

BASHA AND ORS.

v.

KHAIRUNNESSA BIVI AND ORS.

AUGUST 17, 1994

[K. RAMASWAMY AND S.C. AGRAWAL, JJ.]

Mohammedan Law—Ancestral property—Partition of—Oral gift of certain property—Plaintiff in uninterrupted possession and enjoyment in assertion to his own right as an owner under partition deed—He having possessory title from 1952 till date of suit—Suit for declaration of title filed in 1968—Defendants trespassed into the property in January, 1968—Plea of adverse possession found false—Decree granted is legal—Code of Civil procedures, 1908.

The 2nd plaintiff and his brother partitioned the properties by a partition deed dated December 4, 1952. Eversince they have been in possession and enjoyment of the property. The second plaintiff by an oral gift settled some property to the 1st plaintiff. When the appellants - defendants attempted to trespass into the land on January 6, 1968, the plaintiffs filed suit on July 4, 1968 for declaration of title and for recovery of possession. The Trial Court dismissed the suit. On appeal, the suit was decreed. The High Court while upholding the decree dismissed the second appeal.

In appeal by special leave it is contended that the property belongs to the appellants and the declaration of title and possession of the property was illegal.

Dismissing the appeal, the Court

HELD : 1.1. In the instant case, in the partition deed, there is a clear recital of the properties which admittedly form part of ancestral property. There is also a clear recital that they separated the property and thereafter the properties continued to be in possession and enjoyment of the respective parties. The suit was filed on July 4' 1968 by which date more than 16 years have passed and the plaintiff remained in uninterrupted possession and enjoyment is assertion to his own right as an owner having obtained the same under partition deed. Thereby he had possessory title right from 1952 till date of the suit. The declaration of title thereby given is clearly legal. The

A appellants trespassed into the property on January 6, 1968. The assertion that they have title by adverse possession is found false because the trespass was for the first time on January 6, 1968 and the suit was filed on July 4, 1968. Under these circumstances, the decree granted by the Appellate Court and affirmed by the High Court is perfectly legal. [711-C-F]

B **CIVIL APPELLATE JURISDICTION** : Civil Appeal No. 397 of 1979.

From the Judgment and Order dated 9.8.78 of the Madras High Court in Second Appeal No. 1640 of 1977.

C G. Viswanatha Iyer, Dileep Tandon and P.K. Pillai for the Appellants.

A.T.M. Sampath and S. Balaji for the Respondents

D The following Order of the Court was delivered :

The appellants are the defendants. One Murthuza Hussain Sahib, the 2nd Plaintiff and his brother Nawab Basha @ Syed Badrajjalami Hussain Sahib under Partition deed dated December 4, 1952, Ex:A-2 partitioned the properties and Item Nos. 1 and 2 of the ancestral property fell to the share of Syed Murthuza Hussain Sahib. The Partition deed recites thus :

E "The share of properties allotted to the respective person, shall be enjoyed by them with absolute right and freedom thereto undisputedly from this day onwards hereditarily from son to grand son and with powers of effecting gift sale and alienation one individual shall have no right in respect of properties belonging to the other individual."

F Eversince they have been in possession and enjoyment of the property. The 2nd Plaintiff by an oral gift settled item no.1 to the 1st Plaintiff. When the appellants attempted to trespass into the land on January 6, 1968, the respondents filed suit on July 4, 1968 for declaration of title and for recovery of possession. The Trial Court dismissed the suit. On appeal, the District Judge, Madurai in A.S. No. 358/1975 by its judgment and decree dated July 7, 1977 reversed the judgment and decree of the Trial Court and decreed the suit. The High Court in S.A. No. 1640/77 by judgment and decree dated August 9, 1978 dismissed the second appeal. Thus this appeal

by special leave.

It is contended by Mr. G. Viswanatha Iyer, learned senior counsel for the appellants that the property belongs to Bedralam Sahib and the appellants, the 5th defendant and defendant Nos. 3 and 4 are the daughters of Syed Badralam Sahib son of Babjan Sahib. Defendants 1 and 2 are the husbands of defendants 3 and 4. The property belonged to Babjan Sahib and the respondents have no title to the property unless they established the title through Babjan who is claimed to be the owner of the property. The declaration of title and possession of the property is clearly illegal. We find no force in the contention. It is seen that in the partition deed, Ex. A-2 there is a clear recital of the properties which admittedly form part of ancestral property. There is also a clear recital that they separated the property and thereafter the properties continued to be in possession and enjoyment of the respective parties. Thereby Murthuza Hussain Sahib had the properties allotted to his share. Thereafter remained in possession and enjoyment till he parted with possession of item 1 by a gift given to the 1st respondent, his daughter and second item in his own possession. Admittedly, the suit was filed on July 4, 1968 by which date more than 16 years have passed and he remained to be in uninterrupted possession and enjoyment in assertion to his own right as an owner having obtained the same under partition deed, Ex. A-2. Thereby he had possessory title right from 1952 till date of the suit. The declaration of title thereby given is clearly legal. It is found that they were in possession of the property and were enjoying the same by lease out etc. It is also found by the District Judge and affirmed by the High Court that the appellants trespassed the property on January 6, 1968. The plea of adverse possession set up by the appellants has been negatived. The assertion that they have the title by adverse possession is found false because the learned District Judge and the High Court found that the trespass was for the first time on January 6, 1968 and the suit was filed on July 4, 1968. Therefore, the question of adverse possession does not arise. Under these circumstances, the decree granted by the Appellate Court and affirmed by the High Court is perfectly legal. It does not warrant any interference. The appeal is accordingly dismissed. No costs.

A.G.

Appeal dismissed.