
(1921) 09 MAD CK 0021
In the Madras High Court

P.S. Narayana Aiyar

APPELLANT

Vs

Biyari Bivi alias Kathun Bivi and Others

RESPONDENT

Date of Decision : 08-09-1921

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 64

Citation : AIR 1922 Mad 221 : (1922) ILR (Mad) 103 : (1921) 14 LW 524 :
(1921) 41 MLJ 557

Judgement

1. The decision appealed against gives plaintiff a charge for two lakhs of rupees on the properties purchased by 3rd defendant, appellant, at a sale

held in execution of 1st defendant's money decree against 2nd defendant, after the dismissal of plaintiff's claim.

2. The nature and extent of Plaintiff's right over the properties depends on the effect of a series of transactions originating in the liability of the 1st

defendant, her husband, for mahar settled at ₹22,500 when their marriage took place in 1884. This liability is referred to in Exs. E and F and is

not disputed before us, although those documents are not registered and may not effect the security for its satisfaction, to which they refer. This

attempt to provide security was due to 2nd defendant becoming indebted ; and in 1909 he further gave Ex. A, undertaking (I) to repay to Plaintiff

a loan taken for the discharge of his debts, within five years from the income of the properties, which had fallen to him as his share under the

partition, Ex. G, and (2) to sell her at the end of five years those properties for two lakhs of the mahar debt or to give her possession thereof,

apparently as security for that sum. This document also was unregistered and therefore was valid only as an agreement to sell. On this, the loan

was, as Exs. H series and K show advanced ; but nothing was done in pursuance

of the provision for sale or delivery and on 11th December 1914

the properties were attached by 1st defendant. 2nd defendant however in defiance of his obligations under Ex. A and the attachment gave a lease

for three years, Ex. B, for an advanced rent of Rs. 7,500 to P.W. 1 and another ; and this was followed within two months by a reference on the

part of plaintiff and 2nd defendant to arbitrators of the differences, which according to the muchilika, Ex. J, had arisen between them, the

arbitration ending in an award, Ex. J-1 which was made a decree of Court, Ex. J-3. It is with the effect of Ex. J-3 that we are concerned, its terms

being that (1) 2nd defendant should within one month execute a sale-deed conveying to plaintiff the properties referred to in Ex. A or that in case

of his default the court should execute one on his behalf, (2) he should borrow Rs. 7,500 from plaintiff, repay the lessee under Ex B the amount

received from him and then put plaintiff in possession of the properties which, until he did so, should be charged with two lakhs of rupees for her

benefit and (3) he should repay the plaintiff within two years another amount already borrowed on a pro-note.

3. In pursuance of this the lease Ex. B was terminated and plaintiff alleges that she was put in possession of the properties, her claim was made and

dismissed, and 3rd defendant purchased at the sale, which followed. In her suit plaintiff asked generally for a decree vacating the order on her

claim and "" declaring that the properties were not liable to be sold. But the lower court refused the latter relief on the ground that she had not

perfected her right by obtaining a sale-deed; and it is not suggested on her behalf that this refusal was wrong. The question is only whether the

lower court was entitled to grant her a charge for two lakhs on the property.

4. The charge it allowed was not created by Ex. A. which was unregistered, and therefore it must be supported, if at all as created by Ex. J-3.

That decree was however passed after the attachment of the property and it is argued with reference to Section 64, Civil Procedure Code, that, as

the award, which it embodied, resulted from the consent of plaintiff and 2nd defendant to a reference to arbitration, it must ""be "Regarded as a

private transfer of the property attached or, consistently with plaintiff's case, of an interest in it and was void against 3rd defendant's claim, which

is enforceable under the attachment. It is not necessary to consider whether a

decree embodying an award can be so regarded, in case it is proved" that the reference to arbitration was collusive and the whole proceedings a device to invest a private arrangement between the parties with the appearance of a public adjudication. For, the learned practitioners who appear for 3rd defendant, have expressly disclaimed any intention to attack the lower court's finding that the contrary was the case. And then in accordance with *Qurban Ali v. Ashraf Ali I.L.R.(1882) All. 219* and *Kasi Viswanatham Chettiar and Another Vs. Ramaswami Athitha Nadar and Others*, the former being a decision of a Full Bench and proceeding on general principle not on any of the particular facts before the court, we must hold that a decree such as Ex. J-3, which embodied an award is not a private transfer, which can be treated as void u/s 64.

5. Plaintiff has however still to establish that the charge she is claiming is created by Ex. J-3. The lower court held that she did so on the ground that, as her claim to two lakhs, as part of her Mahar was in fact accompanied by possession of the suit properties, she had under Mahomedan Law a lien on them and a right to retain possession until that Mahar debt was discharged. It referred in support of this to Mulla's principles of Mahomedan Law, 4th Edition, Rules 206, 207 and before us, the dictum of Seshagiri Aiyar, J in *Abi Dhunnissa Bibi v. Muhammed Fathi-ud-din* ILR (1917) Mad. 1026 that "'a Mahomedan wife has a lien over the property of her husband in her possession for unpaid dower,'" has been relied on. But this contention rests on a misapprehension, due perhaps to indiscriminate use by the learned author and the learned Judge just referred to, of the "term" wife to denote both a divorced wife and a widow, since the law recognises such a lien as that now claimed in both of these cases. We have not, however, been shown that the right of the wife to a lien before the marriage is dissolved, is recognized by any authority; and in fact the context of the learned judge's dictum" with its references to "'the estate of the deceased husband'" and two cases, in which only a widow's possession of such an estate was in question, shows that he had no such extension of this well defined doctrine, as plaintiff requires, in mind. This failing, it is necessary to consider her claim, as it is put forward before us, with direct reference to the terms of Ex. J-3.

6. One term relied on provides that "'defendant (here 2nd defendant) shall after

paying the lessees and redeeming the lease, put the plaintiffs in possession of the properties covered by it and till then the properties shall be under a mortgage charge for Rs. 2, 00,000." This is the only provision for a charge and in fact the decree directs elsewhere as regards the mahar generally that plaintiff is entitled to it during 2nd defendant's life-time, only when he pays it of his own accord, and it is therefore on this term if at all, that plaintiff can succeed. Reading as it stands, it provides for a charge to continue only until plaintiff is given possession, and ½ she was shortly after Ex. J-3 was passed; and, if so, it had ceased to be operative before the present suit began and no claim to relief therein can be founded on it. Plaintiff however contends that the words "till then" cover, not only the contingency specified in their immediate context, but also the performance of the other obligation imposed on 2nd defendant in the preceding portion of the decree, the execution within a month of a sale-deed, and further that this interpretation is in accordance with the award in the terms of which the decree is drawn up. The answer is firstly, that the words "till then," can most naturally be read in connection with the contingency, the transfer of possession referred to in the distinct clause, in which they stand, and that after that transfer, when plaintiff would be in enjoyment of the property, the right to a charge would be useless, since it would not assist her to obtain performance of 2nd defendant's remaining obligation, the giving of a sale deed, Her remedy by execution being available. And secondly although it is true, that for some purpose, which is obscure, Ex J-2, the award provides in Clause 9(b) in accordance with plaintiff's contention for a charge "for a period extending from this day to the date of the completion of the said sale" we are not at liberty to import those words into a decree which is easily intelligible in itself and without them, which was passed at plaintiff's own instance against which she did not appeal and which had become final in its present form 3rd defendant made his purchase.

7. The grounds, on which plaintiff claims a charge, being unsustainable, the appeal must be allowed and her suit must be dismissed with costs in both courts.