

Durga Das and ors. Vs. Muhammad Nawab Ali Khan and ors.

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Court : Allahabad

Decided On : Mar-24-1926

Reported in : AIR1926All522; 95Ind.Cas.19

Appellant : Durga Das and ors.

Respondent : Muhammad Nawab Ali Khan and ors.

Judgement :

1. The order of the subordinate Judge in this case dismissing, the suit of the plaintiff's is erroneous and must be set aside. The suit was a suit for partition, the plaintiffs being the assignees of the interests of a lady named Mt. Kaniz Sughra in the estate of her deceased husband Mr. Hamid Ali Khan. Mr. Hamid Ali Khan died in the year 1918. He belonged to the Shia persuasion and the law which regulates the course of inheritance in this case is the Shia Law. The heirs left by Mr. Hamid Ali Khan were his brother Nawab Ali Khan, his sister Mt. Salim-un-nissa and his widow Mt. Kaniz Sughra. Admittedly the share of the widow in the inheritance is a one-fourth share according to the Shia Law where the widow is childless as Kaniz Sughra is. On the 22nd of December 1920 this lady assigned the whole of her interest in this inheritance to the plaintiffs in consideration of a sum of Rs. 15,000. The deed of transfer is printed at page 43 of the record. It appears that out of this Rs. 15,000 the plaintiffs were to be allowed to retain a sum of Rs. 7,500 for the purpose of fighting out certain cases in which the lady was interested. As regards the balance it was to be recovered from the transferees after the passing of a decree in their favour.

2. It is on the basis of this deed of transfer that the plaintiffs came into Court asking for a partition of the estate of the deceased and claiming that they were entitled to a one-fourth share in certain property, both moveable and immovable. At this stage it may be observed at once that the plaintiffs are not entitled on the basis of this transfer in their favour to any share in any land left by the deceased.

3. The Shia Law is that the childless widow of a Shia is not entitled to a share in the value of any land belonging to her husband including land which constitutes the sites of buildings. Her one-fourth share includes a share in the proceeds of the sale of the buildings. Therefore, when the plaintiffs set up a claim to a one fourth share in certain landed properties, their claim was unsustainable.

4. Various pleas were put forward by the defendants in order to defeat the suit and these seem to have found favour with the learned Judge of the Court below, who arrived at the conclusion that the plaintiffs were not entitled to maintain the suit for partition, which he dismissed entirely. In doing so the Subordinate Judge was clearly wrong, and the reasons given by him in support of his finding are altogether unacceptable. It is necessary, therefore, for us to send the case back to the Subordinate Judge in order that he may pass a proper preliminary decree in the partition suit and proceed thereafter to ascertain the value of the share which the plaintiffs can claim as being assignees of Mt. Kaniz Sughra.

5. We wish to lay it down for the guidance of the Court below that the Shia Law declares, as we have stated above, that while the childless widow is not entitled to a share in the value of any land even where the land forms the site of a building, she is entitled to a one-fourth share in the proceeds of sale of the buildings. This was the view of the law which was laid down by their Lordships of the Privy Council in the case reported as *Ago, Mahomed Jaffer Bindanim v. Koolsom Beebee* (1898) 25 Cal 9.

6. We also have to point out for the guidance of the Court below that the decision of the Subordinate Judge regarding the plaintiffs' interest in certain usufructuary mortgages is erroneous. The Subordinate Judge seems to have thought that the usufructuary mortgages executed in favour of the deceased owner constituted immovable property in the sense of land, so as to disentitle the widow to any share

in property of this nature. This is an erroneous view of the law. The lady is without doubt entitled to her proper share in all debts which were owing to her deceased husband whether these debts were secured by usufructuary mortgages or otherwise. Her share in the debts must be declared and awarded.

7. A plea was also taken in the Court below to the effect that the widow was already in possession of moveables belonging to her deceased husband, the value of which far exceeded the total value of her share of the inheritance. Some evidence was given before the Subordinate Judge; we are not in a position to say whether he believed it or not but, at any rate the question whether this lady has this property in her possession is one which must be investigated before a final decree for partition is passed, and she will without doubt have to account for all property in her possession and bring it into the hotchpot in order to enable fair and proper partition to be made.

8. We should like to add for the direction of the Court below that if the defendants put forward, as they would be well-advised to do, an estimate of the value of the buildings as separate from the land, this valuation would be considered by the plaintiffs as an alternative to a sale; but if the parties cannot agree as to what is the fair one-fourth value of the buildings as distinguished from the site, then the properties will have to be brought to sale. In that event there might also be an agreement that the land and the buildings should be sold as one lot there being an apportionment as to the value of the buildings and the value of the site; otherwise if the value of the buildings alone is put on to the market the result may be that the price fetched will be very small.

9. We make these observations in the interests of the defendants who should endeavour to come to a settlement with the plaintiffs as to the valuation of the buildings, if they can possibly do so, so as to avert a sale. We allow the appeal, set aside the decree of the Court below and send the case back to the Court of the Subordinate Judge for the preparation of a proper preliminary decree. The preliminary decree having been passed, the Court will then take such proceedings as are necessary for the preparation of the final decree. Costs here and hitherto will abide the result including in this Court fees on the higher scale.

