
(1934) 03 AHC CK 0013
In the Allahabad High Court

(Lala) Shiam Lal

APPELLANT

Vs

Mohamad Ali Asghar Husain and Others

RESPONDENT

Date of Decision : 20-03-1934

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : AIR 1935 All 174 : 153 Ind. Cas. 73

Hon'ble Judges : Bajpai, J

Bench : Division Bench

Judgement

Bajpai, J.—This is a second appeal by Lala Shiam Lal who was defendant 4 in a suit brought by Muhammad Ali Asghar Husain. This appeal is connected with Second Appeal No. 1512 of 1931 which was filed by Jagannath Prasad who was defendant 8 in the same suit. Both of these appeals might be disposed of by a single judgment.

2. The facts are that one Hashmat was the owner of some immovable property. He died in 1886 leaving four widows, Mt. Sogha, Mt. Munira, Mt. Sabza and Mt. Chamari. He had two brothers surviving him, Aijaz and Baqar. We know nothing about the heirs of Baqar but we know that Aijaz" died in 1886 leaving behind him a widow, Mt. Niazunnissa, a son, Hamza Ali, and two daughters, Kaniz Bano and Shahr Bano. It is common ground that Hashmat was a Shia and not having left any children his property under the Shia Law would devolve upon his two brothers, Aijaz and Baqar. The plaintiff, Muhammad Ali Asghar Husain is a purchaser from Mt. Kaniz Bano, one of the daughters of Aijaz Husain under a document dated 23rd December 1929.

3. This plaintiff"s case is that the property in dispute which is a small share comprising 1 biswansi out of a very much larger area in patti Soghra Begum, mohal Narain Das, khata kewat No. 4, mouza Mauama belonged to Hashmat and after his death it was inherited by Aijaz and Baqar and from Aijaz a portion was inherited by Mt. Kaniz Bano who sold it to the plaintiff in the year 1929. It is also alleged that the property originally belonged to one Tufail Ahmad who executed

two mortgages dated 22nd August 1874, and 22nd April 1875, in favour of one Fazal Ahmad. Tufail Ahmad executed a sale-deed of the mortgaged properties in favour of Hashmat Husain and that is how Hashmat Husain became the owner of this property which devolved on the plaintiff as mentioned before. The property was mortgaged usufructually to Fazal Ahmad and is in possession of his heirs as usufructuary mortgagees which heirs have not been impleaded in the present suit. The plaintiff then goes on to say that Sogra Begam died on 9th March 1918 and after her death Mt. Sabza Begum and Mt. Chaman Begam made certain transfers in favour of one Muhammad Jan on 9th February 1920 and 20th May 1921, and the said Muhammad Jan at first hypothecated the property in dispute to Jagannath Prasad, defendant 8, and subsequently sold the same to Shiam Lal defendant 4. The dates of the hypothecation in favour of Jagannath Prasad and the "sale in favour of Shiam Lal are not given in the plaint, but the plaintiff's case is that all these transactions are fictitious and collusive transactions and cast a cloud upon the plaintiff's title who is interested in the equity of redemption and entitled to redeem the heirs of Fazal Ahmad, the original usufructuary mortgagee. The plaintiff therefore prayed for the relief that on proof of the plaintiff's right of ownership as against the defendants it may be declared that the plaintiff is, as the owner, entitled to get the property in dispute redeemed at the stipulated time. It may be mentioned that the time fixed for redemption of the mortgages of 1874 and 1875 is 1936. The other defendants to the suit were two widows of Hashmat Husan namely. Sabza Begum and Chaman Begum and certain other transferees from the widows. As mentioned before, the heirs of the usufructuary mortgagee, were not impleaded in the suit.

4. I am concerned with the written, statement of Jagannath Prasad and Shiam Lal alone for they are the appellants in the present second appeals. They did not mention in their written, statement as to when they obtained the hypothecation or the sale from: Muhammad Jan and as I said before these dates are not mentioned in the plaint. The case of the defendants was that Hashmat had gifted his entire property including the property in dispute to his widow and consequently Aijaz and Baqar did not get any portion of Hashmat's inheritance and the plaintiff by obtaining a sale deed from. Mt. Kaniz Bano did not obtain any interest in the disputed property. They further pleaded that the plaintiff's suit was barred by estoppel vide Order 2, Rule 2, and Section 41, T.P. Act.

5. The Courts below have decreed the plaintiff's suit for the declaration claimed by him. In second appeal it is contended before me that the finding of the Court below that Hashmat did not make a gift of the property in dispute to his widows is not correct inasmuch as the lower appellate-Court has misread the evidence of Hanwant Sahai, the principal witness, in this case. I am not prepared to set aside the finding of fact recorded, by the lower appellate Court on this point. It is true that the learned. Judge has referred to the (Statement of Hanwant Sahai as negating the case of the defendants but that Court has also relied on several other considerations in arriving at the finding;; moreover, there has not been a real, misreading of the evidence of Hanwant Sahai. Hanwant Sahai's evidence is

more or less hearsay and Hanwant Sahai does not in his cross-examination: say that Hashmat had told Hanwant Sahai that Hashmat had made a gift of his entire property in favour of his widow. As I said before, the finding, is based not only upon the evidence of Hanwant Sahai but on a variety of circumstances and the finding is to my mind a finding of fact which cannot be challenged in second appeal.

6. It was then contended on behalf of the defendants that the plaintiff and his predecessor, Mt. Kaniz Bano is estopped from asserting that the widows of Hashmat did not get the entire property from Hashmat under a gift because on 17th July 1915, Mt. Muniran one of the widows executed a gift in favour of Mt. Niazunnissa, the mother of Mt. Kaniz Bano, and Mt. Kaniz Bano having inherited from Mt. Niazunnissa it is not open to Mt. Kaniz Bano or to Mt. Kaniz Bano's transferee to question the right of the widows. The simple answer to this contention is that it does not appear that Mt. Kaniz Bano derived any title from Mt. Niazunnissa and Mt. Kaniz Bano is undoubtedly the heir of her father Aijaz Husain who has not accepted any gift from Mt. Muniran and who in no sense of the term can be said to be estopped. Another answer, which is perhaps simpler, is that fact is not known whether Mt. Niazunnissa is dead, and that fact not being known it cannot be said that Mt. Kaniz Bano has inherited anything from Mt. Niazunnissa. The Courts below have further held that the deed of gift dated 17th July 1915, is a fictitious document executed without the knowledge of Mt. Niazunnissa.

7. The next contention of the appellant is that the plaintiff's suit is barred by time. In this connection it is said that the plaintiff's suit being for declaration it must be governed by Article 120, Limitation Act and it is conceded by the plaintiff that Article 120 does apply to the facts of the present case. It is said that the names of the widows of Hashmat were mutated on this property some time in 1886 and the plaintiff's suit having been instituted more than six years from that date it is barred by time. The principal defendants to the suit are Mt. Sabza and Mt. Chaman whose names were recorded as against this property some time in the year 1886. Reliance is placed upon the case of Akbar Khan v. Turban (1909) 31 All. 9. That case however was a peculiar case in which the defendant's name had been entered in 1895 and nothing more happened except a refusal in 1903 on the part of the defendant to get the entry corrected. The former entry in 1895 was made after a contest with the plaintiff. Their Lordships accordingly held that the cause of action accrued when there was a definite denial by the defendant in 1895 and the subsequent refusal of the defendant to get the entry corrected was a continuance of the original cause of action and not a fresh denial of title. Akbar Khan v. Turban (1909) 31 All. 9 has been considered in a number of subsequent cases and it is now well established that a mere entry of names does not debar the person against whom the entry is made for all times to come from suing for a declaration and any new invasion of rights which amounts to a fresh denial of title confers on the owner in possession a fresh right to sue.

8. It was argued on behalf of the plaintiff that the plaintiff's right to sue came into existence on 23rd December 1929, when he took the sale deed from Mt. Kaniz Bano and therefore anything which took place prior to 23rd December 1929, should not be taken into consideration when deciding the question of limitation. I am not prepared to accede to this submission on behalf of the respondent because this would lead to the anomaly that a person who himself might have allowed limitation to run against him confers a right to sue unfettered by the plea of limitation by transferring the property to another. Indeed this would amount to saying that no rule of limitation applies to a declaratory suit where the defendants are interested in denying the plaintiff's right within the meaning of Section 42, Specific Relief Act. As observed by their Lordships of the Privy Council in *Balo v. Koklan* 1930 P.C. 270, the right to sue accrues when there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. It is said in the plaint that the cause of action arose on 27th December 1929, or thereabout when the defendants finally denied the plaintiff's right. This statement of the plaintiff would not give the plaintiff a right to sue. If the plaintiff asked for an acknowledgment of his right from the defendants some time in December 1929 and the defendants refused to acknowledge the plaintiff's right that would not give the plaintiff a right to sue. The fresh act must be on the part of the defendants which can be said to amount to a fresh invasion of the plaintiff's right or a fresh attempt to cast a cloud on the plaintiff's title and not merely a denial of the plaintiff's title when the plaintiff attempts to assert his title because this denial would be merely a continuation of the denial made long ago.

9. In this case it is suggested on behalf of the plaintiff that there was a denial of the title of the plaintiff's predecessor in 1886 when the names of Hashmat's widows were recorded on the property, there might be said to be another denial of the title of the plaintiff's predecessor in February 1920 and in May 1921, when Mt. Sabza and Mt. Chaman made transfers in favour of Muhammad Jan but there has been no subsequent cloud on the plaintiff's title and therefore the present suit which is instituted on 2nd January 1930, is barred by the six years' rule of limitation. There has to my mind been yet another invasion of the title of the plaintiff's predecessor and that was when the transfers were made by Muhammad Jan in favour of Jagannath Prasad and Shiam Lal and when the names of Jagannath Prasad and Shiam Lal were mutated over the property.

10. The plaintiff in para. 9 of the plaint mentioned the various transfers that were made by Mt. Soghra Begam and Muhammad Jan and then in para. 10 he alleged that these transfers were collusive. His cause of action may therefore be taken to be these various transfers made not only by Soghra Begam but also by Muhammad Jan and the entry of the names of Jagannath and Shiam Lal in the revenue papers. As I said before, neither in the plaint nor in the written statement has it been mentioned as to when Muhammad Jan executed the hypothecation in favour of Jagannath and the sale in favour of Shiam Lal. Mr.

P.M.L. Verma on behalf of the respondent has drawn my attention to a sale deed executed by Muhammad Jan in favour of Shiam Lal which is Ex. G of my record. Mr. Khwaja on behalf of the plaintiff has accepted this document as being the transfer in favour of Shiam Lal but he has pointed out that this was drawn up on 11th November 1925, and the plaintiff's suit of 2nd January 1930, is well within six years of that date. It was however said on behalf of the respondent that in this very sale deed there is the mention of a hypothecation in favour of Jagannath Prasad dated 21st November 1921 but beyond this recital nothing has been pointed out to me from which I can find out the date of the hypothecation in favour of Jagannath Prasad, the hypothecation which is mentioned in the plaint and admitted in the written statement. Mr. Khwaja is not prepared to accept this recital as evidence of the date of the hypothecation nor am I prepared to accept this as conclusive. This might well be another mortgage deed in favour of Jagannath. The position therefore is that the plaintiff's suit cannot be said to be barred by time inasmuch as we do not know the date of this fresh invasion. I might in this connection mention the observations of Sulaiman and Sen, JJ. in *Aftah Ali Khan v. Akbar Ali Khan* 1029 All. 520 :

The plaintiffs in the present case alleged their cause of action to have arisen from the wrong entries of the names of the contesting defendants 1 to 4 and not their ancestor Mt. Sakina Bibi. It is not clear from the record whether this occurred within six years of the suit and the present action therefore cannot be thrown out simply on the ground of limitation.

11. It has not been proved to my Satisfaction that the hypothecation in favour of Jagannath and the entry of his name on the revenue papers was made more than six years prior to the institution of the suit and the sale in favour of Shiam Lal was undoubtedly within six years of the suit. I therefore overrule the plea of limitation advanced on behalf of the defendants.

12. It was then contended that the plaintiff's suit is barred by Section 41, T.P. Act, because it is said that the defendants took the transfer from Muhammad Jan with the express or implied consent of the plaintiff's predecessor and the defendants were not aware of the real state of affairs. This plea comes with a very bad grace from the defendants Jagannath and Shiam Lal. It has been pointed out by the Court of first instance that both Shiam Lal and Jagannath knew everything about the state of Hashmat's family and that these two persons, have been trying their best in conjunction with Kaniz Bano's brother to damage the claims of Mt. Kaniz Bano. The lower appellate Court also agreed with the observations of the Court of first instance and held that Shiam Lal and Jagannath "appear to have been playing a game of backgammon." There is therefore no force on the plea of Section 41, T.P. Act.

13. It was then contended that the plaintiff's suit is barred by Order 2, Rule 2, Civil P.C. Both the Courts below have repelled this contention. It appears that in 1912 a suit was instituted by Mt. Kaniz Bano against certain defendants and in that suit the deed of gift executed by Mt. Soghra on 15th February 1909, and

subsequent transfers made by the donees were challenged. The cause of action for that suit as pointed out by the Courts below was entirely different from the cause of action for the present suit. In that suit it was said that Mt. Soghra had no right to execute the deed of gift dated 15th February 1909, because she did not inherit anything from Hashmat who was a Shia but it was held that the property which Mt. Soghra had gifted came to her possession from Hashmat by virtue of the fact that Hashmat gifted that property in favour of Mt. Soghra. In the present case it has been found by both the Courts below that Hashmat did not make a gift of the present property to his widows. The plea of Order 2, Rule 2 also has no force because the cause of action of the former suit is entirely distinct from the cause of action in the present suit.

14. It was then contended that the equity of redemption now vests in the predecessors of the defendants, they having acquired a title to the said equity of redemption by adverse possession. It may be conceded that an equitable estate as well as a legal estate can become barred by time and an equity of redemption can become by adverse possession the property of a person but I am satisfied that in the present case it cannot be said that the defendants Jagannath and Shiam Lal or their immediate predecessor Muhammad Jan or even the widows of Hashmat have become the owners of the equity of redemption by adverse possession. The property in dispute is I in the possession of the usufructuary mortgagees and the mere fact that the names of the widows of Hashmat were recorded in the revenue papers as mortgagors would not justify me in holding that they became the owners of the equity of redemption by adverse possession. I am bound by a Division Bench ruling of this Court in Kunwar Sen v. Darbari Lal 1916 All. 79, in which it was held that a person could not acquire a title by adverse possession to land which was the subject of a usufructuary mortgage and therefore in the possession of the mortgagees, merely because he had managed to get his name recorded in the village papers for a series of years in respect of the mortgaged property.

15. It was also contended on behalf of the appellant that there should be a presumption in favour of the defendants that Mt. Kaniz Bano agreed to relinquish all claims to Hashmat's property in favour of the widows of Hashmat and reliance was placed on the case of Shakur v. Husaini Bibi 1923 All. 447. It cannot be said that Mt. Kaniz Bano acquiesced in the rights of the widows of Hashmat indeed we know that in the year 1912 she fought valiantly up till the High Court to assert her rights against the rights of the widows in respect of certain other property; and the case which has been cited relates to the case of co-heirs and ex hypothesi in the present case Mt. Soghra and the other widows of Hashmat are, no heirs to Hashmat's property under the Shia Law.

16. Finally, it was argued on the authority of Aftah Ali Khan v. Akbar Ali Khan 1029 All. 520 in that this is not a fit case in which a declaratory decree should have been granted to the plaintiff. It is said that in the present case as in that case the heirs of the mortgagee have not been impleaded and the decree passed

in favour of the plaintiff would not be effective. In that case the sixty years period for bringing a suit for redemption was about to expire. In the present case a suit for redemption can be brought up till the year 1996, and the plaintiff is not saying that he is entitled to the entire equity of redemption. It is conceded by Mr. Khwaja that the plaintiff is only interested in a portion of the equity of redemption and as the defendants and not the mortgagees are denying the right of the plaintiff and as the plaintiff has still a number of years for filing a suit for redemption a declaratory relief should be given unless barred by any other rule of law, lest the evidence which is available now might become unavailable to the plaintiff by lapse of time. I feel inclined to hold that this is a fit case in which a declaratory decree might be given; moreover, I have got to consider the case from a different aspect also. This is not a case in which a declaratory relief has been refused by the Courts below and I am asked to grant it in appeal; this is a case in which a declaratory relief has been given by the Courts below and I am asked to refuse this relief in appeal. I cannot do so unless I come to the conclusion that the Courts below in the exercise of their discretion have acted in an arbitrary or perverse manner and I am not prepared to hold upon the materials on the record that the Courts below have exercised their discretion in an arbitrary or unjudicial manner.

17. The result is that I dismiss this appeal with costs. Leave to file an appeal by way of Letters Patent is granted.