
(1924) 02 AHC CK 0066
In the Allahabad High Court

Musammat Mubarak-Un-Nissa and Another	APPELLANT
Vs	
Muhammad Raza Khan and Others	RESPONDENT

Date of Decision : 13-02-1924

Acts Referred:

Transfer of Property Act, 1882 — Section 41

Citation : 79 Ind. Cas. 174

Hon'ble Judges : Lindsay, J;Kanhaiya Lal, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. The dispute in this appeal relates to the property of Sardar Khan. Who died on the 24th of September 1907, leaving two daughters, Mst. Mubarak-un-nissa and Mst. Bismilla Begam, who are the plaintiffs, and three grandsons Muhammad Raza Khan, Maqsud Khan and Daud Khan by a predeceased son, who are the defendants Nos. 1, 2 and 3. He also left a brother Mahmud Khan and a nephew, Nazar Muhammad Khan, who was the son of one of his predeceased brothers. Mahmud Khan had two sons, Usman Khan and Chidda Khan. The plaintiff Mst. Bismilla Begam was married to Usman Khan, who died in the life-time of Mahmud Khan,

2. On the death of Sardar Khan his property was entered in the names of the defendants Nos. 1, 2 and 3. The plaintiffs took no steps to get their names entered in the Revenue papers in regard to the share of the property, now claimed by them. Their case was that the property in dispute devolved on the death of Sardar Khan on the plaintiffs to the extent of a two-thirds share and on Mahmud Khan to the extent of the remaining one-third; that Mahmud Khan told them that he had got their names entered in the Revenue papers in respect of their two thirds share, and that they had been in receipt of the profits of their shares from Mahmud Khan till 1324 Fasli. Their complaint was that the defendants Nos. 1,2 and 3 had wrongfully made certain mortgages of the property in question in favour of the other defendants and that it was not until

some of the latter defendants had obtained a decree for the sale of the properties mortgaged with them that they came to know that their names were not entered in the Revenue papers. The present suit was accordingly filed by them for the recovery of possession of the two-thirds share of the properties in the villages of Patwari, Nagli Biloch and Basantpur, and for mesne profits. A declaration was also claimed that the mortgages effected by the defendants Nos. 1, 2 and 3 in favour of the other defendants were not valid and binding on them.

3. The suit was principally contested by Narain Das and his sons, and Chhadammi Lal. Their defence was that the plaintiffs had never been in possession of any portion of the property in dispute and that the claim was barred by limitation and by Section 115 of the Indian Evidence Act and Section 41 of the Transfer of Property Act. It was further pleaded by some of the contesting defendants that the plaintiffs had relinquished their claim to a share in the property of their father at the time when mutation of names was effected in favour of the defendants Nos. 1, 2 and 3. It was admitted that Ibrahim Khan, the father of the defendants Nos. 1, 2 and 3, had died in the life-time of Sardar Khan. The Court below found that the defendants Nos. 1, 2 and 3 were in possession of the property in dispute as trespassers; that the plaintiffs had never been in receipt of the profits of the property in question, and that the claim was barred by limitation. It further found that the plaintiffs had relinquished their claim to a share in the property of their father and that the mortgages had acted, after reasonable care and inquiry, in taking the mortgages now impeached, from the ostensible owners, whose names were entered in the Revenue papers, for consideration, and in good faith.

4. The first question for consideration in this appeal is whether the claim of the plaintiffs was barred by limitation. The lower Appellate Court was apparently led to think, by what was stated in the plaint and which does not appear to have been contested by the other side, that the defendants Nos. 1, 2 and 3 were not entitled to any share in the property of their grandfather Sardar Khan; but that is not, however, so. Under the Muhammadan law, on the death of Sardar Khan, the property devolved on the two plaintiffs to the extent of a two-thirds share, and the remaining one-third share devolved on the defendants Nos. 1, 2 and 3 as residuary of the first class. The defendants Nos. 1, 2 and 3 cannot, therefore, be regarded as trespassers; and on the principle laid down in *Corea v. Appuhamy* (1912) A.C. 230 : 81 L.J.P.C. 151 : 105 L.T. 836. no claim to adverse title can be set up by these defendants because among co-sharers the possession of one co-sharer cannot become adverse to another except where the co-sharer in possession has explicitly denied and repudiated the title of the others and has been in possession since then for more than 12 years. The plaintiffs produced evidence to show that they had been in receipt of the profits up to 1324 Fasli but that evidence is of little value. One of the plaintiffs was living in a village in the Meerut district; the other plaintiff was living in the house of Chhidda Khan, the brother of her deceased husband. The defendants Nos. 1, 2 and 3 had applied for the mutation of their names on the 22nd November 1907 and they got an order

for mutation in their favour without any objection some time in February 1908. After the death of Sardar Khan, Mahmud Khan was appointed lambardar of the villages in question, and there is no reliable evidence to show that any profits were paid by Mahmud Khan to any of the plaintiffs. After the death of Mahmud Khan, Nazar Muhammad Khan was appointed lam-bardar of the village ; but Nazar Muhammad Khan has not been produced ; and we see no reason for differing from the view taken by the learned Subordinate Judge on this matter. The finding of the learned Subordinate Judge that the possession of the defendants Nos. 1, 2 and 3 was adverse from its inception, is, however, vitiated by the fact that, according to his view, the defendants Nos. 1, 2 and 3 were trespassers, whereas they were really co-sharers; and as co-sharers there is nothing to show that they had ever set up an express ouster against their aunts or that they had set up an adverse title within their knowledge. The claim of the plaintiffs as against these defendants cannot, therefore, be deemed to be barred by limitation or by adverse possession within the meaning of Article 144 of the Indian Limitation Act.

8. The next question for consideration is whether the plaintiffs had ever surrendered their claim to a share in the property of their father. The only evidence produced on the point is that of Ahmad Baksh who states that some time before his death Sardar Khan had stated that his property should be entered in the names of his grandsons after his death. In the application made for the mutation of names after the death, of Sardar Ahmad Khan by the defendants Nos. 1, 2 and 3 no such oral devise was referred to. The claim was then based on inheritance and we do not consider that the evidence of Ahmad Khan Baksh on that point can be accepted as reliable. The learned Subordinate Judge refers to the conduct of Mahmud Khan in not setting up a claim to what was supposed to be his share in the property of his brother ; but as we have already pointed out that reasoning proceeds on a misapprehension of the manner in which the property devolved on the death of Sardar Khan. Mahmud Khan was not entitled to any share in the property of Sardar Khan in the presence of the plaintiffs and the defendants Nos. 1, 2 and 3 and his conduct in not applying for the entry of his name is explicable and cannot affect the title of the plaintiffs to a share in the property of their father.

9. The learned Subordinate Judge, however, proceeded to base his decision against the plaintiffs on a third ground which was stronger, namely, that the claim was barred by Section 41 of the Transfer of Property Act. It appears from the description of mortgaged property given in the deeds of mortgage produced by the mortgages that the property in dispute had been partitioned apparently some time after the death of Sardar Khan between the different co-sharers of the villages in question and that the defendants Nos. 1, 2 and 3, along with some of the other "co-sharers, had made mortgages for consideration in favour of Narain Das and his son Kishori Lai and some of the other defendants between 1911 and 1917. All these deeds of mortgage given a detailed description of the mortgaged property with the mahals to which they appertained at the time of the

mortgage; and we have no doubt that copies or extracts from the khewats must have been available at the time these mortgage-deeds were written in order to supply the parties to the transaction with an accurate description of the entries that existed at that time in the Revenue papers in regard to them. These entries must naturally have satisfied the mortgages that the mortgagors had a good title to the properties, which they were mortgaging; and we have no doubt that, acting on those entries, the mortgages advanced the considerations mentioned in the deeds of mortgage. As observed by Lindley, L. J., in *Bailey v. Barnes* (1894) Ch. D. 25 : 63 L.J. Ch. 73 : 7 R. 9 : 69 L.T. 542 : 42 W.R. 66.

A purchaser of property is under no legal obligation to investigate his vendor's title. But in dealing with real property, as in other matters of business, regard is had to the usual course of business; and a purchaser who wilfully departs from it in order to avoid acquiring a knowledge of his vendor's title is not allowed to derive any advantage from his wilful ignorance of defects, which would have come to his knowledge, if he had transacted his business in the ordinary way.

10. There was nothing in the course of dealings connected with the property in dispute, which would have required on the part of the mortgages who lived in other places greater circumspection than appears to have been exercised in the present instance by an examination of the entries in the Revenue papers. The entries would, in the ordinary course, have been sufficient to satisfy a mortgage of the title of the mortgagor to mortgage the properties in question ; and we do not consider that there were any circumstances rendering a further enquiry on his part necessary. Section 41 of the Transfer of Property Acts lays down that, where, with the consent express or implied, of the persons interested in the immovable property, a person is the ostensible owner of such property, and transfers the same for consideration, the transfer shall not be avoidable on the ground that the transferor was not authorised to make it provided the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

11. The plaintiffs had, by their conduct or omission, allowed the defendants Nos. 1, 2 and 3 to get their names entered in the Revenue papers to their exclusion. These entries existed from as far back as 1908 and remained unchallenged till the present suit was filed. The mortgages advanced money on the strength of these entries to the persons whose names were entered in the Revenue papers as the owners of these properties. They acted in good faith. There was no circumstance established which rendered it necessary for them to take greater care than what appears to have been taken in the present instance and we consider that the mortgages are sufficiently protected in what they did by the above provisions.

12. On behalf of the plaintiffs reliance has been placed on the decision in *Partap Chand v. Saiyida Bibi* 23 A. 442 : A.W.N. (1901) 137, and *Azima Bibi v. Shamalanand* 17 Ind. Cas. 758 : 40 C. 378 : 17 C.W.N. 121 : 13 M.L.T. 159 : (1913) M.W.N. 125 : 11 A.L.J. 169 : 17 C.L.J. 303 : 15 Bom. L.R. 423 : 25 M.L.J. 55

(P.C.) ; but the circumstances of each case would naturally vary and the conclusion based on facts found in one case cannot be of any assistance in the determination of a similar issue on the facts found in another case. In the former case it was found that the transferee could have ascertained that the property which the transferors professed to transfer was acquired in their names by their father, who was a Tahsildar, when they were Children of tender years, and that there were other circumstances which rendered it incumbent on the transferee not to rest satisfied with merely seeing that the names of the transferors were entered in the Revenue records. In the latter case the transferee was a pleader from whom greater circumspection would naturally have been expected; and the main ground on which the transferee sought protection was that he thought that the transferor who would ordinarily have been governed by the Muhammadan Law had still retained the Hindu Law in the matter of inheritance. The plea set up on behalf of the transferee was of such an unusual nature that their Lordships of the Privy Council felt constrained to think that he had not discharged the onus which lay upon him of making due enquiry in regard to the manner in which the property had descended before taking the mortgage. A reference has; also been made to the decision in *Muhammdd Sulaiman v. Sakina Bibi* 69 Ind. Cas. 701 : 20 A.L.J. 654 : AIR 1922 392 : 44 A. 674, but in that case it was found that the transferee, though aware of the title of the original owner before he had taken the transfer, had omitted to make further enquiry as to how that title had passed from the original owner to the transferor. No, men special circumstances exist in the present case. On the other hand, the circumstances of the present case are somewhat similar to those in *Khwaja Muhammad Khan v. Muhammad Ibrahim* 25 A. 499 and we are satisfied that there was nothing in the transaction to require the mortgagees to make a further enquiry as to the real title to the property beyond what appeared from the entries in the Revenue papers.

13. The claim of the plaintiffs is, therefore, barred as against the transferees in regard to the property mortgaged with them. Their claim as against the defendants Nos. 1, 2 and 3 must, however, succeed. We allow the appeal accordingly and decree the claim of the plaintiffs against the defendants Nos. 1, 2 and 3 with costs here and hitherto; but dismiss it as against the remaining defendants who will get their costs here and hitherto from the plaintiffs appellants. The costs in this Court will include fees on the higher scale.

14. Among the papers printed by the defendants-respondents there are several papers which do not relate to the properties in dispute. There are others which were equally unnecessary to be printed for the purposes of this appeal. In fact, no reference has been made to most of these papers. We direct accordingly that the costs incurred in the translation and printing of the tabular matter exhibited from pages 116 to 181 of the printed record shall be excluded from the defendants costs.