

**IN THE HIGH COURT AT CALCUTTA**  
**CIVIL APPELLATE JURISDICTION**  
**APPELLATE SIDE**

PRESENT:

**The Hon'ble Justice Nishita Mhatre**  
**And**  
**The Hon'ble Justice Asha Arora**

**F.A NO. 334 of 2007**

***Rafique Anwar Ansari***  
***... Appellant***

***vs.***

***Abdul Razzaque Ansari & Ors.***  
***... Respondents***

For the Appellant	: Mr. Ashis Bagchi Mr. Balailal Sahoo Mr.Sankha Prasad Roy
For the Respondents	: Mr. Hiranmay Bhattacharya Mr. Tanmay Mukherjee
Heard on	: 02.04.2015
Judgment on	: 22.04.2015

**Asha Arora, J.:**

1. The present appeal at the instance of the plaintiff/appellant arises out of a suit for partition. The judgment dated 28<sup>th</sup> March, 2007 and decree rendered by the Civil Judge (Senior Division), 3<sup>rd</sup> Court Alipore, in Title Suit No. 70 of 2004 have been assailed by the plaintiff. By the impugned judgment and decree the Trial Court decreed the suit in part in preliminary form only in respect of the

property described in Schedule 'A' of the plaint and negatived the plaintiff's claim for partition with reference to the property described in Schedule 'B', 'C' and 'D' of the plaint.

2. Being aggrieved, the plaintiff brought the matter in appeal before this Court mainly on the grounds that the evidence adduced by the parties as regards Schedule 'B', 'C' and 'D' properties have not been properly appreciated and the learned Trial Court erred in excluding the aforesaid properties from the partition decree. It is the contention of the plaintiff/appellant that all the properties excepting 'A' schedule were acquired by the parties from their joint fund while they were residing in joint mess and as such, in view of Article 57 of the Mohamedan Law the presumption is that they are the joint properties of the parties so a decree for partition ought to have been passed in respect of the properties in Schedule 'B', 'C' and 'D'.

3. The point that poses determination is whether the properties described in Schedule 'B', 'C' and 'D' of the plaint are the joint properties of the parties?

4. In order to appreciate this question it is necessary to advert briefly to the facts of the case. The parties are referred to herein as they are arrayed in the suit.

5. The plaintiff and defendants are the sons of deceased Abdul Rahman Ansari who died on 10<sup>th</sup> December, 1985. The properties described in Schedule

'A', 'B,'C' and 'D' of the plaint have been referred to as the suit properties. The Trial Court decreed the suit in preliminary form declaring 1/4<sup>th</sup> share of the plaintiff and 1/4<sup>th</sup> share of each of the defendants in respect of 'A' Schedule property. The instant appeal is concerned with the properties described in Schedule 'B', 'C', and 'D' claimed by the plaintiff as the joint properties of the parties acquired from their joint fund. According to the plaintiff, during the lifetime of their father all of them were living together in joint mess and income from different sources were kept in joint fund. The properties described in Schedule 'B', 'C' and 'D' were acquired from their joint income while they were in joint mess. 'B' Schedule property was acquired in the name of defendant No. 1 who is a mere name lender as he was the headman of their joint family at the relevant time. The said property was purchased in the year 1980. The property described in 'C' Schedule consisting of two shop rooms was jointly acquired by the parties in the year 1994 following a tenancy agreement in the name of three brothers viz., plaintiff and the defendant Nos. 1 and 2. Defendant No. 3 was then a student. The business in the said shop was carried on by defendant No. 2 and another shop room was under the defendant No. 1. The property in Schedule 'D' is a shop room acquired out of the joint fund of the parties in the year 1995 in the name of defendant No. 1. It is the further contention of the plaintiff that he is in actual physical possession of the aforesaid properties jointly with the defendants. He has in his possession 7 rooms, privy, bathroom and courtyard in 'A' Schedule property. The plaintiff and the defendants have been possessing the suit properties jointly but difficulties developed in the matter of joint user and

enjoyment which prompted the plaintiff to demand partition by metes and bounds. As the defendants refused the plaintiff's proposal for partition of the suit properties, he was constrained to file the suit for partition.

6. The suit was contested by the defendant No. 1 who filed written statement categorically denying and disputing the plaintiff's case that the properties in Schedule 'B', 'C', and 'D' were purchased from the joint fund of the parties. It is the specific case of the defendant No. 1 that he is a tenant in respect of 'C' and 'D' Schedule property. So far as the property in Schedule 'B' is concerned, defendant No. 1 claimed to be the absolute owner in respect thereof by virtue of a registered deed of conveyance. He is in possession of the said properties and has been paying tax on mutation. It is, therefore, the assertion of the defendant No. 1 that the aforesaid properties in Schedule 'B', 'C' and 'D' cannot be the subject matter of partition.

7. Defendant Nos. 2 and 3 also filed written statement stating, inter alia, that Abdul Rahman Ansari since deceased was the owner of the suit properties and the parties as the legal heirs of deceased each having 1/4<sup>th</sup> share in the said properties and have been in joint possession of the same.

8. The Trial Court after considering the oral and documentary evidence came to the finding that plaintiff is entitled to a decree for partition only in respect of 'A' Schedule property and that there was no evidence to prove that the plaintiff and defendant Nos. 2 and 3 are jointly possessing 'B', 'C' and 'D' Schedule

properties along with the defendant No. 1. Holding thus, the suit was decreed in part only in respect of 'A' Schedule property.

9. We are to determine whether the judgment and decree impugned are sustainable on facts and law.

10. Referring to Article 57 of Molla's Mohamedan Law, Mr. Bagchi Learned Counsel for the appellant strenuously argued that if during the continuance of a joint Mohamedan family, property is acquired in the name of the managing member of such family, the presumption is that it is the property of the family and not the separate property of the member in whose name it stands. To buttress his argument Mr. Bagchi relied on the case law reported in **1932 Indian Law Reports (ILR) Vol. LIX Calcutta 541 (Aminaddin Munshi vs. Tajaddin)**. In the same context reference has been made to the decision in **AIR 1998 Patna 1** under Head Note B (**Rukaiya Begum vs. Fazalur Rahman**). It has further been contended by the learned Counsel for the appellant that it was for the defendant No. 1 to show that the properties in Schedule 'B', 'C' and 'D' were self-acquired from his own income but he failed to discharge his onus.

11. Repudiating the submissions on behalf of appellant, Mr. Bhattacharya learned Counsel appearing for the respondent No. 1 invited our attention to the evidence of PW 1 wherein he admitted in his cross-examination the case of the defendant No. 1 regarding the properties in 'B', 'C' and 'D' Schedule.

12. Leading us through the relevant paragraph 9 of the reported decision of Calcutta High Court in **1976 (2) CLJ 113 (Hassain Bibi vs. Must. Hussainara Bibi)**, Mr. Bhattacharya countered that the case laws referred on behalf of the appellant find no application to our present case. We concur with the submission made by Mr. Bhattacharya and in this regard it would be pertinent to refer to the relevant portion of paragraph 9 of the judgment at page 123 wherein it has been observed as follows:

*“ It appears that the last portion of the observation in Article 57 is based on a case reported in (2) ILR 59 Cal, 531 : AIR 1932 Cal, 538 (at 539-40). In the said case it appears that there was a joint ancestral property and karbar which were inherited by all the brothers. After the death of the Mahomedan father, the son, who inherited the property, continued the business for quite a long time. Thereafter the joint family continued as it did not break up with the death of the mother and the question arises whether the property purchased in the name of the managing brother was a joint property of the Mahomedan family. It was held that the property was joint property and partition was granted. The case has a distinctive quality and as such cannot be an authority on the broad proposition that any karbar between the two Mahomedan brothers will have the presumption of the Hindu law in the Mahomedan system also. On the other hand the case on the point as we have referred to is quite clear that this cannot be so. We are, therefore, of the opinion that assuming the brothers carried on the business jointly in dry fruits, there*

*cannot be a joint family property if one of the brothers purchased the property in his own name.”*

13. Learned Counsel for the respondent No. 1 drew our attention to the evidence of PW 1 as well as the oral and documentary evidence on behalf of defendant No. 1 in support of his submission that the property in Schedule ‘B’ being the purchased property of defendant No. 1 while Schedule ‘C’ and ‘D’ properties being tenanted cannot be the subject matter of partition.

14. Before embarking on a discussion of the legal issues involved in the matter let us examine the evidence on the question of the plaintiff’s claim in respect of ‘B’, ‘C’ and ‘D’ Schedule properties. The plaintiff himself was examined as PW 1. Besides his oral evidence PW 1 relied on three sale deeds dated 4<sup>th</sup> July, 1968, 2<sup>nd</sup> May, 1969 and 17<sup>th</sup> March, 1986 marked Exhibits 1, 2 and 3 respectively. Now, these sale deeds relate to ‘A’ Schedule property with which we are not concerned for the purpose of the instant appeal. Exhibit 4 is the death certificate of Abdul Rahman Ansari, father of the plaintiff and the defendants. His date of death as mentioned in Exbt. 4 is 10<sup>th</sup> December, 1985. Exbt. 4(a) is the death certificate of Shahidan Bibi, mother of the parties. Exbt. 5 is the property tax receipt issued by KMC in respect of premises No. Z-3 - 208 Jeliapara Road which is not the subject of the present appeal as it relates to Schedule ‘A’ property. Exbt. 6 is the certified copy of the evidence of DW 1 in Title Suit No. 57 of 2002.

15. We now take up the evidence of PW 1 regarding 'B', 'C' and 'D' Schedule property. In paragraph 10 of his affidavit in chief plaintiff (PW1) stated that during his father's lifetime they (plaintiff and the defendants) were living in one mess and their father was the headman of the family. The total income from different sources were kept in joint fund. In paragraph 14 of his affidavit in chief PW 1 referred to defendant No. 1 as the headman of their joint family in whose name 'B' Schedule property was acquired from the joint fund in the year 1980. The assertion of PW 1 in paragraph 14 is not in conformity with what has been stated by him in paragraph 10 wherein the father has been referred as the headman of the family. We cannot lose sight of the evidence of PW 1 that 'B' Schedule property was purchased in the year 1980 that is, during the lifetime of Abdul Rahman Ansari, father of the parties who was, according to PW 1 then the headman of the family. Curiously enough, contrary to what has been stated in paragraph 10 of his affidavit in chief, PW 1 averred in paragraph 14 that 'B' Schedule property was acquired in the name of defendant No. 1 who was then the headman of their joint family as a mere name lender. Such contradictory statements of PW 1 do not inspire confidence and his evidence herein above referred does not appear to be worthy of credence. With regard to 'C' Schedule property PW 1 stated that the two shop rooms comprised therein were occupied by him and the defendants in 1994 by a tenancy agreement in the name of the three brothers. So far as 'D' Schedule property is concerned, PW 1 averred that it was acquired by them out of their joint fund in the name of defendant No. 1 in the year 1995. It is significant to note that PW 1 admitted in his cross-

examination that defendant No. 1 purchased the property in Schedule 'B' and constructed a house thereon where he has been residing with his family. It has also been elicited in the cross-examination of PW 1 that defendant No. 1 got his name recorded in the assessment register of KMC and has been paying municipal taxes in respect of the said property. As regards 'C' and 'D' Schedule property, PW 1 admitted in his cross-examination that defendant No. 1 is a tenant in respect of the said properties and he pays rent to the owner. Being quizzed in cross-examination on behalf of defendant No. 1 plaintiff conceded that he has no documents to show that they used to maintain joint fund nor could he say who contributed what amount in the joint fund. PW 1 also admitted that he had no documents to show that 'B', 'C' and 'D' Schedule properties were purchased by them from their joint fund.

16. On the other hand, defendant No. 1 adduced oral and documentary evidences in support of his specific case that he is a *bona fide* tenant in respect of Schedule 'C' property under the landlords Md. Yunus and Amina Khatoon. He is also a tenant in respect of Schedule 'D' property under "Ghosh Hat" after purchasing the same from Akhtar Ali Gazi and Amina Bibi on 11<sup>th</sup> December, 1997. DW 1 further stated that by virtue of registered deeds of conveyance he purchased 'B' Schedule property and has been in possession thereof. To lend corroboration to his oral evidence defendant No. 1 produced a series of documents relating to 'B', 'C' and 'D' Schedule properties including three sale

deeds (exhibits A(1), B and C), corporation tax receipt (exhibit D), agreement of tenancy (exhibit E/1) and two rent receipts (exhibits E and F).

17. In course of hearing learned Counsel for the appellant sought to impress upon us that as the defendant No. 1 could not disclose the source of purchase money, it cannot be believed that the properties in 'B', 'C' and 'D' Schedule were acquired by him from his personal fund. So there is a presumption that they are the joint family properties. We are unable to accept this argument which appears to be devoid of merit for the simple reason that it is settled-law that plaintiff must succeed on the strength of his own case and not on the weakness of the defendant's case. Proof rests squarely on the person who approaches the Court for relief. In the instant case, it is abundantly clear from the foregoing discussion that plaintiff failed to prove by any iota of oral or documentary evidence that the properties in question (Schedule 'B', 'C' and 'D') are joint properties purchased from the joint fund of the parties.

18. The plea with regard to benami transaction in respect of the property described in Schedule 'B' and 'D' taken in paragraph 10 and 12 of the plaint as well as in the evidence of PW 1 is not sustainable. The reason is not far to seek. It is well-settled that the burden of proving that a particular sale is benami and the apparent purchaser is not the real owner always rests on the person asserting it to be so. In the present case plaintiff claimed that the properties in Schedule 'B' and 'D' were purchased by them jointly from their joint fund in the name of defendant No. 1 who is a mere name lender. Apart from the *ipse dixit* of

PW 1 no evidence is forthcoming in support of this plea which is noted only to be rejected.

19. Coming to the decisions cited on behalf of appellants, evidently both the case laws (**1932 ILR Vol. 59 Calcutta 541 and AIR 1998 Patna 1**) are distinguishable on facts from our present case. In the first mentioned case evidence disclosed that parties were in possession of the disputed properties jointly which is not so in our present case. It is significant to refer to the relevant portion of the judgment at page 544-545 wherein it has been observed as follows:

*“ It is not a question merely of the messing together of certain members of a Mahomedan family. They were possessing these properties in common and in jointness, and the question arises whether the rule can apply to the present case, where, as has been shown by clear evidence on which the Subordinate Judge relied and which we have no reason for discrediting, that the defendant No. 1 was the managing member of such family. Under those circumstances, it seems to us that the burden of proof would lie on the defendant No. 1 for establishing that the properties which were acquired during the jointness of the family and which are shown to stand in the name of defendant No. 1 do not really belong to the joint family.”*

We are, therefore, not impressed with the argument on behalf of the appellant that the evidence of defendant No. 1 wherein he admitted in his cross-examination that in Title Suit No. 57 of 2002 he stated in his oral testimony that

after the demise of their father the four brothers used to maintain joint mess is sufficient proof that the properties in question are the joint family properties of the parties. In our present case plaintiff failed to prove that they were in joint possession of the properties in Schedule 'B', 'C' and 'D' and that these properties were acquired by them jointly nor is there any evidence to show that defendant No. 1 was the Managing Member of such a family. It is clear that the burden of proving that a property held by a member in Mohamedan family is his self acquired property would arise only if the property is held commonly by other members of the family and the entire family lives in commensality possessing the family property in common. In the second case law referred by the learned Counsel for the appellant it was held that notwithstanding the fact that there is no presumption of jointness and joint family business in Mohamedans, but in certain circumstances the Court may uphold such eventuality. The circumstances referred in the case of ***Rukaiya Begum v. Fazalur Rahman*** reported in ***AIR 1998 Patna 1*** do not find place in our present case.

20. For the reasons discussed we are clearly of opinion that plaintiff failed to prove that the properties described in Schedule 'B', 'C' and 'D' are the joint properties of the parties. In the circumstances, the impugned judgment and decree passed by the Trial Court do not call for any interference and are therefore, affirmed.

21. Consequently the appeal fails and is accordingly dismissed.

22. In the circumstances of the case there shall be no order as to costs.
23. Interim order if any, stands vacated.
24. L.C.R. be returned to the Trial Court expeditiously.
25. Urgent Photostat certified copies of this judgment, if applied for by the parties be supplied subject to compliance of requisite formalities.

**(Asha Arora, J.)**

**(Nishita Mhatre, J.)**