

Mohammad Yunis Vs. Malooki Widow of Nabi Khan and ors.

Mohammad Yunis Vs. Malooki Widow of Nabi Khan and ors.

SooperKanoon Citation : sooperkanoon.com/634587

Court : Punjab and Haryana

Decided On : Sep-15-2003

Reported in : AIR2004P& H115; (2004)136PLR330

Judge : Adarsh Kumar Goel, J.

Acts : [Indian Succession Act, 1925](#) - Sections 118; ;[Protection of Human Rights Act, 1993](#) - Sections 2 and 12; ;[Constitution of India](#) - Articles 1(1), 13, 14, 15, 15(3), 16, 21, 25, 26, 44 and 51A; [Hindu Succession Act, 1956](#); Punjab Pre-emption Act, 1913 - Sections 15;

Appeal No. : Regular Second Appeal No. 2501 of 1981

Appellant : Mohammad Yunis

Respondent : Malooki Widow of Nabi Khan and ors.

Advocate for Def. : None

Advocate for Pet/Ap. : A.S. Tewatia, Adv.

Disposition : Appeal dismissed

Judgement :

Adarsh Kumar Goel, J.

1. The appellant-plaintiffs filed a suit for injunction restraining the defendant from alienating the suit land without their consent who are collaterals of her deceased husband. It was stated that defendant was widow of a collateral of the plaintiffs whose husband died four years back. Under the agricultural custom, property could not be transferred against the reversionary rights of the collaterals. The defendant transferred a part of the suit property in favour of her daughters and proposed to transfer the remaining also.

2. The defendant contested the suit and stated that land was not ancestral nor plaintiffs were collaterals and her daughters had preferential right over the collaterals. It was also stated that ancestral property could also be alienated.

3. The trial court held that the parties were related and husband of the defendant was a collateral of the plaintiffs. It was held that in view of evidence of PW1 Mohammad Unis and PW2 Chao Khan, agricultural custom existed in the matter of alienation. It was held that widow's interest was only life interest and she could not transfer the property. Reference was made to *Riwaj-i-Am of Gurgaon District* compiled by Wilson to the following effect-

'The widow's interest is a life interest only. But she is owner of the property for the time being and she can, with the consent of her husband's relatives, alienate by sale, gift, or mortgage the immovable property which is devolved on her from her husband. No distinction is made between the ancestral and self acquired property.'

4. It was held that the said custom was duly recognised by this Court in *Hussain Bai v. Kalu and Ors.*, (1969)71 P.L.R. 819. The suit land was held to be non-ancestral. With these findings, the trial court decreed the suit.

5. On appeal, the lower appellate court reversed the view of the trial court on the ground that as per plaint, the custom set up was only with regard to ancestral property. Relevant part of para 4 of the plaint is as under:-

'The parties are governed, by agricultural custom of Haryana part of Erstwhile Punjab, Gurgaon, District and Tehsil Ferozepur Jhirka, according to which ancestors' property could not be transferred either by the present holder or the last

male holder in any manner to the prejudice of the collaterals within five degrees. The parties to the suit are agriculturists.'

6. While affirming the finding of the trial court that the suit property was non-ancestral property, it was held that there being no custom restricting the power of the widow to transfer non-ancestral property, the suit could not succeed. Accordingly, the suit filed by the appellant was dismissed. Hence this appeal.

7. Learned counsel for the appellant submitted that custom existed not only with regard to ancestral property but also with regard to non-ancestral property. He relies on a judgment of this court in Hussain Bai's case (supra).

8. Although I have not found any merit in this appeal in view of the pleadings of the plaintiff-appellant to the effect that custom was applicable to ancestral property and in view of concurrent findings of both the courts below that the suit property was non-ancestral, there is another angle which requires reference. Custom restricting rights of a woman existing in pre-Constitution era cannot be recognised by the court unless it can meet the approval of equality clause of the Constitution. In recent decision in John Vallamattom v. Union of India, (2003)6 S.C.C. 611, the Apex Court struck down 118 of the [Indian Succession Act, 1925](#) restricting bequeathing of property for religious orcharitable use except in the manner provided therein. It was observed as under:-

'The world has witnessed a sea change. The right of equality of women vis-a-vis their male counterparts is accepted world-wide. It will be immoral to discriminate a woman on the ground of sex. It is forbidden both in our domestic law as also international law. Even right of women to derive interest in a property by way of inheritance, gift or bequeath is statutorily accepted by reason of the [Hindu Succession Act, 1956](#) and other enactments. This court, therefore, while considering constitutionality of Section 118 of the Indian Succession Act, is entitled to take those facts also into consideration.'

'Before I part with the case, I would like to state that Article 44 provides that the State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no

necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation, although it is doubtful whether the American doctrine of suspect legislation is followed in this country. In *Sarla Mudgal v. Union of India*, (1995)3 S.C.C. 635, it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.'

9. In *Hussain Bai's case* (supra), it was observed that custom relating to restriction on alienation applied to ancestral as well as non-ancestral property. In the present case, plaintiff himself has mentioned that the custom was applicable to ancestral property. Thus, judgment relied on by the learned counsel for the appellant is distinguishable. Learned counsel for the appellants stated that the said judgment refers to the Supreme Court judgment in *Ujjagar Singh v. Mst. Jeo*, A.I.R. 1959 S.C. 1341. Reference to the Supreme Court judgment is only for holding that *Riwaj-i-Am* could be referred to for holding that there was a particular custom. Thus, with regard to applicability of custom about non-ancestral property, this judgment is not reiteration of the judgment of the Supreme Court. In the judgment of the Supreme Court, question involved is different i.e. right of a sister to inherit and it was held that custom is a matter of pleading and evidence, unless general custom is duly recognised by some judicial precedent.

10. In *Preman v. Union of India and Ors.*, A.I.R. 1999 Kerala 93, Section 118 of the [Indian Succession Act, 1925](#) was held to be violative of Article 14 of the

Constitution on the ground that the said section:-

- 'a) discriminates against ,1 Christian vis-a-vis non-Christian
- b) discriminates against testamentary disposition by a Christian vis-a-vis non-testamentary disposition;
- c) discriminates against religious and charitable use of property vis-a-vis all other uses including not so desirable purposes.
- d) discriminates against a Christian who has a nephew, niece or nearest relative vis-a-vis Christian who has no relative at all and
- e) discriminates against a Christian who dies within 12 months of execution of the will, of which he has no control.'

11. In *Atam Prakash v. State of Haryana and Ors.*, A.I.R. 1986 S.C. 859, while considering validity of Punjab Pre-emption Act, 1913 to the extent it conferred right of pre-emption on certain relations of a vendor, it was observed as under:-

'The real question is whether a classification in favour of the kinsfolk of the vendor can be considered reasonable so as to justify a right of pre-emption in their favour for the purpose of preserving the integrity of the village community or implementing the agnatic theory of succession or preserving the unity and integrity of the family. We do not think that the classification can be considered reasonable in the circumstances prevailing today whatever justification there might have been for the classification in 1960 when the legislature amended Section 15 of the Punjab Pre-emption Act. Apart from the Courts characterising the right as 'archaic', 'feudal', 'piratical' 'outmoded' and so on, the Punjab Legislatures recognised the incongruity of the right in modern times and repealed it in 1972. We find it difficult to uphold the classification on the basis of unity and integrity of either the village community or the family or on the basis of the agnatic theory of succession which is again in a way connected with the integrity of the family. It is well known and, we may take judicial notice of it, that not only has there been a green and a white revolution in Haryana, this State is also in the process of an industrial revolution. Industries have sprung up throughout the State and the population has been in a

state of constant flux and movement. The traditional integrity of the village and the family have now become old wives' tales. Tribal loyalties have disappeared and family ties have weakened. Such is the effect of the march of history and the consequences of industrialisation, mechanisation of agriculture, development of marketing and trade, allurements of professions and office, employment opportunities elsewhere and so on. The processes of history cannot be reversed and we cannot hark back to the traditional rural-family-oriented society.'

12. In *C. Masilamani Mudaliar and Ors. v. The Idol of Sri Swaminathaswami Swaminathaswami Thirukoli and Ors.* A.I.R. 1996 S.C. 1697, it was held by the Apex Court as under:-

'The personal laws conferring inferior status on women is anathema to equality. Personal laws are derived not from the Constitution but from the religious scriptures. The laws thus derived must be consistent with the Constitution lest they become void under Article 13 if they violated fundamental rights.' It was further observed as under:-

The General Assembly of the United Nations adopted a declaration on December 4, 1986 on 'The Development or the Right to Development' to which India played a crusading role for its adoption and ratified the same, its preamble cognises that all human rights and fundamental freedoms are indivisible and interdependent. All nation States are concerned at the existence of serious obstacles to development and complete fulfilment of human beings, denial of civil, political, economic, social and cultural rights. In order to promote development, equal attention should be given to the implementation, promotion and protection of civil, political economic, social and political rights.

Article 1(1) assures right to development an inalienable human right, by virtue of which every person and all people are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development in which all human rights and fundamental freedoms can be fully realised. Article 6(1) obligates the state to observance of all human right and fundamental freedom for all without any discrimination as to race, sex language or religion. Sub-article(2) enjoins that....equal attention and urgent consideration should be given to implement,

promotion and protection of civil, political economic, social and political rights. Sub article (3) thereof enjoins that 'state should take steps to eliminate obstacle to development, resulting from failure to observe civil and political rights as well as economic, social and economic rights. Article 8 casts duty on the State to undertake development and ensure, inter alia, equality of opportunity for all in their access to basic resources....and distribution of income'. Effective measures should be undertaken to ensure that women have an active role in the development process. Appropriate economic and social reforms should be carried out with a view to eradicate all social injustice.

Human Rights are derived from the dignity and worth inherent in the human person. Human Rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedom are inter-dependent and have mutual reinforcement. The human rights for woman, including girl child, are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic, and cultural life are concomitants for national development, social and family stability and growth, culturally, socially and economically. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights.

Vienna declaration on the elimination of all forms of discrimination against women for short 'CEDAW' was ratified by the UNO on December 18, 1979. The Government of India who was an active participant to CEDAW ratified it on June 19, 1993 and acceded to CEDAW on August 8, 1993 with reservation on Articles 5(e), 16(1), 16(2) and 29 of CEDAW. The Preamble of CEDAW reiterates that discrimination against women, violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation on equal terms with men in the political, social economic and cultural life of their country; hampers the growth of the personality from society and family and makes more difficult for the full development of potentialities of women in the service of their countries and of humanity. Poverty of women is a handicap. Establishment of new international economic order based on equality and justice will contribute significantly towards

the promotion of equality between men and women etc. Article 1 defines discrimination against women to mean 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose on impairing or nullifying the recognized enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.' Article 2(b) enjoins the State parties while condemning discrimination against women in all its forms, to pursue, by appropriate means, without delay, elimination of discrimination against women by adopting 'appropriate legislative and other measures including sanctions where appropriate prohibiting all discriminations against women,' to take all appropriate measures including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Clause C enjoins to ensure legal protection of the rights of women on equal basis with, men through constituted national tribunals and other public institutions against any act of discrimination to provide effective protection to women. Article 3 enjoins State parties that it shall take, in all fields, in particular, in the political, social, economic and cultural fields, all appropriate measures including legislation to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. Article 13 states that 'the state parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women', in particular.....Article 14 laid emphasis to eliminate discrimination on the problems faced by rural women so as to enable them to play 'in the economic survival of their families including their work in the non-monetized sectors of the economy and shall take.....all appropriate measures.....' Participation in and benefit from rural development and, in particular, shall ensure to such women the right to participate in the development programme to organize self groups and co-operatives to obtain equal access to economic opportunities through employment or self-employment etc. Article 15(2) enjoins to accord to women an equality with men before the law, in particular, to administer property.....

The Parliament made the [Protection of Human Rights Act, 1993](#). Section 2(b) defines human rights means 'the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international conventions and enforceable by Courts in India.' Thereby the principles embodied in CEDAW and the concomitant right to development became integral parts of the Indian Constitution and the Human Rights Act and became enforceable. Section 12 of Protection of Human Rights Act charges the commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms.

Article 5(a) of CEDAW to which the Government of India expressed reservation does not stand in its way and in fact Article 2(f) denudes its effect and enjoin to implement Article 2(f) read with its obligation undertaken under Articles 3, 14 and 15 of the Convention vis-a-vis Articles 1, 3, 6 and 8 of the Convention of Right to Development. The directive principles and fundamental rights, though provided the matrix for development of human personality and elimination of discrimination, these conventions add urgently and teeth for immediate implementation. It is, therefore, imperative of the State to eliminate obstacles, prohibit all gender based discriminations as mandated by Article 14 and 15 of the [Constitution of India](#). By operation of Article 2(f) and other related articles of CEDAW, the State should take all appropriate measures including legislation to modify or abolish gender based discrimination in the existing laws, regulation, customs and practices which constitute discrimination against women.

Article 15(3) of the [Constitution of India](#) positively protects such Acts or actions. Article 21 of the [Constitution of India](#) reinforces 'right to life'. Equality, dignity of person and right to development are inherent rights in every human being. Life in its expanded horizon includes all that give meaning to a person's life including culture, heritage and tradition with dignity of person. The fulfilment of that heritage in full measure would encompass the right to life. For its meaningfulness and purpose every woman is entitled to elimination of obstacles and discrimination based on gender for human development, women to enjoy economic, social, cultural and political rights without discrimination and on footing of equality. Equally in order to effectuate fundamental duty to develop scientific temper,

humanism and the spirit of enquiry and to strive towards excellence in all spheres of individual and collective activities as enjoined in Article 51A(h) and (J) of the [Constitution of India](#), facilities and opportunities not only are to be provided for, but also all forms of gender based discrimination should be eliminated. It is a mandate to the State to do these acts. Property is one of the important endowments or natural assets to accord opportunity, source to develop personality, to be independent, right to equal status and dignity of person. Therefore, the State should create conditions and facilities conducive for women to realise the right to economic development including social and cultural rights.

Bharat Ratna Dr. B.R. Ambedkar stated, on the floor of the Constituent Assembly that in future both the legislature and the executive should not pay mere lip service to the directive principles but they should be made the bastion of all executive and legislative action. Legislative and executive actions must be conformable to and effectuation of the fundamental rights guaranteed in Part III and the directive principles enshrined in Part-IV and the Preamble of the Constitution which constitutes conscience of the Constitution. Covenants of the United Nation add impetus and urgency to eliminate gender based obstacles and discrimination. Legislative action should be devised suitably to constellate economic empowerment of women in socio-economic restructure for establishing egalitarian social order. Law is an instrument of social change as well as the defender for social change. Article 2(e) of CEDAW enjoins that this Court to breath life into the dry bones of the Constitution, international convictions and the Protection of Human Rights Act and the Act to prevent gender based discrimination and to effectuate right to life including empowerment of economic, social and cultural rights to women.

As per the U.N. Report 1980 'women constitute half the world population, perform nearly two thirds of work hours, receive one tenth of the world's income and own less than one hundredth per cent of world's property'. Half of the Indian population too are women. Women have always been discriminated and have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities inequality and discrimination. Articles 13, 14, 15 and 16 of the [Constitution of India](#)

and other related articles prohibit discrimination on the ground of sex. Social and economic democracy is the cornerstone for success of political democracy.

In *Mrs. Valsamma Paul v. Cochin University and others*, J.T. 1996(1) S.C. 571 this Court has held thus:

'Human rights are derived from the dignity and worth inherent in the human person. Human rights and fundamental freedoms have been reiterated in the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter-dependent and have mutual reinforcement. The human rights for women, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. The full development of personality and fundamental freedoms and equal participation by women in political, social, economic and cultural life are concomitants for national development, social and family stability and growth-cultural, social and economical. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Convention for Elimination of all forms of Discrimination Against Women (for short 'CEDAW') was ratified by the U.N.O. on December 18, 1979 and the Government of India had ratified as an active participant on June 19, 1993 acceded to CEDAW and reiterated that discrimination against women violates the principles of equality of rights and respect for human dignity and it is an obstacle to the participation on equal terms with men in the political, social, economic and cultural life of their country; it hampers the growth of the personality from society and family, making more difficult for the full development of potentialities of women in the service of the respective countries and of humanity.

Establishment of new international economic order based on equality and justice will contribute significantly towards the promotion of equality between men and women etc. Article 1 defines 'discrimination against women' to mean 'any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognized enjoyment or exercise by women, irrespective of their marital status, on the basis of equality of men and women, all human rights and fundamental freedoms in the political, economic,

social, cultural, civil or any other field.' Article 2(b) enjoins upon the State parties, while condemning discrimination against women in all its forms, to pursue, by appropriate means, without delay, elimination of discrimination against women by adopting 'appropriate legislative and other measures including sanctions where appropriate, prohibiting all discriminations against women; to take all appropriate measures including legislations, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Clause C enjoins upon the State to ensue legal protection of the rights of women on equal basis with men, through constituted national tribunals and other public institutions against any act of discrimination to provide effective protection to women. Article 3 enjoins upon the State parties that it shall take, in all fields, in particular, in the political, social, economic and cultural fields, all appropriate measures including legislation to ensure full development and advancement of women for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men. Article 13 states that appropriate measures to eliminate discrimination against women in other areas of economic and social life in order to ensure, on a basis of equality of men and women.'

The Parliament has enacted the [Protection of Human Rights Act, 1993](#). Section 2(b) defines 'human rights' to mean 'the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution, embodied in the international convictions and enforceable by Courts in India.' Thereby, the principles embodied in CEDAW and the concomitant right to development became integral part of the [Constitution of India](#) and the Human Rights Act and became enforceable. Section 12 of the Protection of Human Rights Act charges the commission with duty for proper implementation as well as prevention of violation of the human rights and fundamental freedoms.'

13. In view of the march of the society as recognised in decisions of the Apex Court and having regard to the position of rights of a woman under the Constitution, the restriction on right of a woman to transfer non-ancestral property inherited by her from her husband, has become quite doubtful.

14. For the above reasons, the appeal is dismissed.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com