

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.424 of 2005

Judgment reserved on: 15-10-2019

Judgment delivered on: 24-10-2019

1. Afajal Ali, S/o late Rahmat Ali, Age 35 years.
2. Ashraf Ali, S/o Late Rahmat Ali, Age 30 years,
Both R/o Village Barwahi, Occupation Agriculturist, Tehsil Pal, Distt. Surguja (C.G.)
3. Smt. Nurjahan (Died and deleted)

(Plaintiffs)
---- Appellants

Versus

1. Amruddin Ansari (Dead) Through LRs
(1) Jaibun, Wd/o late Amruddin Ansari, age about 60 years,
(2) Umat Rasul, S/o Late Amruddin Ansari, aged about 45 years,
(3) Abid, S/o Amruddin Ansari, aged about 42 years,
(4) Asique Ansari, S/o Amruddin Ansari, aged about 39 years,
All are R/o Village Dolangi, Post Dolangi, Janpad Panchayat Ramchandrapur, District Balrampur (C.G.)
2. Volayat Ansari, S/o Wajid Ali Ansari, Age 46 years.
3. Tahir Hussain, S/o Wajid Ansari, Age 40 years.
Respondents No.2 & 3 R/o Village Dolangi, Occupation Agriculturist, Tehsil Pal, District Surguja (C.G.)
4. Smt. Begum Alias Amna Khatun, D/o Abdul Rajjaque, age about 45 years,
5. Smt. Seyara Khatun, D/o Abdul Rajjaque, age about 35 years.
Respondents No.4 & 5 R/o Village Jainagar, Tehsil Surajpur, Distt. Surguja (C.G.)
6. State of Chhattisgarh, through Collector of Surguja, Ambikapur (C.G.)

(Defendants)
---- Respondents

For Appellants: Mr. Sushil Dubey and Mr. Aman Upadhyay. Advocates.
For LR's of Respondent No.1 and Respondents No.2 to 5: -
Dr. N.K. Shukla, Senior Advocate with Mr. Ashwin
Panickar, Advocate.
For Respondent No.6 / State: -
Mr. Sanjeev Kumar Agrawal, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This second appeal preferred by the plaintiffs / appellants was admitted for hearing by formulating the following substantial questions of law: -

i) "Whether the learned first Appellate Court was justified in holding that since the decree holder did not deposit the deficit court fees within the period allotted by the trial Court, the decree becomes inexecutable, is correct particularly in view of the fact that the deficit court fees has been deposited by the plaintiff/decreed holder with the permission of the trial Court?"

ii) "Whether the finding of the first Appellate Court that the instant suit was not maintainable in view of the doctrine of res judicata, is justified in the absence of any evidence that the earlier suit was between the same parties and for the same relief?"

iii) "Whether the finding of the appellate Court that the document titled as Vazib Dava of Ex.P.1, by which the patta holder Abdul Rajak has relinquished his right in favour of the plaintiffs could be ignored only on the ground that the same has not been proved by examining the attesting witnesses particularly in the light of the fact that the same has not been disputed by the defendants?"

[For the sake of convenience, parties will hereinafter be referred as per their status shown in the suit before the trial Court.]

2. The three plaintiffs brought a suit for declaration of title and permanent injunction stating inter alia that the suit land was earlier Manwar land in the Surguja State held by the Maharaja of Surguja State and father of plaintiffs No.1 & 2 and husband of plaintiff No.3

was Gautia of Village Barwahi and in lieu of his services as Gautia, Gautiai patta was granted vide Ex.P-3 on 14-10-1944 in favour of Abdul Rajjaque and said Abdul Rajjaque, who was the father of defendants No.4 & 5, executed a Wajib Dava (Ex.P-1) on 15-10-1952 in favour of his younger brother Rahmat Ali – father of plaintiffs No.1 & 2 and husband of plaintiff No.3 and delivered peaceful possession to them and the name of Rahmat Ali was also recorded in the revenue records, but on 19-12-1986, defendants No.1 to 3 got their names mutated in the revenue records holding that they have purchased the suit land from Mariam Bibi and defendants No.4 & 5, as such, the plaintiffs are entitled for declaration of title and the sale deed dated 19-12-1986 is ineffective.

3. Defendants No.1 to 3 filed their written statement and admitted the fact that the suit land was settled in favour of Abdul Rajjaque by the Maharaja Bahadur of Surguja State by way of Gautiai patta Ex.P-3, but refuted the fact of Wajib Dava / batwara dated 15-10-1952 in favour of Rahmat Ali and also disputed the possession and set up a plea that they have purchased the suit land by sale deed dated 19-12-1986 and further pleaded the plea of res judicata pleading that Civil Suit No.37A/1996 (Rahmat Ali v. Amruddin and others) was dismissed on 26-2-1998 and appeal there-against was also dismissed on 1-7-1999.
4. The trial Court upon consideration of oral and documentary evidence on record, negatived the plea of res judicata and held that the plaintiffs are title holders of the suit land by virtue of Ex.P-1

dated 15-10-1952, as Abdul Rajjaque was given the Gautiai patta by the Maharaja Bahadur of Surguja State which was converted into ryoti rights on 30-10-1954 by the order of the Deputy Commissioner (Land Records) passed in Revenue Case No.6A/1952-53. On appeal being preferred by defendants No.1 to 3 / purchasers of the suit property, the first appellate Court set aside the decree of the trial Court holding that the plaintiffs failed to deposit the deficit court fees within the time limit prescribed by the trial Court and it suffers from the principle of res judicata which has not been proved in accordance with law.

5. Mr. Sushil Dubey, learned counsel appearing for the appellants herein / plaintiffs No.1 & 2, would submit that the first appellate Court is absolutely unjustified in setting aside the judgment & decree of the trial Court, as the plaintiffs had already deposited the court fees after getting the certified copy of decree on 28-10-2002. The suit was dismissed under Order 9 Rule 2 of the CPC and therefore after rejection of application, fresh suit was filed which was in time and is maintainable. The document Ex.P-1 is a 30 years old document and was produced from proper custody, therefore, its correctness will be presumed and as such, the impugned judgment & decree be set-aside and the appeal be allowed.
6. Dr. N.K. Shukla, learned Senior Counsel appearing for LR's of defendant No.1 and for defendants No.2 to 5, would submit that the plaintiffs have deposited the deficit court fees after 14 days from the date of judgment of the trial Court and the suit has rightly held to be

barred by res judicata and thirdly, vide Ex.P-1 Abdul Rajjaque had no right to transfer *spes successionis* in view of Section 6(a) of the Transfer of Property Act, 1882 which provides that property of any kind may be transferred, except the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, as such, Abdul Rajjaque could not have transferred his ryoti right which was not conferred on the date of executing Ex.P-1 dated 15-10-1952 and which was actually conferred on 30-10-1954. Lastly, he submits that even otherwise, Ex.P-1 is not a registered document and therefore Ex.P-1 has rightly been not relied upon by the first appellate Court to non-suit the plaintiffs.

7. I have heard learned counsel for the parties and considered their submissions made herein-above and also went through the records with utmost circumspection.

Answer to substantial question of law No.1:

8. The trial Court by its judgment & decree dated 16-10-2002 directed for payment of deficit court fees within a week from the date of judgment. The plaintiffs applied for certified copy of the judgment on 21-10-2002 which was delivered to them on 25-10-2002 as per the record and ultimately, the deficit court fees was paid on 28-10-2002. Though the plaintiffs applied for obtaining certified copy of the judgment a little late, but the time spent in applying and getting certified copy i.e. 21-10-2002, 22-10-2002, 23-10-2002, 24-10-2002 & 25-10-2002 – five days would be excludable for computing the period of seven days and further the trial Court itself signed the

decree on 19-10-2002. In normal practice, certified copy of the judgment is not delivered unless the objections on decree are invited and decree is signed thereafter. The decree has been signed on 19-10-2002 and promptly, the plaintiffs had applied for certified copy of the judgment on 21-10-2002, certified copy of the judgment was delivered on 25-10-2002 and court fees has been deposited on 28-10-2002. Even otherwise, no objection has been raised by the defendants and the court has also allowed the plaintiffs to deposit the deficit court fees on 28-10-2002 without protest and demur. Therefore, the adverse finding of the first appellate Court in this aspect cannot sustain. The first substantial question of law is answered accordingly in favour of the plaintiffs and against the defendants.

Answer to substantial question of law No.2:

9. Since the first suit filed by Rahmat Ali – Civil Suit No.37A/1996 was dismissed for non-compliance of payment of court fees on 26-2-1998 and the application for restoration was dismissed on 1-7-1999, therefore, the second suit is barred. In view of that, the first appellate Court has held that the suit was barred by the principle of res judicata. Copy of the order sheet dated 26-2-1998 passed in Civil Suit No.37A/1996 has been placed on record though not marked as exhibit would show that the plaintiff's suit was dismissed for non-payment of process fees under Order 9 Rule 2 of the CPC. Remedy is available under Order 9 Rule 4 of the CPC.
10. The question would be, whether second suit would be barred under Order 9 Rule 4 of the CPC?

11. By virtue of the provision contained in Order 9 Rule 4 of the CPC, where a suit is dismissed under Rule 2 or Rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for such failure as is referred to in Rule 2, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.
12. The question is, whether the two remedies prescribed under Order 9 Rule 4 of the CPC are mutually exclusive?
13. The Privy Council in the matter of **Bhudeo v. Musammat Baikunthi**¹ has held that the two remedies prescribed under Order 9 Rule 4 of the CPC are not mutually exclusive and even if the application for restoration has been rejected, the fresh suit would be maintainable and it was held as under: -

“1. The point raised is whether the two remedies allowed to a plaintiff whose suit has been dismissed under Order IX, Rule 2 or 3, namely, the remedy of bringing a fresh suit or applying to have the dismissal set aside, are mutually exclusive. The words of Order IX, Rule 4, are materially the same as the words of Section 99, Act XIV of 1882, upon this point. The wording is not very happy. The use of the word "or" presents many difficulties. In spite of the fact that the word "or" is used and in spite of the fact that the remedy of bringing a fresh suit is placed first and the remedy of having the order set aside is placed second, I am of opinion that the lower Appellate Court is right. I cannot read into the words of the section the meaning that when a person, in good faith believing his suit to have been wrongfully dismissed, comes into Court to have that order set aside and fails to succeed, that person incurs the penalty of not being permitted to bring another suit upon the same facts. The selection of the remedy of bringing a fresh suit involves the plaintiff in the necessity of paying a fresh Court-fee

1 [1921] 63 I.C. 239

and a man would naturally wish to take his chance of getting his suit restored and avoiding payment of a fresh Court-fee. It does not seem likely that it was the intention of the Legislature that if he took this chance, he was to be deprived of all other remedy in event of failure. The whole of the argument on the side of the appellant practically rests upon the use of the solitary word "or," and I do not think that there is sufficient force in that argument to support the appellant's contention. I, therefore, dismiss this appeal with costs."

14. The decision of the Privy Council rendered in Bhudeo (supra) was followed by a Division Bench of the Allahabad High Court in the matter of Govind Prasad v. Har Kishen and others². Similar is the proposition laid by a Division Bench of the High Court at Oudh In the matter of Raja Krishna Pal Singh³ in which it has been held that the two remedies prescribed by Order 9 Rule 4 of the CPC are not mutually exclusive.
15. Even otherwise, the first suit was not decided on merits and the Supreme Court in the matter of Sheodan Singh v. Daryao Kunwar⁴ has clearly held that where decision in the former suit is not on merits, the principle contained in Section 11 of the CPC would not apply and held as under: -

"In order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation

2 (1929) AIR (Allahabad) 131

3 AIR 1937 Oudh 262

4 AIR 1966 SC 1332

or for failure to pay additional Court-fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be res judicata in a subsequent suit.”

16. Reverting to the facts of the present case, it is quite vivid that though the plaintiffs first suit was dismissed under Order 9 Rule 2 of the CPC for want of payment of process fess and application for restoration was also dismissed, but in view of the above-stated principle of law rendered by the Privy Council and followed by the two High Courts that two remedies available under Order 9 Rule 4 of the CPC are not mutually exclusive, the finding of the first appellate Court cannot sustain in this behalf. The substantial question of law is answered accordingly.

Answer to substantial question of law No.3:

17. The suit property was admittedly settled in favour of Abdul Rajjaque vide Ex.P-3 by granting him the Gautiai patta on 14-10-1944 and said Abdul Rajjaque, father of defendants No.4 & 5, executed Wajib Dava vide Ex.P-1 in favour of his younger brother Rahmat Ali – father of plaintiffs No.1 & 2 and husband of plaintiff No.3, and said to have delivered peaceful possession to them. Admittedly, on the date of executing Wajib Dava Ex.P-1 on 15-10-1952, ryoti right was not conferred to Abdul Rajjaque, it was conferred by the order of the Deputy Commissioner (Land Records) on 30-10-1954 passed in Revenue Case No.6A/1952-53. Thus, learned Senior Counsel appearing for the defendants submitted that since ryoti right was not conferred to Abdul Rajjaque on the date of executing Wajib Dava Ex.P-1 dated 15-10-1952 in favour of his younger brother

Rahmat Ali, therefore, by virtue of Section 54 of Mulla's Principles of Mahomedan Law, there is total bar to transfer right of spes successionis under the rule of Mahomedan law. Therefore, vide Ex.P-1 no title is conferred to the father of the plaintiffs (Rahmat Ali) and thereafter, to the plaintiffs.

18. In order to consider the plea, it would be appropriate to notice Section 6(a) of the Transfer of Property Act, 1882 which is incorporated in Chapter II thereof. Section 6 provides that property of any kind may be transferred, except as otherwise provided in clauses (a) to (i). Clause (a) of Section 6 is relevant herein and is reproduced herein: -

“6. What may be transferred?.—Property of any kind may be transferred, except as otherwise provided by this Act or by any other law for the time being in force,—

(a) The chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.”

19. The provision of Section 6(a) of the Transfer of Property Act, 1882 has to be read along with Section 2 of the said Act which provides repeal of Acts and saving of certain enactments, incidents, rights, liabilities, etc.. It specifically provides that nothing in the second Chapter (Chapter II) of the Act shall be deemed to affect any rule of Muhammadan law.

20. Chapter VI of Mulla's Principles of Mahomedan Law (20th Edition) by Sir Dinshaw Fardunji Mulla deals with the General Rules of Inheritance under the Muhammadan law. Section 54 which comes under Chapter VI provides for Transfer of spes succession is:

Renunciation of chance of succession. It provides as under : -

“§54. Transfer of spes succession is: Renunciation of chance of succession The chance of a Mahomedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release.”

21. The aforesaid rule of Mohammedan law that an heir cannot renounce his right to inherit is not different from the law under the Transfer of Property Act, 1882, Section 6(a).
22. Section 6(a) of the Transfer of Property Act, 1882 provides that the chance of an heir-apparent succeeding to an estate, the chance of a relation obtaining a legacy on the death of a kinsman, or any other mere possibility of a like nature, cannot be transferred.
23. The Supreme Court in the matter of Gulam Abbas v. Haji Kayyum Ali and others⁵, while dealing with Section 54 of Mulla's Principles of Mahomedan Law read with Section 6(a) of the Transfer of Property Act, 1882, held that renunciation of an expectancy in respect of a future share in a property in a case where the party concerned himself chose to depart from the earlier views, was not only possible, but legally valid. It was observed by Their Lordships as under: -

“12. As already indicated, while the Madras view is based upon the erroneous assumption that a renunciation of a claim to inherit in future is in itself illegal or prohibited by Muslim law, the view of the Allahabad High Court, expressed by Suleman, C.J., in *Latafat Hussain's case* (supra) while fully recognising that "under the Mahomedan law relinquishment by an heir who has no interest in the life-time of his ancestor is invalid and void", correctly lays down that such an abandonment may, nevertheless, be part of a course of conduct which may create an estoppel against claiming the right at a time when the right of inheritance has accrued. After considering several decisions, including the Full Bench of

5 (1973) 1 SCC 1

the Madras High Court in *Asa Beevi's case* (supra) Suleman, C.J., observed at page 575 :

"The question of estoppel is really a question arising, under the Contract Act and the Evidence Act, and is not a question strictly arising under the Mahomedan Law."

He pointed out (at pages 575-576) :

"It has been held in this Court that contingent reversioners can enter into a contract for consideration which may be held binding on them in case they actually succeed to the estate: See 19 ALJ 799, and 21 ALJ 235. It was pointed out in 24 ALJ 873, at pp. 876-77, that although a reversionary right cannot be the subject of a transfer, for such a transfer is prohibited by Section 6, T.P. Act, there was nothing to prevent a reversioner from so acting as to estop himself by his own conduct from subsequently claiming a property to which he may succeed. Among other cases reliance was placed on the pronouncement of their Lordships of the Privy Council in 40 All 487, where a reversioner was held bound by a compromise to which he was a party."

13. Incidentally, we may observe that, in *Mohammad Ali. Khan v. Bisar Ali Khan*⁶, the Oudh Chief Court has relied upon *Hurmoot-Ool-Nisa Bagum's case* (supra) to hold that "according to Mahomedan Law there may be renunciation of the right to inheritance and such renunciation need not be express but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another".

24. Likewise, in the matter of Jumma Masjid, Mercara v.

Kodimaniandra Deviah and others⁷, the Supreme Court held as

under: -

"18. ... We accordingly hold that when a person transfers property representing that he has a present interest therein, whereas he has in fact, only a spes successionis, the transferee is entitled to the benefit of S. 43, if he has taken the transfer on the faith of that representation and for consideration. In the present case, Santhappa, the vendor in Ex. III, represented that he was entitled to the property in praesenti, and it has been found that the purchaser entered into the

⁶ AIR 1928 Oudh 67

⁷ AIR 1962 SC 847

transaction acting on that representation. He therefore acquired title to the properties under S. 43 of the Transfer of Property Act, ...“

25. The principles of law laid down in Gulam Abbas (supra) was considered by Their Lordships of the Supreme Court in the matter of Shehammal v. Hassan Khani Rawther and others⁸ in which following three questions were formulated by Their Lordships in paragraph 25: -

“(i) Whether in view of the doctrine of *spes successionis*, as embodied in Section 6 of the Transfer of Property Act, 1882, and in Section 54 of Mulla's Principles of Mahomedan Law, a deed of relinquishment executed by an expectant heir could operate as estoppel to a claim that may be set up by the executor of such deed after inheritance opens on the death of the owner of the property?

(ii) Whether on execution of a deed of relinquishment after having received remuneration for such future share, the expectant heir could be estopped from claiming a share in the inheritance?

(iii) Can a Mohammedan by means of a family settlement relinquish his right of *spes successionis* when he had still not acquired a right in the property?”

Their Lordships observed as under in paragraphs 27, 28 and 29 of the report: -

“27. In spite of the aforesaid provisions, both of the general law and the personal law, the courts have held that the fetters imposed under the aforesaid provisions are capable of being removed in certain situations. Two examples in this regard are—

(i) When an expectant heir willfully does something which has the effect of attracting the provisions of Section 115 of the Evidence Act, is he estopped from claiming the benefit of the doctrine of *spes successionis*, as provided for under Section 6(a) of the Transfer of Property Act, 1882, and also under the Mohammedan Law as embodied in Section 54 of *Mulla's Principles of Mahomedan Law*?

8 (2011) 9 SCC 223

(ii) When a Mohammedan becomes a party to a family arrangement, does it also entail that he gives up his right of *spes successionis*?

The answer to the said two propositions is also the answer to the questions formulated hereinbefore in para 25.

28. The Mohammedan Law enjoins in clear and unequivocal terms that a chance of a Mohammedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or release. Section 6(a) of the Transfer of Property Act was enacted in deference to the customary law and law of inheritance prevailing among Mohammedans.

29. As opposed to the above, are the general principles of estoppel as contained in Section 115 of the Evidence Act and the doctrine of relinquishment in respect of a future share in property. Both the said principles contemplated a situation where an expectant heir conducts himself and/or performs certain acts which makes the two aforesaid principles applicable in spite of the clear concept of relinquishment as far as Mohammedan Law is concerned, as incorporated in Section 54 of *Mulla's Principles of Mahomedan Law*. “

Finally, Their Lordships held in paragraph 36 as under: -

“36. We are, however, not inclined to accept that the methodology resorted to by Meeralava Rawther can strictly be said to be a family arrangement. A family arrangement would necessarily mean a decision arrived at jointly by the members of a family and not between two individuals belonging to the family. The five deeds of relinquishment executed by the five sons and daughters of Meeralava Rawther constitute individual agreements entered into between Meeralava Rawther and the expectant heirs. However, notwithstanding the above, as we have held hereinbefore, the doctrine of estoppel is attracted so as to prevent a person from receiving an advantage for giving up of his/her rights and yet claiming the same right subsequently. In our view, being opposed to public policy, the heir expectant would be estopped under the general law from claiming a share in the property of the deceased, as was held in *Gulam Abbas* case (supra).”

26. Reverting to the facts of the present case in light of the principles of law laid down by Their Lordships of the Supreme Court in **Gulam**

Abbas (supra) and **Shehammal** (supra), it cannot be held that the Wajib Dava (Ex.P-1) executed by Abdul Rajjaque in favour of Rahmat Ali – father of plaintiffs No.1 & 2, is hit by Section 54 of Mulla's Principles of Mahomedan Law read with Section 6(a) of the Transfer of Property Act, 1882. Accordingly, this question is answered against the defendants and in favour of the plaintiffs.

27. Now, the question is, whether the trial Court was justified in closing the opportunity of the defendants to cross-examine the plaintiffs' witnesses?

28. The trial Court fixed the case for the plaintiffs' evidence on 12-7-2002. On the said date, the plaintiff's five witnesses Afajal Ali (PW-1), Sukhdev (PW-2), Bigan Sai (PW-3), Mohd. Naeem (PW-4) and Mohd. Safique (PW-5) were present. When the matter was called-up for hearing, neither the defendants nor their counsel appeared and when the suit was taken for hearing later-on, an application was filed by defendant No.1 that his counsel Mr. R.A. Tiwari, Advocate, has gone out and therefore cross-examination be adjourned, but the trial Court refused to grant adjournment finding no sufficient cause for adjourning the matter. A careful perusal of the application I.A.No.1 would show that no sufficient cause has been shown by defendant No.1, except showing that his counsel Mr. R.A. Tiwari, Advocate, has gone out, nothing has been mentioned except pleading that he has gone out and no reason whatsoever has been disclosed in the said application which the trial Court rejected and examined five witnesses of the plaintiffs and defendant No.1 was present throughout at the time of examination.

Thereafter, on 31-7-2002, an application for permitting defendant No.1 to cross-examine the plaintiffs' witnesses was made and that was also rejected by the trial Court. The trial Court has assigned sufficient cause for not granting adjournment to defendant No.1, as in the application it was simply mentioned that Mr. R.A. Tiwari, Advocate, had gone out and no further particulars as to the place where he has gone or reason for his going out all of a sudden or any other urgency has been shown in the said application, whereas sufficient reason ought to have been disclosed by defendant No.1 to seek adjournment, particularly when the date was already fixed on 26-6-2002 for 12-7-2002. The reason assigned by the trial Court cannot be taken exception to. The adjournment has rightly been refused and the application has rightly been not granted in favour of defendant No.1 which has unnecessarily been interfered by the first appellate Court.

29. Now, the question is, whether the Wajib Dava (Ex.P-1) is inadmissible in evidence for want of registration under Section 49 read with Section 17 of the Registration Act, 1908. Section 17(1)(b) of the Registration Act, 1908 provides as under: -

“S. 17. Documents of which registration is compulsory.—(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

(a) xxx xxx xxx

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right,

title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) to (e) xxx xxx xxx”

30. The question is, whether a deed purporting to relinquish the chance of Mohammedan heir requires registration, as the same is barred by Section 54 of Mulla's Principles of Mahomedan Law. Under the Mohammedan law, a mere possibility, such as expectant right of an heir-apparent is not regarded as present or vested interest and cannot pass by succession, bequest or transfer so long as the right has not actually came into existence by death of present owner.
31. The Bombay High Court in the matter of Abdool v. Goolam⁹ has held that a deed purporting to relinquish or assign the chance of a Mahomedan heir succeeding to an estate does not require registration.
32. Similarly, in the matter of Nand Lal v. Mt. Lakhmi and others¹⁰, it has been held by the Lahore High Court that a transfer of reversionary rights is not tantamount to transfer of property and registration is not necessary in case of a document embodying an agreement by a reversioner giving up his reversionary rights.
33. It is quite vivid that the deed purporting to relinquish or assign the chance of a Mahomedan heir succeeding to an estate is not registrable under Section 17 read with Section 49 of the Registration Act, 1908. The reason is that the heir has only a spes successionis or chance of succession, and has no right or interest in the property vested or contingent. Therefore, such a document is

9 (1905) 30 Bom 304

10 AIR 1939 Lahore 414

not required to be registered and it would not tantamount to vested or contingent right within the meaning of Section 17(1)(b) of the Registration Act, 1908.

34. In view of the aforesaid analysis, I am of the considered opinion that the first appellate Court is absolutely unjustified in setting aside the judgment & decree of the trial Court. Consequently, judgment & decree of the first appellate Court is set-aside and that of the trial Court is restored. The appeal is allowed to the extent indicated herein-above. No order as to cost(s).

35. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge