APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava and Mr. Justice Ziaul Hasan

1935 *April 26*

MOHAMMAD YAQUB KHAN AND ANOTHER (PLAINTIFFS-APPELLANTS v. MUSAMMAT AZIZUN-NISA AND OTHERS (DEFENDANTS-RESPONDENTS).*

Succession Act (XXXIX of 1925), section 109—Will—Legatee dying in testator's lifetime but his descendants surviving—Bequest, whether can take effect in favour of heirs other than lineal descendants—Interpretation of Statutes, rules of—Transfer of Property Act (IV of 1882), section 41, applicability of—Quantum of enquiry to be made by transferor under section 41.

All that section 109 of the Indian Succession Act (XXXIX of 1925) provides is that where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator. In other words in order to prevent a lapse it must be assumed that the legatee survived the testator. The section does not contain any provision that on such assumption being made the bequest is to take effect only in favour of the lineal descendants. The bequest can, therefore, take effect in favour of other heirs also who are not lineal descendants.

In interpreting a Statute it is not permissible to depart from the language of the Statute unless there are strong and adequate grounds for it. The functions of a Court of law are merely to interpret the Statute and not to legislate.

The quantum of enquiry which a transferee should make in order to entitle him to the benefit of section 41 of the Transfer of Property Act depends upon the circumstances of each case. When the transferee examined the *khewats* showing that mutation was effected in favour of the transferor on the basis of a Civil Court decree and there is no suggestion that the transferee did not act in good faith, he is entitled to the benefit of section 41. *Baidya Nath Dutt* v. *Alef Jan Bibi* (1), referred to.

*First Civil Appeal No. 95 of 1933, against the decree of Sheikh Mohammad Baqar, Subordinate Judge of Rae Bareli, dated the 31st of July, 1933.

(1) (1923) A.I.R., Cal., 240.

Mr. *Naim Ullah*, for the appellants.

Mr. *Radha Krishna Srivastava*, for the respondents.

SRIVASTAVA and ZIAUL HASAN, JJ.:—This is an appeal by the plaintiffs against the judgment and decree, dated the 31st of July, 1933, of the learned Subordinate Judge of Rae Bareli dismissing their claim for a declaration that they were the owners of a moiety share in the four annas share of Moti Bibi in the villages in suit and that the transfers made by defendant No. 1 did not affect their share.

One Abdul Hakim Khan was the taluqdar of Amawan estate in the Rae Bareli district. His name was entered in the Lists I and III prepared under section 8 of the Oudh Estates Act. He executed a will, (exhibit 1), on the 21st of February, 1873, by means of which he bequeathed a four annas share in the villages mentioned in the list attached to the plaint to his daughter Moti Bibi. Moti Bibi died on the 25th of April, 1873, in the lifetime of her father. On the death of Abdul Hakim, which took place on the 23rd of February, 1878, disputes arose regarding succession to his estate and ultimately on the 30th of August, 1890, it was decided by the late Court of the Judicial Commissioner of Oudh that Musammat Aziz-un-nissa, who is defendant No. 1 in the present suit, was entitled to the four annas share which had been bequeathed to her mother Moti Bibi.

The plaintiffs, who are the step-brothers of Musammat Aziz-un-nissa defendant No. 1, being the sons of her father by a different mother, instituted this suit on the allegation that the four annas share which had been bequeathed by Abdul Hakim to Moti Bibi devolved in equal shares on Moti Bibi's daughter Aziz-un-nissa and her husband Mohammad Yusuf and that they have succeeded to the two annas share of Mohammad Yusuf on the latter's death in February, 1910. They also alleged that their father Mohammad Yusuf and after him the plaintiffs have been in joint possession with Aziz-un-nissa of the entire share and are still in such possession.

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They complained that Aziz-un-nissa has made certain transfers in respect of the entire share of Moti Bibi in some of the villages in suit in favour of defendants 2 and 3 and has also made a *wakf* in respect of the entire share of Moti Bibi in two of the villages in suit and thus cast a cloud on the title of the plaintiffs and has made it necessary for them to bring the present suit for declaration of their rights.

Aziz-un-nissa defendant No. 1 pleaded in her written statement that she succeeded to the entire share of Moti Bibi, that mutation of names was effected in her favour in respect of the entire four annas share in the estate and that she had been in exclusive possession of it, though the collections were made on her behalf by the plaintiffs and their father. But the suit was contested mainly by the transferees, defendants 2 and 3, who pleaded that the entire share bequeathed to Moti Bibi was inherited by defendant No. 1 alone and that the plaintiffs were by their conduct estopped from questioning the transfers made by defendant No. 1 in their favour. They also sought the protection of section 41 of the Transfer of Property Act.

The learned Subordinate Judge held that the four annas share of Moti Bibi devolved on her personal heirs according to Mohammadan Law and that the plaintiffs were therefore entitled to $5\frac{1}{4}$ pies share only in the four annas share which had been bequeathed to Moti Bibi. He further found that the plaintiffs' father and the plaintiffs had been in joint possession with defendant No. 1. As regards the transfers he held that both defendants 2 and 3 were protected under section 41 of the Transfer of Property Act and that the plaintiffs were also estopped by their conduct from questioning the transfers in favour of defendant No. 3. At the end he dismissed the plaintiffs' suit *in toto*.

The plaintiffs appealed against the entire decree and impleaded all the three defendants as respondents. Defendant No. 3 died during the pendency of the appeal.

No steps having been taken to bring her legal representatives on the record within the prescribed time the appeal has abated against her under this Court's order dated the 9th of May, 1934. The learned counsel for the plaintiffs-appellants has therefore confined his arguments in the appeal to his claim against defendants 1 and 2. Defendant No. 1 has not appeared to contest the appeal and it has been heard *ex parte* against her.

The first question arising for decision is as regards the succession to the property which had been bequeathed by Abdul Hakim to Moti Bibi. Admittedly Abdul Hakim was a taluqdar who was subject to the provisions of the Oudh Estates Act. Section 19 of the Oudh Estates Act makes certain sections of the Indian Succession Act applicable to wills made by a taluqdar. One of these sections is section 96 of the Indian Succession Act (X of 1865) which corresponds to section 109 of Act XXXIX of 1925. This section runs as follows:

"Where a bequest has been made to any child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal descendant of his survives the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will."

It was conceded in the lower Court and is admitted before us that the provisions of this section govern the bequest made by Abdul Hakim in favour of Moti Bibi. The result therefore is that the bequest in favour of Moti Bibi did not lapse by reason of her predeceasing her father, but it must be given effect to as if the legatee had died immediately after the death of the testator. It has been argued on behalf of the defendant-respondent that this provision is intended for the benefit of the lineal descendants of the legatee and therefore it must be held that the bequest devolved only on the lineal descendants and not on any other heirs of the legatee. We regret we are unable to accede to this argument. All that the

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section provides is that in such a case the bequest shall take effect as if the death of the legatee had happened immediately after the death of the testator. In other words in order to prevent a lapse it must be assumed that the legatee survived the testator. The section does not contain any provision that on such assumption being made the bequest is to take effect only in favour of the lineal descendants. It is not permissible to depart from the language of the Statute unless there are strong and adequate grounds for it. The functions of a Court of law are merely to interpret the Statute and not to legislate. If we were to hold that in such a case the bequest is to take effect only in favour of certain heirs and not in favour of others we will be putting a construction on the section for which no warrant can be found in the plain and clear language of it. We have therefore no hesitation in agreeing with the learned Subordinate Judge that according to the correct interpretation of section 109 the bequest must be held to take effect in favour of all the heirs of Moti Bibi. The counsel for the parties are agreed before us that Moti Bibi was not a person belonging to any of the classes specified in section 14 of the Oudh Estates Act and therefore under section 15 of that Act the devolution of the share bequeathed to Moti Bibi must be according to Mohammadan Law. The learned counsel for the plaintiffs-appellants has not therefore contested the lower Court's finding that the plaintiffs are not entitled to anything more than $5\frac{1}{4}$ pies share in the four annas share of Moti Bibi. He has, however, contended that the learned Subordinate Judge has acted wrongly in not giving a decree to the plaintiffs in respect of this share against defendant No. 1. This contention in our opinion must succeed. The learned Subordinate Judge has given no reasons for dismissing the claim against defendant No. 1. His order dismissing the claim in its entirety seems to be due to a mere oversight. In the operative part of his order he says that the plaintiffs' claim fails by reason of his findings on issues 5 and 6.

These issues deal with the question of estoppel and section 41 of the Transfer of Property Act. They were framed on the pleas raised by defendants 2 and 3. No plea of estoppel was raised by defendant No. 1 and there is nothing on the record to substantiate such a plea on her behalf. There is nothing to show that the defendant No. 1 has in any way changed her position to her detriment on account of any conduct or acquiescence on the part of the plaintiffs. We are therefore of opinion that the appeal must succeed as against defendant No. 1 and the plaintiffs should be given a declaration that they are entitled to $5\frac{1}{4}$ pies share in the four annas share bequeathed to Moti Bibi in villages entered at Nos. 3, 7, 9, 11, 12, 14 and 16 of the list attached to the plaint and that the plaintiffs' $5\frac{1}{4}$ pies share in villages Dasauti and Rukunpur (items 7 and 9 of the list) is not affected by the deed of *wakf* executed by defendant No. 1.

The next line of attack of the learned counsel for the appellants was directed against the finding of the lower Court that the defendant No. 2 was protected under section 41 of the Transfer of Property Act. The defendant No. 2 holds a simple mortgage which was executed in favour of her ancestor Ganga Bakhsh Singh by the defendant No. 1 on the 18th of February, 1913. There can be no doubt, and it is not seriously disputed, that defendant No. 1 was an ostensible owner of the property transferred by her, within the meaning of section 41 of the Transfer of Property Act with the consent, express or implied, of the plaintiffs and their father. As already stated she had obtained a decree from the Judicial Commissioner's Court as far back as the 30th of August, 1890, in which she had been held entitled to the whole of the four annas share which had been bequeathed to Moti Bibi. Mutation of names was effected in her favour on the basis of this decree and her name continued to be recorded in the *khewat* as owner of the whole share during the last two settlements. The plaintiffs' father and after him the plaintiffs managed the property on her

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behalf but never before the institution of the present suit questioned her title or took any steps to have the *khewat* entries corrected. The plaintiffs' father jointly with defendant No. 1 made an application (exhibit B11) for partition of Rasulpur, one of the villages which had been bequeathed to Moti Bibi, in the Revenue Courts. In this application defendant No. 1 was described as having a four annas share. On the death of the plaintiffs' father the plaintiffs were substituted in his place and the partition was continued at their instance. These facts are in our opinion more than ample to show that defendant No. 1 was an ostensible owner with the express or implied consent of the plaintiffs.

The main contention of the appellants is that the mortgagee, ancestor of defendant No. 2, did not make proper inquiries into the title of defendant No. 1 before taking the mortgage. The evidence of D. W. 2 Mata Prasad, a servant of the defendants, shows that Ganga Bakhsh before taking the mortgage consulted his legal advisor Mir Fida Husain deceased, vakil of Rae Bareli. Mir Fida Husain deputed the witness to make inquiries about the extent of the defendant's share in the villages proposed to be mortgaged. In pursuance of this the witness examined the *khewats* of all the villages. The witness has been believed by the trial Judge and there is no reason for us to disbelieve him. The story about Mir Fida Husain having been consulted seems very probable in view of the fact that the mortgage deed (exhibit B9) is scribed by his clerk. The decree of the trial Court (exhibit B4) in the suit above referred to which was finally decided by the Judicial Commissioner's Court shows that the same Mir Fida Husain was a counsel in that suit. He was therefore presumably aware about the title of defendant No. 1 to the entire four annas share having been upheld in that litigation. Under the circumstances we are inclined to agree with the lower Court that the evidence of inquiry given by the defendants must be accepted as sufficient. The quantum of inquiry must

depend upon the circumstances of each case. In *Baidya Nath Dutt* v. *Alef Jan Bibi* (1) it was held by a Bench of the Calcutta High Court that it is not enough to assert generally that inquiries should be made or that a prudent man should make inquiries; some specific circumstance should be pointed out as the starting point of an inquiry which might be expected to lead to some result. In the present case the *khewat* entries which had been examined by the mortgagee showed that mutation had been effected on the basis of the Civil Court decree. As already mentioned, presumably the lawyer who was consulted was fully cognizant of that litigation. Even if the mortgagee or his agent had pursued the inquiry further he would only have found that the highest Court in the province had upheld the title of defendant No. 1 in respect of the entire share. There is no suggestion that the mortgagee did not act in good faith. We must therefore uphold the lower Court's finding that the defendant No. 2 is entitled to the protection of section 41 of the Transfer of Property Act.

The result therefore is that we allow the appeal against defendant No. 1 and modify the decree of the lower Court by granting the plaintiffs a declaration against her to the effect stated above. The appeal against defendant No. 2 is dismissed. The plaintiffs-appellants will pay the costs of the defendant No. 2 in this Court and bear their own costs.

Appeal allowed.

(1) (1923) A.I.R., Cal., 240.