

Bhullan Vs. Ehsan Elahi and ors.

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Court : Delhi

Decided On : Jul-18-1995

Reported in : 1995IIIAD(Delhi)373; 59(1995)DLT324; 1995(34)DRJ475

Judge : C.M. Nayar, J.

Acts : Mahomedan Law - Sections 117

Appeal No. : Regular Second Appeal No. 49 of 1977

Appellant : Bhullan

Respondent : Ehsan Elahi and ors.

Advocate for Pet/Ap. : Maehswar Dayal,; P.K. Jaitely and; N.Verma, Advs

Judgement :

C.M. Nayar, J.

(1) The present second appeal is directed against the judgment dated December 14, 1976, of Additional District Judge, Delhi. The learned Judge upheld the judgment dated March 31, 1975 of the trial court in suit No. 424/75.

(2) The brief facts of the case are that one Mehboob Elahi filed a suit for partition in respect of property bearing Municipal Nos. 7590 to 7592 situated in Gali Ghante Wali, Qasabpura, Delhi alleging that Badruddin was the owner of the aforesaid

properties having obtained the same in family partition on September 18, 1944; that he had four sons, namely, Mehboob Elahi, Noor Elahi, Maqbool Elahi and Fazal Elahi and one daughter Smt. Bhullan appellant/defendant herein. Badruddin died on March 2, 1968 and, as a consequence, his sons and daughters became owners of the aforesaid properties; that the sons had 2/9th share each while Smt. Bhullan had 1/9th share; that Mehboob Elahi did not want to keep his share with other heirs and thus he filed a suit for partition. Mehboob Elahi died during the pendency of the suit and Noor Elahi, who was defendant No.1 in the suit, was substituted as a plaintiff in his place, Later on, Noor Elahi also died and his legal representatives were brought on record as plaintiffs. The municipal number of the property to be partitioned was also amended to 7589-7592 in place of the original municipal numbers 7590-7592. It is further stated that Mehboob Elahi sold his share to Noor Elahi on January 21, 1969, while Maqbool Elahi sold his share to Noor Elahi on March 23, 1971 and in this way Noor Elahi became owner of the 2/3rd share of the property. The share of the appellant/ defendant was held to be 1/9th in respect of the property as mentioned above.

(3) The suit was contested by Smt. Bhullan alleging that the suit for partition was not maintainable as it was for partial partition for estate of the deceased. Late Badruddin made a Will dated February 24, 1968 in favor of the appellant bequeathing property No. 7591 Qasabpura, Delhi in her favor; that the Will was registered with the Sub Registrar on February 28, 1968 and thereafter the deceased Badruddin called his sons, other relations and friends and asked his sons to admit and honour the Will made by him and that such an assurance was given by the brothers of the appellant to their father Badruddin. The appellant, accordingly, contended that she became the absolute owner of property No. 7591 which had been in her occupation; that the other heirs of Badruddin had no right, title or interest in the said property and the suit be dismissed.

(4) The following issues were framed on the pleadings of the parties:

1. Whether the suit in the present form is not maintainable? Opd

2. Whether Shri Badruddin deceased has made a valid Will on 24.2.1968 in favor of defendant no.4? Opd

3.If issue no.2 is proved, whether the will made by Shri Badruddin has been accepted by his heirs after his death. If not to what effect.

4.Whether Shri Badruddin disinherited their heirs in case of non acceptance of will executed on 24.2.68.

5.Whether the present suit is for partial partition? If so its effect?

6.Relief.

(5) The learned trial judge disposed of issue no.2 by holding that Badruddin executed the Will in his life time bequeathing property No. 7591 in favor of the appellant. Issue No.3 was decided against the appellant/defendant and it was held that the sons of Badruddin i.e. Noor Elahi, Mehboob Elahi, Maqbool Elahi and Shri Fazal Elahi had not consented to the Will in favor of Smt. Bhullan, appellant herein after the death of Badruddin. therefore, the said Will was of no effect as under the Mahomedan Law a bequest or a Will in favor of the heir is not valid unless the other heirs consent to it after the death of the testator. Similarly, issues no. 4 and 5 were decided against the appellant. The suit for partition of the property as mentioned above was decreed and Commissioner was appointed to prepare a partition plan of the property so as to assign respective shares of the parties to them. The share of the appellant/defendant was held to be 1/9th share of the entire property.

(6) The appellant felt aggrieved by Order dated March 31, 1975 of the trial court and filed an appeal in the court of Additional District Judge. The learned Judge upheld the findings of the trial court and held that the appellant/defendant had not been able to prove on record that her brothers i.e. the sons of Badruddin had accepted the Will of their father. There was no dispute that the Will of Mahomedan would not be effective unless it was accepted by his heirs after his death. The findings of the trial court were affirmed.

(7) I have heard learned counsel for the parties. The position of law is well settled that under the Mohamedan Law a bequest or a Will in favor of an heir is not valid unless the other heirs consent to it after the death of the testator. Section 117

(Chapter IX) of the Mulla's Principles of Mahomedan Law reads as follows:

'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.

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

(8) In the present case, there is no doubt that the deceased Badruddin executed a Will in favor of the appellant in respect of one property No. 7591 on February 24, 1968. The said Will was registered on February 28, 1968. The trial court, however, on appreciation of evidence came to a firm conclusion that the other heirs i.e. sons of the deceased Badruddin did not consent to the Will after the death of the testator nor any such consent was proved on record. therefore, the appellant could not be held entitled to the property willed in her favor. The findings of the trial court have been affirmed by the First Appellate Court and it has been clearly held that the appellant has not been able to prove on record that her brothers had accepted the Will of their father. The learned counsel for the appellant has not been able to point out that the courts have misread and misapplied the evidence or that it was a case of no evidence. The finding in this regard is affirmed as it is not open for this court to reappraise the evidence and arrive at a different conclusion in the second appeal. It is further settled under the Mahomedan Law of Inheritance that the share of a daughter in the property of her father is 1/2 of the share of her each brother. In this view of the matter, the appellant Bhullan has been correctly held entitled to 1/9th share in the property along with her brothers. There is no infirmity or illegality in this finding as well. The same is, accordingly, affirmed.

(9) The learned counsel for the appellant lastly contends that the appellant is an old lady and is living in the property which was bequeathed to her by her late father. It will be harsh to dislocate her at this age. The commissioner has already been appointed for partition in respect of the property Nos. 7589-7592 and to assign the respective shares to the parties including to the appellant who is

entitled to 1/9th share. The Commissioner shall ensure that the appellant is not dislocated as far as possible and her 1/9th share may be assigned to her in the manner that her present status in life is least disturbed.

(10) With the above observations, the Regular Second Appeal is dismissed. There will be no order as to costs. The parties are directed to appear before the District Judge on 6th September, 1995 for further proceedings.

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