
(1976) 07 MAD CK 0047

In the Madras High Court

Case No : A.A.O. No. 656 of 1975, against order of Dist. J. Vellore in A.S. No. 373 of 1973, D/- 6-8-1975

A.G. Ramachandran and Another

APPELLANT

Vs

Shamsunnissa Bivi

RESPONDENT

Date of Decision : 30-07-1976

Acts Referred:

Evidence Act, 1872 — Section 112

Muslim Personal Law (Shariat) Application Act, 1937 — Section 2

Tamil Nadu Civil Courts Act, 1873 — Section 16

Citation : AIR 1977 Mad 182 : (1977) ILR (Mad) 303 : (1977) 90 LW 98 : (1977) 1 MLJ 482

Hon'ble Judges : Ramanujam, J

Bench : Single Bench

Judgement

1. This is an appeal filed by defendants 13 and 16 in O. S. No. 62 of 1968, on the file of the Subordinate Judge, Tirupattur, against the order of remand made by the lower appellate court, remitting the suit to the trial court for fresh disposal.

2. The respondent herein file the suit for partition and separate possession of half in the suit properties and for recovery of mesne profits for three years before the suit. Her case was that the suit properties belonged to her father, one Mohamed Hussain, and that as his daughter by his second wife, she has become entitled to the said half share after his death in 1964. Defendants 1 and 2 are the first and second wives respectively of the said Mohammed Hussain and defendants 3 to 9 and 15 to 17 are the legal representatives of his brothers. Defendants 10 to 14 are the alienees of some of the items of the suit properties.

3. The plaintiffs claim was resisted mainly by some of the legal representatives of the brother of Mohamed Hussain and also by the alienees. One of the defences taken is that the plaintiff is not the legitimate daughter of Mohamed Hussain by the second wife. It was their case that the plaintiffs mother, the second defendant was married to Mohamed Hussain on 26-1-1952, that the plaintiff was born on 26-4-1952, within three months of the date of the marriage and that,

therefore, the plaintiff cannot be taken to be the legitimate daughter of Mohamed Hussain.

4. With reference to this plea, the trial court found, on the basis of the evidence of P.W.s 1 and 2, Ex. B-7, the nikkah register extract for the marriage, and Ex. A-1 the birth register extract for the plaintiff, that the plaintiff was born three months from the date of the marriage between Mohammed Hussain and the second defendant, that, therefore, the plaintiff cannot be taken to have been born to Mohamed Hossain and that even if she was born to him, she can only be his illegitimate child. In this view, the trial court dismissed the suit.

5. On appeal by the plaintiff, the lower appellate court has taken the view that even if the plaintiff was born three months of the marriage, she must be taken to be a legitimate child in view of the presumption contained in S. 112 of the Evidence Act, that though under the Mohamedan Law a child born within six months of the marriage between its parents is an illegitimate child, the presumption under S. 112 is applicable even to persons governed by Mahomedan Law and that S. 112 would certainly override the principles of Mohamedan Law, relating to legitimacy. In this view, the lower appellate court set aside the dismissal of the suit by the trial court and remitted it for fresh disposal.

6. In this appeal, Mr. Sundaram Iyer, learned counsel appearing for the appellants, contends that the view taken by the lower appellate court that S. 112 of the Evidence Act overrides the Mohammedan personal law relating to legitimacy and that, therefore, the plaintiff should be taken to be is legitimate child of Mohamed Hussain is erroneous, and that as the order of remand is based exclusively on that view, it cannot be sustained. According to the learned counsel, under the Mohamedan Law, a child born within less than six months after the marriage is illegitimate and that the said presumption of illegitimacy under the Mohamedan Law cannot be said to have been superseded by S. 112 of the Evidence Act. The Learned counsel also points out that the lower appellate court has overlooked the provisions of the Muslim Personal Law (Shariat) Application Act, 1937 (Central Act 26 of 1937), which came into force on 7-10-1937 and the provisions of the Madras Civil Courts Act which according to him, clearly indicate that it is the Mohamedan Personal Law that has to govern and not the general provision contained in S. 112 of the Evidence Act.

7. The question whether S. 112 of the Evidence Act supersedes the rules of Mohamedan Law as to legitimacy was left open in Md. Allahad Khan v. Md. Ismail Khan, ILR (1888) All 289, with the following observations;

"The peculiarity of the English law has no doubt been imported into India by S. 112 of the Indian Evidence Act, and it may some day be a question of great difficulty to determine how far the provisions of that section are to be taken as trenching upon the Mohamedan Law of marriage, parentage, legitimacy and inheritance, with departments of law under other statutory provisions are to be adopted as the rule of decision by the courts in British India....."

But later the same court in (Syed) Sibte Mohammad Vs. Mohammad Hameed and Others has held that S. 112 supersedes Mohamedan Law and that it applies to Mohamedans as well. There a Division Bench has expressed;

"S. 112 of Evidence Act applies by its terms to all classes of persons in British India and no exception is made in favour of Mohamedans. If it had been intended that the provisions of S. 112 should not apply to Mohamedans, we should certainly expect to find a clear proviso to this effect. This course has been followed in other enactments, when general provisions of law were not intended to affect the rules of Mohamedan Law. For instance, Chap, VII of the Transfer of Property Act, 1882 lays down the general rules relating to gifts, but S. 129, at the end of the chapter, expressly states that "nothing in this chapter shall be deemed to affect any rule of Mohamedan law". So, if the legislature had intended that the provisions of S. 112 of the Evidence Act should not apply to Mohamedans Law, this intention should have been clearly expressed. S. 112 is perfectly clear in its terms and we are not entitled to refuse to give effect to its provisions merely on the ground that such provisions are out of place in the Evidence Act and should have been included in the department of family law, or on the ground that the effect of these provisions in their application to Mohamedan Law was unforeseen, or would be undesirable. In our view, we are bound to give effect to the clear provisions of S. 112 although they conflict with the rules of Mohamedan Law."

The learned Judge have taken the above view after considering two conflicting views taken by the commentators on Mohamedan Law. Sir Roland Wilson in his treatise on Anglo-Mohammadan Law, 5th Edn., at p. 161 had opined that S. 112 of the Indian Evidence Act is really, notwithstanding its place in the statute book a rule of substantive marriage law rather than of evidence, and as such has no application to Mohamedans, so far as it conflicts with the Mohamedan rule that a child born within six months after the marriage of its parents is not legitimate. This opinion has been dissented from by two other learned commentators in Mohamedan Law, namely, Mr. Mullah and Mr. Tyabji. Their conclusion was-

"It is difficult to resist the conclusion that the Indian Evidence Act S, 112, was drafted without giving a thought to the framework in which it would have to be set, if it is to displace the Mohamedan Law on the same point. But this oversight can hardly be a ground for disregarding its provisions."

In *Mt. Sampatia Bibi v. Mir. Mahboob Ali*, AIR 1936 All 528, the earlier decision in (Syed) Sibte Mohammad Vs. Mohammad Hameed and Others was followed, and it was held that the question of legitimacy must be decided in accordance with S. 112 of the Evidence Act, although its provision conflicts with the provisions of Mohamedan Law and that S. 112 applies by its terms to all classes of persons in British India and no exception is made in favour of Mohamedans.

8. In my view, the above decisions lay down the law correctly when they said that S. 112 of the Evidence Act, is very general in its terms and it applies to all

person including Mohamedans who may have a personal law of their own relating to legitimacy as there is no provision exempting them from the application of S. 112.

9. The learned counsel for the appellant would contend that the above decisions had been rendered before the enactment of Central Act 26 of 1937 and that the application of S. 112 of the Evidence Act should be taken to have been excluded after the enactment of the said Act. The learned counsel refers to S. 2 of that Act which is as follows-

"Application of Personal Law to Muslims: Notwithstanding in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of Personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and mubaraat; maintenance, dower, guardianship, gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be Muslim Personal Law (Shariat)....."

It is said that the effect of the said section is to make the Muslim Law expressly applicable to parties governed by Muslim Personal Law relating to succession, marriage, guardianship, trusts, etc. Reference has also been made to S. 16 of the Madras Civil Courts Act, 1873, which is as follows:--

"Where, in any suit or proceeding, it is necessary for any Court under this Act to decide any question regarding succession, inheritance, marriage, or casts, or any religious usage or institution,

(a) the Mohamedan Law in cases where the parties are Mohamedans and the Hindu Law in cases where the parties are Hindus, or

(b) any custom (if such there be) having the force of law and governing the parties or property concerned shall form the rule of decision, unless such law or custom has by legislative enactment, been altered or abolished,

(c) in cases where no specific rule exists, the court shall act according to justice, equity and good conscience."

It is said that under S. 16, whenever the court has to decide any question regarding succession, inheritance, marriage, casts or religious usage, the court has to administer only the Mohamedan Law in cases where the parties are Mohamedans and Hindu Law where the parties are Hindus. The contention of the learned counsel is that by virtue of the provision in S. 2 of Central Act 26 of 1937, read with S. 16 of the Madras Civil Courts Act, 1873, if the parties are Muslims, the question of legitimacy has to be decided by the court applying the Mohamedan Law relating to legitimacy. But a close reading of S. 2 of Central Act 26 of 1937 and S. 16 of the Madras Civil Courts Act, 1873, indicates that they do not deal with the law relating to legitimacy. It is true, they refer to the law of

succession and wherever the parties are Muslims, the court has to decide their rights with reference to the Muslim Law of succession. But the law relating to legitimacy cannot be taken to be a part of the law of inheritance or succession as urged by the learned counsel for the appellant. Legitimacy may be a matter relevant for deciding his claims relating to succession but it cannot be said that it is part of the law of succession. The question whether a particular child is legitimate or not can arise not only with reference to succession but also with reference to the various other matter. I do not, therefore, agree with the learned counsel for appellant that questions of legitimacy will come under S. 16 of the Madras Civil Courts Act, read with S. 2 of Act 26 of 1937, so as to say that the court is bound to apply the presumption under the Mohamedan Law on questions of legitimacy and not the presumption contained in S. 112. Therefore, the presumption under S. 112 of the Evidence Act should be taken to have superseded the Mohamedan law relating to legitimacy to the extent of any inconsistency between the two.

10. In this view, the order of remand made by the lower appellate court should be held to be valid. The civil miscellaneous appeal therefore fails and it is dismissed. There will, however, be no order as to costs. No leave.

11. Appeal dismissed.