APAELLATE CIVIL,

1911
February 8.

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

NASIR-UL-HAQ AND OTHERS (DEFENDANTS) *v.* FAIYAZ-UL-RAHMAN AND OTHERS (PLAINTIFFS).*

Muhammadan law—Suit for dower—Compromise—Family arrangement—Transfer of expectancy—Act No. IV of 1882 *(Transfer of Property Act), section* 6 *(a).*

A Muhammadan wife brought a suit for dower against her husband which resulted in a compromise, the terms being that the wife was given possession of some property in lieu of her dower and the husband retained possession of some other property for life, which life interest in case of urgent necessity he was authorized to sell or hypothecate, and it was agreed that on the death of the wife the persons who should be the heirs of both would be the owners of the properties. The wife predeceased her husband, who then transferred certain properties in his own right and as heir of his wife, *held* that the compromise was in the nature of a family settlement under which the husband was not competent to dispose of more than the life interest in certain property therein named. The relinquishment by the husband of his right to succeed as heir to his wife was not obnoxious to the prohibition contained in section 6 *(a)* of the Transfer of Property Act, 1882. *Musammat Hurmat-ul-nissa Begum* v. *Allahdia Khan* (1), *Shums-ud-din Goolam Husein* v. *Abdul Husain Kalim-ud-din* (2), *Kunhi Mamod* v. *Kunhi Moidin* (3) and *Ram Nirunjun Singh* v. *Prayag Singh* (4) referred to.

THE facts of this case were as follows:—

One Abdullah owned, among other properties, 10½ biswas of the village of Nizam-ud-dinpur and 17½ biswas of Tayabpur. His wife, Musammat Mubarak-un-nissa, brought a suit against him for the recovery of her dower of Rs. 10,000, and this suit was compromised and the compromise embodied in a decree of the 29th of August, 1889. The material portions of the decree ran as follows:—

"The defendant, Abdullah, gives the whole of the undermentioned properties to the plaintiff in lieu of Rs. 10,000 dower claimed by her. Now the plaintiff is the owner of the said properties, but the defendant will retain possession over 10 biswas of Nizam-ud-dinpur for his life; the income of it will be appropriated by the defendant, and in case of urgent necessity he may hypothecate or sell his life estate in 5 biswas out of the said 10 biswas . . . On the death of the plaintiff those who may be the heirs of both the plaintiff and the defendant will be the owners of the properties."

Mubarak-un-nissa died on the 25th of May, 1894, and was survived by her husband Abdullah. He, on the 19th of

*Appeal No. 82 of 1909 under section 10 of the Letters Patent.

(1) (1871) 17 W. R., 108.
(2) (1906) I. L. R., 31 Bom., 165.
(3) (1896) I. L. R., 19 Mad., 176.
(4) (1881) I. L. R., 8 Calc., 188.

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April, 1897, executed a usufructuary mortgage in favour of the defendant No. 1 of 4 biswas of Nizam-ud-dinpur and 2½ biswas of Tayabpur. On the 2nd of April, 1899, he sold to the plaintiff 3¾ biswas out of the 5 biswas of Nizam-ud-dinpur, of which, according to his construction of the above-mentioned decree, he was the owner, and 1¼ biswas out of the other 5 biswas of the same village to which he claimed title by inheritance from his wife. Abdullah died in 1899, and on the 14th of June, 1907, the plaintiff brought the suit out of which this appeal has arisen for the redemption of the property mortgaged by Abdullah under the mortgage of the 2nd of April, 1889. He impleaded the mortgagee and the heirs of Mubarak-un-nissa and Abdullah, namely, the defendants 2—13, who are their children and grand children. These last mentioned defendants 2—13 disputed the right of the plaintiff to redeem the mortgage, contending that Abdullah had only a life estate in 10 biswas of Nizam-ud-dinpur, and that the interest of the plaintiff in the 5 biswas, which was transferred to him, came to an end with the death of Abdullah. It was further contended that according to the terms of the decree Abdullah relinquished his chance to succeed as an heir to any part of the estate of Mubarak-un-nissa, inasmuch as he agreed with her that only those who might be the heirs of both himself and her would be the owners of her property on her death.

The court of first instance dismissed the suit, holding that under the compromise incorporated in the decree, Abdullah got only a life estate in the 10 biswas and that he relinquished his right of inheritance to his wife as to the properties comprised in the decree.

An appeal was preferred and before the lower appellate court it was admitted that Abdullah had only a life estate in a 10 biswa share of Nizam-ud-dinpur, but it was contended that on the death of his wife he inherited 2½ biswas out of the remaining 10 biswas. The decree of the court of first instance was upheld.

The plaintiff Faiyaz-ul-Rahman appealed to the High Court, when his appeal coming before a single Judge of the Court was

allowed and the suit decreed. The defendants thereupon appealed under section 10 of the Letters Patent.

Mr. *Muhammad Ishaq Khan*, for the appellants.

Mr. *D. R. Sawhny* (for Babu *Surendra Nath Sen*), for the respondents.

STANLEY, C. J., and BANERJI, J.—The facts of this case are not in dispute. They are these :—One Abdullah owned, among other properties, 10 biswas of the village of Nizam-ud-dinpur and 17½ biswas of Tayabpur. His wife, Musammat Mubarak-un-nissa, brought a suit against him for the recovery of her dower of Rs. 10,000, and this suit was compromised and the compromise embodied in a decree of the 29th of August, 1889. The material portions of the decree ran as follows :—

"The defendant, Abdullah, gives the whole of the undermentioned properties to the plaintiff in lieu of Rs. 10,000 dower claimed by her. Now the plaintiff is the owner of the said properties, but the defendant will retain possession over 10 biswas of Nizam-ud-dinpur for his life; the income of it will be appropriated by the defendant, and in case of urgent necessity he may hypothecate or sell his life estate in 5 biswas out of the said 10 biswas ... On the death of the plaintiff those who may be the heirs of both the plaintiff and the defendant will be the owners of the properties."

Mubarak-un-nissa died on the 25th of May, 1894, and was survived by her husband Abdullah. He, on the 19th of April, 1897, executed a usufructuary mortgage in favour of the defendant No. 1 of 4 biswas of Nizam-ud-dinpur and 2½ biswas of Tayabpur. On the 2nd of April, 1899, he sold to the plaintiff 3¾ biswas out of the 5 biswas of Nizam-ud-dinpur, of which, according to his construction of the above-mentioned decree, he was the owner, and 1¼ biswas out of the other 5 biswas of the same village, to which he claimed title by inheritance from his wife. Abdullah died in 1899, and on the 14th of June, 1907, the plaintiff brought the suit out of which this appeal has arisen for the redemption of the property mortgaged by Abdullah under the mortgage of the 2nd of April, 1889. He impleaded the mortgagee and the heirs of Mubarak-un-nissa and Abdullah, namely, the defendants 2—13, who are their children and grand-children. These last mentioned defendants 2—13 disputed the right of the plaintiff to redeem the mortgage, contending that

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Abdullah had only a life estate in 10 biswas of Nizam-ud-dinpur, and that the interest of the plaintiff in the 5 biswas, which was transferred to him, came to an end with the death of Abdullah. It was further contended that according to the terms of the decree Abdullah relinquished his chance to succeed as an heir to any part of the estate of Mubarak-un-nissa, inasmuch as he agreed with her that only those who might be the heirs of both himself and her would be the owners of her property on her death.

The court of first instance dismissed the suit, holding that under the compromise incorporated in the decree, Abdullah got only a life estate in the 10 biswas and that he relinquished his right of inheritance to his wife as to the properties comprised in the decree.

An appeal was preferred and before the lower appellate court it was admitted that Abdullah had only a life estate in a 10 biswa share of Nizam-ud-dinpur, but it was contended that on the death of his wife he inherited 2½ biswas out of the remaining 10 biswas. The decree of the court of first instance was upheld.

A second appeal was then preferred and the learned Judge of this Court before whom it was argued, reversed the decisions of the courts below, holding that the agreement on the part of Abdullah to relinquish his chance to succeed Mubarak-un-nissa was void and unlawful, and that the court had no jurisdiction to pass the decree, on its basis, of the 29th of August, 1889, under section 375 of the Code of Civil Procedure (Act No. XIV of 1882). The Court held that the decree of the 29th of August, 1889, so far as it debarred Abdullah from inheriting his share in the assets of Mubarak-un-nissa is a nullity, and that Abdullah's representative in interest is not bound by it, and accordingly that Abdullah, on the death of Mubarak-un-nissa, inherited 2½ biswas out of 10 biswas of Nizam-ud-dinpur, and that the plaintiff as a purchaser from him is entitled to redeem the entire mortgage. We may point out that Abdullah could not inherit more than a sixth of the share of his wife, and not a fourth, as stated by our learned brother. There being children of the marriage,

his share according to the Muhammadan law would only be one-sixth. This, however, is of no importance so far as regards the present appeal.

From the decision of our learned brother this appeal has been preferred under the Letters Patent. In his judgement the authorities bearing on the subject of the right of a Muhammadan to relinquish his chance of succeeding as an heir to the estate of a living person are reviewed. We do not think it necessary in the view which we take of the facts to refer particularly to all the authorities. In the case of *Musammat Hurmut-ul nissa Begum* v. *Allahdia Khan* (1) Their Lordships of the Privy Council held that according to the Muhammadan law there may be a renunciation of the right to inherit. The ruling has not, so far as we are aware, been questioned by Their Lordships in any subsequent case. The ruling was, however, prior to the passing of the Transfer of Property Act, and it may be that that Act has some bearing upon the question, as was held by JENKINS, C. J. and BEAMAN, J., in *Shumsuddin Goolam Husein* v. *Abdul Husein Kalimuddin* (2). In that case it was held that the chance of an heir-apparent succeeding to an estate is under Muhammadan law neither transferable nor releasable, that it is only by application of the principle that equity considers that done which ought to be done that such a chance can, if at all, be bound. In *Kunhi Mamod* v. *Kunhi Moidin* (3), decided long subsequent to the passing of the Transfer of Property Act, it was held by COLLINS, C.J. and PARKER, J., that the renunciation by a Muhammadan of his chance of succeeding to an estate was valid. In that case the plaintiff, in consideration of Rs. 150, which was paid to him by his mother in respect of the share in her estate to which he would become entitled on her death, admitted that he had no longer any right to her property. The learned Judges held that "*primâ facie* there is nothing illegal in the transaction" and in the absence of clear proof that it is forbidden by Muhammadan law, they thought that the plaintiff should be held to be bound by it.

(1) (1871) 17 W. R., 108. (2) (1906) I. L. R., 31 Bom., 165.
(3) (1896) I. L. R., 19 Mad., 176.

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There is no doubt a conflict of decision in the High Courts in India upon this question, but is it necessary in this case to determine it? We think not. Prior to and at the date of the decree of the 29th of August, 1889, Abdullah was the absolute owner of the property affected by that decree. His wife claimed her dower. They had children, and an arrangement was come to, whereby the wife accepted in lieu of her dower a life estate in portion of the property of her husband, and Abdulah accepted a life estate in other portions of his property, and subject to the life estate the properties were settled upon the children of the marriage. This was in the nature of a family settlement. Both Abdullah and Mubarak-un-nissa agreed that upon their respective deaths the property in which life estates were reserved to them should devolve upon their heirs. There is nothing, so far as we are aware, unlawful in such an agreement. There was no transfer or renunciation of an expectant interest or of a mere possibility. The court, which passed the decree upon the compromise, considered it lawful and passed a decree in accordance with it. It appears to us that the decree debarred Abdullah, or anyone claiming under him, from successfully asserting a title to any interest in the property outside and beyond the life interest which was reserved to him. Having taken benefits under the compromise it was not open to him, nor is it open to anyone claiming under him now to impugn the validity of the transaction or deprive the heirs of the rights and interests conferred upon them not merely by Abdullah but by Mubarak-un-nissa. Section 6 (*a*) of the Transfer of Property Act merely provides that "the chance of an heir apparent succeeding to an estate . . . or any other mere possibility of a like nature, cannot be transferred." This clause seems to strike at transfers of a mere possibility or expectancy not coupled with any interest or growing out of any existing property. It does not, for example, strike at agreements by expectant heirs, such as an agreement to divide a particular property in a certain way on the happening of a particular contingency: see *Ram Nirunjun* v. *Prayag Singh* (1).

(1) (1881) I. L. R. 8 Calc., 188.

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For these reasons we think that our learned brother was wrong in reversing the decrees of the lower courts. We accordingly allow the appeal, set aside the decree of the learned Judge of this Court and restore the decree of the lower appellate court with costs in all courts.

Appeal decreed.

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

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February 11.

JAGDIP NARAIN SINGH (PLAINTIFF) *v.* BILAR SINGH AND OTHERS (DEFENDANTS).*

Limitation—Adverse possession—Purchaser of a decree on a mortgage allowing a puisne mortgagee to pay him off—Such position inconsistent with a claim to be in adverse possession of the mortgaged property.

Held that when the purchaser of a decree for sale on a mortgage accepted from a puisne mortgagee the amount due under the decree which he had purchased, he by so doing admitted the validity of the puisne mortgage, and his position was not consistent with a claim to be in adverse possession of the mortgaged property. *Ramcharan* v. *Sadashiv* (1) referred to.

THIS was a suit for a declaration that the plaintiff had acquired a title by adverse possession to certain property. The claim had first been asserted in a similar suit in 1894, but that suit had been dismissed. The immediate cause of the bringing of the present suit was that one of the defendants had executed a mortgage of the property in favour of other defendants, who had obtained a decree thereon and were about to bring the property to sale. The court of first instance, Subordinate Judge of Gorakhpur, decreed the claim in part. On appeal the District Judge dismissed the suit *in toto* for reasons which will be found set forth at length in the judgement of the High Court. The plaintiff appealed to the High Court.

Mr. *B. E. O' Conor* (with him Babu *Durga Charan Banerji*), for the appellant.

Mr. *W. Wallach* (with him the Hon'ble Pandit *Sundar Lal*), for the respondents.

STANLEY, C. J., and GRIFFIN, J.—This appeal arises out of a suit for a declaration that the plaintiff had acquired a title by

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* Second Appeal No. 676 of 1910 from a decree of F. D. Simpson, District Judge of Gorakhpur, dated the 26th of May, 1910, reversing a decree of Gokul Prasad, Subordinate Judge of Gorakhpur, dated the 9th of August, 1909.

(1) (1886) I. L. R., 11 Bom., 422.