

ALITHAMBY AND FOUR OTHERS
v.
BASTIANPILLAI

COURT OF APPEAL.

L. H. DE ALWIS, J. AND MOONAMALLE, J.

C.A. 230/73 (F) – D.C. VAVUNIYA 2659.

JANUARY 17, 1984.

Muslim Law of Intestate Succession – Devolution on husband and only daughter – Whether re-marriage of husband affects his rights to inheritance – Abandonment and ouster.

One Mohamedu Meera Nachiya who owned the land in suit died intestate leaving as heirs her husband the 1st defendant and an only daughter Kadija Umma. In 1956 by P 1 Kadija Umma sold the entire land to an outsider and to this deed the 1st defendant signed as a witness. Twelve years later Kadija Umma re-purchased the land and sold it to the plaintiff. On receiving notice to quit from the plaintiff the 1st defendant who lived on the land with his dependants undertook in a statement to the Police to vacate it on 15.12.1969, having admitted he was on the land as a licensee.

On the failure of the 1st defendant and his dependants to do so the plaintiff instituted this action in the District Court against them. The 1st defendant averred that according to the Muslim Law of Intestate Succession he was entitled to half share of the land and therefore his daughter could not have conveyed the whole land. The learned District Judge gave judgment in favour of the plaintiff. The defendants appealed from this judgment.

Held—

According to section 2 of the Muslim Intestate Succession Ordinance, the law applicable to intestacy is the law governing the sect to which the deceased Muslim belongs. This is the law applicable to the Shafei Sect of Sunnis to which the Muslims in Sri Lanka belong. Accordingly in the present case on the death of his first wife, the 1st defendant was entitled to a one fourth share while the daughter was entitled to a half share. The fact that the husband remarried does not affect his rights of inheritance.

In this case however the 1st defendant had been an attesting witness to the deed by which his daughter sold the entire land. In a voluntary statement to the Police he had admitted he was residing on the land with the consent of the plaintiff and had undertaken to vacate it. The conduct of the 1st defendant amounts to an abandonment of his rights which is stronger than ouster. In any event the transfer of the entire land by Kadija Umma on P 1 with the knowledge of her father the 1st defendant who signed as a witness amounts to his ouster as a co-owner. Thereafter the land had passed to several outsiders and was re-purchased by Kadija Umma 12 years later and sold to the plaintiff. The possession of the 1st defendant was admittedly as a licensee and cannot create prescriptive title in his favour.

Cases referred to

- (1) *Wappu Marikkar*, (1911) 14 N.L.R. 225.
- (2) *Mangandi Umma v. Lebbe Marikkar*, (1906) 10 N.L.R. 1.
- (3) *Rabia Umma v. Saibu*, (1914) 17 N.L.R. 338
- (4) *Abdul Majeed v. Umma Zaneera*, (1959) 61 N.L.R. 361.

APPEAL from the District Court of Vavuniya

M. S. M. Nazeem for appellants.

H. L. De Silva, S.A. with *S. Mahenthiram* for respondent.

Cur. adv. vult.

March 9, 1984.

L. H. DE ALWIS, J.

It is common ground that the divided western 1/2 share of the land called Vappupen Sinnapillai Kudiyiruntha Valavu in extent 24 1/2 yards on the north, 21 yards on the south and 30 yards on the east and west is the subject matter of this action and that it belonged at the material time to Mohamedu Meera Nachiya, and that she died leaving her husband S. Alithamby, the 1st defendant-appellant, and an only child, a daughter by the name of Kadija Umma. Kadija Umma along with her husband Mustaffa conveyed the land on deed 4360 of 8.6.56 (P1) to Mohammed Haniffa and it eventually devolved on deeds P3, P4, P5 and finally on deed No. 9889, dated 30.3.68 (P2) on the plaintiff. The plaintiff's case is that he is entitled to the land as against the 1st defendant and his dependants who are living on the land with his leave and licence. The 1st defendant undertook to vacate the land on 15.12.69 and when he failed to do so the plaintiff instituted this action on 1.7.71.

The 1st defendant took up the position that according to the Muslim Law of Intestate Succession, a 1/4 share of the land devolved on him, on his wife Meera Nachiya's death, and only a 1/2 share of the land devolved on their only child Kadija Umma.

The learned District Judge has answered the issues on the basis that the plaintiff is the lawful owner of the land and that the 1st defendant is in wrongful and unlawful possession of the land and entered judgment for the plaintiff as prayed for. The defendants now appeal from it.

The first question that arises for determination on this appeal is whether according to the Muslim Law of Intestate Succession, Meera Nachiya's entire rights in the land devolved on her only child Kadija Umma, from whom the plaintiff claims title, or only a 1/2 share of the land, while a 1/4 share devolved on her surviving husband Alithamby, the 1st defendant.

Section 2 of the Muslim Intestate Succession Ordinance provides that the law applicable to the intestacy of any deceased Muslim who at the time of his death was the owner of any immovable property in Ceylon shall be the law governing the sect to which such deceased Muslim belonged. The authorities indicate that in Ceylon, the Muslims belong to the Shafei Sect of Sunnis. See *Wappu Marrikar* (1) ; *Mangandi Umma v. Lebbe Marrikar* (2) ; *Rabia Umma v. Saibu* (3).

In *Mangandi Umma's Case* (*supra*) it was held that there is no difference between the various schools of Sunni Muslims in regard to sharers on intestacy, that is, between Shafeis, Malikis and Hanafis. According to the Sunnite Law of Intestate Succession, a 1/2 share devolves on the daughter as an only child, and a 1/4 share on the husband. See *Fyze : Outlines of Muhammedan Law*, 3rd Ed., page 397, *Ameer Ali : Mohammedan Law*, Volume II page 47 ; *Minhaj et Talibin-Muhammedan Law Nawavi*, page 247. See also Dr. Tambiah : *Principles of Ceylon Law*, page 192. The fact that the 1st defendant remarried does not affect his rights to inheritance.

Be that as it may, the 1st defendant has by his conduct abandoned his rights in the land. No specific issue was raised on this question at the trial but it is covered by the issue of prescription that was raised. Moreover, being a question of law, it is open to this Court to consider it at this stage on the evidence led at the trial. On deed 4360 of 8.6.56 (P1) Kadija Umma along with her husband has given a conditional transfer of the entirety of the land to one Haniffa for a period of five years, after the death of her mother Meera Nachiya. If the 1st defendant claimed any rights in the land he too should have joined in the deed if he wished to convey his rights also to Haniffa. What was conveyed on P1 was not a 1/2 share of Kadija Umma's interests in the land but the entirety of the land. The title recited in the deed is that the land belongs to Kadija Umma by maternal inheritance. The land is described in extent as 24 1/2 yards on the north, 21 yards on the south, 30 yards on the east and west and is the land described in D2. The 1st defendant who is the father of Kadija Umma has acknowledged the latter's title to the entirety of the land when he signed as an attesting witness to the deed. Learned Counsel for the appellant submitted that the 1st defendant signed as an attesting witness to the transfer of only Kadija Umma's share, which was the western 1/2 share of the land, while his rights lay in the eastern portion of the land. But the eastern portion had earlier been gifted to

Kowa by Kadija Umma's grandparents. Indeed as the schedule in D2 indicates, the land that devolved on Meera Nachiya was the divided western 1/2 share of the larger land, and that is the land that was conveyed on P1.

Another strong item of evidence against the 1st defendant is the complaint he made to the Police on 7.10.69 (P6). There, in no uncertain terms, he admits that the house and premises belong to his daughter Kadija Umma, and that she and her husband sold it to the plaintiff, Bastianpillai. He has thus acknowledged the fact that he has no rights in the property. He goes on further to say that he is residing in the house with the consent of the plaintiff and undertakes to vacate it before the 15th of December. This is a further admission that his occupation of the house was with the leave and licence of the plaintiff. The 1st defendant denied that he was living in the house with the leave and licence of the plaintiff but conceded that the statement to the Police was made voluntarily by him when the plaintiff sent him a notice to quit ; and he is bound by it.

Learned Counsel for the appellant submitted that an overt act is necessary to oust a co-owner. In *Abdul Majeed v Umma Zaneera* (4) H. N. G. Fernando, J., stated that whether the presumption of ouster is to be drawn or not depends on the circumstances of each case. In the present case the circumstances are such that the conduct of the 1st defendant points unequivocally to a voluntary abandonment of his rights in the land, which is stronger than an ouster and brings to an end co-ownership. In any event, the transfer of the entirety of the land by Kadija Umma on P1 with the knowledge of her father, the 1st defendant, as an attesting witness to the deed, amounts to his ouster as a co-owner. Thereafter the land passed to several outsiders and was re-purchased 12 years later by Kadija Umma, in January 1968, on P5 and then conveyed to the plaintiff on P2. The 1st defendant cannot avail himself of his 35 years possession of the land to create a prescriptive title in his favour because his possession is admittedly that of a licensee.

In the result I am of the view that the plaintiff's case must succeed and the judgment of the learned Judge must be affirmed.

The appeal is dismissed with costs.

MOONEMALLE, J. – I agree.

Appeal dismissed.