SUPREME COURT OF INDIA

N. K. Mohd. Sulaiman Sahib

Vs.

N. C. Mohd. Ismail Saheb

C.A.No.432 of 1963

(K. Subba Rao, K. N. Wanchoo, J. C. Shah, S. M. Sikri and V. Ramaswami, JJ.)

23.09.1965

JUDGEMENT

SHAH, J.:

1. Khader Miran, Muhammad Abdul Kassim and Muhammad Labhai mortgaged on August 21, 1933, certain immoveable property in favour of Narsimha Reddy to secure repayment of Rs. 20,000. Khader Miran died on November 19, 1937. On July 12, 1940 Narsimha Reddy commenced an action for enforcement of the mortgage against Muhammad Abdul Kasim, Muhammad Labhai, and three widows of Khader Miran Fathima Bi, Amina Bi and Mahaboob Bi, and a daughter Muhammad Marriyam Bi. A preliminary mortgage decree passed in the action on November 25, 1940 was made absolute on October 11, 1941, and in execution of the decree the properties mortgaged were sold at a Court auction and were purchased by the mortgage Narsimha Reddy on October 16, 1942, with leave of the Court. Narsimha Reddy thereafter transferred the properties to P. Chinnamma Reddi and the latter in his turn alienated portions thereof.

2. N. K. Mohammad Sulaiman -hereinafter referred to as the 'plaintiff'- claiming that he was the son

of Khader Miran instituted suit No. 125 of 1950 in the Court of the Subordinate Judge, Chittoor for a decree for partition of the mortgaged properties "by metes and bounds" and in the alternative for a declaration that he was entitled "to redeem the mortgage or portion thereof equal to his share in the mortgaged properties" and for an order against Narsimha Reddy and the aliences from him to render a true and correct account of the income of the properties, and for a further declaration that the decree and judgment in suit No. 87 of 1940 and the execution proceedings thereon were null and void, and "if necessary to set aside the same". To this suit were impleaded Mohammad Ismail who, it was claimed, was also the son of Khader Miran, and was not impleaded in the earlier suit, Mahaboob Bi the mother of the plaintiff, Mariyam Bi his step sister, Narsimha Reddy and twenty-two alienees of the property. The suit was resisted by Narsimha Reddy and the alienees on two principal grounds-that the plaintiff was not the son of Khader Miran, and that the decree in suit No. 87 of 1940 was in any event binding upon the plaintiff for the estate of Khader Miran was fully represented in the suit by those who were in possession of the estate of Khader Miran. On the second plea, it was submitted that Narsimha Reddy had made "'full and bona fide inquiry" and had come to learn that only the three widows and daughter of Khader Miran were the surviving members of the family of Khader Miran and that they were in possession of his estate, and that it was not brought to the notice of Narsimha Reddy at any time that there were, beside those impleaded, other heirs to the estate of Khader Miran.

3. The Trial Court held that the plaintiff who was the son of Khader Miran was "sufficiently represented" by the three widows and the daughter of Khader Miran in suit No. 87 of 1940, and that the plaintiff and his brother Mohammed Ismail were bound by the decree and the sale in execution thereof even though they were not impleaded as parties eo nomine. In appeal to the High Court of Andhra Pradesh, the decree passed by the Trial Court, dismissing the plaintiff's suit, was confirmed. With certificate granted by the High Court, this appeal is preferred in forma pauperis by the plaintiff.

4. The Trial Court and the High Court have held that Narsimha Reddy had instituted the mortgage suit after making bona fide enquiry and being satisfied that the only heirs of Khader Miran were his three widows and his daughter, and that the entire estate was in their possession, and that there were no other heirs. This finding is not challenged before us, but counsel for the plaintiff argues that when in a suit to enforce a mortgage instituted after the death of a muslim debtor one or more out of the heirs of the deceased debtor is or are not impleaded in the suit and decree is obtained, what passes to the auction-purchaser at the Court sale is only the right, title and interest in the properties of the heirs of the deceased debtor who were impleaded in the suit. On this question, there has been a sharp conflict of opinion amongst the High Courts in India.

5. It is necessary in the first instance to set out certain principles which are accepted as well settled. The estate of a muslim dying intestate devolves under the Islamic law upon his heirs at the moment of his death, i.e., the estate vests immediately in each heir in proportion to the shares ordained by the personal law and the interest of each heir is separate and distinct. Each heir is under the personal law liable to satisfy the debts of the deceased only to the extent of the share of the debt proportionate to his share in the estate. A creditor of a muslim dying intestate may sue all the heirs

of the deceased and where the estate of the deceased has not been distributed between the heirs he may execute the decree against the property as a whole without regard to the extent of the liability of the heirs inter se. The creditor is, however, not bound to sue all the heirs: the creditor may sue some only of the heirs and obtain a decree against those heirs, and liability for satisfaction of the decree may be enforced against individual heirs in the property held by them proportionate to their share in the estate. It is also settled that where the defendant in an action dies after institution of the suit, the creditor after diligent and bona fide enquiry impleads some but not all the heirs as legal representatives, the heirs so impleaded represent the estate of the deceased and a decree obtained against them binds not only those heirs who are impleaded in the action but the entire estate including the interest of those not brought on the record: Daya Ram v. Shyam Sundari. AIR 1955 SC 1049. This Court at p. 1054 observed:

"The almost universal consensus of opinion of all the High Courts is that where a plaintiff or an appellant after diligent and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondents are and brings them on record within the time limited by law, there is no abatement of the suit or appeal, that the impleaded legal representatives sufficiently represent the estate of the deceased and that decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record."

This Court has, therefore, recognised the principle of representation of the estate by some heirs where the defendant dies during the pendency of a suit to enforce a claim against him, and not all the heirs are brought on the record. If after bona fide enquiry some but not all the heirs of a deceased defendant are brought on the record, the heirs so brought on the record; the heirs so brought on the record represent the entire estate of the deceased, and the decision of the Court in the absence of fraud or collusion binds those who are not brought on the record as well as those who are impleaded eo nomine. Daya Ram's case. AIR 1965 SC 1049, it is true did not relate to the estate of a deceased muslim, but the rule enunciated is of the domain of procedural law and applies to all communities irrespective of the religious persuasion on personal law. Counsel for the plaintiff says that this rule applies only to cases where the defendant dies after institution of the suit, and does not apply where a suit is instituted against the heirs of a deceased debtor. The reason suggested is that by the combined operation of O. 22, Rr. 4 and 5, Code of Civil Procedure there is a decision of the Court that persons impleaded are the heirs of the deceased and are allowed to be brought on the record as his heirs and legal representatives. Reliance is also placed upon the definition of "legal representative" in S. 2 (11) of the Code of Civil Procedure. It is submitted that where persons are either expressly or by implication directed or permitted by an order of the Court to represent the estate, in the absence of fraud or collusion the heirs brought on the record will represent the entire estate, and the decree passed against them and proceedings taken pursuant thereto will be binding upon the heirs not so impleaded. But where the plaintiff institutes a suit against certain persons as legal representatives of the deceased debtor there is no representation to the estate by some only of the heirs of the deceased where the deceased was a muslim. On this point there has been, as already stated, conflict of opinion and in some High Courts from time to time different views have been expressed. To seek elucidation of principle from an analysis of the numerous decisions of the cases may turn out a futile pursuit. That is not because we do not hold the opinions expressed by eminent Judges on this question in great respect, but because in our view it would conduce to greater clarity if the ground on which the decisions have proceeded are examined in the light of the true principles

applicable.

6. In seeking its solution the problem whether a decree obtained by a creditor in a suit instituted against some of the heirs of a deceased muslim for payment of debts due by him is binding on the other heirs has been approached from different angles: (i) by the analogy of Hindu law where on devolution of property on death of a Hindu upon members of a joint Hindu family or a widow the estate of the deceased is represented by the manager or the widow, and the creditor in a suit properly instituted against the manger or the widow may obtain a decree which binds all the persons having interest in the estate; (ii) the rule of Mahomedan law as set out in Hamilton's Hedaya, 2nd Edn. P. 349. Bk. XX, Ch. 4 (relating to the duties of the Kazee): "for any one of the heirs of a deceased persons stands as litigant on behalf of all the others, with respect to anything due to or by the deceased, whether it be debt or substance, since the decree of the Kazi in such case is in reality either in favour of or against the deceased; and any of the heirs may stand as his representative with respect to such decree. ****" To this it is objected. "If one heir be litigant on behalf of the others, it would follow that each creditor is entitled to have recourse to him for payment of his demand, whereas, according to law, each is only obliged to pay his own share." Reply: "The creditors are entitled to have recourse to one of several heirs only in a case where all the effects are in the hands of that heir. This is what is stated in the Jama Kabeer: and the reason of it is that although any one of the heirs may act as plaintiff in a cause on behalf of the others, yet he cannot act as defendant on their behalf, unless the whole of the effects be in his possession."; (iii) that a creditor of the deceased may sue one of the heirs who is in possession of the whole or any part of the estate, without joining other heirs as defendants, for administration of the estate and for recovery of the entire debt, and get a decree against the entire estate; and (iv) on the strict rules of Islamic law that devolution of inheritance takes place immediately upon the death of the ancestor, and jus representation is being foreign to the Islamic law of inheritance, only those heirs who are sued by the creditor of the deceased ancestor are liable to satisfy the debt proportionate to their interest in the estate.

7. The first view was enunciated by the Calcutta High Court in Mt. Nuzeerun v. Moulvie Ameerooddin, (1875) 24 Suth WR 3, and was adopted by the Bombay High Court in Khurshetbibi v. Keso Vinayek, (1888), ILR 12 Bom 101; Davalava v. Bhimaji, (1896) ILR 20 Bom 338: and Virchand v. Kondu, ILR 39 Bom 729: (AIR 1915 Bom 272).

8. The second view though pressed for acceptance before the Courts has not met with approval. The rules of procedure enunciated by the Muhammadan lawyers have no application under the Indian system of jurisprudence to the trial of actions in our Courts and as observed by Mahmood, J., in Jafri Begam v. Amir Muhammad Khan, (1885) ILR 7 All. 822 (FB), at p. 842:

"* * * and if there are any claims against the estate, and they are litigated, the matter passes into the region of procedure, and must be regulated according to the law which governs the action of the Court. The plaintiff must go to the Court having jurisdiction, and institute his suit within limitation, impleading all the heirs against whose shares he seeks to enforce his claim;"

9. The Calcutta High Court in Muttyjan v. Ahmed Ally, (1882) ILR 8 Cal 370, accepted the third view and regarded a suit filed by a creditor to recover a debt due from the estate of a deceased muslim debtor as an administration-action. It was further confirmed in Amir Dulhin v. Baij Nath Singh, (1894) ILR 21 Cal 311. On this rule an exception was engrafted in a later judgment in Abbas Naskar v. Chairman, District Board, 24-Parganas. ILR 59 Cal 691: (AIR 1933 Cal 81). It was observed in Abbas Naskar's case, ILR 59 Cal 691: (AIR 1933 Cal 81), that in the case of an estate of muslim dying intestate if there has been no distribution of the estate, and the suit is instituted for recovery of a debt the creditor may sue any heir in possession of the whole or part of the estate without joining the other heirs as defendants, for relisation of the entire debt passed in such a suit may be enforceable against all the assets that are in his possession. But a decree for administration may only be passed where the heirs who are sued are in possession of the whole or any part of the estate so as to be liable to account for the same to the rest, or in other words, the suits were against some of the heirs, who are in possession of property exceeding their shares of the inheritance: where the heirs are in possession of the respective shares of inheritance, that principle can have no application. The modified rule accepted by the Calcutta High Court is that where an heir is in possession of the estate of a deceased muslim on behalf of the other heirs, in a suit to recover a debt due from the estate a decree for administration may be passed.

10. The last view has been uniformly expressed by the Allahabad High Court since it was first enunicated by Mahmood, J., in Jafri Begam's case, (1885) ILR 7 All 822 (FB). It may be observed that the Bombay High Court in later decisions has accepted this view: Bhagirthibai v. Roshanbi, ILR 43 Bom 412: (AIR 1919 Bom 61), Shahasaheb v. Sadashiv, ILR 43 Bom 575: (AIR 1919 Bom 135), Lala Miya v. Mamubibi, ILR 47 Bom 712: (AIR 1923 Bom 411) and Veerbhadrappa Shilwant v. Shekabai, ILR (1939) Bom 232 (AIR 1939 Bom 188).

11. We may now examine whether the grounds on which the different views were expressed are sustainable in principle.

12. It must be recalled that whether a decree obtained by a creditor against the heirs of a deceased muslim is binding upon the entire estate or only of those who were impleaded eo nomine is not a question to be determined on the personal law either of the deceased or of the defendant in the suit. It is a part of the law of procedure which regulates all matters going to the remedy, and when the matter passes into the domain of procedure, it must be regulated by the law governing the action of the Court.

13. An administration-action may undoubtedly lie at the instance of a creditior for and on behalf of the all the creditors for an order that the Court do enter upon administration of the estate and do pay to the creditors claiming the amount either the whole or such amount as may be rateably payable to each creditor out of the estate after satisfying the primary liabilities of the estate. A suit by a creditor may if appropriate cases, where the procedure prescribed in that behalf is followed, be treated as an

administration-action, but every action instituted by a creditor of a deceased debtor to recover a debt due out of his estate in the hands of some or all the heirs is not an administration-action. A person in possession of the whole or a part of the estate which originally belonged to a debtor dying intestate does not clothe himself with a right to represent other persons who are interested in the estate. Such a person may by intermeddling with the estate be regarded as executor de son-tort and may render himself liable accordingly, but thereby he cannot represent those whose estate he has intermeddled with. An administrator appointed by the Court would represent the estate, and a creditor may sue him for recovery of the debts due out of the estate. In an administration-action properly instituted, the Court may take upon itself the duty to administer the estate out of which the debts may be satisfied. But a simple action for recovery of a debt from the estate of a deceased debtor will not be regarded as an action for administration.

14. Ordinarily the Court does not regard a decree binding upon a person who was not impleaded eo nomine in the action. But to that rule there are certain recognised exceptions. Where by the personal law governing the absent heir the heir impleaded represents him interests in the estate of the deceased, there is yet another exception which is evolved in the larger interest of administration of justice. If there be a debt justly due and no prejudice is shown to the absent heir, the decree in an action where the plaintiff has after bona fide enquiry impleaded all the heirs known to him will ordinarily be held binding upon all persons interested in the estate. The Court will undobtedly investigate, if invited, whether the decree was obtained by fraud, collusion or other means intended to overreach the Court. The Court will also enquire whether there was a real contest in the suit, and may for that purpose ascertain whether there was any special defence which the absent defendant could put forward, but which was not put forward. Where however on account of a bona fide error, the plaintiff seeking relief institutes his suit against a person who is not representing the estate of a deceased person against whom the plaintiff has a claim either at all or even partially, in the absence of the fraud or collusion or other ground which taint the decree, a decree passed against the persons impleaded as heirs binds the estate, even though other persons interested in the estate are not brought on the record. This principle applies to all parties irrespective of their religious persuasion.

15. A few illustrative cases which support this principle may be noticed. In Chaturbujadoss Kushaldoss and Sons v. Rajamanicka Mudali, ILR 54 Mad 212: (AIR 1930 Mad 930), a debtor died leaving a will bequeathing his estate to his nephew subject to certain dispositions. In ignorance of the will, and bona fide believing that the widow was the proper legal representative, a creditor of the deceased brought a suit against her alone and obtained a decree ex parte for satisfaction of the debt out of the husband's estate and satisfied his claim by sale of certain items of the estate in her hands. A nephew of the deceased who was a devisee under the will sued to set aside the decree and sale in execution thereof. It was held by the High Court of Madras that as the creditor bona fide believed the widow was the proper legal representative and as she was then interested in defending the estate and sufficiently represented the estate and as the creditor got his decree without any fraud or collusion with her, it was binding on the nephew who was the residuary legatee under the will. In dealing with this question, Madhavan Nair, J., observed at p. 218 (of ILR Mad): (at p. 934 of AIR).

"Prima facie, a decree will bind only the parties to it or those claiming through them; but there are

exceptions to this rule. The Courts have held that in certain circumstances when one who is not the true legal representative of a deceased person is impleaded as his legal representative, then a decree passed against him in his character as the legal representative of the deceased would be binding on the true representative though he is not a party to it. The suit may have been instituted against the wrong legal representative at the very commencement or the wrong legal representative may have been brought on record during the pendency of the suit or after the decree and for purposes of execution."

The principle so stated derives support from the judgment of the Judicial Committee in Khairajmal v. Daim, 32 Ind App 23 (PC). In that case, the material facts out of the many complicated facts which have a bearing on the point under review are these: a suit was instituted for redemption of two mortgages of 1874 in respect of certain immovable properties. The plea of the mortgagee in substance was that the equity of redemption had been sold in execution of money decrees against the mortgagors in earlier proceedings and was vested in other persons, and therefore the mortgagors had no right to sue. One of such mortgagors was Nabibaksh. It appeared that in suit No. 372 of 1879 instituted for recovery of a debt there was reference to arbitration, and Nabibaksh signed the reference. Nabibaksh died shortly thereafter and his two widows and his son Muhammad Hasan named as legal representatives were served with the summons and were willing to accept the award. They were also served with the notice of sale of the property of Nabibaksh. An infant daughter of Nabibaksh was omitted from the list of heirs impleaded, but the entire interest of Nabibaksh was sold in execution of the decree obtained in that suit. The Judicial Committee held that the estate of Nabibaksh was sufficiently represented for the purpose of the suit, although the name of the infant daughter was omitted and that the share of Nabikaksh in the equity of redemption in the property sold in execution of the decrees in suit No. 372 of 1879 being bound by the sale, was irredeemable. It is true that Nabibaksh died after suit for recovery of the debt was instituted and his heirs were brought on the record under a procedure similar to O. 2R. 4 of the Code of Civil Procedure. But the Judicial Committee did not express the view that the estate was represented because the heirs were brought on record after the death of Nabibaksh in a pending suit, but apparently on the principle on which the Madras High Court in Chaturbujadoss Kushaldoss and Sons' case, ILR 54 Mad 212: (AIR 1930 Mad 930), proceeded. This view was also expressed by the High Court of Orissa in Sarat Chandra Deb v. Bichitrananda Sahu, ILR (1950) Cut 413: (AIR 1951 Orissa 212), where Jagannadha Das J., observed that where proceedings taken bona fide by the creditor against the person actually in possession by virtue of the assertion of a claim to succeed to or represent the estate of the deceased debtor are binding against the real legal heir, whether such proceedings were commenced or continued against the wrong person and irrespective of any express or implied decision by the Court that the person so impleaded was the proper legal representative. The Court in that case recognised that though the title of a person to property cannot normally be affected by any proceedings to which he is not a party, his interest in the property may still be bound if he may, having regard to the circumstances, be said to have been sufficiently represented in the proceeding. The learned Judge observed at p. 445 (of ILR Cut); (at p. 229 of AIR).

"I have, therefore, no hesitation in coming to the conclusion that where a mortgagee institutes a suit bona fide against the person in possession of the estate of the deceased mortgagor, who is in such possession in assertion of a claim to succeed to that estate, and where a person purchases the mortgaged property bona fide in execution of that decree, such purchaser gets the full title to the

mortgaged property by virtue of such sale and the real heir is bound thereby and that his only remedy, if at all, in a proper case is to get the sale set aside by appropriate proceedings in time."

16. In a recent judgment of the Madras High Court in Shunmugham Chettiar v. Govindasami Chettiar, AIR 1961 Mad 428, it was held that where after the death of the mortgagor, in a suit on the mortgage, the mortgagee bona fide and "after due care and caution" impleads a person who is believed by him to be the legal representative of the mortgagor and who is in possession of the mortgaged property and a decree is obtained on that footing without the legal representative so impleaded disclaiming any liability, the decree thus obtained by the mortgagee will bind other legal representatives who may be in existence.

17. It is true that the cases of the Madras and Orissa High Courts did not relate to the estate of a muslim debtor. But the rule, as already stated, is one of procedure and not of personal law, and applies to a muslim debtor's estate as well as to a Hindu debtor's estate. It is true that in the case of a debtor who is sued for recovery of the debt, and if he dies after the institution of the suit, there is some order of the Court-express or implied-recognising that the person sought to be brought on record are the heirs and legal representatives of the deceased debtor. The Court records a conclusion if not expressly by implication, that they represent the estate. It was held by this Court, as already stated earlier, in a recent judgment in Daya Ram's case, AIR 1965 SC 1049, that failure to bring the other heirs on record, if there is a bona fide enquiry as to the existence of the heirs, does not affect the validity of the decree and the proceedings taken thereunder. In a suit instituted against the heirs of a deceased debtor, it is the creditor who takes upon himself the responsibility to bring certain persons as heirs and legal representatives of the deceased on the record. If he has proceeded bona fide and after due enquiry and under a belief that the persons who are brought on the record are the only legal representatives, it would make no difference in principle that in the former case the heirs have been brought on the record during the pendency of the suit, the creditor having died since the institution of the suit and in the other at the instance of the plaintiff certain persons are impleaded as legal representatives of the deceased person. In either case, where after due enquiry certain persons are impleaded after diligent and bona fide enquiry in the genuine belief that they are the only persons interested in the estate, the whole estate of the deceased will be duly represented by those persons who are brought on the record or impleaded, and the decree will be binding upon the entire estate. This rule will of course not apply to cases where there has been fraud or collusion between the creditor and the heir impleaded or where there are other circumstances which indicate that there has not been a fair or real trial, or that the absent heir had a special defence which was not and could not be tried in the earlier proceeding.

18. The appellant and his brother Mohammad Ismail were both minors when the action for enforcement of the mortgage in favour of Narsimha Reddy was instituted. The mortgaged property was in the possession of the three widows and a daughter of Khader Miran, and the other mortgagors. It is also found that Narsimha Reddy had made bona fide enquiry and has not come to learn about the existence of any other heirs. It is also not the case of the appellant that he had any special defence to the suit which if he was impleaded as a party to the suit he could have set up, nor is there any ground for holding that there was no fair or real trial of the action.

19. This appeal therefore fails and is dismissed with costs. The appellant was permitted to appeal in forma pauperis. He will pay the court-fee payable on the memo of appeal as if he had not been permitted to appeal is forma pauperis.

Appeal dismissed.