9 SCOB [2017] AD 40

APPELLATE DIVISION

PRESENT:
Mr. Justice Md. Abdul Wahhab Miah
Ms. Justice Nazmun Ara Sultana
Mr. Justice Muhammad Imman Ali
Mr. Justice Md. Nizamul Huq

CIVIL APPEAL NO. 72 OF 2009
(From the judgment and order dated 21.03.2006 passed by the High Court Division in Civil Revision No.966 of 2002)

Most. Rabeya Khatoon being dead her heirs: Md. Abdur Rakib Sarker and others	:	.....Appellants. (In all the appeals)

Versus

Jahanara alias Shefali Bewa being dead her heirs: Salma Akter alias Most. Maya Khatun and others	:	.....Respondent. (In C.A. No.72/09)

For the Appellants. (In all the appeals)	:	Mr. Rokanuddin Mahmud, Senior Advocate, instructed by Mr. Md. Taufique Hossain, Advocate-on-Record.
For the Respondent No.1 (In all the appeals)	:	Mr. Mahabuby Alam with Mr. Probir Neogi, Senior Advocates, instructed by Mr. Zainul Abedin, Advocate-on-Record
For the Respondent No.2-10 (In all the appeals)	:	Exparte
Date of Hearing.	:	30.08.2016, 31.08.2016, 01.09.2016, 23.11.2016 06.12.2016 and 07.12.2016
Date of Judgment.	:	The 14th December, 2016

Mohamedan Law of Bequest:
Bequest by a Mohamedan to his heir of any quantum of property requires the consent of his other heirs after his death to be valid. But a bequest by a Mohamedan to any stranger (other than his heir) upto one-third of the surplus of his property which remains after payment of his funeral expenses and debts is valid and does not require consent of the heirs of the testator. Bequest to a stranger over and above one-third of the property of the testator which remains after payment of funeral expenses and debts of the testator requires the consent of the heirs of the testator after his death to be valid. ...(Para 11)

JUDGMENT

NAZMUN ARA SULTANA, J:

1. This civil appeal, by leave, is directed against the judgment and order dated 21.03.2006 passed by a Single Bench of the High Court Division in Civil Revision No.966 of 2002 making the Rule absolute reversing the judgment and decree dated 18.04.1999 passed by the learned District Judge, Sirajganj in Other Class Appeal No.89 of 1999 dismissing the appeal affirming the judgment and decree dated 30.04.1994 passed by the learned Subordinate Judge, Sirajganj in Other Class Suit No.39 of 1989 dismissing the suit.

2. The above mentioned Other Class Suit No.39 of 1989 was filed by two wives, one daughter and two other relations of Late Haji Moniruddin Sarker praying for declaration that the Wasiyatnama dated 21.03.1988 purportedly executed by Haji Moniruddin Sarker in favour of the defendant Nos.1-5 and the plaintiff No.2 is forged, fabricated, antedated, null and void and not binding upon the plaintiffs. The plaintiffs' case, in short, is that the suit property belonged to Haji Moniruddin Sarker. That the plaintiff Nos.1 and 2 are his two widows, the plaintiff No.3 is his daughter through his second wife Mst. Jahanara Khatoon-the plaintiff No.2, the defendant No.1 is his first wife, the defendant Nos.2, 4 and 5 are his daughters by his first wife and the defendant No.3 Md. Abdur Rakib is his grand son through his first daughter Ms. Rabeya Khatoon, the defendant No.2. That since his second wife Mst. Jahanara Khatoon-the plaintiff No.1 refused to give consent to the third marriage of Haji Moniruddin Sarker, he drove her out of the house with her daughter, the plaintiff No.3 and the plaintiff Nos.1 and 3 then made a complaint to the then Martial Law authority who, on making inquiry, instructed Haji Moniruddin Sarker to transfer share of his property in favour of plaintiff Nos.1 and 3. Haji Moniruddin Sarker accordingly executed and registered three kabala deeds on 21.11.1982 transferring some property in favour of his second wife and her daughter, the plaintiff Nos.1 and 3. That Haji Moniruddin Sarker subsequently obtained signatures of plaintiff Nos.1 and 3 on blank papers on the plea that those would be necessary for other purposes, but subsequently it transpired that Haji Moniruddin Sarker converted the said signed blank papers into a 'Nadabipatra' dated 21.11.1982 showing that the plaintiff Nos.1 and 3 relinquished their shares in the property of Haji Moniruddin Sarker. That after the death of Haji Moniruddin Sarker, on 08.04.1988 the plaintiffs filed Succession Case No.55 of 1988 wherein the contesting defendants filed a written statement disclosing about the Wasiyatnama and on inquiry the plaintiffs came to know about the said forged and antedated document which was created after the death of Haji Moniruddin Sarker and thus the plaintiffs have been compelled to file the suit.

3. The defendant Nos.1 and 3, the first wife and grand son respectively of Haji Moniruddin Sarker contested the suit by filing written statement. Their material case was that Haji Moniruddin Sarker had no male issue from the first and the second wife and as such he married the plaintiff No.2 as his third wife. That the plaintiff Nos.1 and 3 filed Complaint Case No.55 of 1981 before the Union Parishad for maintenance which was decreed for an amount of Tk.12,900/- and Haji Moniruddin Sarker paid the said amount to plaintiff Nos.1 and 3. Subsequently, the plaintiff Nos.1 and 3 filed complaint before the District Martial Law authority and Haji Moniruddin Sarker being pressurized transferred some properties by registered kabalas in favour of his second wife, the plaintiff No.1 and her daughter Mst. Maya Khatoon alias Salma Akter, the plaintiff No.3. That the plaintiff Nos.1 and 3 also executed and registered a deed of 'Nadabipatra' on 21.11.1982 relinquishing all their shares in the property of Haji Moniruddin Sarker. That Haji Moniruddin Sarker, during his life time,

transferred about .17 acre of land to Baitul Mokadda Mosque and he used to look after the affairs of the said Mosque as Mutwalli during his life time. That Haji Moniruddin Sarker disclosed also that after his death his grand son Md. Abdur Rakib, the defendant No.3 would look after the affairs of the said Mosque. That Haji Moniruddin Sarker sold out 2 bighas of land for an amount of Tk. 72,000/- and kept the entire amount with the Rupali Bank, Shahajadpur Branch and thereafter Haji Moniruddin Sarker executed the Wasiyatnama on 21.03.1988. That Haji Moniruddin Sarker appointed his grand son, the defendant No.3 Md. Abdur Rakib as executor of that Wasiyatnama. According to the Wasiyatnama the plaintiffs or defendants are not entitled to receive any money of the said bank account which was dedicated to Dariapur Baitul Mokaddes Jame Mosque for its remaining construction works. That Haji Moniruddin Sarker died on 08.04.1988 and thereafter, as per the terms of the Wasiyatnama, his grand son Md. Abdur Rakib, the defendant No.3, as the executor of that 'Wasiyatnama' got the said Wasiyatnama registered on 08.10.1988. That the plaintiff Nos.4 and 5 are not legal heirs of Haji Moniruddin Sarker. That the suit is liable to be dismissed with cost.

4. The defendant No.5, Mst. Mohera Khatoon alias Nabia Khatoon, one of the daughters of Haji Moniruddin Sarker through his first wife, the defendant No.1 also filed a separate written statement contending that the Wasiyatnama dated 21.03.1988 is forged, fraudulent and void; that the defendant No.3 Abdur Rakib created this Wasiyatnama in collusion with the deed writer. This defendant No.5, however, ultimately did not appear and contest the suit.

5. The trial Court dismissed the suit on making findings to the effect that the plaintiff Nos.4 and 5 were not the heirs of Haji Moniruddin Sarker, that the suit was bad for defect of party for not impleading the members of the managing committee of Dariapur Mddhayapara Baitul Mokaddas Mosque as parties in this suit, that the plaintiff Nos.1 and 3 relinquished their interest in the property left by Haji Moniruddin Sarker and that the impugned Wasiyatnama was a genuine one and Haji Moniruddin Sarker executed the said Wasiyatnama. The appellate Court below affirmed these findings and decision of the trial Court.

6. In revision the High Court Division, though did not differ with the findings of the Courts below to the effect that the impugned Wasiyatnama was genuine and Haji Moniruddin Sarker himself executed the same, decreed the suit declaring the impugned Wasiyatnama invalid. The High Court Division made observations to the effect that according to Mahomedan Law a bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator and that a Mahomedan cannot by will dispose of more than $\frac{1}{3}$ of the surplus of his estate after payment of his funeral expenses and debts and that bequests in excess of the legal one-third cannot take effect, unless the heirs consent thereto after the death of the testator. The High Court Division made observations thus "… … … Mahomedan Law clearly indicate that a Mahomedan is not permitted to dispose of by will more than a third of the surplus of his estate after payment of funeral expenses and debts and bequest in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator … … …". "… … … it is mandatory under the Mahomedan Law that unless an heir or heirs express their clear consent to a bequest after the death of the testator, such bequest is not legal and valid … … …...".

7. Being aggrieved by this judgment and order of the High Court Division the contesting defendants preferred Civil Petition for Leave to Appeal No.1246 of 2006 before this Division

and this Division granted leave to appeal to consider the submissions of the learned Advocate for the defendant-leave-petitioners to the effect

> that Dariapur Baitul Mokaddes Jame Mosque is a Waqf property and the defendant No.3, leave petitioner is not a legal heir of the testator Haji Moniruddin Sarker but a stranger, and the property bequeathed to this Mosque and the defendant No.3 did not exceed the legal one-third of the property of the testator and as such no consent of the heirs of the testator was necessary at all to make the bequest in favour of Mosque and defendant No.3 valid inasmuch as a Muslim can bequeath up to one-third of his property to strangers without the consent of his heirs; that the High Court Division without taking into consideration the fact that the defendant No.3 and the mosque were not heirs of the testator and without determining the quantum of the bequeathable one-third of the total estate of the testator was wrong in holding that the Wasiyatnama in question was invalid; that the validity of Wasiyatnama in question cannot be determined without first determining the size of the total estate of the testator and also the quantum of the bequests to the Mosque and the defendant No.3 Leave petitioner and hence the High Court Division was wrong in declaring the Wasiyatnama invalid.

8. Mr. Rokanuddin Mahmud, the learned Senior Advocate appearing for the appellants has made argument before us to the effect that the High Court Division was wrong in interpreting the Mahomedan Law as regards will. The learned Advocate has argued that the High Court Division though considered the relevant provisions of Mahomedan Law but has failed to interpret the same properly and consequently arrived at a wrong decision; that according to Mohamedan Law a bequest by a Mohamedan to a stranger, i.e., other than his heir, upto one-third of his property remains after payment of his funeral expenses and debts, does not require consent of the heirs of the testator to be valid; that admittedly the defendant No.3 of the original suit namely Md. Abdur Rakib Sarker, one of the present appellants, was not an heir of Haji Moniruddin Sarker at the time of his death since the mother of the defendant No.3, the daughter of Haji Moniruddin Sarker, was alive at that time. The learned Advocate has argued that this very important fact escaped the notice of the learned Judge of the High Court Division in declaring the impugned Wasiyatnama illegal and invalid. The learned Advocate has made submission to the effect also that in this Wasiyatnama Haji Moniruddin Sarker dedicated some money to a Mosque which also is not an heir of Haji Moniruddin Sarker. The learned Advocate has read out also the relevant provisions of Mahomedan Law and has argued that according to these provisions of Mahomedan Law any bequest of any quantum of property to an heir requires consent of other heirs of the testator after his death to be valid, but any bequest to any stranger i.e. not an heir, upto one-third of the surplus of the estate of the testator which remains after payment of his funeral expenses and debts, does not require consent of other heirs to be valid. The learned Advocate has submitted that in this case the defendant No.3 Md. Abdur Rakib Sarker was given much less than the legal one-third of the property of the testator Haji Moniruddin Sarker by this impugned Wasiyatnama and the Mosque also was given some cash money only by this Wasiyatnama which is also much less than the legal one-third of the testator's property and therefore this impugned Wasiyatnama is valid at least to the extent of the property given to the defendant No.3 and the Mosque. In support of this argument Mr. Rokanuddin Mahmud has furnished a written statement of the properties showing the total quantum of the property of the testator Haji Moniruddin Sarker and also the quantum of the properties bequeathed to two wives and 3 daughters of the testator Haji Moniruddin Sarker and also to the defendant

No.3 Md. Abdur Rakib Sarker and has argued that this written statement of the properties clearly shows that Md. Abdur Rakib Sarker was given only 1.40 acres of land by this impugned Wasiyatnama whereas, the total quantum of the land bequeathed by this Wasiyatnama was $12.70\frac{3}{4}$ acres out of total $37.93\frac{1}{2}$ acres of land of the testator Haji Moniruddin Sarker. Mr. Rokanuddin Mahmud has argued that the High Court Division did not bother even to find out what quantum of property was given to this defendant No.3 by the impugned Wasiyatnama. Mr. Rokanuddin Mahmud has concluded his argument making submissions to the effect that the law is that a bequest to any body other than an heir of the testator of any property not exceeding the legal one-third of the property of the testator is valid without the consent of the heirs of the testator and as such the impugned Wasiyatnama so far as it relates to the property given to the defendant appellant Md. Abdur Rakib Sarker and also the Mosque is valid.

9. Mr. Mahabuby Alam with Mr. Probir Neogi, the learned Senior Advocates appearing for respondent No.1 though made some submissions before us supporting the impugned judgment and order of the High Court Division but the learned Advocates could not deny the legal position that according to the Mahomedan Law a Mahomedan can bequeath upto legal one-third of his property to any body other than his heir without the consent of his heirs. The learned Advocates for the plaintiff-respondents have also examined the written statement of the properties furnished from the side of the appellants showing the quantum of the properties bequeathed to different persons by the impugned Wasiyatnama and ultimately conceded the facts that the defendant No.3 Md. Abdur Rakib Sarker was not an heir of Haji Moniruddin Sarker and he was given much less than legal one-third of the property left by the testator Haji Moniruddin Sarker by this impugned Wasiyatnama.

10. In this circumstances, we do not require to make any elaborate discussion at all. For clarification we should quote here the relevant provisions of Mahomedan Law. According to Mahomedan Law,

> "A bequest to an heir is not valid unless the other heirs also consent to the bequest after the death of the testator. Any single heir may consent so as to bind his own share" (vide paragraph 117 of MULLA's Principles of Mahomedan Law).

> "A Mahomedan cannot by will dispose of more than a third of the surplus of his estate after payment of funeral expenses and debts. Bequests in excess of the legal third cannot take effect, unless the heirs consent thereto after the death of the testator" (paragraph 118 of MULLA's Principles of Mahomedan Law).

11. In view of the above quoted provisions of Mahomedan Law, it is evident that bequest by a Mahomedan to his heir of any quantum of property requires the consent of his other heirs after his death to be valid. But a bequest by a Mahomedan to any stranger (other than his heir) upto one-third of the surplus of his property which remains after payment of his funeral expenses and debts is valid and does not require consent of the heirs of the testator. Bequest to a stranger over and above one-third of the property of the testator which remains after payment of funeral expenses and debts of the testator requires the consent of the heirs of the testator after his death to be valid.

12. In the present case it is now an admitted fact that the defendant No.3 Md. Abdur Rakib Sarker being the son of the living daughter of the testator was not an heir of the testator Haji Moniruddin Sarker. Admittedly at the time of death of Haji Moniruddin Sarker (also) his daughter, the mother of this defendant No.3 Md. Abdur Rakib Sarker was alive. By the impugned Wasiyatnama this defendant No.3, who was not an heir of the testator Haji Moniruddin Sarker, was given much less than one-third of the property of Haji Moniruddin Sarker which remained after payment of his funeral expenses and debts. The learned Advocates for the plaintiff-respondents ultimately have conceded this legal position that the impugned Wasiyatnama, so far as it relates to the property given to the defendant No.3 Md. Abdur Rakib Sarker, is valid.

13. By this impugned Wasiyatnama the Dariapur Baitul Mokaddes Jame Moszid was given some money kept in a Bank account. The learned Advocates for the plaintiff-respondents have conceded also that the bequest of this money to the Mosque also is valid.

14. So, from the above discussion, it is evident that this Civil Appeal requires to be allowed in part.

15. Accordingly, it is ordered

> that this Civil Appeal be allowed in part on contest against the contesting respondents and ex-parte against the rest without any order as to costs. The Wasiyatnama in question, so far as it relates to the property given to the appellant Md. Abdur Rakib Sarker and also the money given to Dariapur Baitul Mokaddes Jame Moszid for its remaining construction work is declared to be valid.

16. The impugned judgment and order of the High Court Division stands modified accordingly.