N. K. Mohammad Sulaiman

Vs

N. C. Mohammad Ismail and Others

Civil Appeal No. 432 of 1963

(K. N. Wanchoo, J. C. Shah, K. Subha Rao, S. M. Siskri, V. Ramaswami - I JJ)

23.09.1965

JUDGMENT

SHAH J. -

Khader Miran, Muhammad Abdul Kassim and Muhammad Labhai mortgaged on August 21, 1933, certain immovable 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 Kassim, Muhammad Labhai, and three widows of Khader Miran Fathima Bi, Amina Bi, and Mahaboob Bi, and a daughter Muhammad Mariyam Bi, A preliminary mortgages 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 mortgagee 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.

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 alienees 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

This 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 Trail Court, dismissing the plaintiffs suit was confirmed. With certificate granted by the High Court, this appeal is preferred in forma pauperis by the plaintiff.

The Trail 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 this 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 a 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 Court in India.

It is necessary in the first instances 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, 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

> " The almost universal consensus of opinion of all the High Court is that where a plaintiff or an appellant after diligent, and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondent 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 a 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 tendency 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 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, 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 or 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

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 manager or the widow may obtain a decree which binds all the persons having interest in the estate: [ii] the rule of Mahomedean 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 person stand 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;

The first view was enunciated by the Calcutta High Court in Mussemat Nuzeerun v. Moulvie Amerooddin and was adopted by the Bombay High Court in Khurshetbibi v. Kesho Vinayak Davalava v. Bhimaji and Virchand v. Kondu.

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 applications under the Indian system of jurisprudence to the trial of action in our courts and as observed by Mahmood, J. in Jafri Begam v. Amir Muhammad Khan 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."

The Calcutta High Court in Muttyjan v. Ahmed Ally accepted the third view and regarded a suit fled 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 Amit Dulhin v. Baijnath. Singh. On this rule an exception was engrafted in a later judgment in Abbas Naskar v. Chairman, District Board, 24-Parganas. It was observed in Abbas Naskar's case that in the case of an estate of a 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, 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 realisation of the entire debt passed in such a suit may be enforceable against all the assets that are in his possession. But a decree fro administration may only be passed where t

The last view has been uniformly expressed by the Allahabad High Court since it was first enunciated by Mahmood J. in Jafri Begam's case. It may be observed that the Bombay High Court in later decisions has accepted this view: Bhagirathibai v. Roshanbi : Shahasaheb v. Sadashiv : Lala Miya v. Manubibi and Veerbhadrappa Shilwant v. Shekabai.

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

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, it must be regulated by the law governing the action of the court.

An administration action may undoubtedly lie at the instance of a creditor for and on behalf of 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 liabilities of the estate. A suit by a creditor may in 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 interested in the estate. Such a person may by intermeddling with the estate be regarded as executor de sontort and may render himself liable accordingly, but thereby he cannot represent those whose estate he has intermeddle

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 his interest 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 interests in the estate. The court will undoubtedly investigate, it 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 p

A few illustrative cases which support this principle may be noticed. In Chaturbujadoss Kushaldoss and Sons v. Rajamanicka Mudali 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 here 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

> " 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, 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. In that case, the material facts out of the many complicated facts which have bearing on the point under review are these : a suit was instituted for redemption of two mortgage of 1874 in respect of certain immovable properties. The plea of the mortgage in substance was that the equity of redemption had been sold in execution of money decrees against the mortgagors in earlier proceedings has 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 Hassan named as legal representatives were served with the summons and wee willing to accept the

aware. 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 heir

> " 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 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 said by appropriate proceedings in time."

In a recent judgment of the Madras High Court in Shunmugham Chettiar v. K. A. Govindasami Chettiar and others it was held that where after the death of the mortgagor, in a suit on the mortgage bona fide and after due care and caution impleads a person who is believed 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 rep[representative who may be in existences.

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, 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 fro recovery of the debt, and if he died 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 that failure to bring the other heirs on record, if there is a bona fide enquiry as to the existence of the heirs does no affect the validity of the decree and the proceeding taken thereunder. In a suit instituted against the heirs of a deceased deb

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 daughter of Khader Miran, and the other mortgagors. It is also found that Narsimha Reddy had made bona fide enquiry and had 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.

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 not been permitted to appeal in forma pauperis.

Appeal dismissed.

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