Tej Singh and ors. Vs. Chaudhari Hannu Prasad and ors.

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Court : Allahabad

Decided On : Mar-26-1940

Reported in : AIR1940All433

Appellant : Tej Singh and ors.

Respondent : Chaudhari Hannu Prasad and ors.

Judgement :

Mohammad Ismail, J.

1. This is an appeal by the plaintiffs from a decree and judgment of the learned Civil Judge of Mainpuri. The plaintiffs brought this suit for the recovery of the properties described at the foot of the plaint and mesne profits. The plaintiffs claimed to be the reversioners of Drig Singh who died in 1885 leaving two widows, Mt. Indar Kuar and Mt. Rukman Kuar. The widows took possession of the estate of the deceased as limited owners. Mt. Indar Kuar died in 1926 while Mt. Rukman Kuar died on 25th May 1931. On 2nd December 1890 the widows executed a mortgage by conditional sale for Rupees 5290 in favour of Hannu Prasad, defendant 1, and Kalyan Singh, father of defendants 2 to 4. By this deed besides the properties in suit 20 biswa share of village Kailashpur was mortgaged. The mortgagees brought a suit for foreclosure (No. 6 of 1903) on 23rd January 1903. In this suit village Kailashpur, for the reasons to be stated later, was not included. A preliminary decree was passed on 24th February 1903 which was made final on 22nd September 1903. The total amount decreed was Rs. 55,427-14-0. The interest was calculated on Rs. 3040 only because a part of the consideration left with the mortgagee to be paid to Dube Mathura Prasad on account of his mortgage of 1884 with respect to mauza Kailashpur was never paid by Hannu Prasad and Kalyan Singh. The defendants decree-holders obtained possession of the properties in suit on 26th October 1903.

2. The case of the plaintiffs is that Drig Singh had property of considerable value which yielded a large income; that the widows were under the influence of Hannu Prasad by reason of relationship; that Hannu Prasad took advantage of the helplessness of the widows and acted as their sarbarahkar; that the deed of conditional sale of 1890 was executed without consideration and lawful necessity; that the ladies were inexperienced, illiterate and pardanashin and therefore did not appreciate the consequences of their act; that the money said to have been paid by the mortgagees to various creditors was in fact paid from the income of the estate of the widows; that the decree obtained on foot of the mortgage did not bind the reversioners and that the plaintiffs were entitled to the possession of the property and mesne profits. The suit was contested inter alia on the grounds that the widows were experienced persons and fully understood the nature of the transaction; that the money borrowed under the mortgage deed was utilized for the payment of the debts

payable by Drig Singh; that the deed of conditional sale was executed for full consideration and legal necessity and as such is binding upon the reversioners; that the plaintiffs are not the reversioners of Drig Singh and that the suit is barred by res judicata. The learned Civil Judge held that the plaintiffs were the nearest reversioners and that the reversioners were bound by the transaction which was entered into for legal necessity. The suit was accordingly dismissed.

3. I do not consider it necessary to discuss in detail the evidence adduced by the parties on the issue of relationship. The learned Civil Judge has given very good reasons for deciding that issue in favour of the plaintiffs. The full pedigree is printed at p. 7 of our paper book and it has been duly proved by oral and documentary evidence. It appears that one Bacha Ram had two sons Kumbhaki and Asa Ram. Kumbhaki had four sons, Zalim Singh, Majlis Singh, Bakht Singh and Ram Baksh. The plaintiffs are said to be the descendants of Zalim Singh. According to the defendants Asa Ram had no connexion with Bacha Ram, but he was son of Jaswant Singh. According to the defendants Asa Ram was not related to Zalim Singh as alleged by the plaintiffs. It appears that the pedigree given by the plaintiffs was set up in a suit No. 56 of 1888 which was instituted by Nawal Singh and Girand Singh, sons of Zalim Singh, against the descendants of Ram Baksh and the widows of Drig Singh. The suit was instituted to recover possession of 5 biswas of mauza Dubhai which was sold by one of the grandsons of Ram Baksh to the widows of Drig Singh. In that suit the pedigree set up by the plaintiffs was disputed. The suit was ultimately dismissed. The Court recorded the following finding on the question of pedigree:

The defendants at first disputed the relationship alleged in the plaint, but it was ultimately admitted and the allegations of the plaintiffs as to relationship were correct.

4. Apart from this finding, there is overwhelming evidence on the record in supports of the pedigree proving the relationship of the plaintiffs with Drig Singh. The defendants have failed to substantiate their allegations on this point. In my opinion this issue was rightly decided in favour of the plaintiffs by the Court below. The next question that falls to be decided is whether the mortgage deed in suit was duly executed for consideration and for legal necessity. All the attesting witnesses are dead and it is extremely difficult to adduce evidence of persons who had direct knowledge of the transaction, after a lapse of 45 years. The execution of the mortgage deed is not denied. The deed of 1890 is a registered document and bears the endorsement of the Sub-Registrar. It appears that the deed was written out on 2nd December 1890 and was registered on 10th December 1890 at the residence of the executants. On the back of the document the Sub-Registrar made the following endorsement:

5. Tharir wa takmil dastawez wa wasulyabi zar rahan hasb mundaraja dastawez se Mt. Indar Kunwar wa Rukmin Kunwar Zojgan Dirag Singh mutwaffa qom Ahir sakinan wa zamindaran Kailashpur pargana Barnahal ne andar parda kewar chuk beruni ki jisha darwaza purabroya hai baith kar ba awaz buland jisko main ne apne kanon se suna iqbal kiya we kaha ki yah, dastatwez bad registry Kalyan Singh ahidul murtahan ko di jawe.

6. It must be presumed that the Sub-Registrar fully satisfied himself that the ladies understood the contents of the deed. About 12 years later the suit for foreclosure was instituted. The ladies did not contest the suit and submitted to the decree. It is

difficult to accept the contention put forward by the plaintiffs that the executants were ignorant of the transaction and that the deed of conditional sale was executed without their knowledge. The ladies remained in possession of a large property for a number of years and there is no evidence to show that they did not manage the estate efficiently. Having regard to the long interval between the execution of the deed and the institution of the present suit, the recitals in the deed should be accepted as evidence embodying a correct statement of facts. Their Lordships of the Judicial Committee in Nand Lal Dhur Biswas v. Jagat Kishore (1916) 3 AIR PC 110 observed:

Under ordinary circumstances and apart from statute, recitals in deeds can only be evidence as between the parties to the conveyance and those who claim under them. But where a very long time has elapsed between the date of the deed and the institution of proceedings challenging' the transaction, such recitals cannot be disregarded, although, on the other hand, no fixed and inflexible rule can be laid down as to the proper weight which they are entitled to receive. If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration and certainly should not be accepted as proof of the facts. But as time goes by and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case, assumes greater importance land cannot lightly be set aside.

7. Of the two mortgagees Kalyan Singh is dead but Hannu Prasad is still alive. He is said to be extremely old and was unable to give evidence. In the circumstances I have no hesitation in accepting the finding of the Court below that the execution of the deed and its valid registration is duly proved. It will be convenient at this stage to examine the nature of the consideration for the bond of 1890. The consideration is comprised of the following items: (1) Rs. 2082-10-0 left with the mortgagees to be paid in satisfaction of decree No. 166 of 1889, dated 10th February 1890 in favour of Nand Ram and others. (2) Rs. 957-6-0 left with the mortgagees for the satisfaction of decree No. 652 of 1889, in favour of Mathura Prasad. (3) Rs. 2250-12-0 left with the mortgagees for the payment of the mortgage dated 8th May 1884 for Rs. 600 executed by Drig Singh in favour of Mathura Prasad. (His Lordship discussed evidence about these items and concluded.) In my opinion the evidence and circumstances show that the mortgagees did pay this amount.

8. As stated above this loan was taken by Drig Singh and the estate of Drig Singh was liable to satisfy the loan. It was the duty of the widows who were in occupation of the estate to liquidate this debt. In case of failure to do so, the ancestral share in Mohabatpur would have been put up for sale and would have been lost to the family. The total liabilities of Drig Singh which the widows were bound to pay come to Rs. 3040 and it is manifest that the widows were fully entitled to raise this sum by hypothecating the property in their possession. The transaction of conditional sale however is challenged as an imprudent and extravagant act because to save 8 biswas odd of village Mohabatpur the widows hypothecated two other villages of considerable value. They raised the loan at an exorbitant rate of interest which cannot be considered reasonable or proper. If they had not raised the sum, namely Rs. 3040, they would have lost only Mohabatpur which is assessed to Government revenue amounting to about Rs. 558. The Government revenue assessed on Ahmadpur is Rs. 620 and on Azampur Rs. 420. It would appear that village Ahmadpur is a more valuable property than Mohabatpur and Azampur yields about the same

income as Mohabatpur. There was no justification therefore for hypothecating Ahmadpur and Azampur in order to save Mohabatpur. Similarly, in my opinion, there was no justification for borrowing money at the rate of Rs. 2 per cent, per mensem with six-monthly rests. On the evidence I am fully satisfied that the payment of Rs. 3040 constituted valid and legal necessity, but it was highly imprudent to endanger ancestral property with the exception of Mohabatpur. As stated above a decree on the basis of this mortgage deed was obtained in 1903.

9. It is argued by learned Counsel for the respondents that it is not open to the reversioners to re-open the transaction because the widows represented their husband's estate in the litigation and any decree obtained against the widows is binding on the reversioners. There is no doubt that in a suit against a widow brought for the recovery of the debt due from her husband the widow represents her husband's estate, and if a decree is obtained in such a suit it cannot be challenged by the reversioners unless fraud or collusion is proved. It was established as early as the year 1863, by the decision of their Lordships of the Privy Council in Katama Natchiar v. Raja of Shivagunga (1865) 9 MIA 539 at p. 604 that a Hindu widow represented the inheritance and that a decree fairly and properly obtained against her would be binding not only on her but on the reversionary heirs as well. Turner L.T. in that case observed:

The whole estate would, for the time, be vested in her, absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance, would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow.

10. In Hari Nath v. Mothur Mohun Goswami,(1894) 21 Cal 8 at p. 18 it was held that the principle of the decision in Katama Natchiar v. Raja of Shivagunga (1865) 9 MIA 539 would apply, even where the decree against the Hindu widow in her lifetime was founded upon the law of limitation, and the same view was followed in several other cases. In the recent case in Smt. Rajlakshmi Dassi v. Bholanath Sen the rule in Katama Natchiar v. Raja of Shivagunga (1865) 9 MIA 539 has been explained as applicable only where a decree has been fairly and properly obtained against a widow in a suit in which a question of title is in issue and not merely a question of the widow's possession during her life. No authority however has been cited in support of the proposition that a reversioner will be bound by a decree obtained against a widow in a suit brought for the enforcement of a mortgage executed by the widow. Such cases will be governed by an entirely different principle. In all cases of alienation by a female limited owner, it will have to be seen whether such alienation was for valid and legal necessity or not. If it was for legal necessity, it will be binding on the reversioners. On the other hand, where the alienation is not for necessity it is in no way binding on the reversioners who would be entitled to challenge it either by a declaratory suit during the lifetime of the widow or by a suit for possession at her death.

11. Learned counsel for the respondents has argued that the mortgage of 1890 was merely a renewal of the earlier mortgages and therefore in effect the suit brought for the enforcement of the mortgage of 1890 should be deemed to be a suit for the recovery of a debt due from the husband of the widows. I am unable to accept such

an extension of the principle of representation. The mortgage of 1890 was executed by the widows on terms which were agreed upon between the mortgagees and the mortgagors. The property hypothecated was also different. In the absence of a clear authority it is impossible to accept the contention of learned Counsel for the respondents that the widows represented the estate in executing the deed of conditional sale and further that they represented the estate in the litigation that was founded upon the deed of conditional sale. In order to uphold this transaction, it is incumbent on the defendants to show that the execution of the conditional sale was within the power of the widows as recognized by Hindu law. The power of a widow or other limited heir to alienate the estate inherited by her for purposes other than religious or charitable is analogous to that of a manager of an infant's estate as defined by the Judicial Committee in Hunooman Persaud Pande v. Mt. Babooee Munraj Koonweree (1872) 6 MIA 393. That power is a limited and qualified one and can only be exercised rightly

in a case of need or for the benefit of the estate. The actual pressure on the estate, the damage to be averted, or the benefit to be conferred upon it in the particular instance, is the thing to be regarded.

12. If the alienation is for purposes of legal necessity or for the benefit of the estate, it binds not only her interest in the estate but the whole body of reversioners. The word 'necessity,' when used in this connexion, has a somewhat special and almost technical meaning. It does not mean actual compulsion but the kind of pressure which the law recognizes as serious and sufficient: see Ramsumran Prasad v. Mt. Shyam Kumari (1922) 9 AIR PC 356 at p. 346. It is in the light of these observations that we have to examine the allegations of the parties. Upon a review of the entire evidence and circumstances, I have no doubt that the widows had exceeded their power in executing the deed of conditional sale on such onerous terms. That being so the reversioners are bound to pay only the debt, namely Rs. 3040, which was due from Drig Singh. They are also bound to pay reasonable interest on that sum until 26th October 1903 when the defendants obtained possession of the property in suit.

13. The next question to be determined relates to the rate of interest. It is well settled that the authority of limited owners to borrow on the security of the family estate is a limited one, and that, in the case of a loan to them, the burden of proof in the first instance rests upon the lender to show that the borrowing and the terms were within the authority which the limited owner can exercise. I have already held that the widows had the authority to borrow Rupees 3040 but they could borrow only on reasonable terms. The contractual rate was 2 per cent, per mensem with six-monthly rests. In twelve years the principal and interest reached the figure of over half a lac. In the absence of very clear evidence, it is manifest that the rate of interest was excessively high. The parties have adduced some evidence to prove their respective allegations. On behalf of the plaintiffs reliance has been placed on several deeds to show that money was borrowed by other persons in or about the year 1890 at the rate of about 6 per cent, per annum. In some cases the interest was compound and in others simple. These terms do not afford a safe guide. The sums borrowed were small and there is no clear evidence to prove the status of the borrower. On the other hand, the defendants rely upon some deeds executed by Drig Singh himself. The hypothecation bond dated 18th June 1883 (Ex. T) was for a sum of Rs. 400 at 2 par cent, per mensem simple. The hypothecation bond dated 8th May 1884 (Ex. U), executed by Drig Singh for Rs. 600, was at 2 per cent, per mensem with six-monthly rests. Mortgage deed dated 19th April 1889 (Ex. 5) was executed by the widows for

Rs. 9000 at 1 per cent, compoundable yearly.

14. From a perusal of these documents, it appears that the rate of interest varied in each case. We cannot lose sight of the fact that the widows offered very good security for the loan. In the circumstances they should have been able to raise sufficient money to pay the debts of Drig Singh at a much lower rate of interest than what they agreed to pay. Learned counsel for the respondents contends that a creditor is always nervous in lending money to limited owners. It is a fact that invariably litigation follows such transactions. The reversioners often challenge the authority of the widow to borrow money even when the loan has been contracted for legal necessity. In the present case the plaintiffs allege that money was never paid by the creditors at all and that the debts of Drig Singh were satisfied from the income of the estate in possession of the widows. The plaintiffs wholly failed to prove this allegation. The suit has been instituted about 45 years after the transaction and it is not possible to expect direct evidence relating to the transaction. In the cases cited before us different rates were allowed, but in no case the interest at the rate claimed in this case was upheld. It is not possible to lay down any hard and fast rule as regards a proper rate of interest for mortgage transactions. Each case will have to be decided on its own merits. In Nazir Begam v. Raghunath Singh (1919) 6 AIR PC 12 a member of a joint Hindu family had borrowed money on the security of family property at the rate of Rs. 2-8-0 per cent, per mensem with half-yearly rests. The High Court reduced the rate of interest to 2 per cent, per annum simple. Their Lordships remarked:

It is incumbent on those who support a mortgage made by the manager of a joint Hindu family to show not only that there was necessity to borrow but that it was not unreasonable to borrow at some such high rate and upon such terms, and if it is not shown that there was necessity to borrow at the rate and upon the terms contained in the mortgage, that rate at those terms cannot stand.

15. In Narain Das v. Abinash Chandra (1922) 9 AIR PC 347 the rate of interest was reduced to 12 per cent, per annum. In Sundar Mul v. Satya Kinkar (1928) 15 AIR PC 64 at p. 371 the rate of interest was reduced to 12 per cent, per annum. At p. 371 their Lordships observed:

There is no rule, which their Lordships can discover, which binds them, when the terms of a loan are challenged, to lean to their reduction, or to presume that simple interest must always be judicially preferable to compound interest, or that rates, because they might seem high here, must be unreasonable in India. Compound interest is common and may often be necessary and proper in India under the circumstances of that country.

16. In Radha Kishun v. Jag Sahu (1924) 11 AIR PC 184 the rate of 24 per cent, per annum simple was upheld. From the authorities cited above it would appear that no uniform rate of interest can be suggested which should be considered proper in every case. In the present case, having regard to the fact that Drig Singh himself borrowed at the rate of 24 per cent, compoundable, six-monthly, we cannot reduce the rate of interest to the extent desired by the plaintiffs. In my opinion having regard to all the circumstances the rate of interest should be reduced to 12 per cent, per annum compoundable yearly. Learned counsel for the appellants has further argued that even assuming that Rs. 3040 was required for legal necessity, in any event the mortgagees cannot claim credit for the payment of Rs. 250 out of the total sum left with them as the aforesaid amount was in fact paid by the widows. It appears that out

of Rs. 957 left with the mortgagees for the payment of Mathura Prasad in satisfaction of decree No. 652 of 1889, Rs. 250 was paid on 17th June 1890, that is some six months before the execution of the deed of conditional sale of 1890. By a reference to Ex. 5 however, it appears that the sum was paid by Hannu Prasad on behalf of the ladies. This sum is included in the total amount of Rs. 957-0-6 left with the mortgagees although no special reference has been made to the fact that Hannu Prasad paid this money out of his own pocket. If this sum had been paid by the ladies I find it difficult to believe that the mortgagees would have been allowed to include this sum in the deed of conditional sale. The evidence produced on behalf of the appellants to show that the money was paid by the ladies did not find favour with the Court below. In the circumstances I am not disposed to disagree with the Court below on this point. As stated above, any direct evidence to prove the details of the transaction cannot be expected after a lapse of nearly half a century. In my opinion, on the evidence available, it must be held that the entire amount of Rs. 3040 was paid by the mortgagees.

17. The next point stressed is that Hannu Prasad was intimately connected with the management of the widows' estate and that he took an unfair advantage of his position in obtaining terms favourable to the mortgagees and detrimental to the estate. In support of this contention reliance has been placed on Ex. 18, which shows that in 1885 Hannu Prasad was recorded in revenue papers as a sarbarahkar representing the widows. From Ex. Y, dated 16th June 1885, however it appears that Hannu Prasad was dismissed from that office. There is no satisfactory evidence on the record to show that Hannu Prasad looked after the property of the widows since his dismissal. In any event this question is not material for the decision of this case as it has been decided that the deed of conditional sale and the foreclosure decree obtained on the basis of it must be set aside. It is not profitable therefore to discuss this part of the plaintiffs' case any further.

18. The next question that has been pressed on behalf of the defendants-respondents is that the suit is barred by res judicata. It appears that Hukum Singh, son of Nawal Singh, Ratan Singh, son of Girand Singh, and Ram Singh brought a suit on 30th August 1904 against Hannu Singh, Kalyan Singh and the widows for a declaration that the widows had no right to mortgage the property without any valid necessity and that the mortgage deed and the decree dated 24th February 1903 passed on the basis of the said mortgage deed was null, void and ineffectual as against the plaintiffs after the death of the defendants second party. From the evidence on the record it appears that the plaintiffs in that suit were the nearest reversioners of Drig Singh. The suit was dismissed on the ground of limitation. It is contended that the suit by the then plaintiffs was in a representative capacity and the present plaintiffs are bound by the decision of that suit. A suit may be brought during the lifetime of a Hindu female by a reversioner to have an alienation declared to be void except for the lifetime of the female within 12 years from the date of the alienation. Such a suit, if decreed, will not empower the plaintiffs to obtain possession of the property. After the death of a Hindu female a suit for possession may be instituted within 12 years of the death of the limited owner. The suit for declaration, which was numbered as Suit No. 101 of 1904, was brought more than 12 years after the alienation. A fresh cause of action however accrued to the reversioners after the death of the widows and in my opinion the decision of the first suit will not bar the present suit. An examination of the authorities cited by learned Counsel for the respondents will show that the contention put forward on behalf of the respondents is untenable.

19. The first case cited is Hari Nath v. Mothur Mohun Goswami,(1894) 21 Cal 8. The facts that gave rise to that appeal were these. One Ramonandan had several daughters but no son. The defendant was the son of one of the deceased daughters and was In possession of the estate. The plaintiff was the son of the last surviving daughter. The suit was brought by the plaintiff after the death of his mother for recovery of possession. The defence was that the suit brought by the plaintiff's mother in her lifetime against the same defendant for her share had been dismissed by a final judgment on the ground that her claim was barred by limitation. Their Lordships held

that the estate which would have devolved on the plaintiff's mother as survivor of her sister was similar to the inheritance of a widow, the same result following the dismissal of the daughter's son that ensued in regard to the decree adverse to the widow. In Katama Natchiar v. Raja of Shivagunga (1865) 9 MIA 539 where a decree duly obtained against the widow bound the reversioner, the previous decree dismissing the daughter's suit as barred was binding on her son. His claim therefore failed not only as to his share of inheritance, but, for similar reason, as to the share acquired by him from the defendant donor.

20. It would appear from the facts of that case that the mother was entitled to possession and the suit by her for recovery of possession failed as the defendants were held to be in adverse possession. A suit by her son for the same relief was obviously barred because the defendants had perfected their title long before that date. Their Lordships at page 18 observed:

The intention of the law of limitation is not to give a right where there is not one, but to impose a bar after a certain period to a suit to enforce an existing right.

21. In the present case the plaintiffs had no right to possession of the property in 1904. They had a right to claim a declaration only within the prescribed period. As they failed to exercise that right within the time allowed by law the declaration sought by them was refused. The defendants in the case cited above claimed an independent right in themselves against the estate. After the expiry of the statutory period the daughter lost all right in the property and the succeeding heirs could not be allowed to bring a suit for a relief which was refused in an earlier litigation. The next case cited is Jaggo Bai v. Utsava Lal (1929) 16 AIR PC 166. In that case their Lordships observed:

Where a decree founded upon a law of limitation, e.g. adverse possession, is obtained against the Hindu widow in her lifetime, the reversionary heir is bound and cannot get the benefit of Article 141; but where no such decree is obtained, Article 141 applies to suits for possession of immovable property and time begins to run from the date of the death of the widow.

22. At page 721 their Lordships remarked:.In the suit the plaintiff was seeking to establish her title to her father's estate as heir in reversion on her mother's death. She was not seeking and could not then have sought, to recover possession from the aunt of any particular item of property forming part of that estate. In the present suit she is seeking to recover possession of the house upon the footing that it forms part of the estate and that the defendant is in wrongful possession of it. The present cause of action arises out of tortious conduct on the part of the defendant or his predecessor, the aunt, in respect of the house, and is in their Lordships' opinion a

cause of action distinct from that in the previous suit. The claim which the plaintiff is now making could not in fact have been made in the previous suit.

23. The above observations were with reference to Rule 2 of Order 2, Civil P.C., but they apply with equal force to the plea of res judicata. The plaintiffs in the present suit acquired right of possession upon the death of the surviving widow in 1931. No suit for possession could have been brought by them during the lifetime of the widow. The defendants never claimed a right adverse to the widows. They derived their title from the widows and if the widows had no right to transfer it follows that the defendants have no right to retain the property after their death. The case in Hari Nath v. Mothur Mohun Goswami,(1894) 21 Cal 8 was considered by Mears C.J., and Sir Lal Gopal Mukerji J. in an unreported case No. 314 of 1924. The principle underlying the decision was summed up as follows:

The matter can be put in a different way. When, on the death of the last owner, a female is entitled to succeed, but a trespasser takes possession, the property has to be recovered and restored to the estate of the deceased. The title on which the property may be recovered is the title of the last owner plus the fact of succession. A suit may be instituted either by the female heir or on her death, by the male reversioner who succeeds. In either case the basis of the suit, the cause of action, is the same, viz., title of the last male owner and the succession. If the female owner brings a suit to recover possession, she does so on behalf of the estate, which she fully represents. If she has brought a suit, no second suit (by the reversioner) can be maintained under the general rule of law, viz. 'no person shall be twice vexed in respect of the same cause.' If the female heir do not institute a suit, it would be open to the reversioner to institute one, within the period prescribed, viz,, 12 years of the death of the female heir. But in no case there can be allowed two suits, one by the female heir and the other by the reversioner. This is because of Hindu law and the rule of res judicata based on public policy.

24. The authorities cited by learned Counsel for the respondents do not support the proposition advanced by him. I have no hesitation therefore in holding that the suit is not barred by res judicata. The only question that now remains to be decided relates to the question of mesne profits. The plaintiffs alleged that they are entitled to be awarded mesne profits from the death of the surviving widows which occurred on 25th May 1931. Learned counsel for the defendants contends that the alienation made by the widows being only voidable at the instance of the reversioners, the possession of the defendants cannot be considered wrongful, and therefore no mesne profits can be claimed by the plaintiffs. The following passage from the judgment of a learned Judge of the Bombay High Court in Mallappa Gurupadapa v. Anant Balkrishna (1936) 23 AIR Bom 386 has been relied on:

In my opinion the true view is that where the plaintiff sues to set aside the original transaction whether it be a sale by Hindu widow, or manager of a joint family, or guardian of a minor, and he makes the original parties to the transaction, or their representatives, parties, he is entitled to an order restoring the parties to their original position. In such a case the Court is in a position to make such order as is just and equitable, and to provide that the plaintiff recovers the land with mesne profits from the date from which he was dispossessed, and the defendant purchaser gets back his purchase money with interest and in a proper case other moneys to which he may be entitled.

25. It was observed by their Lordships of the Judicial Committee in Giresh Chandra Lahiri v. Shoshi Shikhareswar (1900) 27 Cal 951:

Mesne profits are in the nature of damages which the Court may award according to the justice of the case.

26. In the present case, I find no difficulty in disposing of this matter. The plaintiffs cannot get possession of the property in suit unless and until they have paid the sum which has been found to be binding upon them. The income from the property in dispute is alleged to be about Rs. 1600 per annum. No allowance has been made for management charges and remissions of rent granted in recent years by the Local Government. Upon a rough calculation, I find that the interest on the total sum payable by the plaintiffs would be about the same if not more than the mesne profits payable to the plaintiffs. The Court below has not examined this question in detail and it will not be in the interests of the parties to prolong this litigation indefinitely. In the circumstances, I think, it will be just and equitable to set off the interest against the profits. For the reasons given above I would allow the appeal, set aside the decree of the Court below and decree the plaintiffs' suit for possession on payment of Rs. 3040 with interest at 1 per cent, per mensem, compoundable yearly, from 2nd December 1890 to 26th October 1903. The plaintiffs should pay this amount within six months from the date of the decree of this Court. In the event of the payment of this amount, the plaintiffs will be entitled to proportionate costs from the contesting defendants. In case of failure to pay this amount within the aforesaid time the plaintiffs' suit will be dismissed with costs.

Verma, J.

27. I agree.

28. The appeal is allowed, the decree of the Court below is set aside, and the suit of the plaintiffs is decreed for possession of the property claimed, subject to the condition that they shall get possession of the property on payment, within six months from today, to the contesting defendants the sum of Rs. 3040 together with interest at 1 per cent, per mensem with annual rests from 2nd December 1890 to 26th October 1903. In the event of the plaintiffs making the payment within the time fixed, they will be entitled to proportionate costs from the contesting defendants, who will in that case bear their own costs. In case of failure the suit shall stand dismissed with costs throughout. The office of this Court will calculate interest due on the sum of Rs. 3040 from 2nd December 1890 to 26th October 1903, at the rate of 1 per cent, per mensem, compoundable annually, and show in the decree of this Court the total amount of principal with interest thus arrived at as the sum of money payable by the plaintiffs-appellants to the contesting defendants within the time fixed above. The plaintiffs-appellants, if and when they deposit to the credit of the contesting defendants the amount thus shown in the decree of this Court as mentioned above, will be entitled, if they so desire, to deduct from that amount the amount shown in the decree of this Court as the costs recoverable by the plaintiffs-appellants from the contesting defendants-respondents in the event of their depositing the money.