

(2009) 09 AP CK 0016

In the Andhra Pradesh High Court

Case No : City Civil Court Appeal No. 96 of 2002

Syeda Afsar Quadri

APPELLANT

Vs

Syed Sarwar Biabani (died) per LRs. and Others

RESPONDENT

Date of Decision : 22-09-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Evidence Act, 1872 — Section 91
Registration Act, 1908 — Section 17(1), 49
Stamp Act, 1899 — Section 36

Citation : (2010) 1 ALT 645

Hon'ble Judges : B. Chandra Kumar, J;A. Gopal Reddy, J

Bench : Division Bench

Advocate : Mohd Abdul Khader and Pratap Narayan Sanghi, for the Appellant; M. Basith Ali Yavar, for Respondent No. 2, K.V. Bhanu Prasad and K. Narasimha Chari, for Respondent Nos. 5 to 10, for the Respondent

Final Decision : Dismissed

Judgement

A. Gopal Reddy, J.—This regular appeal u/s 96 of CPC by the plaintiff is directed against the judgment and decree of the VII Senior Civil Judge, City Civil Court, Hyderabad made in O.S. No. 1238 of 1996, dated 21.09.2001 whereby the suit filed for partition has been decreed partly in respect of "A" schedule properties as per the terms of Ex.B.7 and also for division of golden jewellery kept with 3rd defendant by the father of parties in the ratio of 1/5th for the plaintiff and 2/5th each for defendants 1 and 2, and with further direction to the defendants 1 and 2 to pay a sum of Rs. 60,000/- to the plaintiff within two weeks.

2. For the sake of convenience, the parties are hereinafter referred to as their array before the trial Court.

3. Plaintiff is the sister of defendants 1 and 2 and they are the children of late Syed Ghulam Ahmed Biabani and Mrs. Amtul Karim, who died on 6.11.1993 and 17.11.1989 respectively. The plaintiff instituted the above suit alleging that her

parents left Matruka of Immovable and moveable properties at Hyderabad and Khazipet, Warangal as detailed in the annexed schedules of properties, and that on the death of the parents, those properties are devolved upon the three children i.e. the plaintiff and defendants 1 and 2. In addition to those properties, their father kept golden ornaments in the custody of his maternal nephew i.e. defendant No. 3, and that the said ornaments are part of matruka and liable to be divided among the plaintiff and defendants 1 and 2 as per the Mahomedan Law. It is also alleged that their father left his bank account in the State Bank of Hyderabad, Dabeerpura branch at Hyderabad, and that the defendants 1 and 2 be directed to disclose the withdrawal, if any, made by them from the said account. According to the plaintiff, defendants 1 and 2 and their father entered into an agreement of sale of dry land of Ac.5.37 gts. in various survey numbers on 9.6.1993 in favour of defendant No. 4 for a consideration of Rs. 7,87,500/-, and that defendant No. 4 paid an advance of Rs. 2 lakhs to the father of the plaintiff and defendants 1 and 2, and that she is entitled to her legal share in the balance sale consideration of Rs. 5,87,500/- due and payable to her father. The plaintiff and defendants 1 and 2 belong to Hanafi School of Muslim law and their respective shares are 1/5th to plaintiff and 2/5th to each of the defendants 1 and 2. When the plaintiff called upon the defendants 1 and 2 through legal notice dated 2.11.1995 for mutual settlement and apportionment of Matruka properties as per their legal shares, they refused to do so. Defendant No. 1 denied the right of the plaintiff in the joint Matruka property while the defendant No. 2 got returned the legal notice through the postman. Defendant No. 4, who received the legal notice did not turn up and she learnt that he is making underhand dealings with defendants 1 and 2. Hence, the suit.

4. Defendant No. 1 filed a written statement admitting the relationship but denying the allegation that the properties left by their father are Matruka properties and the right of plaintiff to claim the partition. This defendant is enjoying the properties mentioned at serial No. 2, 3 and 4 of schedule "A" properties with absolute right by virtue of family settlement entered into among this defendant, defendant No. 2 and their father in the year 1973 (1993). According to him, he is unaware of the golden ornaments that were kept in the custody of defendant No. 3. In pursuance of a family settlement made by their father, plaintiff was given one lakh in the year 1973 (1993) in the presence of elders in lieu of her share in the properties, and that the plaintiff having received the entire amount kept quiet since all these years. It is his case that in order to avoid any dispute among the plaintiff and defendants 1 and 2, their father expressed his intention to make family settlement among his heirs as such this defendant, plaintiff and defendant No. 2 had agreed for the same, and that in pursuance of the acceptance, their father made a family arrangement in the year 1973 (1993) which was reduced into writing and attested by one V. Srirama Chandra Murthy. As per the terms of the said settlement, plaintiff was given an amount of Rs. 2 lakhs towards her share, and that by receiving the said amount the plaintiff openly declared in the presence of their father that she would not

claim any right in respect of the moveable or Immovable properties in view of receipt of the said amount. Just before the death, their father used to stay with defendant No. 1 at Dabeerpura and he called upon the defendants and plaintiff and expressed his intention to settle the house property situated at Dabeerpura for which, the plaintiff and defendants 1 and 2 have accepted and as per the settlement, their father paid huge amount to the plaintiff in lieu of her share, in the presence of Rizwana and other elders, before whom, the plaintiff having received the said amount through cheque expressed and declared that she had no right in respect of the house situated at Dabeerpura. In view of said settlement, this defendant and defendant No. 2 are exclusively entitled to equal rights in respect of the house situated at Dabeerpura. At the time of death of their mother, Sharefunnisa begum Manjoor, the cousin of mother of this defendant, removed the golden and silver ornaments from the dead body of their mother and gave them to the plaintiff for safe custody and that apart, their father had also handed over golden bangles worth of 20 Tolas to the custody of plaintiff, and that in the suit schedule, those ornaments were not shown, which are in her possession. The suit is filed only to harass this defendant.

5. Defendant No. 2 filed a separate written statement stating that the golden ornaments are kept in the custody of defendant No. 3 on the day of death of their father. He admitted about his parents leaving behind items 1 to 5 of "A" schedule properties and B schedule moveable properties. According to him, in respect of property mentioned as item No. 5 i.e. the dry land to an extent of Ac.5.25 gts. of Khajipet, himself, his father and defendant No. 1 entered into an agreement of sale on 9.6.1993 with defendant No. 4 and received an amount of Rs. 2 lakhs being advance consideration and out of that, Rs. 50,000/- was paid to defendant No. 1; Rs. 1.5 lakhs was with his father from which, Rs. 1 lakh was paid to the plaintiff towards her share through a cheque, dated 25.6.1993 and therefore, she cannot claim any right over the said land. Since a family settlement has already been arrived among the parties, he has no objection to enjoy their respective properties as per the said settlement, which was already acted upon.

6. Defendant No. 3 filed a written statement admitting the custody of the gold ornaments that were given by the father of plaintiff, defendants 1 and 2 weighing about 1 1/2 Tolas, mentioned against i, ii, iii and iv of serial No. 8 of schedule "B" of the plaint. According to him, after the death of Mr. Syed Ghulam Ahmed Biabani, he called upon the plaintiff and defendants 1 and 2 to come together and take the custody of the gold ornaments, but so far, they have not complied with the same.

7. On the above pleadings, the trial Court settled the following issues for trial:

1. Whether the plaintiff is entitled for partition of "A" and 13" schedule property and 1/5th share?
2. To what relief?

8. In order to prove the case, the plaintiff herself examined as P.W. 1 and marked the copy of legal notice as Ex.A. 1. Defendant Nos. 1 and 2 themselves examined as D.W.1 and D.W.2 and marked Exs.B.1 to B.8 on their behalf.

9. The trial Court after analyzing the oral and documentary evidence, on issue No. 1 held that Ex.B.1 contains the acceptance and signature of plaintiff whereunder she agreed for receiving Rs. 1,60,000/- which was paid to her and after the demise of their father on 6.11.1993, to avoid any disputes among themselves, another document of settlement was written under Ex.B.7 on 13.2.1994 in pursuance of elders, which was signed by the plaintiff, defendants 1 and 2, whereunder, the Afzal Manzil, item No. 2 of the schedule, four mulgies of item No. 4 of the schedule, a piece of land situated opposite to Afzal Manzil under which the property left by their parents were agreed to be divided. As per the settlement under Ex.B.7, defendant 1 is to get item No. 2 of the schedule "A" house called as "Afzal Manzil" at Khazipet, four mulgies in item No. 4 of schedule "A" property, the land situated opposite to Afzal Manzil and a land which is in the name of defendant No. 2 at Khazipet and Rs. 60,000/-from the balance sale consideration of item No. 5 of schedule "A" property. Whereas, defendant No. 2 is entitled to item No. 3 of schedule "A" property which is the old house near to Afzal Manzil at Khazipet and the house at Dabeerpura, Hyderabad described as item No. 1 of schedule "A" property. The plaintiff is to get one mulgi in the item No. 4 of schedule "A" property situated at Khazipet, a small house described as item No. 3 of schedule "A" property and an amount of Rs. 60,000/-. It was observed that the essential dispute is with regard to item No. 2 and 3 houses, item No. 4 mulgies at Khazipet and item No. 1 house at Dabeerpura, Hyderabad. There is no denial of the fact that the land described as item No. 5 has already been sold to defendant No. 4 during the life time of father of the parties, of-course, under an agreement of sale and after the death of their father, the defendants 1 and 2 stated to have executed the sale deeds and only some balance amount is with the defendant No. 4. It was observed that once the plaintiff admitted in clear terms that Ex.B.1 was signed by her, the genuineness of Ex.B.1 is established and therefore, she cannot go back from what she agreed therein.

10. Even though as per Ex.B.1, the plaintiff agreed that she would receive only Rs. 1,60,000/- in full quittance of her right, and that Rs. 1 lakh was already paid and only Rs. 60,000/-remained to be paid, still the defendants 1 and 2 agreed to give her one mulgi together with the rear land, which is one of the mulgies of item No. 4 of schedule "A" property and also a house bearing No. 24-3-4 described as item No. 3 of schedule "A" properties apart from the amount of Rs. 60,000/-. Therefore, it was held that the plaintiff and the defendants have to partition "A" schedule properties as per the terms agreed by them under Ex.B.7 and hence, the plaintiff is not entitled to claim 1/5th share in all those "A" schedule properties. With regard to the moveable articles which are described as schedule "B" properties, it was held that the plaintiff and defendants 1 and 2 are to share those properties in the ratio of 1/5th by the plaintiff and 2/5th each by

the defendants 1 and 2. With regard to the gold and jewellery which is described as item No. 8 of "B" schedule, it was held that the parties should approach defendant No. 3 who should divide the same in the ratio of 1/5th to the plaintiff and 2/5th each to the defendants 1 and 2 with a further observation that if there is any disagreement, defendant No. 3 shall deposit the said gold jewellery into the Court for passing further orders. The claim of the plaintiff for rendering the account in respect of the rents collected from the mulgies of item No. 4 of "A" schedule properties was rejected. The suit was decreed in the above terms. Questioning the correctness of the said decree, the present appeal is filed by the plaintiff.

11. Sri P. Narayan Sanghi, learned counsel appearing for the appellant-plaintiff contended that in reply to the suit notice- Ex.A.1, the defendant No. 1, under Ex.B.6, claimed settlement of the properties between the parties, wherein it is his specific plea that the family settlement is of the year 1993, but the so called family settlement has not seen the light of the day nor it was filed into the Court. Exs.B.1 and B.7 are not admissible in evidence for want of registration and therefore, any division of the properties made thereunder is invalid and not binding on the plaintiff. Exs.B.1 and B.7, under which the properties sought to be transferred, do not convey any title for want of registration. Under Ex.B. 1 the house belongs to mother of parties is sought to be partitioned, but the same is contrary to Section 63 of Mahomedan Law. When both the brothers have not given their consent for distribution of properties under Ex.B.1, the same cannot be relied upon. For the said proposition, the learned counsel placed reliance on Vazeer Bee and Another Vs. Putti Begum, ; Damodar Kashinath Rasane Vs. Shahajsdibi and Others, ; and Imamul Hassan Choudhary Vs. State of Bihar and Others, It is contended that in the absence of any mention of settlement as in Exs.B.1 and B.7 in the written statements and when Ex.B.7 does not deal with the land to an extent of Ac.5.37 gts. described as item 5 of schedule "A" in the plaint, the plaintiff is entitled for partition of 1/5th share in the said property as the defendants failed to establish that the said property is conveyed to defendant No. 4 under a sale deed during the life time of their father.

12. Per contra, the learned counsel appearing for the respondents 1 and 2 contended that after decreeing the suit, in pursuance of Ex.B.7 settlement, the parties received the gold ornaments on 10.4.2003 and therefore, the dispute now is only with regard to the schedule "A" properties. It is submitted that item 5 of schedule "A" properties is sold by the defendants 1 and 2 and their father during his lifetime in favour of defendant No. 4 on 19.6.1993. To the terms under Ex.B.1 agreement to settle the properties, dated 23.6.1993, plaintiff specifically gave her consent and now she cannot turn around and dispute the same. Item 1 of schedule "A" properties is given to defendant No. 2; items 2 to 4 of schedule "A" properties are given to plaintiff as well as defendant No. 1. On the death of father of the parties, Ex.B.7 settlement was drafted by the husband of the plaintiff, which was signed by the plaintiff, defendant Nos. 1 and 2 agreeing to share the properties as per the desire of their father. As per Ex.B.7 settlement,

Rs. 60,000/- was already deposited as per the wish of father of the parties under Ex.B. 1 and Rs. 1 lakh was already paid to the plaintiff, which was also been admitted by her during the cross-examination. Therefore, once Exs.B.1 and B.7 are acted upon and when the plaintiff has not raised any objection for marking of Exs.B. 1 and B.7 it is not open for her now to contend that those documents are inadmissible in evidence for want of registration. To buttress the said submission, reliance is placed on Kale and Others Vs. Deputy Director of Consolidation and Others, ; Roshan Singh v. Zile Singh AIR 1988 SC 881 ; and Siniginieedi Hymavathi and Another Vs. V. Nageswara Rao and Others,

13. In reply to the above submissions, learned counsel for the appellant submitted that the land to an extent of Ac.5.37 gts. has not been mentioned either in Ex.B.1 or in Ex.B.7 and though a partition was pleaded in 1973 between the father of the plaintiff, defendant No. 1 and 2, the same has not been filed, which discloses that the said property has been suppressed by the father and defendants 1 and 2 and therefore, the appellant is entitled to 1/5th share in the said property. Further, it is contended that as per Mahomedan Law, a Muslim cannot bequeath more than 1/3rd of his property either in favour of a stranger or his heirs when there are heirs left by him. It is contended that a son/daughter does not have any right or interest over the property in the life time of his/her father and they acquire right only in the event of death of his/her father and therefore, since the bequeath made by the father of the parties under Ex.B.1 is in excess of 1/3rd of his estate, the whole bequeath becomes invalid.

14. In view of rival submissions as referred to above, the only point that arises for consideration in this appeal is "whether or not the plaintiff is entitled to 1/5th share in the "A" schedule properties as claimed by her?

15. The plaintiff who examined herself as P.W. 1 deposed that all the schedule properties are left by her father, and that defendant No. 1 is in occupation of Afzal Manzil at Khazipet, Warangal and another small house is in occupation of a tenant. There are five mulgies near Regional Engineering College, Khazipet, Warangal occupied by the tenants and their father during his lifetime used to collect the rents from the tenants and after his death, defendant No. 1 has been collecting the rents. She denied about the family settlement by her father in 1973 and also denied of being given Rs. 1 lakh or Rs. 2 lakh by her father in lieu of her share. She stated that there was no settlement made by her father during his lifetime in respect of the house situated at Dabeerpura. In the cross-examination, she admitted that there was two pieces of land and Ac.5.37 gts. of land is Dhanbadi (cultivate land) in Khazipet village and the other land was behind the five mulgies on Dargah road, which is dry land. After the death of their father, there were oral talks among herself, defendant No. 1 and 2. The house other than Afzal Manzil which is known as Chota-Ghar is in possession of defendant No. 1. The said house is situated nearby Afzal manzil and two houses intervening between Afzal Manzil and Chota-Ghar. During the lifetime of their father, defendants 1 and 2 were living separately. She admitted that Ex.B.1 bears

her signature and Ex.B.2 is the translation of Ex.B.1. She denied the suggestion that she has not signed any document dated 13.2.1994 (Ex.B.7) and also denied the suggestion that no settlement in respect of the properties left by her parents was made after the death of her father. She admitted that she does not know whether her father executed the agreement of sale in respect of item No. 5 of "A" schedule properties in favour of defendant No. 4. She also admitted that her father gave her Rs. 1 lakh and Rs. 2 lakh each to the defendants 1 and 2. She denied the suggestion that her father did not gave Rs. 2 lakh to defendant No. 2 and also denied the suggestion that after the death of her father there was a settlement and according to that settlement, the property is to be partitioned among the plaintiff and defendant No. 1 and 2. She denied the suggestion that there was a settlement of the property and it was not acted upon by the parties.

16. Defendant No. 1, who was examined as D.W.1 admitted in the cross-examination that item No. 5 of "A" schedule properties which is dry land admeasuring Ac.5.00 belonged to their father and that himself, defendant No. 2 and their father equally partitioned the said land and sold it to defendant No. 4. The said partition was under document dated 15.3.1973. During the lifetime of their father, sale deed was also executed. From the advance amount received under the agreement of sale with defendant No. 4, his father took Rs. 1 lakh and himself and defendant No. 2 took Rs. 50,000/- each, and that after the death of their father, himself and his brother (2nd defendant) received the balance sale consideration as per their shares. He executed a registered sale deed in favour of defendant No. 4 towards his share, but at another point, he stated that a registered sale deed was jointly executed by himself, his father and defendant No. 2. He stated that the plaintiff executed an unregistered relinquishment deed under Ex.B.1 which is in the handwriting of husband of the plaintiff. But after perusal of Ex.B.1, he stated that it was signed by plaintiff and admitted that the document does not contain the signatures of himself and defendant No. 2. He admitted that item No. 5 of "A" schedule property was sold to defendant No. 4 by himself, his father and defendant No. 2, and that the defendant No. 4 is due Rs. 1,60,000/- to his father in that transaction. The writing in Ex.B.1 does not belong to his father. He denied the suggestion that during the lifetime his father settled the properties to be partitioned among his children in a particular way as mentioned in Ex.B.1. Ex.B.7 bears the signature of his sister-plaintiff and his brother-defendant No. 2 and himself, which was scribed by his brother-in-law (husband of plaintiff) and Ex.B.7 was prepared on their understanding but not on the stating of their father. As per Ex.B.7, all the properties situated at Khazipet have to be given to him except one mulgi and a small house which would be given to the plaintiff.

17. Whereas, defendant No. 2, who was examined as D.W.2 admitted that Ex.B.1 contains his father's signature, and that as per Ex.B.1 the plaintiff was to get Rs. 1,60,000/-, out of which, one lakh was paid on 25.6.1993 through a cheque drawn on State Bank of Hyderabad and she has to get the balance amount of Rs. 60,000/-. After the death of their father, a mutual partition was effected among

himself, defendant No. 1 and the plaintiff. A settlement deed was written on a white paper which is Ex.B.7. According to Ex.B.7, he should get a house described as item No. 1 of "A" schedule properties and some open land at Khazipet with 3 dilapidated rooms situated by the side of Afzal Manzil. Ex.B.7 bear the signatures of himself, defendant No. 1 and plaintiff. Ex.B.7 was scribed by the husband of plaintiff. He deposed that he has no objection if the property is partitioned as per the terms of Ex.B.7 settlement. To a question put by the Court that the desire of his father as mentioned in Ex.B.1 was not acted upon by any of the legal heirs, he answered that it was acted upon during the lifetime of his father where his sister (plaintiff) has accepted and received Rs. 1 lakh from his father on 25.6.1984. He admitted that he had mentioned in written statement at para 3 that item No. 5 is dry land of Ac. 1.35 gts. left by his father. He also admitted that in Ex.B.7 the said item No. 5 is not mentioned, and that it was not disclosed during the compromise talks since it was disposed of during the lifetime of his father. He admitted that in his written statement, item No. 5, by error/mistake, was typed as Ac. 1.35 gts. instead Ac.5.35 gts. His father has not executed sale deed in favour of defendant No. 4, and that even after the death of his father, no sale deed was executed in favour of defendant No. 4. He also admitted that the partition has to be made according to the terms mentioned in Ex.B.7 settlement.

18. As seen from the above evidence, the entire case of the parties revolves on the documents-Exs.B.1 and B.7. A perusal of Ex.B.1 shows that the father of plaintiff and defendants 1 and 2 executed a deed partitioning the properties held by him with certain terms mentioned therein. In Ex.B.1 the father of plaintiff and defendants 1 and 2 stated that Afzal Manzil, situated at Khazipet is given to defendant No. 1 and some open land towards the eastern side of it, is mutually agreed to be given to defendant No. 2. Apart from the said house, four mulgies would be given to defendant No. 1. Since himself and defendant No. 2 do not have any house at Hyderabad, the house bearing No. 22-2-252, situated at Balshetti Khet, Dabeerpura (which is described as item No. 1 of "A" schedule property) is exclusively given to defendant No. 2, and that since the said property is in the name of his deceased wife, to the extent of Sharai share in the said house, he would give a sum of Rs. 60,000/- to the plaintiff for purchase of any other property. For the said settlement, defendant No. 1 agreed and consented and gave his permission to give the house to his brother-defendant No. 2. Further there is a clear mention in Ex.B.1 that he sold the land admeasuring Ac. 1.34 gts., situated at Khazipet and in view of said sale, a sum of Rs. 1 lakh would be paid to the plaintiff and by including the share amount of the said house conveyed to defendant No. 2, the total amount of Rs. 1,60,000/- in cash would be paid to the plaintiff. That apart, he gave one mulgi to the plaintiff situated opposite to college and the house known as Chota-Ghar. There is a mention in Ex.B.1 to the effect that I hope that Afsar Bibi will accept my offer; as God blessed her fully and the amount is a meager amount." Finally, he expressed his wish that each person should get registered the property of their

respective share; firstly, the house situated at Hyderabad should be registered and then he would get registered all the properties of Khazipet, and would also pay the sum of Rs. 1,60,000/- to the plaintiff. The plaintiff who signed Ex.B.1 also endorsed to the effect that Whatever is given by Baba (father), I accept the same for his pleasure".

19. In Vazeer Bee's case (1 supra) on which strong reliance is placed by the learned counsel for the appellant, this Court held that u/s 118 of Mohammaden Law, a Mohammedan is prohibited to dispose of by a will of not more than a third of the surplus of his estate after payment of funeral expenses and debts; and for excess thereof, the consent of the heirs thereto after his demise is mandatory. It was also observed that u/s 117 a bequest to an heir is not valid unless the other heirs consent to it after the demise of the testator. In Damodar's case (2 supra) Justice Sawant as he then was, while speaking for the Bench after referring to various books of distinguished authors who interpreted the Mohammaden Law on the subject held that according to the exposition of Hanafi Law, a Muslim cannot bequeath more than one-third of his property whether in favour of a stranger or his heir when there are heirs or other heirs left by him as the case may be. A Full Bench of High Court of Patna in the case of Imamul Hassan (3 supra) while dealing with the question whether a major son of a Muslim land-holder is entitled to a separate unit under the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, 1961, after referring to various books of reputed authors on Muslim Law, held that under the Mohammaden Law, birth right is not recognized; the right of an heir apparent or presumptive comes into existence for the first time on the death of the ancestor, and he is not entitled until then to any interest in the property to which he would succeed as an heir if he survived the ancestor. There was a reference to the decision reported in Hasan Ail v. Nazo ILR (1889) All 456, wherein it was held that the "Mohamedan law does not recognize any interest expectant on the death of another, and till that death occurs which by force of that law gives birth to the right as heir to the person entitled to it according to the rules of succession, he possesses no right at all." The Full Bench held that a land-holder in order to constitute a family holds the land in his own right and as a raiyat, and that a Muslim son or daughter does not have any right or interest in the property in the lifetime of his or her father; and that according to Muslim Law, they acquire the right only in the event of the death of the father.

20. There cannot be any quarrel with the proposition of law as referred to above, on which strong reliance is placed by the learned counsel for the appellant. The entire dispute and the claim of the appellant depends upon the interpretation of Ex.B.1 - whether it is a will or an agreement to settle the properties between the plaintiff and defendants 1 and 2 by their father.

21. Learned counsel for the appellant contended that both the documents - Exs.B.1 and B.7 are inadmissible in evidence for want of registration. Whereas the learned counsel for the respondents 1 and 2 would contend that since there

was no objection by the appellant at the time of marking of those documents, the same can be looked into for collateral purpose. The Apex Court in the case of Kale (4 supra) held that the family arrangement may be even oral in which case no registration is necessary, and that the registration would be necessary only if the terms of the family arrangement are reduced into writing, and that a distinction should be made between a document containing the terms and recitals of a family arrangement made under the document and a mere memorandum prepared after the family arrangement had already been made either for the purpose of record or for information of the Court for making necessary mutation, and that in such a case the memorandum itself does not create or extinguish any rights in immovable properties and is, therefore, not compulsorily registrable. In a similar case in Roshan Singh (5 supra) the Apex Court while considering the provisions of Section 17(1)(b) and Section 49 of Registration Act, at para 9, held as under:

9. ...The use of the past tense does not necessarily indicate that it is merely a recital of a past transaction. It is equally well settled that a mere list of properties allotted at a partition is not an instrument of partition and does not require registration. Section 17(1)(b) lays down that a document for which registration is compulsory should, by its own force, operate or purport to operate to create or declare some right in immovable property. Therefore, a mere recital of what has already taken place cannot be held to declare any right and there would be no necessity of registering such a document. Two propositions must therefore flow: (1) A partition may be effected orally; but if it is subsequently reduced into a form of a document and that document purports by itself to effect a division and embodies all the terms of bargain, it will be necessary to register it. If it be not registered, Section 49 of the Act will prevent its being admitted in evidence. Secondly, evidence of the factum of partition will not be admissible by reason of Section 91 of the Evidence Act, 1872. (2) Partition lists which are mere records of a previously completed partition between the parties, will be admitted in evidence even though they are unregistered, to prove the fact of partition.

22. A learned Single Judge of this Court in Simiginieedi Hymavathi (6 supra) held that once a document is admitted in evidence, Section 36 of the Indian Stamp Act bars questioning such admission on the ground "instrument has not been duly stamped".

23. From the document-Ex.B.1 as referred to above, the father of plaintiff, defendants 1 and 2 had not bequeathed the properties but desired/partitioned the properties among his heirs viz., plaintiff, defendants 1 and 2 wherein it was made clear that as per his wish, the properties allotted to his children should be registered of their respective shares; firstly, to get register the house situated at Hyderabad and then he would get register all the properties at Khazipet and would also pay a sum of Rs. 1,60,000/- to Afsar Bee (plaintiff). Therefore, it is clear that the partition desired by father of parties under Ex.B. 1 will complete only on registration of the deeds as desired by the father. In that view of the

matter, we do not see any force in the submission of the learned counsel for the appellant that a Muslim cannot bequeath more than one-third of his property in favour of an heir without leaving any amount for funeral expenses and debts. Therefore, considering Ex.B.1, the judgments cited by the learned counsel for the appellant are misplaced to the facts of the case on hand since no bequeath is made under Ex.B. 1 by the father of the parties.

24. Adverting to Ex.B.7, it is nomenclatured as "mutual partition of matruka property of late Hazrat Syed Gulam Ahmed Babani" and executed by the plaintiff, defendants 1 and 2. In Ex.B.7, dated 13.2.1994 the properties were divided as per the wish/desire of their father as mentioned in Ex.B.1. It was signed by all the parties and they also endorsed to the effect that according to the mutual partition/settlement, all the three heirs will help and assist in the matter of transfer and registration with each other. The partition covered by Ex.B.7 is not a partition effected for the first time between the parties, but it is the admission of partition effected by their father during his lifetime allotting the properties to the respective shares of plaintiff, defendants 1 and 2 as reflected under Ex.B.1. Therefore, Ex.B.7 is only an agreement to divide the properties as per the wish/desire of their father reflected under Ex.B.1 and hence, the bar contained u/s 17(1)(b) and Section 49 of Registration Act would not attract. Inasmuch as Ex.B.1 is acted upon by the parties by executing Ex.B.7 and once the plaintiff attested Exs.B.1 and B.7 with full knowledge of the contents thereof, she cannot turn around and question the validity of those documents nor can she challenge the nature of rights of defendants 1 and 2 in the suit schedule properties.

25. A feeble submission has been made by learned counsel for the appellant that inasmuch as the property shown as item No. 5 of "A" schedule properties does not form part of Ex.B.1 or Ex.B.7 and as the said property has been suppressed by the defendants 1 and 2, the plaintiff is, at least, entitled to a share of 1/5th in item No. 5 of "A" schedule properties or for 1/5th sale consideration receivable as per the agreement of sale entered by their father with defendant No. 4. We do not see any merit in the said submission for the reason that in the plaint at para 5, the plaintiff categorically asserted that her father and defendants 1 and 2 entered into an agreement of sale in respect of Ac.5.37 gts. of land and also admitted in her evidence about the said agreement of . sale entered by her father during his lifetime and in the schedule of property also as against the item No. 5, it is mentioned as balance amount of Rs. 5,87,000/-. Therefore, the submission that the said property was suppressed by the defendants 1 and 2 cannot be accepted. In Ex.B.1 also there is a mention about the said property, but it was wrongly typed as Ac. 1.34 gts. instead of Rs. 5.34 gts., which is evident from the admission of the plaintiff in her pleadings. Since there is no plea to the effect that the property mentioned under Ex.B.1 is different than the property mentioned in para 5 of the plaint, it is not open for the appellant-plaintiff to contend that the defendants 1 and 2 suppressed the property covered by item No. 5 of plaint "A" schedule properties, in which she is entitled to a share.

26. For the forgoing reasons and conclusions reached by us, we do not see any merits in the appeal. The appeal fails and is accordingly dismissed. No order as to costs.