Mahboob Sahab vs Syed Ismail & Ors on 23 March, 1995

Equivalent citations: 1995 AIR 1205, 1995 SCC (3) 693, AIR 1995 SUPREME COURT 1205, 1995 (3) SCC 693, 1995 AIR SCW 1956, (1995) 2 CIVILCOURTC 42, (1995) 2 IJR 981 (SC), (1995) 2 LANDLR 226, (1995) 2 CURCC 268, (1995) 2 CURLJ(CCR) 209, (1995) 2 SCJ 137, (1995) 1 HINDULR 440, (1995) 2 SCR 975 (SC), 1995 ALL CJ 1 484, (1995) 2 APLJ 5, (1995) 2 MAD LW 153, (1995) 2 CIVLJ 324, (1995) 3 JT 168 (SC), 1995 (2) KLT SN 15 (SC)

Author: K. Ramaswamy

Bench: K. Ramaswamy, B.L Hansaria

PETITIONER:
MAHBOOB SAHAB

Vs.

RESPONDENT:
SYED ISMAIL & ORS.

DATE OF JUDGMENT23/03/1995

BENCH:
RAMASWAMY, K.
BENCH:
RAMASWAMY, K.
HANSARIA B.L. (J)

CITATION:
1995 AIR 1205 1995 SCC (3) 693
JT 1995 (3) 168 1995 SCALE (2)395

ACT:

HEADNOTE:

JUDGMENT:

K. RAMASWAMY, J.:

1. Syed Ismail and Ibrahim, sons of Maqdoom, Panchamale filed O.S. No.28 of 1965, impleading their parents and ap-

pellant/purchaser, for possession of the suit lands and for mesne profits from the appellant. The averments made in support thereof are that their father had executed a gift deed bequeathing 15 acres 38 gunthas out of 31 acres 36 gunthas in Survey No.781 of Aland village, jointly in their favour and their mother Smt. Chandi, third defendant, who in her turn, orally gifted over her share to Syed Ismail in April, 1958 at the time of his marriage. Being minors, their father-second defendant, while cultivating the lands on their behalf, had colluded with the Patwari and executed sale deed Ex-D-1 in favour of the appellant. On their becoming aware of the same, they filed the suit since their father had no right, title and interest therein to alienate the lands. The sales, therefore, in favour of the appellant were invalid, inoperative and do not bind them. The appellant pleaded that Maqdoom had entered into an agreement of sale under Ex.D-22 on April 12, 1961 to sell 12 acres of land for valuable consideration and had executed the sale deed,Ex.D-1 dated May 12,1961, to discharge antecedent debts. Similarly an agreement of sale of 4 acres of land for 2,500/- was executed and the appellant had obtained permission from the Assistant Commissioner on August 4, 1964 for sale thereof When he and Smt. Chandi refused to execute the sale deed, he filed OS No.4/1 of 1966 for specific performance which was decreed on contest and the sale deed Ex.D-3 was executed and registered by the court. Their parents had not given any gifts which were set up only to defraud the appellant. It was brought out at the trial that in OS No.3/1/1951 filed by one Ismail on the foot of a possessory mortgage, the executability of another decree obtained by another creditor, was impugned, wherein by judgment and decree dated September 24, 1951, the Court held that Maqdoom had jointly gifted the lands to the respondents and their mother by a registered gift deed.

2. The aforesaid finding was pleaded to operate as res judicata against the appellant. As a preliminary issue, the trial court held that the decree in OS No.3/1/1951 does not operate as res judicata but decreed the suit on merit. In R.A. No.21 1/1970, the Additional Civil Judge, Gulbarga reversed the decree and dismissed the suit holding that Maqdoom as an owner had alienated the property. His name continued to be the owner in revenue records till it was mutated in the name of the appellants after his purchase. Neither the original nor certified copy of the gift deed alleged to have been executed by Maqdoom was filed. A letter of the Sub- Registrar to show its loss filed in the appeal cannot be used as evidence of execution of the gift over. The mother cannot act as a property guardian when the father is alive. The oral gift by the mother to the respondents was false as neither acceptance of the gift nor delivery of possession of the lands either by the father or the mother was proved. It was not proved that the father or any one had acted as guardian when Smt. Chandi gifted her undivided share to the first respondent nor any proof of taking possession from the wife under the oral gift deed. The alleged gifts, therefore, were not proved, nor valid in law. Maqdoom, was a chronic debtor and to defraud the creditors, he set up false plea of gifts in favour of his children and wife or spurious mortgages in favour of third party. Before the appellate court, the decree in OS No.3/1/1951 was not pressed into service as res judicata to sustain the decree of the trial court.

3. The High Court without disturbing any of the findings of facts recorded by the appellate court, reversed the judgment solely on the finding that the decree in OS No.3/1/1951 operates as res judicata, as the parents and the respondents are co-defendants in that suit and, therefore it would

operates as res judicata. Having been divested of his title, Maqdoom had no right to alienate the properties of the minors in favour of the appellant. Accordingly reversed the decree of the appellate court and confirmed that of the trial court in Second Appeal No.161 of 1973, dated January 2, 1979.

4.The question, therefore, is whether the High Court was right in its conclusion that the decree in OS No.3/1/1951 operates as res judicata and whether reversal of appellate decree without disturbing the findings of fact on merits is legal. Having given our anxious consideration to the respective contentions of both the counsel we think that the High Court was wholly wrong in its approach. Neither the mother nor the father examined as witness to prove the gifts said to have been given in favour of their minor sons Ismail and Ibrahim respondents Nos. 1 & 2. Syed Ismail too was not examined as a witness. Ibrahim in his evidence had admitted the execution of the sale deed by his father and he acted as an attesting witness to the sale transaction under Ex.D-1. He also admitted that his father mortgaged the property under Ex.P-3. In the objection petition the gift was not set up. The appellate court, as a final court of fact found dim alleged registered gift deed said to have been jointly given by Maqdoom jointly to his minor sons and wife was not filed either in this suit or in OS No. 3/1/1951.

5.Under s. 147 of the Principles of Mahomedan Law by Mulla, 19th Ed., Edited by Chief Justice M. Hidayatullah, visages that writing is not essential to the validity of a gift either of movable or of immovable property. Section 148 requires that it is essential to the validity of a gift.

that the donor should divest himself completely of all ownership and dominion over the subject of the gift. Under s. 149, three essentials to the validity of the gift should be, (i) a declaration of gift by the donor, (ii) acceptance of the gift, express or implied, by or on behalf of the donee, and (iii) delivery of possession of the subject of the gift by the donor to the donee as mentioned in s.150. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift there should be delivery of possession of the subject of the gift and taking of possession of the gift by the donee, actually or constructively. Then only gift is complete. Section 152 envisages that where donor is in possession, a gift of immovable property of which the donor is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession. It would, thus, be clear that though gift by a Mohammadan is not required to be in writing and consequently need not be registered under the Registration Act; a gift to be complete, there should be a declaration of the gift by the donor, acceptance of the gift, expressed or implied, by or on behalf of the donee, and delivery of possession of the property, the subject-matter of the gift by the donor to the donee. The donee should take delivery of the possession of that property either actually or constructively. On proof of these essential conditions, the gift becomes complete and valid. In case of immovable property in the possession of the donor, he should completely divest himself physically of the subject of the gift. No evidence has been adduced to establish declaration of the gift, acceptance of the gift by or on behalf of the minor or delivery of possession or taking possession or who had accepted the gift actually or constructively. Admittedly he was in possession and enjoyment of the property till it was sold to the appellant. Equally, in Mohammadan Law mother cannot act nor be appointed as property guardian of the minor. She equally cannot act as legal guardian.

6.Section 348 defines "minor" to mean " a person who has not completed the age of eighteen years". Section 349 provides that "all application for the appointment of a guardian of the person or property or both of a minor are to be made under the Guardians and Wards Act, 1890". Section 359 enumerates the persons entitled, in the order mentioned therein, to be guardian of the property of a minor, namely, (1) the father; (2) the executor appointed by the father's will; (3) the paternal grand father, and (4) the executor appointed by the will of the paternal grand father. Section 362 limits the power of the legal guardian to alienate immovable property except in the circumstances enumerated therein. Similarly, the court guardian has no power to mortgage or charge or transfer by sale, gift exchange or otherwise and part with possession of immovable property of the ward or to lease that prop" except with the previous permission of the court and subject to the conditions men- tioned in s.363. Admittedly, no property guardian was appointed to act on behalf of the minors. No evidence, that the father acted as legal guardian. So also there is no proof of acceptance of the oral gifts said to have been made by the, mother to Ismail the eldest son, of her undivided share. There is no proof as well that possession was delivered under the oral gift and accepted on behalf of the minor and taken possession.

7.Her 1/3rd undivided share was not subject matter of OS No. 3/1/1951. The Additional Civil Judge, therefore, was right in his findings that the gifts have not been proved. They were not complete. Admittedly, the father continued to be in possession and enjoyment of the lands as owner as evidenced by the revenue records until it was mutated in the name of the appellants to the extent of 16 acres purchased by him as per the aforesaid sale deeds Ex. D-1 and Ex.D-3. Ibrahim has attested Ex.D- 1 when his father conveyed the lands as an owner. Though the sale was against his interest, he had not objected to the sale. He, thereby, is estopped by conduct and record to assail Ex.D-1 sale or to claim any interest in the lands.

8.Under these circumstances the question emerges whether the High Court was right in reversing the appellate decree on the doctrine of res judicata. At this juncture it may be relevant to mention that the trial court negatived the plea of res judicata as a preliminary issue. Though it was open to sustain the trial court decree on the basis of the doctrine of res judicata, it was not argued before the appellate court on its basis. Thereby the findings of the trial court that the decree in OS No.3/1/1951 does not operate as a res judicata became final. The question then is whether the doctrine of res judicata stands attracted to the facts in this case. It is true that under s. 11 C.P.C. when the matter has been directly or substantially in issue in a former suit between the same parties or between parties under whom they or any of them claimed litigating under the same title, the decree in the former suit would be res judicata between the plaintiff and the defendant or as between the co-plaintiff or co-defendant. But for application of this doctrine between co-defendants four con- ditions must be satisfied, namely, that (1) there must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide the conflict in order to give the reliefs which the plaintiff claims; (3) the question between the defendants must have been finally decided; and (4) the co-defendants were necessary or proper parties in the former suit. Ibis is the settled law as held in SM. Sadat Ali Khan v. Mirza Wiquar Ali, AIR 1943 PC 115, Shashibushan Prasad Mishra v. Babuji Rai & Ors., 1969 (2) SCR 971; and Iftikhar Ahmed & Ors. v. Syed Meharban Ali, 1974 (2) SCC 151. Take for instance that if in a suit by 'A' against 'B & C', die matter is directly and substantially in issue between B & C, and an adjudication upon that matter was necessary to determine the suit to

grant relief to 'A'; the adjudication would operate as res judicata in a subsequent suit between B & C in which either of them is plaintiff and the other defendant. in other words, if a plaintiff cannot get at his right without trying and deciding a can between co-defendants, the court will try and decide the case, and the co-defendants will be, bound by the decree. But if the relief given to the plaintiff does not require or involve a decision of any case between co- defendants, the codefendants will not be bound as between each other.

9.Where the above four conditions did not exist the decree does not operate as res judicata. It must, therefore., be that all the persons who have right title and interest are made parties to the suit and that they should have knowledge that the right, tide and interest would be in adjudication and the finding or the decree therein would operate as a res judicata to their right, title and interest in the subject- matter of the former suit. Even in their absence a decree could be passed and it may be used as an evidence of the plaintiffs title either accepted or negatived therein. The doctrine of res judicata would apply even though the party against whom it is sought to be enforced, was not eo-nomine made a party nor entered appearance nor did he contest the question. The doctrine of res judicata must, however, be applied to co- defendants with great care and caution. The reason is that fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. If a party obtains a decree from the court by practicing fraud or collusion, be cannot be allowed to say that the matter is res judicata and cannot be re-opened. There can also be no question of res judicata in a case where signs of fraud or collusion are transparently pregnant or apparent from the facts on record.

10. Therefore, in applying the doctrine of res judicata between co-defendant or co-plaintiff, care, must, of necessity, be taken by the courts to see that there must in fact be a conflict of interest between the codefendants or co-plaintiffs concerned and it is necessary to decide the conflict in order to give relief which the plaintiff in the suit claimed and the question must have been directly and substantially in issue and was finally decided therein. As found by the appellate court, Maqdoom was playing fraud upon his creditors by creating false oral gifts or spurious claims of mortgages with a view to defraud them. Section 44 of the Evidence Act envisages that any party to a suit or proceeding may show that any judgment, order or decree which is relevant under s.40, 41 or 42 has been obtained by fraud or collusion. Under s.40, the existence of the judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such court ought to take cognizance of such suit or to hold such trial.

11. When the evidence on record establishes that the suit in OS No.3/1/1951 was collusive or fraudulent to defraud the creditors, it is a relevant fact and the court would take cognizance thereof to find whether the trial court is precluded to try the issue. The High Court had not adverted to nor bestowed its attention, this aspect of the matter except mechanical application of the principles laid by this Court in Iftikhar Ahmed's case (supra). The pleadings in OS No.3/1/1951 were not produced in the courts below. The judgment, Annexure 11 indicates that the respondents and their another brother and the parents were impleaded as defendants 1 to 5. Sixth defendant was the decree holder in another suit. It was claimed therein that the defendants 1 to 4 were said to have executed possessory mortgage in favour of one Ismail the plaintiff therein a joint written statement was filed

by them admitting the claim of the plaintiff who had pleaded the gift said to have been given by Maqdoom in favour of the three sons and his wife. They have admitted the same. Thus it would be clear that there was no conflict of interest between the defendants in that suit On the other hand they had confessed to the claim set up by the alleged possessory mortgage therein. Though the appellant claimed title to the property through the parents of the respondents, there was neither conflict of interest nor was it necessary to decide about the validity of the gift said to have been executed by Maqdoom. The dispute therein was whether the possessory mortgagee was bound by the decree and the creditor could proceed against the Maqdoom and the said property is liable to sale for realisation of his decree debt? In that context the relevancy or validity of the gift is immaterial. It was admitted therein that they had executed possessory mortgage in favour of Ibrahim, plaintiff therein. On that basis, the only question would have been whether he would be entitled to resist the execution of the decree obtained against Maqdoom by the 6th defendant therein? The oral gift or sale of 4 acres under Ex.D-3 was not the subject-matter of OS No. 3/1/1951. The High Court, therefore, committed gross palpable error of law in applying the doctrine of res judicata between codefendants relying upon the decree in OS No.3/1/1951 dated September 24, 1951, even if it could be pressed into service in the second appeal.

12. The appeal is accordingly allowed. The judgment and decree of the High Court are set aside and that of the appellate court stands restored, in consequence the suit of the respondents 1 & 2 stands dismissed with costs throughout.