Privy Council Appeal No. 90 *of* 1922.

Bengal Appeal No. 27 *of* 1919.

Srimati Karimunnessa Khatun, since deceased (now represented by Mahomed Alem and others) - - - - - - *Appellants*

v.

Mahomed Fazlul Karim and others - - - - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH DECEMBER, 1924.

Present at the Hearing:

LORD SUMNER.
LORD PHILLIMORE.
SIR JOHN EDGE.
SIR LAWRENCE JENKINS.

[*Delivered by* LORD SUMNER.]

Mia Golam Ali Chowdhury Sahib, of Ghatakhan, in the District of Faridpur, married three wives according to Mahomedan law of the Hanafi School. By the first, Aijunnessa Khatun, he had a son, Ali Ahmed, and two daughters; by the second, Ijjatunnessa, who was the widow of his own younger brother and uterine sister of his first wife, he had two sons, Amjad Ali and Tazammul Ali, and six daughters, of whom Karimunnessa Khatun, who preferred the present appeal from the judgment of the High Court at Calcutta, was the eldest; and by the third, Jamidunnessa, two daughters, of whom the younger, Majidunnessa, a posthumous child, is the plaintiff in the partition suit No. 137 of 1912, in which the present appeal arises. On 7th January, 1888, he died, possessed of the Haturia estate, the subject of the present litigation, to which the persons above-mentioned were the apparent heirs. He purported to have

duly made his will, of which his eldest son subsequently obtained probate.

Thereupon in 1892 a suit was brought to have the will set aside and to obtain possession of the respective plaintiffs' separate shares. The plaintiffs were Karimunnessa Khatun, three of her sisters, and one of the widows, while the other members of the family were joined as defendants. Those who supported the will alleged, among other things, that Golam Chowdhury's second marriage was wholly invalid and that the offspring of it were not entitled to share. This litigation was soon compromised, but Karimunnessa Khatun, not joining in the compromise, proceeded successfully to a decree in the Court of the Subordinate Judge. On appeal the High Court decided (I.L.R. 23 Cal. 130) that the second marriage was invalid, and that she was illegitimate and took no share. From this decision she preferred an appeal to their Lordships' Board, No. 28 of 1895. So far as the present case is concerned this was the last step taken in the suit of 1892.

The position, then, at the beginning of 1896 was this. As against Karimunnessa Khatun it was *res judicata* in favour of the children of the first and third marriages, that she had no right to share in her father's property, while her full brothers, Amjad Ali and Tazammul Ali, had made their peace with their half brothers and sisters, and had been admitted to share. If Karimunnessa Khatun prosecuted her appeal with success, she would share according to her full legal rights, undiminished by compromise; if she failed, she would be wholly excluded. As long as her appeal was pending she took no share.

Their Lordships express no opinion on the question of law, which would have been involved in that appeal, or as to its prospects of success. Her abandonment of it might well be consideration sufficient to support an agreement for a new compromise of the subject-matter of the appeal, and, according to the views taken of its merits by the legal advisers on either side, she might be in a position to insist on favourable terms or find herself at arm's length with her opponents. The position was favourable to negotiation and it is not necessary to inquire where the balance of advantage lay.

Accordingly an Ekrarnama, dated 24th March, 1896, was prepared, on the true effect of which the decree now appealed against was rested. On it, as their Lordships think, the whole rights involved in this appeal must principally depend. It was followed, it is true, on 20th April, 1896, by an amalnama for the appointment of common managers of the estate, but this merely refers to the provisions of the Ekrarnama, and, as the High Court rightly held, carries them no further.

The instrument began by stating that certain named parties "execute this Ekrarnama to the following effect." These parties were the three widows and all their respective children then living, the widow of the first wife's son, joining on her own

account and on account of her infant son. There then follow eleven paragraphs of recitals relating to the initiation of the suit of 1892 and its compromise among parties other than Karimunnessa Khatun, and to certain mesne transactions, not now material, between Ali Ahmed and Tazammul Ali and between them and sundry ladies of the family for the lease of the latter parties' shares apparently in return for fixed annuities. Next comes a recital of the success of Karimunnessa Khatun in the first Court and of her defeat in the second, and a statement that, owing to disputes which arose subsequent to the compromises, the management of the estates fell into disorder and rents were not paid, so much so that an auction sale in execution of creditors' decrees was on the point of taking place in respect of the shares of Tazammul Ali, Bafatunnessa Khatun, Jibunnessa Khatun, Aklimunnessa Khatun, Ali Asraf and Aitunnessa Khatun.

The document then goes on, "so we make an Ekrar to the following effect, for settling all our disputes and misunderstandings." Then follow four so-called "Conditions." The first runs thus :—

> "That we are in possession and ownership of the properties left by the late Mia Golam Ali Chowdhury by right of inheritance and under pottahs, etc. . . . We entrust the entire charge of management of our estate to Babu Kati Krishna Tagore, of Pathuriagata . . . We will all jointly execute a deed of trust and get it registered and will thereby put the entire charge of management of the estate in his hands. . . . If our zamindar, Babu Kati Krishna Tagore, do not take the charge of management, then we, all the sharers, shall jointly appoint a common manager . . . If all the sharers do not join in making the said application, then any of the sharers shall be at liberty to make a petition and have a common manager appointed on the basis of this deed. . . . If for any of the reasons stated above the charge of management do not remain in the hands of our zamindar, Babu Kati Krishna Tagore, or if no common manager can be appointed, then all the sharers jointly or, most of them unanimously, shall be at liberty to appoint a fit person as a manager."

Condition No. 2 is a recital of the shares of those (including the present plaintiff) who, apart from the alleged will and the subsequent compromises and litigation, appeared to be entitled to inherit in consequence of Golam Ali's death. Sons are stated to have inherited shares of 1 anna 15 gundahs; daughters, including Karimunnessa Khatun, to shares of 17½ gundahs; and widows to shares of 13 gundahs, 1 kara, 1 krant each, as jajiyati shares. These fractions aggregate the entirety of the estate. According to the previous recitals the amounts of these shares would appear to have been fixed by the Subordinate Judge in the suit of 1892 in accordance with Mohammedan law. The paragraph concludes :—

> "These shares shall remain fixed. We shall not ever be competent to claim anything in excess of these shares. If we make such a claim the same shall be disallowed by the Court."

The fourth condition contains a submission of nine questions to the decision of certain named arbitrators, of which the seventh is as follows :—

> "With regard to the relinquishment by solehnama of 17½ gundahs share in the immoveable properties left by the late Mia Golam Ali Chowdhury Sahib without mesne profits, in favour of Karimunnessa Khatun contrary to the decree of the High Court, and with regard to the costs, exclusive of Rs. 1,200, which the said Khatun has taken on account of cost, with regard to cash money, and with regard to Dewanbati, Gopalpur owned and held by her."

It is to be noticed that the appeal by Karimunnessa Khatun to their Lordships' Board is nowhere mentioned, and its abandonment is not stipulated for; that Karimunnessa Khatun does not appear at this date to have been in possession of any part of the Haturia estate, whatever she may have been later on, being in fact excluded from it by the decree against her, and that only five persons actually execute the Ekrarnama, namely, Karimunnessa Khatun, Tazammul Ali, Jabidunnessa, Jibunnessa and Bafatunnessa. Even when allowance has been made for the fact that the shares of some of the ladies, who were members of the family, were in the hands of Tazammul Ali, between whom and Karimunnessa Khatun most of the conflict of interest now arose, there remains one important branch of the family, heirs of Amjad Ali, who never executed or became bound by this Ekrarnama, viz., Akbar, the son, Rokea, the widow, and Ijjatunnessa, the mother. No arbitration ever took place, nor did Babu Kati Krishna Tagore take up the management. In April of the same year an English firm was appointed to manage the estates instead of him. Karimunnessa Khatun did not withdraw her appeal; it was dismissed for want of prosecution in 1897.

This document no doubt appears at first sight to have been designed to secure to Karimunnessa Khatun the 17½ gundahs share from which, as matters then stood, she was barred by the decree of the High Court. It is, however, evident that if each person signing became thereupon bound to each other person signing to allow this provision to be carried out and to make it effective himself, so far as his own participation was concerned, those who signed might, as against those who did not, be placed in a position of considerable personal liability. The admission of Karimunnessa Khatun to a share in the estate, to which, as the decree in the partition suit against her then stood, she was not entitled at all, would, of course, *pro tanto*, diminish all the other participants' shares, and if those who did not sign were to contest her right to admission as a participant with success, they would share in proportion to a greater extent, while those who had signed, would share to a less extent. In this view, as between those who signed and those who did not, the former class must suffer if the latter should insist on the decree as it stood.

If, on the other hand, the article were to be read, as it would be read, say, in a creditors' composition deed, that is, if the consideration upon which each party became bound were the execution of the deed by all the others, so that a mutual obligation of all to all must arise before any particular party could be bound, the working of the article would be simple, and when all had signed a complete settlement would have been provided for. This seems to have been the main issue before the High Court upon the construction of the Ekrarnama.

Again, among the matters, " with regard to which " the award of the named arbitrators is to be final, is the seventh question, viz., " with regard to the relinquishment," that is to say, by the other heirs of Mia Golam " by solehnama of 17½ gundahs share, without mesne profits, in favour of Karimunnessa Khatun, contrary to the decree of the High Court," and the effect of this provision appears to be that Karimunnessa Khatun is to have a 17½ gundahs share, if and when the arbitrators award it to her, but that in no event is it to carry mesne profits, nor is there any submission to them of a claim by her for such mesne profits. The difficulties in the way of reconciling this provision with a consensual re-admission of Karimunnessa Khatun forthwith to the circle of the participating heirs, independently of any award, seem to be very great. It is evident that these considerations prevailed with the High Court, whose conclusion as to the Ekrarnama of 1896 is expressed as follows by Sir Charles Chitty :—

> " Of this the learned Judge says that it fixed Karimunnessa's share at 17½ gundahs, and that its terms are sufficient to confer title on her. In this view I cannot agree. In the first place the document purports to be an agreement between nine people, but it was executed only by five of them. Secondly, and more important, the document is only a provisional agreement. . . as a matter of fact no arbitrators were ever appointed."

After very full consideration of the question their Lordships' Board is unable to see its way to differ from this conclusion of the High Court. They are willing to give, if possible, that benevolent construction to the Ekrarnama, which it has often been said that " family arrangements " deserve, but all depends in the long run on the construction of the written words used. The document itself is obscure, and no doubt suffers, as most documents do, by translation. Opposite views as to its nature and effect may well be arrived at by different minds, but, on the whole, their Lordships cannot say that the view of the High Court was wrong.

The decision of the other questions in the case follows readily from this conclusion. It is a curious thing that some members of the family, at any rate, seem to have thought for many years that Karimunnessa Khatun was somehow entitled to the same 17½ gundahs share as her sisters took, for in an Ekrarnama of 1898, to which Tazammul Ali was a party, though Karimunnessa Khatun was not, the several fractions which make up the total of the estate are recited exactly as they stood in Article 2 of the Ekrarnama of 1896, and they are described as being the result

of a settlement by " various deeds," some of which are named and some not. For a long time Karimunnessa Khatun continued to receive regular " allowances " from the managers of the Haturia estate, which must have been payments as of right, since her creditors obtained attachment of them for her debts, and there were produced sundry subsequent settlement records, filed by the receiver of the estate, in which Karimunnessa Khatun appears as entitled, by inheritance from Mia Golam Ali Chowdhury, to the same $17\frac{1}{2}$ gundahs share as her sisters. These records seem to have been prepared by the manager of the estate under the Court of Wards, at a date and under circumstances, however, which are not stated.

The question, then, is whether these facts, separately or collectively, warrant an inference that Karimunnessa Khatun received from the other heirs, at a date subsequent to 1896 and independently of the Ekrarnama of that year, by some agreement which; is nowhere recorded, the very share in the property left by her father, which the Ekrarnama was not effectual to give her. Their Lordships think that the High Court rightly answered this question in the negative. The above facts are not interpretative of the true construction of a prior written agreement: at most they show that many members of the family construed it wrongly, or were imperfectly informed as to what had happened. The facts themselves are of dubious import. No account of any share in the Haturia estate was apparently ever rendered to Karimunnessa Khatun; certainly none was produced, and the payments to her, though varying in amount from time to time, were always made in round figures and could not have represented a small fixed share in the net profits of an estate, which consisted of many different kinds of property, fluctuating in annual value. The Settlement Records are, of course, important documents, which must have been carefully prepared, and probably ought to have been challenged, if they were seriously incorrect, but they are not conclusive, and too little is known of them to enable their Lordships to infer that a valid agreement had at some time been entered into after 1896, which conferred the $17\frac{1}{2}$ gundahs share that the Ekrarnama failed to give. It was admitted that Karimunnessa Khatun had had possession, but this is a possession referable to her title, and must be possession of that only which her title gave her. Their Lordships dismissed, in the course of the argument, the contention that any case of adverse possession could be made out, and they are of opinion that nothing is proved after 1896 to give to Karimunnessa Khatun a share as against other members of the family or their assigns.

Some question arose as to the position of the respondents and the extent of their share in the properties to be partitioned, in virtue of their title as assignees, by mortgage or by sale, of Tazammul Ali and Amjad Ali. Their Lordships have found but scanty material in the Record upon this point, and they deem it

unnecessary to express any opinion about it. As soon as it is held in the present partition suit that Karimunnessa Khatun is not entitled to participate at all, it is not competent to her to challenge the extent of the shares, which may belong to others who do participate. The present respondents having denied with success her right to share at all, no further question arises on this appeal.

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

In the Privy Council.

SRIMATI KARIMUNNESSA KHATUN,
SINCE DECEASED (NOW REPRESENTED BY
MAHOMED ALEM AND OTHERS)

v.

MAHOMED FAZLUL KARIM
AND OTHERS.

DELIVERED BY LORD SUMNER.

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