

(1919) 02 AHC CK 0020
In the Allahabad High Court

Ali Muqtada Khan and Others	Vs	APPELLANT
Abdul Hamid Khan and Others		RESPONDENT

Date of Decision : 08-02-1919

Acts Referred:

Citation : AIR 1919 All 162 : (1919) ILR (All) 412

Hon'ble Judges : Muhammad Rafiq, J; Lindsay, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Muhammad Rafiq and Lindsay, JJ.—The following pedigree will explain the right under which the plaintiffs brought the suit out of which this appeal has arisen:

Syed Ali Azam Khan _____ | _____ | |
 Bunyad Ali Khan. Aman Ali Khan. _____ | _____ | | Ali
 Ahsan Khan. Ali Muzaffar Khan. | Ali Aslam Khan. Ali Muntazim Khan.
 _____ | _____ | | | Ali
 Taqi Khan. Ali Mujtaba Khan. Ali Mutahida _____ | _____
 _____ | _____ Khan. | | | | | Ali Akhtar Khan. Ali Mohtashim.
 Ali Muttaqi Ali Ijtaba Ali Ittifa | Khan. Khan. Khan. |
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 _____ | _____ | | | | |
 Ali Muqtada Ali Ata Khan. Ali Murtaza Ali Sabir Ali Safdar Khan. Khan. Khan
 Khan.

2. The ancestor of the plaintiffs, Bunyad Ali Khan, was possessed of considerable property in respect of which he created a waqf on the 23rd of November, 1845, by a registered deed, under which his two nephews, Ali Ahsan Khan and Ali Muzaffar Khan were to be mutawallis of the waqf property after his death. He further provided that the mutawalliship was to descend to the issue of the two nephews "naslan bad naslan wa batnan bad batnan daiman wa, abadan ghair muntaqim wala muntaqilan ala sabilalistimrar wa alistiqlal; in other words, the

descendants of the two nephews were to get the mutawalliship generation after generation without any break and without any separation for ever and for ever. Ali Muzaffar Khan seems to have survived his brother, Ali Ahsan Khan and his nephew Ali Aslam Khan. Before his death Ali Muzaffar Khan executed a deed on the 18th of April, 1875, by which he appointed his son Ali Muntazim Khan as mutawalli of the waqf property Ali Muntazim. Khan succeeded to the office of mutawalli, He in his turn, on the 14th of July, 1901, executed a deed of appointment in favour of his three sons, Ali Taqi Khan, Ali Mujtaba Khan and Ali Mutahida Khan transferring the office of mutawalli to them in his life-time. The three sons of Ali Muntazim Khan executed a deed which is described as an amanatnama, on the 6th of January, 1903, by which they divided the waqf property in equal shares among themselves professedly with the object of the better management of the waqf property. On the 23rd of July, 1904, Saiyid Ali Taqi Khan executed a deed of mortgage in favour of two brothers called Abdul Hamid and Abdul Majid of property that formed no part of the waqf property. On the same date two other documents were executed, one by Saiyid Ali Taqi Khan and the other by the mortgagees. The said two documents were patta and Kabuliati respectively, in respect of a portion of the waqf property which had come under the management of Ali Taqi Khan under the deed of the 6th of January, 1903. The lease was for fourteen years in favour of the mortgagees, and the rent was to be appropriated by them towards the satisfaction of the mortgage-debt. On the 15th of November, 1904, another mortgage was executed by Saiyid Ali Taqi Khan in favour of the same mortgagees in respect of some other portion of the property which also did not form part of the waqf property. On the same date a lease was granted by Ali Taqi Khan to the mortgagees of a portion of the waqf property, the rent of which was to be applied towards the satisfaction of the mortgage debt. The mortgage was for Rs. 1,500. Some time in March, 1909, Ali Taqi Khan executed a zar-i-peshgi lease in favour of one Musammat Nand Rani in respect of a portion of the waqf property. On the 16th of February, 1911, Ali Taqi Khan executed a deed by which he withdrew from mutawalliship in favour of his two sons, Ali Akhtar Khan and Ali Mohtashim Khan. On the 13th of February, 1911, Ali Mujtaba Khan executed a similar deed in favour of his three sons, Ali Muttaki Khan, Ali Ijtaba Khan, and Ali Ittiqa Khan. Ali Mutahida Khan, the brother of Ali Taqi Khan, and Ali Mujtaba Khan, had already died. He died in 1903. Soon after the execution of the deed of the 16th of February, 1911, the sons of Ali Taqi Khan brought a suit to have the zar-i-peshgi lease in favour of Musammat Nand Rani declared invalid, null and void. The case came up to this Court and was decided against them. It was held that they had no right to sue, as their father could not in his life-time transfer the mutawalliship to them. The judgment of this Court was delivered on the 15th of July, 1915. On the 23rd of September, 1915, Ali Taqi Khan and Ali Mujtaba Khan applied to the District Judge of Moradabad u/s 73 of the Trust Act for permission to withdraw from the mutawalliship. The next day, that is, on the 24th of September, 1915, their sons filed an application to the District Judge praying to be appointed as mutawallis in place of their fathers. On the 27th of September,

1915, the District Judge granted both the applications. On the 30th of September, 1915, the sons of Ali Taqi Khan and Ali Mujtaba Khan as well as three sons of Ali Mutahida Khan brought the present suit asking for a declaration that the leases executed by Ali Taqi Khan in the year 1904 in respect of a portion of the waqf property were invalid and that possession should be given to them as mutawallis of the said property against Abdul Hamid and the legal representatives of Abdul Majid, by the dispossession of the latter. It should be observed here that Abdul Majid had died prior to the institution of the suit. The plaintiffs impleaded as defendants in the case Abdul Hamid Khan and the legal representatives of Abdul Majid Khan as also Ali Taqi Khan, Ali Mujtaba Khan and the two remaining minor sons of Ali Mutahida Khan. The suit was contested by Abdul Hamid Khan and the legal representatives of Abdul Majid Khan. One of the pleas in defence was that the plaintiffs had no right to maintain the suit, inasmuch as they were not the properly constituted mutawallis of the waqf property. The learned Subordinate Judge accepted the plea in defence and dismissed the suit. He held that under the judgment of this Court in the case of Nand Rani, the transfer by Ali Taqi Khan and Ali Mujtaba Khan of the mutawalliship in favour of their sons was invalid and did not give them a right to the office of mutawalliship. As to the three sons of Ali Mutahida Khan, namely, plaintiffs 1, 2 and 3, he held that under the amanatnama of the 6th of January, 1903, they had no right to challenge the act of Ali Taqi Khan. The plaintiffs have come up in appeal to this Court and challenge the decree against them.

3. Before proceeding to consider the appeal we must observe here that one of the legal representatives of Abdul Majid Khan, namely, Musammam Ruqaiyya Bano, who was respondent No. 3 before us, died about three years ago. No steps were taken to bring her legal representatives on the record in time and the appeal as against her abates.

4. It is contended on behalf of the appellants that under the Muhammadan law Ali Taqi Khan and Ali Mujtaba Khan could transfer the office of mutawalliship to their sons. Moreover, even if the transfers by Ali Taqi Khan and Ali Mujtaba Khan are invalid, the sons of Ali Mutahida Khan are co-mutawallis with Ali Taqi Khan and Ali Mujtaba Khan. The original deed of waqf shows clearly that the mutawalliship was to continue in all the branches of the family of the nephews of Bunyad Ali Khan. Our attention has been called to the original words, *naslan bad nadan* etc., which have been quoted in the earlier part of the judgment. The three sons of Ali Mutahida Khan, it is said, can, in any case, maintain the present suit if the plaintiffs 4 to 8, the sons of Ali Taqi Khan and Ali Mujtaba Khan, have no such right. We have considered the language of the original deed of waqf and we think that the contention for the appellants is well founded. Under the terms of the deed the office of mutawalli was to go generation after generation to the descendants of Ali Ahsan Khan and Ali Muzaffar Khan. No mention is made in the deed of waqf by which any preference is to be given among the descendants of the said two persons, nor is any limit placed on the number of mutawallis from among the descendants. It may be that the deeds of appointment by Ali Muzaffar

Khan and Ali Muntazim Khan were not justified under the Muhammadan law, but the sons of both would have taken and did take the office of mutawalliship after their deaths. The succession was both in accordance with the terms of the original deed of waqf and the Muhammadan law. The deeds of appointment of 1875 and 1901 do not in any way affect the status of the sons of Ali Mutahida Khan. Ali Mutahida Khan died in 1903, and under the terms of the deed of 1845 his sons succeeded to the office of mutawalliship and became co-mutawallis with Ali Taqi Khan and Ali Mujtaba Khan. The opinion of the court below that on the death of Ali Mutahida Khan his two brothers Ali Taqi Khan and Ali Mujtaba Khan alone remained mutawallis is incorrect. There is no question of survivorship in the case, either under the Muhammadan law or the terms of the deed of 1845, The view that we take of the case makes it unnecessary for us to decide whether plaintiffs 4 to 8 are entitled to maintain the suit. We think that the plaintiffs 1 to 3, namely, Ali Muqtada Khan, Ali Ata Khan and Ali Murtaza Khan, have a right to maintain the present suit. The amanatnama of the 6th of January, 1903, does not in our opinion take away that right from them. Whatever may have been the position of Ali Mutahida Khan, who was one of the executants of the document, his sons are in no way bound by it. We would also note here that the learned Counsel for the appellants does not press his claim for mesne profits. We, therefore, allow the appeal, set aside the decree of the court below and remand the case under Order XLI, Rule 23, for disposal on the merits. Costs here and hitherto will abide the result.