

(1923) 01 BOM CK 0022

In the Bombay High Court

Case No : Second Appeal No. 158 of 1922

Lala Miya Shaikh Abbas Potrik

APPELLANT

Vs

Manubibi

RESPONDENT

Date of Decision : 30-01-1923

Acts Referred:

Citation : AIR 1923 Bom 411 : (1923) 25 BOMLR 408 : 73 Ind. Cas. 246

Hon'ble Judges : Norman Macleod, J;Crump, J

Bench : Division Bench

Judgement

Norman Macleod, Kt., C.J.—The plaintiffs sued to recover possession by redemption of the property described in Clause (e) of para 2 of the plaint. The properties originally belonged to Bhaudin who left a widow Hamidabibi, a son Daud, and two daughters who are plaintiffs Nos. 2 and 3. After Bhaudin's death, a suit was filed by a creditor of his, and only Daud was made a party, but as he was a minor, Hamidabibi, his mother, was impleaded as his guardian and filed a written statement on his behalf. In execution of the decree which was passed in favour of that creditor, certain property belonging to the estate of Bhaudin was put up for sale. That property had already been mortgaged to one Abbas in 1878, so that the heirs of Bhaudin were only entitled to the equity of redemption, which was purchased by AH, father of Abbas. The present defendants Nos. 1 and 2 are the sons of Abbas. A decree for redemption was passed in favour of plaintiffs Nos. 2 and 3 by the trial Court, and that has been confirmed in appeal.

2. The main question is whether the daughters of Bhaudin were deprived of their rights to the property by the decree passed against Daud and the subsequent sale. Ordinarily speaking they would not be bound by the decree in a suit to which they were not parties, nor would their interests in their father's estate pass by the sale in execution of that decree. That was decided by a Bench of this Court in Bhagirthibai v. Roshanbi ILR (1918) 43 Bom. 412 : 21 Bom. L.R. 329.

3. The learned Judges in that case considered the decisions in Khurshetbibi v. Keso Vinayak ILR (1887) 12 Bom. 101, and Davalava v. Bhimaji Dhondom. Mr.

Justice Heaton said (p. 426):

My learned brother and myself have considered the matter most carefully and have come to the conclusion that it would not be incumbent on us to follow the case of *Khnmhetbibbi v. Keso Vinayak* ILR (1887) Bom. 101 if that case be held to affirm that the theory of substantial representation derived from the Hindu law applies to Mahomedans. For, to follow that case, if it so decides, would be to accept, without any stated reason for doing so, the application to Mahomedans of a rule evolved out of Hindu law; and to do this would, we think, be to set aside the principles underlying the decision of the Full Bench of this Court in *Isap Ahmed v. Abhramji Ahmadji* ILR (1917) 41 Bom. 588 : 19 Bom. L.R. 579

4. We think it is advisable to follow the latest decision on the point, which is also supported by the opinion of Sir Roland Wilson in his *Digest of Anglo-Mahomedan Law*, 3rd Edition. See also paragraphs 566, 567 of F. B. Tyabji's *Principles of Mahomedan Law*. The plaintiffs Nos. 2 and 3 will, therefore, be entitled to redeem, but the decree as drawn up by the trial Court is too wide, as these plaintiffs would only be entitled to redeem to the extent of their shares in the estate of Bhaudin, which would be 7/32 each. The case must go back to the trial Court to ascertain the exact amount which they must pay, and what properties should be redeemed by such payments, as there are five properties in suit, and we are told that only four of these properties were purchased by the defendants at the sale in execution of the decree in Suit No. 691 of 1880. If that is the case, the fifth property is only subject to the mortgage, Exhibit Hi. We do not know whether it really makes very much difference, because plaintiffs Nos. 2 and 3 are entitled to consider that the sale does not in any way affect their interests. Therefore all the five properties may be taken as subject to the mortgage and liable to be redeemed. On the plaintiffs Nos. 2 and 3 paying the redemption money they will be entitled to be placed in joint possession with the defendants. The plaintiffs Nos. 2 and 3 will be entitled to their costs in this Court and in the Court below. Liberty to plaintiffs Nos. 2 and 3 to apply when they pay the money in execution for partition.