

(1919) 02 AHC CK 0015
In the Allahabad High Court

Syed Ali Muqtadi Khan and Others

APPELLANT

Vs

Abdul Hamid Khan and Others

RESPONDENT

Date of Decision : 08-02-1919

Acts Referred:

Trusts Act, 1882 — Section 73

Citation : 49 Ind. Cas. 878

Hon'ble Judges : Rafique, J; Lindsay, J

Bench : Division Bench

Judgement

1. The following pedigree will explain the right under which the plaintiffs brought the suit out of which this appeal has arisen.

Saiyed Ali Azam Khan _____ |
_____ | | Buniyad Ali Khan. Aman Ali Khan,
_____ | _____ | | Ali Ahsan Khan, Ali Aglam Khan. | | Ali
Muzaffar Khan Ali Muntazim Khan, _____ | |
_____ |
_____ | | | Ali Taqi Khan, Ali
Mujtaba Khan, Ali Muhtada Khan | | | _____ |
_____ | _____ | | | | | |
Ali Akhtar Khan, Ali Mohtashim Khan. Ali Muttaqi Khan, Ali Ijtiba Khan. Ali Ittiqa
Khan. | _____ |
_____ |
_____ | | | | | Ali Muqtada Khan. Ali Ata
Khan. Ali Murtaza Khan. Ali Sabir Khan. Ali Safdar Khan.

2. The ancestor of the plaintiffs, Buniyad 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 Mutwallis of the waqf property after his death. He further provided that the Mutawalli ship was to descend to the issue of the two nephews "naslan bad naslan wa batnan bad batnan daimun wa abdan ghair munqataan

wala muntaqilan ala sabil al istimrar wal istiqlal-" in other words, the descendants of the two nephews were to get the Mutwalliship generation after generation without any break and without any separation for ever and for ever. Ali Mnzaffar 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 Mutwalli 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 Muhtada 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 kabuliyat 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 14 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 zarpeshgi lease in favour of one Musammat Nandrani 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 Mutwalliship in favour of his two sons Ali Akhtar Khan and Ali Muhtashim Khan. On the 13th of February 1911 Ali Mujtaba Khan executed a similar deed in favour of his three sons, Ali Muttaqi Khan, Ali Ijtiba Khan and Ali Ittiqa Khan. Ali Muhtada 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 zarpeshgi lease in favour of Musammat Nandrani 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 lifetime transfer the Mutwalliship 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 Trusts Act for permission to withdraw from the Mutwalliship. 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 Mutwallis 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 Muhtada 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 Mutwallia 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 Abdal 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 Muhtada 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 Mutwallis 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 Nandrani, the transfer by Ali Taqi Khan and Ali Mujtaba Khan of the Mutwalliship in favour of their sons was invalid and did not give them a right to the office of Mutwalliship. As to the three sons of Ali Muhtada Khan, namely, plaintiffs Nos. 1, 2 and 3, he held that under the amanat-nama 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. Before proceeding to consider the appeal we must observe here that one of the legal representatives of Abdal Majid Khan, namely, Musammat Ruqaiyya Bano, who was respondent No. 3 before us, died about 3 years ago. No steps were taken to bring her legal representatives on the record in time and the appeal as against her abates.

3. 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 Mutwalliship to their sons. Moreover even if the transfers by Ali Taqi Khan and Ali Mujtaba Khan are invalid, the sons of Ali Muhtada Khan are co-Mutwallis with Ali Taqi Khan and Ali Mujtaba Khan. The original deed of waqf shows clearly that the Mutwalliship was to continue in all the branches of the family of the nephews of Buniyad AH Khan. Our attention has been called to the original words, naslan bad naslan, etc., which have been quoted in the earlier part of the judgment. The three sons of Ali Muhtada Khan, it is said, can, in any case, maintain the present suit if the plaintiffs Nos. 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 Muziffar 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 Muhtada Khan. Ali Muhtada Khan died in 1903 and under the terms of the deed of 1845 his sons succeeded to the office of Mutwalliship and became co-Mutwallis with Ali Taqi Khan and Ali Mujtaba Khan. The opinion of the Court below that on the death of Ali Muhtada Khan, his two brothers Ali Taqi Khan and Ali Mujtaba Khan alone remained Mutwallis is incorrect. There is no question of survivorship in the case either under the Muhammadan Law or in the terms of the deed of 1845, The view that we take of the case makes it unnecessary for us to decide whether plaintiffs Nos. 4 to 8 are entitled to maintain the suit. We think that the plaintiffs Nos. 1 to 3, namely, Ali Muqtadi 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 Muhtada 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 and costs in this Court will include fees on the higher scale.

ORDER

4. By the Court.--It has been brought to our notice to day that Musammat Ruqaiya Bano, respondent No. 3, is dead. According to the report of the serving officer of the Munsif's Court at Amroha which is dated the 30th of January 1917, she died more than 6 or 7 months prior to the making of the report. On the 12th of February the fact that she was dead was brought to the notice of the appellants and they asked for time to bring her legal representatives on the record. Accordingly one month was allowed to them. They got further extensions in the year 1917, No steps were, however, taken and her legal representatives have not yet been brought on the record. The appeal, therefore, as against Musammat Ruqaiya Bano abates and we note accordingly. This note will remain on the record.