the only question discussed. Counsel protests that the advice tendered by the Board to His Majesty and the Order in Council meant no more than that the order of the 7th May, 1925, should be set aside only in so far as it restricted the rights of the respondents on the re-trial and asks that the Order in Council should be so read.

Their Lordships are unable to accede to this suggestion. That the intention of the Board was that the whole order of the 7th May, 1925, should be set aside is they think clear from the direction that there should be a fresh trial before a different Court. It is no doubt possible that the requirements of the case would have been met by a mere modification of the order in question leaving the re-trial to proceed as ordered by the Judicial Commissioner, and this might have been brought to the notice of the Board before the Order in Council was drawn up. An opportunity is always afforded to the parties of meeting any such objection to the form of the advice tendered. But no step in this behalf was taken by the then appellants. It is in their Lordships' opinion impossible to hold that the Order in Council meant anything less than what it says in the plainest of words. It would, they think, be equally impossible to hold that a re-trial before the District Judge which was completed by the 14th January, 1927, was a sufficient compliance with an Order for re-trial by the Subordinate Judge made by His Majesty in Council in March, 1929. Their Lordships are naturally reluctant to prolong this already protracted litigation, but they feel that there is no other solution to the present *impasse* than to send the case back for re-trial. The re-trial of course, will not extend to the matters decided by the preliminary decree of the 22nd October, 1923, which remains undisturbed.

They are of opinion therefore that all the proceedings in India subsequent to the order of the Judicial Commissioner dated 7th May, 1925, were *coram non iudice*; that the decrees of the District Judge and of the Judicial Commissioner dated respectively 14th January, 1927/18th September, 1929, and 21st June, 1930, must be set aside; and that the case must go back for re-trial of the matters determined by the decree of the 24th March, 1924, which was set aside in accordance with the terms of the Order in Council of the 1st March, 1929, and they will humbly advise His Majesty accordingly.

The appellants must, their Lordships think, have their costs from the respondents of all the proceedings subsequent to the arrival in India of the Order in Council of the 1st March, 1929, including the costs of the present appeal. There should, they think, be no costs of the abortive proceedings in the District Court held upon the remand of the 7th May, 1925. All other costs will be dealt with upon the further trial of the case.

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In the Privy Council.

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DELIVERED BY LORD MACMILLAN.

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