

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Muhammad Bakar and another v. Nawab Mirza Muhammad Bakar Ali Khan and another, from the Court of the Judicial Commissioner of Oudh; delivered the 2nd December 1910.

PRESENT AT THE HEARING :

LORD MACNAGHTEN.

LORD MERSEY.

LORD ROBSON.

SIR ARTHUR WILSON.

MR. AMEER ALI.

[DELIVERED BY MR. AMEER ALI.]

This Appeal arises out of a suit brought by the Plaintiffs to recover possession of a half share in certain villages in the district of Sitapur, in Oude. The villages in question belonged originally to one Kazi Muhammad Azhar, but some years prior to the annexation, either for convenience in the payment of Government demands or from motives of greater security, they appear to have been included, with the consent of Muhammad Azhar's widow Wazir-un-nissa, in the ilaka or estate of Nawab Munauwar-ud-daula, the ancestor of the principal Defendant in this case. Thus in 1859, when the first settlement of the Province was carried out, the villages were found to be in the possession of Munauwar-ud-daula. On that occasion Wazir-

un-nissa applied as *malik* or owner for settlement of the villages. The claim was resisted by the Nawab's agent and was ultimately dismissed. It is upon the orders passed by the extra Assistant Commissioner in the settlement proceedings, coupled with certain statements made by the Nawab's agent, that the present action is based. On the 21st of January 1859, in answer to a question by the settlement officer as to his ground of objection to Wazir-un-nissa's claim, he stated as follows:—

“A.—This village has been included in our (my client's) Paka for the last seven or eight years, it neither being mortgaged nor sold. But the arrears for eight (not clear in the original) years, regarding this village are still due to us (my client). Whenever the original Zamindar, *i.e.*, the claimant, will pay off our (my client's) money he will get the village released. There is no other objection.”

“Q.—Who mortgaged this village to you (your client)?

“A.—We (my client) got this village from the wife of Kazi Muhammad Azhar. We know nothing about the claim of Karamat-ul-lah.”

And on the 19th of February 1859 the extra Assistant Commissioner made the following order:—

“The objection of the Agent of Nawab Munauwar-ud-daula is that she at her own instance got the villages included into his Taluka, hence she can get the villages released on payment of the arrears and *takavi*. As the facts of the case have been recorded in detail, therefore it is ordered that the *kabuliat* shall remain as usual in accordance with possession in the name of the Agent of Nawab Munauwar-ud-daula. The claim of the Thakurs, who have been out of possession for 100 years, is dismissed. The *Zamindari* right of the wife of Kazi Muhammad Azhar appears to be correct. She should file a separate application to have the money due to the Agent to Nawab Munauwar-ud-daula settled by arbitration and have her villages released. Whenever the villages, on payment of the money due to Nawab Munauwar-ud-daula, are released, the mortgagees shall be at liberty to put forward their claim. Let the file be submitted to the Deputy Commissioner for perusal and approval.”

As the proceedings related to a number of villages similar orders appear to have been recorded on other dates.

On the 24th of February 1859 the Deputy Commissioner, to whom the matter was submitted for approval, confirmed the settlement with Munauwar-ud-daula and dismissed Wazir-un-nissa's claim.

For the next eight years no action seems to have been taken in respect of the property in suit, but in 1867 when what is called the regular settlement of the Province was in progress, Wazir-un-nissa, in conjunction with her daughter Kutbunnisa, applied that the villages might be settled with her. Her claim was again resisted on the ground that they were included in the *Sanad* granted by Government to the Nawab. Her application for settlement was accordingly dismissed on the 31st October 1868. Two years later the two ladies applied for sub-settlement in respect of the villages in question, but as they could not prove possession within the period prescribed by law, their application was rejected on the 30th of August 1871. Their rights, however, to *nankar* allowance and other dues were admitted and affirmed in proceedings taken about the same time.

In 1873 Wazir-un-nissa and Kutbunnisa transferred by a deed of gift their right and interest in the said villages to Defendant No. 2 who is the son of another daughter of Muhammad Azhar. In 1898 the Defendant No. 2 instituted a suit against the Defendant Bakar Ali Khan to recover possession of those villages. His claim was dismissed by the first Court, but was compromised on appeal.

The present action is brought by the son and daughter of a brother of Defendant No. 2, who claim to be entitled to a half share in the property in suit. Their contention is that the

proceedings in 1859 constituted the ancestor of Bakar Ali Khan either a mortgagee or trustee on behalf of Muhammad Azhar's widow. The latter position was abandoned in the first Court where the case was tried, on the basis that the Nawab was a mortgagee or lienholder. The Subordinate Judge upheld the Plaintiffs' contention, and made a decree in their favour under Section 92 of the Indian Transfer of Property Act (IV. of 1882) for "redemption" on payment of a sum specified.

On appeal by the Defendant Bakar Ali Khan, the Judicial Commissioners have held the suggestion that Government settled the properties with the Nawab as trustee for Wazir-un-nissa, or that he undertook to hold the same as trustee for her, to be untenable. On the question whether the Plaintiffs were entitled to any relief on the hypothesis that he was a mortgagee, they held that Section 6 of Act I. of 1869 was a bar to the action. They accordingly dismissed the suit.

The Plaintiffs have appealed to His Majesty in Council. It is conceded on their behalf that, having regard to the provisions of Section 6 of Act I. of 1869, their claim for redemption cannot be sustained. But it is contended that, as the settlement with the Nawab was made subject to the rights of Wazir-un-nissa, who was declared entitled to recover possession of the villages on payment of the money due from her, the present suit comes strictly within the principle enunciated by this Board in *Hasan Jafar v. Muhammad Askari* (L. R. 26, I. A. 229). Their Lordships agree with the Judicial Commissioners in holding that the facts of the two cases are not at all analogous. In *Hasan Jafar v. Muhammad Askari* the settlement was effected with the person who took it on a distinct understanding which, in their Lordships' judgment, constituted

him a trustee for his co-sharers who were not present at the time.

In the present case, the settlement officer's proceedings can bear no such meaning. The Nawab was in possession of the villages by virtue of some arrangement regarding the exact nature of which there is no evidence. At the time of settlement he or his agent opposed the claim of Wazir-un-nissa to have the properties settled with her, on the ground that he was entitled to remain in possession until the monies he had disbursed on her account were paid off. That objection was upheld, and the settlement was made with the Nawab "in accordance with possession," and the lady was directed to proceed by separate application to get her property released by payment of the money due by her. In their Lordships' judgment there is no warrant for the contention that the correlative obligation that lay on the Nawab to release the property on payment of the money created a trust or constituted him a trustee for Wazir-un-nissa. No step appears to have been taken by her in compliance with the directions of the settlement officer; and the Nawab was allowed to remain in possession of the property without any attempt on her part to get it released. In 1867, when she applied for the regular settlement of the villages, an adverse title was distinctly set up on his behalf. From the date of the dismissal of her application in 1868 on the ground that they were included in his taluqdari sanad the Nawab's possession was adverse to her. The present suit was not instituted until 1905, and is thus clearly barred. The Appeal, therefore, fails and must be dismissed with costs. And their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

MUHAMMAD BAKAR AND ANOTHER,

v.

NAWAB MIRZA MUHAMMAD BAKAR
ALI KHAN AND ANOTHER.

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