

PRIVY COUNCIL

Mohammad Raza

Vs.

Mt. Abbas Bandi Bibi

P.C.A.No.97 of 1930

(Lord Blanesburgh, CJ. Lord Tomlin, Sir Lancelot Sanderson, J. Sir George Lowndes,
and Sir Dinshah Mulla JJ.)

12.04.1932

JUDGMENT

SIR GEORGE LOWNDES. J.

1. The facts necessary for the decision of this appeal are within a small compass. In 1868 one *Sughra Bibi* brought a suit against her cousin *Afzal Husain*, claiming a half-share in certain immovable properties in Oudh which had been entered in his name at the post-mutiny settlement. The litigation ended in a compromise upon which a decree was passed in the suit on 19th September 1870. The compromise was in the following terms:

"We are Mt. Sughra Bibi, plaintiff, claimant of a share in Mahal Shadipur, Nusha, and c., pargana Tanda, and Surhurpur, and Syed Afzal Hasan, son of Syed Tegh Ali Qanungo, Lambardar of the aforesaid Mahal, defendant.

Whereas between the parties to the above-mentioned case in which a share is claimed an amicable settlement has been arrived at to the effect that the plaintiff's marriage by way of nikah with the defendant may be performed in the next month, accordingly in view of a marriage settlement, there no longer exists any dispute regarding a share, and insomuch as the defendant's first wife, the daughter of Raja Syed Abbas Ali, deceased, is alive, it has been settled that both wives should, in accordance with this agreement, in their capacity as wives from this very time be declared permanent owners (malik mustaqul) of a moiety each of the entire Mahal Shadipur, and that the names of Mt. Fatima Begam, the first wife, and Mt. Sughra Bibi, plaintiff, be entered in the public records as owners of half and half (bil munasfa milkiatan). The said females shall not have

power to transfer this property to a stranger ; but the ownership thereof as family property shall devolve on the legal heirs of both the abovenamed wives, from generation to generation ; and the management and collections of the entire estate of Shadipur shall be in the hands of their husband, Syed Afzal Hasan, in his capacity of a husband; if on the part of the husband there is any act of neglect or estrangement towards either of the wives, then, in that case, the wife's only remedy will be to have the management of her share performed by the Government through the Court of Wards ; but during the lifetime of Afzal Hasan neither of the wives shall have the power on her own authority to have the management of the share which is owned by her performed by any member of her father's family, and if in contravention of this agreement the defendant refuses to marry the plaintiff by way of nikah, then the plaintiff shall in accordance with this document remain owner of a moiety, and if the plaintiff acts contrary to the stipulation of nikah, she shall cease to have any rights whatever. If, God forbid, contrary to custom the divorce of either of the wives takes place, then, even in that case, ownership shall remain vested in the wives, as before, subject to the conditions mentioned above ; provided that the divorced wife should regard herself as an undivorced wife, and like a woman without a husband continue to live in the house, and be it understood that the aforesaid conditions shall apply to whatever share exists in the villages comprised in Mahal Shadipur, as detailed below : (1) Shadipur, (2) Niniwan, Bechrai, Daudpur, Nandapur, Qutubpur Belahri, Daryapur; moreover, whatever property, such as Chitai and Nausanda and Mnsha, andc., pargana Tanda and Halimpur and Lodhna and Nathupur, pargana Surhurpur, andc., exists at present, or may be acquired in future, shall, during the lifetime of Mir Teg Ali and myself (the defendant), continue to remain in possession of the defendant, and after me (the defendant) this property also shall devolve on the two wives or their descendants (aulad) in equal shares.

Hence this agreement is made in writing in order that it may serve as evidence thereof and the pending case may be decided in accordance with its terms."

2. *Afzal Husain* thereafter duly married *Sughra Bibi* and died in 1872 childless, his first wife Fatima "Begum having predeceased him in 1871. *Sughra Bibi* took possession of her share in the properties, but had sold or mortgaged it all before her death, which occurred on 26th July 1914. Her transferees remained in undisturbed possession for nearly 12 years after her death. On 20th March 1926, the suit out of which this appeal has arisen was instituted by the respondent in the Court of the

Subordinate Judge of Fyzabad for the recovery of two-thirds of Sughra Bibi's share from the appellants, in whose possession the properties had come under the alienations above referred to.

3. The respondent's case was that under the compromise Sughra Bibi took only a life estate without power of alienation, and that on her death the half-share passed to her heirs of whom the respondent, in right of her mother Zainab Bibi, the sister of Afzal Husain, was one, her share being two-thirds. The other heirs, taking the remaining third, were said to be certain maternal relatives of Sughra Bibi, who apparently made no claim, and were riot joined as parties to the suit, but it is not suggested that it is defective on this account. The present appeal therefore is concerned only with two-thirds of the property, and the rights of the parties depend in the first instance on the validity of the alienations by Sughra Bibi, the title of the respondent, if these alienations were invalid, not being disputed.

4. A preliminary issue which covered this question was raised and tried by the Subordinate Judge. It was in the following terms:

"Was the restriction placed by the compromise deed dated 19th September 1870, upon 'Sughra Bibi's power of alienation valid and legally enforceable."

5. The learned Judge after a detailed but not very informing examination of the case law on the subject held that the restriction imposed by the deed on the lady's power of alienation was invalid and inoperative, and he accordingly answered the issue in the negative. The hearing of some 23 other issues in the case came subsequently before another Subordinate Judge, with the result that the suit was dismissed with regard to certain of the properties claimed, but decreed with regard to others. Both sides appealed to the Chief Court. The case was heard by Raza and Pullan, JJ., who delivered their judgment on 4th January 1929, allowing the appeal of the present respondent, and dismissing that of the appellants, with the result that the suit was decreed in full. The questions other than that as to Sughra Bibi's power of alienation are not now material. They were in part disposed of by concurrent findings of fact of the two Courts, and for the rest involve matters subsidiary to the main issue as to the validity of the alienations.

6. The learned Judges of the Chief Court discussed the meaning of the word "malik" which has been used throughout the compromise agreement, but came to the conclusion that having regard to the express provision that the ladies were not to have power to transfer the property to a stranger, they had only a "limited ownership," with

a gift over to their heirs. They then considered whether under the Shia law, by which the parties were governed, such an arrangement would be valid, and came to the conclusion that it would.

7. Before the Board the case law has been discussed at great length, but without throwing much light upon the construction of the particular document with which this appeal is concerned. It was urged for the appellants that the true effect of the document was to constitute the ladies full owners of the two moieties of the property, and that the attempt to restrict their power of alienation should be regarded as repugnant, special reliance being placed upon the judgment of the Board delivered by the late Sir Binod Mitter in *Raghunath Prasad Singh v. Deputy Commissioner, Partabgarh*. For the respondent it was contended that, having regard to the decisions of this Board, the use of the word "malik" did not necessarily imply full ownership, and that reading the document as a whole the ladies took only life estates with vested remainders in their heir. In support of the appellants' contention it was pointed out that the ladies were to be "malik mustaqil," i. e., permanent proprietors, and were to be entered as such in the public records; that their proprietorship was to take effect from the execution of the document, and that if Afzal Husain refused to marry Sughra Bibi, she was to "remain owner of a moiety" free from restriction of any kind; that other property; to which Sughra Bibi had made no claim, was also dealt with; that it was to remain in the possession of Afzal Husain during his life and the lifetime of his father Tegh Alt, and then was to "devolve on the two wives or their descendants in equal share"-again, as the respondent's counsel concedes, without restriction. From this it is said to be clear that the draftsman of the document was quite competent to put a life estate into direct words if that had been the intention of the parties under the first part of the agreement. It is also suggested that the words upon which the respondent relies as constituting a gift over to the ladies' heirs, are only explanatory of the restriction against transfer to a stranger, which immediately precedes them, and it is pointed out with some force that if only life estates were intended the restriction would not have been confined to the case of strangers.

8. Their Lordships feel the weight of these contentions, and they might have some difficulty in holding that Sughra Bibi took nothing more than a life estate. But assuming in the appellants' favor that she took an estate of inheritance, it was nevertheless one saddled, under the express words of the document, with a restriction against alienation to 'a stranger.'" Their Lordships have no doubt that "stranger" means anyone who is not a member of the family, and the appellants are admittedly strangers

in this sense. Unless therefore this restriction can for some reason be disregarded, they have no title to the properties which can prevail against the respondent.

9. On the assumption that Sughra Bibi took under the terms of the document in question an absolute estate subject only to this restriction, their Lordships think that the restriction was not absolute but partial; it forbids only alienation to strangers, leaving her free to make any transfer she pleases within the ambit of the family. The question therefore is whether such a partial restriction on alienation is so inconsistent with an otherwise absolute estate that it must be regarded as repugnant and merely void. On this question their Lordships think that Raghunath Prasad Singh's case is of no assistance to the appellants, for there the restriction against alienation was absolute and was attached to a gift by will. It is in their Lordships' opinion, important in the present case to bear in mind that the document under which the appellants claim was not a deed of gift, or a conveyance, by one of the parties to the other", but was in the nature of a contract between them as to the terms upon which the ladies were to take. The title to that which Sughra Bibi took was in dispute between her and Afzal Husain. In compromise of their conflicting claims what was evidently a family arrangement was come to, by which it was agreed that she should take what she claimed upon certain conditions. One of these conditions was that she would not alienate the property outside the family. Their Lordships are asked by the appellants to say that this condition was not binding upon her, and that what she took she was free to transfer to them,

10. The law by which this question must be judged is their Lordships think prescribed by Section 3, Oudh Laws Act, 1876, and failing the earlier clauses of the section which seem to have no application, "the Courts shall act according to justice, equity and good conscience," which has been adopted as the ultimate test for all the provincial Courts in India. Is it then contrary to justice, equity and good conscience to hold an agreement of this nature to be binding? Judging the matter upon abstract grounds, their Lordships would have thought that where a person had been allowed to take property upon the express agreement that it shall not be alienated outside the family, those who seek to make title, through a direct breach of this agreement, could hardly support their claim by an appeal to those high sounding principles and it must be remembered in this connexion that family arrangements are specially favored in Courts of equity. But apart from this it seems clear that after the passing of the Transfer of Property Act in 1882, a partial restriction upon the power of disposition would not, in the case of a transfer inter vivos, be regarded as repugnant: see Section

10 of the Act. In view of the terms of this section, and in the absence of any authority suggesting that before the Act a different principle was applied by the Courts in India, their Lordships think that it would be impossible for them to assert that such an agreement as they are now considering was contrary to justice, equity and good conscience.

11. It was said by Lord Hobhouse in *Waghela Rajsanji v. Shekh Masludin (of 14 IA)* that the expression "equity and good conscience" was generally interpreted as meaning English law, if found applicable to Indian society and circumstances. If this is to be the test there is authority that in England a partial restriction would not be regarded as repugnant even in the case of a testamentary gift. So in *re Macleay* [1875] 20 Eq 186, Sir George, Jessel, M. R. upheld a condition attached to a devise in fee that the devisee should "never sell out of the family," pointing out that this had been the law from the time of Coke; and in *Gill v. Pearson* 6 East 173. Lord Ellenborough in the King's Bench affirmed the validity of a similar restriction.

12. Their Lordships see no reason therefore to hold that the provision in the compromise agreement that Sughra Bibi should not have power to transfer the properties in suit to a stranger was otherwise than binding upon her. Their Lordships have heard much discussion of the question whether the Shia law permits of the creation of a vested remainder in such an indeterminate body as the heirs of a living person, but in the view they take of the appellants' case, it is unnecessary for them to come to any conclusion upon this somewhat abstruse problem, or to consider the authorities that have been cited. In their Lordships' opinion Sughra Bibi had no power to transfer, any part of the properties to the appellants, and upon her death the respondent became entitled to the two-thirds share in the properties which she claims. They think that this appeal fails, and that the decree of the Chief Court, dated 4th January 1929, should be affirmed with costs, and they will humbly advise His Majesty accordingly.

Appeal dismissed.

Cases Referred.

AIR 1929 PC 283=120 IC 641=56 IA 372=4 Luck 483 (PC).

[1887] 11 Bom 551=4 IA 89 (PC) at. p.96