

Ahmad Asmal Muse Vs. Bai Bibi

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Court : Mumbai

Decided On : Nov-27-1916

Reported in : AIR1916Bom127; (1917)19BOMLR141

Judge : Basil Scott, Kt., C.J. and ;Heaton, J.

Appeal No. : Second Appeal No. 936 of 1915

Appellant : Ahmad Asmal Muse

Respondent : Bai Bibi

Judgement :

Basil Scott, Kt., C.J.

1. A deceased Mahomedan purported to dispose by will of certain bhag property and other property in favour of his widow, with a remainder to his daughter and her issue if she survived the widow. The plaintiff is a residuary of the testator according to Mahomedan law. He sues for a declaration that he is the nearest agnate of the deceased and that defendants 1 and 2, that is, the widow and the daughter, acquired no rights by the will and that he is entitled to the property after the death of the widow. The suit relates only to the Bhagdari properties, which in the absence of a will devolve by custom upon the Bhagdar's widow, if he dies sonless, for her life and after her death are inherited by his nearest male agnate to the exclusion of the daughter and sister. The plaintiff is, therefore, interested in the property both under the Mahomedan law and under the custom in the absence of

a will. He charged that the widow and the daughter were managing the properties in suit and wasting them to harm plaintiff's future rights. The waste alleged is that two portions of the property in suit had been given to a Masjid and that the rest of the property has been transferred to the name of the daughter with the intention of her becoming the owner thereof.

2. The learned Judge in the trial Court held that the acts of waste had not been proved and that therefore a Receiver should not be appointed, but being of opinion that the will was contrary to the Mahomedan law passed a decree in favour of the plaintiff declaring him the nearest agnate of the deceased and entitled to succeed to his bhag property in suit after the death of the widow and that the will of the deceased was inoperative so far as the bhag property in suit was concerned and that defendant 2 did not acquire any right to the property under the said will against the plaintiff.

3. On an appeal being preferred to the District Judge the decree was reversed and the suit was dismissed, the ground being that although according to Mahomedan law a will in favour of one of the heirs or a part of the heirs is invalid unless the other heir or heirs consent, the rule could not be applied so as to bring in a course of devolution according to the Bhagdari custom which would be at variance with the Mahomedan law. It is, however, conceded that a will can be made of Bhagdari property notwithstanding the existence of the custom. The existence of the custom does not destroy the testamentary capacity of the owner. If then the owner is a Mahomedan, what is his testamentary capacity There is no evidence in the case that his testamentary capacity has been converted by custom into something different from the ordinary capacity of a Mahomedan testator. That capacity is limited by the rule of testation above stated. It appears to me, therefore, that the rule of Mahomedan law is the only law which can be applied and according to it the will is invalid. If so, the plaintiff is the presumptive reversioner under the Bhagdari custom. It has been held by the Privy Council in *Janaki Ammal v. Narayansami Aiyer* : (1916)18BOMLR856 , that if there has been waste or there is danger to the estate established, a possible reversionary heir may come in and ask for relief. There are cases of waste alleged and there is a danger of transfer to the second defendant suggested. Neither of these points have been discussed by

the learned District Judge and as we are of opinion that his judgment upon the preliminary question of the application of the rule of Mahomedan law to the will of the deceased cannot stand, we set aside the decree and remand the case for disposal upon the other questions discussed in the trial Court. Costs costs in the cause.

Heaton, J.

4. I agree. I think that in this case the correct solution is furnished, as it often is, by the simplest method of dealing with the case. We have a Mahomedan making a will. Under the Mahomedan law there are three persons who in case of an intestacy would inherit his property. By his will he bequeathed the whole of it to one of these three persons, with remainder to the second and he left the third, the plaintiff, out of the property altogether. The plaintiff never has consented to this form of will and therefore, under Mahomedan law the will is invalid. Unless we are to deal with the will as a will made by a Mahomedan and therefore subject to the Mahomedan law relating to wills, I cannot for myself discover how we ought to deal with it. I cannot accept the District Judge's reasoning, although I think that it is very ingenious and also that it is a very earnest effort to find a way out of a difficult position. He thinks that the law relating to Bhagdari property eliminates the Mahomedan law of wills altogether in the case of a will concerning Bhagdari property and we have such a will here. But to my thinking the existence of Bhagdari property does not affect the Mahomedan law of wills in any way beyond this, that Bhagdari property might in certain circumstances be taken out of the operation of a will. That Would happen if the will provided for a division of the testator's property which would be contrary to the Bhagdari Act. In that case the property would be taken out of the operation of the will because the Mahomedan law could not be applied to it. But I do not think and I cannot see how the existence of Bhagdari property can affect the Mahomedan law of wills any further than that. In this particular case the will leaves the entire property, including Bhagdari property, to one person. It does not in any way offend against the provisions of the Bhagdari Act. So far as they are concerned, the will would be a perfectly valid will. But when we come to consider the rule regulating the testator's power to make a will, then we find that the will is invalid.

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