Gulam Abbas vs Haji Kayyum Ali & Ors on 18 September, 1972

Equivalent citations: 1973 AIR 554, 1973 SCR (2) 300, AIR 1973 SUPREME COURT 554, 1974 2 SCJ 173, 1973 JABLJ 1041, 1973 2 SCR 300, 1973 (1) SCC 1, 1974 MAH LJ 22, 1974 MPLJ 58

Author: M. Hameedullah Beg

Bench: M. Hameedullah Beg, A.N. Grover

PETITIONER:
GULAM ABBAS

Vs.

RESPONDENT:
HAJI KAYYUM ALI & ORS.

DATE OF JUDGMENT18/09/1972

BENCH:
BEG, M. HAMEEDULLAH
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BEG, M. HAMEEDULLAH
GROVER, A.N.
MUKHERJEA, B.K.

CITATION:
1973 AIR 554 1973 SCR (2) 300
1973 SCC (1) 1

ACT:
Mahomedan Law-Estoppel-Execution of deeds acknowledging receipt of valuable consideration and relinquishing future possible rights of inheritance in the properties of father-On father's death executants filing suit for partition of properties comprised in deed-Applicability of the rule of estoppel-Evidence Act, 1872-Section 115.

HEADNOTE:
Muslim jurisprudence, where theology and moral concepts are found sometimes mingled with secular utilitarian legal principles, contains a very elaborate theory of acts which are good (because they proceed from haana), those which are bad (because they exhibit 'qubuh'), and those which are neutral per se. It classifies them according to varying degrees of approval or disapproval attached to them. The

renunciation of a supposed right, based upon an expectancy, could not, by any test found there, be considered "prohibited". The binding, force in future of such a renuticiation would, even according to strict Muslim jurisprudence, depend upon the attendant circumstances and the whole course of conduct of which it forms a part. In other words, the principle of equitable estoppel, far from being opposed to any principle of Muslim Law will he found, on investigation, to be completely in consonance with it. [306 F]

Abdul Rahim, Muhammedan Jurisprudence, P. 106, referred to.

K, a Muslim, had incurred debts so heavily that all his property would have been swallowed up to liquidate the debts. The appellant and two of his brothers, with their labour and money, rescued the estate of their father and paid up the debts. Two other sons of K who could not contribute anything towards the clearing up of the debts of their father executed deeds acknowledging receipt of cash and moveable properties as consideration for not claiming any eights in future in the properties mentioned in the deeds. On K's death the two sons who had executed the deeds instituted a suit for partition of the properties mentioned in the deeds. The first appellate court ,held that the deeds in question evidenced family settlements and that the sons were estopped from claiming their share in the inheritance. The High Court in second appeal, decreed the suit. It proceeded on the assumption that, if law had not prohibited the transfer of his right of inheritance by a muslim heir, an estoppel would have operated against the respondent on the findings given and held that the rule of Muslim Personal law on the subject had the same effect as Section 6 (a). of the Transfer of Property Act and the chance of a Mahomedan heir apparent succeeding to an estate could not be the subject of a valid transfer of lease. In coming to this conclusion, the High Court relied on the decision of the Madras High Court in Abdul Kafoor v. Abdul Razack (A.I.R. 1959 Mad. 131) in preference to the view adopted by the Allahabad High Court in Latafat Hussain v. Bidayat Hussain (A.I.R. 1936 All. 573.)

Allowing the appeal and setting aside the judgment and decree of the High Court,

HELD: Upon the facts and circumstance in the case found by the courts below, the two sons could not, when rights of inheritance vested

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in them at the time of, their father's death, claim these rights as such a claim would be barred by estoppel.

The object of the rule of Mahomedan law which does not recognise a purported transfer, of a spes successionis as a legally valid transfer at all, is not to prohibit anything but only to make it clear what is and what is not a transferable right or interest in property just as this is what Section 6(a) of the Transfer of Property Act is meant

to do. Its purpose could not be to protect those who, receive consideration for what they do not immediately have so as to be able to transfer it at all. It is not possible to concur with the view of the Madras High Court in Abdul Kafoor's case that a renunciation of an expectancy, as a purported but legally ineffective transfer, is struck by section 23 of the Indian Contract Act. As it would be void as a transfer at all there was no need to rely on section 23 of the Contract Act, If there was no "transfer" of property at all, which was the correct position, but a simple contract which could only operate in future, it was certainly not intended to bring about an immediate transfer which was all that the rule of muslim law invalidated. The real question is whether, quite apart from any transfer or contract, the declarations in the deeds of purported relinquishment and receipt of valuable consideration could not be parts of a course of conduct over a number of years which, taken as a whole, created a bar against a successful assertion of a right to property when that right actually, came into being. An equitable estoppel operates, if its elements are established as a rule of evidence preventing the assertions of rights which may otherwise exist. [304 D]

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 in Latafat Hussain's case, while fully recognising that "under the Mohammedan 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.

Latafat Hussain v. Bidayat Hussain, A.I.R. 1936 All. 573, approved.

View contra in Abdul Kafoor v. Abdul Ratack, A.I.R. 1959 Mad.131 and Asa Beevi v. Karuppan, (1918) 41 Madras I.L.R. 365, disapproved.

Ameer Ali's Mahomedan Law, Vol. 11, Hurmoot-Ool-Nisa Begum v. Allahdis Khan, (1871) 17 W.R.P.C. 108 and Mohammad Ali Khan v. Nisar Ali Khan, A.I.R. 1928 Oudh 67, referred to.

(Since the Court was of opinion, that there was nothing in law to bar the application of the principle of estoppel contained in section 115of the Evidence Act upon the totality of facts found by the final court of facts, it was found unnecessary to deal with at length with the question whether the facts found could give rise to an inference of a "family settlement" in a technical sense.)

JUDGMENT:

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2134 of 1970. Appeal by special leave from the judgment and order dated March 5, 1970 of the Madhya Pradesh High Court in (Indore Bench) in Second Appeal No. 618 of 1964.

K. Rajendra Chowdhry, for the appellant. P. C. Bhartari, D. N. Mishra and J. B. Dadachanji, for, respondent No. 1.

The Judgment of the Court was delivered by BEG, J. This is a Defendant's appeal by Special Leave against the judgment and decree of the High Court of Madhya Pradesh allowing a second appeal in a partition suit between members of a family governed by Muslim law. The Defendant- Appellant and the Plaintiff-Respondent are both sons of Kadir Ali Bohra who died on 5-4-1952 leaving behind five sons, a daughter and his widow as his heirs. It appears that Kadir Ali had incurred debts so heavily that all his property would have been swallowed up to liquidate these. Three of his sons, namely, Ghulam Abbas, Defendant No. 1, Abdullah, Defendant No. 2, and Imdad, Defendant No. 3, who had prospered, came to his rescue so that the property may be saved. But, apparently, they paid up the debts only in order to get the properties for themselves to the exclusion of the other two sons, namely, Kayyumali, Plaintiff- Respondent, and Nazarali, Defendant No. 4, who executed, on 10-10-1942, deeds acknowledging receipt of some cash and moveable properties as consideration for not claiming any rights in future in the properties mentioned in the deeds in which they gave up their possible rights in future. The executant of each deed said :

> "I have accordingly taken the' things mentioned above as the equivalent of my share and I have out of free will written this. I have no claim in the properties hereafter and if I put up a claim in future to any of the properties I shall be proved false by this document. I shall have no objection to my father giving any of the properties to my other brothers.....".

During the father's life-time, when all chance or expectation of inheritance by either Kayyumali or Nazarali could be destroyed by disposition of property, neither of these two raised his little finger to object. The only question before us now is whether the Plaintiff and Defendant No. 4 are estopped by their declarations and conduct and silence from claiming their shares in the properties covered by these deeds.

The first Appellate Court, the final court on questions of fact, recorded the following findings, after examining the, whole set of facts before it, to conclude that the plaintiff and defendant No. 4 were estopped from claiming their shares in the inheritance "In the instant case, it is evident that the release deeds Ex.D/2 and Ex.D/3 were executed by the plaintiff and defendant No. 4, had with their labour and money straightened the status of his father Kadar Ali and had cleared up the debts which would have devoured the, whole property of Kadar Ali and the plaintiff was doing nothing and was in a way a burden to his father. In such state of things when the plaintiff and defendant No. 4 executed the release deeds in question, it can be said that it was a family settlement to prevent the future disputes that may arise and to secure the peace and happiness in the family of the parties and thereby induced the defendants No. 1, 2 and 3 to believe that the plaintiff would not claim a share in the suit properties and led them to discharge the debts due to Kadar All and to be in affluent

circumstances themselves as they are at present and the plaintiff now seeks benefit of it against his own past undertakings".

The High Court reproduced the passage, quoted above, from the judgment of the First Appellate Court, without any dissent from any of the findings of fact contained there. It specifically held that the Court below was correct in finding that consideration had passed the Plaintiff and Defendant No. 4 for the relinquishment of their future possible rights of inheritance. It proceeded on the assumption that, it the law had not prohibited the transfer of his right of inheritance by a Muslim heir, an estoppel would have operated against the Plaintiff and Defendant No. 4 on the findings given. It held that the rule. of Muslim Personal law on the subject has the same effect as Section 6(a) of the Transfer of Property Act which lays down:

> "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.
>
> It pointed out that, although, Section 2 of the Transfer of Property Act provided that nothing in the second Chapter of the, Act will be deemed to affect any rule of Mahomedan Law, so that section 6(a) contained in Chapter 2 could not really be applied, yet, the effect of Mahomedan Law itself was that the chance of a Mahomedan heir-apparent succeeding to an estate cannot be the subject of a valid transfer or lease"

(See : Mulla's Principles of Mahomedan Law-17th Edn. ss 54, page 45). After equating the effect of the. rule of Mahomed an Law with that of Section 6(a) of the Transfer of Property Act, the High Court applied the principle that no estoppel can arise against statute to what it considered to be an estoppel put forward against a rule of Mahomedan law. The High Court had relied on a decision of the Madras High' Court in Abdul Kafoor v. Abdul Razack(l), which had been (1) A.I.R. 1959 Mad. p. 131.

followed by the Kerala High Court without giving fresh reason in Valanhivil Kunchi v. Kengayil Pattikavil Kunbi Avulla(1) in preference to the view adopted by the Allahabad High Court in Latafat Hussain v. Hidayat Hussain(2) followed by the, Travancore Cochin High Court in Kochunni Kachu Muhammed v. Kunj Pillai Muhammed(3) The principal question for decision before us is whether the Madras or the Allahabad High Court view is correct.

The Madras High Court, in Abdul Kapoor's case (supra) had specifically dissented from the Allahabad view in Latafat Hussain' case (supra) on the ground that, if an estoppel was allowed to pleaded as a defence, on the strength of relinquishment of a spes successionis for consideration, the effect could be to permit the pro visions of Mahomedan Law to be defeated. Hence, it held that such an attempt would be struck by section 23 of the Indian Con tract Act. The object however, of the rule of Mahomedan law which does not recognise a purported transfer of a spes succession is as a legally valid transfer at all, is not to prohibit anything but only to make it clear what is and what is not a transferable right or interest in property just as this is what section 6(a) of Transfer of Property Act

is meant to do. Its purpose could not be to protect those who receive consideration for what they do not immediately have so as to be able to transfer it at all. It could, if protection of any party to a transaction could possibly underlie such a rule, be more the protection of possible transfers so that they may know what is and what is not a legally enforceable transfer. With due respect, we are unable to concur with the view of the Madras High Court that renunciation of an expectancy, as a purported but legally ineffective transfer, is struck by Section 23 of the Indian Contract Act. As it would be void as a transfer at all there was no need to rely on Section 23 Contract Act, If there was no "transfer". of property at all, which was the correct position but a simple contract, which could only operate in future, it was certainly, not intended to bring about an immediate transfer which was all that the rule of Muslim law invalidated. The real question was whether quite apart from any transfer or contract, the declarations in the deeds of purported relinquishment and receipt of valuable consideration could not be parts of a course of conduct over a number of years which, taken as a whole, created a, bar against a successful assertion of a right to property when that Tight actually came' into being. An equitable estoppel operates, if its elements are established, as a rule of evidence preventing the assertion of rights which may otherwise exist. (1) A.F.R. 1964 Kerala P. 200 (2) A I R. 1936 All. 573. (3) A.I.R. 1956 Travancore 217.

High Court in Asa Beevi v. Karuppan(1) where Macnaghten's "Principles and Precedents of Moohumudan Law", Sir Roland Wilson's Digest of Anglo-Mohhamadan Law" P. 260, and Ameer Ali's "Mohommedan Law" (Vol. II, third edition, p. 50-51), and Tyabji's "Muslim Law" have been referred to in support of the conclusion that ",here is a large preponderance of authority in favour of the view that a transfer or renuniciation of the right of inheritance before that right vests is prohibited under the Mahomedan Law". The whole discussion of the principle in the body of the judgment, however brings out that the real reason is not a prohibition but that there cannot be a renunciation of a right which is incohate or incomplete so long as it remains in that state. In fact, it is not correct to speak of any right of inheritance before it arises by the death of the predecessor who could have, during his life-time, deprived the- prospective heir of his expectation entirely by dispositions inter vivos.

Sir Roland Wilson, in his "Anglo Mohhamadan Law" (P 260, paragraph 208) states the position thus :-

> "For the sake of those, readers Who are familiar with the joint ownership of father and son according to the most widely prevalent school of Hindu Law, it is perhaps desirable to state explicitly that in Muhammadan, as in Roman and English Law, nemo est heres viventis-a living person has, no heir. An heir-apparent or presumptive has no such reversionary interest as would enable him to object to any sale or gift made by the owner in possession; see Abdul Wahid, L.R. 12 I.A., 91, and 11 Cal. 597 All., 456 (1885) which was followed in Hasan Ali, 1 1 All. 456 (1889). The converse is also true : a renunciation by an expectant heir in the lifetime of his ancestor is not valid, or enforceable against him after the vesting of the inheritance".

This is a correct statement, so far as it goes, of the law, because a bare renunciation of an expectation to inherit not bind the expectant heir's conduct in future. But if the expectant heir goes

further and receives consideration and so conducts himself as to mislead an owner into not making dispositions of his property inter vivos the expectant heir could be debarred from setting up his right when it does unquestionably vest in him other words, the principle, of estoppel remains untouched by this statement. As the Madras Full Bench pointed out, the subject was dis- cussed more fully, in Ameer Ali's "Mohammedan Law" (Vol.

11), than elsewhere. There we find the reason for or the object underlying the rule. It is that there is nothing to renounce in such a case because an expectancy remains at most before it has mate-

(1) [1918] (41 Madras) I.L.R. 365.

rialized only an "incohate right". It is in this light that the following observations in Hurmoot-Ool-Nisa Begum v. Allehdia Khan,(`) is explained by Ameer Ali :

> "According to the Mahomedan Law the right of inheritance may be renounced and such renunciation need not be express but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another."

Ameer Ali explained, citing an opinion of the law officers, given in Khanum Jan v. Jan Bibi; (2 .lm15 "Renunciation implies the yielding up of a right already vested, or the ceasing or desisting from prosecuting a claim maintainable against another. It is evident that, during the life-time of the mother the daughters have no right of inheritance and their claim on that account is not maintainable against any person during her life-time. It follows, therefore, that this renunciation during the mother's life-time of the daughters' shares is null and void it being in point of fact giving up that which had no existence."

In view of the clear exposition of the reason for the rule contained in the authorities relied upon by the Full Bench of the Madras High Court in Asa Beevi's case (supra), we think that it described, by oversight, a rule based on the disability of a person to transfer what he has not got as a rule of prohibition enjoined by Mohamedan Law. The use of the word "prohibited" by the Full Bench does not really bring out the object or character of the rule as explained above.

It may be mentioned here that Muslim Jurisprudence, where theology and moral concepts are found sometimes mingled with secular utilitarian legal principles, contains a very elaborate theory of acts which are good (because they proceed from 'hasna'), those which are bad (because, they exhibit "qubuh"), and those which are neutral per se. It classifies them according to 'varying degrees of approval or disapproval attached to them (see Abdur Rahim's "Muhammadan Jurisprudence" P. 105). The renunciation of a supposed right, based upon an expectancy, could not, by any test found there, be considered "prohibited". The binding force in 'future of such a renunciation would, even according to strict Muslim Jurisprudence, depend upon the attendant circumstances and the whole course of conduct of which it forms a part.. I In other words, the principle of an equitable estoppel, far from being opposed to any principle of Muslim law will be found, on investigation, to be completely in consonance with it.

(1) [1871] 17 W.R.P.C. 108 (2) [1827] 4 S.D.A. Rep. 210.

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, 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 page 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 A.L.J. 799, and 21 A.L J. 235. It was pointed out in 24 A.L.J. 873, at PP. 876-7, that although a reversionary right cannot be the subject of a transfer, for such a transfer is prohibited by s. 6, T.P. Act, there was. nothing to prevent a re-

versioner 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."

Incidentally, we may observe that, in Mohammad Ali. Khan v. Bisar Ali Khan,(1) the Oudh Chief Court has relied upon Hurmoot-Ool-Nisa Begum'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". As we are clearly of opinion that there is nothing in law to bar the application of the principle of estoppel, contained in Section 115 of the Evidence Act, against the plaintiff and (1) A.I.R. 1928 Oudh 67.

Defendant No. 4, upon the totality of facts found by the final Court of facts, which were apparently accepted by the High Court,, it is not necessary for us to deal at length with the question whether the facts found could give rise to the inference of a "family settlement" in a technical sense. It is true that in Latafat Hussain's case (supra) Suleman, C.J., had observed that the conclusion of the Subordinate Court, that there had been an arrangement between a husband and a wife "in the nature of a family settlement which is binding on the plaintiff", was correct. This was held upon circumstances which indicated that a husband would not have executed a deed of Wakf if the wife had not relinquished her claim, to inheritance. In other words, an arrangement which may avoid future disputes in the family, even though it may not technically be a settlement or definition of actually disputed claims, was referred to broadly as a "family arrangement". It was in this wide sense that in the case before

us also, the first Appellate Court had considered the whole set of facts and circumstances examined by it to be sufficient to raise the inference of what it described as a "family settlement".

As our law relating to family arrangements is based on English law, we may refer here to a definition of a family arrangement in Halsbury's Laws of England, (1) where we find: A family arrangement is an agreement between members of the same family intended to be generally and reasonably for the benefit of the family either by compromising doubtful or disputed rights or by preserving the family property or the peace and security of the family by avoiding litigation or by saving its honour. We also find there :

> The agreement may be implied from a long course of ,dealing, 'but it is more usual to embody or to effectuate the against in a deed no which the term 'family arrangement' is :applied." It is ,pointed out there : "Matters which would be fatal to the validity of similar transactions between strangers are not objections to the binding effect of family arrangements."
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> As we have already indicated, it is enough for the decision of this case that the plaintiff and defendant No. 4 were estopped by their conduct, on an application of Section 115 Evidence Act, from claiming any Tight to inheritance which accrued to them, on their father's death, covered by the deeds of relinquishment for consideration, irrespective of the question whether the, deeds could operate as legally valid and effective surrenders of their spes successionis. Upon the facts and circumstances in (1) Halsbury's Laws of England, 3rd. edn. Vol. 17, p.

215,216.

the case found by the courts ,below we hold that the plaintiff and defendant No. 4 could not, when rights of inheritance vested in them at the time of their father's death, claim, these as such a claim would be barred by estoppel.

The result is that we allow this appeal, set aside the judg- ment and the decree of the High Court, and restore that of the first Appellate Court. In the circumstances of this case, we order that the parties will bear their own costs.

K.B.N. Appeal allowed.