

Privy Council Appeal No. 79 of 1931.

Mohammad Aslam Khan and others - - - - *Appellants*

v.

Khan Sahib Mian Feroze Shah - - - - *Respondent*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 24TH JUNE, 1932.

Present at the Hearing :

LORD WRIGHT.

SIR LANCELOT SANDERSON.

SIR DINSHAH MULLA.

[*Delivered by* SIR LANCELOT SANDERSON.]

This is an appeal by special leave from a judgment and decree of the Judicial Commissioner of the North West Frontier Province dated the 18th January, 1930, amending a decree dated the 11th November, 1925, as well as from the decree as amended and the subsequent order dated the 26th June, 1930, in execution granting mesne profits to the plaintiff respondent.

The suit was brought on the 12th May, 1922, by the plaintiff, K.S. Mian Feroze Shah in the first instance against Mohammad Afzal Khan praying for a decree for possession of certain lands in the villages of Ahmadabad and Narai by specific performance of an alleged agreement dated the 1st May, 1921, by means of the execution and registration of a sale deed and for the recovery of the sum of Rs. 4,520 and for such other and further relief as the Court might deem equitable.

The defendant, Mohammad Afzal, pleaded in his written statement, among other pleas, that he had parted with his rights and possession in the lands in the said village of Ahmadabad to M. Aslam Khan, Musammat Khaperai and Musammat Mashala.

Consequently the three last named persons were added as defendants.

They are the appellants in this appeal, and they will hereinafter be referred to as the appellants.

Attar Singh, who was alleged to be a mortgagee, was added as a defendant, but it appears that the District Judge decided not to deal with the rights of the alleged mortgagee but to confine his decision to the case against the appellants. The alleged mortgagee has not been represented in this appeal and no question as to his rights has been raised before their Lordships.

The learned District Judge of Peshawar decided that the plaintiff was not entitled to specific performance of the alleged contract but that he was entitled to recover from the defendant Mohammad Afzal the sum of Rs. 53,900, which he held the defendant Mohammad Afzal had borrowed from the plaintiff.

The plaintiff appealed against the District Judge's judgment and decree to the Judicial Commissioner of the North West Frontier Province, who, on the 11th November, 1925, allowed the appeal, set aside the decree of the District Judge and granted to the plaintiff a decree for specific performance of the agreement dated the 1st May, 1921, against the defendant Mohammad Afzal in respect of the lands mentioned in the Judicial Commissioner's decree. He made no order as to the recovery of the sum of Rs. 4,520, on the ground that it had not been demanded in the appeal. No appeal has been filed by the plaintiff against the Judicial Commissioner's order as to the sum of Rs. 4,520, and their Lordships need not refer to this matter again.

The Judicial Commissioner ordered that the costs of the appeal should be paid by Mohammad Aslam Khan, Musammat Khaperai and Musammat Mashala only. It is to be noted that although the appellants were added as defendants in the suit, the plaint was not amended, and that consequently no relief was prayed against them, that the Judicial Commissioner's decree granted specific performance of the contract against the defendant Mohammad Afzal only, and that although no relief was granted against the appellants, they were directed to pay the costs of the appeal.

The decree of the Judicial Commissioner, to say the least of it, may be described as inconsistent. In January, 1926, the plaintiff applied to the District Judge for execution of the above-mentioned decree, the application was to the effect that all the defendants in the suit should execute and get registered a sale deed in favour of the plaintiff and should deliver possession of the lands in suit.

The appellants applied to the Judicial Commissioner for leave to appeal to His Majesty in Council against his decree of the 11th November, 1925, and leave was granted in October 1926. Execution of the decree was stayed on the condition that the appellants should give security for mesne profits of the lands during the period of the pendency of the appeal.

The appellants did not proceed with their appeal to His Majesty in Council, which was dismissed for want of prosecution on the 21st December, 1928.

It was alleged by the appellants, but not proved, that the reason for their not proceeding with the appeal to His Majesty in Council, was that they were advised that the relief granted by the Judicial Commissioner in the decree of the 11th November, 1925, was against Mohammad Afzal only and that it did not affect the appellants.

In April, 1929, the plaintiff renewed his application to the District Judge for execution of the decree of the 11th November, 1925 ; the appellants filed objections to the application.

The District Judge, on the 26th August, 1929, held that the Judicial Commissioner in his decree used the words " a decree for the specific performance of the agreement against Mohammad Afzal " in a comprehensive sense and that the phrase included more than the execution of the sale deed. He therefore decided that the decree could be executed not only against Mohammad Afzal but also against the appellants.

Against this decision of the District Judge, the appellants in October, 1929, appealed to the Judicial Commissioner, and in December, 1929, the plaintiff applied to the Judicial Commissioner for amendment of his decree of the 11th November, 1925.

The Judicial Commissioner heard the appeal and the application, and on the 18th January, 1930, he delivered one judgment which covered both matters. He granted the plaintiff's application for amendment, holding that he had jurisdiction to make the amendment under section 152 of the Civil Procedure Code. After the amendments the decree was for " specific performance of the agreement dated 1st May, 1921, and for possession of the suit land against all defendants."

The Judicial Commissioner held that, in view of his decision that the decree should be amended as above-mentioned, it was not necessary for him to decide whether the District Judge in his order of the 26th August, 1929, rightly interpreted his decree of the 11th November, 1925, and he formally upheld the District Judge's order.

On the 28th January, 1930, the District Judge directed that the execution of the decree should proceed, and on the 9th November, 1930, the plaintiff obtained possession of the lands in suit. The appellants applied to the Judicial Commissioner for leave to appeal to His Majesty in Council but the application was refused on the 26th June, 1930. In his order the Judicial Commissioner held that the appellants were bound to account for the mesne profits. Thereupon the appellants applied to His Majesty in Council for special leave to appeal, and on the 21st November, 1930, leave was granted. It is necessary to set out the exact terms of the order.

The material part is as follows :

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“(1) Leave ought to be granted to the Petitioners to enter and prosecute their appeal against the Order of the Judicial Commissioner of the North West Province dated the 18th day of January, 1930, amending the decree dated the 11th day of November, 1925, as well as from the decree as amended and the subsequent Order dated the 26th day of June 1930, in execution granting mesne profits to the respondent; (2) that a stay of execution ought to be granted on terms that the Petitioners do give security to the satisfaction of the Court of the said Judicial Commissioner for mesne profits until the final determination of the matter and upon depositing in the Registry of the Privy Council the sum of £400 as security for costs.”

In the first place it was argued on behalf of the appellants that the Judicial Commissioner had no jurisdiction to make the order of the 18th January, 1930, amending the decree of the 11th November, 1925, inasmuch as there was no accidental slip or omission within the meaning of section 152 of the Civil Procedure Code of 1908 under which the Judicial Commissioner purported to act. The section is as follows:—

“Clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.”

The Judicial Commissioner stated in his judgment that there had been a misconception by him of the nature of the plaint, but that his intention was to grant the plaintiff the relief which he claimed. It was argued that the only relief which the plaintiff claimed in his plaint was against the defendant Mohammad Afzal, and consequently that there was no accidental slip or omission and that the Judicial Commissioner had no jurisdiction to amend the decree by giving the plaintiff relief against the appellants which had not been claimed in the plaint. It was further urged on behalf of the appellants that they had abandoned their appeal to the King in Council against the decree of the 11th November, 1925, relying on the fact that the decree as drawn did not make them liable for anything except costs, and consequently that the Judicial Commissioner ought not to have made the order amending the decree even if he had jurisdiction under section 152 of the Civil Procedure Code.

During the course of the argument their Lordships' attention was drawn to the terms of the Order of His Majesty in Council by which leave to appeal was granted, and to which reference has already been made. It then appeared that the appellants had obtained leave to appeal not only from the order of the 18th January, 1930, amending the decree of the 11th November, 1925, but also from the decree as amended. It was therefore open to the appellants to argue on the merits that the decree of the 11th November, 1925, as amended was wrong, and the hearing of the appeal was adjourned to allow learned counsel to argue the appeal on that basis.

After the adjournment the appeal was argued upon the merits of the case, and their Lordships propose to deal with the appeal in the first instance from this point of view.

It appears that Mohammad Afzal Khan was a member of a well known family of Mardan in the Peshawar District. He succeeded to a flourishing estate in the year 1915 and from that time onwards he seems to have been steadily dissipating it. From August to December, 1920, on the strength of several mortgages he borrowed Rs. 80,000 from the firm of Attar Singh of Hoti. This led his relatives to apply to the District authorities that he should be taken under the superintendence of the Court of Wards. The application was made on 16th December, 1920. In January and February, 1921, Mohammad Afzal Khan appears to have borrowed a further sum of Rs. 60,000 from the firm of Partap Singh of Hoti. Apparently by this time his credit with the Mardan money-lenders was exhausted, for at the beginning of May, 1921, he approached K. S. Mian Feroze Shah, a Mian of Ziarat of Kaka Sahib, who lives at Nowshera. On 1st May, 1921, he entered into an agreement with Feroze Shah undertaking to sell him his land in Ahmadabad and Narai at the rate of Rs. 170 a *jarib*. He received Rs. 12,000 in cash on the spot. On subsequent dates from the 27th May to 27th August he received further sums of Rs. 41,900. Under the terms of the agreement a deed of sale was to be executed and registered within a week, a time which was subsequently extended to a month. Mohammad Afzal himself raised very strong objections to being taken under the Court of Wards. Finally, the application, which had been strongly recommended by the Assistant Commissioner of Mardan, was rejected by the Chief Commissioner, North-West Frontier Province, on 5th December, 1921. From that date onwards Mohammad Afzal, who had hitherto been in alliance with Feroz Shah, began to side with his relatives. On 2nd March, 1922, he sold his house and *Hujra* to Mohammad Aslam Khan, his first cousin. On 3rd April, 1922, he sold the land in Ahmadabad (which was covered by the above-mentioned agreement) to Mohammad Aslam Khan and his (Mohammad Afzal's) step-mother and step-sister who are the appellants in this appeal.

Part of the consideration of the sale of 3rd April, 1922, was land belonging to the appellants in the village of Kot Jhungra. On the 7th December, 1922, Mohammad Afzal sold part of this Kot Jhungra land to another first cousin Dost Mohammad Khan, and some time later he sold the remainder of the same land to the same cousin.

On the issues raised in the case the Judicial Commissioner held (1) that Mohammad Afzal was not insane or under the influence of the plaintiff, but that he was reckless and grossly extravagant; (2) that the sum of Rs. 53,900 had been paid by the plaintiff to the defendant Mohammad Afzal; (3) that the agreement of 1st May, 1921, amounted to a legal contract capable of enforcement as such; (4) that the parties did intend to act upon the agreement.

None of the above-mentioned decisions of the Judicial Commissioner have been disputed in this appeal, and it therefore falls to be decided upon the assumption that the above-mentioned findings are correct.

The important question arises upon the next issue considered by the Judicial Commissioner, viz., whether the appellants were protected by the exception contained in clause (b) of section 27 of the Specific Relief Act, 1877. The section is as follows:—

“ Except as otherwise provided by this Chapter specific performance of a contract may be enforced against (a) either party thereto ; (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract.”

Their Lordships have no doubt on the facts of this case that specific performance of the contract of the 1st May, 1921, could have been enforced by the plaintiff against the defendant Mohammad Afzal but for the fact that he had transferred the lands, covered by the sale of the 3rd April, 1922, to the appellants ; further, that the appellants are persons claiming under the said defendant by a title arising subsequently to the said contract between the plaintiff and Mohammad Afzal. The question therefore arises whether the appellants were transferees for value who had paid their money in good faith and without notice of the original contract.

It was alleged that the appellants had paid Rs. 10,000 to Mohammad Afzal before the execution of the sale deed of the 3rd April, 1922. The balance of that part of the consideration, which was to be paid in money, viz., Rs. 17,950, admittedly had not been paid.

The Judicial Commissioner was of opinion that the passing of the consideration of Rs. 10,000 was “ a matter of some doubt ” he did not, however, decide that it was not paid. His finding was that the appellants had notice of the agreement of the 1st May, 1921, between Mohammad Afzal and the plaintiffs, and that it was difficult to ascribe to them the character of bona-fide purchasers. He therefore held that the appellants were not protected by clause (b) of section 27 of the Specific Relief Act.

Their Lordships, after examination of the evidence, are not prepared to hold that the sum of Rs. 10,000 was not paid by the appellants to Mohammad Afzal, though they are not surprised at the doubt which was expressed by the Judicial Commissioner with respect to that matter.

There remains the question whether the appellants had actual or constructive notice of the agreement of the 1st May, 1921, at the time when the deed of sale of the 3rd April, 1922, was executed.

A question was raised as to the party upon whom the onus in respect of this matter rested. Their Lordships do not consider it necessary to enter upon a discussion of the question of onus because the whole of the evidence in the case is before them and they have no difficulty in arriving at a conclusion in respect thereof.

The Judicial Commissioner held that the appellants must have known on the 3rd April, 1922, of the agreement which Mohammad Afzal had made with the plaintiff on the 1st May, 1921. Their Lordships are not prepared to hold that the Judicial Commissioner's finding in this respect was wrong. There was evidence upon which he might arrive at that conclusion.

However that may be, their Lordships upon consideration of the whole evidence, both verbal and documentary, are clearly of opinion that the circumstances connected with Mohammad Afzal's dealings with his property, which were undoubtedly known to the appellants, were such as to put the appellants upon enquiry, and that if reasonable enquiries had been made by the appellants before the transaction of the 3rd April, 1922, they must have become aware of the agreement between the plaintiff and Mohammad Afzal of the 1st May, 1921.

The appellants therefore cannot predicate of themselves that they are transferees without notice of the original contract within the meaning of the exception in section 27 (b) of the Specific Relief Act of 1877.

As already mentioned the whole matter is before their Lordships on this appeal, and it is open to them to make the proper order in view of the above-mentioned conclusions. They are of opinion that the plaintiff should have a decree for specific performance of the agreement of 1st May, 1921, against the appellants as well as against Mohammad Afzal, subject to the appellants' right of pre-emption, which will be referred to hereinafter.

In view of the above-mentioned conclusions it is not necessary for their Lordships to express, and they do not express, any opinion upon the question whether the Judicial Commissioner on the facts of this case had jurisdiction under the provisions of section 152 of the Civil Procedure Code, on the 18th January, 1930, to amend his decree of the 11th November, 1925.

It was agreed by the learned counsel that the appellants had a right of pre-emption in the lands comprised in the agreement of the 1st May, 1921. The terms upon which the decree for specific performance should be made are in the discretion of their Lordships, and they direct that the decree for specific performance already mentioned, shall not be enforced if the appellants exercise their right of pre-emption and pay to the plaintiff the sum of Rs. 49 386 within six months from the date of His Majesty's Order in Council. The above-mentioned sum is the amount alleged by the plaintiff in his plaint to be the price of the lands according to the rate fixed in the agreement. If and when the said sum is paid to the plaintiff by the appellants, the plaintiff must give up possession of the above-mentioned lands to the appellants.

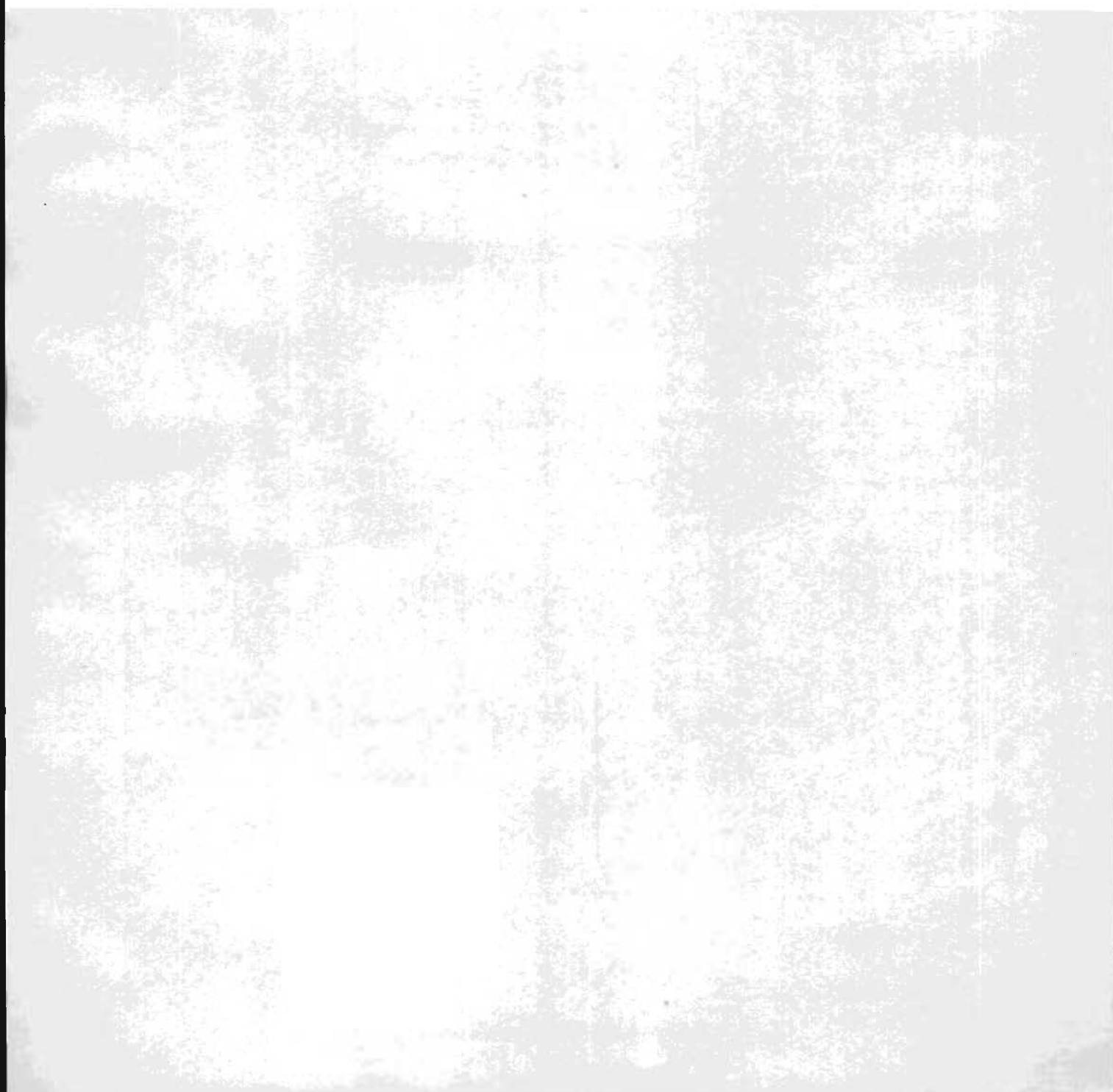
There remains the question of the mesne profits. There is no claim for mesne profits in the plaint, but their Lordships are of opinion that the plaintiff should have leave to amend his plaint by claiming mesne profits and upon such amendment being made a decree for mesne profits should be passed. The period in

respect of which mesne profits should be allowed remains to be considered. The amendment of the Judicial Commissioner's decree was not made until the 18th January, 1930, and the plaintiff obtained possession by way of execution on the 9th November, 1930. The facts of this case are so peculiar and out of the ordinary that their Lordships are of opinion that the decree for mesne profits, if made after amendment of the plaint, should be confined to the mesne profits accruing during the period from the 18th January, 1930, to the 9th November, 1930. The amount of such mesne profits will necessitate an enquiry in India, unless the amount can be agreed upon by the parties.

In the result their Lordships are of opinion that the decree of the District Judge dated the 28th June, 1924, the decree of the Judicial Commissioner dated the 11th November, 1925, the decree of the Judicial Commissioner dated the 18th January, 1930, and the decree of the Judicial Commissioner of the 26th June, 1930, be set aside except in so far as the decrees contain directions as to costs, which directions shall stand. Further, they are of opinion that a decree should be made in favour of the plaintiff respondent against Mohammad Afzal and the appellants for specific performance of the agreement of the 1st May, 1921, and, if the plaint be amended, for mesne profits upon the terms and conditions hereinbefore mentioned.

Any directions, which may be necessary for carrying out the terms of the Order in Council, should be made by the Judicial Commissioner who will have discretion as to the costs relating to such directions.

Their Lordships will humbly advise His Majesty accordingly. The appellants must pay to the plaintiff respondent his costs of this appeal.



In the Privy Council.

MOHAMMAD ASLAM KHAN AND OTHERS

vs.

KHAN SAHIB MIAN FEROZE SHAH.

DELIVERED BY SIR LANCELOT SANDERSON.

Printed by

Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1932.