Rijia Bibi and Others Vs. Md. Abdul Kachem and Another

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Court : Guwahati

Decided On : Jan-02-2013

Judge : S.C. DAS

Appeal No. : R.S.A. No. 40 of 2002

Appellant : Rijia Bibi and Others

Respondent : Md. Abdul Kachem and Another

Judgement :

1. This second appeal has been admitted for hearing on the following substantial question of law:

Whether the learned court below erred in decreeing the suit of the plaintiffs-respondents by holding that the WILL executed by late Abdul Khalaque was void in operative being opposed to the provisions of the personal law of the parties?

2. Heard learned counsel, Mr. P. Roy Barman for the appellants and learned counsel, Mr. D. Chakraborty for the respondents.

3. Fact of the case may be summerised thus:

3.1 One Abdul Khalaque died on 16.12.1987, leaving behind 3.25 acres of land. After his death respondent No1, since deceased, claiming to be the first wife and respondent Nos. 2 and 3 claiming to be sons of Abdul Khalaque through his first wife, claimed their share to the property left by Abdul Khalaque but the defendants i.e. appellant No.1 being the second wife and appellant Nos. 2 to 6 being the sons of Abdul Khalaque through second wife and appellant Nos. 7 and 8 being the daughters of Abdul Khalaque through the said second wife, denied the right of the respondents and refused to make a partition according to the Mahomedan Law of Inheritance and therefore, the respondents as plaintiffs instituted Title Suit(partition) 25 of 1998 in the Court of Civil Judge, Sr. Division, South Tripura, Udaipur claiming partition of the suit land described in the schedule of the plaint.

3.2 The appellants being the defendants in the Title Suit, submitted a joint written statement, inter alia, denying the claim of the plaintiffs being legal heir of Abdul Khalaque and further stated that the said Abdul Khalaque before his death executed a Will on 19.11.1987 bequeathing the suit land amongst the defendants and the defendants according to distribution made in the Will, mutated the land in their names and further stated that they are the legal heirs of the deceased Abdul Khalaque and they prayed for dismissal of the suit.

3.3 The learned trial Court considering the pleadings of the parties framed 6(six) issues namely;

I. Is the suit maintainable in its present form and nature?

II. Whether there is any cause of action to file the suit?

III. Whether the suit land is liable to be partitioned, if so, to what extent the parties are entitled?

IV. Whether defendants are the exclusive sole and only successors of the properties as mentioned in the schedule of the plaint?

V. Whether the plaintiffs are entitled to get relief as prayed for?

VI. To what other relief or reliefs the parties are entitled?

3.4 In course of trial, plaintiffs examined two witnesses and defendants examined four witnesses. Both side proved documentary evidence in respect of death of the deceased. The defendants proved Exbt. D as the Will executed by Abdul Khalaque. The learned trial Court by judgment and decree dated 28.03.2001 (decree signed on 29.03.2001) decided all the issues in favour of the plaintiffs and decreed the suit and also determined the share of the plaintiffs and the defendants in the suit land.

4. The defendants i.e. the appellants herein, filed Title Appeal No. 04/2001 before the District Judge challenging the judgment and decree passed by the trial Court. Learned Additional District Judge, South Tripura, Udaipur by judgment dated 16.05.2002 upheld the judgment and decree passed by the trial Court but re-determined the share of the plaintiffs and defendants according to the Mahomedan Law holding that the determination of share to the suit land by the legal heirs of deceased Abdul Khalaque as made by the trial Court was not correct.

5. Challenging the judgment and decree so made by the First Appellate Court, the present second appeal is filed which has been admitted for hearing on the substantial question of law noted herein before, as formulated by this Court.

6. Learned counsel, Mr. Roy Barman appearing for the appellants with all his fairness has submitted that the issue that Abdul Khalaque died leaving behind two wives, seven sons and two daughters, has been amply proved and the First Appellate Court has rightly held that Abdul Khalaque left behind a Will executed by him on 19.11.1987 bequeathing his properties to the defendant (appellants). He has also submitted that the plaintiffs i.e. the respondents had no consent to the Will executed by Abdul Khalaque and under such circumstances, if the Muslim law of Inheritance is in favour of such execution of deed of Will, the defendant-appellants have got a good case and otherwise, the appellants have no case.

7. Learned counsel, Mr. Chakraborty, appearing for the respondents referring Section 118 of the Mullahs Principles of Mahomedan Law has submitted that the First Appellate Court rightly held that the Will executed by Abdul Khalaque was void and inoperative since it is against the provision as prescribed in the Muslim Law of Inheritance. 8. On going through the judgment passed by the trial Court, I find that the trial Court had arrived at a conclusion that Exbt.D, the alleged Will is a forged one, and that the plaintiffs and the defendants all are legal heirs of deceased Abdul Khalaque. The First Appellate Court has upheld the decision of the trial Court that the plaintiffs and the defendants are all legal heirs of the deceased but disagreed with the finding of the trial Court that Exbt.D the alleged WILL was a forged one. The Appellate Court also re-determined the share of the plaintiffs and the defendants to the suit land. The observation of the First Appellate Court in Para 16 of the judgment reads thus:

The appellants to establish their right, title and interest over the suit land relied on the deed of will executed by Abdul Khalaque bequeathing the entire suit land in favour of the defendants only specifying the different amount of land to be acquired by the different defendant-appellants. The will is marked as Ex.D. Learned Trial Court has not relied on Ex.D and held that it was forged one in view of the fact that the defendants, witnesses are not found to be trustworthy so far as execution of the Ex.D is concerned. Learned Counsel for the appellants argued that Ex.D was perfectly executed by the testator i.e. the Predecessor-in-interest of the defendants-appellants in presence of attesting witnesses. So the Learned Trial Court has committed error in not relying upon the will-Ex.D. According to Muslim Personal Law no Writing is required to make a will valid.

Besides though it is in Writing it does not require to be signed, nor even if signed does it require attestation. However, the burden is upon the legatees to prove that the testator made a will either in writing or verbally subject to the limitation set forth in the Mohamedan Law. In the present case the defendants-appellants exclusively relied on the deed of will to have their right, title on the suit land. So the onus is upon the defendants-appellants to prove that the will was perfectly Written by the testator i.e. Abdul Khalaque during his life time in sound mind. From the evidence put up by the defendants appellants it is evident that on 19.11.87 Abdul Khalaque made a will in respect of his properties in writing in presence of the defendants-appellants, DW 2 Haradhan Das, DW 3 Ramjan Ali and DW 4 Ali Hossain. DW 3 Ramjan Ali deposed that in his presence Abdul Khalaque put thumb impression on the deed of will after thinking over the matter and he himself obtained his thumb impression on the pages of the Will. So I do not agree with the learned Trial Court that the execution of the deed of Will is forged one. However, the Will is otherwise found to be invalid for the reason that by the said deed of will Abdul Khalaque bequeathed his entire properties in favour of some of the heirs i.e. the defendants-appellants depriving the plaintiffs-respondents who are held to be legal heirs of Abdul Khaleque. A Mohamedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequest in excess of legal third cannot take effect unless the heirs sign thereto after the death of the testator. In the present case the plaintiffs-respondents did not consent to the bequest made by Abdul Khaleque in favour of the defendants-appellants depriving the plaintiffs-respondents. Apart from this it is found in the deed of Will that the testator, out of 3.12 acres of land bequeathed 40 acre of land to his wife Rijia Bibi and 80 acre of land to his son Abdul Kalam Azad and thereafter the other defendants- appellants are to share the remaining area of land according to Rule of inheritance of Mohamedan Law. Since the Will executed by Abdul Khaleque does not fulfil the conditions and limitations of Mohamedan Will it is held to be invalid and therefore the defendants-appellants cannot acquire any right, title and interest over the suit land exclusively on the strength of the deed of Will. With this observations and modified reasons, I am also to hold that the deed of will although is not forged but invalid and therefore it is void and inoperative.

9. Section 118 of the Mullas Principles of Mahomedan Law prescribes thus:

118. Limit of testamentary power.A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect unless the heirs consent thereto after the death of the testator(e),

10. The finding recorded by the First Appellate Court in para 16 of the judgment, as reproduced above, has got the support of Section 118 of the Mahomedan Law which has prescribed the rule in respect of Mahomedan Will. Certain basic principles of Mahomedan Will or wasiwaat are -- Under Muslim law, a Will or wasiwaat, is a legal declaration of the intention of a Muslim, in respect of his property he intends, to be made effective after his death. Every adult Muslim of sound mind can make a Will or wasiwaat. Such a Will may either orally or in writing, and though in writing, it does not require to be signed or attested. No particular form is necessary for making a Will or Wasiwaat if the intention of the testator is sufficiently ascertained. Though oral Will is possible, the burden to establish an oral Will is very heavy and the Will should be proved by the person who asserts it with utmost precision and with every circumstances considering time and place. The person making Will, must be competent to make such Will. The legatee must be competent to take the legacy or bequest. The subject and object of the Will must be valid one under the purview of the Muslim Law and the bequest must be within the prescribed limit. The property bequeathed should be in existence at the time of death of the testator, even if it was not in existence at the time of execution of the Will. The limitation to exercise the testamentary power under Muslim Law is strictly restricted upto one third of the total property so that the legal heirs are not deprived of their lawful right of inheritance. A Muslim cannot bequest his property in favour of his own heir, unless the other heirs consent to the bequest after the death of the testator. The person should be legal heir at the time of the death of the testator. The consent by the heirs can be given either expressly or impliedly. If the heirs attest a Will and acquiesce in the legatee taking possession of the property bequeathed, this is considered as sufficient consent. Any consent given during life time of the

testator is not valid consent. It must be given after the death of the testator. If the heirs do not question the Will for a very long time and the legatees take and enjoy the property, the conduct of heirs will amount to consent. If some heirs give their consent, the shares of the consenting heirs will be bound and the legacy in excess is payable out of the shares of the consenting heirs. When the heir gives his consent to the bequest, he cannot rescind it later on.

11. In view of the discussions made above, I am in full agreement with the finding of the First Appellate Court that the Will executed by the deceased Abdul Khalaque was invalid and it was void and inoperative. The share of the plaintiffs and the defendants to the suit land as determined by the First Appellate Court in Para 18 of the judgment, is found to be according to the Mahomedan Law of Inheritance and I find nothing to interfere in it.

12. The appeal, therefore, bears no merit for consideration and accordingly, stands dismissed.

13. Parties are to bear their own cost.

14. Send back the L.C. records along with a copy of this judgment.