

(1945) 10 AHC CK 0016
In the Allahabad High Court

Mohammad Sulaiman Khan	Vs	APPELLANT
Mohammad Rahimdad Khan and Others		RESPONDENT

Date of Decision : 02-10-1945

Acts Referred:

Citation : AIR 1946 All 331 : (1946) 16 AWR 92

Hon'ble Judges : Mathur, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Mathur, J.—These are three connected appeals arising out of proceedings under the Encumbered Estates Act. Mohammad Sulaiman Khan the appellant in each of these three appeals applied u/s 4, Encumbered Estates Act giving a list of the properties which he claimed to be his. Notices were published u/s 9 of the said Act specifying the properties mentioned by the applicant u/s 8. Thereupon two objections were filed by Rahimdad Khan and. a third by Mt. Wilayati Begum. One objection of Rahimdad Khan related to his share in village Amkhera. He claimed that the said property belonged to him by virtue of a deed of gift executed by his father Haji Mohammad Daood Khan in his favour. By a second objection he claimed to be mutwalli of 15 shops and 10 houses together with shares in five villages under a deed of wakf executed by the said Haji Mohammad Daood Khan. The third objection of Mt. Wilayati Begum related to a house and a baithak which she claimed to be her property, and which was in possession of the applicant Mohammad Sulaiman Khan. These objections were made u/s 11, Encumbered Estates Act, but before they could be decided application was made in each case on 7th August 1940, stating that all the matters in issue together with certain outside ones had been settled between the parties by a compromise, but as some of the interested persons were living at distant places and were required to execute certain agreements and documents a compromise could not be filed. Accordingly an adjournment was asked for. These applications were signed both by the objectors and Mohammad Sulaiman Khan the landlord applicant. Time

was granted up to 7th September 1940. On that date the objectors again moved for an adjournment alleging that Mohammad Sulaiman Khan had gone back on his agreement. In this application too the terms of the compromise were not mentioned on the ground that it was late in the day. Time was again granted up to 10th September 1940, on which date three applications were made one in each case mentioning the terms of the compromise. The learned Special Judge recorded a compromise in each case and passed decrees in terms of the compromise on 11th September 1940. An appeal was preferred by Mohammad Sulaiman Khan and the cases were remanded to the trial Court for disposal of each case after deciding what were the actual terms of the compromise and whether they were binding on the parties. The Special Judge thereupon held that the alleged agreements of compromise were not proved, and in his opinion there were no completed agreements. He accordingly dismissed the applications for recording the compromise. The objectors then went in appeal to the learned District Judge of Moradabad, and these appeals were numbered as Nos. 91, 92 and 93 of 1942. The learned District Judge allowed all the three appeals and directed that the compromise be recorded and the claims of the objectors appellants be decreed in terms of the compromise in so far as they related to the claims of the appellants. It is against this decree and judgment of the learned District Judge dated 17th July 1943 that these three appeals have been filed. It has been urged that, it was not proved that any final compromise was arrived at and that no decree on that basis should have been passed. While hearing the appeal it occurred to me that the legal aspect involved in the case has been totally lost sight of by the two lower Courts, and has not even been urged in the grounds of appeal. As I read Section 11, Encumbered Estates Act, it seems to me that Order 23, Rule 3, Civil P.C., was not applicable, and the Special Judge was not competent to record a compromise or to pass a decree in its terms. Section 11, Clause (2) lays down:

Any person having any claim to the property mentioned in such notice shall, within a period of three months from the date of publication of the notice in the official gazette, make an application to the Special Judge stating his claim and the Special Judge shall determine whether the property specified in the claim or any part thereof is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant.

2. It seems obvious to me that the function of the Special Judge is confined only to an examination and decision of the matter specified in the said section. Objections u/s 11, Encumbered Estates Act, cannot be called a suit, and the Court has no power to see whether the matter in dispute has been adjusted wholly or in part. The Court has only to answer the question whether the property specified in the claim or any part thereof is liable to attachment, sale or mortgage in satisfaction of the debts of the applicant. Assuming that Order 23, Rule 3, Civil P.C., was applicable, it has further to be seen whether the compromise was lawful. The first objection to its legality that can be raised is that it imposed a liability on three outsiders Haqdad Khan, Mt. Akhtari Begum

and Mt. Zaida Sultan Begum who were no parties in the objection cases and could not be bound by decrees passed in those cases. It may be lawful in certain cases to record a compromise between some of the parties if that compromise relates to those parties alone, but it would certainly be unlawful if it purports to bind the persons that are not on the record. It has been suggested on behalf of the respondents that Rahimdad Khan alone is ready to shoulder that liability and pay the amount, but that cannot legalise the compromise itself. Then again the share in the village Amkhera is described as belonging to Rahimdad Khan and it is provided that he would relinquish it in favour of Mohammad Sulaiman Khan. This term of the compromise fails to decide whether the share is village Amkhera was liable to attachment, sale or mortgage in consideration of the debts of the applicant, and lastly the house and baithak which was held to be the property of Mohammad Sulaiman Khan in Suit No. 483 of 1936 of the Court of the Munsif of Nagina, Sulaiman Khan v. Wilayati Begum, was held to be the property of Rahimdad Khan in exchange of another house in another mohalla. This was in contravention of Section 7, Clause (2), Encumbered Estates Act, which provides:

The landlord shall not be competent without the sanction of the Collector to make an exchange or gift of, or to sell, mortgage or lease, any of that property.

3. In this way the compromise contravened the provisions of the Act itself, and was absolutely unlawful. On this ground alone it was not open to the lower Courts to order that the compromise be recorded and a decree be passed in its terms. Another aspect of the case is that in an encumbered case the creditors are the most interested party, and nothing can be done behind their backs which would in any way adversely affect their rights. By this compromise the house and baithak which admittedly belonged to Mohammad Sulaiman Khan the landlord applicant, were given up in favour of Mt. Wilayati Begum the objector, and it was also decided that in consideration of the receipt of Rs. 2000 Mohammad Sulaiman Khan would relinquish all his claim to the Waqf Ala-ul-aulad property which consisted of 15 shops, 10 houses, shares in 5 villages, etc. In order to ensure that there was no collusion between the objectors and the applicant Mohammad Sulaiman Khan who are brothers and sisters the presence of creditors was absolutely necessary and no binding compromise could be arrived at in their absence. It has been argued by the learned Counsel for the respondents that the compromise was certainly binding on the parties who entered into it and the creditors should have been left to make an objection subsequently if they did not agree. In my opinion this is not the correct rule of conduct for the Courts. The Courts have to protect the interest of every party concerned, and it would be highly prejudicial to the creditors to lend the sanction of the Court to a compromise to which they were no parties. On this ground also the compromise should not have been recorded and the learned lower Court misdirected itself in not giving due consideration to these points.

4. This is sufficient to dispose of the appeals but before I leave the matter I must also note that the finding of fact arrived at by the lower appellate Court that a

completed compromise was entered into between the parties was not warranted by the facts. The first application dated 7th August 1940, which was signed by the appellant Mohammad Sulaiman Khan as well, clearly stated that for the completion of the compromise it was necessary that certain agreements and documents be executed by certain persons but as they were living in Bombay, and in Datia and Rampur States it would require time. I do not think that by any stretch of language it could be said that on that date a final compromise was arrived at. On the second date another application was made for time in which it was again repeated that a compromise was arrived at, but as it was not completed time was needed for its completion. It was further stated that as it was late in the day it was not possible to give the details of the compromise. This again shows that even on that date the objectors were not aware of the terms of the agreement and could not disclose them. They did not even say that the draft was taken away by Mohammad Sulaiman Khan. When the last and third application was presented on 10th September 1940, it was then that the terms of the alleged compromise were stated, but a close reading of these terms would at once make it clear that the alleged compromise was only in an inchoate state and required several steps before it could be completed. In any aspect of the case, I am quite clear in my mind, that this alleged compromise could not be recorded and incorporated in a decree and the order passed by the lower appellate Court in all the three appeals before me was wrong.

5. The result is that all the three appeals are allowed, and the order of the lower appellate Court is set aside. The order passed by the learned Special Judge rejecting the application under Order 28, Rule 3, Civil P.O., with costs is restored. The appellant shall get the costs of these appeals from the respondents in each case. The case will now be sent back to the learned Special Judge for decision of the objections on the merits. Leave to appeal under the Letters Patent is refused.