

Musammat Dilafroz and another - - - - Appellan  
v.  
Raja Gauhar Zamir Khan and others - - - Respondents

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF  
THE PRIVY COUNCIL, DELIVERED THE 3RD JULY, 1946

*Present at the Hearing :*

LORD MACMILLAN

MR. M. R. JAYAKAR

SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from a judgment and decree of the court of the Judicial Commissioner, North-West Frontier Province, dated the 22nd November, 1941, which set aside a judgment and decree of the Court of the Senior Subordinate Judge, Hazara, dated the 14th October, 1940.

The principal question to be determined in the appeal is as to the right of the grantees to alienate lands granted by a robkar, or order of Government, dated 26th November, 1872, and issued by Captain Wace, Settlement Officer of the Hazara District. The question depends upon the construction of the robkar, and it will be convenient at the outset to notice its material provisions.

The robkar recites that orders dated 1st September, 1872, from the Secretary to the Punjab Government embodying the proposals of the Financial Commissioner regarding restoration of the estate of the Khanpur tract to the Ghakhars, the descendants of Diwan Fateh Khan, etc., Guzarakhors and Serikhors (persons enjoying grant for services rendered) had been received and that it was necessary to give effect to those orders and, accordingly, the proposals sanctioned by those orders were detailed below. The document then goes on to state that the reasons for the restoration of the grant of this estate were that it was proved from the enquiry made at the settlement that, from the year 1600 to 1831, the descendants aforesaid enjoyed the estate of Khanpur as heirs and Jagirdars (persons enjoying free grant), and in the year 1831 the Sikh Government dispossessed the aforesaid heirs and escheated the estate to Government, and that, the administrative rights of the Sikhs having passed to the British Government, and as the aforesaid family had, during the last 26 years, at all times rendered valuable service to the British Government, the latter had been graciously pleased to restore the estate escheated by the Sikhs with effect from the beginning of Kharif (autumn harvest) of 1872 to the descendants of Diwan Fateh Khan, etc., subject to conditions detailed below. After dealing with matters not material to this appeal the document proceeded, in paragraph 5, to state that it had been proved that in the year 1831, before their dispossession by the Sikh Government, Raja Najaf Khan, the ancestor of Raja Jehandad Khan and Raja Sher Mohd Khan, the ancestor of Raja Feroz Khan, held proprietary possession of

the whole tract of Khanpur in equal shares with certain exceptions noted, though Najaf Khan, the ancestor of Raja Jehandad Khan, was acknowledged to be the chief, and that, regardless of the previous partition, the whole of the ilaqa (tract), save certain lands as therein mentioned, had been divided into two parts, and the Settlement Officer was directed either by toss or other means to give one part to Raja Jehandad Khan and one to Raja Feroz Khan. Two villages, however, had been excluded, one of which named the village of Jawalian had been given to Raja Jehandad Khan as his exclusive property by way of "dastar" as the chief of the Gakhar tribe. In the rest of paragraph 5 there is a discussion of the problems to be solved and of the reasons for imposing the conditions subject to which the grant was made.

Paragraph 6 of the robkar laid down these conditions and so far as material was in the following terms:—

"*Para. 6.* Whereas it is desirable to provide against disputes concerning preemption and inheritance, etc.: in respect of the properties restored and to abolish outright all such customs as were in vogue in this part of the country previous to the dispossession of the Ghakhars, it is hereby ordered that the restoration of the properties mentioned in this order will be considered subject to the acceptance and admission of the following conditions:—

*Condition (i).* The proprietary rights of the *Guzaradars* and *Scrikhors* shall not be subject to any conditions or services, with the exception of the observance of the law as enforced by the British Government against all the proprietors of lands, and whosoever gets proprietary rights even in a single holding of culturable land under this order, that is to say, he does not get the whole village, in such an event also the said proprietor shall be entitled to a proportionate share in the village habitation and the "banjar" (uncultivated) lands.

*Condition (ii).* As regards the descendants of Diwan Fateh Khan, it is hereby laid down that the proprietary rights in the lands restored under the authority of this Sanad (order) to any proprietor, shall, on the death of such proprietor, be equally divisible amongst all his sons. In the absence of male issues the landed property, with the exception of the female line and of the circumstances mentioned in the conditions Nos. (v) and (vi), left by him would be disposed of according to Mohamadan Law.

It is further provided that the "dastar" (given something additional to a head of the family) village of Jawalian which has been solely granted to Raja Jehandad Khan in his own name together with 1/4th share of the other properties which are restored to him under this order shall be considered to be the exclusive estate of the Sardar (chief) of the Gakhar tribe. But besides the dastar village and the aforesaid 1/4th share the said sardar shall receive his share in the remaining property just like other sons.

*Condition (iii).* The chiefship of Gakhar tribe along with the special properties attached to it which have been awarded now to Raja Jehandad Khan shall devolve on the death of the chief upon such heir as has been appointed by the chief as his successor with the concurrence of the Government. If in any generation the chief fails to appoint his successor with the concurrence of the Government from amongst his descendants such successor would be appointed by the Government after the death of the chief and in every generation only that person shall continue to remain chief who bears good character and renders services to Government."

[Conditions (iv) and (v) are not material.]

"*Condition (vi).* If at any time henceforward there is no direct male issue of either Raja Jehandad Khan or of Raja Feroz Khan, i.e., there remains no male issue or progeny then the grants which are restored to them under this Sanad (order) shall be given to such person or persons from amongst the descendants of Diwan Fateh Khan as are appointed heirs by the Government under their own orders.

*Condition (vii) If at any time Raja Jehandad Khan or Raja Feroz Khan or their heirs or successors tyrannize their tenants, the Government shall dispossess such proprietors and shall take over in their own hands the management of the estate."*

It is to be noticed that in the Court of the Judicial Commissioner the learned Judges appear to have adopted a rather different translation of paragraph 6, but the differences are not serious.

The facts leading up to the present appeal are not in dispute and are as follows:—

Raja Gauhar Rahman was the son of the said Feroz Khan and in the year 1908 was in possession of the share of the lands which had been allotted to his father. He had two wives, Musammat Begum Nur and Musammat Suriya Sultan. By Musammat Nur he had two sons, Gauhar Zamir and Haidar Rahman, who are the first and second respondents. By Musammat Suriya Sultan he had four sons, Gauhar Zaman, the second appellant, Gauhar Habib, Gauhar Aziz and Gauhar Masud, who are respondents 11, 12 and 13. Gauhar Zaman married Musammat Dilafroz, the first appellant.

On the 9th June, 1908, Raja Gauhar Rahman made a gift to his son Gauhar Zaman of part of the said lands included in the robkar of 1872, which lands were referred to in the courts below as property " B." Gauhar Zaman made a gift of these lands to his wife, Musammat Dilafroz, on the 11th June, 1926.

On the 1st December, 1926, Raja Gauhar Rahman mortgaged part of the lands comprised in the said robkar in favour of his daughter-in-law the said Musammat Dilafroz, in lieu of Rs.20,000 being the amount of the dower due to her from her husband, the second appellant.

In 1928 Gauhar Zamir brought a Suit No. 45/1 in the Court of the Senior Subordinate Judge, Hariipur, against Raja Gauhar Rahman, his sons, Gauhar Zaman, Gauhar Habib and Haidar Rahman and Raja Gauhar Rahman's wife Musammat Suriya Sultan and his daughter-in-law Musammat Dilafroz. He asked for a declaration that the said gift in favour of Gauhar Zaman and the subsequent alienations were null and void as against the plaintiff and did not affect his right of inheriting the property on the death of Raja Gauhar Rahman.

The Senior Subordinate Judge in a preliminary judgment dismissed the claim in respect of the gift made in favour of Gauhar Zaman in 1908 of property " B ", on the ground that this claim was barred by limitation. A succeeding Judge who tried the other issues held that the alienations except those made for dower were invalid. He held that the mortgage in favour of Musammat Dilafroz would not affect the plaintiffs' rights after the death of Raja Gauhar Rahman.

In appeal the Court of the Judicial Commissioner, by judgment dated 16th June, 1931, held that under the grant made by the said robkar there was no power in the grantees to alienate the land and that, therefore, the alienations of Raja Gauhar Rahman were not valid.

In 1931, after the above decision had been given, the mother of Musammat Dilafroz and Raja Gauhar Rahman made an application to the Deputy Commissioner Hazara District for permission to mortgage certain lands in the village of Khanpur to Musammat Dilafroz for Rs.20,000 in lieu of her dower. The Deputy Commissioner is said to have directed a mortgage mutation to be entered and such mutation, No. 2554 dated 31st August, 1931, was accordingly entered. The property included in this mutation was referred to in the courts below as property " A ". The present Suit was also concerned with properties referred to as " C " and " D " in the courts below, but they do not form the subject-matter of this appeal, and need not be further referred to.

Raja Gauhar Rahman died on the 12th July, 1936.

On the 7th June, 1938, the present Suit was filed by Gauhar Zamir and Haidar Rahman in the court of the Senior Judge, Hazara, against the other heirs of Raja Gauhar Rahman and their alienees. In their plaint the

plaintiffs set out the alienations made by Raja Gauhar Rahman as herein-before mentioned, alleged that such alienations were invalid, and claimed a decree for possession of one-third share of the properties in suit. The appellants, who were the first and tenth defendants, contested the suit, alleging that the alienations in question were valid.

On the 14th October, 1940, the Senior Subordinate Judge, Hazara, delivered judgment and passed a decree dismissing the suit. He held that the property in suit was governed by the terms of the robkar of 1872 and that thereunder the Rajas could not transfer the property which was the subject-matter of the grant without the consent of the Government. But he held further that as the mortgage for Rs.20,000 in favour of Musammat Dilafoz, relating to property "A", had been attested with the approval of the Deputy Commissioner who was an agent of Government, it was a valid mutation and the plaintiff was bound by it. With regard to property "B", the subject of the gift in 1908 to Gauhar Zaman, the learned Judge held that the suit in respect of it was barred by limitation, and that this question having been decided in Suit No. 45/1 of 1928 was *res judicata*.

The plaintiffs appealed against the decision of the Senior Subordinate Judge to the Court of the Judicial Commissioner, North-West Frontier Province, and judgment was delivered by that Court on the 22nd November, 1941. The learned Judges agreed with the lower Court in holding that on the true construction of the said robkar the lands granted thereby were not alienable. With regard to property "B" included in the gift of 1908, they held that the plaintiffs' claim was not barred by limitation. In their Lordships' view this is clearly right. The claim to possession which the plaintiffs were asserting in this suit only arose on the death of their father in 1936. The fact that their claim to a declaration relating to their reversionary interest may have been barred in 1928 is irrelevant since that was upon a different cause of action. With regard to the mortgage of property "B" to secure the dower of Musammat Dilafoz the learned Judges held that it was not proved that the Deputy Commissioner as such had consented to the mortgage, or that his consent, if given, was binding on Government. Their Lordships see no reason to differ from this conclusion, but they must not be taken as accepting the assumption, upon which both the lower courts seem to have proceeded, that lands comprised in the robkar could be alienated with the consent of Government. It is not suggested that a restriction against alienation arose from an express term in the robkar forbidding alienation which, it might be argued, could be waived by Government for whose benefit it was imposed; the claim is that the person who purported to alienate was not the full owner of the property dealt with.

On the main question arising in this appeal as to whether, under the robkar, Raja Gauhar Rahman had power to alienate the lands in suit their Lordships are in agreement with the views of the lower courts. They think that the whole tenor of the robkar, as well as the actual language used, are opposed to the view that the proprietor for the time being can alienate. The contention of the appellants was that the robkar restored proprietary rights which had been escheated, that such rights would include a power of alienation as a normal incident of ownership, and that the purpose of the robkar was to settle the mode of inheritance, and not to restrict alienation. They relied strongly on the recital to clause 6 of the robkar that it was desirable to provide against disputes concerning pre-emption and inheritance, etc., no reference being made to restricting alienation. They maintained that pre-emption necessarily involved sale. That no doubt is so, but the sale need not be of the lands comprised in the robkar; the right of pre-emption might be exercised by the owners of those lands on the sale of other lands, and in this sense the use of the word may be explained. It is however difficult to see, on any construction of paragraph 6, what effect it could have upon disputes concerning pre-emption.

Their Lordships cannot accept the arguments of the appellants. It is to be noticed that according to the answers to questions addressed to certain of the Rajas, including Raja Gauhar Rahman, which are contained

in Exhibits P.30 and P.28, the customs of the tribe did not permit of the gift of immovable property, and the recital in paragraph 6 notices the desirability of abolishing all customs in vogue in that part of the country previous to the dispossession of the Ghakhars. It would be natural, therefore, for the robkar to contain some restriction on alienation, though, no doubt, the custom is not shown to have extended to alienations for value. Their Lordships think that the provision in condition (ii) that the proprietary rights in the lands restored to any proprietor shall, on the death of such proprietor, be equally divisible amongst all his sons, the provision in condition (vi) that if there is no male issue of Raja Jehandad or Raja Feroz Khan the grants which are restored to them under the order shall be given to such person, or persons, from amongst the descendants of Diwan Fateh Khan as are appointed heirs by the Government under their orders; and the provision in condition (iii) that the chiefship of Gakhar tribe awarded to Raja Jehandad Khan shall devolve on the death of the chief upon such heir as has been appointed by the chief as his successor with the concurrence of the Government, with the right to Government to appoint a successor from amongst his descendants, if he fails to make an appointment with the concurrence of the Government, are all quite inconsistent with the view that the lands comprised in the robkar can be alienated at will by the proprietors for the time being, with the result that all these provisions might be rendered nugatory. For these reasons their Lordships are of opinion that the decree of the Court of the Judicial Commissioner was correct. In view of the construction which their Lordships have placed upon the robkar, it becomes unnecessary to consider the contention of the respondents that the appellants are bound by the decision of the Court of the Judicial Commissioner in Suit 45/1 of 1928, and are not free to maintain that alienation is permitted by the robkar.

Their Lordships, therefore, will humbly advise His Majesty that this appeal be dismissed with costs.

In the Privy Council

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MUSAMMAT DILAFROZ AND ANOTHER

2.

RAJA GAUHAR ZAMIR KHAN AND  
OTHERS

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