

(1935) 03 BOM CK 0014
In the Bombay High Court
Case No : First Appeal No. 62 of 1928

Mir Nasiruddin Ahmed Khan		APPELLANT
	Vs	
The Secretary of State for India		RESPONDENT

Date of Decision : 04-03-1935

Acts Referred:

Pensions Act, 1871 — Section 4, 6

Citation : AIR 1935 Bom 439 : (1935) 37 BOMLR 763 : 160 Ind. Cas. 846

Hon'ble Judges : Murphy, J; Barlee, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Murphy, J.—The claim in the Court below was for an account and administration of what was alleged to be a trust fund, amounting in 1915 to over eighteen lakhs of rupees, and for the claimant's share in that fund with interest to date of suit, future interest and "costs.

2. Plaintiff is a descendant, through a daughter, of the last Nawab of Surat, who died in 1843, and the case involves a consideration or review of certain historical facts.

3. In 1800 the Honourable East India Company, as a sovereign power, entered into a treaty with the then Nawab of Surat, who was also a sovereign power, by which the Company took over the administration of the city of Surat and its defence from the Nawab. In return, the Company undertook to pay the Nawab a pension of one lakh of rupees plus a fifth of the net revenue of the ; city. This arrangement continued till 1818, when it was modified, the uncertain one-fifth share of the net revenue being replaced by an increment to the fixed pension of Rs. 50,000.

4. The last Nawab Mir Afzal-ud-din died in 1842 without male issue. His heir was a daughter Baktyar-un-nissa Begum, who was married to Mir Jafar-alli Khan. She died in 1845, leaving two daughters, Zia~ul-nissa Begum and Rehim-un-nissa

Begum. Except the Secretary of State, and a Receiver in insolvency representing defendant No. 11, the parties to the suit are all defendants of these two ladies, the plaintiff being a grandson of Rehim-un-nissa. To gather their pleas it is necessary to describe what happened to the Nawab's pension of one and a half lakh of rupees. The Government's view was that with the last Nawab's death in 1843 all legal claim to the pension lapsed : but it was decided to make some financial provision for the Nawab's descendants. Mir Jafar Ali Khan, the last Nawab's son-in-law, claimed the pension on his wife's behalf, and when she died in 1845, on his own, and went to England to enforce his rights. The view of the Court of Directors was that the title and pension had lapsed on the death of the last Nawab, but as an act of liberality they granted a pension of one lakh of rupees to Mir Jafar Ali and his two daughters, the condition being that the pension would lapse on the death of the last survivor of the three recipients.

5. Mir Jafar Ali Khan died in 1863, and the pension was then paid half and half to his two daughters. Rehim-un-nissa Begum died in 1887, leaving two sons and two daughters. By the terms of the grant, the whole pension should then have been paid to the surviving sister, called for short Ladli Begum. But Government were unwilling to pay her the whole pension, because it was necessary to support Rehim-un-nissa's family, and also because it was thought that as she was heavily indebted and there was no hope of prudent management of her finances, nothing would be left on her death for the support even of her own descendants.

6. The final decision was to pay Rs. 10,000 out of it to Rehim-un-nissa Begum's descendants, to pay Rs. 3,000 to Mir Zulfikar Khan, who was also a descendant of Mir Jafar Ali Khan, and who had a decretal claim against the two Begums : and to invest the balance, through the Accountant General, to form, with arrears by then accumulated, a fund for the benefit of the descendants of the two Begums when the pension lapsed.

7. Ladli Begum died on May 27, 1915, the fund having accumulated from 1887 to that date and amounting by then to a capital of over eighteen lakhs.

8. The question of what was to be done then arose : and the ultimate orders were that the interest of the accumulated capital sum should be converted into two political pensions of Ra. 2,574-1-8 a month, to be paid to the heads of the two families left by the Begums. The capital which had accumulated was "absorbed" by Government being replaced by these two political pensions which in future represented it.

9. This is an outline of the history of the matter set out as briefly as may be.

10. Defendant No. 6, representing the descendants of Ladli Begum, and defendant No. 2 (since deceased), representing Rehim-un-nissa's branch, were the two recipients of the pensions. They sided with the Secretary of State in the suit.

11. The arrangement is obviously to the disadvantage of the cadets of the family, for they are left to depend on the generosity,. or otherwise, of the two heads of the family who got the pensions,. and plaintiff's claim is really that he should get a share, either of the pension, or of the capital sum it replaced, as of right.

12. Under Muhammadan law, which is the only system of distribution we can have recourse to, the plaintiff's father having died, defendant No. 6 was as against him the preferential heir of his grandmother's pension. Plaintiff's case, put shortly, is that the arrangement of 1889 amounted to the creation of a trust : and that made in 1916 was a breach of that trust : and the suit was therefore for an account of the trust amount and for its" administration under the orders of the Court.

13. The seventh relief prayed for in the statement of claim in the plaint, which was for a half share in the pension so far received by defendant No. 6, was struck out, because it would have involved paying Court-fee on a large sum, Defendants Nos. 2 and 6 sided with the Secretary of State. The defences were that the orders of 1889 did not constitute a trust for the benefit of plaintiff and other descendants of the last Nawab ; that the suit was barred by Section 6 of the Pensions Act; and that the acts complained of were acts of State, for which the Secretary of State for India is not amenable to the Municipal Courts.

14. The other defendants sided with the plaintiff and claimed their shares, if the trust alleged were administered.

15. There were eighteen issues, though some of these now appear unnecessary. The learned Judge found :-

- (1) that no trust had been formed,
- (2) that the Secretary of State and his agents were not trustees,
- (3) that the suit for administration did not lie,
- (4) that the claim could not be entertained as it related to acts of State done, referable to a treaty obligation.
- (5) that the grants could not be questioned in a municipal Court,
- (6) that the arrangement; of 1889 was not a family one,
 - (a) that the Nawab's heirs had no legal claims on his death in 1842,
 - (b) that the pension of Rupees one lakh paid to Mir Jafar Ali was an act of bounty,
 - (c) that the suit was not barred by Act XVIII of 1848 ;
- (7) that the accumulations made since 1889 remained at the orders of Government,
- (8) that the plaintiff had no right to them,

- (9) that the orders of 1917 were not ultra vires and void.
- (10) that the payment of Rs. 10,000 to Ladli Begum on her sister's death was discretionary,
- (11) that the orders of 1915 and 1917 were not illegal and ultra vires.
- (12) that the arrangement of 1887 conferred no enforceable rights against defendant No. 1,
- (13) that the question of the result of plaintiff's father predeceasing Ladli Begum did not arise.
- (14) that Government did not declare themselves trustees of the Nawab's heirs,
- (15) that defendant No. 2 has no interest in the fund,
- (16) and so with defendants Nos. 10 and 11,
- (17) that the suit is not in time, and
- (18) is barred by Articles Nos. 14 and 8 of the Indian Limitation Act, and
- (19) that the suit is also barred by Section 4 of the Pensions Act.

16. Despite these numerous issues and findings, the questions principally discussed by the learned Judge were few. They were, whether a trust had been constituted as alleged, whether the acts complained of were "acts of State," and whether the suit was barred by the provisions of the Pensions Act, and the question of limitation.

17. This last point really depends on the first, for if a trust had been created for a specific purpose, Section 10 of the Indian Limitation Act would apply and there would be no period of limitation : but if there is no trust, Article 14 providing for the setting aside of an act of Government or its officers would govern the suit, and plaintiff has not sued within one year of his attaining majority. We agree with the learned Judge in thinking that Act XVIII of 1848, which was to provide for the distribution of the last Nawab's private property and did not cover his pension, also has no application.

18. As to the question of the Pensions Act, Section 4 enacts that no civil Court shall entertain any suit relating to any pension or grant of money or land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted. Section 3 defines "grant of money or land revenue" to include anything payable on the part of Government in respect of any right, privilege, perquisite or office.

19. There is no doubt that the sums arranged to be paid to the Nawabs and to Mir Jafar Ali Khan and his two daughters were pensions. It also seems to us to be

clear that the monthly sums now being paid to the two heads of the Nawab's family are pensions, being periodical payments out of the revenues of the Government of India on account of past services or particular merits, or as compensation to dethroned princes their families and dependants : The Secretary of State for India in Council v. Khemchand Jeychand I.L.R(1880) 4 Bom. 432. In Bishambar Nath v. Imdad Ali Khan I.L.R (1890) Cal. 216 the pension was paid under a treaty obligation. The real point in this issue is dealt with by the learned Judge in paragraph 38 of his judgment dealing with Mr. Koyajee's argument that once a pension is paid (here into a trust fund,) it ceases to be a pension.

20. The cases referred to by the learned Judge are-Jijaji Pratapji Raje v. Balkrishna Mahadeo I.L.R(1892) 17 Bom. 169, Andi Achen v. Kombi Achen I.L.R(1894) Mad. 187, Girjabai Shivdeorao Vinchurkar Vs. Narayanrao Ganpatrao Vinchurkar, , Dwarkmath Amrit v. Mahadeo Balkrishna I.L.R(1912)37 Bom. 91 : 14 Bom. L.R. 938 and Raghawendra Ayyaji v. Gururao Raghawendra I.L.R (1913) 37 Bom. 442 : 15 Bom. L.R. 362. The learned Judge's ultimate reason was that the plain construction of Section 4 is opposed to the view that the word " pension" is used in a narrow sense. The argument in this Court has been the same as in the Court below, and is shortly that an accumulated pension does not retain that character or need not necessarily do so, and that when a part of it is used to create a trust fund to secure a capital sum out of the interest of which, after a certain period, annuities will be paid, or it may be the total sum will be divided, there is no longer a pension, but a trust fund. There is no decided case directly on the point. The cases relied on by counsel for the Secretary of State all relate to undoubted pensions, a share in which was sought by members of the family enjoying it. The case of Nawab Bahadur of Murshidabad v. Karnani Industrial Bank, Limited I.L.R (1931) I Cal. 1, P.C. is not similar for there the suit related to the profits of an estate and not to a pension.

21. We think that here also the answer depends on the view we take of the fund set up in 1889. It was clearly derived from the withheld pension of Zia-ul-nissa Begum. If a definite trust was, however, created, it seems to us that there was then something of a different character come into existence, which could hardly be called a pension, since the accumulation would have well defined characters : but if Government were simply holding and accumulating Ziya-ul-nissa's pension for their own purposes, the accumulation would retain the quality of its origin, and in that case a certificate under the Pensions Act would be necessary for the plaintiff to succeed.

22. The facts that Government charged costs of management against the fund, and imposed Income Tax on its revenue, do not, we think, make any difference in this respect.

23. The answer here, therefore, depends on the one to be given to the main question.

24. The next point to be considered is the finding that what the suit has challenged is an act of State which cannot be judged of by a civil Court.

25. In his written statement the Secretary of State for India in Council has pleaded that the suit relates to an obligation arising out of a transaction which was an act of State. The pension or stipend was first granted to the Nawab of Surat under a treaty with the East India Company. Any claim arising out of the said treaty relates to an act of State and cannot be adjudicated upon in a civil Court. This statement is a summary of paragraph 2 of the written statement. Paragraphs 3 and 4 plead in detail that the grant of a pension to Mir Jafar Ali and his two daughters was similarly an act of State : as were the orders of 1863 on Mir Jafar Ali's death, and so with those of 1889 and 1917.

26. It has been conceded that the pensions paid to the first Nawab under the treaty and his successors were the outcome of acts of State, and it is difficult to distinguish the pension paid to the two Begums and their father, from those paid to the Nawabs while their line continued.

27. Similarly the payments of political pensions to the present recipients are acts of State, for probably they could be withheld without those recipients, having any remedy in the civil Courts.

28. But the argument here was that once a trust was declared by Government, even though the withholding of Zia-ul-nissa's pension from her and its payment into a fund was itself an act of State, the funds included in the trust lost their character of payments by act of State and became an ordinary trust fund, of which the Government were trustees : and if this is so, the Secretary of State became amenable to the Municipal Courts for its administration and distribution, as found by the learned Judge in paragraph 16 of his judgment.

29. The first two cases relied on by the learned Judge, *Jehangir v. Secretary of State* (1903) 6 Bom. L.R. 131 and *Gibson v. The East India Company* (1839) 5 Bing. (N.C.) 262, 273, do not touch this position, nor does the case of *The Secretary of State in Council of India v. Kamachee Boye Sahaba* (1859) 7 M.I.A. 476, nor does *Salomon v. Secretary of State for India* [1906] 1 K. B. 613.

30. The pith of the argument is that the conduct of Government (in accumulating a fund) is referable to the exercise of political rights and is in no sense a performance of the contractual duty arising out of the arrangement between Jafar Ali Khan and the Court of Directors. But this statement does not really meet the appellant's argument.

31. The distinction really is as between an act of State and an executive act. An act of State may conceivably create something which thereafter takes its place among ordinary events, the subjects of executive orders, though owing their origin to an act of State : but it does not follow that the attributes of an act of State would continue in such an event.

32. What appellant here urges is that by the declaration of trust of 1889, which

in itself may have been an act of State, the Government of India set up a trust in which from its terms he acquired at birth a beneficial interest. By setting up such a trust the Government of India created a fund and its beneficiaries, which fund is subject to municipal law, and plaintiff therefore wants administration of that trust.

33. If, on the other hand, there was no valid trust, what Government did was to withhold Ziya-ul-nissa Begum's pension, to pay a part to some of the family, and to accumulate the remainder for such future use as they saw fit. Plaintiff then, not being a beneficiary under a trust, could not challenge Government's conduct—either as an act of State, or as an executive act. It appears to us that if there was a trust, no answer on the basis of an act of State can be given to the suit, and that plaintiff would succeed so far.

34. The main question in the appeal is therefore whether or no the action taken by the Government of India in 1889, in disposing of the pension of Rs. 50,000 which on the death of Rehim-un-nissa should have been paid over to her sister, the surviving Begum Zia-ul-nissa, amounted to the formation of a trust fund, for the benefit of the descendants of the last Nawab including the plaintiff, or fell short of the requirements of a trust.

35. The Indian Trusts Act (II of 1882) and the Transfer of Property Act (IV of 1882) had then been enacted, but had not been applied to the Bombay Presidency, but it is admitted that the principles of the Indian Trusts Act, which are those of English law, would nevertheless apply to the facts. Since there is no specific instrument of trust, the intentions of Government have to be gathered from the official correspondence on the point, which is all printed in the case papers. The settlement with Mir Jafar Ali had been that he was to get a pension of rupees one lakh a year for himself and his two daughters, the grand-children of the last Nawab. The pensions were for the lives of these three persons, the ultimate survivor taking the whole lakh till his or her death when the pension was to lapse. On the death of Rehim-un-nissa, however, it was thought on the facts, which were that the Begum Zia-ul-nissa was already heavily indebted, that if Rehim-un-nissa's pension were made over to her, nothing would be left at her death for the support of her and her sister's descendants, that it was better to retain and accumulate as much of it as was feasible during her life, to form a means of supporting the descendants of the two Begums after the death of Begum Zia-ul-nissa. The arrangement actually made was that Rs. 10,000 of the pension should be given to Begum Rehim-un-nissa's descendants for their support, that another portion should go to an uncle who had a decree against the two Begums for an annuity, and that the balance of Rs. 37,000 should be used by the Accountant General for the purchase of Government Securities, these annual sums and interest earned by them to be accumulated till the death of Begum Zia-ul-nissa, when the Government contribution was to cease.

36. The question was one dealt with by the Government of India with the sanction of the Secretary of State, and the final orders are contained in the

Government of India's letter No. 1096, G, exhibit 138 ; reproduced in the Government of Bombay Resolution No. 3140 of May 6, 1889, after the sanction of the Secretary of State had been obtained and communicated in the Government of India's letter No. 5969 of March 30, 1889. If a trust was declared, therefore, it could only be by these letters, for they contained the final orders of Government, though one may look at the remainder of the correspondence to elucidate any points which are left in doubt in these orders.

37. Except as to the reasons for the action taken, however, there is little in any of these letters which need be considered, for the orders seem to us to be unambiguous in themselves.

38. In effect, they are that the Rs. 50,000 pension which should have gone to Ziya-ul-nissa on the death of Rehim-un-nissa, should be diverted from her; that Rs. 10,000 of it should be paid to Rehim-un-nissa's descendants, Rs. 3,000 to the uncle decree-holder, Mir Zulfikar Ali ; and that Rs. 37,000 should be invested annually as a trust fund, until the death of Zia-ul-nissa Begum, after which event the income derived from the fund should be applied for the benefit of the descendants of the Nawab. Although the Bombay Government in their letter No. 3602 of June 3, 1887, had suggested that the amount available should be invested in four per cent. Government Promissory Notes, two trustees being appointed for its administration, one of whom should be the Agent to the Governor at Surat and the other the Accountant General, Bombay, this suggestion was not accepted, and the final orders contained no mention of trustees for the fund. The letter No. 738 of January 31, 1888, to which the Government of India's letter is an answer, is not among the printed papers-and the Government of Bombay may meanwhile have made alternative recommendations.

39. Mr. Coltman's argument has been that these orders contain a declaration of trust by the Government of India constituting itself a trustee of a trust fund to be accumulated as indicated for the benefit of, among others, the plaintiff, as a descendant of the Nawab of Surat.

40. Since the Indian Trusts Act of 1882 had not at that date been applied to this Presidency, Section 5 would not presumably ""apply, though it is admitted that Section 6 which enacts the ordinary law on the subject would do so.

41. A trust would, therefore, be created where the author of the trust (the Government of India) indicates with reasonable certainty by any words or acts-(here the orders quoted above) an intention on its part to create thereby a trust, the purpose of the trust, and the beneficiary of the trust property, and transfers the trust property to the trustee. The relevant passage in exhibit 138 is :-

The amount of Rs. 50,000 less the amount required from time to time for the maintenance of Rahim-un-nissa's children should be paid into a trust fund and invested until the death of Ziya-ul-nissa Begum, after which event the income derived from the fund should be applied to the benefit of the descendants of the

Nawab.

Exhibit 136, which is a letter from the Collector and Political Agent, Surat, reporting the action necessary to carry out the orders of the Government of India was approved by Government. There was then a balance of Rehim-un-nissa's pension of Rs. 1,11,000 and this was added to the fund-"to form a good nucleus for the provident fund for the benefit of the children on the lapse of the pension".

42. The sums available were appropriated accordingly, and by 1916 when Ladli Begum died, amounted to over eighteen lakhs of rupees.

43. We doubt in the first place whether the Government of India intended these orders to be a declaration of trust-in the legal and technical sense, though the expression " should be paid into a trust fund and invested" is used : but there are no words constituting either the Government of India or the Local Government a trustee, and no provision for one is made. As the learned Judge has pointed out, the use of the word "trust" or the words " trust fund " are not sufficient to create a trust by declaration or to give it a technical jural character. He has relied on *Kinloch v. Secretary of State for India* (1880) 15 Ch. D. 1, on appeal (1882) 7 App. Cas. 619, where the words " in trust" contained in a royal warrant were held to be insufficient to create a trust.

44. Whether there has been an effective transfer or not is again doubtful. The fund was actually held by the Accountant General : but he had not been appointed a trustee. This being so, he was acting as a cashier or the agent of Government in the matter, and his acts were at their orders. It has been suggested that since he deducted commission and Income Tax, this action shows that beneficiaries were contemplated. But commission for management is charged on all separately held funds, and Income Tax would be deducted at source on the stock.

45. The next point is the question of beneficiaries who are only vaguely indicated-as the " descendants of the Nawab", but at what point of time these were to be determined is not stated, though we may perhaps presume it was at the point of the death of Ladli Begum when the fund was to be used. The plaintiffs contention is that it was then to be divided, half going to one branch and half to another, as in fact it has been, and that he is entitled to a quarter, If the fund is treated as part of the estate of Ladli Begum, as in fact it was, being derived from her withheld pension, and distributed by the rules of Muhammadan law, he would not get a share-he would only do so if the fund is considered partible on some general rule which is unspecified.

46. It has been argued by Mr. Jayakar that even if we assume there was a trust fund-it was by the terms of the declaration a trust for the benefit of the Nawab's descendants, not necessarily all of them, and only as regards the interest-which in fact has been paid to some of them, so that we cannot say there has been a breach of the conditions. He and Mr. Shingne have also argued that (the declaration must be imperative-which here it was not, and that the three

certainties, as they have been called, of a trust are lacking. The objects were uncertain for Government have of intent refused to specify exactly the persons who would benefit : if the distribution was to be in 1915 when Ladli Begum died, the legal distribution is uncertain, for plaintiff has himself raised the objection which applies also to his case, that under Muhammadan law some of the parties could get nothing. The plaintiff's objection is mentioned in the Court's order on exhibit 31 on the application of Mir Jamaluddin Khan and Mir Masumalikhan.

47. It was suggested for the plaintiff by Mr. Coltman on the strength of *Grant v. Lynam* (1828) 4 Russell 292, that family of descendant means next-of-kin and that the Statute of Distribution applies ; but that enactment does not apply in India, and that the descendants would take per capita and not per stirpes ; but for this also there is no authority.

48. Mr. Koyajee's argument for the plaintiff has been that though the order of Government says that it is the interest only which shall be applied for the benefit of the Nawab's descendants, his client would be entitled to the corpus on the analogy of Section 172 of the Indian Succession Act, which provides that where the interest or produce of a fund is bequeathed to any person and the will affords no indication that the enjoyment of the bequest should be of limited duration, the principal as well as the interest shall belong to the legatee.

49. But this is a provision relating to bequests by will and no authority has been shown for its application to trusts, to which at best it would only apply where no contrary intention is expressed, which is not the case here. The trust also, if it was one, seems to contemplate a perpetual enjoyment by the descendants of the Nawab of the interest, and in fact the conversion of the Interest payments into two political pensions secured on the revenues of India has that effect. In 1916, this would have offended against the provisions of Sections 13, 14 and 15 of the Transfer of Property Act : but since that Act was only applied to the-Presidency after 1886, this objection would probably not apply to this case.

50. To sum up, the facts are clear and the intention of the Government of India seems definite from the correspondence between that Government and the Provincial Government printed in the record. It was, we think, that the Government of India never intended to declare a trust and themselves trustees of a fund for the descendants of the last Nawab. Their intention was to form a fund, by appropriating the half of the pension payable to Zia-ul-nissa, admittedly hers by right, and not part of the Government revenue, while she lived, accumulating it by annual contributions to the fund and investments, and reserving the capital to form a fund out of which the Nawab's descendants could be supported on her death when the whole pension lapsed. Government did not constitute themselves trustees, nor were any appointed. Government did not transfer the fund, but kept it under its control in the hands of the Accountant General for management, and Government refrained from specifying, except in the vaguest terms, who were to be the beneficiaries of the fund, whether males only or female descendants as well, whether married as well as unmarried

females were to benefit, and how the descendants alive on Ladli Begum's death were to take, under Muham-madan law or otherwise.

51. We believe no trust was created and consequently that Government's acts were acts of State-and that the accumulation was therefore a pension to which Section 4 of the Pensions Act would apply, and that plaintiff cannot sue without a certificate from the Collector, and that the suit is also barred by limitation. The appeal must therefore fail and be dismissed.

52. A question has been raised as to Court-fees. The learned Judge's order is in exhibit 237 and exhibit 251. He has held that the value of the suit for pleader's fees is Rs. 12,27,070. The ordinary rule is that such fees shall be computed on the amount or value of the subject-matter of the suit. The plaintiff's valuation was arbitrary, on the basis of a suit for accounts and administration. The learned Judge has held that valuations for Court-fees and for pleaders' fees are distinct matters, and that since plaintiff did not merely ask for and value his share, but prayed for the administration and distribution of the whole subject-matter of what he alleged was a trust, he must pay on that amount, which was fixed at the market value of the securities at the date of suit. We have heard the parties and have been referred to Shripatprasad v. Lakshmidas (1922) 25 Bom. L.R. 747 and Kasanji Kuverji Vs. The Surat Municipality, .

53. We think on the pleadings of this case that the learned Judge's order is correct. We confirm the original Court's decree and dismiss this appeal with costs.....the costs to be taxed on the principles followed in the original Court's decree. There are to be three sets of such costs : one for respondent No. 1 ; one for respondent No. 2 ; one for the heirs of respondent No. 6.

Barlee, J.

54. I agree with my learned brother and shall add only a few words to what he has said.

55. The plaintiff-appellant claimed an interest in a fund of eighteen lakhs accumulated by the Government of Bombay for the benefit of the descendants of the last Nawab of Surat. The main defences were that no valid trust had been created ; that a civil Court had no jurisdiction to take cognizance of the suit, inasmuch as it related to an obligation arising out of a transaction which was an act of State; and that the suit was not maintainable without a certificate under the Pensions Act.

56. The second defence is based on the assumption that an obligation did exist, owing to the creation of what would have been a valid and binding trust were the parties private individuals. Learned counsel has tried to persuade us that, because the historical origin of the fund is to be found in a treaty between the East India Company and the Nawab in 1800, it is tinged with a political colour, and is not subject to the jurisdiction of a civil Court. We cannot accept this argument. It is obvious that the treaty was an act of State and that questions

about the pension paid to the Nawab would not have been cognizable by a civil Court. Likewise the pension to his son-in-law and grand-daughter were discretionary grants, which Government had jurisdiction to stop at any time. But it does not follow that they have jurisdiction over pensions once they have been paid. Once money has been paid to trustees it cannot be recovered ; and the same rule applies if it has been set aside in a trust fund, without the intervention of trustees. Up to the date of the payment of each instalment, Government had perfect liberty of action to pay or not to pay. Once the money had been replaced by bonds bought specifically for the fund, the beneficial interest vested in the beneficiaries, if any, and to " reabsorb " it was a breach of trust and not an act of State.

57. The defence under the Pensions Act also fails if the money claimed is a valid trust fund. There is no question of the payment of any pension now that Zia-ul-nissa is dead. What is claimed is a share in a fund which ceased to be pension as soon as it was paid. The respondent relies on the case of Jijaji Pratapji Raje v. Balkrishna Mahadeo I.L.R(1892) 17 Bom. 169, and followed in Girjabai Shivdeorao Vinchurkar Vs. Narayanrao Ganpatrao Vinchurkar, . That the case distinguishable. The plaintiff was claiming from his co-sharer money which had been paid as pension and according to my view had ceased to be pension. But he was claiming it on the strength of his right as a pensioner, and the question whether he was a pensioner or not was one connected with a pension. Here the money claimed is ex hypothesi the accumulation of a series of Government grants which have been paid, and the plaintiff claims as a beneficiary under a trust and not as a pensioner.

58. The important question is whether the Secretary of State created a trust fund-did he express with reasonable certainty the intention to create a trust, and did he name or indicate the beneficiaries with reasonable certainty ?

59. Learned counsel has asked us to confine our attention to the document by which, he says, the trust was created and to pay no attention to previous correspondence. Were there a formal declaration contained in one document, I would agree with his view-in fact Section 91 of the Indian Evidence Act would leave us no choice. But it cannot be said here that the terms of the grant have been reduced to the form of one document. At any rate the document on which he relies is not a trust-deed. We have four letters on the subject. Exhibit 134 of June 3, 1887, contains proposals from the Government of Bombay ; exhibit 138 of June 7, 1888, gives the assent of the Government of India ; exhibit. 135 communicates the assent of the Secretary of State. Lastly,, exhibit 136 of September 16, 1889, embodies orders given by the Government of Bombay to their Agent at Surat. This last is the document on which the appellant relies. But the only authority competent to create a trust out of imperial fund was the Secretary of State, and the trust declaration must be looked for in his final letter, which approved the proposal made in the letter of the Government of India ; and this I think must be read with the original proposals of the Government of

Bombay. If we do not do so, there can be no trust as the Secretary to the Government of India speaks of the descendants of some Nawab without saying what Nawab he means.

60. Reading the letter of the Government of India with that of the Government of Bombay to which it was an answer, we find a clear declaration of intention to create a trust fund. The Government of Bombay speak of two trustees, and use the words "trust fund" and beneficial interest. The Government of India do not disagree with the general idea ; and they too speak of a trust fund. Clearly they were writing without legal advice, for the scheme they favoured was certain to violate the rule of perpetuities and possibly that against accumulations-but that is not material in the present enquiry. There was also a sufficiently clear indication of the object of the trust and the trust properties. But when we come to the class of beneficiaries we find a difficulty. It is the appellant's case that it was the intention of the Government of India to give a vested interest in the fund to the descendants in existence at the time, to be deferred for the purpose of accumulation. That would have been quite feasible. But I cannot find any indication that Government intended to create any immediate interest. The Government of Bombay had written that it was not necessary to define who should have the beneficial interest,-and the Government of India replied that the money should be invested until the death of Zia-ul-nissa Begum, "after which event the income should be applied for the benefit of the descendants of the Nawab". To succeed the plaintiff must persuade us that the settlor intended to divest himself of the beneficial ownership at once. But I am not persuaded that the Government of India were thinking of the then living descendants. A separate arrangement had just been made in the same letter for their maintenance up to the death of the lady. All that the Government of India were considering was the maintenance of such of them as might survive her, and there are no words to create an immediate settlement. The effect of this is that the declaration was executory and not executed, and the settlor cannot now be forced to execute it. The document, as the learned Government Pleader has argued, may have expressed the intention to create a trust for the descendants living at a future date, but did not create one for the descendants then in existence.

61. In forming this opinion I have not left out of account the second paragraph of the Government of India's letter. It speaks of an arrangement "conducive to the benefit of the lady and the other members of the family of the late Nawab". That may mean an immediate benefit, but the idea was discarded for neither the lady nor the members were given any immediate benefit. There is one other point. In my opinion the word "apply" creates a difficulty. The final order of the Government of India was that the income of the fund when accumulated should be applied for the benefit of the descendants of the Nawab. This indicates that they were not thinking of the distribution of the income amongst the descendants in accordance with any particular rule of law but meant the Government of Bombay to have a discretion to make grants to such of the descendants as most needed them. If the distribution was to be discretionary, no

one particular descendant has a right to share, and the plaintiff must fail.