Madras High Court
Mohammed Gani vs Parthamuthu Sowra on 21 January, 2008

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 21/01/2008

CORAM
THE HONOURABLE MR.JUSTICE G.RAJASURIA

A.S.No.1315 of 1989

1.Mohammed Gani
2.Gulam Mohammed
3.Sherfuddin ... Appellants/Defendants

Vs

Parthamuthu Sowra ... Respondent/Plaintiff

Prayer

Appeal filed under Section 96 of the Code of Civil Procedure, against the judgment and decree dated 20.06.1989 in O.S.No.76 of 1986 on the file of the Subordinate Judge, Pudukkottai.

!For Appellants ... Mr.G.Sridharan

^For Respondent ... Mr.K.Srinivasan

:JUDGMENT

Challenging the judgment and decree dated 20.06.1989 in O.S.No.76 of 1986 on the file of the Subordinate Judge, Pudukkottai, this appeal has been filed by the unsuccessful defendants.

2. The parties, for convenience sake, are referred to hereunder according to their litigative status before the trial Court.

3. Broadly but briefly, precisely but narratively, the case of the plaintiff as stood exposited from the plaint could be portrayed thus:

The properties described in the Schedule of the plaint and other properties originally belonged to the deceased N.M.Abdul Rahiman Rowther, the father of the plaintiff and the defendants 1 to 3. By a registered partition deed dated 07.11.1963, the said original owner distributed his estate and allotted shares for himself and his sons born through his first wife and separately allotted a share nomenclatured as 'D' Schedule to the plaintiff and the defendants jointly. The plaintiff and the defendants were minors at the relevant time of emergence of the said partition deed and hence their mother represented as guardian for the minors. The defendants after attaining majority admitted the plaintiff's share in the suit properties as co-owner entitled to equal share along with the defendants. The plaintiff decided not to continue in joint possession and enjoyment of the suit properties and hence, the lawyer's notice dated 29.10.1980 emerged at her instance calling upon the defendants to agree for amicable partition and for allotment of her 1/4 th share in the suit properties, but there was no positive response. Hence, the suit for partition and for other incidental reliefs as well as for rendition of accounts.

4. Per contra, denying and disputing, refuting and challenging the averments/allegations in the plaint, the defendants filed the written statement with the averments which would run thus:

The plaintiff is not entitled to 1/4 th share in the suit properties. As per Holy Kureon, a daughter could claim only one share whereas a son is entitled to two shares. The wife is entitled to 1/8 the share alone in her husband's property in the presence of children. The defendants have not admitted the plaintiff's alleged 1/4 th share in any Court proceedings. A sum of Rupees One lakh was spent relating to the marriage of the plaintiff and the defendants also spent Rupees Two lakhs for protecting the suit properties. The mother of the plaintiff and the defendants, Aayisa Beevi Ammal during the life time of the deceased N.M.Abdul Rahiman Rowther obtained his rice mill in her favour and as such, the plaintiff cannot claim partition in the rice mill. The suit is also bad for non-joinder of Aayisa Beevi Ammal as a party to the suit. In fact, the plaintiff during her marriage got by way of jewels and other articles worth more than her share. The defendants also gave twenty bags of paddy every year to the plaintiff ever since her marriage. Accordingly, they prayed for dismissal of the suit.

5. The trial Court framed eight issues. During trial, the plaintiff examined herself as P.W.1 and Exs.A.1 to A.9 were marked and the first defendant examined himself as D.W.1 along with D.W.2 and Exs.B.1 to B.52 were marked.

6. Ultimately, the trial Court decreed the suit to the effect that the plaintiff is entitled to 1/4th share and also ordered for rendition of accounts.

7. Being aggrieved by and dissatisfied with, the judgment and decree of the trial Court, this appeal has been filed on the following main grounds inter alia thus:

The trial Court committed error in holding that the plaintiff despite she being a Muslim lady, is entitled to 1/4 th share in the suit properties, even though she is entitled to only 1/8th share in the presence of the defendants who are the brothers of the plaintiff. The defendants are entitled to 7/8 th share as per Muslim law. The trial Court failed to hold that according to Muslim law, a daughter

of the deceased is entitled to one share whereas the son of the deceased is entitled to double shares. The trial Court failed to hold that the suit is bad for non-joinder of Aayisa Beevi Ammal, the mother of the parties. Accordingly, they prayed for setting aside the judgment and decree of the trial Court or at the most, for decreeing the suit only to the extent of 1/8th share in favour of the plaintiff.

8. The point for consideration are:

(i) Whether the respondent/plaintiff is entitled to 1/4 th or 1/8 th share in the suit properties as per the Muslim law and more particularly, in the wake of the recitals in Ex.A.1, the partition deed dated 04.11.1963?

(ii) Whether the suit is bad for non-joinder of the mother of the plaintiff and the defendants as a party to the suit?

(iii) Whether there is any infirmity in the judgment and decree of the trial Court?

9. All the points are taken together for discussion as they are interlinked with one another.

Point Nos:(i) to (iii)

10. The learned Counsel for the defendants placing reliance on Ex.A.1, the partition deed would develop his argument to the effect that the deceased N.M.Abdul Rahiman Rowther allotted the suit properties which were described as 'D' Schedule in Ex.A.1 in favour of the plaintiff and the defendants jointly by appointing their mother as guardian; the recitals in Ex.A.1 would demonstrate that the plaintiff and the defendants were expected to enjoy jointly the suit properties and nowhere it is found specified therein that the plaintiff and the defendants should share equally the suit properties. Whereas the trial Court erroneously in the judgment understood as though the deceased N.M.Abdul Rahiman Rowther had given the properties to the plaintiff and the defendants, for being shared equally among them; as per Muslim law, the plaintiff being the daughter and the defendants 1 to 3 being the sons of the deceased N.M.Abdul Rahiman Rowther, should take one share by the plaintiff and double shares by the defendants and accordingly, the plaintiff is entitled to only 1/8th share. Accordingly, they prayed for modifying the judgment and decree of the trial Court by allotting only 1/8th share in favour of the plaintiff.

11. The learned Counsel for the plaintiff would interpret Ex.A.1 to the effect that as per the recitals in Ex.A.1, the plaintiff and the defendants were given with 'D' Schedule properties to be enjoyed equally and in such a case, each of them is entitled to 1/4 th share and that the Muslim law relating to the allotment of shares should not be pressed into service.

12. The cardinal point which required to be decided in this case is as to whether the deceased N.M.Abdul Rahiman Rowther intended that the plaintiff, his daughter and the defendants, his sons should take equally 1/4th share in the suit properties. Ex facie and prima facie, the trial Court fell into error in giving a finding that as per the recitals in Ex.A.1, the said N.M.Abdul Rahiman Rowther intended that the plaintiff and the defendants should share equally the suit property. Nowhere in

Ex.A.1, it is found stated like that. It is just and necessary to extract certain portions in Ex.A.1 thus: "4tJ ghh;l;o ikdh;fs; ehy;tUk; ndp 1yf;f jhuUf;Fk; 4tJ ghh;l;ofspd; fhh;oad; Map&h gPtpf;Fk; re;jjp Vw;gl;lhy; mth;fSk; Brh;e;J xU ghfkhf mDgtpj;Jf; bfhs;sBtz;oaJ Map&h gPtpf;F Vw;fdBt xJf;fg;gl;oUf;fpwgo mth;fs; mile;J bfhs;s Btz;oaJ ndp xUtUf;bfhUth; jpBuf rk;ke;jBk jtpu mh;j;j rk;ke;jKk; gpd; ghj;jpaKk; Jlh;r;rpa[k; ny;iy."

13. A mere perusal of it, would pave no way for ambiguity as the recitals would demonstrate that he intended the plaintiff and the defendants should jointly enjoy the property. He also set out therein that for his wife so to say, the mother of the plaintiff and the defendants, he had given separate properties during his life time. It is therefore crystal clear that the father of the plaintiff and the defendants intended that the plaintiff and the defendants should enjoy the property jointly, but he never contemplated and mandated therein as to how the inter se partition should take place among them. So long as, they have to enjoy jointly, the question of share would not arise. But, once the property which they got it from their father should be partitioned, automatically Muslim law of inheritance will come into vogue.

14. The main point to be taken into consideration here is that the plaintiff and the defendants constitute one group under Ex.A.1 and they are the legal heirs of the deceased N.M.Abdul Rahiman Rowther and it is not as though N.M.Abdul Rahiman Rowther gave the property to some third parties. During his life time itself, the said N.M.Abdul Rahiman Rowther in order to avoid disputes among the children born through his several wives, executed the partition deed Ex.A.1. As such, he intended that the suit property, that is 'D' Schedule in Ex.A.1, should go to the children born through his wife Aayisa Beevi Ammal, so that his other children born through his other wives would not be able to make any claim.

15. It is not a mere Hiba given by the said N.M.Abdul Rahiman Rowther to strangers comprised of males and females. But, he gave it to his own children born through one of his wives so as to make them to enjoy jointly leaving open the application of Muslim law in the event of they opting for partition. As such, Ex.A.1, the partition deed is not having the effect of ousting the application of Muslim law of inheritance when the question of inter se partition among the heirs born through his wife Aayisa Beevi Ammal, arises. Hence, the argument advanced on the side of the plaintiff that once the plaintiff and the defendants jointly got the suit properties under Ex.A.1, the question of applying the Muslim law of inheritance does not arise, fails to carry conviction with this Court in view of the reasons set out supra.

16. The paramount intention of the said N.M.Abdul Rahiman Rowther was to protect the children born through his wife Aayisa Beevi Ammal from the interference of other children born through his other wives and it was not his intention that the plaintiff, his daughter should take equal share with his sons, the defendants 1 to 3 ousting the Muslim law of inheritance. The trial Court's finding that the non-joinder of the said mother who was given with the properties separately, was not a necessary party to the proceedings, requires no interference. It is therefore clear that the judgment and decree of the trial Court is liable to be modified declaring that the plaintiff is entitled to 1/8th share and the defendants are entitled to the remaining 7/8 share.

17. There is one other alternative plausible legal view available in this case. It is worthwhile to refer to the principles of Mohammedan Law. I suo motu referred to the principles of Hiba and mushaa and called upon the learned Advocates on either side to argue on it as those are all pure questions of law which could be raised at any stage including the appellate stage as it is the case herein. The learned Advocates on either side also concentrated on those principles and argued in entirety.

18. It is a trite proposition of Muslim Law, there is no distinction between ancestral property and self-acquired property. A Muslim can transfer inter vivos his properties by Hiba (gift). By birth, a descendant is having no right over his ascendant's properties during the life time of the latter. In this factual matrix, what the said Abdul Rahim Rowther as per Ex.A.1, intended was to donate his properties by hiba, in favour of his sons born through his other wives and the 'D' Schedule properties as one lot in Ex.A.1 (i.e, the suit properties herein) in favour of his children who were born through his third wife and also to the children yet to be born to him through his same third wife.

19. At this juncture, I would like to reproduce the relevant excerpts from the famous Treatise "Mulla's Principles of Mahomedan Law" [19th Edition - by M.Hidayathullah and Arshad Hidayatullah] thus:

"160. Gift of mushaa where property divisible.-

A gift of an undivided share (mushaa)in property which is capable of division is irregular (fasid), but not void (batil). The gift being irregular, and not void, it may be preferred and rendered valid by subsequent partition and delivery to the donee of the share given to him. If possession is once taken the gift is validated.

Exceptions._ A gift of an undivided share (mushaa), though it be a share in property capable of division, is valid from the moment of the gift, even if the share is not divided off and delivered to the donee, in the following cases:_ (1) where the gift is made by one co-heir to another;

Kanij Fatima v. Jai Narin (1944) 23 Pat. 216, ('44) A.P.334 (a case of gift by mother to daughter of two anna share in lands, the daughter having taken joint possession).

(2) where the gift is of a share in a zemindari or taluka; (3) where the gift of a share in freehold property in a large commercial town;

(4) where the gift is of shares in a land company.

161. Gift to two or more donees._ A gift of property which is capable of division to two or more persons without specifying their shares or without dividing it is invalid, but it may be rendered valid if separate possession is taken by each donee of the portion of the property given to him or if there is a subsequent arrangement between all the donees with regard to the possession of the property gifted. This rule does not apply to the case mentioned in the third Exception to sec. 160 (h), nor, it is conceived, to the cases mentioned in the other Exceptions."

20. Admittedly, the parties are covered by the Sunni Law as they are residents of Tamil Nadu. The recitals in Ex.A.1, obvious as they are, do not demonstrate that the said Abdul Rahim Rowther intended the suit properties, referred to in the 'D' Schedule of Ex.A.1, should be divided equally among his sons and daughters and the children to be born to his third wife. In fact, he went a step further and set out therein that he wanted that 'D' Schedule properties as one lot should be enjoyed jointly by his children namely the parties to this suit and his children to be born through his third wife quite antithetical to the principles of Muslim law relating to Hiba and mushaa.

21. The learned Counsel for the plaintiff placing reliance on the said recitals in Ex.A.1, would develop his arguments that had the donor intended that his sons and daughters should take equal specific shares, he might not have set out therein that his male or female children to be born also should enjoy those properties. As such, it is obvious that there is no certainty or specificity of shares to be taken by his children under Ex.A.1, which is ex facie and prima facie against the Muslim law which precisely prohibits confusion leading to litigative partition among the donees.

22. The concept 'mushaa' which as per Muslim Law, prohibits donation to several donees without specifying as to what are the specific shares of the donees by metes and bounds. No doubt, the learned Counsel for the defendants would argue that at the time of the said hiba arrangement, the defendants were minors and hence, on behalf of them, their mother accepted the gift of properties. No doubt, as per the Muslim Law, there might be acceptance by the mother on behalf of the minors. But, there should have been specification of shares of the donees.

23. It is an incontrovertible proposition of Muslim law that the father has got the right to make gifts of unequal shares to his children quite contrary to the shares and arrangement contemplated in the Muslim law of inheritance.

24. However, had the donor specified the exact shares, then the matter would have been different, but it had not been done so under Ex.A.1. Adding fuel to fire, he even mandated that his children to be born also would be entitled to enjoyment and that clearly evidences that at the time of executing Ex.A.1, the shares were uncertain relating to the donees and the number of donees also were uncertain. the unassailable Muslim Law proposition is that donation can be given to a child in the womb "en ventre sa mere", but not to a child not yet conceived in the mother's womb. As such, I am of the considered opinion that to that much portion of Ex.A.1 falls foul of Muslim Law and as such, the suit properties should be treated as the properties inherited by the plaintiff and the defendants from their father.

25. A doubt might arise as to whether the other wives and children born through other wives would lay claim over the suit properties herein. The fact remains that the donor during his life time settled various properties in favour of his other children born through his other wives and he also gave properties to his third wife and as per the recitals in Ex.A.1 itself, such donees virtually accepted their snapping of their interest over the 'D' Schedule properties.

26. The learned Counsel for the defendants also would submit that in the previous litigation before the Court, the plaintiff and the defendants jointly as one group got a finding from the Court itself

that Ex.A.1 is a valid document. Ex.A.9, is the certified copy of the judgment dated 15.03.1972, in O.S.No.2 of 1967 passed by the Sub Judge, Pudukkottai, which was filed by one of the widows of the said Abdul Rahim Rowther, against the sons born through his third and fourth wives and also against his fourth wife and others for partition.

27. No doubt, in that case, the document Ex.A.1 herein, was also marked as Ex.B.10 and ultimately, the Court did not disturb the validity of even a portion of Ex.A.1 herein. In my opinion, such judgment emerged on a different footing and this legal point was not raised therein and obviously there was no adjudication on that.

28. This judgment is one passed 'in personam' and not 'in rem'. So far, the rights of others are concerned, the parties to those proceedings are bound by it and the arguments of the learned Counsel for the defendants herein would be a good answer for those other heirs of the donor if they try to lay claim over the 'D' Schedule property in Ex.A.1, but among the plaintiff and the defendants herein, the suit properties should be divided among them by applying the Muslim law of inheritance. Simply because, in the previous proceedings, the other heirs of Abdul Rahim Rowther did not raise such plea that it does not mean that in the inter se dispute between the plaintiff and the defendants, the embargo contemplated as against Ex.A.1 under Muslim law should not be invoked or considered.

29. Be that as it may, without being tautologous, I would reiterate that the judgment to be passed herein, is only a judgment 'in personam' and not a judgment 'in rem'. Accordingly, if viewed, it is clear that as per the Muslim law, the plaintiff is entitled to 1/8th share in the suit property and the remaining shares belong to the defendants. As such, Ex.A.1 settlement relating to the D Schedule property, even if taken as valid in toto, yet the plaintiff is entitled to 1/8th share and alternatively as per the second view expressed supra, that much portion of Ex.A.1 fails as it falls foul of the principles of hiba and in such an event once again, the plaintiff would be entitled to 1/8th share and the defendants would be entitled to the remaining shares.

30. In fact, the division should be as follows:

The entire suit properties should be divided to 7 shares. 1/7th share shall be allotted to the plaintiff and each of the defendants is entitled to 2/7 th share.

31. In the result, this appeal is disposed of accordingly, modifying the judgment and decree of the trial Court. No costs.

rsb To The Subordinate Judge, Pudukkottai.