
(1944) 07 AHC CK 0004
In the Allahabad High Court

Mt. Mumtaz-un-Nissa Begum

APPELLANT

Vs

Sha Abu Sayeed and Others

RESPONDENT

Date of Decision : 08-07-1944

Acts Referred:

Citation : AIR 1945 All 35 : (1944) 14 AWR 250

Hon'ble Judges : Sinha, J

Bench : Division Bench

Final Decision : Disposed Of

Judgement

Sinha, J.—This is an appeal in proceedings under the Encumbered Estates Act against an order rejecting the appellant's prayer for the restoration of her case to its original number, for permission to file her written statement and for the determination of her claim. The facts briefly are these : Shah Abu Saeed, a resident of the town of Behat in the district of Saharanpur, made an application u/s 4, Encumbered Estates Act, on 27th July 1935. He mentioned four creditors, Bhagwan Das Bank, Amrit Lal, Shanker Lal and Inder Sen. He made no reference to the claim which is now set up by the appellant who admittedly is one of his wives. The written statement u/s 8 was filed on 25th November 1935, and on 28th December of the same year the necessary publication u/s 9 was made. The publication u/s 11 was made on 30th May 1936, and the case was finally decided on 3rd February 1937. Decrees were drawn up in favour of the creditors on 24th April 1937, and after some proceedings in the High Court, which have not been clearly brought out either in the judgment under appeal or in course of the arguments, the decrees were sent to the Collector in June 1937 and the record was consigned to the record room on 21st July 1938. The appellant, who, as has been said above, is admittedly one of the wives of Shah Abu Saeed, the landlord applicant, presented an application on 19th September 1940. Her case, in the main, was that her dower debt of Rs. 25,000 was not mentioned by her husband in his application u/s 4 of the Act and that she was unaware of the proceedings before the Special Judge till a letter had been sent to her by her nephew

Mohammad Husain on 9th September 1940. The letter itself purports to bear the date 9th September 1940, and the endorsement on the envelope indicates that it was received later.

2. Stripped of unnecessary details, her case essentially was that she was married to Shah Abu Saeed on 6th March" 1898, and under the kabainnama of that date her dower was fixed at Rs. 25,000. Rs. 14,000 out of this debt was made a charge on the property. For some time, according to her, the relations between the husband and the wife continued to be what they should have been, till in 1909-the learned Judge is not right when he says that in 1912 -Shah Abu Saeed married a prostitute. The advent of the second wife, viz., the prostitute, broke up all relations between Mt. Mumtaz-unnissa and her husband, with the result that, according to her, she had to leave Behat and began to live with her parental relations. She further went on to say that, not only that she left her husband's home and began to live with her parents, but the relations between the two became so strained that she did not come to Behat after she had left it in 1909, on the introduction into the family of the second wife.

3. On these allegations she claimed an extension of the period of limitation, both u/s 9 (3), Encumbered Estates Act, and also u/s 18, Limitation Act. Of the creditors, Hari Chand, Inder Sen and Bhagwan Das Bank alone entered defence. They denied that the relations between the husband and the wife were strained or that she had left Behat or that she had no knowledge of the proceedings under the Encumbered Estates Act. It was also pleaded that, far from Shah Abu Saeed committing any fraud upon his wife, he was really at the bottom of the claim and the application was a collusive application. Bhagwan Das Bank put in a further defence which will presently be dealt with separately. Its case was that even if all the allegations of the appellant with regard to want of information and with regard to the fraud of the husband be accepted the application so far as it was concerned, was not entertainable, inasmuch as, on the date that the bank was cited as a party, the claim was obviously time barred.

4. To follow the narrative which constitutes a sequel to the application of the lady, dated 19th September 1940 which has given rise to the present appeal, Bhagwan Das Bank transferred all the debts in favour of the Punjab National Bank except the debt due from Shah Abu Saeed. In the application, dated 19th September 1940, Mt. Mumtazunnissa mentioned all the creditors except Bhagwan Das Bank. On 14th April 1942 she made another application, requesting the Court to make Bhagwan Das Bank a party. Notice of this application was served on it on 17th April and finally, on 8th May 1942, the bank was made a party.

5. The learned Special Judge has accepted the case of the creditors in general and also that of Bhagwan Das Bank in particular. He has found that the lady had full knowledge of the proceedings before him. He has also found that there was no fraud perpetrated upon her by her husband; on the other hand, the application was a collusive application, at the instigation of Shah Abu Saeed

himself. He has found further that even if all the allegations of the lady be accepted, the claim, so far as it concerns Bhagwan Das Bank, must be rejected on the ground of limitation. The first question which falls for consideration is whether the " learned Special Judge is right when he entered into the discussion of the question of the dower debt and has arrived at a finding on it. In our opinion the only question which waited consideration at that stage was whether the appellant had knowledge of the proceedings or whether she had none and was, therefore, entitled to the benefit of Section 9 (3), Encumbered Estates Act, read with Section 18, Limitation Act. We are, therefore, of opinion that the finding of the learned Judge that no fraud had been perpetrated upon Mt. Mumtazunnissa and the application was a collusive one was an uncalled for finding and must stand vacated.

6. On the main question as to whether the appellant had knowledge of the proceedings before the Special Judge the finding does not commend itself to us. It must not be forgotten that the appellant is a pardanashin lady. Indeed, there is a presumption that she is a pardanashin and nothing has been shown that she is otherwise. It has not been disputed that the second wife came into the family in 1909 and, if we accept the statement of Shah Khalid, she was a prostitute. The advent of a second wife generally, if not invariably, leads to an estrangement of the feelings between the husband and the first wife and it is not surprising if the advent of this particular wife who was a prostitute, led to a complete break up of the home in so far as Mumtazunnissa was concerned. We have, therefore, to look into the evidence of both the parties with this background. In support of her case that she never lived in Behat and that she lived with her parents after the introduction of the second wife she has examined her son Shah Khalid and her brother Syed Ahmad. Shah Khalid is one of the three sons of the lady, the other two being Shaid and Abul Khair. It may be that they are presenting an exaggerated picture of the relations between their mother and their father, but the substance of their statements seems to be true, viz., that the relations between the two left a great deal to be desired after the introduction of the second wife and the appellant began to live separately, that is, away from her husband.

7. On the other hand, the creditors have examined Hari Chand and Inder Sen. Hari Chand himself did not know that Mt. Mumtazunnissa and Abu Saeed lived at Behat, although, on his own showing, he lived close-by. He came to know this only when he made inquiries after this case had begun. It is also significant that Hari Chand in his examination-in-chief, says that he lived in Behat but, when pressed in cross-examination, he had to admit that he lived in a village close-by. Perhaps his statement in the examination-in-chief was motivated by a desire to impress it upon the Court that he was in possession of the facts intimately. The next witness Inder Sen does not speak anything from personal knowledge. He says that he purchased kapas from the son of Mt. Mumtazunnissa and, when he went to the* house, the son asked his mother to move away -as perhaps a stranger was coming in. In the first place, Inder Sen is a man vitally interested in

defeating the claim of the appellant and his statement cannot be accepted at its face value. Apart from this, he is a Vaish and it is impossible to believe him when he says that he does not maintain any account-books. If the account-books had been before us, we would have been in a position definitely to say whether the story of the purchase of the kapas which has been pressed into service, in order to justify his presence on a particular occasion, was true or false. This is the whole of the evidence on the question of the residence of the appellant at Behat or at her parental home. We have given our very careful consideration to it and have come to the conclusion that on the whole, the evidence of the appellant is more satisfactory than that of the creditors. Coupled with the evidence, if we bear in mind the introduction of the second wife who was a prostitute, the inference is irresistible that the lady did not live with her husband. It may be it is not necessary to go into this question at length - that she had not completely cut herself off from Behat. Her sons were living there and she might have been coming off and on to see her children, but this is very far from saying that the relations of the husband and the wife remained as they were even after the second marriage.

8. We now come to the crucial question in the case as to the precise date when she acquired knowledge. Her story is that the letter of Mohammad Husain was the first means of information. The learned Special Judge has, however, rejected it on the ground that this letter was written only to create evidence for the purpose of the case. We are not disposed to agree with him in this conclusion. If her story, in its main feature, is true that she never or seldom lived at Behat after the introduction of the second wife, and if her story is further true that she lived mostly at her parental home, there is no reason to believe that she had any information of these proceedings. If she had no information of these proceedings, there must have been some person in this world who must give her this information, and it is not surprising that Mohammad Husain, who is her nephew, conveyed that information. The learned Special Judge has lost sight of the conditions of purdanashin ladies in these provinces. They generally do not know of the proceedings in a Court of law. It is not surprising that Mt. Mumtazunnissa, about whom it is not suggested that she is a highly educated lady, was not acquainted with the proceedings taken in Court. We have looked at the case from all these points of view and feel constrained to say that the finding of the learned Judge that the letter Ex. 2 is a faked up document, that is it is a document brought into existence for the purposes of the ease, is not correct.

9. Mr. Shambhu Nath Seth, the learned Counsel for the respondents, has not attempted to justify the finding of the learned Special Judge on the materials on the record. He has, however, sought to justify the conclusion on an interpretation of Section 9 (3), Encumbered Estates Act, as also S.18, Limitation Act, and contends that the appellant is not entitled to any extension of time. He contends that the period of time provided by Section 9 (3), Encumbered Estates Act, is an absolute period and no further extension can be granted as a result of the application of Section 18, Limitation Act. That Section 18 has application to

proceedings under the Encumbered Estates Act is manifest from Section 29 (2), Limitation Act. In *L. Chunni Lal Vs. Chandan Gopal and Others*, a learned Judge of this Court has held in favour of the applicability of Section 18 to proceedings under the Encumbered Estates Act. Mr. Banerji, the learned Counsel for the appellant, however, contends that the expression "sufficient cause" in Section 9 (3), Encumbered Estates Act, constitutes a cause independent of a cause which may be the result of fraud as contemplated by Section 18, Limitation Act. This appears to be so. Section 9 (3) makes no reference to fraud. On the other hand, the bed rock of Section 18, Limitation Act, is fraud. "Sufficient cause" in Section 9 (3), Encumbered Estates Act, means a cause personal to one who wants to present the written statement. On the other hand, cause which is the outcome of fraud will be a cause flowing from the conduct of somebody else.

10. It has been held in this Court that if a party is kept from the knowledge of a certain fact and this has the effect of causing loss of right, the case comes within the four corners of fraud as contemplated by Section 18, Limitation Act: vide 1934 A.L.J. 25. This is at least the ratio of that case. *Chunni Lal v. Chandan Gopal Mt. Mt. Balkesha Kunwar and Another Vs. Harakh Chand and Others and Kazim Husain v. Mt. Mubarak Jahan* ("39) 26 AIR 1939 Oudh 227 furnish a complete answer to the argument of the learned Counsel for the respondents that Section 18 cannot apply to proceedings under the Encumbered Estates Act. It may be mentioned that it is settled law that fraud vitiates the most solemn proceedings of the Court and no judgment or decree passed by any Court can stand in the way of a party who has been deprived of his rights in consequence of the fraud of his adversary. In *Mahadeo Prasad v. Takia Bibi* ("03) 25 ALL. 194 their Lordships make the following observations at page 24:

In this decision of their Lordships there is a clear indication that if a fraud has been practised, the person or persons injured by it will be able to obtain redress in the civil Courts, notwithstanding the difficulties which may be thrown in their way by reason of the finality of the partition proceedings carried out in the Revenue Court. That an Act of Parliament will not stand in the way of relief being given in a case of the kind is laid down by Lord Westbury in the well known case in *McCormick v. Grogan* (1869) 4 H. P. 82. I only quote this case for the statement made by Lord. Westbury in his judgment, which is as follows:

The Court of Equity has from a very early period decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud.

In the earlier case in *Barnesly v. Powel* (1749) 1 Ves. 2836 it was laid down to the effect that though the Court of Chancery could not set aside the judgment of a Common Law Court obtained against conscience, it would consider the person who had obtained the judgment fraudulently as a trustee, and would decree him

to reconvey any property that he might have become possessed of under the judgment on the ground of laying hold of his conscience so as to make him do what was necessary to restore matters as before." The principle underlying this decision-though not in precise terms-will be found re-affirmed in Bhagwan Das Marwari and Others Vs. Suraj Prasad Singh and Others . That was not a case of fraud alone but of a conspiracy on the part of a number of people to deprive certain parties of their legitimate rights. Their Lordships, no doubt, said that the case was not one of fraud alone but of a conspiracy, but in our view there is hardly a line to be drawn between fraud and conspiracy because, in the ultimate analysis, conspiracy either originates or eventuates in fraud.

11. There remains the contention of the bank. It contends that even if on 19th September 1940, the appellant was entitled to the benefit of time u/s 18, Limitation Act, she was not entitled to any benefit from that date up to 8th May 1942, when the order impleading it was actually passed. In the first place, there was no duty cast upon the appellant to cite all the creditors. The main battle she had to fight was against her husband. It was the conduct of the husband who had set the machinery of the Court in motion without making her a party, which was the main cause. If she succeeds against her husband she automatically succeeds against all persons who derive their claim from him. Bhagwan Das Bank was one of those persons who derived their claim from Shah Abu Saeed. It cannot be put in a higher position than Shah Abu Saeed and if she is entitled to the benefit of Section 9 (3), Encumbered Estates Act, read with Section 18, Limitation Act, as against Shah Abu Saeed, she is also entitled to it against the creditors of Shah Abu Saeed. We have therefore come to the conclusion that the order of the learned Special Judge by which he rejected the applicant's application, should be set aside. We therefore set aside the order of the Court below and send the case back to the learned Special Judge at Saharanpur with directions to restore it to its original number and to give an opportunity to the appellant to prove her claim. The appellant is entitled to her costs.