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Makkama Khadirsaheb Vs Masabi Abasali

Second Appeal No. 514 of 1923

Court: Bombay High Court

Date of Decision: Sept. 19, 1924

Acts Referred:
Transfer of Property Act, 1882 â€" Section 41

Citation: AIR 1925 Bom 299 : (1925) 27 BOMLR 208

Hon'ble Judges: Lallubhai Shah, Acting C.J.; Kincaid, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Lallubhai Shah, Kt., Acting C.J.

1. The plaintiff in this case sued to recover possession of certain property consisting of one survey number and a house. She based her claim upon

a Mahrnameh which was passed by defendant No. 1 and his -son in her favour The plaintiff is the daughter-in-law of defendant No. I. And

defendant Mo. 2 is the wife of defendant No. 1. The defence of defendant No. 2 way that these two properties were given to her along with the

rest of the property by defendant No 1 by way of Mahr in 1908, The Mahrnameh in favour of the plaintiff was made in 1910. Defendant No. 2

claimed these properties an her property and misted the plaintiff"s claim. The trial Court was satisfied that Defendant No. 1 had given the plaint

property in Main* to defendant No. 2 before it wan given to the plaintiff; but it was of opinion that it way not valid and operative in law.

Accordingly the plaintiff claim was decreed against the defendants.

2. Defendant No. 2 appealed to the District Court, and the learned Assistant Judge, who heard the appeal, accepted the finding that in 1908 the

property in suit was given by way of Mahr to defendant No. 2 by defendant No. 1. But there was 20 writing about it and the laud and the house

continued ostensibly in the name of defendant No. 1 and in his possession as before. The Assistant Judge was of opinion that in 1916 this

particular property was given by way of Mahr to the plaintiff; and that shortly after defendant No. 1 gave possession of other land to defendant

No. 2 in lieu of her dower, The learned Judge was further of opinion that in any case the defendants were estopped from contesting the plaintiff"s

claim under the Mahrnamch in her favour. Accordingly the appeal was dismissed and the decree of the trial Court was confirmed.

3. Defendant No. 2 has now appealed to this Court. It is argued on her behalf that as the property in suit was given to her by way of Mahr in

1908, the title to that property is with her. It is further argued that no document in writing evidencing the giving of the land by way of Mahr is

required according to law, and that in 1916 defendant No. 1, who purported to give the property in suit to the plaintiff by way of Mahr, had no

title to it. On the other hand it is argued that the Mahr, given to defendant No. 2 in 1908, was really a fictitious Mahr, that what was given to her in

1916 was the real dower, and that defendant No. 2 had no title to this property at the date of the transfer in favour of the plaintiff. Further it is

argued that defendant No 1 transferred this property to the plaintiff on the express understanding that the property belonged to him, that it was in

his enjoyment, and that lie had every right to give it by way of Mahr to her, and that the defendants are now estopped from contesting the plaintiffs

claim, In fact the grounds taken by the lower appellate Court are relied upon by the learned pleader for the respondent in support of the decree.

4. It is difficult to say that defendant No 2 did not get this property in suit an Mahr in 190S. It has not been shown in the argument before us that

the transfer by way of Mahr can take place only by a registered document. We, however, do not consider it necessary to decide this point. All that

we desire to say is that, apart from the ground to which I shall presently refer, it may not be easy to support the view taken by the lower appellate

Court. If these properties were promised by the husband as Miahr to defendant No. 2 it is clear that he would have no right to deal with the

property in 1916 when he transferred it to the plaintiff. But whether he had such right or not it seems to us that u/s 41 of the Transfer of Property

Act the transfer in favour of the plaintiff is not voidable on the ground that the transferor, that is, defendant. No. 1, was not authorised to make it. It

is clear that the property in suit continued in the name of defendant No. 1 and in his possession after 1908 as before his marriage with defendant

No 2. Under these circumstances, even if the ownership of the properly be taken to be vested in defendant No. 2, it must be taken that the land

continued to stand in the name of defendant No. 1 in the Revenue Record with the implied consent of defendant No. 2, and that at the date of the

transfer in 1916 the defendant No. 1, and not defendant No. 2, was the ostensible owner. Whether defendant No. 1 acted honestly in this matter

or not is not the question Apparently he acted in a manner which was in derogation of the right of his wife. But he being the ostensible owner and

an assurance having been given to the present plaintiff that he was the owner and in possession, the plaintiff was entitled to act upon the belief that

she was entitled to accept the transfer of property from him. No doubt the proviso to Section 41 of the Transfer of Property Act requires that the

transferee after taking reasonable care to ascertain that the transferor has power to make the transfer must act in good faith The facts of this case,

an found by the lower appellate Court, would justify the view that the requirements of this proviso are satisfied. The plaintiff was the wife of

defendant No. 1"a son, and unless he had transferred this property to her as Mahr possibly there might have been a difficulty in effecting the

marriage. Such inquiry as the person in the position of the plaintiff would be expected to make must he taken to have been made by the plaintiff,

and there can be no doubt that she acted in good faith and the ostensible owner* ship of defendant No. 1 was made possible with the implied

consent of defendant No. 2. Therefore, this transfer in favour of the plaintiff must take effect as against the defendants. On these grounds we

confirm the decree of the lower appellate Court and dismiss the appeal with costs.