



IN THE HIGH COURT OF KARNATAKA, DHARWAD BENCH

DATED THIS THE 29TH DAY OF JULY, 2024

PRESENT

THE HON'BLE MR JUSTICE KRISHNA S.DIXIT

AND

THE HON'BLE MR JUSTICE VIJAYKUMAR A.PATIL

MISCELLANEOUS FIRST APPEAL NO. 101005 OF 2015 (FC)



BETWEEN:

SHRI. BASHIRAHMED S/O. IMAMSAB TAHSILDAR,
AGE: 52 YEARS, OCC: BUSINESS,
R/O: GROUND FLOOR OF THE HOUSE BEARING,
CTS NO.4817/52/HB, 2ND CROSS,
SUBHASH NAGAR, BELGAUM.

... APPELLANT

(BY SRI. VITTHAL S. TELI, ADVOCATE)

AND:

1. SMT. SURAYYA D/O. USMANSAB BENNI,
AGE: 44 YEARS, OCC: HOUSEHOLD WORK,
R/O: IN A ROOM BUILT ON THE TERRACE OF THE
HOUSE BEARING CTS NO.4817/52/HB,
2ND CROSS, SUBHASH NAGAR, BELGAUM.
2. SHRI. NADEEM S/O. BASHIRAHMED TAHSILDAR,
AGE: 27 YEARS, OCC: BUSINESS,
R/O: GROUND FLOOR OF THE HOUSE
BEARING CTS NO.4817/52/HB,
2ND CROSS, SUBHASH NAGAR, BELGAUM.
3. MISS AAFIYA D/O. BASHIRAHMED TAHSILDAR
AGE: 25 YEARS, OCC: SERVICE,
R/O: GROUND FLOOR OF THE HOUSE
BEARING CTS NO.4817/52/HB, 2ND CROSS,
SUBHASH NAGAR, BELGAUM.

...RESPONDENTS

(BY SRI. VISHWANATH V. BADIGER, ADV. FOR R1;
NOTICE TO R2 & R3 ARE SERVED)





THIS MFA IS FILED U/S.19(1) OF THE FAMILY COURTS ACT 1984, AGAINST THE JUDGMENT & DECREE DATED 12.11.2014, PASSED IN O.S.NO.7/2012, ON THE FILE OF JUDGE FAMILY COURT, BELAGAVI, DECREERING THE SUIT FILED FOR DECLARATION, PARTITION AND CONSEQUENTIAL RELIEF OF PERMANENT INJUNCTION.

THIS APPEAL, COMING ON FOR FINAL HEARING, THIS DAY, JUDGMENT WAS DELIVERED THEREIN AS UNDER:

CORAM:HON'BLE MR. JUSTICE KRISHNA S.DIXIT
AND
HON'BLE MR. JUSTICE VIJAYKUMAR A.PATIL

ORAL JUDGMENT

(PER: HON'BLE KRISHNA S.DIXIT)

This appeal arises from the judgment and decree dated 12.11.2014 entered by the learned Family Court Judge, Belagavi in respondent's suit in OS No.7/2012, the operative portion of which reads as under:

"Suit of the plaintiff is decreed as under.

It is hereby declared that the plaintiff has got 1/4th share in the suit schedule property mentioned in para-1 of the plaint.

Plaintiff is entitled for 1/4th share in the suit house property by way of partition as per Sec.24 of CPC.

It is hereby permanently restrained the defendant from alienating the suit property.

No order as to costs.

Draw preliminary decree accordingly."



2. Brief facts of the case:

(a) The parties are Sunni Muslims. They got their marital tie disrupted by virtue of Khulanama dated 6.4.2008 at Ex.P3. It is the case of plaintiff/wife that in terms of this Khulanama, the appellant/husband had agreed to give 1/4th share in the house property bearing CTS No.4817/52/HB fully described in the suit schedule. Some dispute as to this property having propped up, the respondent/wife had filed the subject suit seeking a decree for declaration as to her 1/4th share in the said property and a decree of partition of this share. In addition, she had also prayed for the grant of a decree for restraining alienation of the said property.

(b) The appellant being the defendant entered appearance through his counsel and filed his Written Statement resisting the suit claim, inter-alia, contending that the law relating to Khulanama contemplates consideration being given by the wife to the husband and not the reverse of it; wife having taken up money in lieu of 1/4th share in the subject property has given up her claim over the same, as is evidenced by her



affidavit dated 6.4.2008. Suit of the kind was not maintainable in its present form and substance.

(c) On the basis of pleadings of the parties and the documents accompanying the same, learned Family Court Judge framed the following six principal issues for consideration:-

- 1) Whether the plaintiff proves that she is the absolute owner of 1/4th share in the suit schedule property on the basis of Khulanam dated 6.4.2008?
- 2) Whether the plaintiff is entitled for partition and separate possession of 1/4th share in the suit schedule property?
- 3) Whether this Court has no jurisdiction to entertain the suit?
- 4) Whether the suit in the present form before this Court is not maintainable as contended by the defendants 1 and 2?
- 5) Whether the plaintiff is entitled for the relief of declaration as sought for?
- 6) Whether the plaintiff is entitled for the relief of permanent injunction as sought for?

(d) To prove her case, the plaintiff got herself examined as PW1; her brother one Mr.Babu had deposed as PW2. In their deposition, six documents came to be marked as Ex.P1 to P6. They inter-alia comprised of Sale Deed, Property Register, Khulanama, etc. From the side of the defendants, the



appellant himself got examined as RW1 and no documents were produced from his side. The learned Family Court Judge having adverted to the pleadings of parties and weighed the evidentiary material placed on record has entered the impugned judgment & decree that are put in challenge in this appeal at our hands.

3. Having heard the learned counsel for the parties and having perused the appeal papers along with the original TCR, we decline to grant indulgence in the matter for the following reasons:

(a) The first submission of learned counsel appearing for the appellant that, in Islamic Law where the marriage is dissolved by *khula*, it is the wife, who has to give consideration to the husband and not the reverse, is difficult to countenance as a thumb rule and reasons for this are not far to seek: firstly it is not a case of *khula* as such but a mixed case of *mubara'at* & *Khula*. Asaf A.A. Fyzee's OUTLINES OF MUHAMMADAN LAW¹:

“...In the case of *khula* the wife begs to be released and the husband agrees for a certain consideration which is usually a part or the whole of the *maher*...;

¹ 5th Edition at page 129 says



while in *mubara'at* apparently both are happy at the prospect of being rid of each other... As a general rule, in *khula* the wife makes some compensation to the husband or gives up a portion of her *maher*; but this is not absolutely necessary..."

(b) In Islamic Law there lies a difference between the process by which *khula* is brought about and the way *mubara'at* is effected: in the former, the proposal to put an end to the marital relation comes from the side of wife whereas in the later both the sides bring it up. In ***Moonshee Buzulur Raheem Vs. Luteefut-oon-Nissa***², what the Privy Council observed, lends support to this view: "... A divorce by *Khoola* is a divorce with the consent and at the instance of the wife in which she gives or agrees to give a consideration to the husband for her release from the marriage tie ..." Fyzee *supra* at page 129 further writes "... if the desire to separate emanates from the wife it is called *Khula*; but if the divorce is effected by mutual aversion (and consent) it is known as *mubara'at* ...". The marital tie between the parties was disrupted by virtue of "KHULA – MUBARA'AT" DEED dated 06.04.2008, at Ex.P-3. It specifically mentions that the marital

² (1861) 8 MIA 379



relationship between the parties became strained and reached beyond the stage of patch up. That is how they have entered into the arrangement, whereby the marriage is dissolved. Deed also mentions that the appellant has given property share on the instructions of elders of community. Thus, he has not given it at the insistence of respondent. Therefore, it is not a clear case of *khula* but an anomalous arrangement, not unknown to Islamic Law

(c) The appellant and the respondent have entered into a contract to put an end to the marriage and accordingly the marriage came to be dissolved. As a part of bargain between the parties, in which others too participated the appellant had undertaken to give 1/4th share in the subject property to the respondent. This cannot be said to run counter to the Islamic Law which mandates that the women should be treated with love and affection. Prophet Muhammad had said:

“The most excellent of you is he who is best in the treatment of his wife.” (M 13:11). “O my people! You have certain rights over your wives and your wives over you... They are the trust of God in your hands. So you must treat them with kindness.” (M 15:19)³

³ ‘The position of Women in Islam’, by Mohamad Ali Syed, State University of New York Press.



The mankind is appreciably moving towards gender equality. India is a party to several International Conventions that promote gender equality. The UN Convention on the Elimination of All Forms of Discrimination against Women is one of them. Conventions of the kind need to animate out domestic law, be it statutory or customary. They have to be kept in view while construing and applying the rules of personal laws like Hindu Law, Islamic Law, etc. Added the contention of the kind runs counter to the Equality Jurisprudence that has been gloriously enacted in our Constitution. The Apex Court in ***Safai Karmachari Andolan Vs. UOI***⁴. has observed that International covenants which have been ratified by India are binding to the extent that they are not inconsistent with the native law.

(d) A perusal of the Deed of *Khulanama & Mubara"at* at Ex.P-3 coupled with the attending circumstances indisputably lead to one single conclusion that the parties had decided to go for dissolution of marriage and that they have accordingly dissolved it. The stipulation as to granting of 1/4th share in the subject property is in the nature of condition super added.

⁴ (2014) 11 SCC 224, para 16



Even without that, the position would not have been altered in the sense that there would not have been dissolution of marriage. Therefore, the idea of consideration which arguably *khula* involves, has to stay away. To put it differently, there is a marked difference between what is consideration and what is condition. The stipulation in the circumstances is only a condition and not consideration. It hardly needs to be stated that ordinarily consideration is the price for the arrangement whereas condition is not. A transaction is any less valid if it lacks consideration. Agreements founded on matrimonial relationships ordinarily fall into this category. Even otherwise, *pacta sunt servanda* that is "abide by what is agreed upon" is a way of life on which the society has been organised. The appellant had undertaken and accordingly gave 1/4th share in the property in question which has been rightly the subject matter of impugned decree. An argument to the contrary strikes at the root of law, reason & justice. Countenancing that would be like placing premium on unconscionability.

(e) The next contention of the learned counsel appearing for the appellant that the respondent in terms of her affidavit dated 6.4.2008 (Ex.P6) has given away all and



whatever interest that was sought to be created in the subject property under Khulanama at Ex.P6 is again difficult to agree with. The said affidavit at paragraph-2 reads as under:

"Due to the strained relationship between myself and my husband for the last two years we are unable to continue our marital relationships. Therefore by Khulanama - Mubaraata dated: 06th day of April 2008 we have dissolved our marriage with the terms of stipulated in the Khulanama - Mubaraata. From this day after the compliance of the terms of the Khulanama- Mubarrata whereby I have been given ¼ share in CTS No.4817/52/HB I do not have any claim over my husband or any property belonging to him. I further state that I will not file any complaint or any maintenance case or any other suit against my divorce husband or against my children."

It is difficult to agree with the construction placed by the counsel on this paragraph. It is in plain English and being as clear as Gangetic waters it does not admit any interpretation,. It only reflects and reiterates what has been stated in the Khulanama. There is nothing that indicates that the respondents has given up her claim over the subject property that is 1/4th share.

(f) The last contention of the learned counsel appearing for the appellant that suit of the kind was not maintainable before the Family Court, is again liable to be rejected. Section 7 of the Family Courts Act, 1984 by its terminology vests a



pervasive jurisdiction in the Family Courts in respect of matrimonial causes. Section 7 reads as under:

"7. Jurisdiction.—(1) *Subject to the other provisions of this Act, a Family Court shall*

(a) have and exercise all the jurisdiction exercisable by any district court or any subordinate civil court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district court or, as the case may be, such subordinate civil court for the area to which the jurisdiction of the Family Court extends.

Explanation to sub- section (1) reads.- "the suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:- ...

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them"

That being the position, suit of the kind perfectly fits into its wide phraseology.



In the above circumstances, this appeal being unworthy of merit is liable to be and accordingly **dismissed** with costs of Rs.10,000/- (rupees ten thousand only)

Sd/-
(KRISHNA S.DIXIT)
JUDGE

Sd/-
(VIJAYKUMAR A.PATIL)
JUDGE

JTR/ct-an
List No.: 1 Sl No.: 32