

(2014) 08 KAR CK 0172
In the Karnataka High Court
Case No : R.S.A. Nos. 1053/2009 and 1052/2010

Mahaboob Bi

APPELLANT

Vs

Sharfunnisa
 Sharfunnisa Vs Mahaboob Bi

RESPONDENT

Date of Decision : 14-08-2014

Acts Referred:

Succession Act, 1925 — Section 59

Citation : (2014) 4 AKR 682 : (2015) 4 RCR(Civil) 180

Hon'ble Judges : Jawad Rahim, J

Bench : Single Bench

Advocate : G.L. Vishwanath, Manasa and Sridevi, Advocate for the Appellant;
N.M. Sanaulla, Sridevi and G.L. Vishwanath, Advocate for the Respondent

Judgement

Jawad Rahim, J.—These two second appeals are directed against the judgment in R.A. 24/07 dated 29.6.2009 on the file of District and Sessions Judge, Ramanagar, whereby learned appellate judge while confirming the judgment and decree of the trial court in O.S. 5/94 decreeing the suit partly, has held plaintiffs to be entitled to 1/6th share each and 1st defendant to be entitled to half share in item No. 1 property. This judgment is assailed by the 1st defendant as also the plaintiffs in the suit.

2. R.S.A. 1053/09 is by Mahaboob Bi-1st defendant against dismissal of her appeal R.A. 24/07, while R.S.A. 1052/10 is by the plaintiffs against the judgment in Cross Objections Appeal 1/07.

3. I have heard learned counsel, Mr. G.L. Vishwanath appearing for the appellants in R.S.A. 1053/09 and Mrs. Sona Vakkund, learned counsel representing the appellants in R.S.A. 1052/10 and perused records in supplementation thereto.

4. From the elaborate arguments advanced by the learned counsel on both sides and reference made to the factual matrix by Mr. G.L. Vishwanath, it is seen the genesis of these second appeals is the claim by the respondents in R.S.A.

1053/09 (plaintiffs in the suit) seeking partition of two items of properties described in the schedule to allot unto them 1/4th share on the basis of intestate succession by inheritance according to Mahomedan law. The contextual facts needing reference are:

a) O.S. 5/94 was filed by them on the premises they (plaintiffs 1 to 3) are sisters, while the 1st defendant (appellant in R.S.A. 1053/09) is also their sister; the 2nd defendant Habeeb Bi is their mother. Their father-Abdul Khader had acquired certain properties during his lifetime amongst which property bearing Survey No. 60 measuring 2 acres 10 guntas situate in Kasaba Hobli, Bolappannahalli village, Ramanagar Taluk, was agricultural land. He also owned a residential house with RCC roofing and Mangalore tiles measuring east-west 40" and north-south 60" in Khatha No. 541/1727, Ijoor Mohalla, Ramanagar Taluk, more fully described as item Nos. 1 and 2 in the schedule.

b) Abdul Khader died intestate on 9.6.1993 at Ramanagar, leaving behind them and defendants to succeed to his estate according to Mahomedan law of succession. Thus the properties are divisible amongst them as also 2nd defendant in the ratio prescribed. They claimed each of them was entitled to 1/4th share out of 7/8th share while 1/8th had to be assigned to the 2nd defendant-their mother.

c) During the pendency of the suit, their mother died and her legal heirs who were brought on record continued the lis. The 1st defendant (appellant in R.S.A. 1053/09) entered contest; the 2nd defendant joined with her and they filed common written statement. It is material to note, upon the death of Habeeb Bi, since all legal heirs were not brought on record, a memo was filed requesting to delete her from the party array and it is not known in what circumstances the trial court has passed the order on 3.12.1996 deleting her from the proceedings. The 1st defendant remained in contest.

d) Traversing the plaint averments, she admitted the proximate relationship between herself and the plaintiff and the fact that they are the genetic children of Abdul Khader. She also admitted except plaintiffs and her, Abdul Khader did not have any male issue and thus the property had to devolve upon them.

e) With this prelude, she averred in the normal circumstances the property would be divisible according to Mahomedan law, but in the instant case her father during his lifetime had executed a will bequeathing the properties owned by him as it was his desire as evidenced from the registered will (Ex. D2) dated 28.8.1984. Under that bequest, she claimed her father had bequeathed unto her item No. 1; so far as item No. 2 is concerned, she claimed he had bequeathed one portion each to the plaintiffs and her as indicated in the indenture. Her substance of defense was, the bequest under the will was consented to after the demise of Abdul Khader by the plaintiffs which is evident from their conduct in consenting to transfer khatha in respect of the shares allotted to them and further not objecting to the revenue entries obtained by her in respect of item

No. 1 of the property in question. While contending thus, she disputed plaintiffs' assertion that there was demand by them to divide the properties; she denied either on 3.1.1994 or any other time plaintiffs had asked division of the properties from her mother and thus cause of action was generated to them. She questioned the maintainability of the suit on the ground that the estate of Abdul Khader devolved upon the plaintiffs and her in terms of the will dated 28.8.1984 and not under the general mode of division by inheritance amongst them. She claimed she has acquired absolute right as legatee in respect of item No. 1 and 1/4th share in item No. 2 in terms of the will. She imputed knowledge of the plaintiffs of the contents of the will and the fact that she had been exercising absolute right in terms of the will which became operational from the date of death of their father. She thus supported the will. She sought to support the material propositions in the written statement through ocular and documentary evidence and in this regard relied on the extract of khatha and revenue entries and permission obtained by her from the local municipal authorities for replacement of tiled roof, renovation of building and exercise of exclusive right of ownership to the knowledge of plaintiffs 1 to 3.

f) Based on the material propositions, learned trial judge framed the following issued for consideration:

- 1) Whether the plaintiffs prove that the suit schedule properties are the joint family properties of the plaintiffs and defendants?
- 2) Whether the defendants prove that Late Abdul Khadar has bequeathed the suit schedule properties through a registered will dated 28.8.1984 in favour of the plaintiffs and the 1st defendant?
- 3) Whether the plaintiffs are entitled for mesne profits as claimed?
- 4) Whether the suit is properly valued for the purpose of court fee and jurisdiction?
- 5) To what share if any, the plaintiffs are entitled to?
- 6) What order or decree?

and in the inquiry that ensued, 1st plaintiff-Sharifunnissa tendered evidence as PW 1 and relied on one document, i.e. power of attorney executed by other plaintiffs. The 1st defendant tendered evidence as DW 1 and examined two witnesses, Vasantha Aradhya (DW 2) and V.L. Mallegowda (DW 3), and placed reliance on 17 documents which include registered will executed by Abdul Khader (Ex. D2), RTC extracts (Exs. D3 to D5), tax paid receipts (Exs. D7 and 8), endorsement (Ex. D9), assessment extract (Ex. D10), photographs (Exs. E11 to 16) and receipt (Ex. D17).

g) Analyzing the evidence on record, learned trial judge opined plaintiffs have made out a case for division of item No. 1 property according to the law of inheritance, but so far as item No. 2 is concerned, opined division as proposed in

the will would prevail and in the result, decreed the suit partly, ordering division of property at item No. 1 assigning to 1st defendant 1/3rd share by virtue of the will-Ex. D2 and then ordered division of the remaining 2/3rd according to Mohamedan Law amongst plaintiffs and 1st defendant, taking note of the demise of the wife of Abdul Khader.

h) Aggrieved by the judgment of the trial court, 1st defendant preferred R.A. 24/07. Though the learned trial judge had favoured plaintiffs 1 to 3, they raised cross objections registered as Crob. 1/07. Learned appellate judge heard the parties in the appeal and cross objections and by the impugned judgment dated 29.6.2009, affirmed the judgment of the trial court though, of course, in the operative portion there are certain errors.

i) Assailing the judgment of the first appellate court in R.A. 24/07 and Crob. 107, the 1st defendant filed R.S.A. 1053/09, while plaintiffs are in R.S.A. 1052/10.

5. R.S.A. 1053/09 is admitted to consider the following substantial questions of law:

1) Section 118 of Mohammedan Law describes the limits of testamentary Power of a Mohammedan, viz., that he cannot dispose more than 1/3rd of his surplus estate unless the heirs consent thereto after the death of the Testator. In this light how should the consent of an heir be determined-expressly or by implication also?

2) Whether the 1st Appellate Court was right in concluding that merely because the Plaintiffs were not Attestors to the Will Ex-D2; they did not participate in its execution; nor had knowledge about it, could it be said that they had not consented to the bequest if such consent could be otherwise implied from surrounding circumstances?

3) The will Ex-D2 related to bequest of 2 items of property. With respect to one item assuming that an heir had consented by implication, could it be said that such consent was necessary for the other item of the property also or would a single consent bind the other item of property as well?

4) Both the Courts below having held that the Will Ex-D2 was proved by the Defendants, was it right in decreeing the suit of the Plaintiffs either in whole or in part?

5) Was it necessary to establish consent of an heir by showing that the Will was revealed or that any act such as filing of a joint application to the Municipality for obtaining Katha was essential and that in the absence of such material, consent could not be implied from the surrounding circumstances.?

Likewise, R.S.A. 1052/10 is admitted to consider the following substantial question of law:

Whether the court below was right in holding 1/3rd share of the property in favour of the respondent alone without the consent of other heirs as per Mohammadan

Law (Section 117 bequest to heirs)?

6. Mr. G.L. Vishwanath representing the 1st defendant-appellant in R.S.A. 1053/09 and Mrs. Sona Vakkund representing plaintiffs 1 to 3-appellants in R.S.A. 1052/10 have addressed elaborately in support of their respective contentions as urged before the court below and on the questions of law framed.

7. Before I advert to the factual and legal issues urged by Mr. G.L. Vishwanath, it is appropriate to refer to the facts not in dispute:

i) Abdul Khader was the owner of properties in item Nos. 1 and 2 of the schedule and died intestate on 9.6.1993. His death certificate at Ex. D1 is relied by the parties.

ii) He had during his lifetime executed a will on 28.8.1984 and had registered it as evidenced from Ex. D2. Under that bequest, he had indicated the mode of testamentary disposition of his estate.

iii) Though plaintiffs strongly relied on the alleged Panchayat on 3.1.1994, they have not explained why they obtained possession of their respective shares in item No. 12 property as indicated in Ex. D2.

iv) The 1st defendant was in physical possession and enjoyment of item No. 1 property and had obtained change of entries in revenue records to her name based on the bequest under Ex. D2. Plaintiffs did not produce any evidence either extracts from the revenue records or otherwise to show how the properties of Abdul Khader were dealt with after his demise on 9.6.1993.

8. Thus from all attending circumstances, it could be seen execution of will by Abdul Khader on 28.8.1984 was established by the 1st defendant through her ocular testimony and by examining the scribe, DW 2-Vasanthi Aradhya and attester to the will, V.L. Mallegowda. The trial court has accepted the evidence regarding execution of will by the testator-Abdul Khader and has in fact decided to act in terms of the will so far as division of property of item No. 1 is concerned, plaintiffs 1 to 3 did not question the said fact urged by the 1st defendant nor rebutted the evidence tendered by her witnesses about genuineness of the will. Needless to record that the will was a registered document and had lent credence to its authenticity and having been executed by the testator with free will.

9. The question which now narrows down for consideration in the appeal is:

Whether the bequest in favour of the 1st defendant bequeathing item No. 1 property in entirety is legally permissible in view of the embargo/restriction imposed by Section 117 of the Mohamedan Law?

Plaintiffs have used this provision as lethal weaponry available to them to defeat the bequest which is otherwise valid in favour of the 1st defendant. They contend as the bequest was not shown to be by their consent after the demise of the testator, to that extent the bequest which is more than 1/3rd is unsustainable

and the 1st defendant acquires no title. In fact the trial court had honoured the will keeping in mind the objections raised by the plaintiffs. In that the trial court had held the bequest in favour of the 1st defendant to the extent of 1/3rd in item No. 1 property as valid. Thus she gets 1/3rd by virtue of Ex. D2 and again by intestate succession she would get a share in the remaining 2/3rd. Plaintiffs are not satisfied with that.

10. Mr. G.L. Vishwanath would submit, as facts are not in dispute, the law on the subject has to be applied which is clear as of now that consent to the bequest of the property more than 1/3rd is legally permissible if the person claiming such right could show that consent has to be presumed by conduct of the parties and it need not be express. In short, he contends, even implied consent is permissible in terms of Section 117 and there need not be express consent in writing by the other heirs of the deceased. He has placed reliance on the following decisions in support of his contention:

1. Abdul Manan Khan Vs. Mirtuza Khan and Others,
2. Sri Allbux Lakkadahare Vs. Smt. Allabi, Smt. Hajrabi Jakati and Smt. Saliha (dead by L.R. Sri Safisayyad),
3. Md. Khalilur Rahman vs. Md. Fazlur Rahman.
4. Anarali Tarafdar Vs. Omar Ali and Others,
5. Mahomed Hussein Haji Gulam Mahomed Ajam Vs. Aishabai,
6. Huseni Begam Vs. Syed Mohammad Mehdi,
7. Ajit Kumar Nag Vs. General Manager (P.J.), Indian Oil Corporation Ltd., Haldia and Others,
8. Madan Gopal Kanodia Vs. Mamraj Maniram and Others,
9. C. Chenga Reddy and Others Vs. State of Andhra Pradesh,

He has teased out the evidence on record to contend except for a feeble attempt questioning the decree, plaintiffs have admitted to valid execution of the will. He would then submit, from the evidence it is established that 1st defendant, as to the knowledge of the plaintiffs and all concerned, remained in exclusive physical possession and enjoyment of item No. 1 property and had, in exercise of her right under the bequest, obtained even sanctioned plan from the local authorities and replaced roofing and modified the building. Plaintiffs 1 to 3 did not object to any such act, nor did they object to revenue records mutated in her name.

11. Learned counsel would then draw my attention to the admission of the plaintiffs that they and 1st defendant are in occupation of one portion each of item No. 2 property in terms indicated in Ex. D2-will dated 28.8.1984. He would submit,, from the evidence and grounds urged even in appeal, it could be seen, plaintiffs did not dispute the fact that they had occupied the respective portions in terms of the will and were enjoying possession and usufruct as owners, he

would submit, the finding of the trial court that the will is valid in respect of item No. 2 as it is assigned to each legatee her legitimate share according to Mohamedan Law accrues to the benefit of the 1st defendant. The will cannot be valid partly in respect of one property and invalid in respect of the remainder when it is accepted as a genuine testamentary disposition by the testator. He thus seeks dismissal of the suit and consequently reversal of the finding of the first appellate court.

12. In negation of these grounds, learned counsel for the plaintiffs-respondents in R.S.A. 1053/09 (appellants in R.S.A. 1052/10) would contend, at no time plaintiffs admitted genuineness of the will-Ex. D2; they claimed a share according to the law of succession and in this regard the trial court was required to consider only whether the plaintiffs had established genetic relationship between the owner of the property and the contesting parties. She would submit, neither the 1st defendant nor 2nd defendant disputed plaintiffs are daughters of Abdul Khader and that during his lifetime he had not disposed of his properties in any manner. She would submit, the will relied on by the 1st defendant no doubt is registered and even if it is construed as having been established as genuine, it confers no title on the 1st defendant to claim title to the property in entirety. She would submit,, admittedly parties are Mohammedans and a defined share should be given to each in terms of Islamic precepts. Abdul Khader having died without male issues leaving behind his wife who passed away during the pendency of the proceedings, the properties were equally divisible between the four daughters, viz., plaintiffs and 1st defendant. She would submit, the judgments of the first appellate court and trial court no doubt non-suit the 1st defendant, yet it is not in their interest. The courts below have presumed defendant is entitled to 1/6th share in item No. 1 property and remaining portion would be divided amongst the sisters. This is based on the so-called will which is not permissible. In other words, her contention is, the mode of division stated by the trial court is not legal; the property has to be divided into four equal shares amongst plaintiffs and 1st defendant.

13. Mrs. Sona Vakkund would further contend, when plaintiffs have sought for equal share, the trial court erred in apportioning their share depending on the bequest which is not valid in law. In this regard, she would submit,, even assuming Abdul Khader executed the will, since the bequest is more than 1/3rd, it is rendered invalid and unenforceable. She then commented on the evidence of DW 2-scribe to state he has admitted he does not know the provisions of Mohamedan Law when he drafted the document, and Abdul Khader was not keeping good health when he drafted the will. Besides, she would submit, had the courts below examined the will in the right perspective and applied the test of validity, the finding would have been different than what is now recorded. Even the attessor's testimony is sought to be questioned by the learned counsel.

14. Relying on Section 59 of the Indian Succession Act, she would submit, as the testator is shown to have attained 89 years at the time of execution of the will,

evidence establishing he was in good health and of sound mind was required which has not been laid before court.

15. Keeping in mind what is urged on both sides, I have re-appraised the evidence on record, even though this is a second appeal since questions of law are framed referring to such material.

16. I have in the preamble referred to certain admitted facts. The legal propositions emerging from the case laws cited at the Bar is also referred. Section 117 of the Mohamedan Law which is the provision that has been employed by the plaintiffs to non-suit the 1st defendant's claim, undoubtedly, needs reference and understanding though in its phraseology it is very clear. Section 118 refers to the limit of testamentary power, which envisages "a Mohammedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator."

17. Section 117 is used in this case as by this provision bequest to a heir is not valid unless other heirs also consent to the bequest after the death of the testator. In both the provisions it is material to note that "consent" referred to is not qualified with any pre-conditions or riders. The word "consent" in both these provisions is "consent" simpliciter. Thus it could be either express or implied. This means, "consent" is to the testamentary disposition by the deceased after his demise. Therefore by the language of this provision, it can be understood that "consent" need not be in the bequest itself or during the lifetime of the testator. The testator's will to bequeath his estate to his heir by will is not barred but it is valid only if it is consented to after his demise by other heirs. In this situation, we do not expect any consent by other heirs in the will itself; it has to be adjudged from the conduct of the parties after the death of the testator. Perhaps it is for this reason there is no indication in the provision that it could be express only. As the provision requires consent after the death of the testator, it could be from conduct or by other express consent.

18. In other words, "consent" could be implied or express and therefore, conduct of the parties gains importance. The case laws to which reliance has been placed in paragraphs supra to show long inaction on the part of other heirs to question the bequest in favour of one of the heirs, or acquiescing to the acts of the legatee under the will in enjoying possessing or usufruct of the property is construed as "implied consent" to the will, thereby rendering the bequest under Section 117 valid.

19. The second circumstance would be, despite knowledge of the testamentary disposition, if the other heirs do not question the bequest, it has to be inferred as "implied consent." Acting openly and adverse to the interest of other heirs by a person claiming to be the legatee under the will and inaction on the part of the heirs to question such acts is one such conduct which would show "consent."

20. "Consent" in Black's Law Dictionary is defined thus:

1. Agreement, approval or permission as to some act or purpose, esp. given voluntarily by a competent person; legally effective assent;
2. Consent is an affirmative defense to assault, battery and related torts as well as such torts as defamation, invasion of privacy, conversion and trespass.
3. Consent may be a defense to a crime if the victim has the capacity to consent and if the consent negates an element of the crime or thwarts the harm that the law seeks to prevent.

In Principles of the Law of Contract by William R. Anson, "consent" is described thus:

The consent [to a contract] is nonetheless "genuine" and "real" even though it be induced by fraud, mistake or duress. Consent may be induced by a mistaken hope of gain or a mistaken estimate of value or by the lie of a third person, and yet there is a contract and we do not doubt the "reality" of the consent.

Fraud, mistake and duress are merely collateral operative facts that co-exist with the expressions of consent and have a very important effect upon the resulting legal relations.

"Consent" defined - Two or more persons are said to consent when they agree upon the same thing in the same sense.

21. In the instant case, evidence would show that the 3rd plaintiff had applied for change of khatha in respect of item No. 2 property and obtained transfer in respect of 1/4th share in terms of the will and to seek such transfer, she relied on the will in question. This was sought to be produced by the 1st defendant through her application filed under Order XLVII Rule 27, C.P.C. which the appellate court has allowed, as seen from the observation in paragraph 19 of its judgment. By that additional evidence the 1st defendant has brought out that after the demise of Abdul Khader, the 3rd plaintiff had applied to the municipal authorities for transfer of khatha in respect of her 1/4th share acquired by her in terms of the will dated 28.8.1984. The first appellate court eschewed this evidence being of the opinion that factum of possession was not proved, but he could not have brushed aside such evidence because it is one such piece of evidence which shows 3rd plaintiff had not only knowledge of Ex. D2, but was also conscious of the manner in which the testator had disposed of his estate in favour of his legal heirs. This would also show she had accepted the genuineness of the will and had sought to derive benefit under the bequest.

22. So far as item No. 2 property is concerned, evidence establishes they have also obtained physical possession and enjoyment of their respective shares in terms of Ex. D2 and are in physical possession and enjoyment. So also is the case with the 1st defendant. Thus evidence on this point sufficiently establishes that each one of the heirs of Abdul Khader had accepted the mode of division of

item No. 2 in terms of the will. Therefore the question is, whether the bequest in favour of the 1st defendant could be treated as having been consented to by them.

23. Long inaction on their part to question it, the fact that they had not objected to the 1st defendant utilizing item No. 2 as her own, the fact that they did not object to the fact of improvement to the structure and the fact that they did not object to her obtaining transfer of khatha and change in revenue records in her name sufficiently establishes their "implied consent" which gives validity to the bequest even though it may be in favour of one of the heirs, in view of Section 117 of the Mohammedan Law. This is the only question of law arising for consideration and on facts there is no dispute.

24. Thus I am satisfied appellant-1st defendant had made out a case to prove Ex. D2 as valid based on the conduct of the parties which is sufficient in law to be construed as "implied consent," as required under Section 117 of the Mohammedan Law. Being of this view, I am satisfied the judgment and decree of the trial court so far as item No. 1 is concerned, needs to be interfered with.

25. In the result, the appellant in R.S.A. 1053/09 succeeds in her legal pursuit. R.S.A. 1052/10 is dismissed. The questions of law framed in the appeals are answered in favour of the appellant against the respondents. The judgment and decree in O.S. 5/94 on the file of Civil Judge (Senior Divn.) & JMFC, Ramanagaram, is set aside. The suit is dismissed so far as item No. 1 in the schedule is concerned, but the judgment and decree of the trial court so far as it relates to item No. 2 of the schedule is confirmed. Item No. 2 is held to be divisible amongst the plaintiff and defendants in terms of Ex. D2-will. As plaintiff and defendants are already in physical possession of their respective shares, the same is confirmed in terms of the will. In view of this finding, the judgment and decree in R.A. 24/07 is set aside. Considering the proximity of the relationship between the parties, I make no order as to costs.