

(1919) 11 AHC CK 0051
In the Allahabad High Court

Bazmir Khan and Others

APPELLANT

Vs

Rustam Khan and Others

RESPONDENT

Date of Decision : 13-11-1919

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : (1919) 11 AHC CK 0051

Hon'ble Judges : Lindsay, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Lindsay, J.—This appeal, in my opinion, must prevail. The facts may be briefly stated as follows:-- The dispute relates to a small parcel of Zemindari property which admittedly belonged at one time to a lady sated Muhammadi Begum. She died in the year 1911.

2. It is now admitted that before her death, that is to say, in the year 1907, Muhammadi Begam made a gift of her property to two persons, Inayat Khan and Rustam Khan. Rustam Khan is the principal defendant-respondent in this appeal.

3. According to the finding of the lower Appellate Court the history of Inayat Khan and Rustam Khan is this; They were foundlings who were discovered in the Bazar at Peshawar by the husband of this lady Muhammadi Begum. They were brought to Muhammadi Begum's house and were reared as her children, she having no children of her own. It is found, however, that there was no blood relationship between Inayat Khan and Rustam Khan.

4. Inayat Khan died in 1909 and at the time of his death he had become the owner by gift of the property now in dispute. Claims for mutation in respect to this property were put forward by Muhammadi Begam on the one hand and by Rustam Khan on the other hand. The Revenue Court decided in favour of Muhammadi Begam, and the property continued to be recorded in her name down till the time of her death in the year 1914. After the death of the lady there

was another dispute regarding mutation. The present plaintiffs-appellants Bazmir Khan and Ors. claimed mutation on the ground that they were legal heirs to the estate of Muhammadi Begam. Rustam Khan, the principal respondent, also claimed as an heir on the ground that he was the brother of Inayat Khan and was the true owner. The result of this dispute was that the Revenue Court awarded mutation in favour of Rustam Khan, and so we have the present suit in which the plaintiffs claiming as heirs of Muhammadi Begam came into Court and asked for recovery of possession. The Courts below have dismissed the plaintiffs' claim.

5. I have already referred to the fact that the story put forward by Rustam Khan that he was the brother of Inayat Khan and consequently his heir has been exploded. It is clear, therefore, that Bustam Khan has no right to this property on the ground that he is an heir of Inayat. On the other hand, it is admitted that the plaintiffs are the rightful heirs of Muhammadi Begam). The learned Judge of the Court below, however, has taken a peculiar view of the case. He says in his judgment that after the death of Inayat Khan who had acquired this property by gift, Muhammadi Begam had no right to possession of the property and consequently as she had no right and as Bustam Khan has no right to the property, it has escheated to Government and so he says that the plaintiffs, although he finds them to be the rightful heirs of Muhammadi Begam, have no claim to be put in possession on the ground that Muhammadi Begam had no title to the property herself. It is clear that this opinion of the lower Appellate Court is wrong. While it may be the case that Muhammadi Begam had no title as heir to this property after the death of Inayat Khan, it is nevertheless clear that she was at least in possession without title and her possessory title was capable of being disposed of either by transfer or by inheritance. The law on this subject has been well settled and I need not refer to the long series of authorities. The case specially relied upon by the learned Counsel for the appellants is reported as Gobind Prasad v. Mohan Lal 24 A. 157 PC: That case followed the well known case of Asher v. Whit-lock (1865) 1 Q.B. 1 : 35 L.J.Q.B. 17 : 11 Jur. (N.S.) 925 : 13 L.T. 254 : 14 W.R. 26. Another case has been referred to in this connection, an unreported case, Second Appeal No. 1399 of 1913 decided by Sunder Lal, J., on the 3rd of July 1914. There can be no doubt that at the time of her death Muhammadi Begam had a title which though perhaps imperfect was nevertheless capable of descending by inheritance to her heirs, who are the plaintiffs, and until the true owner of this property comes forward to assert a claim, the heirs of Muhammadi Begam are entitled to possession. I say nothing regarding the rights of Government in this matter. If the property has escheated to Government, it can come forward and assert its claim if so advised. All that is necessary to say here is that Bustam Khan, who has no title of any kind to the property, cannot be maintained in possession to the exclusion of the plaintiffs who are the heirs of Muhammadi Begam.

6. The learned Counsel for the respondents in arguing his case referred to the provisions of Section 41 of the Transfer of Property Act. I take it that his intention was to suggest that the defendants in this case other than Bustam

Khan were entitled to be maintained in possession notwithstanding the status of the plaintiffs as heirs of Muhammadi Begam. Their case was that they were bona fide purchasers for value from Bustam Khan whose name was entered in the khewat. That plea is no answer to the plaintiffs' case. If Bustam Khan had no title whatever to this property, he could not by sale or otherwise convey any title to this property to other defendants. As to Section 41, it cannot help the case of these defendants purchasers, unless indeed they could show that there was something in the conduct of the present plaintiffs entitling them to say that their purchase could not be avoided by the plaintiffs. Section 41 covers the case of the transfer of property by an ostensible owner, that is to say, by a person who has been in ostensible possession with the consent express or implied, of the true owner. No such case can be set up here, however, for in view of the facts which have been set out before, there is nothing to suggest that the present plaintiffs ever stood aside and consented, either expressly or by implication, to Bustam Khan's holding himself out as the owner of this property. On the contrary it was shown that they fought with Bustam Khan in the mutation Court and lost their case there. No question of consent, express or implied, arises and so Section 41 has no application. I have dealt now with all the points which have been raised in the course of argument and the result is that I find in favour of the plaintiffs and the suit will accordingly be decreed with costs in all the three Courts, including in this Court fees on the higher sale. The appeal is allowed and the decree of the Court below is set aside accordingly.