

1908

HAR
PRASAD
v.
RAGHUNAN-
DAN
PRASAD.

stated above we hold that if Har Prasad discharged the mortgage of the 6th of January, 1890, he acquired priority over the plaintiffs, as regards two biswas of Meadi Khurd, to the extent of the proportionate liability of that property for the mortgage debt. The court below has not found whether he has paid off that debt, and, if he has done so, what is the proportionate amount of liability of the aforesaid share for that debt. We accordingly refer the following issue to that court under the provisions of section 566 of the Code of Civil Procedure :—

Did Har Prasad pay the amount due upon the mortgage of the 6th of January, 1890, and if so, for what portion of that amount was the two-biswa share of the village Meadi Khurd comprised in that mortgage proportionately liable ?

The court below will take such additional evidence relevant to the above issue as may be necessary. On receipt of its findings ten days will be allowed for filing objections.

Case remanded.

1909
January 8.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

HAMID-UN-NISSA BIBI (PLAINTIFF) v. NAZIR-UN-NISSA AND ANOTHER (DEFENDANTS).*

Act No. IV of 1882 (Transfer of Property Act, section 53—Transfer with intent to defeat or delay creditors—Muhammadian law—Transfer by Muhammadan to one of his wives with intent to defeat claim of the other for dower.

A few days after the institution of a suit against him by his first wife for recovery of her dower, a Muhammadan, who had two wives, transferred the bulk of his property to his second wife in satisfaction of her claim for dower. *Held*, on suit by the first wife to have the transfer above mentioned set aside, that such transfer was not necessarily unimpeachable, but that it was necessary to find, first, that the transfer was a real, and not merely a colourable transaction ; and, secondly, that the second wife had not combined with her husband in carrying out the transaction in question for the improper purpose of defeating the claim of the first wife.

THE facts out of which this appeal arose are as follows :—

One Ali Jawad had two wives, Hamid-un-nissa and Nazir-un-nissa. On the 1st December 1904, Hamid-un-nissa

* Second Appeal No. 1324 of 1907, from a decree of C. Rustomjee, District Judge of Allahabad, dated the 3rd June 1907, confirming a decree of Raj Nath Sahib, Subordinate Judge of Allahabad, dated the 16th of May, 1906.

filed a suit against Ali Jawad for the recovery of her dower debt. On the 6th December 1904, Ali Jawad transferred substantially the whole of his property to his second wife Nazir-un-nissa. On the 22nd of February 1905 Hamid-un-nissa in her suit for dower obtained a decree for Rs. 5,000 and proceeded to execute her decree by attachment of property which was the subject of Ali Jawad's gift to his second wife. Nazir-un-nissa successfully objected to the execution of her co-wife's decree, and in consequence the present suit was brought for a declaration that the transfer of his property by Ali Jawad to Nazir-un-nissa was void. The Court of first instance (Subordinate Judge of Allahabad) dismissed the suit, and this decree was on appeal confirmed by the District Judge, mainly with reference to the following cases: *Suba Bibi v. Balgobind Das* (1), *Khodija Bibi v. Shah Muhammad Zaki Alam* (2) and *Umrao Singh v. Kaniz Fatima* (3). The plaintiff appealed to the High Court.

Mr. *Abdul Majid*, for the appellant.

-Dr. *Tej Bahadur Sapru*, for the respondent.

STANLEY, C.J. and BANERJI, J.—This appeal arises out of a suit brought by the first wife of the defendant Ali Jawad for a declaration that a transfer made by him on the 6th of December, 1904 substantially of all his property in favour of his second wife was void against her. It appears that the appellant, Hamid-un-nissa Bibi, demanded her dower from her husband and instituted a suit for the recovery of it on the 1st of December 1904. Five days after the institution of this suit Ali Jawad made the transfer which is impeached in this suit. On the 22nd of February 1905 the plaintiff appellant obtained a decree for her dower amounting to Rs. 5,000, and forthwith proceeded to execute her decree. She was resisted by the defendant respondent, Musammat Nazir-un-nissa, and in consequence the suit out of which this appeal has arisen was instituted.

The court of first instance dismissed the plaintiff's claim. Upon appeal the learned District Judge affirmed the decision of the court below

(1) (1886) I. L. R., 8 All., 178. (2) Weekly Notes, 1901, p. 64.
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The main ground of that appeal was that the deed of transfer in question was a collusive and fictitious document, and that the dower of the defendant was only 500 *dirhams* and not, as she alleged, Rs. 20,000. As regard the amount of the dower both courts find that the dower of the defendant, Nazir-un-nissa was Rs. 20,000, but the learned District Judge finds that the impeached deed of transfer was undoubtedly a device on the part of Ali Jawad to deprive his first wife of the fruits of her victory in her suit for dower. He refers to a number of authorities and observes:—"Taking the trend of all these rulings I am of opinion that the deed of gift cannot be looked upon as a fraudulent transaction." He then says—"At the time of the gift the dower of the second wife was still due to her and constituted a valid debt in payment of which he could under the law make a valid gift of all his property to her," and then he observes:—"I must therefore hold that in law the transaction is unimpeachable." Now it may be true that a transfer by Ali Jawad to his second wife of all his property in satisfaction of her dower may be a valid and unimpeachable transaction, but that is not the sole question for determination. Having found that the transfer to his second wife was made by Ali Jawad for the purpose of defeating his first wife's claim and depriving her of the fruits of her successful litigation, it was necessary for the learned District Judge to determine whether or not the second wife was a party to the improper conduct of her husband. In other words whether or not she combined with her husband in carrying out the transaction in question for the improper purpose of defeating the claims of the first wife. If she did so combine, she would not be a transferee in good faith. It was further alleged that there was in reality no real and genuine transfer by the husband to his second wife. Before therefore we can determine this appeal we must have definite findings upon the following two issues:—

- (1) Whether the transfer of the 6th of December 1904, was a real transaction or merely colourable?
- (2) Was the defendant Nazir-un-nissa a transferee of the property comprised in that transfer in good faith?

We refer the above issue to the learned District Judge under order 41, rule 25, Civil Procedure Code. These issues he will determine upon the evidence already before him. On return of the findings the parties will have the usual ten days for filing objections.

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Issues remitted.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Banerji.

KAM KUMAR SINGH (DEFENDANT) v. ALI HUSAIN AND OTHERS
(PLAINTIFFS).*

1908

January 8.

Suit for damages against joint tortfeasors—Compromise between plaintiff and one of the defendant—such compromise no bar to a decree against the other defendants.

The plaintiff sued several defendants jointly to recover damages in respect of an alleged assault committed on him by the defendants, but entered into a compromise with one of the defendants. *Held* that the existence of this compromise did not preclude the plaintiff from recovering damages against the remaining defendants. *Brinsmead v. Harrison* (1) and *Thurman v. Wild* (2) referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of RICHARDS, J. The facts are stated in the judgment under appeal, which was as follows:—

“This was a suit for damages for assault. Before the institution of the present suit criminal proceedings had been commenced against some 12 persons, with the result that 8 out of 12 were convicted. The criminal proceedings were followed by the present proceedings in the Civil Court for damages against the same 12 persons. Before the suit was tried one of the four persons who had been acquitted by the Criminal Court entered into a compromise with the plaintiff. The suit then proceeded against the remaining defendants, with the result that a decree was given against the same 8 persons who had been convicted by the Criminal Court. The only plea argued in the present appeal is that the compromise by one of the defendants, to which I have referred above, barred the plaintiff's right to a decree against the other defendants or any of them. The appellant relies upon Pollock on Torts, 7th edition, p. 194.

* Appeal No. 45 of 1908 under section 10 of the Letters Patent.

(1) (1872) L R., 7 C. P., 547. (2) (1840) 11 A. and E., 453.