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the basis of an argument that a suit is barred in every case in which notice is prescribed by the Court of Wards or any other Act. We are therefore quite unable to agree with the learned Judge of the court below that the provisions of the Court of Wards Act bar the present suit either expressly or impliedly and must therefore hold that the learned Judge was in error in not allowing costs to the plaintiff.

Nanavutty and Ziaul Hasan, JJ.

It was also urged that costs being in the discretion of the learned trial Judge, this Court should not interfere with that court's order about costs. Generally this is so, but as the discretion exercised by the court below is based on an erroneous view of the law we think it is our duty to interfere with that court's order about costs.

On the question of the rate of interest *pendente lite* we are not prepared to increase it from 6 to 12 per cent. per annum.

The appeal is allowed in part and the lower court's decree modified so as to award costs to the plaintiff in both the courts in proportion to success. In other respects the decree of the lower court will stand.

Appeal partly allowed.

APPELLATE CIVIL

1937
January, 15

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

IMDADUL RAHMAN *alias* LALLAN AND ANOTHER (DEFENDANTS-APPELLANTS) *v.* PURBI DIN AND OTHERS (DEFENDANTS-RESPONDENTS)*

Mahomedan Law—Will—Consent of heirs, requisites of—Motive of consent, how far material—Rule of justice, equity and good conscience, applicability of.

The question whether the consent to a will of a Muslim by his heirs is valid has to be decided according to the Mahomedan law and not according to rules of justice, equity and

*Second Civil Appeal No. 161 of 1935, against the decree of R. F. S. Baylis, Esq., I.C.S., District Judge of Bara Banki, dated the 23rd of March, 1935, modifying the decree of Syed Qadir Hasan, Additional Judge of Bara Banki, dated the 18th of April, 1934.

good conscience. Rules of justice, equity and good conscience can only be resorted to when there is no direct legal provision about a matter. The only requisite under the Mahomedan law is that the consenting heirs should be adults and possessed of understanding and it is not required to go into the motive of the consent. *Kali Charan* v. *Mohammad Jamil* (1), distinguished. *Azizunnissa Bibi* v. *O. M. Chiene* (2), referred to.

Messrs. *M. Wasim* and *Ali Hasan*, for the appellant.

Messrs. *Radha Krishna Srivastava* and *S. N. Srivastava*, for the respondents.

NANAVUTTY and ZIAUL HASAN, JJ.:—This second appeal against a decree of the learned District Judge of Bara Banki arises out of a suit brought by the plaintiff-respondent for a declaration that the deed of gift, dated the 7th of July, 1927, said to have been executed by Shafiqul Rahman, defendant No. 3, in favour of his late wife Azmatunnissa is fictitious and collusive and that the property, the subject of the gift, belongs to defendant No. 3, and is liable to be attached and sold for payment of the decrees held by the plaintiff.

On the 19th of January, 1926, defendant No. 3 executed a promissory note for Rs.250 in favour of the plaintiff-respondent and the latter obtained a decree on foot of it on the 21st of July, 1931. Another promissory note for Rs.1,517 was executed by defendant No. 3 and one Mahmud Alam in favour of the plaintiff and on this a decree for Rs.2,742 was passed in favour of the plaintiff on the 18th of March, 1929. On the 20th of July, 1927, defendant No. 3 executed a deed of gift (exhibit A-4) in respect of the property in suit in favour of his wife Azmatunnissa transferring the property to her in lieu of her dower which was said to be Rs.50,000. On the 19th of October, 1928, Azmatunnissa executed a will (exhibit A-5) in favour of the defendants-appellants Imdadul Rahman and Lamanul Rahman, who are relations of defendant No. 3 and belong to the same family. Azmat-

(1) (1930) A.L.J., 588. (2) (1920) I.L.R., 42 All., 593.

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unnissa died a few days after making the will that is, on the 31st of October, 1928, leaving as her heirs Shafiqul Rahman her husband, Azmatunnissa her sister, Iqbal Ahmad and Nurul Haq her uncles' sons. On the 7th of December, 1928, all these heirs presented a petition to the revenue court saying that all of them had consented to the will made by Azmatunnissa in favour of defendants 1 and 2 and praying that mutation of the property left by Azmatunnissa be made in favour of defendants 1 and 2 under her will. It may also be mentioned that defendant No. 3 was declared an insolvent on his own application on the 21st of January, 1932. The plaintiff-respondent having failed to obtain satisfaction of his decrees against defendant No. 3 by execution of the decrees brought the suit from which his appeal arises on the 30th of May, 1933. His main allegation was that the deed of gift in favour of Azmatunnissa was collusive and fictitious and was executed to defeat and delay him and the other creditors of defendant No. 3. The amount of the dower due to Azmatunnissa and the fact of its remaining unpaid were also denied.

The learned Civil Judge of Bara Banki held that the dower due to Azmatunnissa was Rs.50,000, that it remained unpaid, that the deed of gift in question was genuine and was not executed to defeat or delay the creditors and further that the will of Azmatunnissa was valid owing to the consent given to it after her death by her heirs. On these findings he dismissed the suit.

In appeal the learned District Judge upheld almost all the findings of the trial court but held that the consent given by defendant No. 3 to his wife's will was not valid as it was presumably given to save the property from his own creditors. He therefore thought that defendant No. 3's half share in his wife's inheritance could not be affected by the will and accordingly in modification of the trial court's decree he decreed the plaintiff's suit in respect of half the property in suit. The learned Dis-

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trict Judge has relied on the case of *Kali Charan* v. *Mohammad Jamil* (1) and said that though the defendant No. 3 was not an insolvent when he gave his consent to his wife's will, the principle of that case was applicable.

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In that case no doubt a Bench of the Allahabad High Court held that the consent given by the heirs of a Mahomedan testator, who were insolvents, to the will was invalid as it was presumably given to save the property from going into the hands of the receiver but with great respect we are unable to agree with the principle underlying that decision. The learned Judges purport to proceed according to rules of justice, equity and good conscience but rules of justice, equity and good conscience can only be resorted to when there is no direct legal provision about a matter. The quesion whether the consent to a will of a Muslim by his heirs is valid has to be decided according to the Mahomedan law but the Mahomedan law does not require us to go into the motive of the consent. The only requisite under the Mahomedan Law is that the consenting heirs should be adults and possessed of understanding (vide Amir Ali's Mahomedan Law, Volume I, 4th edition, page 589). In another case of the same High Court, namely, *Azizunnissa Bibi* v *O. M. Chiene* (2) two other learned Judges gave effect to the consent of heirs who had been declared insolvents, even before they gave their consent Presumably the latter case was not brought to the notice of the learned Judges who decided the case of *Kali Charan* v. *Mohammad Jamil* (1).

We may also note that in the present case Shafiqul Rahman was not declared an insolvent till about three years after the death of his wife so that a presumption as to the motive of his consent would be still more unjustifiable.

It may further be observed that in the case of *Azizunnissa* v. *O. M. Chiene* (2) the learned Judges applied the

(1) (1930) A.L.J., 588. (2) (1920) I.L.R., 42 All., 593.

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Mahomedan law in spite of there being some conflict between the principles of that law and the wording of section 16 of the Insolvency Act. In the case before us there is no conflict between the Mahomedan law and the provisions of any enactment and consequently there is all the more reason to apply the Mahomedan law to the case.

We therefore decree the appeal wih costs and setting aside the decree of the learned District Judge restore that of the trial court.

Nanavutty and Ziaul Hasan, JJ.

Appeal allowed.

APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice H. G. Smith

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MUSAMMAT RAJANA, (PLAINTIFF-APPELLANT) *v.* MUSAHEB ALI (DEFENDANT-RESPONDENT)*

Estoppel between mortgagor and mortgagee—Mortgage of plaintiff's share by her mother during plaintiff's minority—Suit for possession by plaintiff on ground that mortgage not binding on her—Defendant, if estopped from questioning plaintiff's title—Oudh Court's Act (IV of 1925), section 12(2) —Third appeal—Point not raised before Judge whose decree is appealed against, if can be allowed to be raised in third appeal.

The rule of estoppel between the mortgagor and the mortgagee cannot be invoked in a case where the suit is not based on the mortgage, but is one in repudiation of the mortgage. Accordingly in a suit for possession on the ground that the mortgage of the property in suit made by the plaintiff's mother during the plaintiff's minority is not binding on her, the defendants are not estopped from disputing the title of the plaintiff by reason of their having obtained the deed of mortgage from her mother on the footing of the plaintiff's being the owner of the property, inasmuch as the suit is undoubtedly one for ejectment of the defendants by evidence of the mortgage.

*Section 12(2), Oudh Courts Act Appeal No. 1 of 1935, against the decree of the Hon'ble Mr. Justice E. M. Nanavutty, Judge of the Chief Court of Oudh, Lucknow, dated the 21st of February, 1935, upholding the decree of Babu Bhagwat Prasad, Civil Judge of Mohanlalganj at Lucknow, dated the 31st of July, 1933.