1934

EHSAN BEG v. RAHMAT ALI

There is another reason why the suit of the plaintiffs-appellants cannot succeed; it is that it is barred by clause (*b*) of section 56 of the Specific Relief Act as it seeks to stay proceedings in a Court not subordinate to the Court from which the injunction is sought.

Ziaul Hasan, J.

The appeal fails and is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice Ziaul Hasan

1934

November 15

ABDUL HAMID KHAN (PLAINTIFF-APPELLANT) *v.* PIARE MIRZA AND ANOTHER (DEFENDANTS-RESPONDENTS)*

Mohammedan Law—Inheritance—Shia Mohammedan dying leaving childless widow and no other heirs—Widow entitled not only to one-fourth share but gets remainder by the doctrine of "return".

In the absence of all other heirs a childless Shia widow is entitled to not only a one-fourth share in the movables but gets the remainder of her husband's property also by the doctrine of "return". *Mohammad Arshad Chowdhari* v. *Sajida Begum*, (1), *Khursaidi Begum* v. *Secretary of State for India in Council* (2), *Bafatun* v. *Bilati Khanum* (3), and *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (4), referred to.

Messrs. *Har Dhian Chandra, Ram Nath, Ghulam Hasnain Naqvi* and *Taashuq Mirza*, for the appellant

Mr. *Moti Lal Tilhari*, for the respondents.

NANAVUTTY and ZIAUL HASAN, JJ.:—This second appeal raises an important question of Mohammadan Law applicable to Shias. It arises out of a suit brought by the plaintiff-appellant against the respondents and one Khurshed Husain for possession of a house situate in Gannewali Gali, Mohalla Aminabad, in the city of Lucknow, and for mesne profits.

*Second Civil Appeal No. 19 of 1933, against the decree of Pandit Brij Kishan Topa, Subordinate Judge of Malihabad at Lucknow, dated the 5th of December, 1932, upholding the decree of Babu Hiran Kumar Ghoshal, Munsif South, Lucknow.

(1) (1876) I.L.R., 3 Cal., 702. (2) (1926) I.L.R., 5 Pat., 539.
(3) (1903) I.L.R., 30 Cal., 683. (4) (1860) 8 M.I.A., 500.

1934

ABDUL HAMID KHAN v. PIARE MIRZA

Nanavutty and Ziaul Hasan, JJ.

The house was said to have been built by Musammat Tahiran Jan and Karamat Husain, wife and son respectively of one Asghar Ali, a Shia Mohammadan, after Asghar Ali's death by raising money by mortgage of another house. How Abdul Hamid Khan, plaintiff, claimed title to the house was as follows. His case was that Tahiran Jan died in 1922 leaving Karamat as her sole heir, that Karamat died in 1928 leaving his widow Musammat Ahmadi Bibi as his heir, that Ahmadi Bibi was succeeded on her death in 1930 by her mother, Musammat Bachchan, who when she died in the same year left two heirs, namely, her second husband Farkhund Ali and her son, the present plaintiff, appellant and that on Farkhund Ali's death in November, 1930 the plaintiff-appellant became sole owner of the house. According to the plaintiff both the old and the new houses were mortgaged by Karamat to Khurshid Husain, defendant 3, who is no party to this appeal, in 1925, but obtained a lease from the mortgagee and sublet both the houses to one Fazl Beg and Mohabbat Husain, and then left Lucknow for Calcutta. It was said that Fazl Beg and Mohabbat Husain let out the house in question to Piare Mirza, defendant No. 1. Khurshid Husain, it is said, let out the house in Karamat's absence in Calcutta to one Masum Ali and when the latter brought a suit for rent against Piare Mirza the latter denied Karamat's title and set up ownership by adverse possession. In that suit Piare Mirza also alleged that Amir Mirza, defendant 2, his step-son, was heir to Karamat and hence he was also impleaded by the plaintiff-appellant in his suit.

In his defence to the suit Piare Mirza respondent admitted Karamat's ownership of the house but denied that Ahmadi Bibi was his wife and alleged that Karamat had a brother, Munne, whose son was Amir Mirza, defendant 2, and that Amir Mirza was the heir to Karamat. A further plea was that even if Ahmadi Bibi was wife of Karamat, she, as a childless Shia widow, was

1934

ABDUL HAMID KHAN v. PIARE MIRZA

entitled to no more than a fourth share in the materials of the house and the rest should go to Amir Mirza, or if he be not found to be heir to Karamat, the house should escheat to the Crown.

Nanavutty and Ziaul Hasan, JJ.

The trial Court held that Ahmadi Bibi was not the wife of Karamat and dismissed the suit, though it also held that Amir Mirza was not the son of Munne or heir to Karamat. The learned Subordinate Judge of Malihabad in appeal found that Ahmadi Bibi was the wife of Karamat, but holding that the plaintiff was entitled to no more than one-fourth of the materials of the house refused to dispossess the defendants and dismissed the appeal.

The plaintiff has brought this second appeal, which first came on for hearing before a learned Judge of this Court sitting singly, who was of opinion that the case should be heard by a Bench of two Judges, and hence it has been put up before us.

The sole question of law for determination in this second appeal is whether in the absence of all other heirs a childless Shia widow is entitled to only a one-fourth share in the movables, the rest escheating to the Crown, or whether the widow can get the remainder of the husband's property also by the doctrine of "return".

We have heard the learned counsel on both sides, considered the cases relied on by them and one of us has also consulted the original texts of Shia Mohammadan Law. As a result we have come to the definite conclusion that the question in issue must be decided in favour of the appellant.

The learned counsel for the appellant has relied on the cases of *Mohammad Arshad Chowdhry* v. *Sajida Begum* (1) and *Bafatun* v. *Bilati Khanum* (2), but in both these cases the question was about the succession to the property of a Sunni Mohammadan, while in the present case we are dealing with the case of a Shia Mohammadan. Similarly, the cases of *Musammat*

(1) (1876) I.L.R., 3 Cal., 702. (2) (1903) I.L.R., 30 Cal., 683.

1934

ABDUL HAMID KHAN v. PIARE MIRZA

Nanavutty and Ziaul Hasan, JJ.

Khursaidi Begum v. Secretary of State for India in Council (1) and *The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah* (2) can be no guide in the present case. While in the former case a Shia Muslim had died absolutely without any heirs, in the latter the question was about the estate of a Brahmin dying without heirs. The question that we have to decide, namely, whether a childless Shia widow is entitled to her husband's property by the doctrine of "Rud" did not arise in these cases at all.

Coming now to the authorities on Shia Mohammadan Law we find that there is divergence of opinion among them on the point in question. The Right Honourable Sir D. F. Mulla in his "Principles of Mohammadan Law", (9th Edition, page 94) lays down, "If the deceased left a wife, but no other heir, the wife will take her share $\frac{1}{4}$, and the surplus will escheat to the Crown; in other words, the surplus never reverts to a wife".

In Baillie's Digest of Mohammadan Law we find the following: It is otherwise in the case of a husband's decease leaving no heirs of any description save his widow, for she receives only her appointed share, viz., a fourth part of his property, and the remaining three-fourths go to the Imam or public treasury, as a widow has no residuary title in any situation whatsoever, according to the most prevalent opinion, and to a positive judgment of the Imam Mohammad Bakir, on whom be peace, quoted by Mohammad Ebn Mooslim, in the instance of a man who died leaving only his widow, to this effect: "She receives only a fourth part, and the residue goes to the Imam." (Baillie's Digest of Mohammadan Law, Part II, 2nd Edition, page 339).

The theory of the residue going to the Imam is also found in Wilson's Anglo-Mohammadan Law (6th Edition, page 450), where it is said, "The surplus does not 'return' to the wife even where there are no other heirs, but passes by escheat in Shia theory to the Imam".

(1) (1926) I.L.R., 5 Pat., 539. (2) (1860) 8 M.I.A., 500.

1934

ABDUL HAMID KHAN v PIARE MIRZA

The correct and the most authentic view, however, appears to have been taken by the late Mr. Amir Ali in his book on Mohammadan Law (Volume II, 4th Edition, page 153), where he says, "If a woman die leaving her surviving her husband as her sole heir, he takes the entire inheritance, half as his specified share and the remainder by *return*. According to the ancient doctors, the widow, when sole heiress, did not take by *return;* according to them she took her one-fourth, and the residue went to the Imam. As stated already according to the modern jurists the widow also is entitled to take *by return. This is the rule now in force*".

Nanavutty and Ziaul Hasan, JJ.

In our opinion the view expressed by the late Mr. Syed Amir Ali is entitled to great weight not only because his book is "compiled from authorities in the original Arabic" but also because he was himself a Shia Mohammadan and this is the view that we ourselves have come to after consulting the original texts.

In the Sharaya-ul-Islam, which is one of the most authentic books on Shia Mohammadan Law and which is referred to by almost every writer on Shia Law we find the following:

الثالثة ان لايكون هناك وارث اصلا من نسب ولا سبب فالنصف للزوج والباقي رد عليه والزوجة الربع ولم يرد عليها فيه اقوال ثلاثة احدها يرد والاخر لايرد والثالث يرد مع عدم الامام لا مع وجوده والحق انه لايرد *

[The third case (of husband and wife being heirs) is where there is no heir whatever either by blood or by connexion. In this case half is for the husband and the residue is "returned" to him, and for the wife is one-fourth. On the question whether or not there is "return" for the wife there are three doctrines. One is that there is "return" for her; the second is that there is not, and the third is that she gets by "return" in the absence of the Imam, not in his presence. The correct view is that there is no "return" for her. (*Vide* Sharaya-ul-Islam printed at Alavi Press, Katra Mohammad Ali Khan, Lucknow, page 371).]

The view expressed by the author of Sharaya-ul-Islam must, however, be taken in the light of what we gather from other sources of Shia Mohammadan Law. Out of the four books on Traditions which are given the foremost place in point of reliability is a book called Al-istibsar. In it we find the following traditions:

(1) احمد بن محمد بن عيسى عن معاوية من حليم من إسماعيل من ابى بصير قال سئلت ابا جعفر عن امراة ماتت وتركت زوجها لوارث لها غيره قال اذا لم يكن غيره فله المال والمراة لها الربع وماابقى فللامام *

Nanavutty and Ziaul Hasan, JJ.

(From Abu Basir, through the sources mentioned: he said, "I asked Abu Jafar—Imam Mohammad Bakir—about a woman who died without leaving any heir except her husband. He said that when there is no heir other than the husband he gets the entire property and that for the wife there was one-fourth and the rest is for the Imam".

الحسن بن محمد بن سماعة عن محمد بن الحسن بن زياد العطار عن محمد بن النعيم الصحاف قال مات محمد ابن ابى عمير وادصي الى و ترک امراة ولم يترک وارثا غيرها فكتبت الى عبد صالح عليه‌السلام فكتب الى بخطه للمراة الربع واحمل الباقى الينا *

(From Mohammad son of Naim: he said, "I wrote to Imam Musi Kazim about Mohammad bin Amir who died without leaving any heir besides his wife and he wrote back to me with his own hand 'one-fourth is for the wife and send the residue to us' "

احمد بن محمد بن عيسى عن محمد ابن ابى عمير عن ابن مسكان عن ابى بصير عن ابى عبدالله عليه‌السلام قال قلت له رجل مات و ترک امراة قال المال لها قال قلت امراة ماتت وتركت زوجها قال المال له *

(From Abu Basir: he said, "I asked Abu Abdullah—Imam Jafir Sadiq—about a man who died leaving only a widow; he said, 'The entire property is for her'. I then asked him about a woman who died leaving only her husband and he said. The entire property was for him'."

1934

ABDUL HAMID KHAN v. PIARE MIRZA

(*Vide* Al-istibsar, printed in Jafari Press, Nakhas, Lucknow, Volume II, pages 272 and 273.)

From among the more recent authorities we may quote the following from the Persian book Rauzatul Ahkam, by one of the most renowned Shia scholars of Lucknow, namely, Maulana Syed Husain:

Nanavutty and Ziaul Hasan, JJ.

(2) امام و بر زوجه پس محل خلاف است و قول اول اینست که فاضل فریضه برای امام علیه‌السلام و بر زوجه مطلقاً رد نیست و این قول مشهور است میان اصحاب - دوم بر زوجه رد مطلقاً و این قول از شیخ مفید منقول شده - سوم آنکه وزمان غیبت امام علیه‌السلام بر زوجه رد می نماند نه در زمان حضور آنحضرت و این قول صدوق است در فقه *

(As for "return" on the wife, there is divergence of views on it. The first view is that the residue of the shares is for the Imam and that there is no "rud" for the wife. This is the generally known view. The second is that the wife is entitled to "rud" absolutely. This view has been reported from Sheikh Mufid. The third is that a wife gets by "rud" in the absence of the Imam and not in his presence. This is the correct view in theology.)

It may be noted that according to the passage quoted above from Rauzatul Ahkam the view that the widow is absolutely entitled to "Rud" is reported from Sheikh Mufid. Sheikh Mufid was one of the greatest Shia jurists of his time (A.H. 333 to 413) and is frequently referred to by Baillie in his Digest of Mohammadan Law.

But even if the widow's absolute right to "return" be doubted, what is very clearly established by all the authorities cited above is that there can be no manner of doubt about her right to "return" in these days when there is no Imam in existence on the physical plane. According to the Shia belief, no doubt, the Imam is ever present, though he is said to be now hidden from mortal eyes. It is, however, the existence of the Imam in the flesh on this earth plane that according to all the authorities prevents a widow from getting the residue of her

husband's inheritance by "Rud". Therefore, when no Imam is in existence in actual flesh she is undoubtedly entitled to get the benefit of the doctrine of "return".

1934

ABDUL HAMID KHAN v. PIARE MIRZA

As according to the view taken by us Ahmadi Bibi was entitled to the whole of her husband's inheritance and as the plaintiff-appellant is her sole heir his suit must succeed.

Nanavutty and Ziaul Hasan, JJ.

The appeal is, therefore, allowed with costs and the plaintiff-appellant's suit decreed as prayed.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice E. M. Nanavutty and Mr. Justice G. H. Thomas

HARI SHANKAR (JUDGMENT-DEBTOR-APPELLANT) *v.* MUSAMMAT AMINA BIBI (DECREE-HOLDER-RESPONDENT)*

1934 *November* 19

Civil Procedure Code (Act V of 1908), Order XXI, rules 84 and 89—Limitation Act (IX of 1908), Schedule I, Article 166—Oudh Civil Rules, Rule 211—Execution of decree of Civil court—Self acquired revenue-paying land of judgment-debtor ordered to be sold—Sale by Collector—Sale, when complete—Approval of executing court—Application to set aside sale—Limitation, starting point of—Date on which sale is approved.

Where in execution of a civil court decree self-acquired property of the judgment-debtor is ordered to be sold and the papers are sent to the Collector under rule 211, Oudh Civil Rules, for sale, the Collector conducting the sale is only a ministerial officer appointed to sell the property and the Civil Court remains seized with the execution. The sale, although held by an officer of the Court, or by a person appointed in this behalf, is nevertheless a sale by the Court itself. It is not completed until the Court formally accepts the bid and declares the purchaser under Order XXI, rule 84, Civil Procedure Code. Prior to such order, the bidder, whose bid has been accepted by the sale officer at the time of the bid, does not acquire any interest in the property. He becomes the purchaser only when

*Execution of Decree Appeal No. 23 of 1933, against the order of Pandit Brij Kishen Topa, Subordinate Judge of Malihabad at Lucknow, dated the 11th of January, 1933, reversing the order of S. Akhtar Ahsan, Munsif, Lucknow, dated the 16th of March, 1932.