Mohamed Ibrahim Vs Syed Muhamed Abbubakker and other

Court: Madras High Court

Date of Decision: Feb. 18, 1973

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 2 Rule 2, 66
Limitation Act, 1963 â€" Section 14(1)

Hon'ble Judges: Ramprasada Rao, J; Maharajan, J

Bench: Division Bench

Advocate: M.S. Venkatarama Ayyar, S. Ramalingam and S. Palaniswami, for the Appellant; V.C. Veeraraghavan, K. Sarvabhauman, T.R. Mani and S.K. Ahmed Meeran, for the Respondent

Judgement

Ramprasada Rao, J.
The third defendant in O.S. No. 243 of 1962 on the file of the court of the Subordinate Judge, Coimbatore, is the

appellant in App. No. 533 of 1969. Defendants 18 to 20 who are the legal representatives of the 12th defendant in the said suit are the appellants

in App. No. 203 of 1970. The suit was filed by the plaintiff for partition and separate possession of his 14/144th share in schedules B to F

properties. Sheik Hussain Din I and Sheik Magdoom were brothers. They had considerable properties in which each had a half share therein. In

1888, Sheik Hussain Din I died leaving behind him his widow Sheikammal, two daughters Vawu Ismail Bibi and Khader Hussain Bibi, and two

sons Khader Hussain Din and Sheik Hussain Din II. Vawu Ismail Bibi had a daughter Meeran Bibi, who died leaving behind defendants 21 to 24

as her legal representatives. She had another son Syed Mohammed Abbubakker, who is the plaintiff in the action. Khader Hussain Bibi, the other

daughter of Sheikammal died in 1944 and her heirs are defendants 8 to 11. Khader Hussain Din (the first son of Sheikammal) married Rahima

Bibi, the 7th defendant in the suit and left behind him his heirs defendants 2 to 6. Sheik Hussain Din II died unmarried on 27th July, 1961. The 12th

defendant is the alienee of some of the suit properties from the heirs of Khader Hussain Din. Defendants 13 to 18 are either the lessees of the suit

properties or having an interest therein as encumbrances. As already stated, the plaintiff claims a share in all the plaint schedule properties and

would attack inter alia the deed of gift executed by Sheik Hussain Din II in relation to certain items of the suit properties and would say that the

said hiba would not bind him and the said properties also should be deemed and considered to be family properties in which he has a share.

Originally, the plaint was filed in the court of the District Munsif, Udumalpet. As the defendants raised a plea of exclusion of the plaintiff as a co-

owner from joint possession of the suit properties, and as the jurisdictional value was beyond the jurisdiction of the Munsif''s court, the plaint was

returned and thereafter, presented in the Sub Court, Coimbatore, and renumbered as O.S. No. 243 of 1962. The first defendant supports the

plaintiff''s case. The second defendant''s case is that the properties described in Schedules B to F did not belong to Sheikammal and her children

and in particular, would say that the properties described in the E schedule excepting S.F. No. 163/A-2 was purchased by Khader Hussain Din

and Sheik Hussain Din II on 21st June 1962 from one Khadarsa Rowther of Ayakudi, that the E schedule properties belonged only to the father of

the first defendant and his uncle and that the plaintiff, his mother or grandmother did not have any right, title or interest therein. It is the case of the

defendant that the plaintiff has no right over the B schedule properties, that the half share of Sheik Magdoom therein was sold in 1902 itself, that

defendants 2 to 6 and their uncle Sheik Hussain Din II were adversely in possession of the B schedule properties, that the plaintiff''s mother in an

earlier suit filed by her in 1913 did not even claim any share in the said properties, and, that therefore, the plaintiff has no right to them. According

to this defendant, the plaintiff has lost his right to claim a share in the C schedule properties by limitation and the plaintiff''s mother having filed an

earlier suit for partition as early as 1913, and she not having furthered the decree therein, the properties described in schedules D and F are

adversely held by this defendant, and the third defendant, adverse to the other heist, and, therefore, the plaintiff''s claim to have the properties

described in schedules D and F partitioned and he be allowed his share is unsustainable. According to this defendant and the third defendant, the

suit properties were in their exclusive possession and were held by them adversely to others, and, therefore, the plaintiff''s suit for partition as

prayed for is not maintainable. As between him and the third defendant, the second defendant would say that the gift deed dated, 16th April 1961

is invalid and does not bind him and that be would be entitled to a half share in the properties of Sheik Hussain Din II. The third defendant sustains

the hiba and pleads that the E schedule properties are not family properties in which the plaintiff could claim a share. In particular, he would allege

that Sheik Hussain Din II obtained S.F. No. 163/A 2 dharkast from the Government and that, therefore, the plaintiff cannot project any interest

therein. He would plead like the second defendant that the B schedule properties have ceased to be the family properties, and that, defendants 2 to

6 and Sheik Hussain Din II were in exclusive possession of the same to the prejudice of the other heirs. A similar contention is raised as regards

the properties described in schedules G and D. He sustains the alienation made by him, and the second defendant and Sheik Hussain Din II to the

12th defendant. On the question of hiba or the gift deed executed on 16th April 1961, third defendant''s case is that the same is a valid gift and the

second defendant having attested the same and acquiesced in it cannot question it. Even so, his case is that the properties gifted to him by Sheik

Hussain Din II are not family properties. On the whole, it is pleaded that the right of the plaintiff and the other heirs of Sheikammal to obtain their

respective shares in the properties mentioned in schedules B, C, D and F are barred, as the third defendant and the second defendant were in

possession of the same adversely to the other co-heirs. The third defendant also denies the right of the plaintiff to any mesne profits in any one or

more of the items of the suit properties. In the additional written statement, the third defendant raised the plea that the present suit is barred by O.2,

R.2 C.P.C. The 4th defendant and the 5th defendant sail with the third defendant. The 6th defendant, however, would say that the gift deed dated

16th April 1961, executed by Sheik Hussain Din II in favour of the 3rd defendant is not valid. She would however sail with the third defendant that

the plaintiff has no right over the E schedule properties including S.F. 163/A.2. She would join with defendants 2 and 3 in asserting that the

plaintiff''s right over B, C, D and F schedule properties are barred, since those properties were adversely held by others to the prejudice of the

plaintiff. She claims her share in the B to F schedule properties and seeks for a decree for partition in that behalf. The 7th defendant sails along with

the 3rd defendant. Defendants 8 to 11 would allege that Khader Hussain Din was managing the entire family properties mentioned in the suit

schedules and that after his death, Sheik Hussain Din II was similarly managing the properties and that the income from the properties was being

divided amongst various sharers including these defendants and that the possession of the suit properties by Khader Hussain Din and Sheik

Hussain Din II was only for the benefit of the family, and, therefore, no question of adverse possession would ever arise. They would also allege

that certain properties mentioned in the suit schedules are in their possession and that they are entitled to a 7/48th share in the suit properties and

other family properties. They would attack the gift deed dated 16th April 1961.

2. The 12th defendant alienee claims that his purchase is fully supported by consideration and that he purchased the properties from Khader

Hussain Din and Sheik Hussain Din II when they were recognised as absolute owners thereof, and that, be, being a bona fide purchaser for value,

his title to the properties purchased by him has to be sustained. This defendant would also assert that he has made considerable improvements on

the properties and has been mortgaging the same for his benefit without any protest by others, and that therefore the properties purchased by him

from Khader Hussain Din and Sheik Hussain Din II and their heirs ought to be excluded from being partitioned.

3. The other defendants filed formal written statements. On the above pleadings the following issues and additional issues were framed--

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[Issues omitted Ed]

4. On the first issue, the learned trial Judge came to the conclusion that all the suit properties belonged to Sheikammal and her children. On issue

No. 2, he found that the E schedule properties did not belong exclusively to the third defendant. On issue No. 3, he found that the 3rd defendant

or any other defendant did not acquire title to the properties described in schedules B to F to the plaint either by adverse possession or otherwise.

After rendering his opinion on the formal issues 4, 5 and 6, he held that the gift deed dated 16th April, 1961 was not true, valid and binding on the

plaintiff and defendants other than the third defendant. On the question of accounting he held against the defendants and on the issues relating to the

adverse possession he held against the defendants and in favour of the plaintiff and on issue 13 he held that the plaintiff would be entitled to his

legitimate share in the E schedule properties excepting the land obtained in dharkhast by Sheik Hussain Din II which is S.F. No. 163/A 2, and also

held against the 12th defendant as be was of the view that he could only be a usufructuary mortgagee over the properties purchased by him and

ultimately found that the suit was in time and is maintainable. In the result, he granted a preliminary decree for partition and separate possession of

the plaintiff''s 14/144 share in the suit properties and made the necessary directions which normally follow a preliminary decree for partition.

5. It is as against this, the 3rd defendant and the 12th defendant have come up in appeals already referred to.

6. Though a semblance of an argument was addressed before us on the findings rendered by the trial court in relation to the properties described in

Schedules B, C, D and F, yet no substantial material has been placed before us to interfere with the finding and conclusions of the court below in

relation to the above-mentioned properties. As a matter of fact, at one time this was not even seriously argued or pressed. In the light of this, we

are not adverting to or canvassing the correctness of the findings of the court below as regards properties described in schedules B, C, D and F

and hold that the plaintiff and other heirs would be entitled to their legitimate share in it according to their personal law, and they should be deemed

and held to be family properties.

7. The main controversy, however, is as regards the E schedule properties. We shall advert to the merits of the appeal, A.S. 203 of 1970

presented by the alienee 12th defendant at a later stage. We shall now consider the broad aspects which touch upon the E schedule properties and

find whether the plaintiff''s theory that the E schedule properties should be deemed, construed and held as the family properties is correct and

sustainable.

8. Under Ex.A. 1, Sheik Magdoom obligated himself to pay 17 salagais of paddy to Sheikammal and her heirs in consideration of himself being put

in possession of the entire family properties which obviously included his half share therein also. Sheik Magdoom having committed default in the

matter of the payment of annuity, Sheikammal had to file a number of suits as is seen from Ex.B. 1 to B.4. Pursuant to a decree obtained by her in

O.S.797 of 1899 on the file of the court of the District Munsif, Udumalpet, a certified copy of which is Ex. B-4 Sheikammal brought the share of

Sheik Magdoom in the E schedule properties to sale through court. One, Khadersa Rowther of Ayakudi purchased the half share of Sheik

Magdoom and incidentally also purchased the right of Sheik Magdoom to manage the entire properties which was stipulated in Ex.A. 1. The court

auction purchase is evidenced by a sale certificate issued in favour of Ayakudi Khadersa Rowther under Ex. B-5 dated 15th November, 1900.

There is evidence to show that Ayakudi Khadersa Rowther took possession of these properties after the issue of the sale certificate and that he

had the pattas transferred to his name. These facts are evidenced by Exs. B-6 and B-8. The case of the plaintiff is that this purchase of Ayakudi

Khadersa Rowther was benami for the family and the possession of Ayakudi Khadersa Rowther or his successors in interest should always be

held to be for the benefit of Sheikammal and her heirs. Incidentally, it was pointed out that Ayakudi Khadersa Rowther was the husband of the

sister of Sheikammal and that it was Sheikammal, who paid the amount towards the court auction purchase and that the possession of Ayakudi

Khadersa Rowther could only be attributed to the possession of the members of the family of Sheikammal. The learned Judge was inclined to

accept this theory.

9. We are unable to share that view. There was no pleading to the effect that the court auction purchase under Ex. B-5 which was about 60 years

before the suit was laid was a benami one.

10. It is a well known rule that if a person sets up a case of benami title in another, the onus is very heavy on him; besides he should expressly

plead that the ostensible title holder is a benamidar for another, and after having said so, should expatiate the same by oral and documentary

evidence. Courts do not allow the weaving and developing of such a plea either in the course of arguments or in the course of trial. S.66, C.P.C. is

intended to put a stop to benami purchases at execution sales and has to be construed strictly. Cl.1 of S.66 effectively makes the certified

purchaser the real purchaser and makes such a purchase as conclusive evidence that the court auction purchaser is a true owner and shall not be

liable to be ousted on the ground that his purchase was made on behalf of another. Such being the purport of Cl.1 of S.66 it is idle for the plaintiff

to trot out a case of benami without pleading the same, nearly six decades of the court auction sale.

11. The Supreme Court in S.M. Karim Vs. Mst. Bibi Sakina, held that the protection available by S.66, C.P.C., is not only against the certified

purchaser but also against any one claiming through him and S.66 bars of claim of a stranger to the bargain. The court also said that the second

sub-section refers to the claims of the creditors and not of transferees, which is dealt with in the first sub-section. A retrospect of the attendant

circumstances and facts prevailing at or about the time when the court auction sale was held also gives the impression that the sale of the property,

by Ayakudi Khadersa Rowther in 1901 could not have been benami for Sheikammal or her heirs. We have already seen that Sheikammal had to

file successively suits in 1891, 1894 and 1900 under Exs. B-1 to B-4 for the recovery of small sums such as Rs. 51, Rs. 97-8-0 and Rs. 612. It

was in execution of one of those decrees that the property was sold. It has not been brought out that apart from the properties which Sheik

Magdoom was administering for and on behalf of Sheikammal, she had any independent means and separate property. The fact that Ayakudi

Khadersa Rowther is a relation of Sheikammal does not throw any light on the proposition under consideration. The other circumstances that the

creditors were filing suits against Sheikammal and the members of her family as is seen from Exs. B-1 to B-12 also show that Sheikammal did not

have the wherewithal to provide any money to a third party so as to bid at the court auction for her benefit.

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[The discussion of facts is omitted.--Ed.]

12. If this aspect is borne in mind, then the question arises whether the possession of Din brothers of the other half share in the E schedule

properties could be treated as possession adverse to the co-owners of the properties and other members of the family. The other question, which

arises for consideration is whether the Din brothers were in possession of one half share of the E schedule properties which they purchased under

Ex. B-9 as representatives of the family of Sheikammal.

13. I shall take up the first question. We have already seen that the Din Brothers after 1903 were in possession of the other half share of the E

schedule, not in furtherance of any right vented in them. If they continued in possession, then it should for all purposes be for the benefit of the other

sharers and members of the family. It was by accident that they came into possession of the other half share of E schedule properties. It is a

fundamental principle of law that a co-owner cannot set up a title in himself by being accidental in possession of such property to the exclusion of

others, unless a specific case of ouster is pleaded and made out. In fact, the Din brothers themselves did not at any time make it appear that they

have ousted the other members from the other half share of the E schedule properties.

14. Mr. M.S. Venkatarama Iyer, himself, would not stress this question of perfection of title to the other half share by adverse possession by the

Din brothers. Possession to be adverse must be adequate in continuity, in publicity and in extent to show that it is possession adverse to the

competitor. There is no such evidence. But on the other hand, the Din brothers continued to occupy the other half of the E schedule properties

obviously because they were put into possession of the same by Ayakudi Khadersa Rowther who was in possession of the entirety of the

properties as court auction purchaser. It may be recalled that the entire E schedule properties were with Magdoom. One half thereof belonged to

him and the other half thereof vested in him as administrator of the same on behalf of Sheikammal. This right was snapped in 1903 when Din

brothers purchased the E schedule properties in 1912. They got back the other half share and continued to be in possession of the same in a

fiduciary capacity and as co-owners of the property. The Din brothers, therefore, cannot project any adverse title in themselves as co-owners. We

agree with the trial court that the other half share in the E schedule properties was held by the Din brothers as representatives of the family and that

one half share of the E schedule properties is partible amongst the sharers of the Mohammadan family. In the absence of any pleading to that

effect, we are unable to disagree with the trial court on this aspect. We hold that the Din brothers did not perfect their title by adverse possession in

so for as the other half share of the property is concerned.

15. As regards the second question, whether the Din brothers were in possession of one half share of the E schedule properties purchased by them

under Ex. B. 9, as representatives of the family of Sheikmmal, we are equally unable to accept the finding of the court below that such was the

position. The personal law of Muslims does not recognise a system of joint holding as is common amongst Hindus. There may be cases, however,

where a custom may be set up in the matter of the holding of such properties by some of the members of a Muslim family whereby it could be

established that such possession and title in some of the members is customarily to be interpreted and understood as possession on behalf of all the

members. Acquisition of property independently by a member cannot automatically be said to be for the benefit of the family. If there is conclusive

evidence that a member of the Muslim family, who acquired such properties gained an advantage to himself and caused prejudice to others and if

such acquisition is traceable to surplus family assets or funds from and out of which the property could have been purchased, then matters would

be different. Again it is also necessary to prove that the members were living jointly and enjoing the property jointly and in common. A reference to

the expression in some of the documents is also pressed into service in support of the contention that Khader Hussain Din was treated as the

manager of the family. A mere description will not effect legal implications of a given situation We are not impressed by the argument that as

Khader Hussain Din was described as the general principle applicable to the holding of property by a Hindu joint family manager would

automatically have an impact on the facts of this case and that it should be taken for granted that the half share purchased by the Din brothers

under Ex. B-9, should be held to be for the benefit of the other members of the family.

16. We shall now refer to the decided cases. Ex. B-9 is a document of the year 1912. The suit is of the year 1902. The document is, therefore, 50

years old.

17. The Privy Council in Bangachandra Dhur Biswas v. Jahat Kishore Acharya Chowdari 44 Cal. 186 stated as follows:

Recitals in deeds cannot by themselves be relied upon for the purpose of proving the assertions of fact which they contain. They can only be

evidence as between the parties to the conveyances and those who claim under them. After a long period, however, has elapsed between the

alienation and the suit to set it aside when all those who could have given evidence on the relevant points have grown old or have passed away, a

recital consistent with the probabilities and circumstances of the case assumes greater importance and cannot lightly be set aside. The recital is

clear evidence of the representation, and if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its

truth, then when proof of actual enquiry has become impossible the recital coupled with such circumstances would be sufficient evidence to support

the deed.

In the instant case, the other members of the family had ample opportunity to act and establish that Ex.B-9 should be understood as conferring title

on the Din brothers only as representatives of the family. When such an opportunity was available to them, as is seen from the various litigations

fought, they did not agitate this aspect, but, on the other hand, they were satisfied by not claiming a share in the entirety of the E schedule

properties. After a long lapse of time and as clinching evidence of the intention of the parties cannot be produced, the recitals in Ex. B-9 may be

taken as probabilising the case of the Din brothers that they acquired one half of the E schedule properties absolutely for themselves and without

intending to vest any beneficial interest in the members of the family.

18. In Aminaddin Munshi Vs. Tajaddin and Others, a Division Bench of that Court laid down the principle thus:

Where members of a Mahomedan family live in commensality possessing the family property in common and in jointness, the acquisition by one of

the members occupying the position of a managing member during the jointness of the family will be presumed to be for the benefit of the Members

of the family not because of any presumption regarding acquisition akin to the joint Hindu family, but because such person is in fiduciary

relationship with other members and has an obligation to discharge towards other members and if any property as acquired stand in the name of

such person, the harden of proving that it was his self acquired and not the property of the joint family will be on him.

Thus, it is seen that the burden of establishing that a property held by a member in Mahommedan family is his self acquired property would arise

only if the property is held commonly by the other members of the family and the entire family lives in commensality possessing the family property

in common. That is not the case here. It is nobody''s case that apart from the Din brothers the one half share in the E schedule properties

purchased by them under Ex. B-9 was held and possessed commonly by the family and they were enjoying it together. It is also not pleaded that

the Din brothers held such property in trust for the other members. No doubt this pleading is made as regards the other half share. In so far as the

half share of the E schedule properties purchased by them under Ex.B-9 is concerned, it cannot be said that there was such fiduciary relationship

between the Din brothers and the other members of the family when they purchased the same.

19. In Vallai Mira Ravuthan v. Mir Moidin Ravuthan 2 M.H.C.R. 414 the well known principle that additions made to the joint estate by the

managing member of a Mahommedan family will be presumed, in the absence of proof, to have been made from the joint estate, and will be for the

benefit of all the members of the family entitled to a share, is referred to. But the point is that each case has to be decided on its own merits. It is

not the case of the respondents that the properties purchased by Din brothers under Ex. B-9 was an accretion made to the joint estate by the Din

brothers from the available surplus of the family nucleus. This has to be established factually in order to sustain the contention that the property

purchased by the Din brothers under Ex. B-9 would be the family property. No attempt has been made to do so and even otherwise, there is no

evidence to support this contention.

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20. Mullah in his Book on the Principles of Mahommedan Law, 17th Edn. page 54, brings out the scope of the principle underlying the discussion

thus :

When the members of a Mohammadan family live in commonsality, they do not form a joint family in the sense in which that expression is used in

the Hindu Law. Further, in the Mohammadan law, there is not, as in the Hindu law, any presumption that the acquisitions of the several members of

a family living and messing together are for the benefit of the family. But if during the continuance of the family properties are acquired in the name

of managing member of the family and it is proved that they are possessed by all the members jointly the presumption is that they are the properties

of the family, and not the separate properties of the member in whose name they stand.

As the theory of a representation is unknown to Mohammedan law, and as there is no presumption that acquisition of one or more of the

properties of the family are to be presumed to be for the benefit of the family, unless there is proof to the contrary and as stated by Natesan, J. in

Maimoon Bivi v. Khajee Mohideen, AIR 1970 Mad. 200 children in a Mahommedan family are not co-owners in the sense that what is purchased

by one person enures for the benefit of another.

21. We may usefully refer to the observations of Rajamannar J., as he then was in Sahul Hamid v. Sultan AIR 1947 Mad. 287, 290.

The Mohammadan Law doss not recognise a joint family as a legal entity. In fact, according to the rules of the Mohammadan law of succession,

heirship does not necessarily go with membership of the family. There are several males and females who have no interest in the heritage but may

be members of the family. On the other hand, there are several heirs like for example, married daughters of a deceased male owner who take an

interest in the estate but form no part of the family.

In the instant case, there is no doubt that the female members went out of the family by marriage long before the purchase by Din brothers under

Ex. B-9. It, therefore, follows that their heirs cannot seek for a share, which is the subject matter of Ex. B-9, on the ground that their ancestors

were enjoying the property purchased under Ex. B-9 in commensality with Din brothers.

22. For all the above reasons, we are unable to hold that the property purchased by Din brothers under Ex. B-9, is the family property and that it

should be shared by all the sharers in the action. One doubt was raised before us that Din brothers were not possessed of requisite funds to

purchase the property as they purported to do under Ex. B-9. It is not the case of the plaintiff that the family of Sheikammal or any other heir

provided such funds to Din brothers. It is in this sense that the argument is a hesitant one and in the nature of ad misericordiam . Din brothers have

become majors and it would not have been impossible for them to purchase the properties under Ex. B-9 for valid consideration.

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Discussion of facts and Summary of Conclusions, etc., omitted.

We, therefore, set aside the finding of the court below that the hiba is not sustainable.

23. It only remains for us to consider the contentions in A.S. No. 203 of 1970. The 12th defendant died in the course of the proceedings and he is

now represented by defendants 18 to 20 who are the appellants. Under Ex. B. 30 dated 9th November, 1949 an extent of 12-1 acres in S. No.

162/A (162/A-1, 162/A-3) was purchased by the 12th defendant from defendants 2, 3, 5, 6 and 7, the heirs Khader Hussain Din and Sheik

Hussain Din II. From the recitals in the document, it is seen that there was ample consideration for the sale. The sale was effected in order to

discharge of a mortgage debt created by the second and the seventh defendants along with late Khader Hussain Din.

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[The discussion of facts is omitted.--Ed.]

24. We are not impressed by the argument that the plaintiff''s suit it barred by limitation and that the 12th defendant has perfected his title by

adverse possession. He was an usufructuary mortgagee and he purchased the property only from Sheik Hussain Din II and the heirs of Khader

Hussain Din other than the 4th defendant. The 4th defendant no doubt by his attitude in O.S. 36 of 1962 on the file of the Court of the District

Munsif, Udumalpet, gave the impression that he was not attacking the title of the 12th defendant. But it cannot be said that the 12th defendant on

and after the date of his purchase could have been in possession of the property openly, continuously and adversely to the interest of all the

sharers. The pleadings and the evidence let in do not support this contention. Again, the present action was filed on 23rd March, 1962, originally in

the court of the District Munsif, Udumalpet, but later it was returned for presentation to the Sub Court.

25. It is also clear from the records that 12th defendant took possession of the property only on 8th April, 1950. The plaintiff presented the first

suit in the court of the District Munsif, Udumalpet, on 23rd March, 1962. In our view such an institution of the suit by the plaintiff in the first

instance. In the court of the District Munsif, is on a mistaken impression. Such a process has to be, therefore, understood as a bona fide litigation

undertaken by the plaintiff. As the date, when the 12th defendant took possession of the property, falls within a period of 12 years, from, the date

of presentation of the plaint in the first instance, the 12th defendant and the appellant in A S. 203 of 1970 cannot base their claim on adverse

possession. Even otherwise the time taken by the plaintiff in prosecuting the suit in a wrong court but bona fide ought to be excluded under S.14(1)

of (he Limitation Act.

26. Taking all these circumstances into consideration, we are not impressed with the argument that the 12th defendant has satisfactorily established

his title to the property based on adverse possession. Still the question remains whether the sale in his favour has to be set aside. We have already

seen that the sale is for the discharge of an antecedent debt. Therefore, the 12th defendant should be considered and deemed to be a bona fide

purchaser for value. We have to, therefore, accept the sale as a binding one. In the circumstances, therefore, we direct, while upholding the sale in

favour of the 12th defendant, that at the time of the final decree the property purchased by the 12th defendant, may be allotted to the share of the

heirs of Khader Hussain Din, namely, defendants 2 to 7 and thus adjust the equities between the parties.

27. In the result, therefore, we allow the appeal in part and modify the judgment and decree of the court below in the light of our judgment as

above.

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[Directions in the decree omitted.]

In the result, a preliminary decree for partition and separate possession of the plaintiff''s 14/144th share in the family properties is passed. The

direction as to accounting and mesne profits shall be considered at the time of the final decree proceedings. The sharers, of course, will file a

memorandum at the time of the final decree as to what would be their quantified share in the family properties and obtain separate decrees in their

favour on the payment of the necessary court fee. As the appellants have succeeded in the main, we direct that all the parties bear their own coats

in this court and in the trial court.