

(1918) 11 PAT CK 0005
In the Patna High Court

Musammat Dulhin Sona Kuer and Others	APPELLANT
Vs	
Maulvi Jamil Ahmad	RESPONDENT

Date of Decision : 07-11-1918

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151
Transfer of Property Act, 1882 — Section 52

Citation : AIR 1918 Patna 668 : 48 Ind. Cas. 779

Hon'ble Judges : Dawson Miller, C.J.; Mullick, J

Bench : Division Bench

Judgement

Mullick, J.—This application for revision arises out of a dispute as to the possession of a portion of the property of Musammat Fasihan, a Muhammadan lady, who died on the 2nd July 1909, leaving her surviving two sons Muhammad Umar and Kalimuzaffar, and four daughters named Habiba, Fatima, Saira and Salima. Shortly before her death the lady had executed various deeds of gift in respect of certain properties in favour of Habiba, and her two sons and on the 26th March 1912 Fatima and Saira brought a suit in the Court of the Subordinate Judge of Patna seeking to set aside these transactions and praying for the administration of the estate of the deceased. Four separate and somewhat similar suits were lodged by Salima but with these we are not concerned. The suit lodged by Fatima and Saira was transferred to the Court of the District Judge of Patna and numbered 6 of 1913. Salima's suits were numbered 9, 10, 11 and 12 of 1913.

2. In Suit No. 6 of 1913, the District Judge held that all the deeds of gift, except that in favour of Kalimuzaffar dated the 7th May 1909, were invalid and he directed a partition of all the lands of the estate with the exception of those covered by the said deed of gift.

3. There was then an appeal to this Court which was disposed of on the 18th July 1917 by Chamier, C.J., and Jawala Prasad, J. The learned Judges held that the deed of gift in favour of Kalimuzaffar was also invalid having been made without

the consent of other heirs and contrary to the intention of the donor. The following passages from the judgment of Jwala Prasad, J, shew the reliefs which were granted to the plaintiffs:

All the deeds of gift including the Hiba of the 7th May must be set aside and declared invalid and inoperative. The deeds of gift, therefore, do not stand in the way of the heirs of Bibi Fasihan taking their shares under the Muhammadan Law. Her husband Sobhan inherited one fourth share of the lady's properties: her two sons Muhammad Umar and Kalimuzaffar each took 632 and each of her four daughters, Habiba, Fatima, Saira and Salima took 3/32 of the properties left by her. The heirs of such of the aforesaid persons as have died since the death of the lady have succeeded to the shares inherited by their predecessors. The properties left by Musammat Fasihan are, therefore, liable to be distributed among her heirs and heirs of her heirs, unaffected by dealings or transfers of interests in excess of their legal shares. As the donees and the heirs have been dealing with the properties since 1909 and the matter is complicated by the claims of creditors and others and thus the appeal gives each of the heirs a decree for his or her share in, the ordinary way. The result of passing such a decree would be endless litigation. The proper course appears to be to direct a general administration of the property of Musammat Fasihan under the orders of the Court.

"I would dismiss with costs Appeals Nos. 73 and 219 arising out of Suit No. 6, Appeal No. 42 arising out of Suit No. 9 and Appeal No. 339 arising out of Suit No. 11 I would allow with costs Appeal No. 112 arising out of Suit No. 6 and Appeal No 581 arising out of Suit No. 6 and set aside the deed of May 7th, 1909. I would declare that the heirs of she deceased are entitled to the shares specified above in the properties of Musammat Fasihan. I would remand Suits Nos. 6 and 9 of 1913 to the Court below, in order that in the presence of parties a preliminary decree may be passed with reference to Order XX, Rule 13, ordering such accounts and enquiries to be taken and made and giving such directions as may appear to be necessary. It would probably be necessary to appoint a Receiver or Commissioner to carry out the administration. Arrangements must be made to pay off the debts of the deceased as soon as possible. Those heirs or representatives of heirs who have been in possession of parts of the property should be debited with what they or their heirs claiming under them have received.

4. In consequence of the above decree the District Judge on the 22nd September 1917 made a preliminary decree for administration and on the 25th January 1918, after notice upon the various mortgages and, creditors, appointed a Receiver to carry out the same.

5. It appears that on the 4th February 1913, that is about a year after Saira and Fatima's suit was instituted, Muhammad Umar mortgaged the proprietary interest in certain Mauzas to Musammat Dulhin Sona Kuer. The consideration at first was fixed at Rs. 85,000, out of which Rs. 60,000 were to be paid by

Musammat Sona Kuer to the creditors of Mohammad Umar and Rs. 25,000 to one Kesho Das, who held a mortgage from Musammat Fasihan of certain properties which included the properties covered by Muhammad Umar's mortgage. Kesto Das refused to take the amount tendered to him, and, therefore, for all intents and purposes the consideration of Umar's mortgage must be regarded to have been the sum of Rs. 60,000 which was due to be paid and was paid by Dulhin Sona Kuer to his creditors. Sona Kuer sued upon her mortgage and on the 25th February 1915 obtained a decree for Rs. 72,958.

6. On the 20th June 1916 she brought the mortgaged properties to sale and purchased them herself. It is alleged that a sum of Rs. 37,000 is still due to her under her decree.

7. In September 1916 she got possession of all the mortgaged properties except three, which had subsequently to her mortgage been sold for arrears of Government revenue and had passed out of the possession of the mortgagor. It is not disputed that her possession in consequence of her auction-purchase still continues,

8. When the Receiver was appointed, Sona Kuer refused to deliver up possession to him and upon the matter being referred to the District Judge, he on the 22nd March 1918 decided in favour of the Receiver, It is against that order that Musammat Sona Kuer prefers the present application for revision, namely, No. 75 of 1918.

9. Revision No. 138 of 1918 has been preferred by another set of transferees, namely, Ram Prasad Singh and others, and against whom a similar order has been made directing delivery of possession to the Receiver.

10. I will deal first of all with Case No. 75 of 1918 which relates to Sona Kuer's properties.

11. It is unnecessary to consider what would have been the position if the transfer by Muhammad Umar had been made before the institution of the administration suit. Clearly the transfer is affected by the provisions of Section 52 of the Transfer of Property Act regarding *lis pendens*. I agree with the appellant that the transfer does not become *ipso facto* void, but if the provisions of Section 52 have any meaning at all, then as soon as the Receiver was appointed to carry out the administration, the Court was entitled, if it so chose, to consider the transfer a nullity and to regard the property, as still in the hands of Muhammad Umar and I do not think there can be any doubt that the Court had full authority to direct the Receiver to take possession.

12. It is contended that under Order XL, Rule 1, Sub-clause 2, the Court is not authorised to remove from the possession or custody of property any person whom any party to the suit has not a right so to remove; that Muhammad Umar as one of the heirs of Musammat Fasihan was a co-owner who had full power to give a mortgage to the extent of his share in the estate and that the other co-

owners could only eject him if it was shown that he had taken possession of more than his proportionate" share. That is an argument which might have had some force if the transfer had been one before the suit, but it being pendente lite I do not think there can be any doubt that the plaintiffs in the administration suit were competent to ask the Court to take possession of all the properties in the custody not only of the co-owners but also of transferees who had obtained possession by transfers subsequent to the institution of the suit. Muhammad Umar has died since the suit was instituted and it is urged that in the absence of a specific order in the preliminary decree of the 22nd September 1917 directing his co-owners to deliver up the properties in their possession, the present order of the Court is ultra vires. I am unable to appreciate this argument. The preliminary decree read with the appellate decree of the 18th July 1917 gives power to administer the property generally and to, appoint a Receiver. The Receiver's powers are regulated by Order XL of the CPC and I am of opinion, the only ground upon which his possession can be resisted is Sub-clause 2, which has already been considered and held to operate in favour of the Receiver and not the appellant.

13. The learned Vakil for the appellants next relies upon the judgment of this Court, dated the 15th July 1917, and contends that it was the intention of the learned Judges, when directing a general administration, to preserve the possession of the various transferees, as far as possible, to the extent of the shares of their transferors.

14. It is admitted that Muhammad Umar had no right to transfer the specific properties in question and that he had merely an inchoate right to the residue after the estate was fully administered by reason of his joint undivided share in the estate. But it is contended that the intention of this Court was that the administration should be carried on and accounts taken leaving Sona Kuer in possession till it was ascertained that she was holding more than Muhammad Umar's share. I have in vain examined the appellate judgment of this Court for an indication of this intention. The passages I have cited certainly do not support this interpretation and I can find no others which give us any assistance in the matter. Clearly the administering Court will be put to the gravest inconvenience if it cannot take possession of the properties in the custody of the co-owners, and it is conceivable that under certain circumstances further proceedings may be reduced to a standstill if this procedure were adopted. It may be the Court's management would be more beneficial and more efficient than that of the mortgagee or that the sale of the zeraf lands might save the rest of the property. There may be many reasons to support the decision of the learned District Judge to take the property into his own custody and I do not think that the appellant has any cause for complaint, seeing that she took the mortgage with full notice after the institution of the suit and knowing that she would be bound by whatever orders the Court thought fit to pass in the suit.

15. Mr Kulwant Sahay on behalf of the appellant has offered to deposit a year's

rent in Court as security against the risk of the property being sold for arrears of Government revenue, but I do not think" that any arrangement of this kind can be accepted in view of the fact that unless all the properties are brought under the custody of the Court, the Court cannot come to a satisfactory conclusion as to the real value of the assets. Other transferees may make the same claim and the appellant is, in my opinion, not entitled to and ought not to be allowed any special preference as against them. The appellant might perhaps resist the Receiver if she could shew that she had a right to suppose that her vendor was mortgaging for the purpose of paying Musammat Fasihan's debts. She would then be competent to invoke the equitable principle which was recognised in *Price v. Price* (1887) 35 Ch. D. 297 : 56 L.J. Ch. 530 : 56 L.T. 842 : 35 W.R. 386. But in the case before us, although an attempt has been made to shew that a sum of Rs. 25,000 out of the consideration money was intended to pay off Musammat Fasihan's mortgage to Kesho Das, it is quite clear that no part of this money was in fact the consideration for Sona Kuer's mortgage and that the true consideration was the sum of Rs. 60,000 only. This sum of Rs. 25,000 is said to have, been, after Kesho Das refused to accept it, deposited in the Bank of Bengal and subsequently withdrawn by the appellant herself.

16. It is next contended that on the 2nd January 1917 Musammat Sona Kuer paid a sum of Rs. 36,000 to Kesho Das to discharge the incumbrance created by Musammat Fasihan on two Mauzas. This payment is said to have come about in the following way. Kesho Das sued upon his prior mortgage from Fasihan, which (covers not only the properties now in suit but other properties, and on the 26th February 1916 brought the mortgaged properties to sale. On the 15th December 1916, the Subordinate Judge set aside the sales on the ground of fraud and dismissed the execution case. Against that order there was an appeal by the auction-purchasers to the High Court, which affirmed the Subordinate Judge's order setting aside the sale upon the judgment-debtor paying to the auction-purchasers a certain sum as compensation. On the 2nd January 1917, Sona Kuer came in and paid to Kesho Das the sum of Rs. 36,000 for the purposes of freeing from his charge the properties covered by her mortgage. I fail to see how this payment can be considered sufficient to subrogate Sona Kuer to the rights of Kesho Das. It seems settled that there must be a satisfaction of the whole mortgage before a person interested can claim to be subrogated to the position of a prior mortgagee [*Gurdeo Singh v. Chandrika Singh* 1 Ind. Cas. 913 : 36 C. 193 : 5 C.L.J. 611]. Here according to the appellant's own case there was no satisfaction of Kesho Das' full decree but only that portion of it which fell upon the properties covered by the present proceedings. The principle of subrogation, therefore, does not assist the appellant in respect of the mortgage of Kesho Das.

17. It is, however, said that Kesho Das agreed to a splitting up of his mortgage. Of this there is no evidence. It is said the point was taken before the learned District Judge, but the petition of the appellant before him does not disclose any such contention in clear and unequivocal terms. There was certainly no evidence tendered by the appellant on this question of fact. The truth is that a case is now

being made in this Court which, even if indicated, was never developed in the Court below. The appellant is not entitled to raise a point of this kind in appeal and much less in revision. Indeed Mr. Kulwant Sahay's argument on this part of the case convinces me that complicated questions as to the rights of transferees are certain to arise and that they can only be satisfactorily decided if the Court is in custody of the whole estate. Mr. Khurshed Husnain agrees that if it is found by the Receiver that Kesho Das has in fact split up his mortgage, the sum paid by the appellant for the two Mauzas will be refunded to her.

18. In the view I take of the merits it becomes unnecessary to consider whether an appeal lies in this case or not. As the point, however, has been argued I will deal with it shortly. Sona Kuer objects to deliver possession to the Receiver appointed by the Court under Order XL, Civil Procedure Code, and in my opinion an appeal lies under Order XLIII against the order of the learned District Judge; The appellant, following a decision of this Court which laid down that no appeal lay if the person aggrieved was not a party to the suit, has filed an application for revision. But in a recent case we considered all the authorities and held that the proper remedy of a person in the position of the appellant was by appeal. We have, therefore, no power to interfere unless we accept the application for revision as a memorandum of appeal.

19. Now there is ample authority for accepting an appeal which is found incompetent as an application for revision, and there is also some authority for the converse process of converting an application for revision into a memorandum of appeal. In my opinion this Court has ample jurisdiction, in exercise of its inherent powers u/s 151, to condone in special cases the misapplication of the Civil Procedure Code, if the provisions of the law as regards limitation and Court-fees are complied with.

20. Here the applicant's fault was that she misconceived her remedy by reason of a judgment of this Court and if she had, instead of describing her application as an application for revision, described it as a memorandum of appeal she would have been competent to invoke the assistance of the Court. It is admitted that there is no defect as regards Court-fees and limitation and having regard to the special circumstances of this case, I think the interests of justice require that we should accept the application as a memorandum of appeal. The appellant, however, must be confined to the grounds taken in her application and she cannot be allowed to urge any ground which she had not taken in it in support of her appeal.

21. The result is that in the view that I take the appeal must be dismissed with costs.

22. This judgment disposes of Revision No. 138 of 1918 also. That application must also be treated as an appeal. The facts in this case are simpler than in Case No. 75. The mortgage of Muhammad Umar in this case was in favour of Ram Prasad and others. It was executed on the 3rd November 1913 for Rs. 9,000 and

was followed on the 21st January 1917 by a sale in favour of the mortgagees by Umar for Rs. 16,000 and the appellants, after satisfying the mortgage charge, are alleged to have paid the balance to Umar in cash. The sale deed mentions the fact that, an appeal against the decision of the District Judge is pending in the High Court and it appears that in order to indemnify himself against the risk of Umar's title under the hiba being declared invalid, the mortgagees took a security bond by way of indemnity. So there can be no doubt that the principle of *les pendens* is fully applicable in this case and if that is so, the transfer is invalid for the purpose of affecting the rights of the plaintiff and the Receiver is clearly entitled to take possession.

23. The application for revision treated as an appeal as in the last mentioned case is dismissed with costs. The costs in both appeals will be calculated on the assumption that the value of the appeals is above Rs. 5,000 in each case.

Dawson Miller, C.J.

24. I agree.