

Fatima Bibee Vs. Ahmad Baksh

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Court : Kolkata

Decided On : Aug-14-1903

Reported in : (1904)ILR31Cal319

Judge : Rampini and; Pargiter, JJ.

Appellant : Fatima Bibee

Respondent : Ahmad Baksh

Judgement :

Rampini and Pargiter, JJ.

1. This appeal arises out of a suit to establish the validity of a hibanama, or deed of gift, said to have been executed by one Dader Baksh and his wife Salimat-unnessa in favour of their son Ahmad Baksh on the 21st May 1897, six days before the death of Dader Baksh.

2. Bader Baksh was a Sub-Deputy Collector. He suffered from diabetes for 8 or 9 years, and then albuminuria supervened in 1896. He obtained leave on medical certificate and returned to his home in Cuttack early in May 1897. He was attacked with fever about the 12th May and was treated by 6 Doctor named Keshab Chandra. On the 20th May, Colonel Meadows, the Civil Surgeon, was called in to treat him, and a nurse, Mrs. Anderson, was engaged on that day or the next day. On the 21st May, Dader Baksh and his wife executed a hibanama and it was

registered by the Special Sub-Registrar on the 25th. Dader Baksh died on the morning of the 27th. He left six daughters besides his widow and son, the three eldest of whom were married.

3. After his death the daughters impugned the hibanama and claimed their legal shares in the property with the aid of Nurul Haq, who was the eldest daughter's husband, and was appointed guardian of the three minor daughters. But the second daughter, Khatima Bibee, alias Tahera Bibee, subsequently relinquished her claim. The son has instituted this suit to establish his right under the hibanama; and the dispute relates to the shares which the five dissenting daughters claim. The mother Salimat-un-nessa admits the deed and supports the plaintiffs claim. He says he got possession at once of the whole of the property under the deed; that he is in possession of the share of $5\frac{1}{2}$ annas which the three youngest daughters claimed but has been dispossessed of the share of $3\frac{1}{2}$ annas, which the first and third daughters claimed and for which they got their names registered in the collectorate. He asks that he may recover possession of the latter share and that his possession of the former share may be confirmed. The Subordinate Judge decreed the suit, except as regards one item, a house. The five daughters have appealed and the plaintiff has put in cross objections regarding the house.

4. The Subordinate Judge has stated in his judgment all the issues that have arisen and most of them are raised in this appeal. But some of them have not been argued before us. It is not necessary, then, for us to discuss there at length, and it is sufficient to state that we agree with the lower Court regarding the first three issues, that the third daughter Khodya Bibee was not a minor at the time of the institution of the suit, and that the suit is not multifarious nor under-valued. The reasons which he has given are sound and have not been controverted before us.

5. The principal issues are the 4th, whether the hibanama is a genuine and valid deed, and the 5th, whether the plaintiff's allegation of possession and dispossession is true. The former of these two issues involves many questions. Foremost among them are the defendants' contentions that the hibanama is forgery, and that Dader Baksh suffered so much from delirium that, if he did

execute it, he did not understand what he was doing.

6. It is not necessary for us to discuss the evidence on the two points in any fulness, for it has been fully discussed by the Subordinate Judge and we entirely concur with his conclusion. The deed carried out what had been Dader's and his wife's intention for a long time before it was executed without any attempt at secrecy, and moreover the three eldest daughters signed it in acknowledgment that it was made with their consent. It was attested by persons of respect ability and independence, and it was registered by the Special Sub-Registrar whose testimony altogether destroys the allegations of false fabrication and mental incapacity. The alleged difference in the signature is not material. Dader knew perfectly well what he was doing; and there is no doubt that his wife in joining in the deed understood it fully, for therefore is no allegation that he misled her. We find therefore, that the hibanama was executed by both of them with full consciousness, understanding and deliberation.

7. The principal discussion under this issue has been whether the deed is valid with reference to the Mahojnedan Law regarding gifts made during marz-ul-maut or death illness: for such gifts are declared invalid. The law on this matter has been cited from Baillie's Mahomedan Law, Book VIII, Chapter VIII, Mr. Justice Amir Ali's Mahomedan Law, second edition, Vol. I, page 53, Moulvi Mahomed Yusoofs Tagore Law Lectures, Vol. III, page 392, 2920, and page 402, 2946, Sir Roland Wilson's Anglo-Mahomedan Law, 1st edition, pages 233 and 234 and the authorities quoted in the case of Labbi Beebee v. Bibbun Beebee (1874) 6 All. H.C. 159. In the first two works the Fatawa-i-Alamgiri is quoted as the chief authority and has been treated as such before us. Put briefly it declares thus: 'A death-illness is one which it is highly probable will end fatally whether the sick person has taken to his bed or not; or whether in the case of a man, it disable him from rising up for necessary avocations out of the house or not, such as for instance, when he is a faki or lawyer, from going to the masjid or place of worship, and when he is a merchant from going to his shop; or whether in the case of a woman it does or does not disable her from necessary avocations within doors.' But the illness is to be considered death illness when a man cannot pray standing.

8. The passages cited in Labbi Beebe's (1874) 6 All. H.C. 159 case. mentioned above, show that the doctrine of death-illness has been qualified by a further condition, and that condition as enunciated by the Allahabad High Court in the case of Gulshere Khan v. Mariam Begam (1881) I.L.R. 3 All. 731 is that, when the malady is of long continuance and there is no immediate apprehension of death, the illness is not a death-illness; so that a gift made by a sick person in such circumstances, if he is in the full possessions of his senses, is not invalid; and it is explained that the malady should be considered to be of long continuance, if it has lasted a year. The explanation of this rule (as allowed without dispute on both sides) is that such a prolongation of the illness demonstrates that it is not fatal and implies that it becomes part of the sick person's modified constitution.

9. There is no dispute that Dader's health failed after he suffered from albuminuria and that his illness was sufficient to entitle him to a medical certificate and six months' leave (see Exhibits VIII, XX and Q). But it is proved by the evidence and is not disputed that a man suffering from that disease may live for years, and that the disease did not constitute a death-illness in his case, if it had lasted a year. There has been some discussion whether he did suffer from it a full year before the execution of the deed. Now we agree with the observation made in the case of Hassarat Bibi v. Golam Jaffar (1898) 3 C.W.N. 57 that this limit of one year does not constitute a hard-and-fast rule, and that it may mean a period of about one year. We think, however, it is clear on the evidence corroborated by the probabilities of the case, that Dader had suffered for more than a year (see Balaram Bose's deposition). There can be no doubt, therefore, that albuminuria did not constitute a death-illness in his case. This conclusion has not been seriously disputed by the learned vakil for the defendant-appellants; but he relies on a passage cited from the Fatawa-i-Shamiat page 164 of Labbi Beebe's (1874) 6 All. H.C. 159 case mentioned above and baa given us a fresh, translation of it, which runs thus: 'If it (the disease) becomes old in this way that it extends beyond a year, and no increase occurs within that (period), then he (the sick person) is (to be deemed to be) in health; but he dies in a state of increase, whether the increase takes place before the (year's) prolongation or after it, he is (to be deemed to be) sick.' The meaning of this passage is this, that if the illness increases and death then ensues, the increase is the death-illness; and both, sides agree in this view.

Now, it is dear from the evidence on both, sides, that, although his symptoms improved on his return home, Dader did have an increase of illness about 10 days before the deed was executed; and the question arises, whether that increase constituted a death-illness. To decide this we must apply the law as stated above, regarding death-illness.

10. The parties contended for two different constructions of the passages cited above. These passages mention three matters (i) illness (ii) expectation of a fatal issue, and (iii) certain physical incapacities which indicate the degree of the illness. The learned vakil for the defendants, contends that the meaning of this is that, if the 1st and 3rd exist, then the 2nd must necessarily be presumed, namely, that there is an expectation of death. The learned vakil for the plaintiff contend son the other hand, that there is no such necessary presumption, that the matters of the 3rd class are only evidence and that the Court must decide from that and the other evidence Whether the second actually exists, that is, whether there is expectation of death. The latter appears to us to be the correct view: for the passage from Fatawa-i-Alaingiri distinctly states twice that the definition of death-illness is illness in which death is highly probable, whether the incapacities mentioned exist or not. These incapacities, therefore, are not infallible signs of death-illness. Only one symptom is mentioned as conclusive, namely, that the man cannot stand praying. The explanation appears to be this: At the time when this law was laid down, little medical knowledge existed. It was necessary, however, to decide when an illness was a death-illness; and that could only be done by simple rules dealing with certain; symptoms which all persons could notice and comprehend. Yet it appears from these passages that even while the lawyers suggested that certain physical incapacities indicated dangerous illness, they did not lay down positively that these incapacities are conclusive, as contended for by the learned vakil for the defendants; for it was no part of their definition of death-illness, whether the incapacities mentioned existed or not. It is only with regard to the extreme case, where a man cannot stand up to perform the primary and simple obligation of saying his, prayers, that they declared the illness should be deemed a death-illness.

11. For these reasons we agree with the remark made in Hassarat Bibi (1898) 3 C.W.N. 57 case, mentioned above, that too narrow a view must not be taken of the doctrine of death-illness; and our view is in agreement with the way in which the doctrine is stated in that case, namely, was the disease of such a nature or character as to induce in the person suffering the belief that death would be caused thereby, or to engender an apprehension of death? 'and' was the illness such as to incapacitate him from the pursuit of his ordinary avocations, or standing up for prayers, a circumstance which might create in the mind of the sufferer an apprehension of death?.'

12. We have thus to decide whether the increase in the illness which began about the 12th May constituted a death-illness; and we must apply the foregoing principles to that increase. The principal question, then, is whether Dader was under apprehension of death, when he executed the hibanama. If he had marked physical incapacities at the time, they did not necessarily imply that he must have been under such apprehension, but they are matters to be considered in deciding the question.

13. Now it is quite certain that each party has adjusted its evidence regarding that increase in his illness with reference to the above mentioned rules of Mahomedan Law. Thus the plaintiff's witnesses assert that the illness did not prevent Dader from undertaking his necessary avocations, and the defendants' witnesses assert that he was absolutely confined to his bed and was very seriously ill. Hence each party's evidence cannot be trusted much regarding its own case, But statements which favour the opposite party may be relied on; and the best evidence is the proscription register (Exhibit R) which was written up at the dispensary in the ordinary course of business and is unimpeachable. That register coupled with the deposition of Dr. Zorab, the Civil Surgeon, shows? that Dader was treated for fever on the 14th May. His illness, became more serious on the 20th May, for Dr. Meadows, the Civil Surgeon, was, called in and prescribed four medicines a automatic tonic, a febrifuge, a sedative and an anti-thirst draught (Exhibits IXa, IKb, IXc). But Dr. Zorab' said' in his deposition from the above prescriptions I think the doctor, who was treating the patient could not have thought he was to die within a short time. There is nothing in the prescription to indicate he was in a

critical state.' Dr. Meadows prescribed again on the 21st May (see 9th entry in Exhibit R--there are mistakes in the paper-book) and only added an extra ingredient (a diaphoretic) to the stomachic tonic. He prescribed similar medicines on the 22nd and 23rd of May (see 10th and 11th entries in Exhibit E, which are printed twice in the paper-book, and the last two entries). He was not called in again and the nurse left about the 23rd May; for Nurul Haq, the principal witness on the defendant's side, says she stayed only three or four days. Dader seems, therefore, to have improved under this treatment; and Dr. Bhushan, who visited him twice on the 26th May, prescribed only Mellin's Food and a sleeping draught in the evening. Next morning Dader died. What the immediate cause of his death was is not known. No medical evidence about it has been given. Neither party has examined Dr. Keshab Chandra, who treated Dader throughout the increase of illness till his death, nor Mrs. Anderson, the nurse. Dr. Meadows is dead. We have therefore only Dr. Bhushan's testimony. He visited rarely and prescribed only on the evening of 26th May; and he did not then think that Dader would die shortly. He says he cannot say exactly what Dader died of.

14. All that is known then from the evidence is that Dader got fever on the 12th May and was much weakened by it, so that he had been most of his time reclining in the inner apartments upstairs for convenience. But there is no good evidence that he was incapable of standing up to say his prayers. The evidence on the defendant's side is highly exaggerated. The symptoms did not indicate that he must have been under apprehension of death. There is nothing in the medicines prescribed to show that he was in a critical condition, and there is no reason to suppose that Dr. Meadows in prescribing for him and in engaging a nurse had any further idea than that the fever required and would yield to careful treatment. There is no reason, then, to suppose that Dr. Meadows or any one else could have told Dader he was in a critical state on the 21st. The albuminuria had become chronic and required rest and change (see Exhibit XX). Fever is a common ailment. There was nothing, therefore, in his symptoms which should necessarily have excited in him apprehension of death. Moreover, no hurry was shown in getting the deed registered. There was nothing, therefore, to indicate that Dader was under apprehension of death on the 21st May; hence the increase of illness did not constitute a death-illness. We accordingly find that the hibinama is valid.

15. Next comes the question whether possession of property was given to the plaintiff. The evidence shows that Dader at once gave possession to the plaintiff's uncle Ebrahimi on behalf of the plaintiff.

16. But delivery was not necessary; for according to Mahomedan Law no actual delivery of possession is necessary where a parent makes a gift to his son, who is a minor. The gift is completed by the deed and if the parent retains possession, his possession is equivalent to possession by the minor: see Baillie's Mahomedan Law, Book VIII, Chapter V; Ameer Ali's Mahomedan Law, Second Edition, Vol. I, page 103; and the Privy Council decision in *Ameevoonnissa Khatoon v. Abadoonnissa Khatoon* (1875) 15 B.L.R. 67 : L.R. 2 I.A. 87.

17. Apart from this, moreover, it is contended by the learned vakil for the plaintiff that, according to Section 123 of the Transfer of Property Act, registration of the hibanama completed the transfer; and he refers to the remark in the case of *Hassarat Bibi v. Golam Jaffar* (1898) 3 C.W.N. 57, 9. In answer, the learned vakil for the defendants says that Section 123 of that Act does not affect the rule of Mahomedan Law in this matter by reason of Section 129. But it is not necessary for us, after the above findings, to pronounce any opinion on this point.

18. It is not disputed that the first and the third daughters have got possession of 3 1/2 annas share in the property. The dispossession therefore is manifest, and we find the issue regarding the plaintiff's possession and dispossession in his favour.

19. Lastly, the defendant's contention is that the registration of the hibanama was irregular and invalid. But this objection has not been argued before us; nor have the Subordinate Judge's reasons been controverted. We need only say that we see no reason to differ from him; and we hold that the irregularity was not material.

20. These are the questions that have been raised in this appeal; and there remains the cross objection by the plaintiff. One of the properties sued for is a house (item No. 6 in schedule A attached to the plaint). The eldest daughter Fatima Bibee and her husband Nurul Haq went and lived in the house after Dader's death, and the Subordinate Judge has decided that the plaintiff cannot get possession of it. The house is included in the hibanama and the plaintiff got

possession of it from the date of that deed. When Fatima Bibee took up her residence in it, she dispossessed him, and that was before the institution of this suit. If the plaintiff had stated these facts, he might have obtained a decree for the house along with the other properties of which he said he had been dispossessed. But he did not set out these facts in his plaint and he placed the house among the properties which he said were in his possession and in which he wished his possession confirmed. We do not see, then, how we can, upon these facts, give him a decree for recovery of possession of the house in this suit.

21. For these reasons, we affirm the decree of the Lower Courts and dismiss this appeal with costs. We also dismiss the cross appeal.

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