IN THE HIGH COURT OF JUDICATURE OF TRAVANCORE-COCHIN

Present:

The Hon'ble Shri K.T. Koshi, C.J. and
*The Hon'ble Shri G. Kumara Pillai, J.

Appeal Suit No. 24 of 1954

O.S. No. 38 of 1124 of the Kottayam District Court

Appellants - defendants 1 and

1. Kochunni Kochu Muhammad of Paravuthara, Kumaranam Kara, Kumaranam Pakuthy

2. Kochunni Kunju Pathumma of Payyil Veettil, Malloosseri Kara, Aymanam Pakuthy

By advocates M/s. K.P. Abraham and T. Mohamed Ismail

Respondents - plaintiff 2 and defendant 3

1. Kunju Pillai Muhammad now residing at Puthen Purakkal, Malloosseri Kara, Aymanam Pakuthy, from Paravuthara, Kumaranam Kara and Pakuthy

2. Kochunni Iysha Umma of Valiya Veettil, Thazhathangadi, Kottayam Kara and Pakuthy

Respondent 1 by advocates Shri K.T. Hinan and N. Anantha-krishna Iyer.

This appeal suit having been finally heard on 16.9.1955, the court on 21.12.1955 delivered the following

(K.T. Koshi, C.J. and Kumara Pillai, J.)

Appeal Suit No. 24 of 1954

JUDGMENT

Delivered by Kumara Pillai, J.

THIS appeal arises out of a suit for partition of the share of a Mohammedan widow in the estate of her deceased husband. The husband whose estate is sought to be partitioned was the third husband of plaintiff 1, and plaintiff 1 herself was his second wife. Plaintiff 1's first husband died in 1077 and her second husband, who married her in 1082, divorced her a year or two after the marriage. In 1085 she was married again by her third husband, Kochuuna Kochunni Methar, who will hereafter be referred to in this judgment as Methar. At the time of their marriage plaintiff 1 had children born to her first husband, and Methar also had children by his first wife who had died about the year 1082. Methar had no children by plaintiff 1. He died on 3.9.1121, and on 3.3.1124 plaintiffs 1 and 2 brought the present suit for partition of the share of plaintiff 1, namely one-eighth, in his estate. Defendants 1 to 3 are Methar's children by his first wife, defendant 1 being his son and defendants 2 and 3 daughters. Plaintiff 2 is the son of plaintiff 1 by her first husband. Plaintiff 1 was seventynine years old at the time of the institution of the suit, and she died shortly afterwards. She had stated in the plaint that she had transferred to plaintiff 2 all her rights in the estate of her deceased husband for consideration received from him, and after her death plaintiff 2 alone prosecuted the suit.

2. Defendants 1 and 2 contested the suit. Their main contentions were that there was an agreement between Methar and plaintiff 1 at the time of their marriage whereby they had agreed that on the death of either of the spouses the survivor would not claim the share which he or she, as the case may be, would ordinarily be entitled to under the Mohammedan Law in the estate left by the other spouse and that all the properties left by the deceased spouse should be taken only by his or her other heirs, that plaintiff 1 subsequently executed a deed on 26.3.1117, Ex. I, relinquishing her right of inheritance to Methar's estate in the event of his predeceasing her, that this was part of a family settlement, and that on account of it plaintiff 1 was not entitled to claim any share in the estate of Methar. In regard to this contention the plaintiffs' case was that there was no agreement at the time of the marriage as alleged by defendants 1 and 2, that Ex. I was caused to be executed by fraud and undue influence practised on plaintiff 1 by Methar, and that Ex. I and the relinquishment of her right of inheritance by plaintiff 1 were void and should not be given effect to. The lower court found that there was an agreement at the time of the marriage as alleged in the written statement, and that Ex. I was not vitiated by any fraud or undue influence as urged by the plaintiffs. Nevertheless, it refused to give effect to Ex. I on the ground that it was void and invalid. Consequently it passed a preliminary decree for partition in favour of plaintiff 2, and this appeal is filed by defendants 1 and 2 against that preliminary decree.

3. That there was an agreement between Nathar and plaintiff 1 at the time of their marriage that, in the event of one of them predeceasing the other, the survivor would not claim any right of inheritance in the properties left by the deceased person and that a family settlement on the lines of this agreement was made on the date of Ex. I are matters which admit of no doubt. Ex. II is a partition deed executed by plaintiff 1 and her children by the first husband by which all the properties inherited by them from the first husband of plaintiff 1 and all the properties which plaintiff 1 got from her father were settled upon and partitioned between those children. Both Exs. I and II were executed on the same date and presented for registration almost simultaneously. The Sub Registrar's endorsement on these documents show that Ex. II was presented for registration at 12 noon on 26.3.1117 and Ex. I at 12.15 P.M. on the same day. To both these documents a brother of plaintiff 1 as well as a brother of her first husband were attestors. Plaintiff 2 and his brother and sister as well as Nathar were also present in the Sub Registry Office in connection with the registration of these documents. On the date of these documents plaintiff 1 was seventytwo years old and plaintiff 2 fortythree years old. Plaintiff 2 is a merchant by occupation. Except his own interested statement plaintiff 2 has absolutely no evidence to show that plaintiff 1 was caused to execute Ex. I by any fraud or undue influence practised by Nathar. The attestors to the documents, who are his own uncles and the brother and brother-in-law of plaintiff 1, have not been called as witnesses to prove the allegation of fraud and undue influence, and it is difficult to believe that these

close relatives of plaintiff 1 and her grown up children, including plaintiff 2, would have allowed her to execute Ex. I and themselves participate in the execution of the document if Mathar had induced her to execute it by fraud and undue influence. Ex. I explicitely states that there was an agreement between Mathar and plaintiff 1 at the time of the marriage that, in the event of one of them predeceasing the other, the survivor would not claim any right of inheritance in the properties left by the deceased person. At the time of her marriage with Mathar plaintiff 1 was thirty seven years old, and as may be seen from Ex. II she was then in possession of considerable properties left by her first husband and belonging after his death to her and her children by him. She and her children were then living with her father; and after the marriage the children continued to live with and under the guardianship of their maternal grandfather. He too was a person of considerable means, and plaintiff 1, being his daughter, was one of his heirs. In the circumstances it is only too probable that an agreement like this would have been entered into by Mathar and plaintiff 1 at the time of the marriage with a view to conserve the properties of plaintiff 1 to the ultimate benefit of her children alone and the properties of Mathar to the ultimate benefit of his children alone and to avoid future disputes and quarrels between their children. Dealing with the subject of marriage contracts, Tyabji says in the third edition of his book on Muhammadan Law, page 113, that if the wife has any property of her own it is desirable to make special arrangements about it in the marriage contract. Having regard to all these facts and circumstances we think that it is too probable that there was an agreement as alleged by the defendants and consider that the

findings of the District Judge both in regard to the truth of the agreement at the time of the marriage as well as to the falsity of the allegation that Ex. I was caused to be executed by fraud and undue influence practised by Nether on plaintiff 1 are perfectly right.

6. It is mainly on the ground that a contingent right of inheritance cannot be transferred or renounced that the learned District Judge has held that the relinquishment of her right of inheritance in Nether's estate by plaintiff 1 is void and cannot be given effect to, and he has placed reliance in this connection on the decisions of the High Courts of Bombay and Madras in Sumsuddin Goolambussein vs. Abdul Hussein Kalimuddin, (I.L.R.) XXXI Bombay 165 and Asha Beevi vs. Karuppan Chetty, XLV Indian Cases 35. Dealing with the question of the validity of the relinquishment of a contingent right of inheritance of a Mohammedan heir,. Sir Lawrence Jenkins, Chief Justice, who delivered the judgment of the court in Sumsuddin Goolambussein vs. Abdul Hussein Kalimuddin, (I.L.R.) XXXI Bombay 165, has said at page 171 of the report:

> "By the Transfer of Property Act it is provided that the chance of an heir-apparent succeeding to an estate cannot be transferred (section 6(a)). It is true that in Section 2(d) it is enacted that nothing in the second chapter of the Act shall be deemed to affect any rule of Mohamedan Law, but so far from there being any rule that conflicts with this provision, such a transfer would seem to be opposed to the principles of Mohamedan law: see the opinion of the majority of the Law Officers in Khajoomaut Khanum Jan vs. Khajoomaut Jan Bibi (1827) 4 O.L.C. (Beng.) 210 and Abdul Majid Khan vs. Mahomed Ameer Bibi, (1885) 12 I.A. 77 at p. 101.
>
> And in the absence of clear proof to the contrary, we are prepared to hold that there is any rule of Mohamedan law that sanctions the transfer of an expectancy.

> By parity of reasoning I come to the further conclusion that there could not be a release of such a chance: compare Kemp vs. Kelsey, (1720) Prec. Chan. 545".

In Acha Beevi vs. Karuppan Chetty, XLV Indian Cases 35, a Full Bench of the Madras High Court has, after consideration of the prior decisions of that court to the contrary and also some decisions of the other courts, held that "there is a large preponderance of authority in favour of the view that a transfer or a renunciation of the right of inheritance before that right vests is prohibited under the Mahomedan Law and that as the rules of Mahomedan Law are not affected by the Transfer of Property Act it is unnecessary to consider whether this transfer or renunciation would not also be invalid under the provisions of Section 6 of the Transfer of Property Act itself". But an important exception to the general rule that a Mohammedan heir cannot transfer or renounce his right to inherit has been recognised by eminent writers of text books. Section 371 of Tyabji's Muhammadan Law (third edition, pages 393 and 394) reads as follows:

> "A gift of the expectation of succeeding to the estate of a living person is not valid; provided first that under Shia Ithna Asheri law the expectant heirs of a living person may empower him to dispose by will of property exceed ng the bequeathable third of his estate; and secondly that a contract not to claim any inheritance out of the estate of a living person on his death may validly be made for good consideration. Where such a contract is in the nature of a family arrangement the Court may look upon it with favour."

In Mullah's Principles of Muhammadan Law, thirteenth edition, it is said at page 45:

> "A Muhammadan heir may by his conduct be estopped from claiming the inheritance he has agreed to relinquish if the release was part of a compromise or family settlement and if he has benefitted by the transaction".

This exception has also been expressly recognised and given effect to by the Allahabad High Court in two cases, (see Rahafat Husain vs. Hidayat Husain, XXXIV Allahabad Law Journal 342 and Nasir-Ul-Nas vs. Faiyaz-Ul-Rahman, XXXVII Allahabad 457). Rafat Husain vs. Hidayat Husain XXXIV All. L.J. 342 was a case in which the second wife of a Muhammaden executed a deed of release relinquishing her claim to inherit in the estate of her husband in consideration of a deed of waqf executed by him under which he appointed her as the mutwalli and constituted her children as the beneficiaries. The Allahabad High Court held in that case:

> "The contract made by an heir for consideration not to claim a certain property cannot be said to be in any way illegal or forbidden by any law. Of course where the consideration is received and it is only a cash consideration and the contract is subsequently sought to be enforced, it would be a matter of discretion for the court to refuse specific performance and to make the plaintiff pay compensation when he is not carrying out his contract. But in cases where the agreement has been affected in a form which made it impossible for the court to grant adequate compensation to the aggrieved party the agreement may well be enforced, and the plaintiff be held bound by it".

Dealing with the question whether such a contract would be opposed to Section 6 of the Transfer of Property Act, Sulaiman, Chief Justice, has said in the case:

> "If the relinquishment is in the nature of a gift or transfer of a contingent right then of course it would be void under Section 6; but if it is merely an agreement or contract for not claiming a contingent right of inheritance when succession opens in future then the case would not be governed by the provision of Section 6 at all."

Nasir-Ul-Nas vs. Faiyaz-Ul-Rahman, XXXVII Allahabad 457 was a case in which under the terms of a compromise a Muhammedan husband relinquished his right to succeed as

heir to his wife. It was held in that case that the compromise was in the nature of a family settlement and that the relinquishment of his right by the husband to succeed as heir to his wife was not in the circumstances obnoxious either to Muhammedan Law or to Section 6 of the Transfer of Property Act.

5. From the circumstances of the present case and the expressed terms of Exs. I there cannot be the least doubt that Exs. I and II were executed as parts of a family settlement and that the relinquishment by plaintiff 1 of her right to inherit in Nathar's estate in the event of his predecreasing her was made for valid consideration. As has been pointed out already it was proper under the Muhammaden Law to make special arrangements at the time of the marriage about the properties which the wife owned, and in making such arrangements about the properties of plaintiff 1 both Nathar and plaintiff 1 had agreed that in the case of either of them predeceasing the other the survivor would not claim the right of inheritance to the estate of the deceased person. Whether the renunciation of the contingent right of inheritance made at the time of the marriage was valid and could be enforced or not it is absolutely certain that this agreement would have led to future disputes between the children of plaintiff 1 on the one hand and the children of Nathar on the other. Both Nathar and plaintiff 1 had considerable separate properties, and the children of neither would have liked the children of the other to share in the properties left by their parent. When Exs. I and II were executed both Nathar and plaintiff 1 were well advanced in age and it was difficult to predict

who would predecease the other. In these circumstances they would have naturally desired to make a family settlement to secure the peace and happiness of all the members in the family including themselves and the children of each of them and avoid possible disputes between their children in the future. For a valid family settlement it is not necessary that there should be a dispute in existence at the time the settlement is made. If in order to prevent the arising of disputes and in order to secure peace and happiness in the family the parties arrived at a settlement among themselves the settlement arrived at must be deemed to be valid (see Bhagwan Singh vs. Bhagat Singh, 1938 Indian Rulings Delhi 111). By executing Exp. 2 and 3 plaintiff 1 and her children and Nathar were effecting a family settlement for avoiding possible disputes in the future between the children of plaintiff 1 on the one hand and the children of Nathar on the other by settling immediately all the properties of plaintiff 1 on her two children and plaintiff 1 ~~contracting~~ agreeing not to claim a right of inheritance in the estate of Nathar after his death. The renunciation of the right to inherit is contained in Ex. 1 and the agreement in regard to it was made for good consideration. In consideration for this agreement all of the properties of Nathar was handed over to plaintiff 1 for her residence and maintenance till her death and that fact is [redacted] noted in Ex. 1. We therefore hold that Ex. 1 is part of a valid family settlement and that the agreement by plaintiff 1 contained in it not to claim a right of inheritance in Nathar's estate after his death is supported by good consideration and has to be given effect to.

6. It follows that the plaintiffs' have no right to claim a partition of the properties left by Nathar and that their suit should be dismissed.

7. In the result, the appeal is allowed, the decree of the court below is reversed and the plaintiffs' suit is dismissed. Parties will bear their costs in both courts.

21st December 1955.

Sd/- R.L. KRISHNA, C.J.
Sd/- D. C. KUMARA PILLAI, J

Compared by

(True copy)

Deputy Registrar
For Registrar