

(1927) 06 PAT CK 0015

In the Patna High Court

Ihsan Hassan Khan and Others

APPELLANT

Vs

Panna Lal and Others

RESPONDENT

Date of Decision : 23-06-1927

Acts Referred:

Citation : AIR 1928 Patna 19

Hon'ble Judges : Ross, J;Kulwant Sahay, J

Bench : Full Bench

Judgement

Kulwant Sahay, J.

This appeal arises out of a suit instituted by the plaintiffs-appellants for recovery of possession of 1 anna 6 gandas 3 kauris odd share in mahal Mohiuddinpur Katarmala and Sisauni, Tauzi No. 654 of the Monghyr Collectorate.

1. The plaintiffs' case is that Haji Mohammad Amir Hasan Khan had two wives. By his first wife, Mt. Bibi Kadirunnissa, he had a daughter Bibi Fazilatunnisa and two sons Hadi Hasan Khan and Mehdi Hasan Khan. Hadi Hasan Khan and Mehdi Hasan Khan died in lifetime of their father, and the defendants 2--14, who are described as defendants second and third parties, are the heirs of these two predeceased sons. The second wife of Amir Hasan Khan, according to the plaintiffs, was Bibi Kamrunnissa. Plaintiffs 1 and 2 claim to be the sons and plaintiff 3 claims to be the daughter of Amir Hasan Khan by this second wife. It is alleged there were two other daughters, Saidunnisa and Kaniz Batul by the second wife, both of whom are now dead, and defendant 16 is the daughter of Saidunnisa. She did not join in the suit and she was, therefore, made the defendant fifth party in the present suit.

2. The plaintiffs allege that Amir Hasan Khan died on the 5th October 1896, leaving Fazilatunnisa his daughter by the first wife, Bibi Kamrunnisa his second wife, and the plaintiffs and that two deceased sisters, the children of the second wife, as his heirs according to the Mahomedan law. The two sons by the first wife, Hadi Hasan Khan and Mehdi Hasan Khan having died in the lifetime of their

father, their children were excluded from inheritance according to the Mahomedan law. Amongst the properties left by Amir Hasan Khan was an 8-annas share in village Katarmala the village now in dispute. According to the plaintiffs the share of Fazilatunnisa was 7/64ths and that of the second wife Kamrunnisa and her children amounted to 57/64ths in the properties left by Amir Hasan Khan. On the death of Amir Hasan Khan, various litigations took place between the daughter and the heirs of the two sons by the first wife and the second wife and her children and it was asserted by Fazilatunnisa, the daughter by the first wife, that Kamrunnisa was not the wife, of Amir Hasan Khan and that her children were not the legitimate children of her father. It would be necessary to consider in detail the various litigations that took place between the parties.

3. In 1908 a suit was instituted by the present plaintiffs and their mother for a declaration of their title to their legal share in the village now in dispute. This suit was dismissed by the Subordinate Judge, and during the pendency of an appeal in the High Court a compromise was effected on the 5th March 1917, and a compromise decree was made under which the plaintiffs got 1 anna 7 gandas 3 kauri's odd share from Zafar Hasan Khan one of the sons of Mehdi Hasan Khan who is defendant 2 in the present suit. Defendant 1 had, however purchased the share of Zafar Hasan Khan in execution of certain decrees partly prior and partly subsequent to the suit which the compromise was made. The plaintiffs allege that they got actual delivery of possession of the share they got under the compromise, but that they were dispossessed by defendant 1, in September 1920. As defendant 16, who is the daughter of one of the deceased sisters of the plaintiffs did. not join in the suit, the present suit was instituted for recovery of possession of 1 anna 6 gandas 3 kauris odd share after excluding the share of defendant 16. The suit was contested by defendant 1, the purchaser of the interest of Zafar Hasan Khan and by defendant 15 who is a mortgagee from the defendant 1. Defendants 17 and 18, who are the defendants sixth party in the suit are purchasers of the disputed property in execution of a mortgage-decree against Zafar Hasan Khan and they did not contest the suit.

4. The principal contention of the contesting defendants was that the plaintiffs were not the legitimate children of Amir Hasan Khan and were not his legal heirs; that defendant 1 being the purchaser of the disputed share in execution of his decree against Zafar Hasan, prior to the compromise decree of the 5th March 1917, was not bound by the said decree, and that the said compromise was fraudulent.

5. The learned Subordinate Judge has held that the plaintiffs are not the legal heirs and legitimate issues of Haji Muhammad Amir Hasan Khan, and that they have no title to the property in dispute and he has accordingly dismissed the suit.

6. The principal point argued in this appeal relates to the question raised by the seventh issue framed by the learned Subordinate Judge, viz., whether the plaintiffs are legal heirs and legitimate issues of the late Nawab Amir Hasan Khan? Soon after the death of Amir Hasan Khan disputes arose between the

parties as regards the inheritance. Amir Hasan Khan died in October 1896, and in 1897 an application was made by Kamrunnisa and her children for registration of their names under the Land Registration Act, in respect of their 57/64ths share in the 8-annas of mouza Katarmala owned by Amir Hasan Khan. Objections were made by Fazilatunnisa and by the heirs of Hadi Hasan and Mehdi Hasan. A reference was made to the civil Court Under the provisions of the Land Registration Act, and the learned Subordinate Judge who heard the reference held by his decision dated the 5th December 1898, (Ex. A) that the petitioners had no right to the possession of the property and were not entitled to have their names registered in the collectorate. This decision was based on the finding that Kamrunnisa was not the wife and her children were not the legitimate issues of Amir Hasan Khan. The result was that the application of Kamrunnisa, and her children for registration of their names was dismissed, and Fazilatunnisa, the daughter by the first wife, was registered in respect of 4 annas, the heirs of Mehdi Hasan in respect of 1 anna 9 gandas and odd, and the heirs of Hadi Hasan in respect of 2 annas 10 gandas odd in respect of the village in dispute.

7. We next find that in 1899 a suit was instituted by Fazilatunnisa in the Court of the Subordinate Judge at Muzaffarpur against Kamrunnisa and her children, who were the defendant first party, for a declaration that she was the only heir of her father Amir Hasan Khan. The heirs of her predeceased brothers Hadi Hasan and Mehdi Hasan were made the defendants second party in this suit. The learned Subordinate Judge by his decision, dated the 20th September 1901, held that the present plaintiffs were the legitimate issues and their mother was the lawful wife of Amir Hasan Khan. This judgment of the Subordinate Judge was confirmed in appeal by three Judges of the Calcutta High Court on the 18th August 1904. This judgment is Ex. 2 in this case and is reported as Mt. Bibee Fazilatunnisa v. Mt. Bibee Kamrunnisa 9 C.W.N. 852.

8. In 1908 the present plaintiffs and their mother instituted a suit No. 416 of that year in the Court of the Subordinate Judge at Muzaffarpur challenging the decision of the Subordinate Judge of Monghyr in the reference under the Land Registration Act. This related to the 8-annas share in mouza Katarmala which lay in the District of Monghyr and to two houses situated in the District of Muzaffarpur. The learned Subordinate Judge held that the plaintiffs had no cause of action in respect of the two houses as they had passed out of the hands of Amir Hasan Khan in his lifetime, and as regards the claim to the share in mouza Katarmala he held that the property was situated in the District of Monghyr and that he had, therefore, no jurisdiction to entertain the suit and he dismissed it on that ground on the 4th November 1910. Against the decision of the Subordinate Judge an appeal was taken to the High Court in which the compromise was effected on the 5th March 1917 as stated above.

9. We thus find that the question as regards Kamrunnisa being the wife and the plaintiffs being the legitimate issues of Amir Hasan Khan was differently decided at different times. In the present case the oral evidence adduced on either side is

inconclusive. (The judgment then discussed the evidence and proceeded.) It is, no doubt, the case of the plaintiffs that Kamrunnisa was born of Mahomedan parents and was married in the regular legal form, while the case of the defendants is that she was a Hindu born of Lalji Kahar and married to one Ruplal Kahar and that she was working as a maid servant in the house-hold of Amir Hasan Khan and that Amir Hasan Khan had illicit intercourse with her. The recitals in the two mukarrari pattas lend some support to the defendants' allegation that the plaintiffs' mother was a Hindu and was the daughter of Lalji; but the evidence that she was married to Buplal is entirely insufficient. Under the Mahomedan law a Mahomedan male may contract a valid marriage with a Mahomedan woman or with a Kitabia, i.e., a Christian or a Jewess but not with an idolatress or a fire-worshipper, but if he does marry any idolatress or a fire-worshipper the marriage is not void (batil) but merely invalid (fasid): see Mulla's Principles of Muhammadan Law, Section 200; Sir Rowland Wilson's Digest of Mahomedan Law, Section 39A; and Amir Ali's Mahomedan Law, Vol. II, p. 388 (4th edition). Therefore, even if it be assumed that Kamrunnisa was originally a Hindu named Mt. Kuar still in the absence of proof that she had already been married before her marriage with Amir Hasan Khan or that if married her husband was living at that time her marriage with Amir Hasan Khan will not be void but merely invalid, and the offspring of such marriage will not be illegitimate but legitimate issues of their father: Section 206. Mulla's Principles of Muhammadan Law.

10. In this state of the evidence all that we can say is that the marriage of Amir Hasan Khan with Kamrunnisa is uncertain. It cannot be said that it has been disproved. Under the circumstances the acknowledgment of Amir Hasan Khan contained in the am-mukhtarnamia, the kobala and the will (Exs. 15, 14 and 13) would undoubtedly go to prove the legitimacy of the present plaintiffs: Sadik Husain Khan v. Hashim Ali Khan AIR 1916 P.C. 27; Habibur Rahaman v. Altaf Ali Chaudhury [1919] 46 Cal. 259; and Habibur Rahman Chawdhury v. Altaf Ali Chowdhury AIR 1922 P.C. 159. Under the circumstances and having regard to the unequivocal acknowledgment of Amir Hasan Khan it must be held that the plaintiffs are the legitimate issues of Amir Hasan Khan.

11. If the plaintiffs are the legitimate issues of Amir Hasan Khan then Zafar Hasan, defendant 2, had no title to the share claimed by him and the defendant 1 acquired no title under his purchase in execution of his decree against Zafar Hasan Khan.

12. The question was raised in this appeal on behalf of the defendants that the plaintiff's suit was barred by limitation. The issue as regards limitation was not pressed before the Subordinate Judge and he was of opinion that the suit was not barred by limitation. The evidence has been placed before us, and the evidence of plaintiffs' witnesses 1, 3 and 4, and the fact of the delivery of possession in execution of the compromise decree of March 1917, go to show that the plaintiffs were in possession within 12 years of the suit and the

plaintiffs" suit is not barred by limitation.

13. The plaintiffs, however, forgo their claim to more than 14-gandas share of the village in dispute and they in this appeal limit their claim only to 14-gandas of the village in dispute. Defendant 1 has given a sudbharna of his interest in the village to the defendant 15. This defendant does not oppose the plaintiffs' claim provided there is no prejudice to him as against his claims under the mortgage against defendant 1. Defendants 17 and 18 who are the subsequent purchasers in execution of a mortgage-decree do not oppose the plaintiffs' claim. Under the circumstances a decree will be made in favour of the plaintiffs declaring their title to 14-gandas share of the village in dispute and awarding them possession thereof.

14. Having regard to the fact that the contesting defendants have come to an agreement as regards the share to which the plaintiffs are entitled the plaintiffs do not press their claim to mesne profits which is disallowed.

15. The result is that the decree of the Subordinate Judge will be set aside, a declaration will be made that the plaintiffs are the legitimate issues of Haji Amir Hasan Khan, and a decree will be made awarding them possession over 14-gandas of the village in dispute; each party will bear his own costs.

Ross, J.

16. I agree.