

Smt. Razika Begum vs Sri. Rehamathulla Khan on 24 September, 2024

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NC: 2024:KHC:39671
RSA No. 1462 of 2017

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 24TH DAY OF SEPTEMBER, 2024

BEFORE

THE HON'BLE MRS JUSTICE K.S. HEMALEKHA

REGULAR SECOND APPEAL NO.1462 OF 2017 (DEC/INJ)

BETWEEN:

1. SMT. RAZIKA BEGUM
D/O. SHAFIULLAKHAN,
AGED ABOUT 46 YEARS,
2. SMT. SHAHANAZ BEGUM
D/O. SHAFIULLAKHAN,
AGED ABOUT 42 YEARS,
3. SMT. RAFEEKA BEGUM
D/O. SHAFIULLAKHAN,
AGED ABOUT 36 YEARS,

ALL ARE RESIDENTS OF NO.11,
KATTIGANAHALLI,
JADAGANAHALLI POST,
HOSKOTE TALUK - 562 104.

Digitally signed by
MAHALAKSHMI B M
Location: HIGH
COURT OF
KARNATAKA

... APPELLANTS

(BY SRI SIDDHARTHA H.M., ADVOCATE FOR A-1 & A-2;
SMT. IRFANA NAZEER, ADVOCATE FOR A-3)

AND:

1. SRI REHAMATHULLA KHAN
S/O. LATE ABDUL MAJID KHAN
@ ARIFULL KHAN,
SINCE DECEASED
REPRESENTED BY HIS LR's.

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- 1(a) MUSURATH KATHOON
W/O. LATE MR. REHAMATHULLA KHAN,
MAJOR,
- 1(b) SRI ALTAF KHAN
S/O. LATE MR. REHAMATHULLA KHAN,
MAJOR,
- 1(c) SRI MUSTAK KHAN
S/O. LATE MR. REHAMATHULLA KHAN,
MAJOR,
- 1(d) SABEENA KHANUM
D/O. LATE MR. REHAMATHULLA KHAN,
MAJOR,
- 1(e) TASNEEM KHANUM
W/O. LATE MR. REHAMATHULLA KHAN,
MAJOR,

ALL ARE RESIDENTS OF NO.661,
1ST CROSS, MASJID ROAD,
TILAK NAGAR,
BENGALURU - 560 041.

(AMENDED CARRIED OUT
PURSUANT TO THE ORDER
OF THIS HON'BLE COURT
VIDE ORDER DATED 17.01.2022)

- 2. MR. ABDUL HAMEED BAIG
S/O. ABDUL TAWAB BAID,
AGED ABOUT 54 YEARS,
R/O. NO.41/1, 4TH CROSS,
NEAR MEDISCOPE HOSPITAL,
AROGYAMMA LAYOUT,
VENKATESHPURAM,
BENGALURU NORTH TALUK,
BENGALURU - 560 045.
PAN NO.AMQPB1651A,
AADHAR NO.297554013746.

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3. MR. ABDUL SADIZ BAIG
S/O. ABDUL TAWAB BAID,
AGED ABOUT 52 YEARS,
R/O. NO.21, 2ND MAIN ROAD,
2ND CROSS, 2ND STAGE,
PILLANNA GARDEN,
BENGALURU NORTH TALUK,
BENGALURU - 560 045.
PAN NO.AIGPA3855K,
AADHAR NO.947921072978.

(AMENDED CARRIED OUT
PURSUANT TO VIDE
ORDER DATED 22.04.2022)

... RESPONDENTS

(BY SRI S.A. KHADRI, ADVOCATE FOR C/R-1 (A TO E);
SRI P.N. RAJESHWARA, ADVOCATE FOR R-2 & R-3)

THIS RSA IS FILED UNDER SECTION 100 OF CPC.,
AGAINST THE JUDGMENT AND DECREE DATED 05.01.2017
PASSED IN R.A.NO.13/2016 ON THE FILE OF THE I
ADDITIONAL DISTRICT SESSIONS JUDGE, BANGALORE RURAL
DISTRICT, BANGALORE, DISMISSING THE SUIT AND
CONFIRMING THE JUDGMENT AND DECREE DATED 17.12.2015
PASSED IN O.S.NO.591/2009 ON THE FILE OF THE PRL.
SENIOR CIVIL JUDGE, BANGALORE RURAL DISTRICT,
BANGALORE.

THIS APPEAL COMING ON FOR FINAL HEARING, THIS
DAY, JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM: HON'BLE MRS JUSTICE K.S. HEMALEKHA

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RSA No. 1462 of 2017

ORAL JUDGMENT

Being aggrieved by the judgment and decree dated 05.01.2017 in R.A. No.13/2016 passed by the I Additional District and Sessions Judge, Bengaluru Rural District, Bengaluru (hereinafter referred to as the 'First Appellate Court' for short), confirming the judgment and decree dated 17.12.2015 in O.S.No.591/2009 passed by the Principal Senior Civil Judge, Bengaluru Rural District, Bengaluru (hereinafter referred to the 'Trial Court' for short), the defendants are before this Court in the regular second appeal.

2. Parties herein are referred to as per their rank before the Trial Court for the sake of convenience.

3. **Plaint averments:**

i. Plaintiff's grand father Amir Khan has two sons, namely, plaintiff's father - Abdul Majid Khan @ Arifulla Khan and defendants' grand father - Abdul Wajid Khan and daughter Jubeda Begum.

NC: 2024:KHC:39671 ii. Plaintiff's grand father Amir Khan acquired several properties during his life time.

iii. After the death of plaintiff's grand father-Amir Khan, his two sons and daughter have divided all the family properties under registered partition deed dated 17.07.1948 as 'A', 'B' and 'C' schedule properties and in the partition, 'A' schedule properties which is the plaint schedule property bearing Sy. No.80 measuring 2 acres 28 guntas was allotted to the share of the plaintiff's father, 'B' schedule properties were allotted to the share of Jubeda Begum and 'C';

schedule properties were allotted to the share of Abudl Wajid Khan.

iv. In the registered partition deed, there was a mis-

description in respect of 'A' schedule properties, though it was allotted to the plaintiff's father-Abdul Majid Khan, being the first son of Amir Khan and has wrongly been written as Abdul Wajid Khan. Though Abdul Wajid Khan was the second son of Amir Khan, his share and towards the share of Abdul Wajid Khan NC: 2024:KHC:39671 the 'C' schedule properties were allotted and 'B' schedule properties were allotted to the daughter Jubeda Begum.

v. That the plaintiff requested the defendants to execute the rectification deed and in spite of several requests, they have not come forward. vi. That the cause of action for filing the suit arose in the month of March, 2009, when the defendants in collusion with some agents attempted to alienate the schedule properties, taking the advantage of illegal revenue entries in their name, and based on the "mis-description" under the registered partition deed. vii. The plaintiff sought declaration that the plaintiff successors in interest of Abdul Majid Khan are the owners in possession of the suit schedule property.

4. **Averments in the written statement:**

On notice, the defendants appeared and filed their written statement, inter alia, contending as under:

NC: 2024:KHC:39671 i. That after the demise of Amir Khan, his property was inherited by his two sons and one daughter, namely, Abdul Majid Khan @ Arifulla Khan, Abdul Wajid Khan and Jubeda Begum.

ii. That the family properties were partitioned among themselves vide registered partition deed dated 17.07.1948 and as per the partition deed, the properties were partitioned in the following manner:

a. Abdul Wajid Khan, the grand father of the defendants was allotted the suit schedule property measuring 2 acres 28 guntas in Sy. No.80 and another property measuring 32 guntas in Sy. No.122/2 both situated at Medimallasandra Village, Anugondanahalli Hobli, Hosakote Taluk.

b. Abdul Majid Khan @ Arifulla Khan, the father of the plaintiff was allotted a house bearing property No.8/1 situated at Hoskote Taluk.

c. Jubeda Begum was allotted agricultural land measuring 34 acres 31 guntas in Sy. No.130/2 of Hoskote Taluk, after the demise of Abdul Wajid Khan, NC: 2024:KHC:39671 his only son Shafiulla Khan, i.e., the father of the defendants inherited the properties of Abdul Wajid Khan, which included the suit schedule property. iii. That the suit schedule property was allotted to the share of grand-father of the defendants-Abdul Wajid Khan, after partition, the katha continued to remain in the plaintiff's father name i.e., Abdul Majid Khan until 1992- 1993 and in the year 1992-1993, the defendants father made an application to the revenue authorities to transfer the katha in his name with respect to the suit schedule property.

iv. Objections were called for transfer of katha, at that time, neither the plaintiff nor any other person raised objections for the said transfer of katha with regard to the suit schedule property.

v. Shafiulla Khan, the son of Abdul Wajid Khan was cultivating and is in possession of the suit schedule property until his demise on 24.03.1997 and the suit schedule property is bequeathed by way of Will in favour of the defendants under the registered Will dated NC: 2024:KHC:39671 09.10.1996 and after the demise of Shafiulla Khan, the defendants are in lawful in peaceful possession of the suit property.

5. The Trial Court on the basis of the pleadings, framed the following issues:

"1. aÁç zÁªÁ ,ÀéwÛUÉ ªÀiÁ°PÀ£ÁV ±ÁAwAiÄÄvÀ ,ÁéçüÃ£Á£ÄÄ¨sÀªÀ °ÉÆAçgÄÄvÉÛÄ£É JA§ CA±ÀªÀ£ÄÄß ,Á©ÄvÄÄ¥Àr¹gÄÄvÁÛÉAiÉÄÄ?

2. ¥ÀæwªÁçAiÄÄgÄÄ °TvÀ °ÉÄ½PÉAiÄÄ°è w½¹zÄAvÉ °ÉÆÄ ,ÀPÉÆmÉ £ÄªAiÄiÁ®AiÄÄzÀ°è EzÉÄ ,ÀéwÛU£Ä §UÉÎ N.J.ï. 48/2007 zÁR¯ÁV E£ÄÆß ZÁ°ÛAiÄÄ°ègÄÄªÄzÀjAzÀ F zÁªÉ GfðvªªÁUÄvÀPÀÌzÁÝ®è JA§ÄzÀ£ÄÄß ,Á©ÄvÄÄ ¥Àr¹gÄÄvÁÛÉAiÉÄÄ?

5. ªÁç zªÉAiÀÄ°è PÉÃ½zÀAvÉ WÀÉÆÃµÀuÁvÀäPÀ ¥Àj°ÁgÀ ¥ÀqÉzÀÄPÉÆ¼Ài®Ä C°ÀðgÉÃ?

6. AiÀiÁªÀ DzÉÃ±À CxÀªÁ rQæ?"

ii. by judgment and decree, decreed the suit declaring that the plaintiff is the successor in interest of Abdul Majid Khan and owner in possession of the suit schedule property and restrained the defendants by an order of permanent injunction from interfering with the plaintiff's possession over the suit property.

"i. Whether Courts below were right in arriving at a conclusion that suit schedule properties was allotted to the share of Mr. Abdul Majid Khan @ Arifull Khan, father of the plaintiff, under the partition deed dated 17-7-1948, Ex.P.1?

ii. Whether Courts below erred in interpreting the document Ex.P.1 dated 17-7-1948 and thereby decreed the suit erroneously?"

9. Heard Sri Siddhartha H.M., learned counsel for appellant Nos.1 and 2, Smt. Irfana Nazeer, learned counsel for appellant No.3, Sri S.A. Khadri, learned counsel for caveator/respondent No.1 and Sri P.N. Rajeshwara, learned counsel for respondent Nos.2 and and perused the judgment and decree of the Courts below and the original records.

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10. Learned counsel for the appellants would urge the following grounds:

i. The judgment and decree of the Courts below in decreeing the suit of the plaintiff is contrary to the law, facts and material on record and the same are liable to be set aside.

ii. That the Courts below have failed to appreciate the partition deed at Ex.P.1 dated 17.07.1948 and misdirected itself in misconstruing Ex.P.1 and arriving at a conclusion that the suit schedule property was allotted to Abdul Majid Khan @ Arifulla Khan, the father of the plaintiff, when the document at Ex.P.1 clearly indicates that the suit schedule property along with Sy. No.122/2 was allotted to Abdul Wajid Khan, the grand father of the defendants.

iii. That the Courts below have failed to appreciate the mother deed, which is paramount in granting the relief of declaratory suit and wrongly proceeded on an assumption and misconstrued

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NC: 2024:KHC:39671 Ex.P.1 to arrive at a conclusion that the plaintiff's father Abdul Majid Khan @ Arifulla Khan was allotted the suit schedule property under the partition deed dated 17.07.1948 at Ex.P.1.

11. Per contra, learned counsel appearing for the respondents would vehemently contend as under:

i. That the father of the plaintiff, Abdul Majid Khan, being the elder son of Amir Khan, was allotted 'A' schedule property in the partition, 'B' schedule property was allotted to the daughter, Jubeda Begum and 'C' schedule property was to be allotted to Abdul Wajid Khan- grandfather of the defendants, and that in the registered partition deed, there was a 'mis-description' indicating the name of Abdul Wajid Khan instead of Abdul Majid Khan, the father of the plaintiff.

ii. That the Courts below concurrently have held and perused Ex.P1 and rightly arrived at a conclusion that the suit schedule property was allotted to the father of the

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NC: 2024:KHC:39671 plaintiff and there is no misconstruing of Ex.P.1 as contended by the appellant.

iii. That the concurrent findings of facts recorded by the Courts below does not warrant any interference and the substantial questions of law need to be answered against the appellants.

12. This Court has carefully considered the rival contentions urged by the learned counsel for the parties and perused the material on record.

13. This Court is conscious that the concurrent findings of facts recorded by the Courts below cannot be interfered with unless warranted by the compelling reasons, when the findings of the First Appellate Court and the Trial Court are shown to be perverse, the Court can certainly interfere with the findings of facts recorded by the Courts below as held by the Apex Court in the case of Mahesh Dattatray Thirthkar Vs. State of

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NC: 2024:KHC:39671 Maharashtra¹ the phrase 'substantial question of law' as occurring in amended Section 100 is not defined in the Code, the word substantial, means - of having substance, essential, real, worth, important or considerable, where the Courts did not consider the material documents in a proper perceptive, it is incumbent upon the Appellate Court to re-appreciate the entire oral and documentary evidence.

14. In the instant case, the Trial Court, in a very cryptic order misconstruing Ex.P.1, arrived at a conclusion that as per Ex.P.1, the suit property was allotted to the share of the plaintiff's father and the finding that the 'A' schedule property in the partition is been allotted to the father of the plaintiff, as D.W.1 in his cross-examination, has admitted about the partition among the children of Amir Khan and the suit property being fallen to the share of the plaintiff's father.

(2009) 11 SCC 141

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15. At this stage, cross-examination of D.W.1 needs to be looked into, wherein, D.W.1 has categorically stated that the suit schedule property and Sy. No.122/2 was allotted to Abdul Wajid Khan. The entire dispute revolves upon Ex.P.1-the partition deed dated 17.07.1948 and construing of

Ex.P.1 by the Courts below. The perusal of Ex.P.1 clearly indicates that the suit schedule property had fallen to the share of the defendants' father-Abdul Wajid Khan and this description recitals in Ex.P.1 is not disputed by the plaintiff, on the other hand, in clear unequivocal terms, the plaintiff in his pleadings at paragraph No.8 stated as under:

"8. It is submitted that plaintiff nor his family members have no occasion to know the transfer of katha in the names of defendant father in view of the fact that plaintiff have believed the defendants father and after his death defendants as an after thought based on illegal transfer of katha the defendants attempted to alienate the schedule property in the 1st week of March 2009, on enquiry to the shock and surprise the plaintiff marked the illegal transfer of katha and also they have notice in the registered partition deed there is a

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NC: 2024:KHC:39671 misdescription in respect of "A" schedule property was allotted to the plaintiff father Abdul Majid Khan who being the 1st son of Ameer Khan wrongly written as Abdul Wajid Khan, though the Abdul Wajid Khan was the second son of Ameer Khan and towards the share of Abdul Wajid Khan the "C"

schedule property was allotted and he was in possession of the said property and "b" schedule property was allotted to daughter Zubida Begum. The defendants knowing fully well as an after thought they are claiming right over the schedule property. Hence, this suit for declaration."

16. Section 53 of the Bharatiya Sakshya Adhiniyam, 2023 ('the BSA') [(Section 58 of the Indian Evidence Act, 1872)] clearly postulates that the things admitted need not be proved, though proviso to Section 53 of BSA (Section 58 of the Evidence Act) gives full discretion to the Court to require the facts admitted to prove otherwise by such admission.

17. In a suit for declaration when declaratory rights is sought, the burden is on the plaintiff to establish his title and to discharge his burden in an independent manner.

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NC: 2024:KHC:39671 Few sentences or few admissions in the written statement or in the cross-examination of the defendants cannot be an advantageous to the plaintiff to have a decree in his favour, when there was categorical pleadings in corroboration with Ex.P.1, which clearly indicate that the suit schedule property was allotted to the defendants' grand-father Abdul Wajid Khan, the Courts below have misdirected itself in perusing Ex.P.1 and the pleadings of the parties. When the plaintiffs own averments are to the effect about allotting of the suit schedule property to the father of the defendants, the Trial Court and the First Appellate Court would not have arrived at a conclusion that the suit schedule property was allotted to the share of the plaintiff's father.

18. The First Appellate Court, being the last fact finding Court, ought to have borne in mind that the first appeal is a valuable right of the parties and unless restricted by the law, the whole case is open for rehearing both on questions of fact and law and the judgment of the

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NC: 2024:KHC:39671 Appellate Court, must therefore, reflect its conscious application of mind and record finding supported by the reasons, on all the issues, arising along with the contention put forth and pressed by the parties for the decision of the Appellate Court.

19. The First Appellate Court being the last fact finding Court ought to have discharged the statutory obligation cast on it, the pleadings and materials were brought on record before the First Appellate Court and the First Appellate Court ought to have re-appreciated the entire oral and documentary evidence, independently, having failed to do so, the interference is called for by this Court in the second appeal.

20. The pleadings corroborated with the material on record would clearly establish that under the registered partition deed, which is not disputed by either of the parties, the suit properties fell to the share of the grand father of the defendants and not to the share of Abdul Majid Khan @ Arifulla Khan, father of the plaintiff and the

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NC: 2024:KHC:39671 Courts below were not right in arriving at a conclusion that the suit schedule property was allotted to the share of Abdul Wajid Khan under Ex.P.1 and the substantial questions of law framed by this Court is answered in favour of the plaintiff and this Court pass the following:

ORDER i. Regular Second Appeal is hereby allowed. ii. Judgment and decree of the Courts below are set-

aside, suit of the plaintiff is dismissed. In light of the disposal of the second appeal, consideration of interlocutory application would not arise.

Sd/-

(K.S. HEMALEKHA) JUDGE MBM