

Mafazzal Hosain Vs. Basid Sheikh

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Court : Kolkata

Decided On : May-23-1906

Reported in : (1907)ILR34Cal36

Judge : Rampini and ;Woodroffe, JJ.

Appellant : Mafazzal Hosain

Respondent : Basid Sheikh

Judgement :

Rampini, J.

1. The facts of the suit, out of which this appeal arises are, that one Abadi died, leaving a widow, a major son, a minor son and two minor daughters. The widow and major son sold two bighas of the land left by Abadi to one Bechu Sheikh in August 1897 and 4 bighas of the land to the same person in June 1899. Subsequently, in February 1902, the minor son and daughters having attained their majority sold their share of the land amounting to 9 annas odd to the plaintiff, who has now sued for possession.

2. The Lower Appellate Court has dismissed the suit. The District Judge has held that the sales to Bechu Sheikh were good sales and conveyed the interest of the minors, as well as of the major son and the widow. He has found that the sales were for legal necessity and for the benefit of the minors, and accordingly held that

the plaintiff took nothing by his purchase of February 1902.

3. The plaintiff appeals. On his behalf it has been urged.

(1) that the first hobala of August 1897 does not purport to convey the interest of the minors.

(2) that the widow, though purporting in the second kobala of June 1899 to sell the interest of the minors, was not their natural guardian and, consequently, had no right to convey their shares in the land, and

(3) that the sales were not for the benefit of the minors.

4. I do not think there is any force in any of these pleas. In the first kobala, there is, it is true no mention of the minor's share in the land. The sale is, however, said to be made for the maintenance of and for the benefit of the minors. Then the sale was of two bighas of the land, and the vendors, Abadi's major son and widow, had, it is admitted before us, a right to two bighas and ten cottahs of the land. So this sale is evidently good.

5. The nest sale took place in June 1899. The deed of sale of this date purports to convey four bighas of land and to be executed by the major son, Fakir Sheikh, and Tinkari Bibi, Abadi's widow, mother and guardian of the minor son and two minor daughters of Abadi. It conveys four bighas of land and purports to have been executed to pay off debts and for the maintenance of the minors. Now, in these four bighas of land the major son and widow had at least ten cottahs and the minors three bighas ten cottahs. So, whether the first kobala affected the minor's share in the land or not, the second certainly did, provided the sale was made by a person, who had authority to sell, and was for legal necessity and the benefit of the minors.

6. The Judge of the Court below has found that the sales were for the benefit of the minors, being to pay off debts in consequence of which the land might have been seized and sold at Court sales and for the maintenance of the minors. He has entered into the circumstances of the family and has shown that the sales were necessary. I see no reason to doubt the correctness of the Judge's finding on

this point, which, moreover, seems to me a finding of fact, which binds us.

7. The only point that remains to be considered is whether the mother had authority to convey the minor's share. It is evident that according to strict Mahomedan law, she was not the minor's natural guardian. The minor's natural guardian was one of their paternal kindred. But their major brother was one of their paternal kindred. It is not shown that they had any nearer paternal kindred than he. He was a party to both deeds. But it has been laid down in Mr. Justice Ameer Ali's Mahomedan Law, vol. II, p. 476, that, if a mother deals with a minor's estate, her acts, if they are to the manifest advantage of the children, should be upheld. So too in Maonaghten's Precedents, p. 306, and Shama Churn Sarkar's Tagore Law Lectures, p. 480, it is said that any one having the care of the person or property of a minor may enter into a contract on his behalf, where the profit is clear and certain or where it would be advantageous and not injurious to the ward. On this principle, in certain cases it has been held that a de facto guardian, such as the mother, can alienate her minor children's property for legal necessity and for their benefit. Such sales have been held good in the cases of Hasan Ali v. Mehdi Husain (1877) I.L.R. 1 All. 533 and Majedan v. Ram Narain (1903) I.L.R. 26 All. 22 and the present case would seem to be on all fours with these cases. The case, of Syedun v. Velayet Ali Khan (1872) 17 W.R. 239 is also in favour of the validity of the sale.

8. Stress has been laid on the case of Moyna Bibi v. Banku Behari Biswas (1902) I.L.R. 29 Calc. 473, but that case would seem to be clearly distinguishable from the present, for in that case, the alienation of the minor's property was considered not to be for their benefit. In the case of Bhut Nath Dey v. Ahmed Hosain (1885) I.L.R. 11 Calc. 417 there was held to be no urgent necessity for the sale. In Hurbai v. Hiraji Byramji Shanja (1885) I.L.R. 20 Bom. 116 the money raised by the mortgage was not raised, for any purpose specially authorized by Mahomedan Law and the purpose for which it was raised was not for the benefit of the minors.

9. In these circumstances I would dismiss the appeal with costs.

Woodroffe, J.

10. I do not myself think that the first conveyance of the 26th Sraban 1304 was intended to convey and did convey more than the widow's and her adult son's shares. It certainly, however, conveyed their shares. The subject of this and the second deed was the same jama of six bighas in which the widow and her adult son had shares amounting to two bighas and ten cottahs. I think it was intended by the first deed to dispose of the widow and adult son's shares in the whole jama of six bighas to the extent of two bighas and that the remaining ten cottahs were sold by the second deed. In this view, the first sale was clearly good as to these two bighas, and the second as to ten cottahs. By the second deed, which was executed by the mother of the minors as their guardian, she sold 'the whole of the minor's shares of the said jama', that is, three bighas and ten cottahs. The terms of the two deeds, in particular, the words quoted and the words 'remaining shares' in the second deed referring to the shares of the mother and adult son show, I think, that there is no ground for supposing that, assuming that the first deed dealt only with the shares of the widow and adult son, such shares were those belonging to them in the two bighas and not in the whole jama of six bighas. In other words, what was sold was not the widow and adult son's shares of two bighas, but two bighas of the jama as and for their shares or rather part of their shares in the whole jama of six bighas. The result, therefore, of the two transactions is, that as regards two bighas and ten cottahs a good title admittedly passed to the defendant.

11. Then as regards the three bighas and ten cottahs belonging to the minors, which passed under the second deed of the 20th Assar 1306, there is no doubt that the mother was not, under Mahomedan Law, the guardian of the property of the minors, and therefore she could not by any such title convey the property. But in the first place, under Mahomedan Law, the estate of a deceased person must be applied to the payment of his funeral expenses and debts before the heirs can make partition of it. *Pathumabi v. Vittil Ummachabi* (1902) I.L.R. 26 Mad. 734, 738. The first deed recites that the father of the deceased was on his death indebted for the rent of the jama and on a bond executed in favour of one Mahabir Meah, and apparently in respect of dues to other persons. Whether or not the minor's shares were dealt with in the first conveyance, such shares would be liable to discharge such debts, and if the debts were in the first instance paid out of the proceeds of

the shares of the widow and adult son, the minor's property would still be liable to the extent of their share of liability for the debts. Then the second deed was in part executed to pay a bond debt due to one Abdul Gaffar, which the District Judge says was a debt due on a bond executed by the minor's father. Next, as to the remaining causes necessitating the sales, money was, before both the sales, required for the maintenance of the minors and for payment of arrears of rent of the land, in which they had an interest. In fact, at the date of the second sale a rent decree had been obtained and the property was liable to be sold. It is true that the whole holding was in fact sold to the defendant, but this would appear according to the finding of the District Judge to have been more for the benefit of the minors than a forced sale by the Court. As regards the balance of the consideration money it was secured by a mortgage by the vendee of the property sold to him.

12. I am not myself prepared to say that we are precluded in second appeal from dealing with the question whether the sale was or was not for the benefit of the infants. We must doubtless accept the facts as found. But the conclusion to be drawn from them on the question whether, assuming such facts to be true, the sale did or did not bind the minors, may be shown to be another matter with which we are free to deal. However, it is unnecessary to decide this point, for I think that the sale, in so far as it was required to satisfy the debts of the deceased, was for a necessary purpose and was otherwise for the benefit of the minors.

13. The passage cited from Mr. Ameer Ali's Mahomedan Law and the other authorities referred to in my learned brother's judgment show that, where a sale is made by a de facto guardian (that is a person, who is not by Mahomedan Law one of the class of legal guardians of property and who has not been appointed by the Court) such sale, if for the benefit of the minor, will be upheld. This appears to be, as stated in Mr. Ameer Ali's learned work, a rule of Mahomedan Law. But if there were any doubt on the point, having regard to some of the decisions cited, in the absence of a specific provision prohibiting the application of the rule, it is properly [as pointed out in *Hasan Ali v. Mehdi Husain* (1877) I.L.R. All. 533.] enforceable as one of justice, equity and good conscience. I do not think that there is any such prohibition. All that the Mahomedan Law says is, that only certain persons (of whom the mother is not one) are legal guardians of property and entitled to deal

with it as such. In cases such as the present, the transaction is not upheld because of any title as guardian in the mother to convey, for she has none, not because of any authority in the party entering into the transaction, but because of the nature of the transaction itself, viz., its beneficial character, when viewed from the standpoint of the minors' interest. The law relating to guardians is one which exists for the benefit of the minors, and it would both be inconsistent and unjust to set up that law to defeat a transaction which in every respect fulfils its object.

14. I therefore agree that the appeal should be dismissed with costs.

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