

Hashmat and anr. Vs. Ibrahim and ors.

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Court : Punjab and Haryana

Decided On : Nov-23-1950

Reported in : AIR1952P& H251

Judge : Harnam Singh, J.

Acts : Punjab Courts Act, 1919 - Sections 4 and 41; Customary Law

Appeal No. : Second Appeal No. 603 of 1946

Appellant : Hashmat and anr.

Respondent : ibrahim and ors.

Advocate for Def. : R.P. Khosla, Adv.

Advocate for Pet/Ap. : S.L. Puri, Adv.

Disposition : Appeal allowed

Judgement :

Harnam Singh, J.

1. On the 3rd October 1944, Hash-mat major and Barkat minor instituted Civil Suit No. 537/124 of 1944/45 for possession of one-half share of land comprised in Khasra Nos. 853, 855, 852 and 856, mentioned in the jamabandi of 1939-40 situate in village Behrampur, Tahsil Gurdaspur. In the plaint it was stated that the

plaintiffs were owners of one-half share of the land in suit and that the other half was owned by Fateh Mohammad defendant No. 5. Then it was stated that Fateh Mohammad defendant No. 5 sold the entire land for Rs. 400/- on the 9th of February 1938, in favour of Ibrahim defendant No. 1 and Tufail, father of defendants Nos. 2 to 4. That being so, the plaintiffs maintained that defendant No. 5 was not competent to sell one-half of the land owned by the plaintiffs.

2. Defendants Nos. 1 to 4 resisted the suit pleading that Fateh Mohammad defendant No. 5 being the guardian of plaintiffs at the time of the sale was competent to sell the plaintiffs' share and the sale had been for the benefit of the plaintiffs.

3. On the pleadings the trial Court fixed the following issues:

1. Was defendant No. 5 competent to sell the plaintiffs' share?

2. Was the sale effected for the benefit of the plaintiffs? If so, what is its effect?

3. Relief.

4. Finding that Fateh Mohammad defendant No. 5 was the natural and 'de facto' guardian of the plaintiffs, the trial Court held that Fateh Mohammad was competent to make the alienation in suit, which was evidently for the benefit of the plaintiffs. The suit therefore failed and was dismissed with costs.

5. From the decree passed by the trial Court on the 25th May 1945, the plaintiffs appealed in the Court of the Senior Subordinate Judge, Gurdaspur.

6. In the appellate proceedings the Senior Subordinate Judge, Gurdaspur, affirmed the decree passed by the trial Court and dismissed the appeal with costs.

7. From the decree passed by the Senior Subordinate Judge on the 26th of November 1945, the plaintiffs have come up in second appeal under Section 41 of Punjab Courts Act IX of 1919.

8. Parties having migrated to Pakistan, the Custodian, Evacuee Property, East Punjab, was served in the proceedings. Before me, Mr.' Ram Parshad Khosla

represents the Custodian while Mr. Shambu Lal Puri appears for the plaintiffs-appellants.

9. Mr. Puri urges that on the findings given by the Courts below, Fateh Mohammad was not competent to make the sale in suit. He contends that if the parties were governed by Mahomedan Law, Fateh Mohammad would not be guardian of the property of the plaintiffs. In this connection reference may be made to paragraph No. 262 of Principles of Muhammadan Law by D. F. Mulla, 11th edition. Paragraph No. 262 reads:

'Legal Guardians of Property': The following persons are entitled in the order mentioned to be guardians of the property of a minor:

1. the father;
2. the executor appointed by the father's will;
3. the father's father;
4. the executor appointed by the will of the father's father.'

Fateh Mohammad defendant No. 5 is a brother of Allah Bakhsh, father of the plaintiffs. Clearly, Fateh Mohammad is not guardian of the property of the plaintiffs under Muhammadan Law.

10. Indeed, the litigation was fought on the basis that the parties were governed by the agricultural custom. A rains are mentioned at Serial No. 12 in the list of tribes whose custom was recorded in the Customary Law of the Gurdaspur District and are governed by custom. That being so, we have to see whether under the rule of custom Fateh Mohammad was competent to sell the property of the plaintiffs. In this connection reference may be made to answer to Question No. 4, Section IV -- Guardianship and Minority --Customary Law of the Gurdaspur District. Question No. 4 and the answer to that question read.:

'Question '4': To what extent, under what conditions, and for what purpose, can guardians alienate the property, movable or immovable, of their wards by sale, gift or mortgage? May a guardian lease the property of his ward? If so, for what

period?

'Answer 4' : A guardian cannot gift the property of his ward. He has full powers of alienation by sale or mortgage as regards movable property subject only to the condition that he acts in the interests of the minor. 'As regards immovable property the power of alienation by mortgage is admitted by all tribes except the Changs and Labanas of the Pathankot Tahsil. The power of alienation by sale is denied: (1) by all the tribes of the Gurdaspur Tahsil; (2) by all the tribes of the Pathankot Tahsil except the Mohammedan Rajputs; (3) by all the tribes of the Batala Tahsil except Brahmans and Khatris and (4) by all the tribes of the shakar-garh Tahsil except Hindu and Mohammedan Jats, Hindu and Mohammedan Rajputs, Pathans and Gujars.'

11. As stated above, the parties belong to the Arain tribe of the Gurdaspur Tahsil of the Gurdaspur District and that being so, the guardian of the minor plaintiffs was not competent to sell immovable property of the plaintiffs.

12. No other point was argued in these proceedings. Indeed Mr. Ram Parshad Khosla, who appeared for the Custodian in these proceedings, did not controvert the contention raised that Fateh Mohammad defendant No. 5 was not competent under the agricultural custom governing the parties to sell the land owned by the plaintiffs.

13. In the result, I allow this appeal, set aside the judgments and decrees of the Courts below and decree the plaintiffs' suit.

14. Considering the circumstances of the case I leave the parties to bear their own costs throughout.