

(1973) 09 SC CK 0017
In the Supreme Court Of India
Case No : C.A. No. 2134 of 1970

Gulam Abbas

APPELLANT

Vs

Hazi Kayyum Ali and Others

RESPONDENT

Date of Decision : 18-09-1973

Acts Referred:

Contract Act, 1872 — Section 23
Evidence Act, 1872 — Section 115
Transfer of Property Act, 1882 — Section 2, 6

Citation : (1973) JLJ 1041 : (1974) MhLj 22 : (1974) MPLJ 58

Hon'ble Judges : M.H. Beg, J;A.N. Grover, J;A.K. Mukherjea, J

Bench : Full Bench

Final Decision : Allowed

Judgement

M.H. Beg, J.—This is a Defendant's appeal by special leave against the judgment and decree of the High Court of Madhya Pradesh allowing a second appeal in a partition suit between members of a family governed by Muslim Law. The Defendant-Appellant and the Plaintiff Respondent are both sons of Kadir Ali Bohra who died on April 5, 1952 leaving behind five sons, a daughter and his widow as his heirs. It appears that Kadir Ali had incurred debts so heavily that all his property would have been swallowed upto liquidate these. Three of his sons, namely, Gulam Abbas, Defendant No. 1, Abdullah, Defendant No. 2, and Imdad, Defendant No. 3, who had prospered, came to his rescue so that the property may be saved. But, apparently, they paid up the debts only in order to get the properties for themselves to the exclusion of the other two sons, namely, Kayyumali, Plaintiff-Respondent, and Nazarali, Defendant No. 4, who executed, on October 10, 1942, deeds acknowledging receipt of some cash and movable properties as consideration for not claiming any rights in future in the properties mentioned in the deeds in which they gave up their possible rights in future. The executant of each deed said:

I have accordingly taken the things mentioned above as the equivalent of my

share and I have oat of free will written this. I have no claim in the properties hereafter and if I put up a claim in future to any of the properties I shall be proved false by this document. I shall have no objection to my father giving any of the properties to my other brothers....

During the father's life time, when all chance or expectation of inheritance by either Kayyumali or Nazarali could be destroyed by disposition of property, neither of these two raised his little finger to object. The only question before us now is whether the Plaintiff and Defendant No. 4 are estopped by their declarations and conduct and silence from claiming their shares in the properties covered by these deeds.

2. The first Appellate Court, the final Court on questions of fact, recorded the following findings, after examining the whole set of facts before it, to conclude that the Plaintiff and Defendant No. 4 were estopped from claiming their shares in the inheritance:

In the instant case, it is evident that the release deeds Ex. D/2 and Ex. D/3 were executed by the Plaintiff and Defendant No. 4, Nazarali, when the Defendants No. 1, 2 and 8 had with their labour and money straightened the status of his father Kadarali and had cleared up the debts which would have devoured the whole property of Kadar AH and the Plaintiff was doing nothing and was in a way a burden to his father. In such state of things when the Plaintiff and Defendant No 4 executed the release deeds in question, it can be said that it was a family settlement to prevent the future disputes that may arise and to secure the peace and happiness in the family of the parties and thereby induced the Defendants No. 1, 2 and 3 to believe that the Plaintiff would not claim a share in the suit properties and led them to discharge the debts due to Kadar Ali and to be in affluent circumstances themselves as they are at present and the Plaintiff now seeks benefit of it against his own past undertakings.

3. The High Court reproduced the passage, quoted above, from the judgment of the first appellate Court ; without any dissent from any of the findings of fact contained there. It specifically held that the Court below was correct in finding that consideration had passed to the Plaintiff and Defendant No. 4 for the relinquishment of their future possible rights of inheritance. It proceeded on the assumption that, if the law had not prohibited the transfer of his rights of inheritance by Muslim heir, an estoppel would have operated against the Plaintiff and Defendant No. 4 on the findings given. It held that the rule of Muslim Personal law on the subject has the same effect as Section 6(a) of the Transfer of Property Act which lays down:

The chance of an heir apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.

It pointed out that, although, Section 2 of the Transfer of Property Act provided that nothing in the second Chapter of the Act will be deemed to affect any rule of

Mohammedan Law, so that Section 6(a) contained in Chapter 2 could not really be applied, yet, the effect of Mohammedan Law itself was that "the chance of a Mohammedan heir apparent succeeding to an estate cannot be the subject of a valid transfer of lease (See : Mulla's Principles of Mohammedan Law 17th Edn., Section 54, page 45). After equating the effect of the rule of Mohammedan Law with that of Section 6(a) of the Transfer of Property Act, the High Court applied the principle that the estoppel can arise against statute to what it considered to be an estoppel put forward against a rule of Mohammedan Law.

4. The High Court had relied on a decision of the Madras High Court in Abdul Kafoor and Another Vs. Abdul Razack and Another, which had been followed by the Kerala High Court without giving fresh reasons, in Valanhiyil Kunhi Avulla and Others Vs. Eengayil Peetikayil Kunhi Avulla and Others, in preference to the view adopted by the Allahabad High Court in Latafat Hussain v. Hidayal Hussain AIR 1936 Bora. 573, followed by the Travancore Cochin High Court in Kochunni Kachu Mohammed v. Kunju Pillai Mohammed AIR 1956 Tra 217. The principal question for decision before us is whether the Madras or the Allahabad High Court view is correct.

5. The Madras High Court, in Abdul Kafoor's case (supra) had specifically dissented from the Allahabad view in Latafat Hussain's case (supra) on the ground that, if an estoppel was allowed to be pleaded as a defence, on the strength of relinquishment of a spes successionis for consideration, the effect would be to permit the provisions of Mohammedan Law to be defeated. Hence, it held that such an attempt would be struck by Section 23 of the Indian Contract Act. The object, however, of the rule of Mohammedan Law, which does not recognise a purported transfer of a spes successionis as a legally valid transfer at all, is not to prohibit anything but only to make it clear what is and what is not a transferable right or interest in property just as this is what Section 6(a), Transfer of Property Act is meant to do. Its purpose could not be to protect those who receive consideration for what they do not immediately have so as to be able to transfer it at all. It could, if protection of any party to a transaction could possibly underlie such a rule, be more the protection of possible transferees so that they may know what is and what is not a legally enforceable transfer. With due respect, we are unable to concur with the view of the Madras High Court that a renunciation of an expectancy, as a purported but legally ineffective transfer, is struck by Section 23 of the Indian Contract Act. As it would be void as a transfer at all there was no need to rely on Section 23, Contract Act. If there was no "transfer" of property at all, which was the correct position, but a simple contract, which could only operate in future, it was certainly not intended to bring about an immediate transfer which was all that the rule of Muslim law invalidated. The real question was whether, quite apart from any transfer or contract, the declarations in the deed of purported relinquishment and receipt of valuable consideration could not be parts of a course of conduct over a number of years which taken as a whole, created a bar against a successful assertion of a right to property when that right that actually came into being. An equitable

estoppel operates, if its elements are established, as a rule of evidence preventing the assertion of rights which may otherwise exist.

6. We have also examined the earlier decisions of the Madras High Court in *Asa Beevi v. Karuppan* ILR (1918) 41 Mad. 365 where Macnaughtan's "Principles and Precedents of Mohammedan Law", Sir Roland Wilson's Digest of "Anjlo Mohammedan Law" p. 260, and Ameer Ali's "Mohammedan Law" have been referred to in support of the conclusion that "there is a large preponderance of authority in favour of the view that a transfer of renunciation of the right of inheritance before that right vests is prohibited under the Mohammedan Law". The whole discussion of the principle in the body of the judgment, however, brings out the real reason is not a prohibition but that there cannot be a renunciation of a right which is inchoate or incomplete so long as it remains in that state. In fact, it is not correct to speak of any right of inheritance before it arises by the death of the predecessor who could have, during his life-time, deprived the prospective heir of his expectation entirely by dispositions inter vivos.

7. Sir Roland Wilson, in his "Anglo Mohammedan Law" (p. 260, Paragraph 208) states the position thus:

For the sake of those readers who are familiar with the joint ownership of father and son according to the most widely prevalent school of Hindu Law, it is perhaps desirable to state explicitly that in Mohammedan, as in Roman and English, Law *nemo est heres viventis*.....a living person has no heir. An heir apparent or presumptive has no such reversionary interest as would enable him to object to any sale or gift made by the owner in possession; see *Abdul Wahid L.P.* 12 L.A. 91 : 11 Cal 597 (1885) which was followed in *Hasan Ali* 11 All 456, (1889). The converse is also true: a renunciation by an expectant heir in the life-time of his ancestor is not valid, or enforceable against him after the vesting of the inheritance.

This is a correct statement, so far as it goes, of the law, because a bare renunciation of expectation to inherit cannot bind the expectant heir's conduct in future. But, if the expectant heir goes further and receives consideration and so conducts himself as to mislead an owner into not making dispositions of his property inter vivos the expectant heir could be debarred from setting up his right when it does unquestionably vest in him. In other words, the principle of estoppel remains untouched by this statement.

8. As the Madras Full Bench pointed out, the subject was discussed more fully in Amir Ali's 'Mohammedan Law' (Vol. II) than elsewhere. There we find the reason for or the object underlying the rule. It is that there is nothing to renounce in such a case because an expectancy remains at most before it has materialized only an "inchoate right". It is in this light that the following observations in *Hurmoot-Oal-Nisa Begum v. Allahdia Khan* (1871) 87 WRC 108, is, explained by Ameer Ali:

According to the Mohammedan Law the right of inheritance may be renounced and such renunciation need not be express but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another.

9. Ameer Ali explained, citing an opinion of the law officers, given in *Khanum Jan v. Jan Bibi* (1827) 4 SDA Rep. 210.

Renunciation implies the yielding up of a right already vested, or the ceasing or desisting from prosecuting a claim maintainable against another. It is evident that, during the life-time of the mother the daughters have no right of inheritance and their claim on that account is not maintainable against any person during her life-time. It follows, therefore, that this renunciation during the mother's life-time of the daughters' shares is null and void it being in point of fact giving up that which had no existence.

10. In view of the clear exposition of the reason for the rule contained in the authorities relied upon by the Full Bench of the Madras High Court in *Asa Beevi's* case (*supra*), we think that it described, by oversight, a rule based on the disability of a person to transfer what he has not got as a rule a prohibition enjoined by Mohammedan Law. The use of the word "prohibited" by the Full Bench does not really bring out the object or character of the rule as explained above.

11. It may be mentioned here that Muslim Jurisprudence, where theology and moral concepts are found sometimes mingled with secular utilitarian legal principles, contains a very elaborate theory of acts which are good (because they proceed from 'hasna'), those which are bad (because they exhibit "qubuh", and those which are neutral per se. It classifies them according to varying degrees of approval or disapproval attached to them (see : Abdul Rahim's "Mohammedan Jurisprudence" p. 105). The renunciation of a supposed right, based upon an expectancy, could not, by any test found there, be considered "prohibited". The binding force in future of such a renunciation would, even according to strict Muslim Jurisprudence, depend upon the attendant circumstances and the whole course of conduct of which it forms a part. In other words, the principle of an equitable estoppel, far from being opposed to any principle of Muslim Law will be found, on investigation, to be completely in consonance with it.

12. As already indicated, while the Madras view is based upon the erroneous assumption that a renunciation of a claim to inherit in future is in itself illegal or prohibited by Muslim Law, the view of the Allahabad High Court, expressed by Suleman, G. J., in *Latafat Hussain's* case (*supra*) while fully recognising that "under the Mohammedan Law relinquishment by an heir who has no interest in the life-time of his ancestor is invalid and void", correctly lays down that such an abandonment may, nevertheless, be part of a course of conduct which may create an estoppel against claiming the right at a time when the right of inheritance has accrued. After considering several decisions, including the Full Bench of the Madras High Court in *Asa Beevi's* case (*supra*) Suleman, C.J.,

observed at page 575:

The question of estoppel is really a question arising under the Contract Act and the Evidence Act, and is not a question strictly arising under the Mohammedan Law.

He pointed out (at pages 575-576):

It has been held in this Court that contingent reversioners can enter into a contract for consideration which may be held binding on them in case they actually succeed to the estate : See 19 ALJ 799, and 21 ALJ 235. It was pointed out in 24 ALJ 873, at pp. 876-77, that although a reversionary right cannot be the subject of a transfer for such transfer is prohibited by Section 6, T.P. Act, there was nothing to prevent a reversioner from so acting as to estop himself by his own conduct from subsequently claiming a property to which he may succeed. Among other cases reliance was placed on the pronouncement of their Lordships of the Privy Council in 40 All 487, where a reversioner was held bound by compromise to which he was a party.

13. Incidentally, we may observe that, in AIR 1928 67 (Oudh) the Oudh Chief Court has relied upon Harmoot-Oul-Nisa Begum's case (supra) to hold that "according to Mohammedan Law there may be renunciation of the right to inheritance and such renunciation need not be express but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another".

14. As we are clearly of opinion that there is nothing in law to bar the application of the principle of estoppel, contained in Section 115 of the Evidence Act, against the Plaintiff and Defendant No. 4, upon the totality of facts found by the final Court of facts which were apparently accepted by the High Court, it is not necessary for us to deal at length with the question whether the facts found could give rise to the inference of a 'family settlement' in a technical sense.

15. It is true that in Latafat Hussain's case (supra) Suleman, C. J., had observed that the conclusion of the subordinate Court, that there had been an arrangement between a husband and a wife "in the nature of a family settlement which is binding on the Plaintiff", was correct. This was held upon circumstances which indicated that a husband would not have executed a deed of Wakf if the wife had not relinquished her claim to inheritance. In other words, an arrangement which may avoid future disputes in the family, even though it may not technically be a settlement or definition of actually disputed claim, was referred to broadly as a family arrangement". It was in this wide sense that, in the case before us also, the first appellate Court had considered the whole set of facts and circumstances examined by it to be sufficient to raise the inference of what it described as 'a family settlement'.

16 As our law relating to family arrangements is based on English Law, we may refer here to a definition of a family arrangement in Halsbury's Laws of England Halsbury's Law of England; 3rd Edi 17 215, 216, where we find : "A family

arrangement is an agreement between members of the same family intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour". We also find there: "The agreement may be implied from a long course of dealing, but it is more usual to embody or to effectuate the agreement in a deed to which the term "family arrangement" is applied. It is pointed out there : "Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements".

17. As we have already indicated, it is enough for the decision of this case that the Plaintiff and Defendant No. 4 were estopped by their conduct, on an application of Section 115, Evidence Act, for claiming any right to inheritance which accrued to them, on their father's death, covered by the deeds of relinquishment for consideration, irrespective of the question whether the deeds could operate as legally valid and effective surrenders of spes successionis. Upon the facts and circumstances in the case found by the Courts below we hold that the Plaintiff and Defendant No. 4 could not, when rights of inheritance vested in them at the time of their father's death, claim these as such a claim would be barred by estoppel.

18. The result is that we allow this appeal, set aside the judgment and the decree of the High Court, and restore that of the first appellate Court. In the circumstances of this case, we order that the parties will bear their own costs.