

(1927) 05 AHC CK 0009
In the Allahabad High Court

Haji Muhammad Said Khan	Vs	APPELLANT
Rai Bahadur Kunwar Darshan Singh and Others		RESPONDENT

Date of Decision : 04-05-1927

Acts Referred:

Citation : (1928) ILR (All) 75 : 103 Ind. Cas. 116

Hon'ble Judges : Sulaiman, J; Banerji, J

Bench : Division Bench

Judgement

1. This is a defendant's appeal, arising out of a suit for recovery of possession of a house brought by the reversioners of Naik Rai Singh, who was the last male owner. He died some time in 1876, leaving two widows, one of whom died in 1890, and the other Musammat Sundar Kunwar died in 1917. In 1903 Hori Singh was the next reversioner, who would have succeeded to the estate if Musammat Sundar Kunwar had died then. On the 21st of September, 1903, she executed a deed of transfer in favour of Hori Singh, purporting to surrender all her interest in the house in dispute. On the 22nd of September, 1903, a sale-deed was executed by Hori Singh in favour of the defendant-appellant, Haji Muhammad Said Khan and both those documents were presented for registration simultaneously between 1 and 2 o'clock on the 22nd of September, and both were registered consecutively. On the death of the widow the plaintiffs, claiming to be the next reversioners, brought this suit for recovery of possession. The pedigree on which they relied was a very long one and is printed at page 4 of our paper-book. It must be said to the credit of the defendant that he did not choose frivolously to deny this long pedigree, but admitted it. The written statement filed on his behalf which obviously is the result of legal advice obtained by him, is by no means artistically drawn. The pleas if examined strictly amount to these, namely, that Musammat Sundar Kunwar had relinquished all her rights and interest in the property in favour of Hori Singh and had, therefore, extinguished her widow's estate, with the result that Hori Singh became the permanent owner, and that, as much he was perfectly competent to transfer the property. Paragraph 4 was curiously worded and it raised the plea that the transfer by

Musammat Sundar Kunwar and the sale by Hori Singh to the defendant amounted to an alienation for consideration by the widow with the consent of the reversioner. We have referred to these pleas because much stress has been laid by the learned Subordinate Judge on the way in which the written statement was drafted, and because he has come to the conclusion that the defendant cannot be allowed to get over this tamliknama. When the time for the framing of the issues came, the parties understood what was meant by the plea in para. 4, and there is no doubt that the learned Subordinate Judge himself understood what was meant by it. Issue No. 3 which was framed by him was in the following words "Is the sale made by Hori Singh in favour of the defendant to be looked upon as a transfer for consideration with the consent of the next reversioner on behalf of the widow herself, if so, how does that affect the case"? The plaintiffs apparently led no evidence at all. On behalf of the defendant, only the defendant himself was examined as a witness. This is the entire evidence apart from certain documents which were filed by either party. The learned Subordinate Judge has come to the conclusion that there could be no surrender of the estate to the next reversioner, inasmuch, as it was a gift of a part of the estate only. We may note that the defendant did not suggest to the Court below that there was any other property left by the widow after the deed of transfer of 1903. It has, however, been assumed that this was not a transfer of the entire estate then in her possession and the learned Advocate for the appellant has not challenged the soundness of this assumption.

2. In our opinion it is not fair to the defendant to pin him down to the strict wording of the written statement which must have been drafted by his legal adviser. The issue before the parties was clear, and we think that there is no doubt that the defendant did mean to put forward the case that the two transactions were really part and parcel of one transaction, which was a sale by the widow with the consent of the next reversioner. The defence, therefore, cannot be struck out on the ground that it was not raised in the written statement.

3. The main question of fact which we have to consider is whether the defendant has succeeded in proving that the two documents, which on their face value appear to be in fact two separate transactions, were really part and parcel of one transaction of a sale by the widow. The defendant is in this unfortunate position that the scribe of the two documents, Janki Prasad, as well as Hori Singh and the attesting witnesses, Nathu Khan, Kifayat Ullah Khan, and Mohan Lal, are all dead. Thus, the persons, who on the face of these documents, had any connection with these transactions, are all dead except the vendee Muhammad Said Khan. We have thus the solitary evidence of Muhammad Said Khan as to what actually happened. It must be conceded in his favour that the learned Subordinate Judge, who heard him, has not in his judgment stated that he disbelieves him, in fact he has not criticised his evidence so far as its truth goes. Muhammad Said Khan's statement is that one Kifayat Ullah came to him, professing to come on behalf of Musammat Sundar Kunwar, and informed him

that there was property for sale by the widow and that he should purchase it. Muhammad Khan said that a widow had no power to sell any property absolutely. To this Kifayat Ullah replied that she was prepared to sell the property and that the next reversioner, namely, Hori Singh was ready to join in the sale-deed. Muhammad Said Khan then said that he must consult his Pleader before giving a definite reply. He then consulted Hafiz Muhammad Ismail Pleader, who advised him that the effective way was to obtain a tamliknama from the widow in favour of Hori Singh, and a sale-deed from Hori Singh. Muhammad Said Khan's evidence is that on receiving this legal advice he got two drafts, namely, one of a tamliknama and the other of a sale-deed, prepared and gave them to Kifayat Ullah. Then Kifayat Ullah came 4 or 5 days afterwards and told him that both Musammat Sundar Kunwar and Hori Singh had accepted the drafts and were ready to execute the documents. On this Muhammad Said Khan deputed his karinda, Nathu Khan, to get the documents executed and gave him Rs. 2,500 the sale consideration. Muhammad Said Khan then states that his karinda Nathu Khan got the two documents duly executed and registered. The vendee frankly confessed that he made no enquiry as to whether there was any relation nearer than Hori Singh, or whether there was any necessity for the widow to sell the property. He also admits that he had no talk directly with Musammat Sundar Kunwar, or with Hori Singh. He says he did not even enquire whether Musammat Sundar Kunwar had transferred the entire estate to Hori Singh, or whether she had kept anything for herself. The whole evidence of Muhammad Said Khan impresses us in this way that it shows conclusively that he is in no way trying to exaggerate his case. If he were prepared to tell lies he would have told a story as to his having made enquiries and being satisfied that there was necessity, or to his having had some direct talk either with Musammat Sundar Kunwar, or her recognised general attorney. He frankly gives away his case on these points. We have, therefore, come to the conclusion that his evidence, so far as it goes, should be accepted.

4. The question remains whether this evidence, coupled with the coincidence of the dates of registration of the two documents, and the fact that the same set of attesting witnesses attested both the deeds and the same scribe faired out the documents, proves the defendant's case that it was really one transaction of sale. No doubt the mere statement of Kifayat Ullah that he had been sent by Musammat Sundar Kunwar is no evidence by itself of the fact that he had been sent by her, but in this particular case we find that the idea of having two documents instead of one emanated from the legal adviser of the defendant and that the two drafts were handed over to Kifayat Ullah which were subsequently faired out and the two deeds were duly signed by Musammat Sundar Kunwar and Hori Singh under the supervision of his karinda Nathu Khan. This shows definitely that Kifayat Ullah must have communicated the reply of the defendant to the lady who accepted the drafts and ultimately signed the fair copy. We may also note that, according to one power of attorney, Hori Singh was one of the general attorneys of Musammat Sundar Kunwar and was on good terms with her. The

plaintiffs have admitted the genuineness of the transfer by the lady and there is no ground for suspecting that any fraud was practised on her. We may point out that the learned Subordinate Judge has not directed his attention clearly to this question whether the two deeds evidenced one or two independent transactions. On the evidence of Muhammad Said Khan and the surrounding circumstances of the case, we are of opinion that they were really drafted separately on the advice of the defendant's Pleader, and that the real transaction was a sale by the widow.

5. The next question is whether the defendant has succeeded in showing that this transfer is binding on the reversioners. Had Hori Singh survived the widow and the succession opened out to him there would have been no difficulty and he would undoubtedly have been estopped. It is, however, admitted that he predeceased the widow. The plaintiffs, there fore, are not absolutely bound by any admission or consent of Hori Singh. At the same time it is not denied on their behalf that Hori Singh was the next immediate reversioner. In fact on the pedigree given by the plaintiffs themselves he was much nearer in degree to Rai Singh than the present plaintiffs are. Having found that the two deeds evidenced one transaction, we can have no doubt in our minds that Hori Singh was a consenting party to this transfer. The consent of a reversioner is no conclusive proof of the existence of legal necessity. It raises a presumption of the existence of such necessity. The law on this point has been laid down by their Lordships of the Privy Council in the case of Rangasami Gounden v. Nachiappa Gounden 50 Ind. Cas. 498 : 42 M. 523 : 36 M.L.J. 493 : 17 A.L.J. 536 : 29 C.L.J. 539 : ILR 21 Bom. . 640 : 23 C.W.N. 777 : (1919) M.W.N. 262 : 26 M.L.T. 5 : 10 L.W. 105 : 46 I.A. 72 : 1 U.P.L.R. (P.C.) 66 (P.C.). After discussing the various authorities their Lordships summarised the law at page 536 Page of 42 M.-[Ed.] in the form of two propositions the second of which is,

When the alienation of the whole or part of the estate is to be supported on the ground of necessity, then, if such necessity is not proved aliunde and the alienee does not prove inquiry on his part an honest belief in the necessity, the consent of such reversioners as might fairly be expected to be interested to quarrel with the transaction will be held to afford a presumptive proof which, if not rebutted by contrary proof, will validate the transaction as a right and proper one.

6. Their Lordships quoted with approval a similar proposition laid down in the Full Bench case of Debi Prosad Chowdhry v. Golap Bhagat 19 Ind. Cas. 273 : 40 C. 721 : 17 C.W.N. 701 : 17 C.L.J. 499 where it was remarked that "alienation by way of mortgage by a Hindu widow, as heiress, of a portion of the estate of her deceased husband without proof either of legal necessity or of reasonable inquiry and honest belief as to its existence, but with the consent of the next reversioner for the time being, will be valid and binding on the actual reversioner, if the presumption of legal necessity or a reasonable inquiry and honest belief raised by such consent is not rebutted by more cogent proof." In view of this statement of the law it follows that the defendant, even though he did not prove the actual existence of any legal necessity or any bona fide inquiry as to the necessity by

him, or even an honest belief on his part that such necessity existed, has nevertheless discharged that burden in the first instance, by proving consent of Hori Singh, and that the transaction would be binding on the reversioners until they led cogent evidence to the contrary.

7. In this particular case the plaintiffs have led no evidence to show that there was no legal necessity or that the consent of Hori Singh was obtained by fraud. In the absence of such evidence, we are of opinion that the presumption raised by the consent of Hori Singh has not been rebutted.

8. We must at the same time point out that on the face of the two documents they evidence two independent transactions. The plaintiffs were, therefore, fully justified in bringing this suit on the ground that the deed of transfer in favour of Hori Singh was not good beyond the lifetime of the widow. Their case has broken down because of the plea that, although the two deeds were separate documents, they really evidenced one transaction. We accordingly allow this appeal and setting aside the decree of the Court below dismiss the plaintiffs' suit, but we direct that the parties should bear their own costs in both the Courts.