

Judgment Reserved on: 28.04.2017

Judgment Pronounced on: 05.05.2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS
Coram

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

Appeal Suit No.76 of 1999

Abdul Kader Maricar

... Appellant

vs.

1.Saraummal
2.Jaffer Sadic
3.Maideen Abdul kader
4.Hadja Fakrudeen
5.Sabura Ummal
6.SaraUmmal
7.Ummal kani Ummal
8.Arief Maricar
9.Sabiya Ummal
10.M.A.Amanullah
11.M.A.Badurunissa
12.Fathima Faridunissa
13.M.A.Mohamed Ali
14.M.A.Shahul Hameed
15.M.A.Ashraff
Rep. by his
Power Agent
M.O.H.Asalam

... Respondents

Appeal Suit filed under Section 96(1) of the Code of Civil
Procedure against the Judgment and Decree dated 05.08.1997 passed
the Additional District Judge, Pondicherry at Karaikal in O.S.No.21 of
1993.

For Appellant : Mr.T.R.Rajagopalan,
Senior Counsel for
M/s T.Susindran

For Respondent-4 : Mr.N.L.Rajah,
Senior Counsel for
M/s. B.Harikrishnan

JUDGMENT

Aggrieved over the dismissal of the suit for partition, the first plaintiff has filed the present appeal. The parties are arrayed as per their own ranking before the trial Court for the sake of convenience.

2.The Brief facts of the plaintiffs' case is as follows:- Abdul Razack Maricar had three wives and through his first wife he had three daughters and two sons and the sons are the first and second plaintiffs and the daughters are the defendants 5 and 6. The plaintiffs 4 to 9 were born through the second wife viz., Ummasi ammal. He had a daughter viz., Sabiya Ummal, the third plaintiff. The third wife is the first defendant and through her, he had four children viz., defendants 2, 3, 4 and 7. All the properties are the properties of Abdul Razack Maricar. He died in December 1980. Under the Muslim Law, widow viz., Saraummal/first defendant is entitled to 1/8 share and the remaining estate shall be taken by the residuary heirs namely sons and daughters in the ratio of 2:1. The deceased Abdul Razack

Maricar left a registered Will dated 28.5.1973 bequeathing his entire properties in favour of the first defendant and the Will is not valid as the sons and other co-sharers were not given any share. Therefore, the suit was filed for partition.

3.The first defendant filed the written statement and the same was adopted by the defendants 3 and 7. It is stated that the Will dated 28.5.1973 is a perfect valid document and under the Will Abdul Razack Maricar bequeathed all his properties in favour of the first defendant and since then the first defendant was in enjoyment of the same and the Will was executed with the knowledge and consent of the legal representatives and even after the death of Abdul Razack Maricar, the plaintiffs have given consent for the Will. It is also stated that at the time of marriage of the first defendant with Abdul Razack Maricar, he was 48 years old and the first defendant was 16 years old and at that time Abdul Razack Maricar had six sons through his first and second wives and therefore, at the time of marriage Abdul Razack Maricar assured that he would execute a Will in favour of the first defendant in respect of his properties and pursuant to the assurance given, the Will was executed and for the past more than ten years, no objection was raised by the plaintiffs regarding the Will

and the properties are enjoyed by the first defendant and the plaintiffs also had given consent after the death of the testator and the suit is also barred by limitation.

4. On the basis of the above said pleadings, the following issues were framed:

- "1. Whether the suit is barred by limitation?
2. Whether the Will of Abdul Razack Maricar dated 28.5.1973 dis-entitled the plaintiff from claiming any right in the suit properties?
3. Whether the Will of Abdul Razack Maricar dated 28.5.1973 is valid only to the extent of 1/3 share of his properties?
4. Whether the first defendant has perfected her title to the suit properties by adverse possession?
5. Whether the plaintiffs are entitled to partition of the suit properties and if so, what are their respective shares?"

5. On the side of the plaintiffs, the first plaintiff was examined as P.W.1 and 11 documents were marked as Exs.A.1 to A.11 and on the side of the defendants, 4th defendant was examined as D.W.1 and no document was marked as exhibit.

6. On the basis of the evidence and materials, the learned trial

Court has held that there was implied consent by the other legal heirs for the Will dated 28.5.1973 executed by the Abdul Razack Maricar other legal heirs also kept quiet for more than 20 years, therefore, Will was valid and binding on others. Ultimately, the learned trial Court has dismissed the suit. Aggrieved over the same, the present appeal came to be filed by the first plaintiff.

7.The learned Senior Counsel appearing for the appellant submitted that the property belonged to the father of the plaintiffs. The first defendant is the third wife propounded the Will. The trial Court has believed the implied consent. There is no evidence to show that all the legal heirs have given consent. There is no pleadings in that regard. The evidence as to the implied consent has to be established. Absolutely, there is no evidence available on record to prove that all other legal heirs have given consent unequivocal intention. The alleged consent pleaded by the first defendant is not established. The first defendant has also not chosen to examine herself. The learned trial Court without considering all these aspects, dismissed the suit for partition. Hence prayed for allowing the appeal. In support of his arguments the learned Senior Counsel has relied upon the following judgments:-

1. Narunnisa v. Shek Abdul Hamid [AIR 1987 Karnataka 222]
2. Izzul Jabbar Khan Azisul Jabbar v. Chairman District Council KucheryWard Sooni District Chhindwara [AIR 1957 Nakpur 84]
3. Noorunnisa alias Pichamma v. Rahaman Bi [2001 (3) MLJ 141]

8. The learned Senior Counsel appearing for the Respondents submitted that para 4 of the plaint itself is determinative for deciding the case. The Will has not been attacked on the basis of the consent in the entire pleadings of the plaintiffs. The defendants 2 to 9 remain ex parte and plaintiffs 4, 6 to 9 have also not contested the suit. Hence the suit was dismissed against them. Though all the plaintiffs have filed the plaint, none of the plaintiffs have pleaded that there was no consent to the Will. The time gap between the Will and the suit itself proves the implied consent. The trial Court has considered all other aspects and rightly dismissed the suit. If at all this Court comes to the conclusion to decree the suit for partition, the first plaintiff who is contesting the proceedings alone is entitled to share if any. Hence prayed for dismissal of the appeal.

9. On the basis of the above pleadings, the points that arise for consideration are:-

1. Whether the Will dated 28.5.1973 and Ex.A2 is valid?

2. Whether all the legal heirs have given consent for such Will?

10.Points 1 and 2:- The relationship between the parties is not disputed. The fact that the properties belonged to Abdul Razack Maricar is also not disputed. The Abdul Razack Maricar had executed a Will dated 28.5.1973 bequeathing his properties in favour of his third wife is also not disputed. But the only contention of the plaintiff is that under the Muslim Personal Law, bequeath made in favour of one person in respect of entire property is illegal and void. The testator has no capacity to bequeath more than 1/3rd share of his property and any such bequeath cannot be made in favour of the legal heir.

11. Whereas it is the contention of the first defendant in the written statement that the defendants 1 to 5 were alive at the time of execution of the Will and with their knowledge and consent Will has been executed. The Will has been come into force after the demise of the testator. Whereas having pleaded that all the plaintiffs have given consent, the first defendant did not come forward to give evidence before the Court and 4th defendant was examined as D.W.1. In the cross-examination he has admitted that the defendants have not given consent to the Will and he has also given evidence to the effect that the plaintiffs gave consent to the Will in the presence of the

witnesses. Whereas the said aspect has not been pleaded in the written statement and only for the first time introduced in the cross-examination of the D.W.1. No steps whatsoever has been taken to prove the alleged consent by the plaintiffs in the presence of the witnesses, by examining the independent witness.

12.It is well settled that a bequest to an heir is not valid unless the other heirs also give consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share and a bequest to an heir either in whole or in part, is invalid, unless consented to by other heir of heirs and whomsoever consents, the bequest is valid to that extent only and binds his or her share. In this regard Mulla Principles of Mohammedan Law 20th Edition, at paragraph 117 reads as follows:-

"a bequest to an heir is not valid unless the other heirs also consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share and a bequest to an heir either in whole or in part, is invalid, unless consented to by other heir of heirs and whomsoever consents, the bequest is valid to that

extent only and binds his or her share. Neither inaction nor silence can be the basis of implied consent".

13. In the judgment reported in **Noorunissa v. Rahuyaman Bi and others [2001 (3) MLJ 141]**, it is held that

"a Mohamedan cannot bequeath more than one third of his property and even with regard to that one third he cannot bequeath it to his heirs. If the bequest is to an heir it can be validated by the consent of all the heirs after the death of the testator and the bequest is in excess of one third of estate cannot take effect unless such bequest is consented by heirs after the death of the testator".

14. In **Sulaika Vivi v. Rameeza Bivi [2000 (IV) CTC 454]** a Division Bench of this Court in para 20 of the Judgment held as follows:-

"20. When we come to the question about the validity or invalidity of the said Will dated 20.1.1966,

on the ground that the first defendant was not competent to give her consent on her behalf as well as on behalf of the minors defendants 2 to 6 on the date of the death of the testator, is concerned, when we look into the position of law, we find that under Mohamedan Law, it is well settled that a Mohamedan can Will away only to an extent of one-third of his estate and not beyond, and every Muslim who is sane and rational is entitled to make a Will. When a Muslim dies, his debts and funeral expenses are to be paid first and thereafter out of the residue, only one-third can be disposed of by the Will. Whether the bequests exceeding the bequeathable third, will take effect without the consent of the heirs, depends upon the sect such as Shaafi, hanafi, etc., to which the concerned Muslim belongs . As to whether the consent should be obtained after the death of the testator or before the death of the testator depends upon the sect. As far as those persons who belong to the Hanafi sect, it is certain that such consent must be obtained after the death of the testator.

Reference can be had to Tyabji's book of Mohamedan Law, paragraph 579 C. It is also well settled that where the bequests taken in the aggregate exceed the bequeathable third and the heirs do not consent, in Hanafi Law, bequest abate rateably. (Refer page 307 of outlines of Mohamedan Law, by ASAF A.A.Fyzee", Second Edition.) The position with regard to the consent varies with the other schools like Itna Ansari and Ismaili Laws with which we are not concerned. Therefore, it is clear that, for a Will by a testator making a bequest of more than onethird of the residue of his estate, the same would become valid under Hanafi Law only after the consent of the heirs of the testator is obtained after the death of the testator."

Wherein the Division Bench of this Court considering the Hanafi law the consent obtained after the death of the testator is valid to make the Will valid in respect of more than 1/3rd share of his properties.

15. In **Izzul Jabbar Khan Azisul Jabbar v. Chairman District Council Kuchery Ward Sooni District Chhindwara [AIR 1957 Nakpur 84]**, a Division Bench of Nakpur High Court in para 8 of its

judgment held as follows:-

"8.It is however argued on the authority of Daulatram v. Abdul Kayum, ILR 26 Bom 497 (B); Mahomed Hussein Haji Ghulam Mahommed v. Aishabai, AIR 1935 Bom 84 (C) ; Ma Khatoon v. Ma Maya, AIR 1936 Rang 448 (D) and Fakir Mohammed Khan v. Hasan Khan, AIR 1941 Oudh 25 (E) that the consent of the heirs may be signified by conduct showing a fixed and unequivocal intention. It would be impossible to imply consent of the heirs unless it was shown that they knew of the will, knew of its contents and deliberately stood by and allowed the village to be mutated in the names of the legatees, i.e., the appellants in this case.

It may be mentioned that there is no evidence whatsoever of the fact that the female heirs were at all aware of the mutation proceedings. It is however said that the publication of the notice in the tahsil office and in the village was sufficient notice. In our opinion it was necessary for the appellants to establish something more than that in order to

persuade the Court to conclude from the inaction of the female heirs that they knowingly allowed the mutation to be made in favour of the appellants. There is no evidence at all of this kind.

No doubt, respondent No.4, the father of appellant No.1 and brother of appellant No.2 has stated that at the funeral of Abdul Jabbar the daughters brought the will and handed it over to him. That evidence is too absurd to believe. Rejecting it, we find that there is nothing from which it could be deduced that the inaction of the female heirs was deliberate. Thus in this case the necessary condition for inferring an unequivocal intention on the part of the female heirs to allow the legatees to take the entire property under the will has not been satisfied. Thus, in our judgment, the appellants cannot claim possession of the entire property on the basis of the will."

16.In **Narunnisa v. Shek Abdul Hamid [AIR 1987 Karnataka 222]**, a Division Bench of Karnataka High Court in its Judgment at paras 13, 14 and 15 held as follows:-

"13.In the instant case, the Will is executed on

9.11.1973, suit is filed on 17.12.1973. The consent is required to be given after the death. There is no such document to establish the consent of the heirs. Being a bequest in favour of an heir, it is invalid and does not bind the share of the other heirs unless consented. In this Court, Sri I.T.Rai, Counsel for defendant No. 3, Ammajan, submitted that his client does not object to the Will and she consents; so to the extent of her $1/2^{\text{th}}$ share in Item I of 'A' schedule, the bequest in favour of defendant 1 would be valid. In other words, defendants I will get $2/12 + 1/12 = 3/12$ in Item I of 'A' schedule properties.

14.Coming to the share of fifth defendant, appellant in R.F.A. No.37/1976, there is no evidence to establish her consent. In this

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regard the lower Courts' conclusion is as follows:-

"24.xx xx xx

Even though the 5^{th} defendant was aware of the execution of Ex.D1 by her father in favour of the 1^{st} defendant and is also aware of the filing of the suit by

the plaintiff but has kept quiet for a period of more than two years without expressing her dissent to the Will Ex.D.1. I am of the opinion that an inference has to be drawn by her passive acquiescence that she had consented to the bequest made in favour of the 1st defendant under Ex.D.1. I, therefore, hold that the 5th defendant also must be deemed to have given her consent for the bequest in favour of the 1st defendant under Ex.D-1 by Shaik Abdul Gani Saheb and therefore her share in Item I of the Suit 'A' schedule properties is also bound by the bequest made in favour of the 1st defendant."

15. We find it difficult to approve this reasoning. Assuming that express consent is not the requirement of law, nevertheless, the implied consent can be inferred only by some act or dealings in respect of the property, which is sought to be bequeathed. In Mulla's Book, referred to above, we find the following: "Silence not consent: Where a Will contained a bequest excluding the female heirs and mutation of names took place, it was held that consent of the

heirs could not be implied from mere silence on their part at the mutation proceedings.”

17. In any event there must be a consent of all the legal heirs to prove the validity of the Will. P.W.1 also in his evidence categorically denied any consent given by the plaintiffs either express or implied to the Will executed by the father. When the parties attacked the document specifically denies any consent, burden lies on the defendant to establish the factum of alleged consent given by the plaintiffs either it is express or implied. The above judgment clearly shows that consent is a matter of evidence and it should be established that the consent is unequivocal intention of the parties. Therefore, it is the matter of evidence. Mere inaction or silence cannot be the basis of implied consent unless unequivocal intention has been established.

18. The plaintiffs have also issued a legal notice under Ex.A3 calling upon the defendants to effect partition contending that there was no partition. The above notice also not replied. Similarly, the evidence of D.W.1 in the chief-examination would show that he has not spoken anything about the consent. Whereas in the cross-examination he has admitted that even patta of the land continues to

be in the name of his grandfather and he has also admitted that defendants have not given any consent to the Will even they are legal heirs of their grandfather. If really all the legal heirs have given consent either implied or express the defendant No.1 would have effected mutation of records in Revenue Records. Whereas the Revenue Records still in the name of original owner. These facts also show that the alleged consent pleaded by the defendant cannot be true. To make a Will except $1/3^{\text{rd}}$ share of the Mohammedan property the consent of all the legal heirs are absolutely necessary. The evidence of D.W.1 itself clearly indicate that there was no consent by all the legal heirs. Therefore, the Will in its entirety is invalid as per Muslim Personal Law. On the other aspects with regard to the limitation and possession have not been canvassed and given up by the parties.

19. Since the appeal is filed only by the first plaintiff though the suit was filed by all the plaintiffs together, from the judgment of the learned trial Court it could be seen that the suit against the plaintiffs 4, 6 and 9 was already dismissed during the trial. The plaintiffs 2 and 5 though contested the suit, they have not filed appeal. Only the first plaintiff has filed the appeal. Since the consent has not been

established, mere delay in approaching the Court itself cannot be construed as an implied consent. The judgment relied upon by the trial Court itself clearly show that there must be evidence to prove unequivocal intention of the parties to infer the consent. But absolutely there is no evidence available on record. Therefore, this Court is of the view that merely because the delay of 12 years in coming to the Court for claiming partition, that itself cannot be a ground to infer that there is a valid consent by other legal heirs. Hence, the learned trial Court dismissing the suit is liable to be set aside. The points are answered accordingly.

20. Since the first plaintiff alone filed the appeal and the other plaintiffs have not preferred any appeal, this Court is of the view that the first plaintiff is entitled to 14 shares in the suit properties and accordingly preliminary decree is passed dividing the properties into 120 equal shares and allot 14 such shares to the first plaintiff alone. As the other plaintiffs have not preferred any appeal and not contested the suit the preliminary decree is restricted only in favour of the appellant/first plaintiff. Accordingly, the appeal is allowed and preliminary decree is passed in favour of the first plaintiff alone. No costs.

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Index : Yes/No
Internet:Yes/No

N.SATHISH KUMAR, J

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