
(2003) 01 AP CK 0009
In the Andhra Pradesh High Court
Case No : AS No. 84 of 1988

Md. Aliuddin Farooqui (died) by LRs. and Others	APPELLANT
Vs	
Mohd. Karamath Hussain and Others	RESPONDENT

Date of Decision : 28-01-2003

Acts Referred:

Citation : (2003) 3 ALD 528

Hon'ble Judges : B.S.A. Swamy, J;B. Seshasayana Reddy, J

Bench : Division Bench

Advocate : Mohd. Ghulam Hussain, for the Appellant; Vilas Afzalpurkar, for the Respondent

Final Decision : Dismissed

Judgement

B.S.A. Swamy, J.—Heard the learned Counsel for both the parties and perused the record.

2. Since there is no decided case on the present issue, we have considered the issue elaborately and the following judgment is rendered.

3. The judgment and decree of the Subordinate Judge at Sangareddy in O.S. No. 45 of 1982 passed on 31-8-1987 dismissing the suit for partition, the plaintiffs in the suit filed this appeal.

4. For the sake of convenience we refer the parties as arrayed in the suit.

5. The plaintiffs (7 in number) filed O.S.45 of 1982 against one Mohd. Vilayath Hussain seeking partition of the properties in A and B schedule properties and one ninth share in E schedule properties by metes and bounds and for separate possession. They also contended that they are the distant kindred of Mustafa Hussain along with Mohd. Vilayath Hussain being the children of one Mahaboobunnisa Begum late sister of the 1st defendant, i.e., Vilayat Hussain, the children of Raza Hussain predeceased consanguine brother of late Musatafa Hussain and they are entitled for a share in the property as claimed by them.

The defendant in the written statement contended that since Mahaboobunnisa Begum predeceased Mustafa Hussain she is neither a residuary nor a distinct kindred of late Mustafa Hussain and as such her children cannot claim any property inherited by him from the said person. During the pendency of the suit the defendant died and Defendants-2 to 5 were brought on record as LRs. On the above pleadings the Trial Court framed the following issues:

- (1) Whether the suit "A" to "F" plaint schedule lands allotted to the defendant in a compromise decree in O.S.3/70 on the file of the Addl. Dist. Judge, Medak dated 20.6.1979 as the son of late Raza Hussain who predeceased late Mustafa Hussain is joint Matruka property of the plaintiffs and the defendants.
- (2) Whether the plaintiffs are entitled to the extent of 1/3rd share in plaint "A" to "D" schedules and 1/9th share in plaint "E" and "F" schedules as the heirs of late Mahboobunnisa Begum the real sister of the Defendant No. 1?
- (3) Whether plaintiffs are in joint possession and enjoyment of suit lands as tenants in common?
- (4) Whether suit is within time?
- (5) Whether third parties mentioned in para 3(c) and (d) of the Written statement are necessary parties to the suit?
- (6) Whether the suit is correctly valued and Court fee paid is sufficient?
- (7) To what relief?

On behalf of the plaintiffs P.W.1 and P.W.2 were examined and Exs. A-1 to A-8 were marked. On behalf of the defendants the eldest son of late Vilayath Hussain (Defendant-1) was examined as DW.1 and Exs. B.1 to B.6 were marked as exhibits. The Trial Court having considered the oral and documentary evidence held that since Mahboobunnisa Begum predeceased Mustafa Hussain the children of Mahboobunnisa Begum (plaintiffs) are not entitled for any share in the property. While some issues were held in favour of the plaintiffs the other issues were held against the defendants. Aggrieved by the said judgment and decree the present appeal is filed.

6. The principle issue that arises for consideration in this case would be whether Vilayath Hussain can be treated as a distinct kindred or a residuary of Mustafa Hussain and even if Vilayath Hussain is considered to be a distinct kindred whether the children of Mahboobunnisa Begum can claim share in the properties inherited by him from late Mustafa Hussain.

7 As per the genealogy one Altaf Hussain had three sons and one daughter and the third son Mustafa Hussain seemed to have acquired vast properties. Admittedly, the father of Vilayath Hussain, Mr. Raza Hussain and another Riaz Hussain are not the full brothers of Mustafa Hussain, but only consanguine brothers i.e., brothers by blood relationship. Leaving Vilayath Hussain and Mahaboobunnisa Begum. Mr. Raza Hussain and Riaz Hussain leaving Akbar

Hussain predeceased late Mustafa Hussain and after some time Mahaboobunnissa Begum in 1955. Subsequently, Mustafa Hussain died in 1958 issueless leaving only one wife Naseema Begum and his sister Rashidunnisa Begum. Subsequently there seemed to be some litigation with regard to the inheritance of the property of Mustafa Hussain. We need not go into the details of that litigation. As far as, Vilayath Hussain is concerned, himself and two others claiming to be the legal heirs of the Mustafa Hussain filed O.S. No. 3/70 for recovery of the lands in possession of the tenants. The Court decreed the suit permitting him to recover the possession of one third of the properties held by late Mustafa Hussain, under the above judgment he became the legal heir of late Mustafa Hussain for 1/3 of his property. Now, the plaintiffs are seeking a share in that property. Admittedly, Raza Hussain had one son by name Vilayath Hussain and one daughter by name Mahboobunnisa Begum and she also died in 1955 i.e., much earlier to the death of Mustafa Hussain. Now, we are called upon to decide the inheritance of the property held by Mustafa Hussain.

8. It is an admitted fact that there is no joint family system under Muslim Law and as such no member of a family even if they reside jointly cannot claim a share in the property held by a Muslim as per Section 57 of the Principles of Mohammedan Law. To put it aptly, a member of a Muslim family cannot claim as a matter of right a share in the property held by a Muslim unless it is proved that the properties were acquired by pooling the energies of all the people concerned as per Section 57 of the Principles of Mohammedan Law. Admittedly neither Vilayath Hussain nor any other blood relation of late Mustafa Hussain were claiming property as the property acquired by late Mustafa Hussain was for the benefit of their family.

9. Now coming to the inheritance of the property of a Muslim, Section 41 of the Principles of Mohammedan Law deals with the devolution of inheritance. Section 44 deals with the distribution of a estate. Section 56 deals with the vested inheritance. Since these Sections throw light on the issue it is useful to extract the same:

"41. Devolution of inheritance :--Subject to the provisions of Sections 39 and 40, the whole estate of a deceased Mohammedan if he has died intestate, or so much of it as has not been disposed of by will, if he has left a will (Section 118), devolves on his heirs at the moment of his death, and the devolution is not suspended by reason merely of debts being due from the deceased (k). The heirs succeed to the estate as tenants-in-common in specific shares (1).

44. Distribution of estate :--Since the estate devolves on the heirs at the moment of the death of the deceased, they are at liberty to divide it at any time after the death of the deceased. The distribution is not liable to be suspended until payment of the debts.

56, Vested inheritance :--A "vested inheritance" is the share which vests in an heir at the moment of the ancestor's death. If the heir dies before distribution,

the share of the inheritance which has vested in him will pass to such persons as are his heirs at the time of his death. The shares therefore are to be determined at each death (y). See Section 41 above."

10. From a reading of the above three Sections it is seen that if a Muslim dies inter state the property devolves on his heirs at the moment of his death and any of the pre-deceased legal heir or heirs are not entitled for a share. u/s 56 of a heir of the deceased person got property on the death of his ancestor and if he dies before partition of the property the share vested remains intact and his heirs on his death. Hence to the extent of the claim of the defendants that the predeceased legal heirs of a Muslim person (i.e.,) Raza Hussain and Riaz Hussain who predeceased Late Mustafa Hussain cannot have a right over the property is sustainable and it is accordingly held In favour of the defendants.

11. As far as inheritance is concerned Section 61 of the Principles of Mohammadan Law reads as follows:

"61. Classes of heirs :--There are three classes of heirs, namely, (1) Sharers (2) Residuaries and (3) Distant Kindred:

- (1) "Sharers" are those who are entitled to a prescribed share of the inheritance;
- (2) "Residuaries" are those who take no prescribed share, but succeed to the "residue" after the claims of the sharers are satisfied;
- (3) "Distant Kindred" are all those relations by blood who are neither Sharers nor Residuaries (a)."

Section 63 of the Principles of Mohammedan Law deals with the sharers who are entitled for a share in the property and the extent of share they get on the death of a Muslim and Vilayath Hussain cannot be a sharer. Section 65 deals with residuaries. As per this section the residuaries are shown in a table annexed to the section. Table of Residuaries specifies the order of succession as per Sunni Law. As the parties are governed by Sunni Law, the same is extracted hereunder:

III- DESCENDANTS OF FATHER:

5. FULL BROTHER.

FULL SISTER-takes as a residuary with full brother, the brother taking a double portion.

6. FULL SISTER.- In default of full brother and the other residuaries above named, the full sister takes the residue if any, if there be (1) a daughter or daughters, or (2) a son's daughter or daughters h.l.s., or even if there be (3) one daughter and a son's daughter or daughters h.l.s. See Sir.pp.24-25.

7. CONSANGUINE BROTHERS.

CONSANGUINE SISTER- takes as a residuary with consanguine brother, the brother, taking a double portion.

8. CONSANGUINE SISTER.-In default of consanguine brother and the other residuaries above named, the consanguine sister takes the residue, if any, if there be (1) a daughter or daughters or (2) a son's daughter or daughters h.l.s., or even if there be (3) one daughter and a son's daughter or daughters h.l.s. See Sir.pp.24-25.

9. FULL BROTHER'S SON.

10. CONSANGUINE BROTHER'S SON.

11. FULL BROTHER'S SON'S SON.

12. CONSANGUINE BROTHER'S SON'S SON.

Then come remoter male descendants of No. 11 and No. 12, that is, the son of No. 11, then the son of No. 12, then the son's son of No. 11, then the son's son of No. 12 and so on in like order."

12. In view of the above table of residuaries. Admittedly Vilayath Hussain is the son of consanguine brother of late Mustafa Hussain. Hence, he has to be treated as a residuary and in the absence of any sharers the residuaries have to share the property in the line of succession as enshrined in Section 55 of the Principles of Mohammedan Law. In the case on hand, since there are no sharers and all are residuaries the 1st defendant being the son of Raza Hussain the consanguine brother of late Mustafa Hussain is entitled for a share in the property as a residuary. In the light of the above legal position, we do not find any merit in the contention of the learned Counsel for the appellant that Vilayath Hussain cannot be treated as a residuary but only to be treated as distant kindred. Hence, the plaintiffs are not entitled for a share in the property of late Mustafa Hussain since they are not shown as residuaries the table in any common category.

13. Assuming for argument sake that Vilayath Hussain has to be treated as distant kindred. u/s 68 distant kindred are divided into four classes and the children of consanguine brothers were not shown as distant kindred. The situation is further amplified in Section 69, which deals, with the rules of exclusion which reads as under:

"69. Rules of exclusion :--The first class of Distant Kindred comprises such of the descendants of the deceased as are neither Sharers nor Residuaries. The order of succession in this class is to be determined by applying the following two rules in order.

Rule (1)- The nearer in degree excludes the more remote.

Rule (2)- Among claimants in the same degree of relationship, the children of Sharers and Residuaries are preferred to these of Distant Kindred."

Admittedly, Vilayath Hussain is the son of consanguine brother Raza Hussain whereas the plaintiffs are the children of daughter of Raza Hussain. Hence, even if Vilayath Hussain and the plaintiffs are treated as distant kindred, under Rule

(1) of Section 69 , Vilayath Hussain happened to be a distant kindred of near degree than the plaintiffs, they are excluded from inheriting the property. This position is further amplified in Section 70, which deals with the order of succession. Even assuming for argument sake that the defendants and the plaintiffs fall under Item No. 6 of Section 70. Other descendants of the deceased in like order, the very section says that such each group in turn must be exhausted before any member of the next group can succeed. In other words even if Vilayath Hussain and late Mahaboobunnisa Begum are treated as one group being children of late Raza Hussain unless they are exhausted the plaintiffs cannot succeed over the property. Since Vilayath Hussain is very much alive and Mahaboobunnisa Begum predeceased even late Musatafa Hussain she cannot get any share in his property as per Section 41 of Mohammadan Law. Since late Mahaboobunnisa Begum predeceased even late Vilaayath Hussain the plaintiffs cannot claim any share in the property that was inherited by him as residuary of late Mustafa Hussain.

14. Learned Counsel for the appellants strenuously contended that even Vilayath Hussain cannot get any share by way of inheritance as per Section 53 of the Principles of Mohammedan Law. But that question cannot be gone into in this suit for the simple reason that Vilayath Hussain got the properties under a decree passed by a competent Court and as long as it is not set aside we cannot go into that question. At any rate, the appellants did not question the correctness of that judgment and on the other hand they filed the suit for partition for the properties inherited by Vilayath Hussain. Hence, we hold that the plaintiffs cannot blow hot and cold.

15. Viewed from any angle, we hold that the suit is devoid of merits. Though the Court below recorded the findings on different reasons they do not call for any interference by this Court in this appeal and hence the appeal fails and the same is dismissed. No costs.