
(1934) 09 AHC CK 0020
In the Allahabad High Court

Mt. Zabaishi Begam

APPELLANT

Vs

Naziruddin Khan and Others

RESPONDENT

Date of Decision : 06-09-1934

Acts Referred:

Transfer of Property Act, 1882 — Section 41
Transfer of Property Act, 1882 — Section 41
Transfer of Property Act, 1882 — Section 41

Citation : AIR 1935 All 110 : 152 Ind. Cas. 1008

Judgement

1. This dispute in this and the connected Appeal No. 175 of 1930, is about the property that belonged to one Nadir Ali who died before the year 1877 A.D., leaving a widow Nadirjan and two sons, Slier Ali and Hamza Ali and a daughter named Shafat Begam. Nadirjan transferred the share that devolved on her by right of inheritance from Nadir Ali to her two sons. The plaintiffs in the suit, were the heirs of Shafat Begam, viz., Nasiruddin, her husband and Fakhurddin, her sort, and they are the contesting respondents in both the appeals. The claim by them was with respect to the share that on the death of Nadir Ali devolved on Shafat Begam by right of inheritance, and to which share the plaintiffs became entitled, on the death of Shafat Begam in the year 1916, as her heirs. Admittedly Shafat Begam was entitled to a 14-80 share in the property left by Nadir Ali and the plaintiffs' claim was with respect to that share.

2. The property owned by Nadir Ali was zemindari share in Mahal Sher Ali in village Datauji. It is not disputed" that Shafat Begam was never in actual possession of that share, and it is common ground that sometime before the year 1910 a partition between Sher Ali and Hamza Ali took place. By that partition the zemindari share was divided into two holdings, holding No. 1, and holding No. 4. The former holding; was allotted to Hamza Ali and the latter to Sher Ali. Between the years. 1911 and 1920, by various transfers effected by Sher Ali and his widow, the whole of holding No. 4 passed bit by bit into the hands of certain trails ferees who have built glass factories, over portions of the property transferred. Hamza Ali also sold a portion of holding No. 1 to certain

persons, but practically the whole of that holding is still with Hamza Ali's heirs. Hamza Ali died in the year 1919 leaving a widow Zabaishi Begam and three sons and two daughters. One of his daughters was a lady named Muzammil Begam who was arrayed as defendant 6 in the suit. The widow and the sons and the daughters of Hamza Ali were all defendants in the suit. Sher Ali also, died in the year 1921 leaving two sons who were defendants 1 and 2, in the suit. All the transferees were also impleaded as defendants. It would thus appear that the defendants in the suit were the heirs of Sher Ali and Hamza Ali and their transferees.

3. The case formulated in the plaint was that the brothers of Shafat Begam who were in actual possession of the zemindari share left by Nadir Ali, were qua the share of Shafat Begam, in the position of trustees and that Shafat Begam must be deemed to have all along been in constructive possession of the share to which she was entitled. Almost all the defendants, except the sons of Sher Ali, contested the suit mainly on the allegation that on 12th April 1890, Shafat Begam executed a deed of relinquishment with respect to the share that devolved on her by right of inheritance from Nadir Ali in favour of her two brothers and thus ceased to be the owner of the share in dispute. The allegation of the plaintiffs that Shafat Begam was in receipt of the profits of the property was also denied by the contesting defendants and the plea of limitation was put forward in bar of the plaintiffs' claim. The transferees claimed to be transferees in good faith for valuable consideration and contended that they were protected by Section 41, T.P. Act. The plea of estoppel was also raised by the transferees.

4. During the pendency of the suit in the Court below Muzammil Begam died and an application to bring upon the record her legal representatives in the array of defendants was filed by the plaintiffs. There was however difficulty in effecting service on the proposed heirs and, by an application dated 28th July 1929, the plaintiffs prayed that the proposed heirs of Muzammil Begam be exempted from the claim, and the Court granted that application.

5. The Court below overruled all the pleas urged in defence. It held that Shafat Begam did not execute the deed of relinquishment; that Shafat Begam was in receipt of the profits of her share in her lifetime; that the defendants were not in adverse possession of the property in dispute and the suit was not barred by time; that the plaintiffs were not estopped from maintaining the suit and that the transferees were not entitled to the benefit of the provisions of Section 41, T.P. Act. But in view of the fact that the whole of Sher Ali's share and a portion of Hamza Ali's share had passed into the hands of the transferees, the Court below did not grant a decree to the plaintiffs in terms of the reliefs prayed in the plaint and passed a decree as follows:

Suit is decreed with costs. In case a partition of the specific share of plaintiffs takes place, I recommended to the partitioning Officer that he will at first allot 14 sihams of plaintiffs out of 80 sihams of the property at first from the shares remaining in the hands of Hemna Ali Khan and Sher Ali Khan, and if that is not

sufficient to complete the share of the plaintiffs then their said 14 shiams be allowed from the share of the defendants who are subsequent purchasers of the property in suit from the heirs of Sher Ali Khan and Hamza Ali Khan.

6. The present appeal is by the three sons and the widow of Hamza Ali, and certain cross-objections in this appeal have been filed by some of the transferees. At the hearing of the appeal no one appeared to support the cross-objection filed by the defendant, Shafaraz Ali. The connected appeal is by some of the transferees. On behalf of the defendants the finding of the Court below that the execution of the deed of relinquishment by Shafat Begam was not proved has been assailed, and strong exception has been taken to the reception in evidence by the Court below, of a judgment of this Court at a belated Stage of the trial. Shafat Begam was a resident of the town of Ferozabad in the Agra District and it appears from that judgment that on the very date on which the deed of relinquishment is alleged to have been executed by Shafat Begam, a similar deed was executed by another lady Faiyazi Begam who also resided in Ferozabad, in favour of her brother Mirza Umrao Beg. The judgment referred to above was in a case in which the validity of the deed executed by Faiyazi Begam was in question and, in the course of the judgment, this Court, on a consideration of the evidence in the case, came to the conclusion that both the deeds were the outcome of a conspiracy entered into by certain persons to deprive both Shafat Begum and Faiyazi Begam of their shares in the estates of their fathers.

7. There is considerable force in the argument that the Court below was not justified either in accepting that judgment in evidence or in placing reliance on the same. The judgment was filed at a belated stage of the trial in the Court below. The evidence of the parties concluded on 5th December 1929, and arguments were heard on 6th December. The judgment appears to have been filed and admitted after the conclusion of evidence and apparently without any notice to the defendants. We consider that the Court below was wrong in admitting fresh evidence after the parties had led all the evidence that they wanted to produce, and when, the defendants had no opportunity to produce evidence in rebuttal of the evidence newly introduced on the record. Again the judgment was not inter partes and was not relevant for the determination of the question whether the deed of relinquishment in dispute was executed by Shafat Begam. We have therefore discarded the judgment from consideration.

8. The deed of relinquishment purports to have been executed on 11th April 1890. It was presented for registration in the office of the Sub-Registrar of Ferozabad on 15th April, by one Raunak Ali in behalf of Shafat Begam with an application praying that the document be registered at the residence of Shafat Begam. The Sub-Registrar issued a commission to the Naib Tahsildar of Tahsil Ferozabad "directing him to only verify the particulars at the residence of the lady." The report of the Naib Tahsildar is endorsed on the back of the document and is to the effect that he verified the contents of the document from Shafat

Begam at the house of Umrao Beg and that, after hearing the contents of the document, Shafat Begam admitted the same to be correct and stated that she had executed the document. It does not appear what authority Raimak Ali had to present the document for registration on behalf of Shafat Begam.

9. The deed was attested by three witnesses, viz., Umrao Beg, Abbas Ali and Gauhar Ali. Gauhar Ali was dead and his son Malik Ali Khan was called as a witness in the case. It is however significant that neither Umrao Beg nor Abbas Ali Khan were called to prove the deed. The learned Judge of the Court below rightly declined to accept the evidence of Malik Ali Khan. The witness admitted that he was a Mukhtar-i-am of Zabaishi Begam, defendant, for about 8 or 9 years. He took care to state that he did not see Shafat Begam appending her signature to the document. He deposed that when the document was read over, some lady said from the zenana quarters that the document was executed by her, and he recognized that voice to be the voice of Shafat Begam. The witness admitted that he was in debt and one of the plaintiffs was one of his judgment-creditors and that he was declared insolvent. It is manifest therefore that Malik Ali was not a reliable witness and, apart from this, his evidence falls short of proving the due execution of the deed by Shafat Begam.

10. By the deed Shafat Begam purported to relinquish her share in lieu of the receipt of Rs. 30 a year from her brothers. The profits of her share was much in excess of Rs. 30 a year. Shafat Begam was employed as a teacher in some girls' school in Aligarh for about 10 or 12 years. It may therefore be taken for granted that she was not an illiterate lady. She was however a pardanashin lady and there is no evidence on the record to show that the document was either explained to her, or that she had any independent advice for entering into the transaction evidenced by the deed. It cannot be denied that the document had a far-reaching effect on her interest. It purported to deprive her of her share in her father's property for ever and that for a nominal consideration of Rs. 30 a year. Again the proceedings taken for the registration of the document were extremely suspicious. The document was not presented for registration by the lady or by her husband. The registration on commission did not take place at the house of Shafat Begam, but at the house of one Umrao Beg who had apparently no connexion with Shafat Begam. Shafat Begam at the time of registration is alleged to have been identified by Umrao Beg and Gauhar Ali, and at that time even her signature was not taken and Umrao Beg signed on her behalf. There is no explanation why Shafat Begam's signature was not taken at the time of registration.

11. In view of the facts noted above we accept the finding of the Court below that the execution of the document by Shafat Begam was not proved. It was admitted by the defendants that Shafat Begam used to receive Rs. 30 a year, but they alleged that this amount was paid to her as she was entitled to the same by virtue of a deed of agreement executed by the two brothers in her favour contemporaneously with the execution of the deed of relinquishment by her. It it

therefore manifest that Shafat Begam was in receipt of the profits of the property. It may be that she} did not receive her full share of the profits, but that does not matter. Moreover, Shafat Begam and her two brothers were in the position of co-owners and there is no evidence of her ouster in the present case. The suit giving rise to these appeals was filed within 12 years of the death of Shafat Begam. There was therefore no substance in the plea of limitation raised by the defendants.

12. Similarly Section 41, T.P. Act, had no application to the facts of the case. The transferees no doubt asserted in the written statements filed by them that they were transferees in good faith, but not one of the transferees entered the witness-box to substantiate the assertion. There was no evidence in the case to show that before taking the transfers the transferees made any bona fide enquiries as to the title of their transferors. If they had made the least inquiry they would have come to know that Shafat Begam, as one of the heirs of Nadir Ali, had a share in the property in dispute. It was not alleged by any of the transferees that they accepted the transfers on being assured that Shafat Begam had executed a deed of relinquishment. The plea of estoppel raised by the defendants was also rightly rejected by the learned Judge of the Court below. It was not suggested by any of the transferees I that they were misled by any act, omission or declaration of Shafat Begam. It is obvious therefore that the mere fact that some, of the transferees have spent money in making constructions cannot be utilized by them in bar of the plaintiffs' claim.

13. We now proceed to consider an argument based on the exemption of Mazammil Begam's heirs from the claim. It is argued on behalf of the defendants that in a suit for ejectment the omission to implead any of the persons in possession is fatal to the suit, irrespective of the fact whether the property claimed is held by tenants in common or joint tenants or by coparceners. It is said that, apart from any of the provisions in the Civil Procedure Code, relating to the non-joinder of necessary parties or the abatement of a suit, a decree in a suit for ejectment cannot be passed unless all the parties in possession of the property in dispute are before the Court, as the decree will not be binding on the person in possession who is not impleaded in the suit, and, as such, will be infructuous. It is contended that this principle also applies to the claim preferred by one of the heirs of a deceased Muhammadan against his co-heirs. In short, it is argued that if one of the heirs of a deceased Muhammadan, who is not in actual possession of the share to which he is entitled, sues his other co-heirs for possession of his shares and omits to implead one of the co-heirs in possession the suit is not maintainable. In support of this contention reliance has been placed on the decision in Haran Sheikh v. Ramesh Chandra 1921 Cal. 622, Arunadoya Chakrabarty v. Mahammad Ali 1928 Cal. 138, Faqira v. Hardewa 1928 All. 172 and Ram Dei Misrain v. Jurawan Misir 1930 All. 762.

14. The learned Counsel for the plaintiff-respondents, on the other hand points out that this point was not raised in the Court below and, accordingly, contends

that the defendants ought not to be allowed to raise the point in appeal. He rightly maintains that if this question had been debated in the Court below, the plaintiffs could have met the contention of the defendants by proving that all the persons in possession were before the Court, and that Muzammil Begam had no share in the property in dispute on the date of the institution of the suit. In this connection he has invited our attention to a deed of wakf executed by Zabaishi Begam the mother of Muzammil Begam, and the brothers of Muhammil Begam on 7th February 1923. The deed is printed at p. 62 of the record of First Appeal No. 145 of 1930. It is recited in that deed that Muzammil Begam made a gift of her share in the property in dispute in favour of Zabaishi Begam. We consider that the learned Counsel for the plaintiffs is justified in putting forward the contentions noted above. If an issue as regards the effect of the exemption of Muzammil Begam's heirs on the suit had been raised in the Court below, the plaintiffs could very well have met the point by proving that Muzammil Begam had no share left, and, as such, all the persons in possession of the property in dispute were before the Court. We are therefore of the opinion that it would be unfair to the plaintiffs to allow the defendants to raise this point. But as the question, of law has been argued at some length before us, we propose to give our decision on the point.

15. The general rule laid down by the Legislature is that no suit shall be defeated by reason of non-joinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it (vide, Order 1, Rule 9, Civil P.C. It I is in conformity with this rule that in Order 22 of the Code, that deals with the death of parties during the pendency of a suit or appeal, the Legislature has provided in express terms that the omission to take steps to bring on the record the legal representatives of a deceased plaintiff or defendant will result in the abatement of the suit only so far as the deceased plaintiff or defendant is concerned. Similarly the rule laid down by Order 34, Rule 1, Civil P.C., that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage, is "subject to the provisions" of the Code, i.e. subject to the provisions of Order 1, Rule 9, Civil P.C., and of other rules in Order 1, that provide about "parties to suits." It is manifest from these provisions that the non-joinder of a necessary party cannot, by itself, be a ground for dismissing the suit, and that the Court is bound to adjudicate on the rights of the parties actually before it.

16. There is however another well recognized rule which, so to say, constitutes an exception to the general rule noted above. That rule is that a Court will refrain from passing a decree which would be ineffective and infructuous, and the reason for this rule is obvious. It would be idle for a Court to pass a decree which would be of no practical utility to the plaintiff, and be a waste paper in the sense that the relief that it purports to grant to the plaintiff cannot be vouchsafed to him because of the objection of some person who is not bound by that decree. But this rule has no application to cases in which, notwithstanding the fact that

some of the persons interested in the subject-matter of the suit are not parties to the suit, the Court is in a position to pass a decree that is capable of execution and cannot be rendered nugatory at the instance of persons not made parties to the suit. The inability of the Court to pass an effective decree, when all the parties interested in the subject-matter of the suit are not before it, may be due either to the nature of the action or to the nature of the interest that the person, who is not made a party to the action, has in the subject-matter of the suit. An illustration of the former class of cases is furnished by suits for partition or dissolution of partnership and rendition of account. In such cases in the absence of all the interested parties it is impossible for the Court to deal with the matter in controversy between the parties before it and to pass an effective decree. In a suit for partition of joint property, if one of the owners is not joined as a party, the Court will withhold its hand and not proceed to pass a decree, as a decree for partition must deal with the share of all the persons interested in the property sought to be partitioned, and in the absence of one of the owners, his share can obviously be not affected by the decree. Similarly in a suit for dissolution of partnership and rendition of accounts it is impossible for a Court to have the accounts adjusted between the partners inter se unless all the partners are before it, and, as such, the omission to implead one of several partners is always fatal to the suit. It is needless to say that we are not attempting to lay down an exhaustive list of the cases in which the rule laid down in Order 1, Rule 9, Civil P.C., cannot be given effect to because of the inability of the Court to pass an effective and an operative decree.

17. Similarly the nature of the interest in the subject-matter of a suit possessed by a person, who is not a party to the suit, may be such as to render it impossible for the Court to pass an effective decree in his absence. Such is the case when the suit is with respect to some property belonging to a joint Hindu family and all the coparceners are not made parties to the suit. In such a case the Court cannot pass a decree granting reliefs to the plaintiff without prejudicially affecting the right of the coparcener who is not a party to the suit, and as such, the Court cannot, but dismiss the suit. But the rules noticed above have no application to cases in which the interest of the person, who has not been impleaded as party in the subject-matter of the suit, is ascertained or ascertainable, as in such cases the decree, while binding the interests of the persons who are parties to the decree, cannot adversely affect the separate and distinct right of the person who has not been made a party to the suit. In such cases the short answer to the objection raised by the absent party is that his interest being distinct and separate from the interests of the persons who are parties to the decree, the decree, while operative against the interests of the persons who are parties to the decree, can in no way adversely affect his right or interest in the property in suit. The interests acquired by the heirs of a deceased Muhammadan in his property are always definite, distinct and ascertained, and, as such, the absence of one of the co-heirs from a suit brought by another co-heir for possession of his share cannot be a ground for dismissing the suit. The

principles enumerated above were laid down by the decisions in *Faqira v. Hardewa* 1928 All. 172 and *Ram Dei Misrain v. Jurawan Misir* 1930 All. 762, and these decisions, though relied upon by the learned Counsel for the defendants, are of no help to him. The case of *Haran Sheikh v. Ramesh Chandra* 1921 Cal. 622, has also no application to the facts of the case before us. In that case the plaintiffs prayed for a declaration of a right of way as a village road over the disputed land and for removal of an obstruction thereon, but omitted to implead one of the persons interested in the servant tenement, and it was held that the omission was fatal to the suit. It is obvious that a decree passed in that suit in favour of the plaintiffs would have been infructuous as the decree would not have been binding on the owner of the servient tenement who was not arrayed as a defendant. The decision in *Arunadoya Chakrabarty v. Mahammad Ali* 1928 Cal. 138, appears to favour the contention of the defendants. It was held in that case that in an action for ejectment, if any of the persons in possession is left out, a decree passed in the suit is infructuous as the person who was not made a party remains in possession as not being affected by the decree and "the persons ejected as being bound by the decree can always come in under the person who remains in possession." The learned Judges also observed that

there is a certain amount of risk involved in not making the persons in actual possession defendants, for, in execution of the decree, persons may happen to be turned out who may then bring actions against the plaintiff for wrongful dispossession, not being bound by the decree.

18. If the learned Judges intended to lay down that in every action for ejectment the omission to implead one of the parties in possession is fatal to the suit, we, for the reasons given above, are unable to agree with the decision. When the interest of the person not made a party to the suit is distinct from the interests of the persons who are parties to the suit, there is no justification for not dealing with the matter in controversy so far as the rights and interests of the parties actually before the Court are concerned. The position may well be illustrated by the following example: A Muhammadan dies leaving five sons and each of the sons inherits a 1-5th share in the property of the deceased. Four of the sons enter into actual possession of the property and the fifth son is out of possession. It is obvious that each of the four sons is in possession of $(1-5 \times 1-4)$, a 1-20th share of the property in excess of his legitimate share, If the son who is out of possession brings a suit for possession and omits to implead one of the four sons, there is no reason why he should not be granted a decree for so much, of his share as is in possession of the three sons who are made parties to the suit. In such a case the plaintiff can be granted a, decree for 3-20th of the property and the decree can in no way adversely affect the 1-20th share of the plaintiff that is in possession of the brother who has not been made a party to the suit.

19. For the reasons given above we hold that the omission to implead the heirs of Muzammil Begam could not be a ground for dismissing, the suit. We may however add that any decree passed in the present suit will in no way be binding

on Muzammil Begam's heirs. We have stated above that there is a direction contained in the decree passed by the Court below that the share decreed to the plaintiffs is first to come out from the share in the hands of Hamza Ali Khan and Sher Ali Khan and, if the share in their hands is less than the share to which the plaintiffs are entitled, then the deficiency in the plaintiffs' share is to be made good from the share in the hands of the transferees. There is no justification for subjecting the decree in the plaintiffs' favour to the conditions noted above. The plaintiffs are entitled to get their 14-80 share from the properties in possession of all the defendants, i.e., the plaintiffs can execute the decree for recovery of their 14-80 share from both the holdings No. 1 and No. 4.

20. For the reasons given above we allow this appeal to this extent that we modify the decree passed by the Court below by granting to the plaintiffs a decree for possession of 14-80 share in holdings Nos. 1 and 4, mentioned above as against all the defendants. The cross-objections filed by the defendants are dismissed with costs. As the appeal has failed against the plaintiff-respondents and has succeeded against the transferees we direct that the defendant-appellants must pay the costs of the plaintiff-respondents and that the defendants transferees must pay half of the costs incurred by the defendant-appellants in this appeal. Costs of the Court below as in the decree of that Court.