Supreme Court of India
Mohammad Baqar And Ors. vs Naim-Un-Nisa Bibi And Ors. on 9 November, 1955
Equivalent citations: AIR 1956 SC 548
Author: V Ayyar
Bench: B Mukherjea, V Ayyar, Imam
JUDGMENT Venkatarama Ayyar, J.

1. This appeal arises out of a suit instituted on 31-5-1935 by the first respondent, Mst. Naimunnisa Bibi and her sister, Khadija-ul-Kubra Bibi, since deceased, for partition of their shares in the estate of their father, Sheik Ataullah, who died sometime in 1892. The defendants to the action were their brothers, Sheik Kifayatullah and Sheik Mohammad Baqar.

The plaintiffs alleged that after the death of their father, Sheik Ataullah, they and the defendants were living together as members of one family, that the first defendant was in management of the properties on behalf of all of them, that on 10-8-1933 the defendants executed a deed of waqf-alal-aulad for the benefit of their descendants, and that the said deed was a denial of their rights. They accordingly prayed for partition and delivery of 14/48th share in the estate of the deceased Sheik Ataullah, which they claimed as belonging to them, for an account of the management of the same by the first defendant from 1892 and for future mesne profits from 2-2-1934.

The defendants contested the suit on three grounds, viz., (1) that there was a family custom excluding the female heirs from sharing in the inheritance, (2) that in 1893 there was a family settlement under which the plaintiffs gave up their rights to share in the estate, and (3) that the claim of the plaintiffs was extinguished by adverse possession on the part of the defendants, arid that the suit was barred by limitation.

2. The Additional Subordinate Judge of Jaunpur who heard the suit, held by his judgment dated 14-5-1936 that the alleged custom was not made out, that there was, in fact, no family settlement, and that even if it were true, it would not be binding on the plaintiffs as they were minors at the date of the alleged settlement, and that the suit was not barred by limitation, as they had been at all times in enjoyment of the income from the properties.

He, however, held that the plaintiffs were entitled to 34/168th share in the estate of Sheik Ataullah and not 14/48th share as claimed in the plaint, and granted a decree for partition and possession of that share, and for rendition of accounts by the first defendant from 1892. The claim for future mesne profits was, however, negatived.

3. Against this judgment, the defendants preferred an appeal to the High Court of Allahabad contending that the suit was liable to be dismissed on all the three grounds put forward in the trial Court, and further that the decree for rendition of accounts from 1892 was bad. The plaintiffs preferred a cross-appeal claiming that they were entitled also to their share of the profits from the estate from the date of the institution of the suit until they were put in separate possession.

By their judgment dated 22-10-1943 the learned Judges of the High Court agreed with the Subordinate Judge that the defendants had failed to establish the family custom excluding female heirs from inheritance, that further the family settlement which was alleged to have been entered into in 1893 was not proved, and that on the facts no question of limitation arose.

They, however, set aside the decree in so far as it directed rendition of accounts by the first defendant from 1892, but awarded the plaintiffs a decree for future mesne profits from the date of the plaint to be ascertained in further proceedings under Order 20, Rule 12. They also held -- and that was accepted by both parties -- that the correct share to which the plaintiffs were entitled was 153/672 and not 34/168, as decreed by the Subordinate Judge. It is against this judgment that the present appeal by the defendants is directed.

4. Before considering the appeal on the merits, we have to deal with an application filed by the appellants under Order 23, Rule 3 for passing a decree in terms of an alleged compromise. According to them, the matters in dispute in the appeal were compromised on 12-9-1947, and the compromise was embodied in a document which is Record No. 1 in the Supplemental Record.

It must be mentioned that during the pendency of the appeal in the High Court the second plaintiff died leaving behind three sons and two daughters, and they were brought on record on 24-3-1938. One of these daughters, Zaina Bi, had subsequently died leaving behind, her husband, a son and daughter as her heirs, and they were brought on record on 29-7-1943.

The first defendant, Sheik Kifayatullah, died, and his three sons and two daughters were brought on record as his legal representatives on 4-1-1943. These were the persons who were interested in the subject-matter of the decree, which was under appeal.

Now, the document on which the appellants rely as being the compromise is signed by the second defendant, Sheik Mohammad Baqar, but the heirs of the deceased first defendant are not parties thereto. On the side of the plaintiffs, the document purports to bear the thumb-impression of the first plaintiff, and of three of the children of the deceased second plaintiff, Mohammad Ibrahim, one of the sons of the second plaintiff, and the son and the daughter of the deceased Zainab Bi are not eo nomine parties to it.

Mohamed Ibrahim, having subsequently died, his three sons have been brought on record as his legal representatives, and they do not admit the genuineness of this document, and further contend that even if true, it is ineffective as neither the heirs of the deceased first defendant nor some of the heirs of the deceased second plaintiff are parties thereto.

They contend that as the compromise relates to a partition decree, and as under the proposed compromise the plaintiffs are to take as one group, it was impossible to give effect to that compromise, unless all the parties to the decree consented, and that as some of them have admittedly not joined in the compromise, it could not be made a rule of court under Order 23, Rule 3.

5. In our opinion, the application must fail on the short ground that the compromise is not proved. The appellants applied to the High Court to have the compromise recorded and transmitted to this Court. In their application, they stated that the sons of the first defendant, though agreeable to the terms of the compromise at one stage, changed their mind later on.

Even with reference to the parties whose names appeared on the document, as the compromise was not admitted the High Court called for a report from the Civil Judge, Jaunpur as to the truth thereof. But none of the parties turned up at the hearing before the Civil Judge though the matter was before him twice, with the result that he sent a report that the compromise had not been verified.

This report was accepted by the learned Judges in their order dated 29-7-1949. On the materials before us, there is no proof that there was any compromise between the parties, and the petition under Order 23, Rule 3 to pass a decree in terms of compromise must accordingly be dismissed.

6. On the merits, two contentions have been pressed before us: (1) that the family custom excluding the females from taking as heirs must be held to be established, and (2) that the claim of the plaintiffs is barred by limitation. The burden of proving a custom in derogation of the general law being heavily on the party who sets it up, it was incumbent on the appellants to prove by clear and cogent evidence that there was such a custom as was pleaded by them.

It is admitted that there is no documentary evidence in support of it. The appellants examined six witnesses in proof of it. The trial Judge was not impressed by their evidence, and has given good reasons for rejecting it. No serious attempt appears to have been made before the High Court to rehabilitate them.

The strongest piece of evidence relied on by the appellants is on entry in the mutation of records made in 1893, in which it is stated that the daughters are excluded by custom from sharing in the inheritance, and that therefore the names of the sons of Ata-ullah alone are entered as his heirs. It appears from this very record that the source of this information was the first defendant himself, who at that time is stated to have been about 22 years old.

It is obvious that a statement as to custom from a person of that age cannot command much weight, as that must largely depend on his means of knowledge. In view of the fact that he was himself a person interested, his statement must be discarded as too slender for supporting the custom. We do not find any sufficient grounds for disturbing the concurrent findings of the Courts below on this point, and the custom pleaded by the defendants must, therefore, be held not to have been established.

7. Then, there is the question of limitation. The parties to the action are co-sharers, and as under the law, possession of one co-sharer is possession of all co-sharers it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period.

The facts found are that the plaintiffs were minors at the time of their father's death, that they continued to live with their brothers in the same house down to the year 1918, that thereafter they went to reside with their husbands but that they continued to draw from the family chest for all expenses.

The Courts below have found that as the plaintiffs were in enjoyment of the income from the estate, there was no ouster, and that is clearly right. It was not until 1933 when the defendants executed the waqf deed that there was any denial of the title of the plaintiffs, and down to that date, they had been in enjoyment of the properties.

It was argued that what the plaintiffs received was only maintenance, and could not be attributed to their right to a share in the properties. But the evidence shows that the receipts were not merely for maintenance, and that they were of the same character as the receipts by the defendants themselves from the estate during this period. Moreover, there can be no question of ouster, if there is participation in the profits to any degree. On the facts found, therefore, no question of adverse possession arises.

8. Both the contentions urged in support of the appeal fail, and the appeal is accordingly dismissed with costs.