

Hameed Vs. Jameela

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Court : Kerala

Decided On : May-26-1999

Reported in : 2004(1)KLT586

Judge : P.K. Balasubramanyan, J.

Acts : Mohammedan Law

Appeal No. : S.A. No. 624 of 1998

Appellant : Hameed

Respondent : Jameela

Advocate for Def. : T.H. Abdul Azees and; K.E. Sunitha, Advs.

Advocate for Pet/Ap. : N. Subramaniam and; M.S. Narayanan, Advs.

Judgement :

P.K. Balasubramanyan, J.

1. The first defendant in a suit for partition is the appellant. The plaintiff is the daughter of one Aboobacker and the first defendant is the son. Defendants 2 to 9 are also the children of Aboobacker. Defendant No. 10 is the widow of Aboobacker. Aboobacker died on 25.2.1974. Plaint E Schedule property having an extent of 17 cents was sold by Aboobacker during his life time. Overruling the

contentions of the first defendant the plaintiff was given a preliminary decree for partition awarding the plaintiff seven out of 104 shares in plaint A to D and F Schedule properties. This preliminary decree for partition was confirmed by the appellate court repelling the challenge by the first defendant. Feeling aggrieved the first defendant has filed this Second Appeal.

2. Defendants 1, 4 and 9 sons of Aboobacker had purchased the shares of their sisters other than the plaintiff. The defendants denied the entitlement of the plaintiff to a share. Though the defendants set up an oral gift of the properties by the father to themselves to the exclusion of the plaintiff, the said case was found against and on the materials no reason is found to interfere with that finding by the courts below. The defendants raised an alternate contention that the plaintiff was estopped from claiming any share in view of the fact that her claim to a share in the properties of the father had been settled by an arrangement come to even during the life time of the father, and having accepted that arrangement and acted upon it the plaintiff could not claim a share on partition as she has sought to do. This plea was not accepted by the courts below while decreeing the suit and the Second Appeal is filed raising the substantial questions of law on this aspect as formulated in the Memorandum of Second Appeal. This court admitted the Second Appeal on the substantial questions of law formulated and as I noted, the purport of the substantial questions of law framed on the basis of different approaches is essentially the question whether the plaintiff is estopped from claiming a share on partition.

3. According to the defendants the father Aboobacker gave a sum of Rs. 1000 to the plaintiff towards the settlement of her claim or her share in his properties. With that amount the plaintiff purchased 25 cents of property under Ext. B1 sale deed dt. 6.3.1972. The seller thereunder was the husband, of the plaintiff. It is recited in that deed of sale that the consideration proceeded from the father Aboobacker and the contention of the defendants is that this amount was paid in satisfaction of the share of the plaintiff. The plaintiff having accepted that transaction and the amount paid by the father in view of purchase price therefore, she cannot now claim partition of the properties of Aboobacker. Alternatively it is pointed out that in any event she had to elect either to retain the benefit under Ext. B1 purchase dt.

6.3.1972 or to claim a share on the death of the father and she is not entitled to retain the property purchased under Ext. B1 and also claim partition of the rest of the properties.

4. The plaintiff was married away in the year 1968. Ext. B1 sale deed taken from her by her husband on 6.3.1972 states that the consideration for the sale was Rs. 1000 and that the sale price of Rs. 1000 was the amount that was given to the plaintiff purchaser by her father in lieu of her share in the properties of the family into which she was born and it was handed over to the seller on behalf of the father by Hameed (first defendant) the brother of the purchaser and the receipt of such consideration the property was being conveyed to the plaintiff. According to the defendants relevant recital regarding consideration in Ext. B1 clearly shows that sum of Rs. 1000 was paid by the father into the hands of the seller under Ext. B1 on behalf of the purchaser his daughter being the amount decided to be given by the father to the daughter towards or in lieu of her share in the properties of the family. Being persons governed by Muhammadan Law and being followers of Marumakthayam law, the expression 'family' can be understood in the context only as towards the share of the plaintiff in the properties of her family. Admittedly the first defendant has accepted this transaction and had derived benefit therefrom. In addition to this recital in Ext. B1 the defendants also rely on the fact that the plaintiff did not chose to file any suit for partition from 25.2.1974 till the date of the filing of the suit on 8.4.1992. They also point out that neither the plaintiff nor her husband the seller under Ext.B1 had gone to the box even to speak in support of the claim for partition made by the plaintiff. It is pointed out that the first defendant had alone got himself examined as DW1 and has spoken to the fact that the amount of Rs. 1000 was deemed as the share of the plaintiff in the properties of the father and given to her so as to enable her to purchase the property and this arrangement was come to in view of the demand made on behalf of the plaintiff at that time. In answer it is contended on behalf of the plaintiff that in Ext.B1 sale deed there was no declaration by the plaintiff that she was relinquishing her claim to a share in the properties of the father and that her right to a share in the properties of the father arose only on the death of the father and there could be no estoppel against the claiming of her share by the plaintiff on inheritance a right which accrued subsequently. It is also pointed out that there

was no proper plea of any family arrangement set out in the written statement and the plea of family arrangement cannot be raised now on behalf of the defendants. In reply it is pointed out on behalf of the first defendant that in the absence of any evidence on the side of the plaintiff and in the absence of any challenge to the evidence of DW1, even if a family arrangement is not specifically referred to in the written statement, it can be seen that such an arrangement emerges from the evidence in the case. The trial Court took the view that since the plaintiff had not executed any relinquishment deed in favour of the defendants on receipt of Rs. 1000 from her father as recited in Ext.B1, even if the amount had been paid by the father to the plaintiff at the time of purchase of Ext.B1 that would not extinguish the right of the plaintiff to inherit the property as the legal heir of her deceased father. The lower appellate court stated that in the case on hand there was no evidence that there was a gift in favour of the plaintiff by her father. The doctrine of election did not apply in this case since the plaintiff did not have two options one out of which was lost on accepting one of them. The Court stated that in the case on hand there was no evidence that the plaintiff had received any amount from her father in lieu of her share in the properties of her father and hence the question of estoppel cannot arise.

5. It appears to me that the effect of the recitals in the sale deed Ext. B1 taken by the plaintiff from her husband has not been properly understood or appreciated by the lower appellate court. Ext. B1 clearly recites that the consideration paid was a sum Rs. 1000 and that Rs. 1000 was paid into the hands of the seller by the brother of the plaintiff on behalf of the father of the plaintiff and that amount of Rs.1000 was in lieu of or towards the value of the share that the plaintiff had in the properties of her family. This recital is clearly binding on the plaintiff she being the person who accepted that sale deed and acquired title over the property conveyed thereunder. The plaintiff has not gone to the box to speak to the circumstances that surrounded the paying of Rs. 1000 by the father to her or making available the sum of Rs. 1000 to her for the purpose of purchase of property and that too from her husband. In this context there is the uncontroverted evidence of the first defendant as DW1 that while the father was alive the plaintiff and her husband had come two or three times to the house of the father and had demanded that the plaintiff must be given property. He had also pointed out that though initially their

demands were mild, on the father not acceding to that request, there were exchange of words. He further stated that it was then that the father gave some amount for the purpose of purchase of property in the name of the plaintiff and the father also expended money needed for registration and other incidental expenses. It was DW1 who had handed over the money. In the circumstances of the case and taking note of the silence on the part of the plaintiff from the year 1974 to 1992 it is clear that the recitals in the document supported by the oral evidence of DW1 clearly establish a case of the father paying over some amounts to the daughter in lieu of her share in the properties available in her family of birth and it was on the basis of a demand by the plaintiff and her husband for the share of the plaintiff in such properties.

6. In *Qulam Abbas v. Haji Kayyam Ali*, AIR 1973 SC 554, the Supreme Court has held that relinquishment of future possible right of inheritance by the Muslim heir for a consideration may debar him from setting up his right when it actually comes into being. The Supreme Court has also indicated that the binding force in future of such a renunciation depends upon the attendant circumstances and the whole course of conduct of which it forms a part. If the expectant heir receives consideration and so conducts himself as to mislead an owner into not making dispositions of his property inter vivos the expectant heir can be debarred from setting up his right when it does unquestionably vest in him. The principle of estoppel operates in such cases. While taking this view the Supreme Court affirmed the decision of the Travancore-Cochin High Court in *Kochunni Kachu Mohammed v. Kunju Pillai Muhammed*, AIR 1956 TC 217, and overruled the decision of the Kerala High Court in *V. Kunhi Avull v. E.P. Kunhi Avulla*, AIR 1964 Ker. 200. In *Pathuma Kunju v. Assy* ILR 1978 (2) Ker.529, this Court has applied the principle of estoppel in a case where an earlier gift was accepted by one of the heirs with the recital that the said gift as being made in lieu of the share that may be due to the donee on the death of the donor.

7. It is clear from the recitals in Ext. B1 read to the light of the evidence of DW1 that the plaintiff and her husband were making demands for shares in the properties of the father of the plaintiff. In that context the father of the plaintiff decided to give her a sum of Rs. 1000 towards her share in the properties. The

said sum of Rs. 1000 was utilised by the plaintiff for the purpose of purchasing an extent of 25 cents of property from her husband. The document of purchase Ext. B1 clearly recites that the consideration proceeded from the father and that it was on the basis of the decision that it was the value of the share of the plaintiff in the properties of her father or the family of her birth. The recital in Ext. B1 is binding both on the plaintiff and her husband the seller. The plaintiff has not gone to the box in an attempt to explain away the effect of the recitals in Ext. B1 or to speak to circumstances which would enable the court to come to the conclusion that the recitals therein is not conclusive or cannot be treated as against the plaintiff in the absence of any evidence on the side of the plaintiff or explanation of the recitals in Ext. B1 one has to give effect to the recitals in Ext. B1. In fact the said recitals as noticed are binding on the plaintiff. Since going by the recitals in Ext. B1 it is seen that even while the father was alive the plaintiff had obtained a sum of Rs. 1000 in lieu of her share in the properties of her father or of the family of her birth and had purchased a property by utilising that amount and had thus derived a benefit immediately, it is clear that she is estopped from claiming a further share in the properties of the father on the death of the father. It is in this context that one has also to take note of the delay of 18 years after the death of the father in filing the present suit. The lower appellate court in my view was in error in thinking that there is no case for application of the doctrine of election in this case. Here the plaintiff had already accepted the benefit of her share by receiving Rs. 1000 from her father which she had clearly utilised for purchase of another property and thereby she had elected to accept the transaction. Even now the plaintiff is not willing to repudiate the transaction Ext. B1 or to make that property available for partition among all the heirs of her father along with the other properties. Under such circumstances I am satisfied that a clear case of estoppel arises in this case.

Since the Courts below have not properly understood the law of estoppel operating in this case, they have committed a substantial error of law warranting interference by this Court in Second Appeal. I hold that in the light of Ext. B1 and in the light of the evidence of DW1, the plaintiff is estopped from claiming her share in the present suit. I therefore allow this Second Appeal and setting aside the judgments and decrees of the courts below dismiss the suit. In the circumstances of the case, I make no order as to costs.

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