

(1991) 09 MAD CK 0045
In the Madras High Court
Case No : Appeal No. 506/84

S. Kurshid Begum @ Basu and another	APPELLANT
Vs	
S. Ajaram Bi @ S. Hazaram Bibi and 5 others	RESPONDENT

Date of Decision : 20-09-1991

Acts Referred:

Citation : (1991) 09 MAD CK 0045

Hon'ble Judges : Venkataswami, J; Abdul Hadi, J

Bench : Division Bench

Advocate : V. Nicholas, for the Appellant; G. Nagarajan and S. Balaji, for the Respondent

Judgement

Abdul Hadi, J.—This appeal is by defendants 1 and 2. It is against the preliminary decree for partition granted in O.S. No. 564, filed by the two plaintiffs, who are respondents 1 and 2 herein, on the file of Sub Court, Coimbatore. The suit is for a declaration that the settlement deed dated 30.6.1967 in relation to the suit house bearing Door Nos.297 to 306, is void, for partition and separate possession of the plaintiffs 53 1/2 /72 shares in the suit property and for a consequential injunction. The court below has held that the abovesaid settlement deed was void and has granted the preliminary decree for partition as prayed for.

2. The plaintiffs' case as set out in the plaint may be summarised as follows:-

The suit property belonged to one M. Abdul Sathar and his younger brother M. Sathar, M. Abdul Sathar died on 18.1.1973 and M. Sathar. died on 15.5.1979. After the death of the elder brother, the younger brother M. Sathar became the owner thereof, as M. Abdul Sathar had no other legal heirs. Defendants 1 and 2 are the daughters of M. Sathar through his wife, the 3rd defendant. The 4th defendant is the second wife of M. Sathar and mother of the plaintiffs. She died during the pendency of the suit. The plaintiffs were in occupation of the suit properties along with their parents. At the time when the marriage of the 1st plaintiff was arranged, defendants 1 and 2 with the active assistance of their

mother, the 3rd defendant and other close relations, obtained the above referred to deed of settlement on 30.6.1967 from M. Abdul Sathar and M. Sathar behind the back of the children of the 4th defendant by means of misrepresentation, fraud and coercion. However, the settlement deed never came into force. It was not acted upon. The two brothers continued to exercise their rights of ownership and possession. They were paying the debts due on a mortgage of the suit property. The rents were collected by the 2nd plaintiff in 1976 and 1977 on behalf of his father. The alleged settlement deed did not satisfy the mandatory provisions regarding gifts laid down in the Mohamedan law. The plaintiffs were born out of lawful wedlock between M. Sathar and 4th defendant. The marriage between them was not registered but was regularised on 26.8.1967. The plaintiffs 1 and 2 are the legitimate children of M.Sathar. Defendants 1 and 2, without the knowledge of M.Sathar caused a notice to be sent to the plaintiffs in the name of M.Sathar on 6.6.1977. The said notice was properly replied. On 10.3.1977 M. Sathar cancelled the said settlement deed by proper document. Then, defendants 1 and 2, with the assistance of their mother, filed O.S. No.645 of 1975 on the file of the District Munsif's Court, Coimbatore. They also filed I.A.No.846 of 1977 for a temporary injunction, but it was dismissed. On appeal in C.M.A.No.209 of 1977 on the file of the District Judge, Coimbatore, it was held that the 2nd plaintiff was in possession of Door No.25/304 and 306. Ultimately the suit was decreed in favour of defendants 1 and 2 herein on 23.7.1979. The suit was only for permanent injunction. The question of title was not directly in issue in the said suit and the plaintiffs are filing the present suit for declaration and partition. The plaintiffs are in constructive possession of the suit properties. They are entitled 53 1/2 /72 shares in the suit properties. They are entitled to mesne profits also. Defendants 1 and 2 are making attempts to sell away the suit properties with intent to defeat the rights of the properties. Hence the suit.

3. The written statement of defendants 1 and 2 may be summarised as follows:- Ever since the above referred to registered settlement deed dated 30.6.1967, defendants 1 and 2 have exercised ownership of the suit properties as absolute owners thereof. The 2nd plaintiff without any right over the suit properties, attempted to interfere in the suit properties and hence these defendants filed the above referred to O.S.No.645 of 1977 for a permanent injunction and the suit was decreed. The judgment and decree in the said suit is binding on the plaintiffs herein. Further, the Bank of Tanjore Limited filed a suit against the 2nd plaintiff and M. Sathar in O.S.No.280 of 1978 and attached the present suit properties before judgment. The present defendants 1 and 2 filed petition praying to raise the attachment. After due enquiry, the title of these defendants to the suit properties was upheld and the attachment was raised on 29.1.1981. The plaintiffs are not the children of M.Sathar. There was no marriage between M.Sathar and the 4th defendant. Long before the alleged year of marriage, viz. 1967, the plaintiffs were born. That apart in the earlier proceedings, the Court has held that the 2nd plaintiff was not born to M.Sathar. The present suit is, therefore, hit by the doctrine of res judicata. The plaintiffs were never in

occupation of the suit properties at any time. The settlement deed is a true and valid document. There was no mischief, fraud and coercion played by these defendants. It was also acted upon. The donors never continued to exercise their rights of ownership and possession. They continued to reside in a portion of the suit house with defendants 1 and 2. There is no law to cancel any settlement deed by executing a sub-sequent document. So, the alleged document dated 10.3.1977 is void. The defendants 1 and 2, being the absolute owners of the suit properties, have got every right to deal with them.

4. Defendants 7 to 9 were exonerated and defendants 3, 5, 6 and 10 to 13 remained absent and set ex parts.

5. On the above pleadings, after framing necessary issues, the court below came to the following conclusions :-

(i) The marriage between M. Sathar and the 4th defendant is not satisfactorily proved. But, there is ample evidence that M. Sathar and the 4th defendant cohabited for a long time and begot children and that there is acknowledgment that the plaintiffs are children of M. Sathar. So, the marriage between Sathar and the 4th defendant was a valid one subsequently after consummation and cohabitation". In view of the acknowledgment by M. Sathar, the plaintiffs are his legitimate children and heirs.

(ii) The suit is not barred by res judicata

(iii) The recital in the settlement Ex. A3 enabling the above referred to settlers therein to reside in the suit houses indicates that the settlers have retained possession of the properties. But, as per Mohamedan Law, unless possession is delivered to the donee, the gift is not valid. So, since possession was not delivered, the said settlement deed Ex. A3 is not valid. The court came to the conclusion that possession was not delivered also on the ground that the 2nd plaintiff continued to remain in the suit houses even after the execution of the settlement deed. (iv) Ex. A24, whereby the abovesaid settlement deed was cancelled, is also not valid.

Therefore, the abovesaid decree has been passed by the trial court in favour of the plaintiffs.

6. The Learned Counsel for the appellants made the following submissions before us:-

(i) The decision of the Court below that possession has not been delivered to defendants 1 and 2, the donees under Ex. A.3 settlement is erroneous.

(ii) Likewise, the Court below also referred in holding that the plaintiffs are the legitimate children of the abovesaid Sathar.

(iii) The court below ought to have also held that the suit itself is barred by res judicata in view of the decree given in O.S. No.645 of 1977 and the order Ex. B.3 dated 29.1.1981 in the claim petition filed by defendants 1 and 2 viz., I.A.

No.549 of 1978 in O.S. No.280 of 1978 on the file of

Second Additional Sub Court Coimbatore. The Learned Counsel for the appellants also brought to our notice several authorities, which would be referred to in the course of this judgment.

7. The Learned Counsel for the respondents 1 and 2, on the other hand, refuted these submissions of the Learned Counsel for the appellants and supported the findings of the court below. He also relied on certain authorities which also would be dealt with in the course of this judgment.

8. We shall take first, the question of validity of the above referred to settlement deed Ex. A3 executed by M. Sathar and his brother Abdul Sathar on 30.6.1977, gifting away the suit properties to the appellants. No doubt, there is a vague plea in the plaint that defendants 1 and 2 obtained the abovesaid settlement deed "by means of misrepresentation, fraud and coercion." But, neither the particulars of the said misrepresentation, fraud and coercion were given in the plaint, nor any issue was framed regarding this vague plea of misrepresentation and coercion. So, there is also no finding on the said plea by the court below. The Learned Counsel for respondents 1 and 2 also did not advance any argument before us regarding the same.

9. The only ground on which the court below has held that the abovesaid settlement deed is not valid, is that despite the requirement of Muslim Law possession of the property, gifted under the abovesaid settlement deed by the abovesaid donors, was not given to the donees therein so as to complete the gift and make it valid under Muslim Law. To reach the conclusion that the said possession was not given, the Court below relies on the recital in Ex. A3 enabling the donors to reside in the suit houses till their life time. The relevant recital no doubt runs as follows:-

So, as per the abovesaid recital, there is only a reservation to the donors regarding the enjoyment of the properties gifted. By this alone it cannot be concluded that possession of the corpus of the property gifted has not been delivered. The abovesaid reservation relates only to the usufructs of the corpus. It has been held in MD Abdul Ghani v. MT. Fakhir Jahan A.I.R.1922 Privy Council 281 that where a donor makes a gift of the corpus of a property, but reserves the usufruct to himself and continues in physical possession of the property, the payment by the donee of Government revenue after the date of the gift in respect of the property amounts to constructive possession of the property on the part of the donee and the gift is completed by such possession. Then we find in Kadija Beevi v. Maria Ummal A.I.R.1958 Kerala 264(D.B) a Division Bench of the Kerala High Court, following an earlier decision of the same High Court, has held that the mere fact that the donor reserves the right to take the usufruct during his life time does not mean that possession is not given to the donees, and that such a reservation is quite consistent with delivery of possession of the properties to the donees. The Learned Counsel also brought to our notice a

recent decision of the Supreme Court in Jameela Begum Vs. The Controller of Estate Duty, Madras, . There in a gift by a Muslim, there was a stipulation that the income of the gifted property should be paid to the donor during his life time and thereafter to his wife during her life time. In that context, the Supreme Court came to the conclusion that the gift deed and the condition therein are both valid because the donor does not receive dominion over the corpus of the gifted property, but stipulates simply for and obtains a right to the recurring income during his life.

10. No doubt, the Learned Counsel for respondents 1 and 2 brought to our notice M. Babu v. Mrs. Khamirunnisa Begum 1990 T.L.N.J.298, where a Bench of this Court came to the conclusion that the gift document in question therein was invalid on the ground that possession was not delivered to the donee therein. The Bench therein, for coming to the abovesaid conclusion, relied on certain passages in AIR 1948 134 (Privy Council) and Beepathumma and Others Vs. Mohamed Nakoor Meera Rowther and Others, But the above referred to. 1990 TLNJ.298 or the, above referred two decisions relied there in, are not applicable to the present facts. In all those decisions it was found that there was reservation of dominion over the corpus of the property gifted since the donor was given the right to possess the property gifted and enjoy the same till his life time even after making the gift. That is why it was held that there was no delivery of possession and the gift was not complete. But, the present case as already stated, is different since there is reservation only to the enjoyment of the property gifted by allowing the donors to live in the said property till their life time. This makes all the difference, further, it should also be noted that immediately after the abovesaid extracted recital in Ex. A3, it is stated as follows:-

In fact in Jameela Beevi and Others Vs. Sheik Ismail, a Bench of this Court has also held that reservation of a right to enjoy the income, though ordinarily called a life estate, does not militate against the validity of the gift because the corpus of it is absolutely given over to a named individual and the condition whereby the income should be enjoyed either by the donor or by his nominee does not detract from or violate the essence of a valid gift. In fact, in the above referred to 1990 T.L.N.J. 298, the above referred to Jameela Beevi and Others Vs. Sheik Ismail, was considered and it was held that on the facts of the case in the above referred to 1990 T.L.N.J. 298, the decision in the above referred to AIR 1979 Madras 193 was of no application. Further, it should also be noted that in the above referred to 1990 T.L.N.J. 298, there was no mutation in the registry after the gift, and taxes were also paid only in the name of the donor. But, in the present case, there is evidence to show that there was mutation in the registry and the taxes were paid by the donees. The relevant evidence can be gathered from the recitals in Ex. B1 the certified copy of the judgment in the above referred to previous suit O.S. No. 645 of 1977. In paragraph 7 of the abovesaid judgment, various documents have been referred to which will clearly show that possession has been transferred to the donees. Those documents, in relation to

the suit property are, property tax receipts, demand notices for property tax, notice issued by the Authorities under the Urban Land Tax Act, receipts for payment of Urban land tax, electricity bills and receipts for payment of water tax all in the name of the donees only, for a long number of years ever since the abovesaid gift was made. Though the abovesaid documents referred to in Ex. B1 are not marked as exhibits in the present suit, we can take into consideration the references to those documents as found in Ex. B1 judgment, particularly because the Learned Counsel for respondents 1 and 2 could not point out to us that there was at least a suggestion to witnesses examined on behalf of the plaintiffs that those references in Ex. B1 were not correct. All these apart, the abovesaid settlement deed Ex. A3 itself makes one other recital also thus:-

Thus, there is a declaration in the deed of gift itself that possession has been given. This will Certainly bind the persons who claim to be the heirs of the donors, viz., the plaintiffs. No doubt such a declaration is not conclusive. (Vide Mulla's Mohomedan Law S. 150(4) at page 158, eighteenth edition). But, the plaintiffs have not displaced the presumption that arises in view of the abovesaid declaration. Even assuming that the plaintiffs continued to reside in the suit house even after the gift under Ex. A3, it will not prove that possession was not delivered to the donees. They were residing in the suit property even prior to the death of M. Sathar which took place only on 15.5.1979 nearly 12 years after the settlement. That is only permissive physical possession. It is not necessary for the donees to physically drive them out from the suit house after the settlement, to establish that there was delivery of pos-session to them. Further, taking possession of the subject matter of the gift by the donee may be either actual or constructive in order to complete a gift.

11. Therefore, the court below erred in holding that there was no delivery of possession pursuant to the above gift deed. Therefore, the abovesaid gift is complete and perfectly valid. On the other hand, the subsequent cancellation of the gift deed by the donor alone is bad. Under the Muslim Law, after the gift is complete, that is, once possession is delivered, nothing short of a decree of a court is sufficient to revoke the gift. (Vide S. 167(4) of Mulla's Mohomedan Law, eighteenth edition, page 180). Therefore, in view of the fact that Ex. A3 settlement is valid, the suit has to be dismissed on this ground alone.

12. However, since the other points stated above were also dealt with in the suit, we shall deal with those points also. Taking the above referred to question of res judicata the court below has held that in view of the earlier suit O.S. No. 645 of 1977 being an injunction suit, its decision cannot operate as res judicata to the present suit. The earlier suit was filed by the defendants 1 and 2 herein against the 2nd plaintiff herein (and not the 1st plaintiff herein also) praying for a permanent injunction restraining him from interfering with the possession of the suit property by defendants 1 and 2 herein. No doubt, there was only one issue in the said suit, viz., whether the plaintiffs are entitled to injunction as prayed for? But, the Learned Counsel for the appellants relied on a very recent decision

reported in *C. Arumugathan v. S. Muthusamy & others* 1991-1-L.W.63 where in it has been held that the decision given in a suit for bare injunction also can operate as *res judicata* to a later suit based on title, if the question of title was directly and substantially in issue in the former suit. No doubt in the former suit, viz., O.S. No. 645 of 1977 there was no specific issue regarding title. However, in the written statement therein there was a specific denial of title of the plaintiff therein. It was specifically alleged therein that the abovesaid settlement deed dated 30.6.1967 was void and the plaintiffs therein had nothing to do with the suit properties. On the abovesaid defence plea taken, the Court, in the said suit, went into the question of title also and upheld the validity of the said settlement deed. Therefore, we think that the said decision would operate as *res judicata* to the present suit so far as the 2nd plaintiff alone, since he alone was a party in the earlier suit and not the 1st plaintiff, so far as the 1st plaintiff is concerned, there will be no *res judicata*. The Learned Counsel for the respondents 1 and 2 also argued that in view of the above referred to Ex. B3 order in I.A. No. 539 of 1978 also the present suit is barred on the same principle of *res judicata*. The said I.A. was filed in O.S. No. 280 of 1978 by a bank against the 2nd plaintiff and M. Sathar for recovery of some amount and an order of attachment before judgment was made in the said suit, attaching the present suit property. Thereafter, the abovesaid I.A. was filed by defendants 1 and 2 herein claiming the suit property as their own and not the property of defendants therein and by the abovesaid order Ex. B3, the attachment was vacated on the ground that the property was that of the claimants therein, viz., defendants 1 and 2 herein, on the basis of the above referred to Ex. A3 settlement deed. But the said order will not operate as *res judicata* in respect of the present suit since in the abovesaid I.A. the abovesaid bank and M. Sathar alone were respondents and not the plaintiffs herein.

13. Then coming to the legitimacy question, we have to see whether the plaintiffs are the legitimate children of M. Sathar. No doubt, there are documents, wherein M. Sathar has acknowledged the plaintiff as his children. But, in view of the fact that the marriage between M. Sathar and 4th defendant, the mother of the plaintiffs is disproved in the present case, there is no scope for application of the principle of acknowledgment embodied in the Mohamedan Law. It is settled law that the Muslim Law of acknowledgment of parentage with its legitimating effect has no reference whatsoever to cases in which the illegitimacy of the child is proved and established by reason of marriage necessary to render the child legitimate being disproved. The doctrine relates only to cases where either the fact of the marriage itself or the exact time of its occurrence with reference to the legitimacy of the acknowledged child is not proved in the sense of the law as distinguished from disproved. In other words, the doctrine applies only to cases of uncertainty as to legitimacy. (Vide *Mohammed Allahabad v. Muhammad Ismail* (1888) 10 AII. 289, and S. 342 at page 358 of Mulla's Mohamedan Law, eighteenth edition). In this connection, it has to be noted that the Evidence Act defines the terms "proved" "disproved" and "not-proved" as follows:-

"Proved. A fact is said to be proved when after considering the matters before it, the court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.

"Disproved". A fact is said to be disproved when, after considering the matters before it, the court either believes that it does not exist, or considers its non-existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does not exist.

"Not proved". A fact is said not to be proved when it is neither proved nor disproved.

The present case will come only under the definition of the term "disproved" and hence it will not fall under the term not proved in view of the following reasons: One document relied on by the plaintiffs to prove the marriage is Ex. A-9 extract of the marriage register dated 26.8.1967. The court below itself points out that there are many corrections in this extract and that though two witnesses have signed in the register, the plaintiffs have not examined them to speak about the marriage. It also points out that the plaintiffs had not also summoned the original marriage register. All these apart, Ex. A9 only recites that the alleged marriage between M.Sathar and the 4th defendant took place on 26.8.1967. It is recited there in as follows:-

This is a statement made by M.Sathar. Later, in the same document, the person who solemnized the alleged marriage states as follows:-

But, if the marriage has taken place only in 1967 as found in Ex. A9 the plaintiffs cannot claim to be the legitimate children born out of the said marriage, since they were born long before the said marriage admittedly. Admittedly, the 2nd plaintiff was born on 5.6.1946 itself and the 1st plaintiff was born about 4 years earlier. But, it is contended by the Learned Counsel for the respondents 1 and 2 that the marriage between M.Sathar and the 4th defendant was celebrated not in 1967 but long back earlier and since it was irregular then, it was only regularised in 1967 as evidenced by Ex. A9. This cannot be accepted since Ex. A9 does not say so. That apart, though the plaintiff say about this irregularity in the marriage that had taken place earlier, it does not say what was that irregularity, that could be set right subsequently. So, we cannot accept this contention. Further, as sought to be pointed out by the trial court also, no independent witness has been examined to speak about the marriage between M. Sathar and the 4th defendant. No doubt, Ex. A24 cancellation deed by M. Sathar refers to the mother of the plaintiffs though she is not referred to by name). But, it must be noted that this document has come into being after the dispute has arisen between the parties. In none of the earlier documents filed by the plaintiffs, there is such reference. That apart in the original settlement deed A3, the statement made by M. Sathar was entirely different. There it was stated as follows while referring to defendants 1 and 2:-

This statement only shows that as on 30.6.1967 there were no other legitimate children to M. Sathar. Therefore, we have only to hold that the marriage has been disproved. No doubt, the Learned Counsel for the respondents 1 and 2 relied on Mohd. Amin v. Vakil Ahmed 1953 1 M.L.J. 6 S.C.). But, the question of acknowledgment was not considered at all in the said decision and so, it has no application. Syed Amanullah Hussain v. Rajammal 1977 I AWR 123 cited by the Learned Counsel for respondents 1 and 2 only reiterates what was decided in the above referred to (1888) 10 A11.289. Therefore, there is no scope for application of the doctrine of acknowledgment.

14. Further, it has also been held in Mohd.Khan v. Ali Khan AIR 1981 Madras 209 :94 L.W 97 that where a child is proved to be born prior to the marriage, the principle of legitimacy by acknowledgment is not applicable. This decision will also apply to the present case since even assuming that a valid marriage took place in 1967 as alleged in Ex. A9, the plaintiffs who were born much earlier cannot be treated as legitimate children of M. Sathar. In the result, the appeal is allowed, the judgment and decree of the trial court are set aside and the suit is dismissed. However, in the circumstances of the case. No costs.

This Appeal having been posted this day for being mentioned in the presence of the aforesaid advocate, the court delivered the following judgment:-

Venkatasami & Abdul Hadi, JJ.

At the instance of the Office, the matter is posted again before us. As the suit was filed by the respondents as indigent persons, the question of payment of court fee arises now. The appeal is now allowed and consequently, the plaintiffs are directed to pay court fee payable on the plaint.