

Mir Akbar Ali Vs. Mir Abdool Ali

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Court : Mumbai

Decided On : Mar-01-1907

Reported in : (1907)9BOMLR295

Judge : Russell, J.

Appeal No. : Original Suit No. 565 of 1891

Appellant : Mir Akbar Ali

Respondent : Mir Abdool Ali

Judgement :

Russell, J.

1. This was an enquiry under Section 244 of the Civil Procedure Code and raises an interesting question under Mahomedan law, namely, how far the Shia law recognises what is known in English law as a vested remainder.

2. The parties to the suit were Shias : the father and mother of the defendants, being plaintiffs and the defendants were as follows:-Defendants 1, 2 and 3 were the children of the 1st plaintiff by a deceased wife and defendants 4 to 7 his children by the 2nd plaintiff and in their plaint the plaintiffs sought to have it declared that a certain deed, dated the 2nd March 1890, mentioned in the plaint, was void and inoperative as against them; and that the same might be ordered to

be delivered up by the 1st defendant to be cancelled; and that the 1st defendant might be ordered to deliver up to them all the properties which he has taken possession under cover of the said deed and specially a certain property specified in Ex. C to the plaint, situate at Bhendi Bazar.

3. The effect of the plaint, so far as relates to the said deed, was that the 1st defendant had obtained the same fraudulently and by improper means from the 1st plaintiff and that the said deed purported to make over to the 1st defendant's sole trustee under certain trusts the whole of the property, moveable and immovable, of the 1st plaintiff and the property settled on the 2nd plaintiff by the Indenture, hereinafter mentioned, reserving only the right of residence to the 1st plaintiff and that the recitals in the said deed were untrue and the trusts as such left very large powers to the 1st defendant making him in fact the master over the whole family.

4. It appears that on the 25th July 1888 the 1st plaintiff executed an Indenture of settlement of the said property in Bhendi Bazar in favour of the 2nd plaintiff for life with power to appoint amongst the lineal descendants of the 1st plaintiff in such shares and proportion as she might think fit. This is material having regard to the terms of the consent decree hereinafter referred to.

5. A consent decree was passed in the said suit on the 22nd December 1891, whereby inter alia, after declaring that the decree was for the benefit of the minor defendant No. 7 it was declared that the said trust-deed of the 2nd March 1890 was null and void, as also a deed of gift dated the 25th July 1888, mentioned in the plaint and ordered that the 1st defendant should hand over to the 1st plaintiff the deeds and documents inter alia relating to the said Bhendi Bazar property. It was further ordered that the said property in Bhendi Bazar should be held and enjoyed by the 2nd plaintiff for her life and from and after her death the same should be sold by public auction and the net proceeds thereof be divided amongst the six sons of the 1st plaintiff and their heirs in equal shares, after setting aside rupees three thousand out of the sale proceeds for certain ceremonies.

6. After the said consent decree was passed as aforesaid, it appears that the 1st defendant, hereinafter called the Sirdar, obtained from his brothers their shares in

the said Bhendi Bazar property under the documents hereinafter specified.

7. By a conveyance A, dated the 11th of January 1898, Mir Afzulali and Mir Azgurali, defendants 4 and 5 in the said suit, after reciting the said consent decree, conveyed to the Sirdar in consideration of the sum of Rs. 1600 all their right, title, interest and share in the Bhendi Bazar property subject to the life-interest secured to the 2nd plaintiff in the said suit and also transferred to the said Sirdar the one third parts or shares of them, respectively, of and in the monies arising from the sale of the said property. The latter is evidently a mistake inasmuch as the two sons were entitled only to one-sixth share in the said purchase-money.

8. By a conveyance B, dated the 27th March 1905, Mir Abedali, the 2nd defendant in the suit, in consideration of the sum of rupees one thousand and five hundred conveyed to the said Sirdar all his right &c.; in the Bhendi Bazar property and his one-sixth share in the monies realized from the sale thereof.

9. By a conveyance C, dated the 17th June 1903, Mir Fattehali and Mir Zoolficarali, defendants 6 and 7, in the said suit in consideration of the sum of rupees one thousand and six hundred conveyed to the said Sirdar all their right &c.; in the said property at Bhendi Bazar and also the one-third parts or shares of them respectively in the monies realized from the sale of the said premises. Here again the same mistake is made as their shares were one-sixth respectively and not one-third.

10. The matter of the execution of the said decree came before Mr. Justice Scott, who directed this matter to be tried and it came before me accordingly, when the following issues were raised.

(1) Whether these proceedings are valid, having regard to the provisions of Section 248 of the Civil Procedure Code P

(2) Whether any question arising out of the conveyances dated as above can be enquired into under Section 244 P

(3) What is the true construction of the decree dated the 22nd December 1891 as to its provisions with respect of the Bhendi Bazar property

(4) Whether any of the conveyances and if so which, were executed under the undue Influence of the said Sirdar ?

[These four issues were raised by Mr. Strangman who appeared for the three heirs of the said Sirdar.

Mr. Lowndes appeared for defendants 2, 4, 5 and 6 in the suit. The 3rd defendant was called but was absent. Mr. Lowndes then raised Issues.-]

(5) Whether any of the six sons of the 1st plaintiff had under the said decree any interest in the said property capable of being transferred by them ?

(6) Whether in any event the heirs of Afzulali are bound by the terms of the conveyance of the 11th January 1898?

(7) What interest, if any, the heirs of Afzulali take ?

(8) Whether the said conveyance or any of them are equivalent to an adjustment and whether if so such adjustment can be recognized in any way by the Court ?

(9) Whether the said conveyance or any of them can be treated as valid having regard to Sections 257 A and 258 of the Civil Procedure Code Mr. Strahgman then raised issue 10

(10) Whether any claim to set aside the conveyances of the 11th of January 1898 on the ground of undue influence is not barred by limitation ?

Mr. Strangman also raised issue 11.

(11) Similar issue as to the conveyance of the 17th June 1903 ?

11. At the hearing a question arose as to what had happened before Mr. Justice Scott and after interviewing Mr. Justice Davar, who was Counsel for the other sons of the 1st plaintiff and the Advocate-General and referring to the latter's notebook of the 20th September 1906, from all of which it appeared that no real objection

was raised as to this enquiry being held under Section 244, I decided issues (1) and (2) in the affirmative.

12. I then directed the other issues of law, that is, all except issue (4) to be tried first.

13. This was accordingly done and the case was extremely well argued by Mr. Lowndes and by Mr. Strangman for their clients respectively.

14. I should say here that 1st plaintiff K. B. Akbarali died in April 1894, the 2nd plaintiff in the suit died on the 2nd December 1903. Afzulali died in 1899, before the death of the tenant for life, leaving one daughter ; and the Sirdar died on the 14th June 1905.

15. Stated shortly, Mr. Lowndes' argument on issues (3) and (5) was that what is known as a vested remainder is an estate unknown to and not recognised by Mahomedan law and that the sons of the plaintiffs in the said suit under the consent decree acquired a spes successionis only.

16. Mr. Strangman's answer to this was that this was not so and that the creation of such an estate was perfectly good in this particular instance inasmuch as, as was admitted, all the parties to the suit were Shias and not Sunnis.

17. It was conceded that according to the Shia law an estate for life was recognizable. See Wilson on page 475. Amir Ali, page 80, goes further and says that remainders are also recognizable by that law. But he gives no authority for the proposition.

18. The point is a difficult one but in the present case, in my opinion, I must first consider the position of the respective vendees at the date and after their respective conveyances.

19. It appears to me, therefore, that Afzulali, when he executed the conveyance of the 11th January 1898, had nothing more than an expectancy. A remainder is an estate in expectancy. If land be limited to A for life and after his death to B and his heirs, B has a vested estate in fee simple in remainder. During A's life it is

expectant upon or awaits the expiration of A's life-estate. At A's decease, his life-estate regularly expires and then B's remainder regularly vests in B in possession. (Fearne page 10 Note). If this be so, the consent decree herein created an interest to arise in future as regards Afzulali and on this point the case falls exactly within the decision of Mr-Justice Batty in Cassum Sidick v. Essaclo Moosa Suit No. 43 of 1903, which was confirmed by the Court of Appeal on the 18th August 1904 (not reported). In that case a consent decree had been passed whereby it was decreed that on the death of one Haniffabai a moiety of the premises should belong absolutely to Rehimatbai and her heirs. Haniffabai, however, survived Rehimatbai. There was no provision as to what should be done in case Haniffabai should survive Rehimatbai. Mr. Justice Batty in his judgment refers to the case of Abdul Wahid v. Nuran Bibi (1885) 12 I.A. 91 : I.L.R. 11 Cal. 597, in which their lordships referred to Mt. Humeeda v. Mt. Budlun (1872) 17 W.R. 525 and Mr. Justice Batty says that the effect of Abdul Wahid v. Nuran Bibi is that it would be opposed to the Mahomedan law to hold that a deed of compromise between a Mahomedan widow and her sons created in the sons vested interests which on their death, in the lifetime of the widow, would pass to their heirs.

20. Now it appears to me that, whether the parties are Sunnis or Shias, it is correct to say that on the death of a remainderman during the life of the tenant for life the Mahomedan law does not recognize an estate which is transmissible to the heirs of the remainderman. On these grounds, I am of opinion that so far as Afzulali is concerned his interest in the property must be taken to have wholly ceased and have determined.

21. As regards the other sons, however, it appears to me that different considerations may apply.

22. Under the conveyance A, abovementioned, Mir Aggur Ali, defendant 5, conveyed his interest in the property and by C, dated the 17th June 1903, Fattehali and Zoolficarali, defendants 6 and 7, conveyed their interest in the property. The tenant for life died on the 2nd December 1903. The title of those three persons, therefore, at the time of the conveyance was an imperfect one and under Section 18 of the Specific Relief Act the purchaser would be entitled to

compel his vendors to make good their contract with him out of their after-acquired interest in the property and it is to be observed that in the two conveyances abovementioned there are covenants for further assurance which the purchaser would be entitled to have carried into effect.

23. As regards the 3rd conveyance, which was dated the 22nd of March 1905, that was executed by Mir Abedali after the death of the tenant for life, so that his interest and right to possession were complete at the time when he conveyed the property.

24. Now although of course there are many cases which say that under the Mahomedan law applicable to Sunnis a life estate is invalid, the contrary appears to be the case under the law applicable to Shias. I have above referred to Wilson and I need not set out the other authorities for this inasmuch as Mr. Lowndes conceded, as I have mentioned above, throughout his arguments that a life estate was not invalid according to the Shia law. The great difficulty which I have felt in this case has been caused by the case of *Umes Chunder v. Mt. Zahoor Fatima* I L R (1890) IndAp 201, because that case appears to me to be quite contrary to the case of *Abdul Wahid v. Nuran Bibi*, which was not referred to in *Times Chunder v. Mt. Zahoor*. There it was held that where by a Mahomedan deed of settlement a husband granted the lands in suit to his wife on condition that if she had a child by him the grant should be taken as a perpetual mokurruri and in case of no child being born as a life mokurruri with remainder to the settlor's two sons, the two sons took definite interest under the deed similar to vested remainders though liable to be displaced and that such interests were liable to attachment, not being mere expectancies within the meaning of the Civil Procedure Code, Section 266.

25. In order to ascertain whether the parties to the suit in *Umes Chunder v. Mt. Zahoor* were Sunnis or Shias, I communicated with the High Court of Calcutta and the Registrar of that Court on the Appellate Side has been good enough to inform me that the record of the case has been examined but it does not disclose to what sect of the Mahomedans the parties belonged. It seemed, however, from other sources of information not improbable that the Mahomedans concerned in the case were Sunnis.

26. Now, there can be no doubt that *Umes Chunder v. Mt. Zahoor* does recognize vested remainders under Mahomedan law. Their lordships say :-' At the time of the attachment Sultan Ali was still living, and, at all events, in contemplation of law there might be a child to take; but the deed confers upon the sons Farzund and Furhut a definite interest, like what we should call in English law a vested remainder, only that it was liable to be displaced by the event of there being a son of Sultan Ali by Amani Begum.

27. Between the attachment and the sale-very soon after the attachment-Sultan Ali died and then the contingency such as it was, was entirely put an end to. It is quite true the parties might not know whether Amani Begum was with child by Sultan Ali or not, but the fact was determined at that time and there was no longer any contingency in the eye of the law. It does not, in their lordships' view, very much signify whether Sultan Ali was alive or dead at the time of the sale, but they wish to guard themselves against being supposed to concur in an argument that was presented at the Bar, to the effect that if between the time of attachment and the time of sale events should happen which would have the effect of accelerating or enlarging the interest of the judgment-debtor as it stood at the time of attachment, that augmented interest would not pass by the sale which purports to convey all that the judgment-debtor has at the time. But taking the case most strongly against the plaintiff, supposing that he could get nothing but that which was capable of attachment and was actually attached on the 14th of April, 1879, their lordships hold that this interest in remainder is a property which was capable of being attached and which was intended to be attached. It is said that by Section 266 this property was not liable to attachment, because it is there provided that, 'the following particulars shall not be liable in attachment'; and among them is, ' an expectancy in succession, by survivorship or other merely contingent or possible right or interest.' It seems to their lordships that in all probability the High Court, who held that the 17 dams were not attached, must have had this section in their view, though they do not refer to it, because they treat the case as if the two sons had no interest during the life of their father, but as if, upon the father's death, they inherited the property from him. But that is not the case, excepting as regards the one rupee, which for this purpose may be thrown out of consideration altogether. Except as regards that one rupee they inherited nothing from him. He had in his

life-time parted with the whole property, either to Amani Begum his wife and her children from him, or to his two sons. That interest given to the two sons appears to their lordships not to fall within the description of an expectancy or of a merely contingent or possible right or interest. Their lordships therefore hold that as regards the 17 dams the plaintiff has the priority and that the decree of the High Court is erroneous to that extent.'

28. Mr. Lowndes in his argument after I had drawn his attention to *Times Ghunder Sircar v. Musstimmat Zahoor* (1890) L.K. 17 I.A. 201 confessed his inability to reconcile it with *Abdul Wahid Khan v. Mussumat Nuran Bibi*. I have found it very difficult to do so and am of opinion that the first line of the head note in *Abdul Wahid Khan v. Mussumat Nuran Bibi* is stated too broadly. In my opinion it should be stated that Mahomedan law does not recognize vested estates in remainder with all their consequences. To reconcile *Abdul Wahid Khan v. Mussumat Nuran Bibi* with *Umes Chunder Sircar v. Mussummat Zahoor* I think the proposition would have to be stated thus:-

Under the Mahomedan law applicable to Shias (thereunder life estates are recognised) the estate of a tenant for life will not devolve upon the remainderman unless the latter survives the former. The estate of the remainderman cannot be said to vest in him-to use the expression of English law-so as to pass to his heirs in the event of his decease during the life time of the tenant for life.

29. This being so my view of the case is this : the consent decree was a family arrangement come to with the consent of all the parties interested in the Bhendy Bazar property. For their own purposes they consented to allow their respective mother and step-mother to have a life estate therein. After her death the property was to be sold and the sale proceeds divided into 1/6 th parts to be divided between her sons and step-sons. The decree was certified to be for the minor's benefit. This appears to come within the words used in the judgment of the High Court of Bombay in *Mzamudin v. Abdul Gafur* I L R (1888) 13 Bom. 264 (compare *Abdul Gafur v. Nizamudin* (1892) 19 I.A. 175 *Abdul Gafur v. Nizamudin* I L R (1892) 17 Bom. 1:-'The creation of any life-estate at all appears quite inconsistent with the Mahomedan law. In *Mussamut Humeeda v. Mussamut Budlun* (1872) 17

W.R. 525 it might be that by consent such an estate might be created, but as a general rule the donee in such a case would take an absolute estate.' Another mode in which the chance of succeeding to an estate may be bound is by an application of the principle that equity considers that done which ought to be done *Sumsudin v. Abdul* (1906) 8 Bom. L. E. 781

30. This being so, the conveyances' A, B and C, above referred to, bound and transferred the right title and interest of the five vendors (other than Afzul Ali) and they must be held to have conveyed the same to the vendee, the defendant 1.

31. As regards the arguments on issues '8 and 9 I have not been able to see how the conveyances to defendant 1 can be said to come within the mischiefs aimed at by ss. 257 A and 258 of the Civil Procedure Code as to which see *Heera Nema v. Pestonji* I L R (1898) 22 Bom. 693 I do not consider them to have been 'adjustments ' of the decree, within the meaning of these sections. For their own convenience the brother and step brothers parted with their interests in the property to defendant 1 instead of the property being sold and the sale proceeds divided between them.

32. I accordingly find on the remaining issues as follows :-

(3) Under the said decree the 2nd plaintiff became a tenant for her life of the said premises and on her death the five sons (other than Afzul Ali who died in her lifetime) became the absolute owner thereof.

(5) Affirmative (save as to Afzul Ali.)

(6) Negative.

(7) The tenant for life being dead they take the interests of a son of a Mahomedan owner according to Shia law. Afzul Ali's share and interest in the estate not having been validly disposed of.

(8) Negative, as to the 1st point. 2nd point unnecessary.

(9) These sections do not apply.

33. The result is that the remaining issues 4, 10 and 11 remain to be tried.

34. Costs to abide the result of the trial of these issues.

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