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Mohd. Jamal and Other Vs. Mohd. SharfuddIn and Others

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Court : Andhra Pradesh

Decided On : Aug-27-1998

Reported in : 1998(5)ALD223; 1998(5)ALT655

Judge : S.R. Nayak, J.

Acts : Registration Act, 1908 - Sections 17; Hindu Law; Mohammaden Law; Evidence Act, 1872 - Sections 17, 21, 31 and 68

Appeal No. : AS No. 2301 of 1987

Appellant : Mohd. Jamal and Other

Respondent : Mohd. SharfuddIn and Others

Advocate for Def. : Mr. V. Venkataramana, Adv.

Advocate for Pet/Ap. : M/s. Mohd. Azizullah Khan and ;Mohd. Mohiuddin, Advs.

Judgement :
ORDER

1. This first appeal is by the plaintiffs directed against the judgment and decree dated 22-3-1987 passed in OS No.11 of 1981 on the file of the Court of the Additional District Judge, Medak at Sangareddy. The original defendants in the suit are arrayed as respondents in the appeal. During the pendency of the appeal the plaintiff No.6 died. The appellants 1 to 5 who are the legal representatives of

the deceased plaintiff No.6 and who are already on record are recorded as legal representatives of the deceased plaintiff No.6 vide Court order dated22-11-1988 onamemo filed by the appellant's Counsel. The respondent No. 1-defendant No. 1 died during the pendency of the appeal and his legal representative were brought on record as respondents 4 to 8 vide Court order dated23-2-1995 passed in CMP No.2101 of 1992. The respondent No.2 - the defendant No.2 also died during pendency of the appeal and his legal representatives were brought on record vide Court order dated 5-8-1998 passed in CMP No.12829 of 1993 as respondents 9 to 11.

2. The parlies to the appeal arc reffered to in this appeal as they are arrayed in the original suit.

3. The plaintiffs filed suit OS No. 11 of 1981 for a decree for partition and separate possession of the suit schedule 'A', 'B' and 'C' properties by metes and bounds and allot 14/96th share to the plaintiff No.l, 7/96th share to plaintiff Nos.2 to 5 each and 12/96th share to the plaintiff No.6.

4. The material averments of the plaint are as under:

5. One Mohd. Ahmed was the owner and possessor of the properties of the 'A', 'B' and 'C' schedule properties. 'A' schedule property consists of the agricultural lands bearing S. No.57 admeasuring Acs.7-09 guntas of dry land situate at Fasalwadi village. 'B' schedule properties include the land bearing S.No.205/1 admeasuring Acs. 10-37 guntas of dry land; the land bearing S. No.205/2 admeasuring Acs.3-03 guntas dry land, the land bearing S. No.206/1 admeasuring Acs.5-30 guntas of dry land, the land bearing S No.206/2 admeasuring 0-39 guntas of dry land and all of them situate in Kalvakunta village. The 'C' schedule land consists of wet land bearing S No. 187 admeasuring Acs.2-01 gunta situate in Tellapalli village. Mohd. Ahmed expired about 15 years back survived by four sons and four daughters begotten by him through two wives. The defendant No.l is the son of the first wife and the plaintiffs 1 to 5 and defendants 2 and 3 are the children through the second wife, namely, the plaintiff No.6. Mohd Ahmed, during his life time acquired 'A' 'B' and 'C' schedule properties out of his personal income in the names of defendants 1 to 3 due to affection. All the parties to the suit and the deceased

Mohd. Ahmed were in joint possession and enjoyment of the suit properties even though the suit properties were purchased in the names of defendants 1 to 3. The 'B' schedule properties were purchased by Mohd. Ahmed in the name of defendant No. , the 'C' schedule property was purchasedin the name of defendant No.l. All the properties were purchased in the names of the defendants 1 to 3 out of the monies supplied by Mohd, Ahmed and as such the ownership of the defendants 1 to 3 is only ostensible. Since the sale deeds were executed in favour of the defendants 1 to 3, tire pattas of the lands were also transferred in favour of the defendants 1 to 3 in the relevant revenue records. At the time of purchasing the suit lands, the parties to the suit and Mohd. Ahmed and plaintiff No.6 were living jointly and the deceased Mohd. Ahmed was the manager of the family. The defendants were not having any source of income to purchase tire suit lands. The family of the parties to the suit lived in communesality possessing the suit lands in common and in jointness. The plaintiffs and the defendants belong to Hanifi section of Muslims and as per the Mohammedan Law 'Shariyat', plaintiff No.l is entitled to 14/96th share, plaintiff Nos.2 to 5, 7/96th share each, plaintiff No.6, 12/96th share, defendant No.l to 3, 14/96th share each in the suit schedule properties. Mohd. Ahmed was in possession and enjoyment of all the suit lands till his death and thereafter the plaintiffs and the defendants are in joint possession as tenants-in-common as they inherited the suit lands. When the matter stood thus, the defendants clandestinely negotiated to sell the suit lands with intending purchasers taking advantage of the fact that the pattas ofthe suit lands stand in their names and having come to know of this clandestine acts of the defendants, the plaintiffs demanded partition of the suit lands by metes and bounds and for separate possession of their respective shares and since the defendants are evading to comply with the demand taking one or other pretext and atlast on 8-1-1981 the defendants denied the claim of the plaintiffs and claimed the exclusive ownership of the suit lands thereby compelling the plaintiffs to file this suit.

6. The first respondent put in appearance in the suit and contested the claim of the plaintiffs by filing writtenstatement. The material averments in the written statement of the first defendant are as hereunder:

7. Late Mohd. Ahmed was not the owner and possessor of 'B' schedule properties situated in Kalvakunta village. The first defendant is the pattadar, owner and possessor of the 'B' Schedule properties. Mohd. Ahmed was having only one wife by name Habeeb Bi who died before Mohd. Ahmed died and she is the mother of the first defendant. The mother of the plaintiffs 1 to 5 and defendant Nos.2 and 3 is not a married wife of late Mohd Ahmed and she is from Hindu community and she did not adopt Islam. There was no marriage between her and late Mohd, Ahmed. The plaintiffs and defendants 2 and 3 cannot be treated as heirs for any properties of late Mohd. Ahmed as per Muslim personal law. Late Mohd. Ahmed did not invest or contribute for purchase of 'B' schedule properties. The 'B' schedule properties were never in joint possession of the first defendant with late Mohd. Ahmed. During the latter's life time, and even after the death of Mohd Ahmed, the 'B' schedule properties were never in joint possession of the parties as contended by the plaintiffs. Late Mohd. Ahmed purchased 'A' schedule properties in the name of defendant . No.2 and that 'A' and 'C' schedule properties were purchased by late Mohd. Ahmed and given to the plaintiffs and defendants 2 and 3 due to his affection towards them, they being the sons of his concubine. The relationship of first defendant with late Mohd Ahmed was strained due to his illegal contacts with the plaintiff No.6. The defendants and plaintiffs were never in joint either in living or in agricultural operation of the 'B' schedule properties. The Muslim personal law is not applicable to the plaintiffs and defendants 2 to 3 they being not the children of legally wedded wife of late Mohd. Ahmed, and they are only illegitimate children from a Hindu woman. The 6th plaintiff is actually peeri belonging to Madiga community according to Hindu custom and traditions and she is not a Muslim. When late Mohd. Ahmed developed illicit contactswith plaintiff No.6, the first defendant left the house and joined the Government service. The first defendant approached the Revenue authorities to assign the 'B' schedule lands situated in Kalwakunta village in the year 1346 Fasli and the Revenue authorities assigned 'B' schedule lands to the first defendant in the year 1346 fasli and they were mutated in the name of the first defendant. Since then, the first defendant has been in exclusive possession and enjoyment of the 'B' schedule lands. The first defendant has grown mango trees and constructed a house in a portion of the lands and has been residing in the same house after his retirement from service. In view of the

expansion of the Sangareddy town, the first defendant prepared a lay-out proposing formation of plots for house construction. He invested huge amounts towards conversion and development charges. When the plaintiff saw the land value of the 'B' schedule lands has gone up, they filed the suit with mala fide intention to grab the lands. The first defendant is the only heir and successor to late Mohd. Ahmed he being the only legitimate child of Habib Bi, a legally wedded wife of late Mohd Ahmed. Late Habib Bi died on 20-11-1955 and late Mohd. Ahmed died on 26-6-1970 by leaving the first defendant as their only legal heir and successor as per Muslim Personal Law. Therefore the first defendant alone is entitled for the entire properties left by late Mohd. Ahmed including Schedule 'A' and 'C' lands and houses shown in the plaint. Late Mohd. Ahmed had affection towards his illegitimate children, therefore, he got schedule 'A' and 'C' properties and houses for the plaintiff No, 1 and defendants 2 and 3 during his life time and they are in possession and enjoyment of those properties till the date. The first defendant tolerated their continuance to enjoy schedule 'A' and 'C' properties on humanitarian grounds although they are not entitled for those properties acquired by late Mohd. Ahmed. Alternatively, presuming without admitting the relationship of the plaintiffs and the defendants 2 and 3 with the first defendant, the status of the parties is divided family; they are not in joint possessionof any of the suit schedule properties; the plaintiff No. 1 and defendants 2 and 3 are in separate possession of plaint Schedule 'A' and 'C' properties; the plaintiff and defendants 2 and 3 are divided members of the family; the enjoyment of the properties is also separate; therefore, the question of partition does not arise as the partition is already taken place between the parties long ago.

8. The defendant Nos.2 and 3 also put in appearance in the suit and they have filed written statement. The material averments in the written statement filed by the defendants 2 and 3 are hereunder:

All the suit lands were acquired by late Mohd. Ahmed during his life time, out of his personal income in the names of defendants 1 to 3 due to affection and all the parties to the suit and late Mohd. Ahmed were in joint possession and enjoyment of the properties till the death of late Mohd. Ahmed and even after the death of late Mohd. Ahmed the parties to the suit have been in joint possession of the

properties as tenants-in-common. The allegation that the defendants 2 and 3 clandestinely negotiated to sell the lands to the intending purchasers is incorrect. During the life time of Mohd. Ahmed, he executed a Will deed in his own hand writing on 20th October, 1957 giving the 'B' schedule lands situated in Kalwakunta village to defendant No.1, 'A' schedule properties to defendant No.2 and 'C' schedule properties to defendant No.3. Further, during his life time of late Mohd. Ahmed, the entire suit properties were partitioned among members of the family vide partition deed dated 2nd February, 1964. In the Will deed and partition deed, it is mentioned that the entire suit schedule properties are the self-acquired properties of late Mohd. Ahmed; the first defendant and the plaintiffs have signed on the partition deed admitting that the suit lands are the self-acquired properties of late Mohd. Ahmed. However, the defendant No.2 and 3 are ready to make partition of the suit lands.

9. On the basis of the pleadings of the parties the learned trial Judge framed the following issues:

1. Whether the parties are in joint possession of suit properties and the Court fee paid is sufficient?

2. Whether late Mohd. Ahmed acquired the suit properties in the Benami name of defendants 1 to 3 from his personal income and was he in possession of them during his life time?

3. Whether the parties are joint family members and in joint possession of suit properties as tenants in common?

4. Whether defendant No.6 is Muslim and legally wedded wife of late Mohd.Ahmed?

5. Whether plaintiff, D-2 and D-3 are children of late Mohd. Ahmed from his legally wedded wife and entitled for the share in his properties?

6. Whether the plaint 'B' schedule lands are assigned to the D-l by the Government and his self-acquired lands?

7. What is the effect of Will deed on the present suit executed by late Mohd. Ahmed on 20-10-1957 allotting the suit properties between plaintiff No.l, D-l, D-2 and D-3?

8. What is the effect of earlier partition of the suit properties held on 2-2-1964 during the life time of late Mohd. Ahmed between the parties?

9. Whether the plaintiffs are entitled for partition and separate share in suit properties as claimed in the plaint?

10. To what relief?

10. During the trial on behalf of the plaintiffs, the plaintiff No.l was examined himself as PW1, M/s. Karim Baig, Balaiah and Pentaiah as PWs.2 to 4, and producedand marked 13 documents as Exs.A1 to A13. On behalf of the defendants, the first defendant examined himself as DW1 and examined M/s. Hussain Khan, Basheer Baig, Nagaiah, Kareem Khan as DWs.2 to 5 and produced and marked as many as 41 documents as Exs.B1 to B41.

11. The learned trial Judge after consideration of oral and documentary evidence answered the issues 4 and 5 positively and held that the plaintiff No.6 is Muslim and legally wedded wife of late Mohd. Ahmed and the plaintiffs 1 to 5 and the defendants 2 and 3 are children of late Mohd. Ahmed through his legally wedded wife and they are entitled for the share in the properties of late Mohd. Ahmed, On issues 2 and 6 the learned trial Judge held that it has not been proved that plaint 'B' Schedule lands were properties acquired by late Mohd. Ahmed. On the basis of the evidence and the admission of the first defendant, the learned trial Judge recorded the finding that the plaint 'A' and 'C' schedule properties were acquired by late Mohd. Ahmed benami in the names of defendants 2 and 3. On the basis of these findings, the learned trial Judge concluded that the plaintiffs and defendants 2 and 3 are entitled for partition and separate share only in the suit schedule 'A' and 'C' properties as per their shares under Muslim Law and that the plaintiffs, defendant Nos.2 and 3 are not entitled to any share in the plaint Schedule 'B' properties. Accordingly, the learned trial Judge decreed the suit partly for partition of plaint Schedule 'A' and 'C' properties among the plaintiffs and defendants 2 and

3 by metes and bounds and dismissed the suit as regards plaint 'B' schedule properties. Hence this first appeal directed against the dismissal of the suit as regards plaint 'B' schedule properties.

12. Mr. Mohd Azizullah Khan, the learned senior Counsel for the appellants submitted that the oral and documentary evidence produced by the plaintiffs, if considered as a whole and on the preponderanceof probabilities, would go to show that the plaintiffs have proved satisfactorily that the suit 'B' schedule properties are the properties acquired by late Mohd. Ahmed benami in the name of the first defendant and the Court below misdirected itself in appreciating the evidence on record and in recording the finding that the plaintiffs have failed to prove that the suit 'B' schedule properties are not the properties acquired by late Mohd. Ahmed in the benami name of the first defendant. The learned senior Counsel would also contend that the learned trial Judge has committed a serious legal error in taking into account the terms of the partition deed dated 2-2-1964 (Ex.B1). The learned Counsel would also contend that in Ex.B1 the first defendant has admitted that the suit 'B' schedule properties are the self-acquired personal properties of late Mohd. Ahmed and is bound by that admission. On the other hand Sri V. Venkataramana, learned Counsel appearing for the legal representatives of the deceased first defendant would maintain that the finding recorded by the Court below that the plaintiffs failed to prove that the suit 'B' schedule properties were acquired by late Mohd. Ahmed in the benami name of the first defendant is well justified; the plaintiffs have utterly failed to discharge the burden cast on. them that the suit 'B' schedule properties are the properties of Mohd. Ahmed acquired in the benami name of the first defendant; the contention of the plaintiffs that the first defendant has admitted the ownership of Mohd. Ahmed in Ex.Bl and the Will deed Ex.A9 is on the face of it untenable; Ex. A9 is not proved by examining one attestor as required under Section 68 of the Indian Evidence Act and therefore, the said document cannot be considered for any purposes.

13. Having heard the arguments of the learned Counsel for the parties, the following question falls under determination:

Whether the appellants-plaintiffs have proved that late Mohd. Ahmed acquired the suit 'B' schedule properties in the benami name of the first defendant?

14. In dealing with the above point, the other points argued by the learned Counsel for the parties have to be considered. Therefore, the Court has not framed the other points separately for determination.

15. It is trite that the burden to prove the fact that late Mohd Ahmed acquired the suit 'B' schedule properties in the benami name of the first defendant is on the plaintiffs. The question is whether this burden is discharged by the plaintiffs. If the plaintiffs discharged this initial burden of proof, then the burden to prove that the suit 'B' schedule properties are not the properties acquired by late Mohd. Ahmed in the benami name of the first defendant will shift to the first defendant.

16. In this case title documents relating to the suit 'B' schedule properties are not produced by either of the parties for the reasons best known to them. If the parties were to produce the title documents of the lands, those documents would have greatly clinched the issue. Therefore in the absence of title documents, the Court has to record its finding on the issue on preponderance of probabilities.

17. The plaintiffs to prove their case examined PWs.l to 4. The first plaintiff examined himself as PW1. In his evidence he stated that his father late Mohd. Ahmed was owner and possessor of the suit lands having acquired the same during his life time in the names of Defendants 1 and 2 while he was in Government service, and that the 'B' schedule land was purchased in an auction held in the Tahsil office; he is not aware at what rate 'B' schedule properties were purchased. He also states that he has no personal knowledge about the mode of acquisition of suit lands by his father. PW2 Kareem Baig has stated that Mohd. Ahmed was owning open garden at Kalvakunta sivar; he used to visit the garden; mango trees were grown in ft; a well was dug by late Mohd. Ahmed. In cross-examination PW2 stated that he could not say in what yearand for what price the lands were purchased by late Mohd Ahmed. He also admits that he was not present at auction held in respect of 'B' schedule lands. PW3 Balaiah states that he cultivated the 'B' schedule lands of late Mohd. Ahmed; and there were mango trees and those mango tress were planted and grown by late Mohd. Ahmed and

he worked as a farm servant of late Mohd. Ahmed for four years prior to Police Action and that late Mohd. Ahmed was in possession of 'B' schedule lands. The first defendant examined DWs.l to 4 in support of his case. The defendant No. 1 and DW1 states that he studied upto 8th Class in regular school and later he privately appeared for HSC examination; he worked as a temporary clerk in Education department since 1933 for about 3 years and after passing HSC in the year 1936 he joined as an apprentice in Collector's Office at Sangareddy; he also worked as a Typist in Police office for about ten months; in 1943 he joined as a permanent employee of Cooperative department in Sangareddy; when he joined the service in the Education department he was having friendly contacts with the sons of the then Tahsildar Mir Raza Ali and on his application, 'B' schedule lands were assigned to him. DW2 Hussain Khan states that the first defendant got lands by Kalvakunta village on his application to the Tahsildar office and he got those lands free of cost and since then the first defendant has been in possession and enjoyment of the lands and that he raised some mango trees in the land. DW3 Basheer Baig states that he had taken mango trees situate in the 'B' schedule lands on lease for three years and he paid the lease amount to the first defendant. DW4 Nagaiah states that he took 'B' schedule lands from DW1 for grazing purpose for about twenty years and he paid money to the first defendant at the rate of Rs.150/- per year.

18. The oral evidence produced by the plaintiffs is of no help to them in proving that the suit' B' Schedule properties were purchased by late Mohd. Ahmed in the benami name of the first defendant in-as-much as none of thewitnesses of the plaintiffs were witnesses to the alleged purchase of the 'B' schedule properties by late Mohd. Ahmed in the auction held in the Tahsil office, none of them know on what date the auction was held and what was the consideration and from whom the lands were purchased.

19. The learned senior Counsel for the appellants perhaps realising the weakness of the oral evidence adduced on behalf of the plaintiffs would next contend that Ex.A9 and Ex.B 1 manifestly prove that the first defendant admitted that the plaint 'B' schedule properties are the self-acquired and personal properties of late Mohd. Ahmed. Ex.A9 is the will deed executed by late Mohd. Ahmed on 20-10-1957

purporting to bequeath all his properties including the suit schedule lands in favour of his sons. At the threshold, it may be pointed out that Ex.A9 is not admissible in law for want of examination of an attestor to the Will as required under Section 68 of the Indian Evidence Act. Section 68 mandates that if a document is required by law to be attested, it shall not be used as an evidence until one attesting witness atleast has been called for the purpose of proving its execution, if there be an attesting witness alive. Ex.A9 is attested by as many as six witnesses. None of them was examined in proof of Ex.A9. On that ground itself, Ex.A9 cannot be looked into. Be that as it may, I am at a loss to understand how from Ex.A9 one can infer that the first defendant either admitted or acknowledged the assertions of late Mohd Ahmed that the suit 'B' schedule properties are his own properties. Ex.A9 does not bear the signature of the first defendant. It has come in the evidence that at the time of execution of Ex.A9 on 20-10-1957, the first defendant was not living with late Mohd. Ahmed and in fact he was living at some other place in connection with his service. Though Ex.A9 mentions that a copy of the Will deed will be given to all his sons including the first defendant, there is no evidence to show that such a copy was in fact given to the first defendant. There is no reference to Ex. A9 in the plaint also. Therefore the contention ofthe learned Counsel for the appellants that the first defendant should have contradicted the claim of late Mohd. Ahmed made as far back as on 20-10-1957 if the first defendant was really the owner of the suit 'B' schedule properties and the very fact mat he did not take any steps for contradicting the claim of late Mohd. Ahmed indicates that the first defendant acquiesced in the ownership of late Mohd Ahmed over the suit 'B' schedule properties is not well founded.

20. Ex.Bl is said to be an unregistered partition document purporting to partition the properties of late Mohd. Ahmed including suit 'B' schedule properties. Ex.Bl being an unregistered partition document is not admissible in law and that position is settled by the decision of the Full Bench of this Court in Chintiappareddigari Pedda Muthyatareddy v. Chinnappareddygari Venkatareddy and others, : AIR 1969 AP242 . That is also the contention of the learned senior Counsel for the appellants. However, the learned senior Counsel for the appellants would submit that though Ex.Bl is inadmissible in law and cannot be looked into for the terms of the partition, it can be looked into for the limited purpose of establishing a

severance in status as held by the Full Bench in the aforementioned decision. Ex.B1 cannot be looked into not only in view of the decision of the Full Bench referred to above but also for other valid reasons. The parties to the suit are Muslims and they belong to Hanafi sect. There is no such thing as a joint Mohammaden family nor does the law recognise a tenancy in common in a Mohammaden family. The Mohammaden Law does not recognise a joint family as a legal entity. In fact according to the rules of Mohammaden Law of Succession, heirship does not necessarily go with membership of the family. There are several males and females who have no interest in the heritage but may be members of the family. On the other hand there are several heirs like, for example, married daughters of a deceased male owner who take an interest in the estate but are no part of the family. When the members of aMohammaden family live in communesality, they do not form a joint family in the sense in which that expression is used in the Hindu Law. Further, in the Mohammaden Law, there is not, as in the Hindu Law, any presumption that the acquisitions of the several members of a family living and messing together are for the benefit of the family. Therefore, a deed purporting to effect partition of the properties of a muslim in his life time who is the exclusive owner of those properties cannot in law be considered as a partition analogous to a partition of Hindu joint family properties. In this case, admittedly the alleged partition under Ex.Bl was not acted upon. However, the learned Counsel would argue that if Ex.Bl can be looked into for the limited purpose of establishing a severence in status and it can be seen that Mohd. Ahmed in clear terms asserted in the partition deed that the suit 'B' schedule properties are his self-acquired properties, and since the first defendant is a party to the partition deed, it should be held that there is admission of the first defendant that the suit 'B' schedule properties are the properties of late Mohd. Ahmed. The learned Counsel would argue that it is particularly so because though Ex.B1 is dated 2-2-1964, the first defendant did not raise his little finger asserting his right or contesting the claim of his father.

21. It is true that admissions are substantive evidence by themselves in view of Sections 17 and 21 of the Indian Evidence Act, though they are not conclusive proof of the matters admitted. Section 17 of the Indian Evidence Act defines the term 'admission', and according to that Section an admission is a statement, oral

or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons. Section 31 of the Indian Evidence Act states that admissions are not conclusive proof of the matters admitted, but they may operate as estoppels. In other words, an admission which does not operate as an estoppel, is not conclusive. The persons against whom it is proved is at liberty to show that itwas mistaken or untrue. An admission is not conclusive proof by itself. To draw an adverse inference on the basis of what a party is stated to have admitted, the admission must be unequivocal, comprehensive and go the whole-hog, on the point at issue. An admission is not conclusive as to the truth of the matters stated therein. It is weighed depending on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusive by way of estoppel, as held by the Supreme Court in Nagubai v. Shama Rao, : [1956]1SCR451 ; Avadh Kishore v. Aram, : AIR 1979 SC861 . Those admissions which either have been made without any intention of being acted upon, or which have not been acted upon, or by which the situation of the opposite party has not been prejudiced or altered, though receivable in evidence against the parties making them, are not conclusive. An admission can be explained and it can be shown that under the circumstances in which admission was made, it cannot be treated as binding on the person making an admission. It is also open to the maker of an admission to show that the admission made was erroneous and contrary to the realities. In the first place, as stated above Ex.Bl cannot be looked into except for the limited purpose of establishing severence in status. The claim of Mohd. Ahmed that suit 'B' schedule properties are his self-acquitted properties is also a term in the document, and as held by the Full Bench of this Court in Chinnappareddigari Pedda Muthyalareddy v. Chinnappareddygari Venkatareddy and others (supra) an unregistered partition deed cannot be looked into for the terms of the partition. Alternatively, it may be noted that in the instant case under Ex.Bl the defendant No.l was allotted the suit 'B' schedule properties to which he claimed exclusive title as being his self-acquired properties and that constitutes sufficient explanation for the defendant No.l not to challenge the admission made by him. Therefore, Ex.Bl is also of no help to the plaintiffs.

22. Ex.A2 is the certified copy of the khasara pahani for the year 1954-55. Ex.A5 is the certified copy of khasara pahani for the year 1979-80. Both these documents relate to the suit 'B' schedule properties and in both the documents, the name of the first defendant is recorded as the owner. The other documents produced by the first defendant also go to show that he has been throughout considered to be owner and occupier of the suit 'B' schedule properties. It is true that Record-of-rights and pahanies are not title documents, but it is equally true that a presumption of correctness attaches to entries appearing in the record-of-rights, but such entries are not the foundations of title but are mere items of evidence. The presumption raised by them is not conclusive but 'prima facie' merely, and while it must prevail where there is no rebutting evidence, it may be repelled by other evidence and circumstances showing that the entries are not correct. Khasara is held to be a record-of-rights by the Supreme Court in Shikharchand v. D.J.P. Karini Sabha, : [1974]3SCR101 . Though the record-of-rights is not a document of title, the Court is perfectly entitled to take into consideration the entry in the record-of-rights for coming to the conclusion that certain person was the owner of the land in question. Similarly entries in the pahanies have presumptive value to prove possession of a party. Therefore, the documentary evidence produced by the first defendant go to show that he has been the owner and possessor of the suit 'B' schedule properties. As against this evidence led by the first defendant, there is absolutely no documentary evidence in support of the plaintiffs to show that the suit 'B' schedule properties are the self-acquired personal properties of the deceased Mohd. Ahmed in the benami name of the first defendant.

23. The Supreme Court in Union of India v. Moksh Builders & Financiers, : [1977]1SCR967 , held that in a case where it is asserted that an assignment in the name of one person is in reality for the benefit ofanother the real test is the source when the consideration came and that it is also necessary to examine in such cases who actually has enjoyed the benefits of transfer and that the onus of establishing that a transaction is a benami is on the plaintiff. Placing reliance on this decision of the Supreme Court and also the judgement of the Calcutta High Court in Girindra Nath Mukherjee v. Soumen Mukherjee, : AIR1988 Cal375 to the same effect, the learned Counsel for the appellants would submit that if these two

tests suggested by the Supreme Court are applied, it has to be held that the first defendant had no means to acquire the suit 'B' schedule properties and that the plaintiffs and the deceased Mohd. Ahmed as well as the defendants have been in possession and enjoyment of the suit 'B' schedule properties as tenants-in-common. There is no merit in this submission also. There is no scope to apply the first test suggested by the Supreme Court as to from whom the consideration came. This is not a case where the first defendant claims that he acquired the suit 'B' schedule properties by way of sale. His specific case is that the suit 'B' schedule lands were assigned to him free of cost. If the second test is applied relating to enjoyment of the benefits of the transfer, the first defendant should succeed. As noted supra, the first defendant has produced satisfactory evidence to show that he has been in possession and enjoyment of the suit 'B' schedule properties and the plaintiffs have failed to prove that the suit 'B' schedule properties have been enjoyed by all the parties to the suit as tenants-in-common before or after the death of Mohd. Ahmed. No doubt, the oral evidence adduced by the plaintiffs go to show that late Mohd. Ahmed was found to be in possession of the suit 'B' schedule properties some time and he dug a well. This oral evidence of the plaintiffs cannot be considered in isolation, and this oral evidence has to be weighed in juxtaposition of the oral and relevant documentary evidence produced by the first defendant. Even assuming that the oral evidence produced by the plaintiffs as well as the first defendant do not conclusivelyprove that either late Mohd. Ahmed or first defendant had been in possession and enjoyment of the lands continuously after their acquisition, the documentary evidence produced by the first defendant to which reference is made above coupled with oral evidence prove that it is the first defendant who has been in possession and enjoyment of the suit 'B' schedule properties.

24. Therefore, for the reasons stated above I hold that the plaintiffs have failed to prove that late Mohd. Ahmed acquired suit 'B' schedule properties in the benami name of the first defendant. Consequently, the appeal should fail. Accordingly appeal is dismissed with costs.

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