

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.07.2017

Pronounced on : 17-08-2017

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH

and

THE HONOURABLE MR. JUSTICE A.D. JAGADISH CHANDIRA

Appeal Suit No. 865 of 2006

Naaz Jaffar

.. Appellant/Plaintiff

Versus

1. J.M. Sadiq Sait

2. Anis Asif

.. Respondents/Defendants

Appeal filed under Section 96 and under Order 41-A Rules 1 and 2 of of the Code of Civil Procedure, 1908 against the Judgment and Decree dated 10.10.2006 passed in O.S. No. 17 of 2005 on the file of District Judge, Nilgiris, Ootacamund.

For Appellant : Mr. Habibullah Badsha, Senior Advocate
for Mr. T.P. Sankaran

For Respondents : Mr.K.Sukumaran, for
Mr. K. Rajasekaran for R1
Mr. M. Muthukannan for R2

JUDGMENT

R. SUBBIAH, J

The appellant is the plaintiff in O.S. No. 17 of 2005 on the file of District Judge, Ootacamund, The Nilgiris District. She has filed the said suit as against her brother, who is arrayed as first defendant, for the relief of declaration to declare that her mother, deceased Zohara Jaffer Abdul Rahaman, was the absolute owner of the plaint schedule mentioned property and the recitals contained in the sale deed dated 27.01.1960 that after the death of Zohara Jaffer Abdul Rahaman, the suit property will devolve on her son/the first defendant absolutely as null and void, unenforceable; for partition of the plaint schedule mentioned property by metes and bounds into four shares and for allotment of one such share to her and to put her in exclusive possession of her share and for costs. In the said suit, the plaintiff has arrayed her sister as second defendant. The trial court dismissed the suit by the plaintiff on 10.10.2006 against which she has come forward with the present Appeal Suit.

2. For the sake of convenience, the parties in this appeal are referred to as per their ranking in the suit as plaintiff and defendants.

3. The case of the plaintiff, as could be unfolded from the averments made in the plaint filed before the trial court are as follows:-

(i) The plaintiff and the defendants are the children of late. Jaffar Abdul Rahaman Sait and Mrs. Zohara Jaffar Abdul Rahaman. The mother of the plaintiff and defendants namely Mrs. Zohara Jaffar Abdul Rahaman has entered into an agreement of sale dated 08.12.1959 with one Louise Ann Hawke for purchasing the suit property called 'Erin Villa' for a total sale consideration of Rs.39,000/-. In pursuance of such agreement of sale dated 08.12.1959, the mother of the plaintiff and defendants namely Mrs. Zohara Jaffar Abdul Rahaman has purchased the suit property by way of a registered sale deed dated 27.01.1960. According to the plaintiff, even though the entire sale consideration for purchasing the suit property was paid by the mother of the plaintiff and defendants namely Mrs. Zohara Jaffar Abdul Rahaman out of her self-earned funds, in the sale deed dated 27.01.1960, the name of the first defendant/first respondent herein, who was minor at the time of such purchase, was also nominally included as second purchaser at the suggestion of the father of the plaintiff and defendants. Likewise, the recitals in the sale deed would indicate that after the death of the mother Mrs. Zohara Jaffar Abdul Rahaman, the first defendant would be entitled to the suit property absolutely and this was also included at the instance of the father of the plaintiff and defendants. According to the plaintiff, such recitals in the sale deed was incorporated without the consent her mother Mrs. Zohra Jaffar Abdul Rahaman. Further, the mother has informed the first defendant, who is the brother of the plaintiff, on more than one occasion that he is not entitled to the suit property absolutely by virtue of his name being incorporated in the sale deed, as second purchaser, and as such all her children should inherit the properties as per Shariyat Law and the first defendant also agreed for the same. Further, the first defendant, after his marriage, had left the suit property and was residing at Bangalore. It is only the plaintiff, being a spinster, has all along maintained and taken care of her mother till her death on 08.10.2004 by staying in the suit property. Her father Abdul Rahaman died on 13.11.2004.

(ii) According to the plaintiff, the wishes of her mother late. Zohara Jaffar Abdul Rahaman were written in a note book maintained by her in her own handwriting wherein she has also written about the suit property. In the notebook, it was mentioned that after her death, the suit property has to be enjoyed by all her children namely the plaintiff and the defendants as per Shariat Law. It was also written in the note book that she had purchased the suit property by withdrawing her savings amount from Central Bank, Coonoor. Further, in

page No.76 of the note book, it was clearly written as to how she has paid the sale consideration for purchase of the suit property and after her death, how her children should share the suit property. She has also written about all her personal properties including the suit property, which she wished that it should be divided among the plaintiff and the defendants as per Shariyat Law after her demise. According to the plaintiff, the first defendant, after his marriage, has left the suit property and settled at Bangalore with his family. The first defendant never cared to maintain the mother and it was the plaintiff who had taken care of the mother throughout. Mrs. Zohara Jaffer Abdul Rahaman, mother of the plaintiff and defendants, who died on 08.10.2004 when she was 87 years and the father died on 13.11.2004 when he was 94 years. According to the plaintiff, it is only the plaintiff who has taken care of both her father and mother at their old age when they were sick and confined to bed. It is the further case of the plaintiff that during the life time, her mother Mrs. Zohara Jaffer Abdul Rahaman handed over the original agreement of sale as well as the sale deed to the plaintiff and after the death of her mother, at the request of the first defendant, the plaintiff has entrusted the original documents to him on 29.11.2004 in good faith. Thereafter, the first defendant started asserting that the suit property absolutely belongs to him and that the plaintiff has to vacate the suit property as he wants to dispose of the same. Again, on 11.03.2005, the first defendant came to the suit property and had given an ultimatum to the plaintiff to vacate the suit property failing which she would be evicted forcibly. According to the plaintiff, as per Mohammedan Law/Shariyat Law, the plaintiff and second defendant, who is the sister of plaintiff, are entitled to 1/4 share and the first defendant is entitled for 1/2 share. As the first defendant acted detrimental to the interest of the plaintiff and attempted to evict her from the suit property, the plaintiff has filed the suit for the relief aforesaid.

4.(i) The first defendant filed a written statement stating that the suit was filed nearly after 40 years from the date on which the mother has purchased the suit property on 27.06.1960 and therefore, the suit is hopelessly barred by the Law of Limitation. The suit property was not purchased by the mother of the plaintiff and defendants out of her self-earned funds, as alleged by the plaintiff inasmuch as the mother has no funds of her own. The mother of the plaintiff and defendants was never employed nor had any independent source of income. The allegation that the name of the first defendant was nominally incorporated in the sale deed at the instance of the father of the plaintiff and defendants and that the father was responsible for the further recital in the sale deed that after the death of the mother, the property would devolve absolutely on the first defendant is untenable and without any basis. The plaintiff was 9 years and the first defendant was 12 years at the time when the sale deed dated 27.01.1960 was

executed in favour of the mother of the plaintiff and defendants. The allegation that the plaintiff had handed over the original documents to the first defendant on his request is incorrect, when in fact, his mother has handed over those documents to him long back during her life time. Further, the recitals in the sale deed were included at the instance of the father. It is further stated that the mother has not given her consent for inclusion of the name of the first defendant. In fact, the mother of the plaintiff and defendants was a well educated woman, who was very proficient in English language. Therefore, the recitals in the sale deed were incorporated without the knowledge of the mother is without any basis. For the reasons best known, the plaintiff did not initiate any proceedings during the life time of the mother and therefore, the present suit would expose the frivolous intention of the plaintiff to claim a right in the suit property. Further, the first defendant did not promise his mother that he will not claim absolute right in the suit property or he agreed to divide the property along with the plaintiff and second defendant as per Shariyat Law.

(ii) The allegation regarding the intention of the mother to divide the suit property among her children, as written by her in the note book maintained, is absolutely false and the note book had been fabricated for the purpose of filing the suit. In any event, the writings contained in the note book will not bind the first defendant to claim absolute ownership in the suit property. The first defendant did not assert ownership over the suit property after getting the documents from the plaintiff, as alleged by her. In fact, all the family members were fully aware of the fact that the suit property belonged to the first defendant absolutely and the mother had only life interest over the suit property. According to the first defendant, he is the absolute owner of the suit property and even his mother had only a life interest in the suit property. While so, the plaintiff cannot claim any share in the suit property. Further, two commercial properties were brought in the name of the plaintiff and the second defendant and they are in possession of the same. Further, the plaintiff was allowed to reside along with the parents during their life time and on their death, the possession of the plaintiff can only be construed as a trespass in the suit property. The first defendant therefore prayed for dismissal of the suit.

5. The second defendant, another sister of the first defendant, has filed a written statement supporting the claim made by the plaintiff. According to the second defendant, at the time when the sale deed dated 27.01.1960 was executed in the name of the mother of the plaintiff and defendants, the plaintiff and defendants 1 and 2 were minor, particularly, the first defendant was 12 years old. It is further stated that in the sale deed dated 27.01.1960, the first defendant was not represented by any guardian and therefore, he cannot claim any benefits under the sale deed. It is further stated that the

recitals in the sale deed dated 27.01.1960 that after the death of the mother, the suit property would go to the first defendant in entirety has been inserted at the instance of the father. Further, the mother, during her life time, had reiterated that after her death, the suit property has to be divided among her three children as per Shariyat Law to which the first defendant also agreed and assured the mother that he would abide by her wishes. Therefore, the second defendant prayed for passing a decree in her favour for partition and separate possession of 1/4 share in the suit property.

6. On the above pleadings, the trial Court has framed the following issues for consideration namely

(i) Whether the plaintiff's late mother Zohara Jaffar Abdul Rahaman had purchased the suit property out of her own funds and whether she was the sole owner thereof till her death?

(ii) Whether the first defendant was a minor on the date of purchase of the property by the late Zohara Jaffar Abdul Rahaman. If so, has he been properly represented in the sale deed?

(iii) Whether the first defendant became the absolute owner of the suit property after the death of Zohara Jaffar Abdul Rahaman by virtue of the recitals in the sale deed

(iv) Whether the plaintiff is entitled to the declaration prayed for

(v) Whether the plaintiff is entitled for exclusive possession of her share

(vi) Whether the second defendant is entitled to the share claimed by her

(vii) To what reliefs, if any, the parties are entitled to?

7. The trial Court has also framed an additional relief as to whether the suit is barred by limitation?

8. Before the trial Court, the plaintiff examined herself as PW1, one Mohammed Azam as PW2 and Mohammed Oomer as PW3. On behalf of the plaintiff, Exs. A-1 to A-11 were marked. On the side of the defendants, the second defendant was examined as DW1 and the first defendant was examined as DW2 and Exs. B-1 to B-4 were marked. The trial Court, after analysing the oral and documentary evidence, answered issue No. 1 and the additional issue in favour of the plaintiff by holding that the suit property was purchased by the mother of the plaintiff and defendants and the consideration for purchasing the suit property was paid by her. In so far as the additional issue is concerned, the trial Court held that the suit is not barred by limitation as claimed by the first defendant. However, the trial court decided all the other issues against the plaintiff and ultimately dismissed the suit by holding that the first defendant is the absolute owner of the suit property and the

mother of the plaintiff and defendants gets only life estate in the suit property. Aggrieved by the same, the plaintiff has come up with this Appeal Suit.

9. Mr. Habibullah Badsha, learned Senior counsel for the plaintiff would contend that the first defendant is the brother and second is the sister of the plaintiff. The suit property was purchased on 27.01.1960, Ex.A2, by the mother of the plaintiff and defendants. Prior to execution of Ex.A2, a sale agreement dated 08.12.1959, Ex.A-1 was entered into between the vendor Louise Ann Hawke, who is a total stranger and the mother of the plaintiff and defendants. In the sale deed, Ex.A2, the name of the first defendant was included as a second purchaser. Admittedly, at the time of execution of Ex.A-2, sale deed dated 27.01.1960, the first defendant was a minor aged 12 years. However, in the agreement of sale dated 08.12.1959, Ex.A-1, the first defendant was neither a party nor his name was mentioned therein. The entire sale consideration for purchasing the suit property was paid only by the mother of the plaintiff and defendants from and out of her self-earned funds. However, on the instruction of the father of the plaintiff and the defendants, the name of the first defendant was included in the sale deed to the effect that property was conveyed and assigned to the first purchaser (mother) for her life with remainder over to the second purchaser (first defendant) with absolute powers of disposal vested in the first defendant. It is on the basis of Ex.A-2, sale deed dated 27.01.1960, the first defendant claimed absolute right over the suit property after the demise of the mother. In this regard, the learned Senior counsel for the plaintiff would contend that the first defendant is not a party to the agreement of sale, Ex.A1. The mother alone was signatory to the agreement of sale, Ex.A1. The vendor of Ex.A2, sale deed, was a stranger to the mother of the plaintiff and defendants and the vendor has no right to incorporate covenants or recitals of this nature either on her own or at the instance of the father of the plaintiff and defendants. While so, the recitals in the sale deed restricting the rights of the mother of the plaintiff and defendants and conferring her only life estate will not bind the plaintiff and they are void and unenforceable under law. Such a condition or limitation prescribed in the sale deed, Ex.A2 are contrary to the provisions of Section 10 and 11 of the Transfer of Property Act. According to the learned Senior counsel for the plaintiff/appellant, a combined reading of Section 10 and 11 of the Transfer of Property Act would indicate that any condition which restrains the transferee or any person from claiming under him from alienating or parting with or disposing of his right in the property is void. Further, the learned Senior counsel for the plaintiff/appellant would contend that the principles underlying Section 10 of The Transfer of Property Act are to the effect that a right of transfer is incidental to and inseparable from the beneficial ownership of property. If an absolute estate is created and after creation of such estate, a condition which brings a

diminution of that absolute estate is imposed on the person in whose favour the absolute estate is created, the said condition will be repugnant to the very nature of the estate which was created and it is void and unenforceable. It is founded on the principle of public policy allowing free disposition of property. The very object of Sections 10 and 11 of the Act is to provide that transferor shall not be allowed to put a clog or restriction on the right of the vendee so as to be repugnant to the property sold. The rule in this section relating to condition of absolute restraint of alienation is void and it is founded on the principles of public policy allowing free circulation and disposition of property. According to the learned Senior counsel for the plaintiff, in the present case, there is no necessity or situation which arose for the mother to cancel or restrain the rights created in favour of the first defendant in Ex.A2 during her life time and therefore, the first defendant cannot claim any absolute right over the suit property on the basis of the recitals contained in Ex.A2, sale deed.

10. The learned Senior counsel for the plaintiff/appellant also contended that during the life time of the mother, she maintained a notebook, which was marked as Ex.A4. In Page No.79, the mother has clearly written that "Erin Villa, the suit property, will be divided among Anis, Saidq and Naaz (second defendant, first defendant and the plaintiff) as per Shariat Law after my demise and that "Erin Villa" has been purchased from my personal amount collected from 1940 and cash credited in Central Bank from 1946." It is further written in Ex.A4 that "According to Shariat, I will like my children to divide my personal properties as per Shariat." While referring to the other properties owned by the mother, she has written in Ex.A4 that "My father's property I have 1/5th share in it. This is also to be divided if it is not sold in my life. It has to be divided and taken by Anis - 1/2, Sadiq 1/2 and Naaz 1/4 as per Shariat after paying some amount as per my wish on God's name." This book, written by the mother, was marked through the plaintiff, as PW1 without any objection being raised on behalf of the first defendant. The Plaintiff also pleaded about the book, Ex.A-4 in para No.7 of the plaint. Further, DW1/second defendant, the sister of the plaintiff, in her proof affidavit, has stated that Ex.A4 is in the handwritting of her mother. However, in the written statement, the first defendant has referred to Ex.A4 as a fabricated and concoted document for the purpose of filing the present suit. Even though the first defendant contended that Ex.A4 is a fabricated and concocted document, he has not chosen to challenge the admissibility or genuineness of Ex.A4 or produce any other evidence to contravert Ex.A4. Therefore, according to the learned Senior Counsel for the plaintiff, it must be construed that the validity of Ex.A4, which is more than 30 years old, has been proved by the plaintiff as contemplated under Section 90 of The Indian Evidence Act, which says that documents which are purporting or proved to be thirty years old shall be presumed

to be valid. In the instant case, the contents of Ex.A4 were pleaded by the plaintiff and DW1/second defendant also spoken about Ex.A4 in her examination in chief. Whereas, the first defendant, who has merely stated that Ex.A4 is a concocted and fabricated document, could not substantiate such defence by producing any other contrary evidence.

11. The learned Senior counsel for the plaintiff invited the attention of this Court to the deposition of PW1 in her Chief Examination and submitted that during the pendency of the suit, the first defendant had sent a word through a relative Mr. Mohammed Omer Abdul Rehman Sait and Dr. Ameen stating that they along with the plaintiff, first and second defendant could sit with Mufthees at Bangalore and settle the issues involved in the suit as per Shariyat, for which the plaintiff and second defendant consented. Accordingly, the plaintiff and the defendants along with their relatives had three sittings with Mufthees at Bangalore during July and August 2005 and each one of them placed before the Mufthees their grievance with documentary proof. During the course of hearing by the Mufthees, the plaintiff, defendants, their paternal Uncle M.O.A. Rahman Sait, the son of the second defendant namely Mohammed Azam as well as the first defendant's Mufthee Mr.Shakir were present. After hearing the plaintiff and the defendants, the Mufthees have given their final decision to the effect that the suit property is the property of the deceased Zohara Jaffer Abdul Rahaman and as per Shariyat, the first defendant is entitled to half share therein and the plaintiff and second defendant are entitled to 1/4 shares each. It is further stated that the decision of the Mufthees was accepted by the plaintiff and the defendants. Further, the plaintiff and the second defendant also offered to purchase the share of the first defendant by paying a sum of Rs.1,62,50,000/- being the 2/4 share of the value of the suit property at Rs.3,25,00,000/- and he has also agreed to receive the amount. Subsequently, the Mufthees have also sent copies of the order indicating the reasons for arriving at such a conclusion, which was marked as Ex.A6. Even though the first defendant agreed to abide by the decision of the Mufthees and agreed to receive Rs.1,62,50,000/- to sell his share of the suit property to the plaintiff and the second defendant, he has gone back from his assurance. The Plaintiff, as PW1, PW2 and PW3, have clearly deposed about Ex.A6. When the first defendant was cross-examined, he admitted that a decision was rendered by Muftees and they have given their Fatwa (Opinion), however, he has falsely deposed that he has not accepted the decision of the Muftees or signed the same. The learned Senior counsel for the plaintiff would contend that according to the first defendant, he has signed some papers which were in Urdu for having attended the meeting before the Muftees and that no settlement could be arrived at. But the evidence let in before the trial court to substantiate Ex.A6 would clearly indicate that the first defendant fully participated in the meeting before the Muftees and accepted the Fatwa (opinion) rendered by them under Ex.A6. However, the

first defendant refused to accept such decision and contested the suit. Thus, according to the learned Senior counsel for the plaintiff/appellant, the first defendant has approached the court with unclean hands and it shows the attitude on the part of the first defendant to deprive the legitimate share of the plaintiff and second defendant in the suit property. The trial Court also failed to appreciate Ex.A6 in the proper perspective and rejected it on the ground that it had emanated subsequent to the filing of the suit and it cannot be relied on by the plaintiff.

12. The learned Senior counsel for the plaintiff/appellant further submits that in the written statement filed by the first defendant, it was pleaded that two commercial properties were bought, one in the name of the plaintiff and another in the name of the second defendant. There is no further pleading as to how they have any nexus or connection to the suit property or how they are relevant to the issues involved in the case. The plaintiff did not plead in the plaint relating to the above commercial properties as they have no relevance to the case on hand. However, in the chief examination, the second defendant who is another sister of the plaintiff, as DW1, has referred to Ex.A8, sale deed in respect of the commercial property purchased in the name of the Plaintiff and Ex.B3, sale deed in respect of the property in the name of the second defendant. As per Ex.A8, sale deed, the building is in the name of the plaintiff and as per Ex.B3, sale deed, the building is in the name of the second defendant and the sale consideration was paid by the plaintiff and the second defendant out of their funds. Further, there is no averment in the written statement that the suit property was purchased for the benefit of the first defendant. Rather, the first defendant referred to about the two commercial properties in the name of the plaintiff and the second defendant and made an attempt to project a case as if it was purchased by their parents in their name. These pleadings were purposely introduced in the written statement filed by the first defendant to give an impression as if the plaintiff and the second defendant are provided with two separate properties and therefore, they are not entitled to any share in the suit property. The fact remains that these properties are self-acquired properties of the plaintiff and the second defendant, hence, the same has no relevance to the case on hand or it will not disentitle the plaintiff and the second defendant to claim a right over the suit property. But the trial Court, on a misconception, erroneously observed that the suit property was purchased for the benefit of the first defendant alone.

13. The learned Senior counsel for the plaintiff would also contend that it was not the case of the plaintiff in her plaint as well as the first defendant in the written statement that the transaction under Ex.A2 is a binami transaction. There was also no issue framed by the trial Court to this effect. However, the trial court held that the

transaction under Ex.A2 is a binami transaction. Assailing the said findings of the trial Court, the learned Senior counsel for the plaintiff/appellant would contend that the recitals in Ex.A2 conferring life interest to the mother and remainder to the first defendant alone has been challenged in the suit by the plaintiff. Therefore, the question of invoking the provisions of Section 4 of the Binami Transaction (Prohibition) Act will not arise in the instant case. It is not the case of the plaintiff that the suit property was purchased by the mother only in the name of her son/ first defendant, but all along during her life time, she can enjoy the suit property as the absolute owner of the suit property and the first defendant was nominally included as a co-purchaser without the consent of the mother. While so, the trial Court erred in rendering a finding that the transaction to the extent of transfer in favour of the first defendant is a binami transaction. It was not the case of the plaintiff that the transaction in Ex.A2 is a binami transaction.

14. The learned Senior counsel for the appellant also assailed the Judgment and Decree of the trial court by contending that at the time of execution of Ex.A2, sale deed, the first defendant was a minor. In case of sale, the property sold will vest only with the purchaser, who paid the entire sale consideration. As per Section 54 of the Transfer of Property Act, there cannot be a proper sale in favour of the first defendant, who was a minor at that time. The sale is only essentially in favour of the mother and there is no evidence or material made available to show that the first defendant's name was included in Ex.A2 with the consent of the mother. Therefore, according to the learned Senior counsel for the plaintiff, the sale deed, Ex.A2 is void in so far as it conveys transfer of the property in favour of the minor first defendant. Further, it was not even pleaded by the first defendant that he was represented by a guardian at the time of purchasing the suit property under Ex.A2. In such circumstances, the provisions of Section 45 of the Transfer of Property will apply to the facts of this case. As per Section 45 of the Transfer of Property Act, where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contrary to the contrary, respectively, entitled to interests in such property identical, as nearly as may be, with the interest to which they were respectively entitled in the fund. In the present case, the entire sale consideration was paid by the mother and it was not subject to any contract to the contrary. When there is no contract to the contrary, the provisions of Section 45 of the Transfer of Property Act applies to this case. In such circumstance, the mother alone can be construed as a sole and absolute owner of the suit property and consequently, the plaintiff and second defendant are entitled to a share in the suit property as per Shariat Law. In this regard, the learned Senior counsel for the plaintiff/appellant relied on the

decision rendered by the Division Bench of the Calcutta High Court in the case of Ram Chandra Marwari vs. Gopi Nath Choudhari and others) reported in AIR 1916 Calcutta 644 to contend that life interest is just as much property as an absolute interest and any condition absolutely restraining the transferee from disposing of that property is void. Relying on the above decision, it is submitted by the learned Senior counsel for plaintiff that in this case, the life interest given to the mother, who is the absolute owner of the property and thereby restricting her ownership over the suit property only till her life time is contrary to Section 10 and 11 of the Transfer of Property Act.

15. The learned Senior counsel for the plaintiff/appellant also placed reliance on the decision of the Division Bench of the Allahabad High Court in the case of (Gayasi Ram and others vs. Shahabuddin and others) reported in AIR 1935 Allahabad 493 to contend that a clause in a sale deed to the effect that the vendee should not transfer the property by mortgage, gift or sell it to any one excepting vendor or his heirs is contrary to Section 10 of the Transfer of Property Act and it is void. Reliance was also placed on the decision rendered by this Court in (P.V.S. Venkatachellum vs. P.V.S. Kabalamurthy Pillai) reported in AIR 1955 Madras 350 wherein it was held that Sections 10 to 17 of the Transfer of Property Act have been enacted to encourage free alienation and circulation of property. It was further held that entire transfers are not vitiated simply because they may happen to be some clauses in the deeds which are repugnant to the free transfer and circulation of property, such restrictive clauses are to be treated as void.

16. The learned Senior counsel for the plaintiff/appellant also placed reliance on the decision of the Kerala High Court in (Bhavani Amma Kanakadevi and others vs. C.S.I. Dekshina Kerala Maha Idavaka) reported in AIR 2008 Kerala 38 to wherein it was held as follows:-

"The principles underlying the Section 10 is that a right of transfer is incidental to and inseparable from the beneficial ownership of property. If an absolute estate is created and after the creation of such estate, a condition which brings a diminution of that absolute estate is imposed on the person in whose favour the absolute estate is created the said condition being repugnant to the very nature of the estate, which was created is void and unenforceable. The principle is founded on the principle of public policy allowing free disposition of property. Section 11 of Transfer of Property embodies principles of universal application that when the main object of transferor is to make an absolute transfer, an inconsistent provision therein cannot be given effect to."

17. By placing reliance on the above decision, the learned

Senior counsel for the plaintiff/appellant would vehemently contend that the recitals contained in the sale deed, Ex.A2 restricting the ownership of the mother only till her life time and thereafter the suit property shall devolve on the first defendant is contrary to the provisions contained under Section 10 of the Transfer of Property Act. It is further contended that under Mohammadian Law, the entire property cannot be bequeathed to one of the legal heirs to the exclusion of the other legal heir. The trial Court has failed to properly appreciate the above legal aspects and therefore, the learned Senior counsel for the plaintiff prayed for allowing the appeal.

18. Countering the submissions of the learned Senior counsel for the plaintiff/ appellant, the learned counsel for the first defendant/first respondent would contend that suit property was not purchased by the mother Late. Johara Jaffer Abdul Rahman out of her self-earned funds by means of a registered sale deed dated 27.01.1960, marked as Ex.A2. It is not the case of the plaintiff that the mother was employed or she has financial resources to purchase the suit property. The recitals in Ex.A2 clearly indicates that the name of the first defendant/first respondent was incorporated therein as a co-purchaser or second purchaser at the suggestion of the father of the plaintiff and defendants. The recitals would further read that after the death of the mother, the entire property will devolve on the first defendant and this recital was also incorporated at the instance of the father of the plaintiff and the defendants. When the recitals were clearly incorporated in Ex.A2 regarding the right and entitlement of the first defendant over the suit property, the plaintiff and the second defendant are not entitled to any share in the suit property. According to the learned counsel for the first defendant, such recitals were incorporated in the sale deed, Ex.A2 with the consent and knowledge of the mother, who is proficient in English language. The inclusion of the name of the first defendant as a second purchaser in Ex.A2 was also admitted by the plaintiff in her plaint. Therefore, after the death of the mother, the suit property will become the absolute property of the first defendant. When that be so, the claim of the plaintiff that such recitals were incorporated by the vendor of Ex.A2, who is a total stranger, cannot be accepted.

19. The learned counsel appearing for the first defendant/first respondent would contend that the first defendant has specifically raised a defence that he is the absolute owner of the suit property after the death of the mother, on the basis of the sale deed dated 27.01.1960, Ex.A2. However, the plaintiff has not assailed or challenged the sale deed dated 27.01.1960. In the absence of any challenge to the sale deed dated 27.01.1960, Ex.A2, the declaratory relief claimed by the plaintiff cannot be countenanced. Further, the learned counsel for the first defendant invited the attention of this Court to the prayer sought for in the plaint and submitted that the plaintiff has only sought for a declaration

to declare that the deceased Zohara Jaffer Abdul Rahaman is the absolute owner of the suit property and to declare that the covenant contained in Ex.A2 in so far as it confers ownership on the first respondent absolutely as null and void, unenforceable and for partition of the plaintiff schedule mentioned property by metes and bounds into four shares. Thus, the prayer sought for in the suit would only indicate that the plaintiff has accepted the sale deed dated 27.01.1960, Ex.A2 in all other respects. Thus, according to the learned counsel appearing for the first respondent/first defendant, the plaintiff cannot approbate and reprobate in relation to an instrument claiming benefit in one portion of the document and assailing the other portion as bad in law. In this case, the suit sale deed is an instrument in which the plaintiff claims right of a share in the suit property through her mother and in so far as the first defendant, the covenant conferring ownership on him absolutely is sought to be declared as null and void and such a course is totally not available to the plaintiff on the principles of approbate and reprobate. In this context, the learned counsel for the first respondent relied on the decision of the Honourable Apex Court in (R.N. Gosain vs. Yashpal Dhir) reported in AIR 1993 SC Page 352 wherein in para No.10, it was held that "law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that a person cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and then turn around and say it is void for the purpose of securing some other advantage. For the same proposition, the learned counsel appearing for the first respondent/first defendant has also relied on the decision of the Division Bench of this Court in the case of (S. Nagarathinam vs. S. Balakrishnan and 13 others) reported in 1994 (1) Law Weekly 133 and also the decision of the Apex Court in the case of (Rajasthan State Industrial Development and Investment Corporation and another vs. Diamond & Gem Development Corporation Limited and another) reported in (2013) 5 SCC 470. By relying upon the above decisions, the learned counsel for the first defendant would contend that the plaintiff cannot be permitted to blow hot and cold, approbate and reprobate whereby she accepts the benefit of a contract and to deny the validity of the contract to seek for more advantage at a later point of time. This Rule is applied to ensue equity, however, it must not be applied in such a manner so as to violate the principles of what is right and of good conscience.

20. The learned counsel for the first defendant would contend that the sale deed Ex.A2 do not impose absolute restriction on the mother for transfer and only if there is such prohibition or absolute restriction, it will be contrary to the provisions of Section 10 of the Transfer of Property Act. In this regard, the learned counsel for the first

defendant relied on the decision rendered by the Andhra Pradesh High Court in the case of (Somthim Veerabhadra Rao and another vs. Duggirala Lakshmi Devi) reported in AIR 1965 Andhra Pradesh 367 (Volume 52, C.89) wherein it was observed as follows:-

"The term "restricted estate" has not been defined in Hindu Succession Act. Further, such a term does not appear in the text of Hindu Law also. But it would be a mistake to equate that term with the women's estate or life estate as it is commonly understood under the old Hindu Law. It has to be understood in reference to Sections 10 and 11 of the Transfer of Property Act. If the instrument merely creates a life interest without any restriction, it cannot be said to be a 'restricted estate'. But, if along with the creation of a life estate certain valid restrictions are put, then what is created is a 'restricted estate'. It is to such restricted estates that sub-section 2 refers to.

21. The learned counsel for the first respondent also relied on the decision of the Division Bench of the Kerala High Court in (Fatima Sarohini Suresh and others v. K. Saraswathi Amma and others) reported in AIR 1986 Kerala 56 wherein it was held in Para No.9 as follows:-

"9. Sections 10 to 14 of the Transfer of Property Act and the corresponding provisions of the Succession Act are but statutory recognition of principles even otherwise well-settled. To impose a total restraint on transfer of property or to impose rules which keep it out of circulation for ever offends public policy, irrespective of whether such conditions are imposed by a deed of transfer, a will or a simple contract. A contract opposed to public policy is unenforceable, and in this view of the matter, the restrictive clauses in a family settlement restraining alienation of property have to be held as inoperative."

22. By placing reliance on the above decisions, the learned counsel for the first respondent submitted that in this case, there is no absolute restriction imposed on the mother to alienate the suit property till her life time and therefore, Section 10 and 11 of the Transfer of Property Act has no application to this case.

23. With regard to the submissions made by the learned Senior counsel for the plaintiff/appellant that at the time of execution of sale deed, Ex.A2 the first defendant was a minor and not represented by a guardian, the learned counsel for the first defendant/first respondent would contend that merely because the first defendant was a minor and not represented by a guardian in the sale deed, Ex.A2, it will not in any way affect the right of the first defendant conferred thereunder

for the simple reason that any transaction in favour of the minor conferring certain benefits under a document does not require any consent from the minor and such contract is valid and enforceable as per the provisions of the Contract Act. In this regard, the learned counsel for the first respondent relied on the decision of the Apex Court in the case of (K. Balakrishnan vs. K. Kamalam and others) reported in (2004) 1 Supreme Court Cases 581 wherein it was held that Section 127 of the Contract Act recognises the competence of the minor to accept a gift.

24. As regards the submissions of the learned Senior counsel for the plaintiff/ appellant regarding the applicability of Section 45 of the Transfer of Property Act, it is replied by the learned counsel for the first defendant that Section 45 of the Act is not applicable to this case for the simple reason that the sale deed, Ex.A2 reads that the mother shall enjoy the suit property for her life and on her death, the first defendant has to take the suit property absolutely and on the face of the said covenant, the contribution of the sale consideration and in proportion to the said contribution ownership is to be claimed under Section 45 of the Act cannot be made applicable to the case on hand. Ex.A2, sale deed itself provides a contract to the contrary within the meaning of the Act and therefore, Section 45 of the Act cannot be applied to this case. Further, the learned counsel for the first respondent submits that the trial court has specifically made an observation that the suit property was transferred by the vendor in favour of the mother towards her life estate and in favour of the first respondent as a co-purchaser.

25. As regards the submissions made by the learned Senior counsel for the plaintiff/appellant that the findings rendered by the trial court with regard to applicability of Benami Transaction (Prohibition) Act, the learned counsel for the first defendant submits that the suit was filed on 28.03.2005 and at that time Section 4 of the Benami Transaction was applicable, therefore, the suit itself ought not to have been numbered, entertained and proceeded against the first defendant. Though the plea of Benami has not been pleaded by the first defendant in the written statement, he is entitled to raise the same as a question of law since the trial court did not have jurisdiction to entertain the suit of this nature filed by the plaintiff. In any event, the findings of the trial court as to the application of the Benami Transaction Act holds good and the same has not been challenged by the plaintiff/appellant specifically in the memorandum of grounds of appeal.

26. With regard to the submission of the learned Senior counsel for the plaintiff/appellant that Ex.A-4 has been marked before the trial court without any objection and it discloses the intention of the mother to divide the property among her children as per Shariat Law, it was replied by the counsel for

the first respondent that in the written statement, a specific plea has been raised to the effect that Ex.A-4 is a concocted document. The so-called notebook contain the writings from 1942 and a mere look at the said note book does not appear to be the note book maintained before several decades especially when it is stated that the mother was maintaining the book between 1942 to 1997-98 atleast 55 years ago. Furthermore, the plaintiff failed to prove the admissibility or authenticity of Ex.A4 in a manner known to law. The plaintiff has not examined any witness acquainted with the handwriting of the mother. Even assuming without admitting Ex.A4 to be true, unless and until Ex.A2, sale deed dated 27.01.1960 is set at naught, Ex.A4 projected by the plaintiff will not lend her any support to prove her case. Thus, according to the counsel for the first defendant, Ex.A4 cannot be relied on and it has no significance to prove the case of the plaintiff.

27. As regards Ex.A-6 is concerned, it is stated by the learned counsel for the first defendant that it had emanated during the pendency of the suit. Even though Pws 1, 2 and 3 have spoken about Ex.A-6, it was written in Urdu language. Further, Pws 1 to 3 have admitted that they do not know to read Urdu and admitted that in Ex.A-6, there is no endorsement to the effect that the decision of the Mufthees was read and explained to the parties thereto. Therefore, according to the counsel for the first defendant, Ex.A-6 cannot be relied on to substantiate the case of the plaintiff. In this regard, the learned counsel for the first respondent placed reliance on the decision of this Court in the case of (Arulmighu Viswewaraswami and Veeraraghava Perumal Temples, Tiruppur, Coimbatore District vs. R.V.E. Venkatachala Gounder and another) reported in 1996 (III) CTC 199 to contend that when the documents produced are photocopies or the contents of the document are not readable, such documents are inadmissible in evidence. In the present case, Ex.A-4, note book, said to have been maintained by the mother atleast 5 decades before and the contents thereof have not been proved by the plaintiff in a manner known to law. Therefore, the learned counsel for the first defendant prayed for confirming the decree and judgment passed by the trial court and to dismiss the appeal.

28. We have given our anxious consideration to the rival submissions made by the counsel on either side. On consideration of the the rival submissions advanced by the counsel on either side, the following questions arise for determination in this appeal

(i) Whether the entire sale consideration was paid for purchasing the suit property under Ex.A2, Sale deed dated 27.01.1960 by the mother, if so, whether first defendant alone is the absolute owner of the suit property after the demise of the mother in view of the recitals in Ex.A2, sale deed dated 27.01.1960?.

(ii) Whether the inclusion of the name of the first defendant in the sale deed dated 27.01.1960, Ex.A2, when he

was a minor and without being represented by any guardian would disentitle the first defendant to assert a right in the suit property

(iii) Whether the note book, Ex.A4 can be relied on to hold that the wishes of the mother was to divide the property among their children as per Shariyat Law

(iv) Whether the Fatwa (opinion) rendered by Muftes, marked as Ex.A6 will bind the first defendant

(v) Whether the suit filed by the plaintiff is barred by limitation.

29. Point No.1:- It is the submission of the counsel for the plaintiff/ appellant that the conditions incorporated in the sale deed, Ex.A2 conferring only life estate to the mother is in violation to the provisions of Section 10 and 11 of the Transfer of Property Act. It is further contended that such recitals were included without the knowledge or consent of the mother. It is further submitted that the trial court has rendered a finding that the suit property was purchased by the mother out of her self-earned funds, while so, the plaintiff is entitled to a partition in the suit property as per Shariat Law.

30. In the written statement filed by the first defendant, he denied the allegation that recitals in Ex.A2 were included without the knowledge and consent of the mother especially when the mother was not illiterate and a woman who was proficient in English language. According to the counsel for the first defendant, the allegation that the recitals were included in Ex.A2 at the instance of the vendor of Ex.A2 cannot be believed and the recitals were included only with the consent of the mother. It is further stated by the learned counsel for the first defendant that the conditions incorporated in the sale deed, Ex.A2 was with the consent of the mother and it will not vitiate the provisions of Section 10 and 11 of the Act as contended by the plaintiff.

31. Before dealing with the rival contentions of the counsel for both sides, it is necessary to look into Section 10 and 11 of the Transfer of Property Act, which reads as follows:-

"10. Condition restraining alienation-
Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him; provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest therein.

11. Restriction repugnant to interest created.
-- Where on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction.

Where any such direction has been made in respect of one piece of immovable property for the purpose of securing the beneficial enjoyment of another piece of such property, nothing in this section shall be deemed to affect any right which the transferor may have to enforce such direction or any remedy, which he may have in respect of a breach thereof.

32. In this case, condition was imposed in Ex.A2, sale deed dated 27.01.1960 to the effect that mother will have life interest over the suit property with remainder to the first defendant, who was shown as second purchaser. The recitals contained in Ex.A2, if read as a whole, would indicate that the mother has confined her interest over the suit property till her life time with a remainder to the first defendant after her life time, as she intended to confer absolute ownership to the first defendant herein. Therefore, we are of the view that there is no absolute restriction or prohibition imposed in the sale deed. Hence, the recitals in the sale deed, Ex.A2 to that effect that "mother will have life interest over the suit property with remainder to the first defendant" will not make it void as per the provisions of Sections 10 and 11 of the Transfer of Property Act. In this regard, the learned counsel for the first respondent relied on the following decisions (i) Somthim Veerabadra Rao and another vs. Duggirala Lakshmi Devi reported in AIR 1965 AP 367 (Vol.52, C.89) (ii) (Fatima Sarojini Suresh and others vs. K. Saraswathi Amma and others) AIR 1986 Kerala 56 and (iii) (K. Muniswamy (died) by Lrs vs. K. Venkatasamy) AIR 2001 Karnataka 246. On reading of the ratio laid down in the above decisions, we are of the opinion that Section 10 will not apply to the facts of this case. Unless there is a total restraint on the alienation of the property, such transaction is not void. In other words, a partial restraint would be valid and binding. In this case, as stated earlier, the suit property was conveyed to the first defendant with a specific covenant "with remainder over to the second purchaser" which only shows that the mother can deal with the suit property even during her life time in whatsoever manner she likes and if any portion of the suit property is left out, the same will go to the first defendant after her demise. If really the intention of the mother was to divide the suit property among her children, during her life time, she herself could have settled the suit property to the plaintiff and defendants for which she has every right inasmuch as there is no absolute prohibition of transfer of the suit property

involved in this case by the mother. The fact remains that the mother did not effect division of the suit property during her life time which would only indicate that the intention of the mother is not so and to set apart the suit property to be enjoyed by the first defendant after her life time. Thus, viewed from any angle, the recitals in Ex.A2 would only indicate that there was no absolute restriction and it will not render the sale deed, Ex.A2 invalid. Therefore, the submissions of the learned Senior counsel for the plaintiff/appellant that there is absolute restriction in alienating the property and it would vitiate the entire transaction cannot be accepted.

33. Yet another submission of the learned Senior counsel for the plaintiff/appellant is that the entire sale consideration was paid only by the mother and therefore, as per Section 45 of the Transfer of Property Act, the first defendant has no right in the suit property. In this context, the learned Senior counsel for the appellant invited the attention of this Court to Section 45 of the Transfer of Property Act, which reads as follows:-

"45. Joint transfer for consideration:--
Where immovable property is transferred for consideration to two or more persons and such consideration is paid out of a fund belonging to them in common, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property identical, as nearly as may be, with the interests to which they are respectively entitled in the fund; and, where such consideration is paid out of separate funds belonging to them respectively, they are, in the absence of a contract to the contrary, respectively entitled to interests in such property in proportion to the shares of the consideration which they respectively advanced."

In the absence of evidence as to the interests in the fund to which they were respectively entitled, or as to the shares which they respectively advanced, such persons shall be presumed to be equally interested in the property"

34. Thus, by relying upon Section 45 of the Transfer of Property Act, it is submitted by the learned Senior counsel for the plaintiff that a reading of the provisions of the Act would indicate that in the absence of a contract to the contrary, the interest in the property will be in proportion to the share of the consideration the party has advanced. Hence, according to the learned Senior counsel for the plaintiff/appellant, since the entire sale consideration was paid by the mother of the plaintiff and defendants, she alone is the owner of the suit property, particularly when there is no contract to the contrary in the recitals of the sale deed. But it is replied by the counsel for the first defendant that as per the recitals in the

sale deed, Ex.A2, the mother shall retain the suit property till her life and whatever left unsold during her life time shall be vested with the first defendant, after her demise, absolutely. This according to the counsel for the first defendant itself is a contract to the contrary and therefore, Section 45 of the Transfer of Property Act will not be applicable to this case. In this context, useful reference can be made to the decision of the Rajasthan High Court in the case of (Gyan Chand vs. State and others) reported in AIR 1998 Rajasthan 223 wherein it was held as follows:-

"8. Under Section 45 of the Transfer of Property Act, 1882 where immovable property is transferred for consideration to two or more persons jointly makes them co-owners of the property transferred, their interest are in proportion to the share of the consideration they have advanced. In the absence of evidence of share of the consideration, the co-owners shall be presumed to have equal interest in the property. Co-owners have unity of possession and commencement of title in the property, but does not have unity of title or unity of interest in the property. Joint owner of the property cannot be said to have title and interest in the property of another co-owner. Every joint owner has his individual title and interest in the property purchased jointly by them. Thus relinquishment of title and interest in the joint property by one joint owner in favour of another joint owner would only be transfer of interest of one joint owner in favour of another joint owner, each joint owner, having distinguishable, independent, individual title in the jointly purchased property."

35. Keeping the dictum laid down in the above decision, we are of the view that in the instant case, even though the entire sale consideration was paid by the mother, there is a recital in Ex.A2, sale deed dated 27.01.1960 to the effect that after her life time, whatever remainder in the suit property is available, the same shall vest with the first defendant absolutely, meaning thereby after the demise of the mother, whatever portion or unsold property in the suit property shall vest with the first defendant absolutely. Thus, this itself is a contract to the contrary within the meaning of Section 45 of the Transfer of Property Act and therefore, Section 45 of the said Act cannot be applied to this case. Further, the sale consideration paid by the mother for purchasing the suit property in the joint name of the first defendant, would confer independent and individual title to the first defendant in the suit property which the mother has purchased jointly along with the first defendant.

36. Point No.2:- The next submission of the learned Senior counsel for the plaintiff/appellant is that the first

defendant was a minor, aged 12, at the time when Ex.A2, sale deed was executed in which he was shown as co-purchaser. However, the first defendant was not represented by any guardian and therefore it will vitiate the entire sale deed in so far as the first defendant is concerned. It was replied by the learned counsel for the first defendant that any transaction in favour of the minor conferring certain benefits under a document does not require any consent from the minor and such contract is valid and enforceable as per the provisions of the Contract Act. In this regard, the learned counsel for the first defendant relied on the decision of the Apex Court in the case of (K. Balakrishnan vs. K. Kamalam and others) reported in (2004) 1 Supreme Court Cases 581 wherein in Para No. 18, it was held as follows:-

"18. Section 127 throws light on the question of validity of transfer of property by gift to a minor. It recognises minor's capacity to accept the gift without intervention of guardian, if it is possible, or through him. It reads:

"127. Onerous gift - Where a gift is in the form of a single transfer to the same person of several things of which one is, and the others are not, burdened by an obligation, the donee can take nothing by the gift unless he accepts it fully.

Where a gift is in the form of two or more separate and independent transfers to the same person of several things, the donee is at liberty to accept one of them and refuse the others, although the former may be beneficial and the later onerous.

Onerous gift to disqualified person:- A donee not competent to contract and accepting property burdened by any obligation is not bound by his acceptance. But if, after becoming competent to contract and being aware of the obligation, he retains the property given, he becomes so bound."

(underlining by the Court)

19. The last part of Section 127, underlined above, clearly indicates that a minor donee, who can be said to be in law incompetent to contract under Section 11 of the Contract Act is, however, competent to accept a non-onerous gift. Acceptance of an onerous gift, however, cannot bind the obligation and on attaining majority does not repudiate but retains it, he would be bound by the obligation attached to it.

20. Section 127 clearly recognises the competence of a minor to accept the gift. The provision of law is clear and precedents clarify the position. See the decisions of the Judicial Commisisoner in the cases of Firm of Ganeshdas

Bhiwaraj vs. Suryabhan (1917) 13 Nag LR 18 and (Munni Kunwar vs. Madan Gopal (ILR (1916) 38 All 62 (ILR at p.69)

21. The position of law, thus, under the Transfer of Property Act read with the Indian Contract Act is that

"the acquisition of property being generally beneficial, a child can take property in any manner whatsoever either under intestacy or by Will or by purchase or gift or other assurance inter vivos, except where it is clearly to his prejudice to do so. A gift inter vivos to a child cannot be revoked. There is a presumption in favour of the validity of a gift of a parent or a grand parent to a child, if it is complete (See Halsbury's laws of England, Vol.5 (2), 4th Edn., paras 642 and 647).

When a gift is made to a child, generally, there is a presumption of its acceptance because express acceptance in his case is not possible and only an implied acceptance can be expected."

37. In this case, Ex.A2, sale deed was not executed only in favour of the first defendant when he was a minor. Ex.A2, sale deed was executed in favour of the mother of the plaintiff and defendants in which the first defendant was included as a co-purchaser. Thus, it could be seen that the minority of the first defendant on 27.01.1960 will in no way affect the right of the first defendant under Ex.A2 for the reason that any transaction in favour of the minor cannot require a consent from the minor and the said contract is valid and enforceable under law within the meaning of Section 127 of the contract Act.

38. Point No.3:- As regards the admissibility or otherwise of Ex.A4, note book maintained by mother, we have perused the original Ex.A4 produced before us. On perusal of Ex.A4, note book, we find that there is no continuity. A mere look at the note book gives an impression that it does not appear to be in existence for several decades, as pleaded by the plaintiff especially when it is said to have been in vogue from 1949 to 1993. Even though DW2 has spoken to about the handwriting of the mother, we are of the view that Ex.A4 will not outweigh the registered sale deed dated 27.01.1960, marked as Ex.A2. Further, we find that there is no cross-examination of DW2 with respect to Ex.A4 especially when he has asserted that it was fabricated for the purpose of filing the suit. The relevant portion of cross-examination of the first defendant, as DW2, reads as follows:-

".... Ex.A-4 cannot be the notebook maintained by my mother. I do not have any papers or records containing my mother's handwriting. I denied the suggestion that I have not falsely denied Ex.A4 note book was not my mother's note book. It is not correct to suggest that I deny

that Ex.A4 because it contained the suit proeprty exclusive of my mother. I deny the the suggestion that my mother in her life time told several times that the property divided as per Shariat law and I have agreed to that."

39. In this context, useful reference can be made to the decision of the Bombay High Court in the case of (Zenna Sorabji and others vs. Mirabelle otel Co., (Pvt) Ltd., and others) reported in AIR 1981 Bombay 446 wherein it was held as follows:-

"34. Moreover, by consent, proof of the document may be dispensed with, but if the document is intrinsically inadmissible in evidence, no amount of consent by any party can confer the status of admissibility upon the said document. If an authority is necessary for this proposition, it is to be found from the judgment of the Madras High Court in Kamalammal Avergal vs. Athinkari Sangali Subha Pillai (1918) 35 Madras LJ 11; (AIR 1919 Mad 758 (2): at page 14 (of Madras L1) (at p.760 of AIR) of the said Judgment, the leaned Judges stated as follows:-

"Mr. Justice Benson and Mr. Justice Sundaram Aiyar after reviewing all the authorities on the question point out in Shri Rajah Prakasarayanin Guru vs. Venkata Rao (1912) ILR 38 Madras 160 "consent or want of objection to the reception of evidence which is irrelevant cannot make the evidence relevant".

40. In the present case, Ex.A4, a note book is said to have been maintained by the mother in which she had written that the suit property has to be divided among her three children as per Shariyat Law. However, when Ex.A2, sale deed dated 27.01.1960 confers absolute right on the first defendant, the note book, Ex.A4, cannot assume much significance. Even otherwise, the mother herself was the executant of sale deed dated 27.01.1960 by which the first defendant was conferred with remainder over with absolute powers of disposal vested in him for ever and free from all encumbrances.

41. Point No.4:- As regards the Fatwa (opinion) rendered by the Muftes, which was marked as Ex.A6, we are of the opinion that the trial court rightly rejected it on the ground that it has emanated during the pendency of the suit and it cannot be relied upon. Even otherwise, on perusal of the evidence of DW2 and DW3, who have spoken about Ex.A6, it was only stated that Ex.A6 is in Urdu and they are not acquainted with Urdu language. Further, as rightly pointed out by the counsel for the first defendant, there is no endorsement in Ex.A6 to show that it was read over and explained to the signatories thereof. In any event, the validity or otherwise of Ex.A6 cannot be gone into by this Court especially when it has come into existence during the course of trial. Further, if the first defendant failed to comply with the decision taken

by the Fatwas, as pleaded by the plaintiff, he cannot be compelled to accept such decision. In such circumstances, in our opinion, Ex.A6 will not lend any support of the case of the plaintiff.

42. As regards the other submission advanced by the learned counsel for the plaintiff/appellant regarding the execution of sale deed dated 23.10.1963, Ex.A8 in favour of the appellant and Ex.B3, sale deed dated 15.06.1966 in favour of the second respondent in this appeal, we are of the view that the execution of those sale deeds under Exs. A8 and B3 in favour of the plaintiff/appellant and the second defendant/second respondent has no relevance for adjudicating the dispute involved in this appeal and therefore, they are not required to be gone into by this Court.

43. We also find from perusal of the records that neither the plaintiff, in her plaint, nor the first defendant, in his written statement, have raised the plea with regard to applicability of the provisions of the Benami Transaction in this case. The trial court also did not frame any issue in this regard. Therefore, we are of the opinion that the findings rendered by the trial Court with regard to applicability of Benami Transaction Act to this case need not be gone into in this appeal.

44. For all the reasons aforesaid, we do not find any reason to interfere with the Judgment and Decree passed by the trial Court. Therefore, we confirm the decree and judgment passed by the trial court. The Appeal suit is dismissed. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

The District Judge

The Nilgiris

Ootacamund

+1cc to Mr.K.Rajasekar, Advocate sr.59048

+2cc to Mr.T.P.Sankaran, Advocate sr.59099

Judgment in

A.S. No. 865 of 2006

rj(co)

SS(3/10/2017)

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