



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

S.A.(MD)No.818 of 2008

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1.M.S.Abdul Hammed (Died) ... Appellant / Appellant / 1st Defendant
2.K.Rajabunisha Begum
3.B.Hathija Kano
4.A.Sathik Batcha
5.Sharmila Banu
6.D.Fathima Kani ... Appellants(2-6)

(Appellants 2 to 6 are brought on record as Lrs of
the deceased sole appellant vide order dated 08.06.2017)

-Vs-

1.A.Rameejan Bivi
2.A.Mohamed Mustafa ... Respondents 1 & 2 /
Respondents 1 & 2/Plaintiffs
3.S.M.Jafarullah
4.Mohamed Rafeek
5.Lailath ... Respondents / Respondents 3 to 5 /
Defendants 2 to 4

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree passed in A.S.No.14 of 2007 on the file of the Principal District Judge, Thanjavur, dated 13.11.2007 confirming the decree and judgment passed in O.S.No.69 of 2002 on the file of the Principal Sub Court, Thanjavur, dated 06.12.2006.

For Appellants : Mr.V.K.Vijaya Raghavan
For R1 & R2 : Mr.R.Rajaraman
For R3 to R5 : exparte

JUDGMENT

The first defendant in O.S.No.69 of 2002 on the file of the Principal Sub Court, Thanjavur, filed this second appeal. He has since passed away and his legal heirs have come on record. The suit was for partition. It was filed by the respondents 1 and 2 herein. Their case was that the suit property belonged absolutely to their paternal grandmother Havva Bivi. Havva Bivi's husband Mohamed

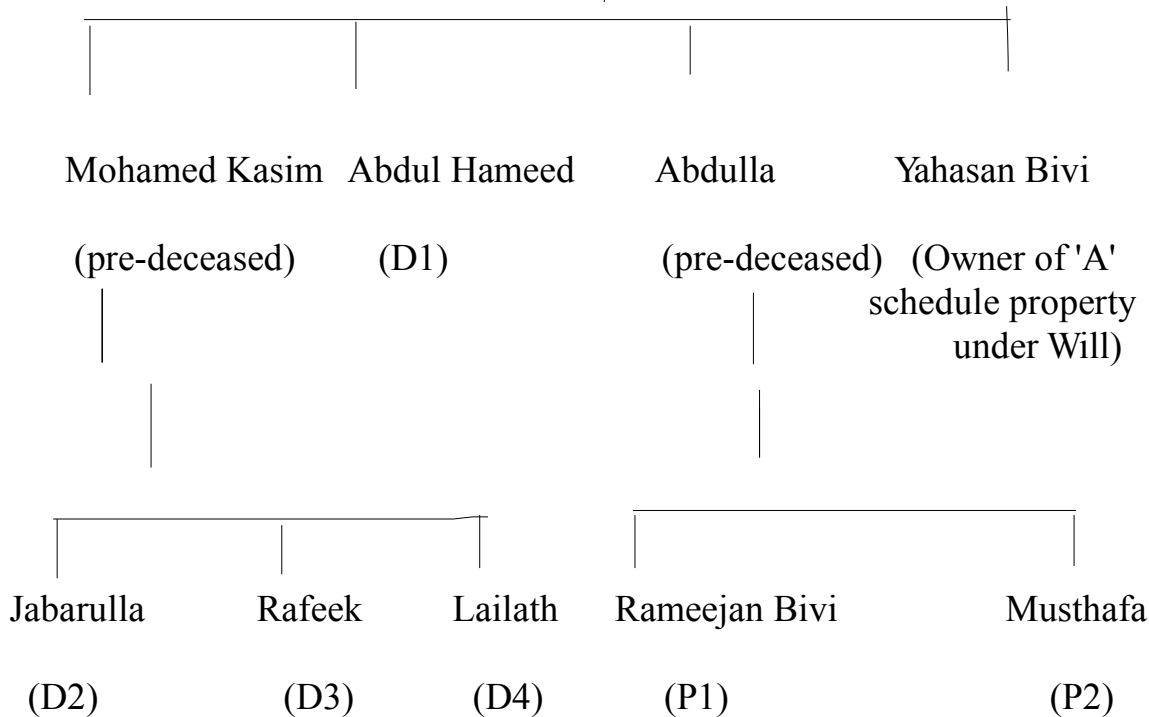


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Sultan had died some time in the year 1964. They had three sons and one daughter. The genealogy is as under:-

Havva Bivi (died)

(W/o.Mohamed Sultan)



2. The first and third sons of Havva Bivi pre-deceased her. The plaintiffs are the children born through the third son Abdulla. The case of the plaintiffs is that Havva Bivi, while in a sound and disposing state of mind and out of her own will and volition, executed Ex.A1-registered Will dated 16.11.1984 bequeathing the suit property in favour of the surviving son, daughter and also the children born through the pre-deceased sons. The property was divided into 'A' schedule and 'B' schedule. 'A' Schedule was bequeathed in favour of the daughter Yahasan Bivi. While 1/3rd share of "B" schedule was given to the surviving son Abdul Hameed, the remaining 2/3rd share was given to the children born through the pre-deceased sons. Havva Bivi passed away on 13.05.1990. The Will came into effect and the legatees took possession of their respective shares. However, the first defendant acted against the interest of the plaintiffs and the other sharers and also managed to send out the second defendant from the suit property and was in occupation of the entire property. The plaintiffs sent suit notice (Ex.A3) calling upon the first defendant to divide the suit property by metes and bounds and allot to them. The first defendant instead of complying with the demand set out in Ex.A3 notice, sent a reply



dated 02.05.2000 (Ex.A4) controverting the notice averments. Therefore, O.S.No.69 of 2002 came to be filed before the Sub Court, Thanjavur.

3. The first defendant filed written statement controverting the averments set out in the plaint. The suit Will propounded by the plaintiffs was impeached as a concocted and fabricated document. It was also pleaded in the alternative that Havva Bivi was incompetent to execute the Will bequeathing her entire estate. It was also pointed out that the children born through the pre-deceased sons cannot be considered as legal heirs. The first defendant contended that the plaintiffs do not have any right to claim partition over the suit property. Based on the rival pleadings, the trial Court framed as many as eight issues. The plaintiffs examined themselves as P.W.1 and P.W.2. Ex.A1 to Ex.A5 were marked. The first defendant examined himself as D.W.1. Ex.B1 and Ex.B2 were marked. After a consideration of the evidence on record, the learned trial Judge passed preliminary decree dated 06.12.2006, granting 1/3rd share in the suit property in favour of the plaintiffs. Questioning the same, the first defendant filed A.S.No.14 of 2007 before the Principal District Judge, Thanjavur. By the impugned judgment and decree dated 13.11.2007, the first appellate Court dismissed the appeal. Challenging the same, this second appeal came to be filed.

4. The second appeal was admitted on the following substantial questions of law:-

"1. When the execution of the Will under Ex.A1 had not been proved and when the beneficiaries of the Will alone had been examined whether the decree and judgment granted by the Courts below on the basis of Ex.A1 is sustainable in law?

2. When the Will marked under Ex.A1 was not proved as per law whether decree and judgment of the Courts below granting one third share to the respondents 1 and 2 who are the plaintiffs in the suit is sustainable in law?"

5. The learned counsel appearing for the legal heirs of the original appellant reiterated all the contentions set out in the memorandum of grounds. He submitted that the plaintiffs who have anchored their entire case on Ex.A1-Will, have miserably failed to prove the same. The plaintiffs have not filed the original Will before the Court. No explanation was forthcoming from them for non-production of the original Will. Since the plaintiffs are relying on a written document, they are bound to prove the same as per Section 68 of the Indian Evidence Act, 1872 r/w Section 63 of the Indian Succession Act, 1925. The learned counsel drew my attention to Section 1 of the Indian Evidence Act, 1872, which states that the provision of the Act would apply to all judicial proceedings in or before any Court. He relied on the decision reported in **1978 TNLJ 277 (P.K.Rathinavelu Vs. Vijayalakshmi)** and a few other decisions in



support of his submission that the loss of Will must be proved. He would also point out that the deceased Havva Bivi owned the suit property alone. If the version of the plaintiffs is to be accepted, she had completely exhausted the entire estate while exercising her testamentary power. As per Mahomedan Law, a Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Of-course, bequests in excess of the legal third can take effect, if the other legal heirs gave their consent after the death of the testator.

6. In this case, the original appellant had not given his consent. Therefore, even if the Court holds that the suit Will had been proved, still it cannot take effect beyond 1/3rd of the estate of Havva Bivi. He placed reliance on the decision of the Madras High Court made in **A.S.No.139 of 1996 (Zubaida Vs. Mahaboob Bivi)** dated 07.06.2010 in this regard. He called upon this Court to answer the substantial questions of law in favour of the appellants and set aside the impugned judgment and decree passed by the trial Court and dismiss the suit in toto.

7. Per contra, the learned counsel appearing for the respondents submitted that the strict provisions of the Indian Evidence Act will not apply in the case of Mohammadan Wills. While conceding that the children born through the pre-deceased sons cannot be counted as legal heirs of Havva Bivi, he nevertheless submitted that the first defendant by his conduct had given his consent for the testamentary disposition effected by Havva Bivi. He also placed reliance on a catena of decision in this regard.

8. I carefully considered the rival contentions and went through the evidence on record. The primary question that arises for consideration is whether the suit Will (Ex.A1) had been proved by the plaintiffs. The learned counsel appearing for the appellants would contend that the original Will ought to have been filed and the execution of Ex.A1 should be proved in the manner set out in Section 68 of the Indian Evidence Act, 1872. I am not able to accept this contention in view of the rulings cited by the learned counsel appearing for the contesting respondents. The Hon'ble Kerala High Court in the decision reported in **1988 2 KLJ 477 (Abdul Kadir Vs. Hameedamma)** had held that Section 68 of the Evidence Act may not strictly apply to a Mohammadan Will. This is because, the Mohammadan Will need not be in writing. It can be verbal also. Even if it is in writing, it does not require to be signed. Even if it is signed, it does not require attestation. Therefore, considering the unique nature of a Mohammadan Will, invoking Section 68 of the Evidence Act may not be in order.

9. The Madras High Court in the decision reported in **AIR 1940 (Mad) 153 (Abdul Hameed Vs. Mohammed Yoonus and others)** had held that a paper drawn up in accordance with the instructions of the



testator and assented to by him, will be a good will, though not signed. If a paper contains the testamentary wishes of the deceased, its form is immaterial. This was followed in the decision reported in **(2008) 6 MLJ 92 (Asma Beevi Vs. Ameer Ali and others)**. The plaintiffs have moved the Court on the strength of the certified copy of Ex.A1. During the course of their testimony, P.W.1 had stated that the plaintiffs were given only photocopy of the Will and that they were called upon to apply for its certified copy and thereafter, work out their rights. Ex.A1 is a registered document. The presumption set out in Section 60 of the Registration Act, 1908 will definitely apply. Section 3 of the Indian Evidence Act defines "proved" in the following term:-

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

10. In the case on hand, the trial Court framed an issue as to whether Ex.A1 was actually executed by Havva Bivi. After considering the evidence on record and after giving elaborate reasons, the trial Court came to the conclusion that Havva Bivi had executed Ex.A1- Will. This finding of fact was duly confirmed by the first appellate Court also. I went through the contents of Ex.A1-Will. The testatrix had given birth to three sons and one daughter. Two of the sons had pre-deceased her. This fact is also mentioned in Ex.A1. Since as per the Mahomedan Law, the children born through the pre-deceased sons are not legal heirs, she wanted to provide for them also. The testatrix had been more than fair. She saw to it that each of them were given appropriate share in the suit property. A very fair arrangement has been worked out by the testatrix.

11. After considering the matters before me, I am satisfied that the finding that execution of Ex.A1 by Havva Bivi has been proved by the plaintiffs does not call for interference. The substantial questions of law are answered against the appellants. Though no substantial question of law as regards the limit of testamentary power has been framed, since the learned counsel for the appellants advanced argument in this regard, I deem it my duty to answer it also. It cannot be disputed that a Mohammedan can dispose of his estate only to the extent of $1/3^{\text{rd}}$, but bequest in excess of the legal third can take effect, if the other legal heirs consent thereto, after the death of the testator.

12. The learned counsel appearing for the appellants would strongly contend that when the first defendant / original appellant did not even accept the execution of the Will, the question of his consent for disposition beyond the legal $1/3^{\text{rd}}$ will not arise at all. This may not be correct in view of the stand taken by the appellant during cross-examination.



13. It was admitted by D.W.1 that a panchayat was held before the local jamath. D.W.1 admitted that in the panchayat, he agreed to make monetary payment in lieu of the share of the plaintiffs and others. The plaintiffs cannot be considered as legal heirs as per Mahomedan Law; Only by virtue of the Will, they can be considered as having share in the suit property. The fact that the first defendant agreed to compensate for the share of the plaintiffs implicitly indicates that he was not only aware of the execution of the suit Will but also consented to its terms. Otherwise, the question of agreeing to compensate for the shares of the plaintiffs and other defendants will not arise at all. I hold that by his conduct, the original appellant had given his consent for disposition beyond the legal 1/3rd. Consent once given cannot be later revoked. The impugned judgment and decree passed by the Courts below do not call for any interference. The second appeal is dismissed. No costs.

Sd/-

Assistant Registrar (CS I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

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To

1.The Principal District Judge, Thanjavur.

2.The Principal Sub Judge, Thanjavur.

Copy to:

The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.R.RAJARAMAN, Advocate (SR-26699[F] dated 18/08/2021)

+1 CC to M/s.V.K.VIJAYARAGAVAN, Advocate (SR-26965[F] dated 23/08/2021)

S.A. (MD) No.818 of 2008

18.08.2021

MGJ(02.06.2022) 6P 7C