

Abdul Subhan Vs. Khyroonibi

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Court : Karnataka

Decided On : Aug-11-1992

Reported in : ILR1992KAR2823; 1992(3)KarLJ666

Judge : K. Shivashankar Bhat and ;R. Ramakrishna, JJ.

Appeal No. : R.F.A. No. 201 of 1981

Appellant : Abdul Subhan

Respondent : Khyroonibi

Advocate for Def. : Khaleemulla Shariff, Adv. for R-1, ;D.S. Sathyanarayana Setty, Adv. for R-2 and ;M.L. Nanjappa, Adv. for R-4 and R-7

Advocate for Pet/Ap. : R. Gopal, Adv.

Disposition : Appeal allowed

Judgement :

Shivashankar Bhat, J.

1. This Appeal is by the first defendant. The plaintiff had sought for partition and possession of certain properties from the first defendant after declaring that she is entitled to 1/3rd share in the sort schedule properties. According to the plaintiff, she is the step sister of the first defendant, both of them being the children of late

Abdul Sattar.

2. It is seen that there is no dispute in this Appeal, as to facts which are as follows:

Mohamed Buden Sab (also referred to as Sheik Buden Sab) was the common ancestor. He had three sons, viz., Mohamed Hayat, Mohamed Abbas and Abdul Sattar. Abdul Sattar had a wife - Sharifabi through whom he got a son Abdui Subhan, defendant No. 1. He had a second wife Chandbi through whom he got the plaintiff Khyroonibi as a daughter. Abdul Sattar died several years ago during the childhood of his children. The common ancestor Sudan Sab died after the death of his son Abdul Sattar. To reiterate, on this aspect there is no dispute and the plaintiff also admits in her evidence that her father predeceased her grandfather. The plaintiff and the first defendant were living jointly with her uncles Mohamed Hayat and Mohamed Abbas, Subsequently the plaintiff was married and in the meanwhile, the first defendant was also engaged in operating Jataka. Budan Sab had left some properties behind him and as already noted, even after his death, his two sons and the grand children, i.e., the plaintiff and the 1st defendant were all living jointly under the same roof for a long number of years. Obviously some dispute must have arisen in the course of time between the first defendant and his uncles.

3. On 30th June 1962 the original of Exhibit P1 came to be executed. The first defendant purported to execute a Release Deed releasing his rights in the properties left by Budan Sab in exchange for a few properties given to him by Mohamed Hayat and Mohamed Abbas. The document was signed only by the first defendant and Mohamed Hayat. The Deed recites that the properties were ancestral properties and the said properties are being enjoyed without partition all along and that the first defendant was entitled 1/3rd share and ultimately the first defendant executed the said Release Deed in favour of others in respect of the properties other than the one which were given to him as stated in Exhibit P1.

4. Subsequently, it seems that the first defendant gifted one of the sites to the plaintiff as per the original of Exhibit D1 dated 25th October 1967. Though the plaintiff has denied that she received any gift, her statement as P.W.1 clearly shows that she obtained a vacant site from the plaintiff and that she had put up

some construction on the said site. The document Ex:D.1, in fact, refers to the Release Deed Ex,P.1 also. The plaintiff was not satisfied with the site obtained by her and consequently she filed the present suit.

5. According to the plaintiff, the properties obtained by the 1st defendant under Exhibit P.1 were obtained by him as representing the branch of Abdul Sattar and therefore she is entitled to a share in the said properties. According to her, the uncles of the parties have released their rights in these properties in favour of the first defendant only because they recognised such a right already in Abdul Sattar though he died earlier to Sudan Sab. The learned Civil Judge decreed the suit and hence this Appeal.

6. The only question that requires consideration is, whether the plaintiff is entitled to claim any share in the properties obtained by the first defendant under Exhibit P1.

7. The learned Civil Judge refers to the recitals in Ex.P.1 and states that according to the parties to the said document, these properties were ancestral () and therefore Abdul Sattar was deemed to possess a right in these properties by necessary implication and on this understanding the first defendant was granted a share in those properties. According to the learned Civil Judge, but for the ancestral character of the properties, the uncles could not have given any share to the first defendant.

8. To a very limited extent only the learned Civil Judge was right Under Muslim Law, no person has a right in the property by birth. It is known that there is no such thing as 'joint family' among the Muslims. So long as the father is alive, the children do not possess any right in the property, it is only on the death of the father, the children living at that time would inherit. However, if any son dies earlier to the father, then the son's issues would not succeed to the father of the deceased son. Principle of 'representation' is entirely unknown to this Law, governing the Muslims (Sunni Law), Right of inheritance arises on the death of the person owning the property and the question of devolution of inheritance rests entirely decided at that point of time when the person through whom the heirs claim dies - death being the sole guide. The illustration given by Mulla on the

Principles of Mohamedan Law (Sixteenth Edition) deriving the same from a reported Decision IN MOOLLA CASSIM v. MOOLA ABDUL makes the position very clear. It is as follows:

'A, a Sunni Mohamedan, has two sons B and C, B dies in the life time of A, leaving a son D. A then dies leaving C, his son, and D, his grand - son, The whole of A's properly will pass to C to the entire exclusion of D. It is not open to D to contend that he is entitled to B's share as representing B : Moolla Cassim v. Molla Abdul (1905) 33 Cal. 173, 32 I.A. 177.

In the case cited above, their Lordships of the Privy Council observed: It is well-known principle of Mohamedan Law that if any of the children of a man dies before the opening of the succession to his estate, leaving children behind, these grandchildren are entirely excluded from the inheritance by their uncles and their aunts'. The son of a predeceased son is therefore not an heir.'

9. In the instant case, the plaintiff asserts a right because the properties were released in favour of the first defendant on the assumption that he is the son of Abdul Sattar. Description of the properties in Ex.P.1 as ancestral is nothing but descriptive nature of the properties and as to how they were originally acquired. Such a recital would not create a new status similar to the status of ancestral property, under the Hindu Law; status would continue as hitherto and is unknown to Muslim Law. Because the properties were acquired by Sudan Sab and left by him, the uncles thought it fit to part with portion of the same in favour of the first defendant, obviously with love and affection. Such an action would not create a new concept similar to the concept of representation known under Hindu Law. It is quite possible that the document writer who wrote Exhibit P1 was more influenced by the dominant Hindu Law in that area which resulted in the particular phraseology. That, however, certainly would not change the nature of the properties obtained by the first defendant under Exhibit P1.

10. It was entirely between the uncles of the first defendant and the first defendant as to whether the former could have released some properties in favour of the first defendant. The said facts cannot be further projected in favour of the plaintiff to seek a share from the first defendant.

11. The plaintiff obtained a site as gift from the 1st defendant as evidenced by Exh.D.1. This gift is on the basis that 1st defendant had absolute right over the properties received by him under Ex.P.1; if so, plaintiff cannot now turn round to contend that 1st defendant obtained the properties under Ex.P1 representing the branch of his father.

We are of the firm view that the trial Court erred in decreeing the suit.

12. Any deposit made by the tenant during the pendency of these proceedings may be withdrawn by the landlord, who obviously is the 1st defendant.

13. The Appeal is accordingly allowed. The suit of the plaintiff stands dismissed. No costs.

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