

Narunnisa Vs. Shek Abdul Hamid

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Court : Karnataka

Decided On : Nov-07-1986

Reported in : AIR1987Kant222; ILR1986KAR4207; 1987(1)KarLJ143

Judge : M.P. Chandrakantaraj URS and ;Murlidhar Rao, JJ.

Acts : Muslim Law

Appeal No. : First Appeal Nos. 37 and 72 of 1976

Appellant : Narunnisa

Respondent : Shek Abdul Hamid

Advocate for Def. : K.I. Bhatta and ;I.T. Rai, Advs.

Advocate for Pet/Ap. : Ashok Haranahallim, ;B.V. Acharya, ;T.S. Krishna Bhat and ;H.G. Hande, Advs.

Judgement :

Murlidher Rao, J.

1. These two appeals arise out of a suit for partition in O.S. No. 58 of 1975, on the file of the Civil Judge, Puttur (D.K.) R.F.A. No. 37/1976 is filed by the fifth defendant and R.F.A. No. 72/1976 is filed by the first defendant. These appeals can be disposed of by a common judgment.

2. Facts, in brief are, S. K. Abbas (Plaintiff) filed a suit for partition claiming 2/12th share in properties in Schedules A and B, annexed to the plaint. Properties in 'A' schedule are immovable properties; properties in 'B' schedule are moveables like utensils, he-buffaloes, bullocks etc. Relationship between the plaintiff and defendants is not in dispute. Defendants 1, 2, 4 and 6 are plaintiff's brothers and defendants 3 and 5 are his sisters. Shaik Abdul Gani, father of plaintiff and defendants, died on 29th Nov., 1973. On the basis of admitted relationship plaintiff claimed 2/12th share, which share, each of the sons of Shaik Abdul Ghani would be entitled to in law; defendants 3 and 5 being sisters, would be entitled to 1/12th share each. Plaintiff sought for a decree in the above terms.

3. Defendant 1 (appellant) contested the suit; his contention was, that Shaik Abdul Ghani had executed a will on 9-11-1973 in respect of Item I of 'A' Schedule properties and therefore he was the sole heir of Item I in 'A' Schedule to the exclusion of others.

4. At the hearing the learned Advocates, appearing for appellants and respondents submitted that the parties 'being Sunnis' are governed by Hanafi School of Muslim Law. Defendants 3 and 5, sisters remained ex parte. The trial Court has held that their absence and non-contest implies consent to the Will executed by Shaik Abdul Ghani and therefore their rights to their respective shares, stand relinquished in favour of first defendant. Accordingly, the Court passed a decree, in the following terms :-

Defendant I - 2/12th in Item II of Schedule 'A' property and in the compensation of Items III to VI in Schedule 'A' and moveables in 'B' schedule 4/12th in Item I of 'A' Schedule (2/12th his own 1/12th of defendant 3 + 1/12th of defendant No. 5).

Defendants III and V : 2/12th in Item 11 of Schedule 'A' and Items III to VI of Schedule 'A' and like share in moveables in 'B' Schedule. No share in Item I of Schedule 'A'.

Plaintiff and Defendants 11, IV, V and VI:

Each entitled to 2/12th in Items I and 11 of 'A' schedule and like share in compensations. Re-Items III and IV, V and VI of the same schedule, and moveables in 'B' schedule.

5. The trial Court has held that the Will is executed by Shaikh Abdul Ghani and he was in sound disposing state of mind. We see no reason to interfere with that finding. However, in the appeal filed by defendant 5, who was suffered an ex parte decree, it is asserted that the Court below was not justified in depriving, her of her legitimate rights, by inferring implied consent. It is said that the consent required for validating a bequest in favour of an heir must be specific and is not a matter of inference or conjecture. Mr. Hande, learned counsel for the first defendant, maintained that firstly, to the extent of one third, no consent is required and even if it is so required it need not be specific. It is said in the circumstances, defendant 5 must be held to have 'acquiesced' in the bequest and therefore, she cannot contend to the contrary, similarly, in his appeal, the contention of first defendant is that he is entitled to absolute rights in Item I of 'A' Schedule properties, the contention is that appellant/1st defendant was not in possession, some of them are stolen. Therefore, it is contended that the decree to that extent is liable to be set aside.

6. Two questions arise for our consideration they are : -

(i) Whether the Will executed by Shaik Abdul Ghani on 9-11-1973 confers exclusive right on first defendant in respect of Item I in 'A' Schedule; is it legally valid without specific consent of other heirs; what is its effect on the decree, impugned in this appeal ?

(ii) Whether the first defendant/appellant in RFA. 72/1976 is not liable to account regarding moveables in 'B' Schedule

In support of the first contentions, Mr. Hande, placed reliance on the following passage in Principles of Mohamedan Law by Mulla (16th Edition).

'S. 40. Vesting of estate in executor and administrator :

XXX XXX XXX But since a Mohamedan cannot dispose of by Will more than one-third of what remains of his property after payment of his funeral expenses and debts, and since remaining two-thirds must go to his heirs as on intestacy unless the heirs consent to the legacies exceeding the bequeathable third, the executor, when he has realised the estate, is a bare trustee for the heirs as to two-thirds, and an active trustee as to one third for purposes of the Will and of these trusts, one is created by the Act and the probate irrespective of the Will, the other by the will established by the probate.'

The above paragraph deals with the rights of executor and administrator; who is not an heir of the executant. It lays down that to the extent of one-third of the estate he takes it is an active-trustee and for the remaining he is a bare trustee, subject to consent by the heirs of the executant. The executor is a trustee or manager; to the extent of one third, after payment of funeral expenses and debts, the properties vest in him for administration, which power includes the power of disposition. But in excess of one-third the bequest vests in him only after the heirs consent or the Will is probated. The learned Author has referred to a decision of the Bombay High Court in Mohammed Hussein Haji v. Aishabi, AIR 1935 Bom 84. In the said case, the deceased left a Will, by which he appointed his widow and one of his daughters (heirs) as executrices, who were arrayed as defendants 1 and 2 in the suit filed by one of the heirs. The Will provided for payment of Rs. 400/- per month to these defendants, as remuneration for their services to administer the estate. In that context, it was observed thus :-

'It was argued that this provision was not binding upon the other heirs of the deceased, unless they consented expressly or impliedly to this payment. The payment is a sort of commission payable to the executrices by way of remuneration. It is a gratuitous bequest and not a debt; See (1897) ILR 25 Cal 9 and AIR 1922 PC 391. Being payable to defendants 1 and 2, it is a bequest to heirs, and can only be rendered valid by consent of the other heirs. Such consent need not be express (page 90).

7. For the point in issue, what is of relevance, is the necessity of 'consent of other heirs, when the bequest, to whatever part or portion of the properties is made in

favour of heir or heirs. On the facts of that case, the Court held that there was implied consent. How far such a conclusion can be drawn, in this case, needs examination, Chap. IX in the above Book pertains to Will para 117 reads thus :-

' 117. Bequests to heirs A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share.

Explanation : - In determining whether a person is or is not an heir, regard is to be had, not to the time of execution of the Will, but to the time of the testator's death.'

Of the several illustrations given by the author, illustration (e) makes the position clear, on the point in issue. It reads :-

'(e). A Mahomedan leaves him surviving a son and a daughter. To the son he bequeathable three-fourths of his property, and to the daughter one-fourth. If the daughter does not consent to the disposition, she is entitled to claim a third of the property as her share of the inheritance : see *Fatima Bibee v. Ariff Ismailjee*, (1881) 9 Cal LR 66.'

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* .

'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 note-d).

11. In Rahummuth Ammat 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 :

'13. XXX XXX XXXNo 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 Scenic 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).

13. In the instant case, the Will is executed on 9-11-1973, suit is filed on 17-12-1973. The consent is required to be given after the death. There is no such document to establish the consent of the heirs. Being a bequest in favour of an heir, it is invalid and does not bind the share of the other heirs unless consented. In this Court, Sri I.T. Rai, Counsel for defendant No. 3, Ammajan, submitted that his client does not object to the Will and she consents; so to the extent of her 1/12th share in Item I of 'A' schedule, the bequest in favour of defendant I would be valid. In other words, defendant I will get $2/12 + 1/12 = 3/12$ in Item I of 'A' schedule properties.

14. Coming to the share of fifth defendant, appellant in R.F.A. No. 37/1976, there is no evidence to establish her consent. In this regard the lower Courts' conclusion, is as follows : -

'24. XX XX XX Even though the 5th defendant was aware of the execution of Ex. D-1 by her father in favour of the 1st defendant and is also aware of the filing of the suit by the plaintiff but has kept quiet for a period of more than two years without expressing her dissent to the Will Ex. D-1. I am of the opinion that -an inference has to be drawn by her passive acquiescence that she had consented to the bequest made in favour of the 1st defendant under Ex. D-1. I therefore, hold that the 5th defendant also must be deemed to have given her consent for the bequest in favour of the 1st defendant under Ex. D-1 by Shaik Abdul Gani Saheb and therefore her share in Item I of the Suit 'A' schedule properties is also bound by the bequest made in favour of the 1st defendant.'

15. We find it difficult to approve this reasoning. Assuming that express consent is not the requirement of law, nevertheless, the implied consent can be inferred only by some act or dealings in respect of the property, which is sought to be bequeathed. In Mullas Book, referred to above, we find the following :

'Silence not consent : Where a Will contained a bequest excluding the female heirs and mutation of names took place, it was held that consent of the heirs could not be implied from mere silence on their part at the mutation proceedings.' (Page 138).

16. It appears, to us neither inaction nor silence can be the basis of implied consent. If the 5th defendant's actions were such by which such inference could be drawn there may be justification to imply consent. Without-being exhaustive, if in some proceedings, pertaining to property in dispute, say, before the revenue authorities or other similar authorities, the fifth defendant had given any statement or held out a belief that she had relinquished her rights that material may afford a basis for implied consent. Or if for a number of years, she has kept herself silent, watching the enjoyment of share, under her nose or actively supporting first defendant's enjoyment that may afford a situation to draw an inference. But to defeat the legal right on the sole ground that she has remained absent cannot be countenanced. It would be fallacious and unjust, if an illiterate pardanashin lady's rights are allowed to be defeated solely on the ground of her absence from the proceedings, which act may be innocent and cannot be attributed to her knowledge or termed as deliberate. She may not know the consequences of her remaining absent : her financial position may be such that she may not be in a position to engage a Counsel and take part in the proceedings. These possibilities cannot be ruled out. Unless strong circumstances exist and conclusion becomes inevitable consent cannot be implied.

17. The evidence regarding Willis found in the depositions of D.Ws. 1, 2 and 3. D.W. 1 is W. S. Rodrigues, who has identified Shaikh Abdul Ghani at the time of execution of Will. He has admitted that he does not know how many daughters Abdul Ghani had, and he had not seen them. D.W. 2 the attester of the Will is brother's son of Shaikh Abdul Ghani. There is nothing in his evidence to infer the knowledge, much less the consent, of other heirs. D.W. 3 is the first defendant. While he states that plaintiff, 2nd defendant, 3rd defendant knew about the execution of Will, nothing is said about 5th defendant. Admittedly, on the date of execution, none of the daughters or other sons were present. In this state of evidence to infer implied consent on the part of fifth defendant would be erroneous

and this finding cannot be sustained. Therefore, RFA 37/76 has to be allowed. Consequently, 5th defendant will be entitled to her share; first defendant's share, as decreed has to be modified, deducting the share of the fifth defendant in Item I of 'A' schedule properties.

18. Mr. Hande, placed reliance on Anarali Tarafdar v. Omar Ali and Ors., : AIR1951 Cal7 . The facts of the said case do not assist Mr. Hande. The property, in the hands of widow, who was the life estate holder, as per the Will executed by her husband was sold in Court auction. The contention was disposition, in excess of one third was void, as it was not consented to by the heirs. The Court without deciding the matter remitted the case to the trial Court. On the question, debated before us, the said ruling has no bearing.

19. Coming to Schedule 'B' property, it is admitted that all the items were in the custody of first defendant. His contention that the articles are stolen and therefore he, is not liable does not appeal to us. It is not denied that those properties were left by Shaik Abdul Ghani. In the circumstances, the Court below was justified in granting respective shares to the plaintiff and defendants, as per law. The said part of the decree does not warrant interference.

20. For the foregoing reasons, the appeal filed by the first defendant in R.F.A. No. 72/1976 is dismissed.

Hence, we make the following Order : -

(i) The judgment and decree of the trial Court to the extent it concerns the shares of plaintiff (S. K. Abbas), defendants 2, 4 and 6 (Abdul Shakur, S. A. Sattar and Abdul Wahab) are confirmed;

ii) R.F.A. 37/1976 is allowed. Consequently, a preliminary decree shall be passed, declaring that appellant 5th defendant (Narunnisa) is entitled to 1/12th share in Items I and II of Suit 'A' schedule properties and in the compensation in respect of Items III to VI of the same schedule. She will be entitled to a like share in 'B' Schedule properties.

(iii) The judgment and decree of the Trial Court is modified regarding the share allotted to first defendant. It be declared that he is entitled to 3/12 th share in Item I of Schedule A; in other respects. Trial Courts' decree is confirmed. R.F.A. 72/1976 is dismissed.

The decree allotting 1/12th share to defendant No. 3 in Item II of Schedule W, and Items III to VI of the same schedule and like share in 'B' Schedule is confirmed. The trial Court's decree in not allotting any share in Item I of 'A' schedule is also confirmed.

(iv) Parties will bear their own costs in both the Courts.

21. Order accordingly.

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