

Shaik Salma and anr. Vs. Shaik Mahammad Abdul Kadar Umoodi and anr.

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Court : Andhra Pradesh

Decided On : Dec-01-1960

Reported in : AIR1961AP428

Judge : Srinivasachari, J.

Acts : Muhammadan Law; India Evidence Act, 1872 - Sections 106

Appeal No. : Second Appeal No. 636 of 1957

Appellant : Shaik Salma and anr.

Respondent : Shaik Mahammad Abdul Kadar Umoodi and anr.

Advocate for Def. : Vasantarao Mukhedkar, Adv.

Advocate for Pet/Ap. : Mohd. Jahangir Ali, Adv.

Judgement :

Srinivasachari, J.

1. This suit relates to the properties of one Sheik Ahmed, who died leaving behind him a brother Sheik Mohd., a sister Sheik Rukiya and a widow Sheik Salma. The brother and the sister brought the present suit for the shares that they were entitled to under the Mohomedan Law, alleging that the widow, the defendant, who had been in possession of the property was divorced by her husband during

his life time and as such she was not entitled to any share.

The properties in respect of which the plaintiffs ask for their share consists of a house and two survey numbers. The plaintiffs also claimed their share in the movables valued at Rs. 225/-, They also claimed mesne profits. The defence raised by the widow was that the house had been gifted to her as also the survey No. 26 situate in Venkatapuram. With regard to survey No. 182, it was stated that it was purchased by her husband from out of the funds furnished by her.

She denied that she had been divorced by her husband, she also contended that the plaintiffs were not related to Shek Ahmed and as such were not entitled to any share in his properties. On the basis of these pleadings issues were raised and the trial court, it would appear, dismissed the suit an limine. It is not necessary to state as to on what grounds the suit was dismissed, because the suit was subsequently remanded.

When the matter went up in appeal, the Sadar Adalat, Medak, remanded the case to the trial court with specific directions to frame issues and take evidence and dispose of the case. After remand, both the parties led evidence and on the evidence the courts gave concurrent findings viz. that the relationship of the plaintiffs was proved' and, therefore, they were entitled to their shares in the properties; that the alleged divorce of the de' fendant had not been proved.

They further held that the alleged gift of either the house or of the land also had not been established. In the result both the courts were of the opinion that the plaintiffs were entitled to a preliminary decree in their favour in respect of their share in the suit properties. The trial court also awarded mesne profits at the rate of Rs. 220/- from the date of suit (11-3-1350F.) to the date of the decree. The lower appellate Court confirmed, the decree of the trial court in all respects, as already stated. The present appeal is by the widow challenging the decree passed by the lower appellate court.

2. The first argument advanced by the learned counsel for the appellant was that the widow in this case was in possession of the properties of the deceased lawfully in lieu of her dower debt and she was entitled to be in possession and have a lien

over such property on account of her dower debt and under those circumstances, no mesne profits could have been decreed as against her, There can be no doubt that under the Mohommedan Law, a widow is entitled to be in possession of her husband's estate in lieu of her mehr debt.

She has a lien over that property and such lien she would have till her dower debt is discharged. While that is so, it cannot be said that her liability to account for the income received by her from the properties of her husband does not exist. While she can exercise her right of lien, she is liable to account to the other sharers with regard to the income as any other co-sharer would be if he is in possession of property of more than 'his share.

Learned counsel placed reliance upon a decision of the Oudh High Court in *Debi Prasad v. Sarabjit Singh*, AIR 1947 Oudh 129. The facts of that case were that the plaintiff and the defendant were co-sharers in a certain property. The defendant was in possession of the whole property and in a suit brought by the plaintiff for mesne profits, the learned Judge held that it could not be said that the defendant had committed any wrongful act or had ousted the plaintiff and, therefore, was not liable for mesne profits.

The learned Judge relied upon the definition of 'mesne profits' in Section 2, clause 12, C.P.C. and held that unless it can be said that the party was in wrongful possession, no mesne profits could be collected from him. The learned Judge also said that it should also be established that the plaintiff who was suing for mesne profits had been ousted by the defendant.

Without expressing any opinion with regard to the correctness or otherwise of this decision, it may be stated that under the Mahommedan Law a widow has the liability to account to the other sharers where she happens to be in possession of her husband's estate in lieu of her mehr debt. That this is well established would be clear from decision of the Privy Council in *Mt. Bebee Bachun v. Sh. Hamid Hussein*, 14 Moo Ind App 377. It would be useful to quote the words of their Lordships of the Privy Council in this connection. Their Lordships say:

'Whatever the right may be called, it appears to be founded on the power of the widow as a creditor for her dower to hold the property of her husband of which she has lawfully and without force or fraud obtained possession until her debt is satisfied with the liability to' account to those entitled to the property subject to the claim for the profits received.'

That would make it abundantly clear that there is the liability of the widow to account to others who are entitled to a share in the property. That being the case, the liability to account of the defendant-appellant is clear.

3. The next argument of the learned counsel was that even if she was liable to account in this case, the plaintiffs have not adduced any evidence with regard to the amounts of the income from the property. The argument was that the initial burden lay upon the plaintiffs to prove the amounts of income and then it would be for the defendant in rebuttal to show that the income was not as stated by the plaintiffs but something different.

With regard to this argument, learned counsel referred me to a Bench decision of the Madras High Court in Ramakka v. Nagesam, AIR 1925 Mad 145. The learned Judges, while stating that where the plaintiff who claims mesne profits adduces no evidence at all, no mesne profits could be awarded to him. They further stated that the profits which a person actually received is a matter within the peculiar knowledge of that person and under Section 106 of the Evidence Act, the burden of proving the amount actually received will lie on that person who received them but the burden of proving the profits that might have been received is on the person who claimed them.

No doubt having regard to the definition of mesne profits in Section 2(12) C.P.C. 'mesne profits' would mean the profits which the person in wrongful possession actually received or might, with ordinary diligence, have received therefrom. Where the plaintiff says that he is entitled to mesne profits at a particular rate, it would come under the latter category, profits which a person in occupation might with ordinary diligence have received. But profits actually received also are within the contemplation of mesne profits and the burden of proving profits actually received is certainly upon the person who has been in possession of the property.

In this case there is no evidence on behalf of the defendant. The plaintiffs, however, led evidence with regard to a particular portion of the property viz., the income from the garden attached to the house. Could under those circumstances, the claim for mesne profits be negatived? It may not be out of place to refer to the observations of the Privy Council in *Girish Chunder Lahiri v. Shoshi Shikhareswar Ray*, ILR 27 Cal 951 (PC), wherein their Lordships say :

'Prima facie their Lordships observe it is fair to infer that a person in possession of land may by ordinary diligence get rent for it according to the prevailing rates for such land and that the true owner wrongfully dispossessed has been a loser by that amount.'

By these observations the Privy Council laid down that the mesne profits would be the rent or income from the property which would ordinarily be derived according to the prevailing rates and the person who is the true owner of the land would be entitled to get mesne profits calculated on that basis. Following the above observations the Madras High Court in the case of *Dhanarajagiri v. Parthasarathy Rayanim Varu*, AIR 1933 Mad 825, observed that it is fair to presume that the person in possession may by ordinary diligence get rent according to the prevailing rates.

Therefore, it follows that it cannot be said that the plaintiffs would not be entitled to get the mesne profits calculated or arrived at on the basis of the prevailing rates or on the basis of what the person in occupation had actually received. The defendant has not led any evidence and the plaintiffs have only chosen to lead evidence with regard to only one portion of the property. Under those circumstances, it is but fair that in the interests of justice the matter as regards the mesne profits is directed to be determined by the trial court by taking evidence of both the parties.

4. It is stated that a receiver has been appointed who is now collecting the income and depositing the same in court. This has been from 1957. The trial court, therefore, while taking the evidence of both the parties with regard to the income derived in all the properties from December, 1941, till the date when the Receiver took over charge and determine the actual mesne profits on the basis of the

evidence and award to the plaintiffs their share in such mesne profits. A decree would, therefore, be passed in favour of the plaintiffs for their share of the mesne profits thus determined as against the legal representatives of the appellant, as it is stated that the appellant died during the pendency of the second appeal,

5. With regard to another item of the assets of the deceased, viz. a deposit in the Hyderabad Co-operative Bank, the plaintiff stated that there was a sum of Rs. 1150/-. With regard to this item, the trial court passed a decree on the basis that the amount in Bank is only Rs. 575/-. The contention of the learned counsel is that there is no warrant for the court to hold that it is Rs. 575/- when the plaintiffs themselves have stated in the plaint that the amount is Rs. 1150/-.

This is answered by the respondent's counsel that no doubt originally the amount was Rs. 1150/- but the appellant's legal representatives obtained a decree against his client for half the amount viz., Rs. 575/- on the basis of a will said to have been executed in his favour by the deceased Sheik Ahmed and withdrawn the same and, therefore, the amount now available is Rs. 575/- only. Evidently, this matter was not brought to the notice of the trial court or the lower appellate court. The trial court will investigate into this matter and determine the amount to which the appellant's legal representative would be entitled to.

6. Inasmuch as this is an administration suit, I direct each party do bear his own costs so far as this court is concerned.

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