

Nazar Deen Vs. Sadar Deen

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Court : Himachal Pradesh

Decided On : Apr-05-2013

Judge : Dev Darshan Sud

Appeal No. : R.S.A. No. 216 of 2003

Appellant : Nazar Deen

Respondent : Sadar Deen

Judgement :

Dev Darshan Sud, J.

1. The plaintiff has challenged the judgment and decree of the two Courts below dismissing his suit praying for a decree of declaration and injunction restraining the defendant from interfering in the suit land. Both the plaintiff and the defendants are brothers.

2. The plaintiff approached the trial Court pleading that Abdul Mazid, Yusuf and Makhbool Ali were three brothers. Yusuf died on 3.8.1999, Abdul Mazid on 11.11.1988 and Makhbool Ali on 12.12.1999. Both Yusuf alias Jussa and Abdul Mazid died issueless. On the date of death of Yusuf, Makhbool Ali was alive. He was a residuary heir and in these circumstances no testamentary disposition could have been made by him without his (Makhbool) consent. (See: Mulla's Principles of Mahomedan Law Section 65). It was pleaded that Yusuf was not in a sound disposing mind and his will dated 4.8.1987 executed in favour of the defendant

does not bind his interest. His suit was contested on a number of grounds and five issues were settled. The first and the most important being as to whether the plaintiff was entitled to succeed to the estate of the deceased Yusuf, whether the will dated 4.8.1987 was valid and executed by the deceased in a fit mental condition, whether the plaintiff had no right, title or interest in the suit land and lastly on locus standi of the plaintiff to prefer the suit.

3. The learned trial Court on these issues and on the evidence holds that the parties are `Sunni Mohammedans. Adverting to the law, the learned Court relied upon the decision of this Court in Mehendi Hassan and Others vs. Rafiquan and Others, 2001(2), Shim.L.C. 231, holds that the will was valid. The evidence on record was of PW-1 Nazardeen plaintiff who stated that Mazid, Yusuf alias Jussa and Makhbool were three brothers out of whom Mazid was first died and thereafter Yusuf and lastly Makhbool (father of both the plaintiff and defendant) on 12.12.1999. According to him, Yusuf never executed any will and he came to know about this fact when he went to the Patwari. Yusuf, was issueless. DW-1 Sadardeen (defendant) supported the will. The scribe Shri O.P. Chauhan, Advocate, DW-3 and Noordeen DW-2 were considered by the learned Court below holding that there was no evidence that the deceased Yusuf was not in a sound disposing state of mind and that his mental faculty had impaired to the extent that he did not know the consequences of his action. The plaintiff has placed reliance on two judgments, namely; Narunnisa vs. Shek Abdul Hamid, AIR 1987 Karnataka 222 and Mahomed Ata Husain Khan vs. Hussain Ali Khan, AIR 1944 Oudh 139, to urge that unless there was consent of the other heirs, a will exceeding 1/3rd share of the estate could not be made. On this issue, the learned Court holds that since Makhbool was alive on the date when Yusuf died, and since he did not challenge the testamentary disposition, in those circumstances, the tacit consent of Makhbool (brother and heir of the deceased) was/could be inferred. The learned appellate Court on the will holds that the will Ex.DW-2/A is duly proved, more especially, on the evidence of the scribe Shri O.P. Chauhan, Advocate; Makhbool, who died later in point of time, never objected to the execution of the will and therefore his consent was implied to the testamentary disposition of the estate for more than 1/3rd of the estate. It was also held by the learned Court that Abdul Mazid died on 11.11.1988, Yusuf on 3.8.1999 and Makhbool Ali on 12.12.1999,

who never challenged the will executed by Abdul Mazid in favour of the defendant Sadardeen which itself constituted consent of the heirs. The appeal was accordingly dismissed.

4. This appeal was admitted on 19.8.2003 on the following substantial question of law:-

Whether the findings recorded by the trial court as affirmed by the first appellate court that Makhbool Ali, father of the plaintiff, had given consent to the Will executed by Yusuf, is de hors evidence on record?

5. I have heard learned counsel for the parties and have gone through the record of the case.

6. Learned counsel for the appellant places reliance on the judgment of the Court in Yasin Imambhai Shaikh (deceased by L.R.s) vs. Hajarabi and others, AIR 1986 Bombay 357, holding:-

4. Mr. Kulkarni argued that however under Mahomedan Law it is necessary for the heirs to consent to the bequest that has been made by the deceased. That in so far as the Appellants are concerned, since they claim under the Will their consent was implied. That in so far as the Respondents were concerned, they have admittedly not given any consent in writing, but then they had made a statement in some revenue matter for mutation of entries. That this must tantamount to their consenting to the bequest. That the Appellants for some reason or the other did not produce this evidence in the trial Court. Hence an application was made to the lower Appellate Court to afford the Appellants an opportunity to produce this evidence. That the lower Appellate Court erred in turning down this application on the ground that the application was belated and would amount to reopening of the case. That the lower Appellate Court ought to have allowed this Application.

5. I am unable to accept this contention since Yasin Imambhai Shaikh, the original Plaintiff, was claiming under a Mahomedan Will and the Will is said to be in writing, it was in the very nature of things for the original Plaintiff to establish that the other heirs had consented to the bequest.

The original Plaintiff could not have succeeded in the suit without establishing this fundamental position. Despite this, it appears that Yasin Imambhai Shaikh, the original Plaintiff, did not choose to lead any evidence at the trial on this point, and the said Yasin Imambhai Shaikh hence failed in the suit. The Application to adduce the evidence has only been made belatedly at the appellate stage, and if in these circumstances, the Appellate Court has rejected the application, it would be proper. Not only this, it is also an admitted position that some of the Respondents have been examined in support of their defence. Significantly no questions have been put to the Respondents as regards the said Revenue proceedings or as to their statements said to have been made in the said proceedings, which could easily have been done. In other words, their testimony to the effect that there was absence of consent has gone unchallenged. If this is so, then the lower Appellate Court was right in rejecting the application, for it would have meant introducing fresh evidence and reopening of the entire case. In view of this, the contention now canvassed must be negatived.

(pp.358-359)

7. He submits that the settled position in Hanafi Law has been considered by the High Court of Karnataka in Narunnisa vs. Shek Abdul Hamid, AIR 1987 Karnataka 222, holding:-

8. The legal position is made clear by the judgment of the Privy Council in Salayjee v. Fatimabi, AIR 1922 PC 391.

The Mahomedan Law does not allow a testator to leave a legacy to any of his heirs unless the other heirs agree, but any single heir may so agree as to bind his own share and the burden of proving the consent of a particular heir is upon the legatee. (head note).

To the same effect is the decision in Ghulam Mohammad v. Ghulam Hussain, AIR 1932 PC 81.

Under the Hanafi law a bequest to an heir is invalid unless consented to by the other heirs after the testator's death.

9. Mr. A.A.A. Fayzee, in his book Cases in the Mohamedan Law of India and Pakistan in the Chapter Gift and Will Compared has extracted the following passage from the judgment in *Ranee Khujooroonissa v. Mussammut Roushun Jehan*, (1876) 3 Ind App 291.

The Policy of the Mohamedan Law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. (Page 308).

10. In *Mahomed Ata Husain Khan v. Husain Ali Khan*, AIR 1944 Oudh 139 it is held:

Under the Mahomedan Law one of the heirs may consent to a Will and as far as he is concerned it will be held to be valid and none of his heirs can challenge it subsequently. (Head noted).

11. In *Rahummuth Ammal v. Mohammed Mydeen Rowther*, (1978)2 Mad LJ 499 the Court was dealing with a case, where the bequest was to an heir coupled with a bequest to a non-heir; after quoting a few decisions on that point, the Court observed thus:

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No doubt, as has already been pointed out the bequest to an heir coupled with a bequest to a non-heir has to be reconciled as far as possible and the totality of the instrument cannot on a hypertechnical ground be rejected in toto. If this is the method by which such an instrument has to be understood and interpreted, then it should be held that the bequest to the first defendant who is an heir in this case is not valid, because it is against the personal law, but in so far as the bequest to a non-heir, namely the second defendant is concerned, it would be operative to the extent of a third of the estate of Sceni Rowther.

(Underlining is ours).

12. The well established position, in our opinion, is that a bequest to an heir, either in whole or in part, is invalid, unless consented to by other heir or heirs and whosoever consents, the bequest is valid to that extent only and binds his or her share. That it is so is clear from the following enunciation in *Mahaboobi v. Kempaiah* (Second Appeal No. 99/150-51) : AIR 1955 Mys NUC 705;

A Muhammadan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. But a bequest of more than the legal third can be validated by the consent of the heirs; and similarly a bequest to an heir may be rendered valid by the consent of the other heirs. The limits of testamentary power exist solely for the benefit of the heirs and they may if they like forego the benefit by giving their consent.: (Headnote C).

(Underlining is ours) (p.225)

8. Lastly, learned counsel urges that the consent has to be clearly expressed. He relies upon the decision of the Madras High Court in *Sajathi Bi vs. Fathima Bi and Others*, AIR 2002 Madras 484, holding:-

3. Though there are five defendants including the 1st respondent Fathima Bi, by the propounder of the Will, 1st defendant-mother, defendants 2 and 3 brothers and 5th defendant-sister, the appellant herein remained ex parte.

16. A Mohammedan cannot by Will dispose of more than 1/3 of the surplus of his share after payment of funeral expenses and debts. Bequests in excess of the share cannot take effect, unless the heirs consent to that and that too after the death of the testator.

17. Both the Courts below would correctly find that the Will is not valid as there is no consent and as such, the plaintiff would be entitled to 10/48 shares. However, unfortunately, the lower appellate Court concluded that the Will is valid insofar as the shares of the defendants 1,2 and 5, inasmuch as there is implied consent. To conclude that there was an implied consent on the part of the defendants, the lower appellate Court inferred the said consent as implied consent, since the other defendants remained ex parte.

18. Though it is stated in Section 117 of the principles of Mohammedan Law by Mulla that a bequest to a heir is not valid unless the other heirs consent to the bequest after the death of the testator and any single heir may consent so as to bind his own share, mere silence by not participating in the concerned proceedings and by remaining ex parte cannot be considered to be even as implied consent as stated in the very same book. (pp.485-486)

9. Having considered the position of law, all that remains to be considered is as to whether the learned Courts below were correct in presuming the consent of Makhbool Ali merely for the reason that he did not challenge the will during his life time. He was the person competent to have done so. I also note at this juncture that the dates of death of both the testator as also Makhbool Ali are within a period of four months from each other.

10. What has been urged before me on the basis of the decision of the High Court of Madras in Sajathi Bis case is that even where a party has been proceeded ex-parte in Court proceedings challenging the will, he/she can still challenge the will. The will Ex.DW-2/A contains a clear recital that Sadardeen has been brought up by the testator and his other brother Abdul Mazid as the mother of Sadardeen had died when he was quiet young. These facts were very well in the knowledge of Makhbool Ali, father of the parties to the suit and in case he wanted to raise any objection regarding the execution of the will he could have done that during his life time that there is no evidence on the record to suggest that Makhbool Ali was not aware about this testamentary disposition.

11. In these circumstances, I hold that both the Courts below were right in holding that no protest having been made with respect to the testamentary disposition by Yusuf. However, the disposition is valid. Two Courts below having been concurrently found on this factual issue in favour of the defendant, I do not find any perversity in the findings of the two Courts below. No question of law much less substantial question of law arises for determination. Appeal is accordingly dismissed. No order as to costs.