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Court : Allahabad

Decided On : May-18-1921

Reported in : AIR1921All242; 63Ind.Cas.344

Judge : Tudball and ;Sulaiman, JJ.

Appellant : Bindeshri Pershad and anr.

Respondent : B. Afzal Khan and ors.

Judgement :

1. This and the connected Appeal No. 233 of 1919 are appeals by the plaintiffs in a suit brought for recovery of possession of certain properties. Preliminary objections are taken to the hearing of both these appeals by the learned Vakil for the respondents. As regards Second Appeal No. 233 of 1919, the plea is that at the time when the appeal was filed, a copy of the first Court's judgment did not accompany the memorandum of appeal and no application was ever made to get the time extended, with the result that no proper appeal was ever filed at all. As to Second Appeal No. 232 of 1919 it is urged that after the dismissal of the other appeal it will be barred by the principle of *res judicata*. We agree that having regard to the amendments of Order XLI, Rule 1 and Order XLII, Rule 1 of the Civil Procedure Code, which this Court has made in exercise of the powers given to it under Section 122 of the Code, a memorandum of second appeal without a copy of the first Court's judgment is an incomplete document and is not properly preferred. The appeal must accordingly be dismissed. This is the view which has

been accepted in a recent Fall Bench case, See *Bhairon Ghulam v. Ram Autar Singh* 63 Ind. Cas. 338-[Ed.].

2. In order to appreciate the plea of *res judicata* it is necessary to state the facts of the case first. One Mir Hidayat Ali was the owner of the property in dispute. He died leaving a widow one Musammat Imaman Bibi, his mother Nuran Bibi and three sisters as his legal heirs and representatives. Musammat Imaman Bibi appears to have entered into possession of the estate in lieu of her dower debt. On the 31st of August 1908, the widow Musammat Imaman Bibi purported to transfer the entire estate of her deceased husband Mir Hidayat Ali, including her one-eighth share in it, in favour of Babu Afzil Khan and the recital of the sale deed shows that she alleged that during the lifetime of her husband the whole of the property had been transferred to her absolutely in full payment of her dower debt. One of the sisters of Mir Hidayat Ali sued to recover possession of the estate against Babu Afzal Khan, the transferee, but the transferee, *inter alia*, pleaded that without payment of a proportionate amount of the balance of the dower debt her suit should not be decreed. His contention, however, was repelled by the Courts below and their judgments were upheld by this Court in Second Appeal No. 1246 of 1914, decided on the 3rd of November 1914. On the 28th of April 1916 the present suit was filed by the plaintiffs, as transferees from one of the sister and a daughter of the third. After the institution of the suit Babu Afzal Khan appears to have taken a second sale-deed from Musammat Imaman, the widow of Mir Hidayat Ali, on the 3rd of September 1917 of her dower debt and a right to retain possession of the estate in lieu of that debt. Fortified by this new sale deed he filed a written statement, pleading *inter alia* that without payment of a proportionate amount of the balance of the dower debt the plaintiffs were not entitled to a decree for the recovery of their shares. The Court of first instance decreed the suit for 15 *sihams* out of 39 *sihams*, and dismissed the suit with respect to the remaining 5 *sihams* out of the 20 *sihams* claimed. The plaintiffs, however, were not called upon to pay any part of the dower debt at all. Two appeals were filed against that decree. One by the defendants who urged that the decree ought to be subject to the payment of a proportionate amount of the balance of the dower debt, and also challenged the decree as regards the 15 *sihams* and the other appeal by the plaintiffs with respect to the 5 *sihams* as to which the suit had been dismissed,

These two appeals were disposed of by the District Judge by separate judgments. He dismissed the plaintiff's appeal but partly allowed the defendants appeal, and made the decree conditional on the payment of the amount which he found due from the plaintiffs to the defendants.

3. It is clear that the points which were raised in the two appeals before the learned District Judge were quite distinct and independent of one another. There was no common issue in the two judgments. These cases are not cases arising out of two separate suits which had been disposed of by one common judgment containing a common finding on any particular disputed matter. The decree of the first Court is still being challenged in Second Appeal No. 232 of 1919 and the judgment of the lower Appellate Court in the other case has not decided the point raised in this second appeal, which, in our opinion, is not barred by the principle of *res judicata* simply because Second Appeal No. 233 of 1919 fails as not having been properly filed.

4. Now coming to the merits of the appeal, it is true that before the sale-deed of the 31st of August 1908 Musammat Imaman was entitled to retain possession of the estate and to resist the claim of the heirs till her dower debt had been satisfied. It might also be said that she was entitled to recover the balance of her dower debt after accounting for the profits received, if she chose to surrender possession. But after the sale deed the position was completely altered, In fact the recital in the sale-deed that the property had been transferred by her husband in his lifetime in full payment of her dower debt would suggest that the dower debt had actually been extinguished at the time when the sale-deed was executed. That being so we must take the sale-deed to be a deed of transfer of the property covered by it and not a deed of transfer of her dower debt. The transferee, after he had obtained possession of the property transferred, held possession adversely to the widow. In our opinion as the dower debt had not been transferred to the vendee, the widow's lien to retain possession of the property till her debt was satisfied must be taken to have become extinguished. It did not remain in her, because she could not retain possession of the property and resist the claim of the heirs; and it did not pass to the transferee, for the simple reason that it had not been transferred to him. It is even doubtful whether after the transfer of the property and after the loss of

possession by the widow she could bring a suit to recover her dower debt, as she had put it out of her power to surrender possession to the heirs. In any case, she did never, in fact, sue to recover her dower debt within the three years of the deed of transfer, dated the 31st August 1908. On the 3rd September 1917 when she executed the second deed, her possessory lien was not alive and could not be legally transferred to Babu Afzal Khan; the dower debt had also become extinguished and was at least barred by limitation, It has been strongly contended by the learned Vakil for the respondents that the right to retain possession of the property till her dower is satisfied is a smaller right in the property and must at least be taken to have passed when the larger right, the proprietary interest in the property, purported to have been transferred. He concedes, however, that the widow had no power to transfer the property itself. We do not agree with this contention. The transfer of the property by the widow was invalid because she had no power to transfer the property. Such a transfer does not necessarily imply a transfer by her of her right to retain possession of the property till her dower debt is satisfied, and much less would it be the case where the sale-deed leave no room for debt that the vendor's allegation at the time was that the debt had actually been satisfied and no longer existed The widow, by transferring the estate over which she had only a possessory right, cannot by implication be deemed to have also transferred her lien together with her dower debt. This is fully established by the rulings of this Court in *All Muhammad Khan v. Azizullah Khan* 6 A. 50 : A.W.N. (1883) 204 : 3 Ind. Dec. (N.S.) 617, where it was expressly held that a transfer of the estate did not imply the transfer of a dower debt, although it is true that in that case the ground of decision was that the lien was personal to the widow and could not pass to the purchaser and this is now not good law. In *Ajuba Begam v. Nazir Ahmad* A.W.N. (1890) 115. Mr. Justice Mahmood (at page 116) pointed out that a purchaser from a widow is, of course, in one sense the representative of the widow vendor, but he is not her legal representative in the sense in which upon her death her heirs would be. He is not her representative in her claim to dower, because it is a money claim by itself and stands upon a different footing to the right of inheritance to a share in specific property; and that the deed of transfer of the estate passed nothing more to the vendee than the widow's inherited rights in the property transferred. Then in *Mohammad Husain v. Bashiran* 26 Ind. Cas. 109

: 12 A.L.J. 1141, it was held that where a widow had not transferred her dower debt and with it the lien which she possessed but had transferred the estate of her husband, the decree for possession against the vendee could not be made conditional on payment of any part of the dower debt. As has already been pointed out, it was held by a Bench of this Court in Second Appeal No. 1248 of 1914 decided on the 3rd of November 1914, arising out of the suit brought by Musammat Kariman, that Babu Afzal Khan was not entitled to resist Musammat Kariman's suit to recover possession of her share on the ground that she must pay a proportionate amount of the dower debt. The same view has also been accepted in the recent case of Maina Bibi v. Wasi Ahmad 51 Ind. Cas. 242 : 17 A.L.J. 629 : 1 U.P.L.R. (A) 106 : 41 A. 538, where the contention that the right to retain possession in lieu of dower is a lesser right which must be taken to have been included in the larger right, viz., the interest in the property, was repelled. The deed of transfer in that case seems to have been very much similar to the one before us and the learned Judges held that the right to claim her dower was not transferred under it and that the transferee could not compel the other heirs to pay a proportionate amount of the balance of that dower debt. In our opinion the question is mainly one of the construction of the deed of transfer in each case, and as we have pointed out, the deed of sale in this particular instance neither expressly nor by implication purported to transfer the widow's lien. Strong reliance has been placed on behalf of the respondents on the Full Bench case of Beeju Bee v. Syed Moorthiya Saheb 53 Ind. Cas. 905 : 43 M. 214 : 37 M.L.J. 627 : 26 M.L.T. 419 : 11 L.W. 150 : (1920) M.W.N. 26. One of the judgments in that case does to some extent support the respondents contention. Abdur Rahim, Officiating Chief Justice, after discussing at length various rulings which lay down that the right to retain possession of the property in lieu of a dower debt is a transferable right, goes on to remark that in as much as a widow, although she has no power to sell the property in her possession and, therefore, the sale itself will not bind her husband's heirs, can, however, transfer her possession along with the dower debt, the transfer must be upheld to that extent. If this observation was based on the particular terms of the sale-deed before the learned Judges, we have nothing to say against it. But if this was meant to be a general observation that a transfer of the property itself necessarily implies a transfer of the dower debt by the widow

even though the deed expressly says to the contrary, we are unable to agree with it. We may note that Seshagiri Aiyar, J., who agreed with the conclusion of the Officiating Chief Justice, seems to have based his decision on an altogether different point, namely, on the principle of subrogation and on the principle of equity which compels a plaintiff to discharge a lawful debt before recovering possession. He considered that these principle is were well recognized and should be applicable to the case of a sale by a widow. The sale deed in that case purported to have been executed with respect to a part of the estate of her husband for payment of the dower debt due to the lady as well as for discharging other debts and family expenses. According to the view which at one time seems to have prevailed in Madras, one of the heirs of a deceased Muhammadan, who happens to be in possession of the entire estate, can transfer a part of the estate for the purpose of discharging the debts of the deceased Muhammadan and such transfer would be binding on the other heirs. Seshagiri Aiyar, J., seems to have applied this principle to the case before him. This Court, however, has consistently held that on the death of a Muhammadan owner the estate devolves immediately on all the heirs, who own inadvertent specified shares in the property, and such devolution is not postponed till all the liabilities and debts have been discharged. In *Jafri Begam v. Amir Muhammad Khan* 7 A. 822 : A.W.N. (1885) 248 : 4 Ind. Dec. (N.S.) 636, it was pointed out that one of such heirs, even if in possession, would not be competent to transfer the estate of the other heirs, nor would he represent them in a suit. The learned Vakil for the respondents has also referred us to certain older cases, *Mahomed Ussud-ool-lah Khan v. Ghasheea Beebee* 1 Agra H.C.R. 150, *Musammatt Kummur-ool-nissa Begum v. Mohomed Husun* 1 Agra H.C.R. 287, and *Musammatt Ghufornn Bebee v. Khwajeh Mustukedeh* 2 Agra H.C.R. 300. In view of the current of recent authorities it is not necessary for us to discuss these earlier cases. Reliance has also been placed on the recent ruling in *Abdulla v. Shamsul Huq* 58 Ind. Cas. 833 : 18 A.L.J. 969 : 2 U.P.L.R (A.) 329 : 43 A. 127, in which two learned Judges apparently held that the possessory right of a widow could be transferred even though her dower debt was not transferred. That case has no bearing on the present case and it is, therefore, unnecessary for us to say whether we agree with the view expressed therein or not. We are of opinion that after the execution of the sale-deed, dated the 31st of August 1908, which did

not transfer the right of the lower debt. Babu Afzal Khan is not entitled to resist the heirs claim and urge that they must pay a proportionate amount of the dower debt due.

5. The decree of the lower Appellate Court must, therefore, be set aside and that of the Court of first instance restored. We accordingly allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance including costs in all Courts. The costs in this Court will include fees on the higher scale.

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