

## **N.M.A. Abdul Mithalif vs Syed Bibi Ammal And Ors. on 26 April, 1979**

**Equivalent citations: 1980SUPP(1)SCC771, 1979(11)UJ545(SC)**

**Author: D.A. Desai**

**Bench: A.P. Sen, D.A. Desai**

### **JUDGMENT**

D.A. Desai, J.

1. This appeal by special leave arises from a suit OS No. 10/66 filed by the plaintiffs respondents being the heirs of one Abdul Karim Rowther against the defendant No. 1 appellant for a declaration that the sale deed dated 30th May 1962 was fraudulent in character, void and not binding on the respondents and for possession of the properties covered by the sale deed which suit was dismissed by the Distt. Munsiff, Pudukkottai but in First Appeal being A. S. No. 68/70 filed by the respondents the Subordinate Judge, Pudukkottai decreed the suit and the Second Appeal being 206/72 by the original defendant No. 1 was dismissed in limine though with a speaking order by the High Court.

2. Abdul Karim Rowther, husband of respondent 1 and father of respondents 2 & 8 (original plaintiffs), and Abdul Rahiman Rowther the father of defendant 1 were full brothers. They had four other brothers. Respondents alleged that they had certain share in the properties set out in the Schedule annexed to the plaint but as Abdul Karim Rowther was a man of weak intellect and was suffering from paralysis since some years prior to 30th May 1962 his brother Abdul Rahiman Rowther was managing and looking after the properties and was giving produce from the agricultural land to the respondents. It was alleged that taking advantage of the hold Abdul Rahiman Rowther had on Abdul Karim Rowther the former took a bogus deed of sale, Ext. A-1 dated 30th May 1962 by which Abdul Karim Rowther purported to sell his entire interest in the properties set out in the Schedule annexed to the plaint in favour of defendant 1. Respondents alleged that the transaction evidenced by the deed was fraudulent in character and was without consideration, bogus and sham and not binding on the respondents. Abdul Karim Rowther and Abdul Rahiman Rowther both died in 1966 at short intervals. Soon after the death of Abdul Rahiman Rowther defendant 1 failed to give the share of the produce or income from the properties to the plaintiffs in April, 1966 respondents were put to enquiry as to what had happened when they learnt about the sale deed Ext. A-1 dated 30th May, 1962. Thereupon they filed the suit on 11th July 1966 for a declaration that the sale deed is bogus, void and inoperative, and for possession of the properties.

3. Defendant 1 contested the suit, inter alia, contending that the suit is barred by limitation. As the only question (hat survives for consideration in this appeal is about the limitation it is not necessary to set out other contentions of the defendant.

4. Original defendants 2 and 3 are sons of Abdul Karim Rowther but as they were not available for being joined as plaintiffs they were joined as defendants 2 and 3 and they supported the plaintiffs.

5. The trial court framed six issues in all. Issue No. 4 was whether the suit was barred by limitation. On issue No. 4 the trial court recorded a finding that the respondents knew about the execution and registration of the sale deed Ext. A-1 dated 30th May 1962 at or about the time of registration and, therefore, the suit filed on 11th July 1966 was barred by limitation. When the matter was in first appeal preferred by the present respondents the appellate court framed a point for consideration when her the suit was barred by limitation. The appellate court found that Article 59 of the Limitation Act, 1963 would apply and, therefore, the period of limitation would begin to run from the time when the facts entitling the plaintiffs to have the instrument cancelled first became known to them and the learned Subordinate Judge, on appreciation of the evidence recorded in the case, held that plaintiffs respondents appear to have come to know AT about the sale deed Ext. A-1 on 6th June 1968 and, therefore, the suit filed on 11th July 1966 was in time. The High Court appears to have confirmed this finding while dismissing the appeal of the present appellant in limine by a speaking order.

6. Mr. M S K. Sastry, learned Counsel who appeared for the appellant urged that the first appellate court ignored and overlooked certain relevant and important pieces of evidence bearing on the question of limitation, about the knowledge in respect of the sale deed, alleged to have been acquired by one or the other of the respondent and, therefore, even though when the knowledge about the sale deed was acquired by one or the other of the respondents is a question of fact this Court should not hold itself bound by it. Mr. Sastry went to the length of saying that this finding can be said to be wholly perverse as it has been recorded overlooking some relevant pieces of evidence of an illuminating character which throws considerable light on the question as to when one or the other of the respondents acquired knowledge about the execution and registration of sale deed Ex. A-1.

7. Before we deal with the only contension raised on behalf of the appellant that the suit of the respondents was barred by limitation it would be advantageous to briefly notice the concurrent findings of facts on other points involved in the litigation which have been found in favour of the respondents plaintiffs and against the appellant-defendant.

8. Deceased Abdul Karim Rowther was the husband of respondent 1 and father of respondents 2-8. Abdul Rahiman Rowther was the father of defendant 1-appellant. Abdul Karim Rowther and Abdul Rahiman Rowther were brothers and they had four other brothers. Properties in the schedule appear to have been acquired by the brothers from their common ancestor which explains the claim of 1/6 share in some of the properties set out in the Schedule annexed to the plaint by the respondents.

9. Deceased Abdul Karim Rowther is alleged to have executed a sale deed Ext. A-1 dated 30th May 1962 in favour of the present appellant for a consideration of Rs. 1000/-. Respondent contend that the sale deed Ext. A-1 is sham, bogus and inoperative and without consideration Appellant defendant 1 who was the contesting defendant has stated in his written statement that the said properties were relinquished in favour of father of defendant 1 by Abdul Karim Rowther in 1935 and therefore he had absolute no title to the suit properties he having parted with the same as early as 1935 and ceased to have possession of the same since that time In other words, the case set up by the appellant was that way back in 1935 by oral relinquishment deceased Abdul Karim Rowther had parted with the suit properties in favour of Abdul Rahim an Rowther. All Courts have rejected the allegations of oral relinquishment. If Abdul Karim Rowther had relinquished suit land in favour of appellant or his deceased father in 1935 there was no necessity of taking a sale deed in respect of the same property as late as 30th May 1962 and on this admission the sale deed would be nominal. It is nowhere suggested that the consideration of Rs. 1,000/- was paid in cash at or about the time of execution of the sale deed. In this connection the case set up by defendant I was that Abdul Karim Rowther had borrowed Rs. 1,000/- from Abdul Rahiman Rowther to meet the expenses of the marriage of his daughter. The first appellate court has found that the marriage of the daughter of Abdul Karim Rowther took place in 1953 and no pronote was shown to have been executed by Abdul Karim Rowther. An alternative stand was taken that the consideration was paid at the time of entering into agreement for sale but no such agreement or receipt acknowledging payment of Rs. 1,000/ is forthcoming. In this state of evidence the first appellate court found that there was no consideration for the sale deed Ext. A1.

10. These findings were affirmed by the High Court while dismissing the second appeal preferred by the appellant in limine. It is thus concluded that the sale deed dated 30th May 1962 was a nominal one without consideration and would not confer any title on defendant 1. His claim about oral surrender in 1935 has been rejected by all the courts. His feeble attempt to claim title by adverse possession was held equally untenable. Thus the appellant has not a vestige of title to the suit land. The question of limitation arises in this background.

11. The suit would be governed by Article 59 of the Limitation Act, 1963 Limitation would accordingly begin to run from the time when the facts entitling the plaintiff to have the instrument cancelled or set aside became known to them The controversy is when knowledge with regard to the sale deed Ext.A-1 dated 30th May, 1962 was acquired by the respondents or anyone of them so as to fasten them with the knowledge about the same since when the limitation would begin to run against them.

12. According to respondents they acquired knowledge about the sale deed Ex A-1 when the appellant and his father Abdul Rahiman Rowther failed to give them their share of the produce of the lands which were managed by Abdul Rahiman Rowther which set then on enquiry and they acquired knowledge about the sale deed somewhere on 6th June, 1966 and thereafter they filed the suit on 11th July 1966 and, therefore, the suit was in time: According to appellant, Kaza Mohideen respondent 7 one of the sons of Abdul Karim Rowther, the executant of the sale deed, identified Abdul Karim Rowther before the Sub Registrar on 2nd June, 1962 when the sale deed Ext A-1 was registered and since then one of the major sons of Abdul Karim Rowther knew about the sale deed

executed by Abdul Karim Rowther and therefore, the limitation would be from 2nd June, 1962 and the suit filed on 11th July 1966 would be barred by limitation.

13. P.W.5 Kaza Mohideen denied having signed the sale deed Ext A-1 as identifying witness before the Sub Registrar, Arunachalam, D.W 1 Sub-Registrar at Annavasal has stated in his evidence that Kaza Mohideen son of Abdul Karim Rowther identified the executant of sale deed Ext.A-1 before him. He probably stated this fact after referring to the Registrar in which signature of the identifying witness is taken (Ext. B 1) because in cross-examination he admitted that he was not Sub-Registrar, Annavasal at the time when sale deed Ext.A-1 was offered for registration. In this context reference to plaint paragraph 8 may be made wherein it is stated that Kaza Mohideen was leaving for his place of business at Sholapur when near the bus station at Annavasal it was represented to him by Abdul Rahiman Rowther that a deed authorising Abdul Rahiman Rowther to manage the lands which had come to the share of Abdul Karim Rowther was being presented for registration and, therefore, he should board the bus after identifying his father before the Sub Registrar. It is further stated that relying on such representation Kaza Mohideen who had not joined as plaintiff but was joined as defendant, without knowing the contents or purports of the document subscribed his signature as identifying witness and then boarded the bus and left for Sholapur. There were thus before the appellate court two versions, one set out in the plaint and another of Kaza Mohideen stated in his evidence. The present appellant has not said anything about the circumstances in which Kaza Mohideen, P.W.5 was available for identifying Abdul Karim Rowther, at the Sub Registrar's office when sale deed Ext. A 1 was offered for registration. It was open to the appellate court to prefer one or the other version. Now, the appellate court preferred the version that Kaza Mohideen, P.W.5 did not have any knowledge about the contents of the sale deed as he was misled by Abdul Rahiman Rowther to identify his father as executant of a deed authorising Management of the property of Abdul Karim Rowther by Abdul Rahiman Rowther which was offered for registration. There are eloquent circumstances on record for preferring this version. It does appear that Abdul Rahiman Rowther was throughout managing the properties. There is evidence of five witnesses that Abdul Karim Rowther was suffering from paralysis and even though he was not shown to be insane he did not appear to be a person in possession of full faculties of his mind. Without any dispute on behalf of the sons of Abdul Karim Rowther the properties were being managed by Abdul Rahiman Rowther till his death. If such was the hold and influence of Abdul Rahiman Rowther, the explanation offered by Kaza Mohideen that while he was on the way to Sholapur. At Annavasal he was asked to come to the Sub-Registrar's office to identify his father would be within the realm of probabilities. This conclusion is reinforced by another telltale circumstance in that the alleged consideration of Rs. 1,000/- is not shown to have been paid in the office of the Sub-Registrar. Therefore, there was nothing to excite the suspicion of Kaza Mohideen that his father was not executing a deed of management but in reality a sale deed of his properties. If the consideration were paid to Abdul Karim Rowther in the presence of Kaza Mohideen it would be a strong circumstance which would put Kaza Mohideen on guard and would of course be followed by an enquiry as to how consideration can be paid while executing a deed of Management. Failure to pay the price at the time of registration is a circumstance which lends credence to the version of Kaza Mohideen about the representation made to him by Abdul Rahiman Rowther which impelled him to identify his father without any suspicion and it would show that he acted on the representation of Abdul Rahiman Rowther. It may be noticed that Kaza Mohideen is not an attesting witness. The attesting witnesses

were all beneficiaries under the sale deed Ext. A 1. Law ordinarily does not attribute knowledge of contents of a document to attesting witnesses then it would be too much to say that such knowledge should be attributed to a more Identifying witness. Mr. Sastry, however, urged that the Court need not infer the knowledge of contents of the sale deed Ext. A 1 by Kaza Mohideen on 2nd June, 1962 when he identified his father Abdul Karim Rowther in the office of the sub Registrar but if Abdul Karim Rowther was a paralytic person not in possession of full faculties of his mind, unable to manage the properties and would not be freely moving out without the help or assistance of someone, these circumstance were eloquent enough to put Kaza Mohideen the major son of Abdul Karim Rowther to an enquiry as to what nature of deed his father executed. It was further urged that admittedly the properties were being managed by Abdul Rahiman Rowther from 1935 or even from an earlier period and that would belie the suggestion of Kaza Mohideen that he would be gullible enough to swallow the explanation offered by Abdul Rahiman Rowther that the deed being executed by Abdul Karim Rowther was one for entrusting management of the properties. There is much to be said in favour of the contention of Mr. Sastry but it is not possible to overlook an equally cogent and telling circumstance that Abdul Rahiman Rowther was probably the man in the management of properties of the family and every one was possibly acting at his behest. Therefore, Kaza Mohideen without raising any query accepted at the face value what Abdul Rahiman Rowther told him about the deed to be executed by Abdul Karim Rowther and necessity of identifying him. Both the views are weighty enough and possible but if the present appellant is shown to be prevaricating with regard to the nature of the sale deed admitting it to be a nominal one and it is shown to be without consideration which transpire from the evidence and defendant 1 claims title on the one hand under an oral relinquishment not having been accepted by any Court or by adverse possession not found convincing by any Court, it would be too much now at this stage to accept the other version and non-suit the plaintiffs. It is in this background that we are not disposed to interfere with the concurrent findings of the first appellate Court and the High Court that the suit is not barred by limitation. This appeal, therefore must fail.

14. Before concluding we must note one dispute raised by Mr. Sastry for the appellant as to what decree the plaintiffs are entitled to. This being a suit for cancellation of a deed plaintiffs would be entitled to a decree in respect of the properties sought to be conveyed by the sale deed which is being set aside There are four items of property set out In the Schedule to the plaint. Item I refers to land which came to Abdul Karim Rowther as his 1/6 share and, therefore, the plaintiffs are entitled to the whole of it Similarly, plaintiff respondents have 1/6 share in properties set out in item I to IV. The question is whether the plaintiffs are entitled to a decree for the entire lands set out in item II and III or 1/6 share in the same. The first appellate court In this behalf has passed the decree as under:

Declared that plaintiffs and defendants 2 and 3 are entitled to whole of items 1 to 3 of plaint schedule and 1/6 share in items 4 that the first defendant do deliver possession of the same to plaintiffs and defendants 2 and 3.

15. Now, item II refers to only one property being land bearing survey No. 161/3 When the properties sought to be conveyed by sale deed Ext. A-1 are properly scanned and keeping in view the description of the property set out in the Schedule to the sale deed it becomes clear that the whole of Survey No. 161/3 belonged to Abdul Karim Rowther. Therefore, the plaintiffs and defendants and

defendants 2 and 3, i.e. the present respondents would be entitled to possession of whole of Survey No. 161/3. Item III refers to six pieces of agricultural land. They form part of Item III of the Schedule of properties set out in the sale deed. It is specifically stated in the sale deed that in respect of these six pieces of agricultural land Abdul Karim Rowther had 1/6 shares. Therefore the plaintiff and defendants No. 2 and 3 would entitle to possession of 1/6 share in six pieces of agricultural land. Accordingly the decree in favour of the plaintiffs and defendants 2 and 3 should be modified to read that the sale deed Ext. A-1 dated 24th May, 1962 is declared null and void and plaintiffs and defendants 2 and 3 would be entitled to possession of properties set out at items I and II in the Schedule of properties annexed to the plaint. Similarly plaintiffs and defendants 2 and 3 would also be entitled to 1/6 share in properties set out at items III and VI in the schedule of properties annexed to the plaint.

16. The plaintiffs having filed a suit for possession they would be entitled to mesne profits at least from the date of the suit since they have not prayed for any mesne profits prior to that date, This Court by an interim order had directed ascertainment of profits and on payment of appropriate stamp respondent's would be entitled to a decree for mesne profits.

17. This appeal, with the modification of the decree as hereinbefore mentioned, is dismissed with costs.