

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Sheikh Hub Ali v. Wazir-un-nissa and another, from the Court of the Judicial Commissioner of Oudh, delivered the 10th April 1906.*

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Present at the Hearing :

LORD DAVEY.

SIR ANDREW SCOBLE.

SIR ARTHUR WILSON.

[*Delivered by Sir Arthur Wilson.*]

The suit out of which this Appeal arises was instituted on the 13th August 1890. The Plaintiffs were Sughra Bibi and Wazir-un-nissa (claiming to be daughter and widow, and as such co-heiresses, of one Raza Ali, deceased) and Inayet-ullah, an assignee from the ladies of a share of their inheritance. The Defendants were Kazim Husain Khan and the present Appellant, Hub Ali, whose connection with the matters in dispute will be explained later.

The case presented on behalf of the Plaintiffs was that about 1856 or 1857 Raza Ali, whose home was then at Seota, was lawfully married to Wazir-un-nissa, and resided with her there for some time, and that Sughra Bibi was the legitimate daughter of that marriage; that subsequently Raza Ali migrated to Tanda, whither he was shortly followed by his wife and daughter, who lived with him there until his death which took place on the 2nd January 1881; and that they, as such widow and daughter, were his lawful heirs according to Mahomedan law. It

was further alleged that Raza Ali, at the time of his death, was the owner of an 8 annas share in the villages Hasanpur Tanda and Asauna; and that on the 11th May 1871 he had mortgaged that property by deed of conditional sale to Raja Tajammul Husein Khan for a period of 30 years, without possession, to secure a principal sum of Rs. 2,000 without interest. It was then said that on the 4th January 1881, immediately after the death of Raza Ali, the Defendant Kazim Husein Khan, the representative of the original mortgagee, without any foreclosure or other legal proceedings, procured mutation of names for the mortgaged property in his own favour, and shortly afterwards entered into possession; and that the other Defendant had obtained a decree in a pre-emption suit against Kazim Husein Khan, to which the Plaintiffs were no parties, and acquired possession of the property. On the basis of the case thus indicated the Plaintiffs asked for a decree for possession of the property and mesne profits.

In answer to this case the Defendant Hub Ali, now Appellant, denied that Wazir-un-nissa was the wife, or Sughra Bibi the daughter, of Raza Ali. He alleged secondly that, if there had been a marriage, both wife and daughter were excluded from inheritance under the terms of the wajib-ul-arz, on the ground that the wife was a ghair kuf woman. It was set up, thirdly, that by the terms of the alleged mortgage, the property vested absolutely in the mortgagee on the death of Raza Ali, and that the mortgagee, and after his death his representative, was entitled to take possession without any legal proceedings. It was said, lastly, that the Plaintiffs ought, upon their own view of the case, to have sued for redemption and could not sue for possession. These were the four questions

discussed before the Courts in India, and again argued on the Appeal before their Lordships.

The District Judge dismissed the suit. He held that the marriage of Wazir-un-nissa was not proved. He held further that, if a marriage did take place, the wife was ghair kuf within the meaning of the wajib-ul-arz, and that therefore mother and daughter were excluded from inheritance. On the other hand he thought that the document called a mortgage by conditional sale was really so, that the mortgagee or his representative had no right except to have recourse to foreclosure proceedings, and that, in taking possession as he did, he was a trespasser, against whom a suit for possession might properly lie.

In the Court of the Judicial Commissioner it was held that Wazir-un-nissa was the lawfully married wife of Raza Ali, and Sughra Bibi their legitimate daughter, that the alleged custom based upon the wajib-ul-arz to exclude a ghair kuf wife and her daughter was not proved, and that if it were proved, Wazir-un-nissa was not a wife of that class. It was further held, in concurrence with the First Court, that the document of the 11th May 1871 was a mortgage by conditional sale, and that the entry by the representative of the mortgagee was a mere trespass; and accordingly a decree was given to the Plaintiffs for possession and mesne profits.

Their Lordships agree with the conclusions arrived at by the Court of the Judicial Commissioner on all points.

As to the fact of the marriage, it was spoken to by the Qazi who says he performed the ceremony, and by four other witnesses who profess to have been present. Those witnesses were disbelieved by the First Court, for reasons which are not very convincing; reasons which are quite sufficient to demand an examination of the evidence in support of the marriage as a

whole and with care, but not sufficient to justify the summary rejection of the testimony of the witnesses in question. The next branch of the evidence in support of the marriage relates to the position and treatment of the alleged wife and of her daughter. With regard to this it seems clear that from the time of the alleged marriage Wazir-un-nissa lived with Raza Ali as his wife down to his death. She and her daughter lived in the inner apartments of the house, whereas a mistress who was kept by Raza Ali lived at the same time in the outer apartments. As to the amount of social intercourse between the two ladies and others more or less connected with Raza Ali's family, the evidence is loose, as is usual in such cases. The daughter, Sughra Bibi, whose parentage is not disputed, was married by her father, with considerable ceremony and publicity, to a man of respectable family. Upon the death of Raza Ali, the Patwari, in his official report, declared that Wazir-un-nissa, his wife, and Sughra, his daughter, were his heirs. The present Appellant himself, in his evidence on a former occasion, describes Wazir-un-nissa as the wife of Raza Ali.

From all this their Lordships think the proper inference is, that the marriage did take place; and it follows that the widow and daughter were heirs of Raza Ali, under the Mahomedan law, unless there was something special to exclude them.

The special circumstance relied upon as excluding them from the inheritance was that Wazir-un-nissa (it was said) was a ghair kuf wife, and that she and her daughter were excluded by custom. Apart from the wajib-ul-arz, it appears to their Lordships that there is absolutely no evidence of any custom on the subject. There is simply a series of statements by witnesses, as to what is usual and what they

consider becoming, with reference to inter-marriages between different groups of Mahomedan families, but there is no instance produced of anybody having been excluded from inheritance in consequence of a marriage not in accordance with the witnesses' views of propriety. The District Judge based his finding upon a statement in the wajib-ul-arz of the village of Hasanpur Tanda. That document, under the heading "Transfer of Property and Right of Inheritance," says:—

" A married wife belonging to a (ghair kuf) different caste, and an unmarried wife, or their descendants will, provided they bear good conduct, be entitled to maintenance according to their status, and they will not be entitled to any share whether the property be partitioned or unpartitioned."

That document bears the signatures, amongst others, of Raza Ali and the present Appellant; and the fact that Raza Ali signed it makes it admissible, for what it is worth, against those who are claiming as his heirs. But the Judicial Commissioner has pointed out that the document commences with words meaning "By Agreement," so that it does not purport to be a record of immemorial custom. The learned Counsel for the first Respondent drew attention to the fact that, though the parties were all Mahomedans, the rules of inheritance laid down are really based, not upon Mahomedan, but on Hindu law. In the absence of other evidence in support of the alleged custom, their Lordships are of opinion that the entry in the wajib-ul-arz is insufficient to establish it. They further agree with the Judicial Commissioner that, supposing such a custom to be established, the case of Wazir-un-nissa has not been shown to fall within it. Raza Ali was by family a Syed, Wazir-un-nissa was by family a Sheikh, and the social position of her father is stated to have been good. If any conclusion can be drawn from the vague and conflicting statements

of the witnesses, it appears to their Lordships to be that such a marriage would not fall within the ban implied by the term "ghair kuf."

The nature of the mortgage transaction and its legal effect have next to be considered. On the 28th September 1866 Raza Ali executed a deed of mortgage in favour of Tajammul for Rs. 2,000, repayable in five years, hypothecating the two villages in question as security, and providing in paragraph 3 that if "I die within the fixed period without paying the said loan then after me the whole share of my zamindari which has been hypothecated, shall be considered as a complete sale to Tajammul . . . . in lieu of the debt." The same paragraph describes the deed as a "mortgage deed by conditional sale."

On the 11th May 1871 the mortgagor executed a second deed in favour of the mortgagee. This deed recited the former mortgage. It recited that the time for payment had nearly expired, and the mortgagor could not pay off the debt, and that at his request the mortgagee had extended anew the period for payment to 30 years from the next year, upon terms which are stated. First, the mortgagor pledged himself for payment at the prescribed time. Thirdly, it was agreed that if the mortgagor should die within the fixed period, then "after me the whole share of zemindari . . . . hypothecated as above shall be considered as a complete sale" to Tajammul. The fourth condition provided that when the creditor became entitled to and possessed of the property, he should be bound to make provision for the maintenance of certain male members of the family to which the mortgagor belonged.

At the time when the mortgage of the 11th May 1871 was entered into, and also at the time when the representative of the mortgagee

took possession of the property, after the death of Raza Ali, the law governing the matter was Bengal Regulation XVII of 1806; the Transfer of Property Act had not passed.

Their Lordships think it clear, as did both the Courts in India, that the mortgage of 1871 was in substance, what it describes itself as being, a mortgage by way of conditional sale. For the Appellant it was suggested that the document might be read as containing two separate and distinct transactions,—first, a mortgage by mere hypothecation, which was not a conditional sale, and secondly, a conditional sale which was not a mortgage. This, in their Lordships' opinion, would be to apply an artificial and illegitimate method of construction to a document which can be naturally, and without difficulty, construed and applied as a whole.

Such being the nature of the transaction, the rights of the parties under the Regulation admit of no doubt. The mortgagee or his representative had the right to take legal proceedings with a view to foreclosure; and that foreclosure he could have obtained, if, after the proper steps had been taken, the representatives of the mortgagor had failed to redeem within the time limited for that purpose by the terms of the Regulation. But there was no right to take possession of the property without the proceedings prescribed by law. In entering as he did, therefore, the representative of the mortgagee was a mere trespasser, and the heirs of the mortgagor are entitled to sue him in ejectment as such.

Their Lordships will humbly advise His Majesty that this Appeal should be dismissed. The Appellant will pay the costs.

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