Raheema Bi and Others Vs Azeema Beevi and Others

Court: Madras High Court

Date of Decision: April 30, 2013

Citation: (2014) 2 MLJ 431

Hon'ble Judges: T. Mathivanan, J

Bench: Single Bench

Judgement

T. Mathivanan, J.
The judgment and decree, dated 6.2.2002 and made in O.S. No. 15959 of 2006 on the file of the learned VII

Additional Judge, City Civil Court, Chennai, are under challenge in this regular appeal. The appellants are the plaintiffs 1, 2 and 4 in the suit

whereas the respondents are the defendants.

2. During the pendency of the suit, the third plaintiff had passed away. Therefore, in view of the order passed by the trial Court on 12.11.1998, the

plaintiffs 1, 2 and 4 have been recognised as the legal representatives of the deceased third plaintiff.

3. The suit has been partly decreed and partly dismissed. The plaintiffs, in respect of the dismissed portion of the suit, have chosen to file the

present appeal.

4. For easy reference and for the sake of convenience, the appellants may hereinafter be referred to as the plaintiffs 1, 2 and 4 and the respondents

as the defendants wherever the context so require.

The excerpts of the facts of the case of the respective parties to the suit are as under:

5. One Abdul Azeez is the owner of the suit property bearing Door No. 35, D.B.K. Chetty Street, Old Washermenpet, Chennai-21. One

Noorjahan Begam is his wife. Unfortunately, they were not blessed with any child. Abdul Azeez had died on 10.5.1986 and his wife Noorjahan

Begam had died on 9.6.1996.

6. The house site of the suit property was purchased by the said Abdul Azeez out of his earning from one P.L. Muthazhagappa Chetty and others

under a registered sale deed, dated 24.5.1962. After the purchase of the house site, he had constructed a house and he had been in peaceful

possession and enjoyment of the same. As aforestated, the said Abdul Azeez had died intestate on 10.5.1986 leaving behind his wife Noorjahan

Begam, his sisters, viz., Raheema Bi and Zehra Begum (plaintiffs 1 and 3), his younger brother Abdul Wahab (plaintiff 2). One Jony Basha is the

younger brother of Noorjahan Begum. He had predeceased his sister Noorjahan Begum. The 4th plaintiff Ameerunissa Begum is the younger sister

of Noorjahan Begum. The first defendant Azeema Bee is the wife of Jony Basha, whereas the defendants 2 to 5 are the children of Jony Basha.

7. As per Mohammedan law, Noorjahan Begum, who is the wife of Abdul Azeez, was entitled to 1/4th share and the remaining balance of 3/4th

share was succeeded by the plaintiffs 1 to 3 as they being the brother and sister of Abdul Azeez. After the death of Noorjahan Begum intestate,

her 1/4th share was succeeded by her existing only sister Ameerunissa Begum, who is the fourth plaintiff herein.

8. All the brothers of the deceased Noorjahan Begum had pre-deceased her. According to the plaintiffs, excepting them, no other legal heirs are

alive. As defined under Mohammedan law, to succeed the estate of the deceased Abdul Azeez and his wife Noorjahan Begum, the plaintiffs

became entitled to the plaint schedule property absolutely, whereas the defendants, who are the wife and children of the deceased Jony Basha,

have no any manner of right.

9. The defendants taking advantage of their distant relationship with the deceased Noorjahan Begum had squatted on the suit property and not

allowed the plaintiffs to have access to the suit property as if they are the absolute owners of the said property. The defendants were also

demanding and collecting rents from the existing 9 tenants of the suit property by threatening and coercing them by force. The defendants, in fact,

do not have any right to squat on the property and collect rent from the tenants. Even in spite of repeated demands, the defendants had refused to

vacate and hand over the premises to the plaintiffs. In these circumstances, the plaintiffs had issued a legal notice to the tenants, dated 13.7.1996

calling upon them not to pay the rents to the defendants. Though the tenants had received the notice, they had informed that they were not aware

as to who are the legal heirs or owners of the suit property. Hence, the suit has been filed by the plaintiffs for the following reliefs:

a. For declaration that the plaintiffs are the absolute owners and legally inherited the suit property.

b. For possession directing the defendants to quit and deliver vacant possession of the suit property to the plaintiffs.

c. Directing the defendants to pay Rs. 5000/- p.m., from the date of plaint till the date of handing over the vacant possession by way of mesne

profits for their use and occupation of the suit property and for costs.

10. The defendants 1, 3 to 5 remained ex-parte as they have not chosen to contest the suit. The second defendant alone has filed his written

statement, wherein he has contended that the suit for declaration of title and possession and also for mesne profits is not at all maintainable. As the

only remedy available for the plaintiffs is to seek partition and separate possession leaving his lawful share in the suit property.

11. He has also contended that he has been in possession as a co-owner and co-sharer and as such he is not in unlawful possession. Keeping in

view of this fact, the relief of payment of mesne profits is misconceived and unsustainable. Late Abdul Azeez had bequeathed an extent of 594Ã¯Â¿Â½

sq. ft. (in the suit property) under his last Will and Testament, dated 19.10.1972, in his favour and therefore, he has been in possession and

enjoyment of the portion measuring 594Ã¯Â¿Â½ sq. ft.

12. Mr. Abdul Azeez had no children and therefore, he was bringing him up treating as his own son and this fact is known not only to the plaintiffs

but all the other relatives. Apart from this, he is also a legal heir of late Noorjahan Begum, who is none other than the sister of his father as well as

the wife of Abdul Azeez.

13. The allegation that the fourth plaintiff Ameerunnissa Begam is the legal heir of Noorjahan Begum is not at all true and correct. The suit is also

bad for non joinder of necessary parties. Apart from the defendants 2 to 5, one Raafitha Bi and Shakira Bi, who are his (D2) sisters, are also the

legal heirs of Noorjahan Begum and on the foot of heirship to Noorjahan Begum, not only the fourth plaintiff but also the defendants 1 to 5 and the

aforesaid Raafitha Bi and Shakira Bi are also entitled to their respective lawful shares under Mohamedan Law. The sons Abdul Rasheed,

deceased brother of Noorjahan Begum are also legal heirs of Noorjahan Begum and as such they are also entitled to their respective shares in the

suit property. Hence, the suit is liable to be dismissed on the ground of non joinder of necessary parties and there is no cause of action to file the

suit as against the second defendant.

14. Based on the material proposition of facts as well as the pleadings of the respective parties to the suit, the trial Court has formulated as nearly

as five issues, which are as under:

a. Whether the plaintiffs are entitled to the relief of declaration and possession as claimed in the plaint?

b. Whether the plaintiffs are entitled for future mesne profits?

c. Whether the second defendant is entitled for a share in the suit property as per the Will, dated 19.10.1972?

d. Whether the suit is bad for non joinder of necessary parties?

e. To what relief, the plaintiffs are entitled?

14a. In order to substantiate their respective cases, the plaintiffs as well as the contesting second defendant were directed to face the trial.

15. One Noor Bi, who is none other than the wife of the second plaintiff, was examined as P.W. 1 and one Syedrullah, who is the son of first

plaintiff, has been examined as P.W. 2.

16. During the course of their examination, Exs. A1 to A7 were marked on their side. On the other hand, the second defendant Sulthan Basha had

examined himself as D.W. 1 and during the course of his examination Exs. B1 to B8 were marked.

17. On appraising the evidences both oral and documentary and on hearing the learned counsels appearing for both sides, the trial Court had

proceeded to decree the suit partly with the finding that the second defendant, as per the Will, dated 19.10.1972 alleged to have been executed by

the deceased Abdul Azeez is entitled to 594Ã¯Â¿Â½ sq. ft. out of 1814 sq. ft.

18. He has also found that the plaintiffs being the legal heirs of Abdul Azeez and Noorjahan Begum are entitled to Ã¯Â¿Â½ shares in the remaining

portion of the suit property. Therefore, the defendants were directed to surrender the remaining portion of the suit property excepting 594Ã¯Â¿Â½ sq.

ft. which is bequeathed to the second defendant under Ex. B2 Will.

19. With regard to mesne profits, the plaintiffs had to initiate separate proceedings under Order 20 Rule 12 C.P.C. Three months time was given

for the defendants to surrender the vacant possession of the suit property, i.e., to the extent of 1220 sq. ft.

20. Being aggrieved by the impugned judgment, dated 6.2.2002, the plaintiffs 1 to 4 (3rd plaintiff passed away) have preferred the present appeal.

21. When the appeal came up for hearing, the respondents 1 to 5, despite the service of notice on them, have not chosen to appear and therefore,

there is no other go for this Court excepting to dispose of the appeal in their absence on merits, after hearing Mr. V. Ragavachari, learned counsel

for the appellants.

22. Mr. V. Ragavachari, the learned counsel has restricted his argument only on the crucial question pertaining to the validity of the Will, dated

19.10.1972 which has been marked as Ex. B2 in the suit. He has submitted that in Mohamedan Law, oral Will is possible.

23. Based on the grounds of appeal and on the submissions made by Mr. V. Ragavachari, the following point has arisen for the consideration of

this Court.

Whether the Will alleged to have been executed by Abdul Azeez has been proved or not?

24. With regard to the legal issue there cannot be any dispute.

25. Abdul Azeez is the absolute owner of the suit property as he had purchased a house site under Ex. A1 on 24.5.1962 and put up a house

therein. Abdul Azeez had passed away on 1.05.1986 and his wife Noorjahan Begum had passed away on 9.6.1996. Both of them had died

intestate. As observed in the opening paragraph of this judgment, they had unfortunately not blessed with any issue.

26. After the death of Abdul Azeez, his wife Noorjahan Begum would get 1/4th share and the brother and sisters of Abdul Azeez would get Ã¯Â¿Â½

shares as per the Mohammedan law. The fourth plaintiff is the sister of Noorjahan Begum and all the brothers of Noorjahan Begum had

predeceased her. Therefore, the fourth plaintiff being the surviving sister of Noorjahan Begum will inherit her Ã¯Â¿Â½ share. She joined with the hands

of the plaintiffs and the plaintiffs altogether have claimed that they are the owners of the suit property in its entirety.

27. The second defendant, who is claiming a right in respect of 594Ã¯Â¿Â½ sq. ft. under Ex. B2 Will, is the son of Jony Basha who is none other than

the elder brother of Noorjahan Begum. The first defendant is the wife of Jony Basha and the defendants 2 to 5 are their children and these facts

are not disputed.

28. P.W. 1 claims that since Jony Basha, who is the elder brother of Noorjahan Begum had predeceased her, as per Mohamedan Law, is not

entitled to inherit the property of Noorjahan Begum. P.W. 1 says that the deceased Abdul Azeez had not executed any Will and he did not create

any encumbrance in respect of the suit property.

29. P.W. 1 being the wife of the second plaintiff has stated that only her son was brought up by Abdul Azeez and subsequently, he was driven out.

She has also stated that till the death of Abdul Azeez, he did not disclose anything about the execution of the Will alleged to have been executed by

him in favour of the second defendant. P.W. 1 has stated in her cross examination that she knew the signature of Abdul Azeez and that the

signature found place in Ex. B2 was not that of Abdul Azeez.

30. She has also stated that Abdul Azeez did not execute any Will in favour of anybody in respect of the suit property. She has also denied the

contention of the second defendant that since Abdul Azeez was not having children, he had brought up him (D2) as his son and as such he (D2)

was living along with Abdul Azeez and his wife Noorjahan Begum till their death in the suit property.

31. P.W. 2 is the son of the first plaintiff. He says that the signature of Abdul Azeez was found place in Exs. P. 4 and P. 5 as well as in Ex. B1

Identity Card and that Ex. B. 1 Identity Card was issued in favour of Abdul Azeez, when he was working in the police department.

32. In the identity card (Ex. B. 1) at page 3, in the first column, Noorjahan Begum is shown as the wife of Abdul Azeez and one Sulthan and

Gouse Badsha are shown as their sons. As per P.W. 2 Gouse Badsha is his brother and Sulthan is the second defendant. One Asraf''s name has

also been mentioned as the daughter of Abdul Azeez. A mere mentioning of the name of the second defendant in Ex. B. 1 will not be sufficient to

show that Ex. B. 2 Will was executed in his favour by Abdul Azeez. Besides him, Asraf has also been shown as the daughter of Abdul Azeez.

33. In Ex. B. 1 Identity Card, the name of Mr. Abdul Azeez has been clearly mentioned. But in Ex. B. 2 Will it appears to have been signed as M.

Azeez. Two witnesses have attested the Will by subscribing their signatures. But none of them has been examined to substantiate the genuineness

of the Will under Ex. B. 2. Besides this, Exs. B. 6 and B. 7 as well as Ex. B8 i.e., voters enumeration list and the certificate given by the Haji are

not sufficient to establish the validity and genuineness of Ex. B. 2 Will.

34. The learned trial Judge with improper appreciation of the available materials on record and inadequate analysis of the testimonies of the

witnesses has simply found that the execution of the Will in favour of the second defendant has been proved to a certain extent.

35. Mr. V. Ragavachari, learned counsel for the appellants in order to fortify his arguments has placed his reliance on the decision in Mohd.

Ghousuddin (died) per L.Rs. Vs. Khaja Moinuddin (died) per L.Rs. and Others, .

36. D.W. 1 has fairly admitted in his cross examination that in Ex. B1 Identity Card, apart from him, the names of three to five persons have been

mentioned and they have also been stated as foster children of Abdul Azeez. He has also fairly admitted that this fact has not been mentioned in his

written statement.

37. With regard to the attestors of the Will, he has stated that the witnesses who had signed in the Will had passed away, but he did not know as

to who had written the Will under Ex. B. 2.

38. It is apparent that excepting the evidence of D.W. 1, no other evidence is available to substantiate the fact of existence of the Will. D.W. 1 has

also admitted that excepting Ex. B. 1 no other document is available to prove the factum that he is the foster son of Abdul Azeez. However, Exs.

B6 to B. 8 are not sufficient to prove the Will.

39. Mr. V. Ragavachari, in support of his contention, has also placed reliance on the decision reported in H. Venkatachala Iyengar Vs. B.N.

Thimmajamma and Others, wherein the Apex Court has explained as to what is the true legal position in the matter of proof of Wills. After

discussing the scope and application of Sections 67 and 68, the Apex Court has held in the aforesaid decision as under:

However, there is one important feature, which distinguished will from other documents. Unlike other documents the will speaks from the death of

the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is

his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded

is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same

enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed

by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the

dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested,

satisfactory and sufficient to prove the sound and disposing state of the testator''s mind and his signature as required by law, Courts would be

justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the

essential facts just indicated.

40. In this connection, it has become imperative on the part of this court to refer the provisions of Sections 67 and 68 of the Indian Evidence Act,

1872.

41. Section 67 deals with the ""Proof of signature and handwriting of person alleged to have signed or written document produced.

42. Section 67 reads as under:

67. Proof of signature and handwriting of person alleged to have signed or written document produced: If a document is alleged to have signed or

to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that

person''s handwriting must be proved to be in his handwriting.

43. Section 68 deals with the ""Proof of execution of document required by law to be attested.

44. Section 68 reads as under:

45. Section 68 deals with the proof of execution of document required by law to be attested:- If a document is required by law to be attested, it

shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting

witness alive, and subject to the process of the Court and capable of giving evidence.

(Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been

registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it

purports to have been executed is specifically denied).

45. As contemplated under the provisions of Sections 67 and 68, it is the onus of D.W. 1, who is the propounder of the Will to prove the same

beyond all shadows of doubt. If any suspicious circumstance is surrounded around the Will then the Court must apply its judicial mind and decide

that the Will which has been projected by the propounder himself is not a genuine one.

46. On a perusal of the judgment of the trial court, this Court finds that the learned trial Judge has given his finding with regard to Ex. B. 2 Will only

on conjectures and not based on any legal evidence. The judge cannot base his findings on matters with his personal knowledge or conjectures.

This proposition has been laid down in (Hakim) Syed Mohammad Vs. Emperor, . Rattan Das and Others Vs. Darshan Dass and Others, .

47. An eminent jurist, ""Whately"", with regard to discussion of evidence, has lamented that, ""the judgment is like a pair of scales, and evidence like

the weights; but the will holds the balance in its hands; and even a slight jerk will be sufficient, in any case, to make the lighter side appear the

heavier.

48. In AIR 1942 232 (Lahore) , it has been held that the Judge or the Magistrate must base all his findings on the evidence before him; he may

sometimes have more sources of information than one, but in his judgment in a judicial case, he can employ only those that are covered by the

Evidence Act.

49. On a perusal of the judgment of the trial Court, this Court finds that without proper appreciation of the evidences, the trial Court has given a

wrong finding and therefore, the judgment and decree of the trial Court are liable to be set aside and accordingly, they are set aside.

50. In the result, the appeal is allowed.

51. With regard to prayer portions ''a'' and ''b'', the plaintiffs are declared as absolute owners as they have legally inherited the suit property. The

defendants are directed to surrender the vacant possession of the suit property within a period of three months from the date of receipt of a copy

of this judgment.

52. Based on the evidences available on record, this Court is of the considered view that the Will Ex. B. 2 has not been proved beyond any

shadow of doubt. It is significant to note here that the first defendant being the mother and the defendants 3 to 5 being the brother and sister of D2

have not chosen to contest the suit. In these circumstances, in the absence of any additional evidence, the contention of D2 is liable to be rejected

and accordingly, the same is rejected. With regard to prayer portion ''c'', i.e., mesne profits shall have to be decided in a separate proceedings

under Order 20 Rule 12 C.P.C. However, considering the relationship between the parties, there is no order as to costs.