(2008) 08 CAL CK 0064

Calcutta High Court

Case No: F.A. No. 570 of 1969 and C.A.N. No. 5984 of 2008

Sk. Fakir Mohammad and Others		APPELLANT
	Vs	
Sk. Jan Mohammad and Others		RESPONDENT

Date of Decision: Aug. 1, 2008

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 41 Rule 27

Citation: (2008) 4 CALLT 68 : (2008) 4 CHN 324

Hon'ble Judges: Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Jiban Ratan Chatterjee and H.K. Bhattacharyya, for the Appellant;Safiullah Mondal, for Respondent Nos. 1, 2 and 4, for the Respondent

Final Decision: Dismissed

Judgement

Bhaskar Bhattacharya, J.
This first appeal is at the instance of the defendants in a suit for partition and is directed against judgment and decree dated 16tn July, 1968 passed by the Subordinate Judge, Purulia, in Title Suit No. 45 of 1961 thereby passing a preliminary decree in a suit for partition by declaring share of the respective parties.

2. The case made out by the plaintiffs-respondents may be summed up thus:

(a) That the parties were the descendants of Sk. Abdul Chik who was the paternal grandfather of the plaintiff Nos. 1 to 8. Sk. Abdul Chik had three wives, namely, Rahamat Bibi, Jumma Bibi and Batulan Bibi, the defendant No. 3. Of the said three wives, Rahamat and Jumma Bibi died during the lifetime of their husband Sk. Abdul Chik. The defendant No. 4, viz. Abdul Aziz, is the only child of Sk. Abdul Chik through Batulan Bibi. Sk. Pir Ali, the father of the plaintiff Nos. 1 to 8, was the only child of his father through Jumma Bibi. Sk. Pir Ali died at Purulia on 10th March, 1955. Pir Ali had three wives, namely, Anisa Khatun, Fatema Bibi alias Budhni Kaharin and Haliman Bibi, the plaintiff No. 9. The plaintiff Nos. 1 to 4 are the sons and the plaintiff Nos. 5

to 8 are the daughters of Sk. Pir Ali through Haliman Bibi and the defendant No. 1 is the son and the defendant No. 2 is the daughter of Sk. Pir All through Anisa Khatun. Both Anisa and Fatema died during the lifetime of their husband Sk. Pir Ali. The parties are Sunni Mohammadans by faith and are governed by the Hanafi School of Mohammadan in matters of succession.

(b) That Sk. Abdul Chik used to carry on business of hide in the town of Purulia and acquired considerable properties in the town of Purulia and in the neighbourhood within the jurisdiction of the Trial Court. The properties, which were acquired by Abdul Chik and were in his possession, were fully described in the schedule No. 2 annexed to the plaint.

(c) That on the death of Sk. Abdul Chik, the said properties devolved upon his widow Batulan Bibi and his two sons Abdul Aziz, the defendant No. 4 and Sk. Pir Ali. As such the defendant No. 3 acquired 1/8th share, the defendant No. 4 had 7/16th share and Sk. Pir Ali, the father of the plaintiff Nos. 1 to 8, the remaining 7/16th share.

(d) That on the death of Sk. Pir Ali, the said 7/16th share devolved upon the plaintiffs and the defendant Nos. 1 and 2. The plaintiff No. 9 being the widow got 7/128th share in the properties described in the Schedule No. 2 below and the plaintiff Nos. 1 to 4 each got 49/960th share, the plaintiff Nos. 5 to 8 each got 49/1920th share and similarly the defendant No. 1 got 49/960th share and the defendant No. 2, 49/1920th share. Therefore, the plaintiffs together obtained 693/1920th share in those properties.

(e) That out of the properties described in the schedule No. 2, the defendant No. 4 sold away his entire share and/or right, title and interest in item No. (iii) of schedule No. 2 to the plaintiff No. 1 by a registered deed dated 3.2.1954 for a valuable consideration of Rs. 499/-. In the circumstances, the plaintiff No. 1 who had 49/960th share inherited from his father and having also acquired by purchase the aforesaid 7/16th share from the defendant No. 4, his total share became 469/960th in the schedule No. 2.

(f) That by registered sale-deed dated 9.7.1959 the defendant No. 4 sold away his entire share and/or right, title and interest in all the properties excepting the aforesaid item No. (iii) in schedule No. 2 to the plaintiff Nos. 1 to 4 by a registered sale-deed dated 9.7.1959 for a valuable consideration of Rs. 2,999/- and since then he has been divested of all the interests in those properties. In the circumstances, in the properties described in the schedule No. 2 below excepting item No. (iii) of schedule No. 2 the plaintiff Nos. 1 to 4 together have got 77/120th share, the plaintiff No. 9 in all the properties of schedule No. 2 had 7/128th share, the plaintiff Nos. 5 to 8 had 49/480th share, the defendant No. 1 had 49/960th share, and defendant No. 2 had 49/1920th share. They are in possession of those properties.

(g) That Sk. Abdul Chik, the aforesaid common ancestor, gave some properties to his first wife, Rahamat Bibi, in consideration of dower and since then Rahamat Bibi was

in possession of those properties. Some of those properties were recorded during the last survey settlement operation in the name of Abdul Chik. Those entries in the Record of Rights are erroneous and in spite of such erroneous entries in the record of right, Rahamat Bibi was all along in possession of those properties. The deed by which the properties were given by Sk. Abdul Chik to Rahamat Bibi described with reference to the names of land with boundaries prior to the survey settlement operation and the plaintiffs described those properties with reference to C.S. plots as far as they could understand. Rahamat Bibi having died issueless, her entire properties devolved upon her husband, Sk. Abdul Chik, and he was in possession of the same until his death. All those properties, which were in the possession of Rahamat Bibi and subsequently inherited by Abdul Chik, are described in the schedule No. 3 of the plaint.

(h) That on the death of Sk. Abdul Chik, the said properties devolved upon the defendant Nos. 3 and 4 and Sk. Pir Ali just like the properties described in the schedule No. 2 hereinabove. Consequently, in those properties the defendant No. 3 has l/8th share, the defendant No. 4 had 7/16th share and Sk. Pir Ali, the father of the plaintiff Nos. 1 to 8 had 7/16th share.

(i) That on the death of Sk. Pir Ali, his share in those properties devolved upon the plaintiffs and defendant Nos. 1 and 2 and as such, the plaintiff Nos. 1 to 4 each of them has got 49/960th share and the plaintiff Nos. 5 to 8 each of them have got 49/1920th share, the plaintiff No. 9, 7/128th share, the defendant No. 1, 49/960th share and the defendant No. 2, 49/1920th share.

(j) That by a registered sale-deed dated July 9, 1959, as aforesaid, the defendant No. 4 sold away his entire share in the properties described in the schedule No. 3 below to the plaintiff Nos. 1 to 4 for a valuable consideration and since then, he has been completely divested of all his interest in those properties. In the circumstances, in the properties described in the schedule No. 3, the plaintiff Nos. 1 to 4 together have got 77/120th share, the plaintiff Nos. 5 to 8 together have got 49/480th share, the plaintiff No. 9, 7/128th share and the defendant No. 1, 49/960th share and the defendant No. 2,49/1920th share or in other words, the plaintiffs together have got 1513/1920th share in the properties described in the schedule No. 3.

(k) That Jumma Bibi, the paternal grandmother of the plaintiff Nos. 1 to 8, acquired considerable properties in the town of Purulia and its neighbourhood from the money she obtained in consideration of dower and from her separate fund. On the death of Jumma Bibi, her husband. Sk. Abdul Chik, got 1/4th share and Sk. Pir Ali, the father of the plaintiff Nos. 1 to 8 got 3/4th share out of those properties. The share of Abdul Chik on his death devolved upon the defendant No. 3, the defendant No. 4 and Sk. Pir Ali. In the circumstances, in the properties described in the schedule No. 4, the defendant No. 3 has 1/32nd share, the defendant No. 4, 7/64th share and similarly Sk. Pir Ali had 7/64th share as heir of his father. However, Pir Ali having inherited 3/4th share of the entire property described in the schedule No. 4 as heir

of his mother, in aggregate he has 55/64th share in those properties. On the death of the father of the plaintiff Nos. 1 to 8 (Pir Ali), his share in the schedule No. 4 amounting to 55/64th devolved upon the plaintiffs and the defendant Nos. 1 and 2. Therefore, the plaintiff No. 9 has 55/512th share, the plaintiff Nos. 1 to 4 each 77/768th share, the plaintiff Nos. 5 to 8 each 77/1536th share and similarly, the defendant No. 1. 77/768th share and the defendant No. 2, 77/1536th share.

(l) That as the plaintiff Nos. 1 to 4 purchased the share of the defendant No. 4 which was 7/6th share in the properties described in the schedule No. 4 below by the registered sale-deed dated July 9, 1959 and consequently, the plaintiff Nos. 1 to 4 in aggregate i.e. as heir of their father and on account of purchase have got 49/96th share and the plaintiff Nos. 5 to 8 together have got 77/341st share. In other words, the plaintiffs together have 49/96th share plus 55/512th share plus 77/341st share = 441881/523776th share and they are the possession of the same.

(m) That the father of the plaintiff Nos. 1 to 8 used to carry on the business of hide like his father in the town of Purulia and its neighbourhood which are fully described in the schedule No. 5 below. On the death of the father of the plaintiff Nos. 1 to 8, his properties devolved upon the plaintiffs and the defendant Nos. 1 and 2. In the circumstances, the plaintiff Nos. 1 to 4 being sons, each got 7/60th share, the plaintiff Nos. 5 to 8 being daughters, got 7/120th share, the plaintiff No. 9 being the widow got l/8th share, the defendant No. 1, 7/60th share and the defendant No. 2, 7/120th hare and they are in possession of the same. The plaintiffs together have got 113/120th share in the properties described in the schedule No. 5 below.

(n) That Fatema Bibi alias Budhni Kaharin, acquired some properties from the money, which she got by way of dower from her husband, Sk. Pir Ali. Those properties are fully described in the schedule No. 6 of the plaint. On the death of Fatema Bibi, those properties devolved upon her husband, Sk. Pir Ali and on the death of Pir Ali, the said properties devolved upon the plaintiffs and the defendant Nos. 1 and 2 and the share in those properties of the plaintiffs and the defendant Nos. 1 and 2 will be the same as in the properties described in the schedule No. 5. In the circumstances, in the properties described in the schedule No. 6 of the plaint, the plaintiffs have 113/120th, share, defendant No. 1 has 7/60th share and the defendant No. 2, 7/120th share.

(o) That the father of the plaintiff Nos. 1 to 8 left some moveable properties which are described in the schedule No. 7 of the plaint. Those properties also devolved upon the plaintiffs and the defendant Nos. 1 and 2 in the shares noted above. The values of those properties are also given in that schedule. In the circumstances, the plaintiffs together have got 113/120th share, the defendant No. 1, 7/60th share and the defendant No. 2, 7/120th share in those properties.

(p) That the father of the plaintiff Nos. 1 to 8, by two registered sale-deeds dated 1st May, 1933 and 2nd June, 1933 and by purchase in auction sale in the year 1935

purchased 2/3rd share of the entire mouza Biahura and he was in possession of the same. By partition between the co-sharers of the said mouza, some properties were exclusively allotted to the 2/3rd co-sharers and 1/3rd co-sharers and some other lands were, for the sake of convenience, kept joint of all the co-shares. The properties which were allotted to the share of 2/3rd co-sharers and purchased by the father of the plaintiff Nos. 1 to 8 and described in item No. (iii) of the schedule No. 5. Those properties were recorded in separate knewats of the vendees. To avoid complications, the properties that are in joint possession of the entire body of the co-sharers are not included in this suit.

(q) That Sk. Abdul Chik, the paternal grandfather of the plaintiff Nos. 1 to 8, had also a property in the town of Giridih in the district of Hazaribagh in the Sate of Bihar but as the plaintiffs had not been able to collect the necessary particulars of those properties, they decided not to include those properties in this suit but they reserved their right to include those in this suit at a later point of time.

(r) That the properties mentioned in the schedule of the plaint are he joint properties of the parties and they are in possession of the same. Those properties have not been partitioned by metes and bounds amongst the parties to the suit. There are many houses belonging to the parties, which are in occupation of temporary tenants. Due to the ill feeling between the plaintiffs and the defendant Nos. 1 and 2, and since for sometime past, the tenants were not paying rent to anybody and the agricultural lands too were not being cultivated resulting in irreparable loss to the parties. Hence, the plaintiffs requested the defendants to partition the properties in suit in accordance with their shares amicably in the month of Baisakh 1369 B.S. but as the defendants did not agree to an amicable partition, they have been obliged to file the suit.

(s) That though the defendant No. 4 has parted with all his interest in the properties in suit but to avoid complication he had been impleaded as a party defendant to the suit.

3. The suit was contested by the defendant No. 1 by filing written statement thereby denying the material allegations made therein and the defence of the defendant No. 1 may be summed up thus:

(i) The plaintiffs had no cause of action for this suit and that the suit was not maintainable.

(ii) The suit was bad for misjoinder of parties. The plaintiff Nos. 5 to 8 and the defendant No. 2 were unnecessary parties to the suit as according to the long-standing custom prevalent in the community to which the parties belong, the daughters and sisters did not inherit any property of their father and brother respectively. The plaintiff Nos. 5 to 8 and the defendant No. 2 had thus no interest in the properties involved in the suit. The defendant No. 3 was also an unnecessary party to this suit, as she had no subsisting interest in the properties in suit.

(iii) The genealogy given in the plaint and the averment made in paragraph 1 of the plaint regarding the relationship of the parties were admitted. The averments in paragraph 2 of the plaint that Sk. Abdul Chik acquired considerable properties in the town of Purulia and in the neighbourhood within the jurisdiction of this Court was admitted but the entire properties described in schedule 2 of the plaint did not belong to Abdul Chik. Out of those properties, some of the properties described in schedule 2 of the plaint did not belong to Abdul Chik. Out of those properties, some of the properties belonged to the defendant No. 1 which he got as a gift from Rahamat Bibi and Jumma Bibi, his grandmothers, during his minority and the gift had been accepted by Sk. Abdul Chik, his grandfather on his behalf and he was in cultivating possession on behalf of the defendant No. 1 and had these properties recorded in his name along with his own properties in the last survey settlement operation.

(iv) The properties left by Sk. Abdul Chik devolved upon his widow Batulan Bibi at that time of his death and upon his only living son Sk. Pir Ali and not upon his son Sk. Abdul Aziz as Abdul Aziz was not born at the time of the death of Sk. Abdul Chik. He was a posthumous son and so he did not inherit any of his properties left by Sk. Abdul Chik. The defendant No. 3, Batulan got one-eighth share of the properties left by Sk. Abdul Chik and the remaining seven-eighth share devolved upon Sk. Pir Ali. The contrary allegation regarding the share of Sk. Abdul Aziz, Sk. Pir Ali as mentioned in paragraph 3 of the plaint was not correct.

(v) On the death of Sk. Pir Ali, his seven-eighth share in his paternal properties and his self-acquired properties did not devolve upon his sons and daughters and widows as alleged in the plaint. Sk. Pir Ali, the father of the defendant No. 1, since after the death of Sk. Abdul Chik, managed and utilized the usufruct of the properties of the defendant No. 1 which he get by way of gift from his grandmothers along with his own properties and so, to avoid any dispute amongst the defendant No. 1 and his other sons in future, sometime before his death he made a family arrangement in presence of the respectable persons of this Purulia town by which he directed that the defendant No. 1 would get half share of all the properties which were being enjoyed by him in his lifetime and the remaining half would go to the plaintiff Nos. 1 to 4 and 9. According to this family arrangement, the defendant No. 1 began to possess and enjoy the half share of the properties, which were in possession of Sk. Pir Ali, and the plaintiff Nos. 1 to 4 and 9 began to possess the remaining half share.

(vi) Soon after the death of Sk. Pir Ali, disputes and differences arose between the defendant No. 1 and the plaintiff Nos. 1 to 4 and 9 regarding the share in the properties which were being enjoyed by Sk. Pir Ali. The plaintiff Nos. 1 to 4 and 9 wanted to ignore the arrangement made by Sk. Pir Ali on the intervention of some of the relations of the parties and respectable gentleman of their community. The plaintiff Nos. 1 to 4 being sons of Sk. Pir Ali through the plaintiff No. 9 and the

defendant No. 1, being the only son of Sk. Pir Ali through his another wife, Ania Khatun and the plaintiffs being more in number, the defendant No. 1 had been pressed to give up two annas out of his eight annas share in the properties which he got as a result of the family arrangement made by Sk. Pir Ali. The defendant No. 1 could not avoid the request of the interveners who tried to settle the dispute amicably and he agreed to that proposal. Accordingly, this defendant had six annas share of the properties in suit and the plaintiff Nos. 1 to 4 and 9 had ten annas share. This arrangement had been arrived at to the knowledge of the plaintiff Nos. 5 to 8 and the defendant No. 2. They did not raise any objection at that time, as they knew that they had no right of inheritance according to the custom prevalent in their community. The plaintiffs being ill-advised have brought the suit with the idea of having more share in the properties in suit to which they were not at all entitled.

(vii) Before the above arrangement was arrived at, late Charu Chandra Roy, an advocate of the local Bar who was in occupation of one of the houses as monthly tenant deposited the rent in the Court of the House Controller according to the provision of Bihar House Rent Control Act and caused notices to be served upon the defendant No. 1 and the plaintiff Nos. 1 to 4 and 9. In that Court, the defendant No. 1 and the plaintiff Nos. 1 to 4 and 9 filed a petition for withdrawing the deposited rent in proportion of six annas and ten annas embodying therein the terms of the amicable settlement arrived at as stated before. Thereafter, this defendant has withdrawn the six annas share of money in deposit and the plaintiff Nos. 1 to 4 and 9 have withdrawn ten annas share of the money from Court.

(viii) According to the said extent of share, the defendant No. 1 and the plaintiff Nos. 1 to 4 and 9 were realising rent from the tenants. The defendant No. 1 had deposited some amount as the death duty against his six annas share and the plaintiff Nos. 1 to 4 and 9 had deposited some amount of death duty against their ten annas share of the entire assets. The superior landlords'' interest having vested in the state and the rent due from this defendant and the plaintiff Nos. 1 to 4 and 9 was being collected separately according to that share. Though there has been no amicable partition by metes and bounds, the defendant No. 1 had been cultivating the lands separately to the extent of his six annas share. The plaintiff Nos. 1 to 4 and 9 were estopped from claiming more shares in the property in suit than that arrived at by way of settlement of dispute as already stated. The other plaintiffs, i.e. plaintiff Nos. 5 to 8 cannot claim any share of the properties in suit.

(ix) The shares of the parties as stated in paragraph 4 of the plaint and in other paragraphs of the plaint and the claim for partition of the properties in suit according to that share were absolutely false and untenable. The plaintiffs could not claim partition of the properties according to the share claimed.

(x) The defendant No. 1 had no knowledge of the alleged sales made by the defendant No. 4 in favour of the plaintiff No. 1 and also in favour of the plaintiff Nos. 1 to 4 jointly by two registered deeds of different dates. If any such sales had been

effected by the defendant No. 4, those must be fraudulent and collusive transactions and by virtue of those sale-deeds the plaintiffs could not claim any share in the properties in suit.

(xi) The defendant No. 4 is no doubt one of the sons of late Abdul Chik but he having been born after the death of his father, Abdul Chik, did not get any share in the properties left by him. Immediately on the death of Abdul Chik, his properties vested in the defendant No. 3 and late Pir Ali, according to legal shares as provided in Mohammedan Law. As the defendant No. 4 did not get any property of his father, his mother Batulan Bibi in order to make provision of her only child gave up her claim in the properties which she became entitled as widow of Sk. Abdul Chik in lieu of some more share in some of the house properties at Purulia and accordingly, Sk. Abdul Aziz has been given half share in the house property in mouza Nadiha within the Purulia Municipality which had been purchased by Sk. Abdul Chik by registered sale-deed dated 9.11.1919 along with half share in holding No. 380 in Mahalla Kasaidanga and half share in Holding No. N397 of the same Mahalla. Besides these properties, Abdul Aziz did not get any other property and Batulan Bibi relinquished her entire interest in all the properties of her husband. The defendant No. 4 got half share of those three items of properties and nothing more. If plaintiff Nos. 1 and 4 have at all purchased any property from the defendant No. 4 they can claim only half share of those three items of properties and no share in any other properties in suit.

(xii) That it is true that Sk. Abdul Chik in consideration of dower gave one properties to Jumma Bibi by a registered deed of dower dated 12th August, 1903 and by another registered deed of dower of the same date he gave some other properties to Rahamat Bibi and since then they came in possession of the properties covered by those registered deeds of dower. Jumma Bibi also purchased some properties by a registered sale-deed dated 6th January, 1920 from Piria Bibi wife of Sk. Azad Hossain and from Azad Hossain himself at Purulia and by another registered sale-deed on the same date from Azad Hossain alone. Those ladies were in possession of their respective properties.

(xiii) The defendant No. 1 lost his mother in his childhood and he had been brought up by his grandmothers, Rahamat Bibi and Jumma Bibi. Sk. Pir All, the father of the defendant No. 1 married the defendant No. 9, Haliman Bibi and began to live separately from his father Sk. Abdul Chik. The defendant No. 1 and his sister, the defendant No. 2 had been all along living with their grandfather, Sk. Abdul Chik and grandmothers, Rahamat Bibi and Jumma Bibi. Both of them were very affectionate to their grandfather and grandmothers and so their grandmothers, Rahamat Bibi and Jumma Bibi, orally gifted their entire properties to the defendant No. 1. The gift had been accepted by the grandfather, Sk. Abdul Chik on behalf of the defendant No. 1 and he went on possessing those properties on behalf of the defendant No. 1. As the grandfather of the defendant No. 1 was in possession of his properties

received by gift from his grandmothers, in the last survey settlement operation, the record of rights had been recorded in the name of the grandfather along with his own properties. The father of the defendants was fully aware of this gift and so before his death, he made the family arrangement as already stated.

(xiv) The entire properties of Rahamat Bibi and Jumma Bibi had been gifted to the defendant No. 1 and so upon their death neither the grandfather nor the father of the defendants got these properties. The defendant No. 3 got one-eighth share in the properties, which actually belonged to her husband Sk. Abdul Chik, and Pir All got seven-eighth share of those properties. Batulan Bibi relinquished her share in those properties as already stated. Therefore, the shares stated in the plaint of properties mentioned in schedule Nos. 2 to 6 of the plaint of the respective parties to the suit were absolutely false and frivolous.

(xv) That in any view of the matter, neither the plaintiffs nor the defendant Nos. 2 to 4 could claim any share in the properties which belonged to Rahamat Bibi and Jumma Bibi and which had been gifted to the defendant No. 1 by both of them.

(xvi) The defendant No. 1 had no objection to the partition by metes and bounds of the immovable properties in proportion to the share of six annas and ten annas amongst the defendant No. 1 on one hand and the plaintiff Nos. 1 to 4 and 9 on the other hand.

(xvii) That the plaintiffs were not entitled to get a decree for partition on all the properties mentioned in schedule Nos. 1 to 7 of the plaint and according to the share as claimed. Hence, their prayer for partition of the properties as claimed was liable to be dismissed with costs.

(xviii) As regards the moveable properties, the defendant No. 1 submitted that the list of moveable properties given in schedule No. 7 of the plaint was imaginary. The defendant No. 1 was living separately from his father in a separate house since the time of his grandfather and he was still living in a separate house. The plaintiff Nos. 1 to 4 and 9 were living in a separate house along with the father of the defendant No. 1. After the death of the father of the defendant No. 1, the plaintiff Nos. 1 to 4 and 9 had taken all the moveable properties and also the cash money of considerable amount which the father of the defendant No. 1 all along kept with him to avoid giving any share of that money to the defendant No. 1 and the plaintiffs had not disclosed the same and had given an imaginary list of the moveable properties alleged to be in custody of the defendant No. 1. If the plaintiffs disclosed the amount of cash money the got from the father and gave a complete list of moveable properties in their possession, the defendant No. 1 would have no objection to the division of the moveable properties, which actually belonged to the grandfather of the defendant No. 2. The defendant No. 1 was not in possession of any of the moveable properties, which belonged to his father. This claim for partition of moveable properties was also fit to be rejected.

4. At the time of hearing, two persons gave evidence in support of the plaint case while four persons deposed in opposing the claim of the plaintiff.

5. As indicated earlier, the learned Trial Judge by the judgment and decree impugned herein disbelieved the case of oral gifts and the family settlement pleaded by the defendant No. 1 and consequently, passed a decree in preliminary form thereby declaring the followings shares of the parties:

Schedule No. 2.

Abdul Aziz, the defendant No. 4.	...	9/16ths
Haliman, the plaintiff No. 9,	...	1/128ths
Each of the plaintiff Nos. 1 to 4 and defendant No. 1	...	49/960ths
Each of plaintiff Nos. 5 to 8	...	49/1920ths
Defendants Nos. 2 to 2(g) together	...	49/1920ths

Schedule No. 3.

Abdul Aziz	...	9/16ths
Haliman, the plaintiff No. 9,	...	7/128ths
Each of plaintiff No. 1 to 4 and defendant No. 1	...	49/960ths
Each of plaintiff Nos. 5 to 8	...	49/1920ths
Defendants Nos. 2 to 2(g)	...	49/1920ths

Schedule No. 4.

Abdul Aziz	...	9/64ths
Haliman, the plaintiff No. 9,	...	55/512ths
Each of plaintiff Nos. 1 to 4 and defendant No. 1	...	77/768ths
Each of plaintiff Nos. 5 to 8	...	77/1536ths
Defendants Nos. 2 to 2(g) together	...	77/1536ths

Schedule No. 5.

Haliman, the plaintiff No. 9,	...	1/8ths
Each of plaintiff Nos. 1 to 4 and defendant No. 1	...	7/60ths
Each of plaintiff Nos. 5 to 8	...	7/120ths
Defendants Nos. 2 to 2(g) together	...	7/120ths

Schedule No. 6.

Haliman, the plaintiff No. 9,	...	1/8th
Each of plaintiff Nos. 1 to 4 and defendant No. 1	...	7/60ths
Each of plaintiff Nos. 5 to 8	...	7/120ths
Defendants Nos. 2 to 2(g) together	...	7/120ths

Schedule No. 7.

So far as it relates to the movables in possession of the plaintiff Nos. 1

Haliman, the plaintiff No. 9,	...	1/8th
Each of plaintiff Nos. 1 to 4 and defendant No. 1	...	7/60ths
Each of plaintiff Nos. 5 to 8	...	7/120ths
Defendants Nos. 2 to 2(g) together	...	7/120ths

6. Being dissatisfied, the defendant No. 1 has come up with the present appeal.

7. At the time of hearing of this appeal, the substituted appellants have filed an application for taking additional evidence by which they sought to rely upon various deeds alleged to have been executed by the respondents during the pendency of this appeal where those respondents relied upon the shares of the parties in the ratio of 10 annas and 6 annas.

8. The appellants further complained that their predecessor filed an unregistered deed of family settlement dated August 13, 1955 before the learned Trial Judge after the closer of hearing and the learned Trial Judge simply directed that the said deed to be kept with the record without marking the same as exhibit. According to the appellants, although the plaintiffs also filed some documents after the hearing was closed, yet, the learned Trial Judge marked those documents as Exbts.- 6(a) series.

9. They, therefore, pray for admission of the family settlement deed mentioned above and further pray for giving them opportunity to prove those additional documents executed during the pendency of this appeal.

10. The aforesaid application has been opposed by the respondents by filing written objection thereby opposing the prayer of the appellants.

11. After hearing the learned Counsel for the parties and after going through the said document dated August 13, 1955 we find that admittedly, the said document is an unregistered document and at the same time, the daughters of Pir Ali are not made parties. Therefore, even if we assume the same to be a genuine document for the sake of argument, by virtue of such unregistered documents executed by some of the heirs of Pir Ali, there cannot be deviation of share of the properties left by Pir Ali as prescribed under the Mohammedan Law. Similarly, an application filed by one of the heirs before the Certificate Officer defending demand of the dues by

asserting lesser amount of share cannot divest the said co-share of the real interest inherited by him, as there is no estoppel against law. We also do not find any reason to allow the subsequent documents allegedly executed by some of the parties during the pendency of this appeal, as even if any such documents are executed by the parties alleging a different shares which are at variance with the ones declared by the preliminary decree, such fact cannot be a ground of variation of the preliminary decree. We, therefore, dismiss the said application with the finding that the case made out in the application does not fall within the ambit of Order 41 Rule 27 of the Code and at the same time, the Court does not require those documents for effective adjudication of the disputes involved herein. We, however, exclude Exbt.-6(a) from our consideration, as those should not have been marked as exhibit.

12. Mr. Chatterjee, the learned senior advocate appearing on behalf of the appellant, laboriously contended before us that the learned Trial Judge erred in disbelieving the case of oral gifts executed by the two grandmothers of the original appellant by not at all considering the oral evidence adduced on behalf of his client.

13. According to the original appellant, as he lost his mother at an early age and his father married for the second time, those two grandmothers out of their love and affection, made oral gifts of the properties mentioned in the written statements in his favour, which were accepted by Abdul Chik, his grandfather. It appears that original appellant, in the year 1968, while giving evidence said that he was aged 63 years. Therefore, he was born in the year 1905. He stated that he lost his mother at the age of one or two. In his cross-examination, he stated that he was aged 14 or 15 years when Jumma Bibi and Rahamat Bibi made oral gifts in his favour. He further said that he had no document to prove such fact but those two ladies admitted such fact to the people. He further stated that Jumma Bibi first made the gift and 5 or 10 years thereafter, Rahamat Bibi made the other gift and that Sk. Munna and Noor Mohammad were present on both the occasions. If we accept the case made by the appellant in his examination-in-chief, the gifts were executed in the year 1919 or 1920. If we, on the other hand, rely upon the statement made by him in cross-examination, then the gift by Jumma was made in the year 1919 or 1920 and the other gift by Rahamat was made 5 or 10 years thereafter in the year 1925 or 1930. He further stated in cross-examination, that Jumma died when he was aged 15 years and Rahamat died when he was aged 30 years. Such statement if taken to be true means that Jumma died in the year 1920 and Rahamat in the year 1935. His own evidence is that Abdul Chik died in the year 1932 and both the two ladies predeceased him.

14. Sk. Munna, the D.W.-2, the only witness of the oral gift, while giving evidence in the year 1968 stated that both the ladies once in the presence of several persons including him declared that they simultaneously, one after the other made the gift and such incident occurred about 25 years ago. Therefore, according to this witness, both the ladies in the year 1943 made such declaration, which is an absurd case. He

further stated that Jumma died 30 or 32 years ago meaning the year 1936 or 1938 and Rahamat died 2 or 4 years thereafter. The specific case of both the parties is that Abdul Chik died in the year 1932 and both Jumma and Rahamat died earlier. We, thus, find that the learned Trial Judge rightly disbelieved the case of oral gift. Moreover, according to Mohammedan Law, a gift made in favour of a minor can be accepted by his natural guardian. Pir All, the father of the appellant being alive, the acceptance of gift by Abdul Chik is not permissible under law. Moreover, those properties were recorded in the name of Abdul Chik and the defendant No. 1, even after attaining majority, did not assert his right over the property. If we accept the version of the D.W.-2, in that event the gifts were made long after the appellant attained majority and as such, he should have accepted the gifts.

15. We therefore, find no reason to accept the absurd story of oral gifts made out by the appellant.

16. The other defence taken by the defendant No. 1 that Abdul Aziz, having been born after the death of Abdul Chik, was not entitled to get any share of his father is equally devoid of any substance. Under the Mohammedan Law, a posthumous child is entitled to get share like any other child of the same sex and thus, Abdul Aziz inherited Abdul Chick in the same way Pir Ali inherited him. The further defence that according to the tradition of their family, the daughters were not entitled to get any share is equally bereft of any substance.

17. We have already found that the alleged family settlement could not be proved and the mere arrangement between the co-sharer to withdraw rent at a particular ratio does not lead to the conclusion that in respect of the immovable properties inherited by the parties, the share varied in accordance with that arrangement.

18. All the points taken by Mr Chatterjee having failed, we find no merit in this appeal and the same is dismissed. In the facts and circumstances, there will be, however, no order as to costs.

Rudrendra Nath Banerjee, J.

19. I agree.