AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No. 474 of 2007

Reserved on : 03.03.2022

Delivered on : 02.05.2022

1. Sulaxani, D/o Mahadeo Jaiswal, Aged About 42 Years.
2. Sukhaman, D/o Mahadeo Jaiswal, Aged About 37 Years.

All appellants, R/o Village- Targawan, P.S. Patana, Tahsil- Baikunthpur, District- Korea (C.G.)

---- Appellants

Versus

1. Sattar Ali, S/o Nasir, Aged About 38 Years, Caste Musalman, Occupation- Cultivation, R/o Village- Targawan, P.S.- Patana, Tahsil- Baikunthpur, District- Korea (C.G.)
2. Jasimuddin, S/o Noor Ali (Dead)
3. Nizamuddin, S/o Subhan Ali, Aged About 52 Years.
4. Rashid Mohammad, S/o Noor Ali, Aged About 27 Years.
5. Nir Mohammad, S/o Ali Zan, Aged About 57 Years.

All respondents No. 2 to 5 ex-parte, R/o Village- Deo Nagar, P.S. & Tahsil- Surajpur, District- Surguja (C.G.)

6. State of Chhattisgsarh, through Collector, Korea (C.G.)

---- Respondents

For Appellants	:	Mr. Amiyakant Tiwari, Advocate.
For Respondent No. 1	:	Mr. D.N. Prajapati, Advocate.
For Respondents No. 3 & 5	:	Mr. Vivek Bhakta, Advocate.
For State/Respondent No. 6	:	Mr. Ishwari Ghritlahre, P.L.

Hon'ble Shri Justice Narendra Kumar Vyas

C.A.V. JUDGMENT

1. This second appeal has been filed by the appellants/defendants under Section 100 of the C.P.C. against judgment and decree dated 20.09.2007 passed by District Judge, Korea (Baikunthpur) (C.G.) in Civil Appeal No. 07A/2006 (Old Case No. 08A/2005) (Sattar Ali Vs. Jasimuddin & others) setting aside the judgment and decree dated 29.03.2005 passed by Civil Judge Class-II,

Baikunthpur, District- Korea (C.G.) in Civil Suit No. 13A/2002 for declaration and possession of the suit property i.e. agricultural land bearing Khasra No. 685, 782 & 920 area admeasuring 0.25, 0.10 & 0.65 R.A. respectively situated at Village- Targawan, Patwari Halka No. 24, Revenue Circle- Patana, District- Baikunthpur (C.G.)

2. For the sake of convenience, the parties shall be referred to in terms of their status in Civil Suit No. 13A/2002 which was filed for declaration and possession of the suit property.

3. The instant Second Appeal is admitted for hearing by this Court vide its order dated 11.08.2010 on following substantial questions of law:-

1. Whether the Will Ex. P-2 is proved in accordance with law, more particularly, law relating to Hiba under the Mohammedan Law ?
2. Whether the Will Ex. P-2 is a suspicious document and the first appellate Court was not justified in allowing the suit preferred by the plaintiff ?

4. Thereafter, on 05.07.2021, an additional issue has been framed by this Court, which reads as under:-

> "Whether the first appellate Court is justified in granting decree of the entire suit property in favour of plaintiff Sattar Ali on the basis of Will dated 16-3-1992 (Ex.P-2) ignoring the fact that the testator of the Will namely, Noor Mohammad was a Sunni Mohammad governed by Hanifi law and by virtue of Rules 117 and 118 of the Sunni Hanifi 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."?"

5. The brief facts, as reflected from the plaint averment, are that the plaintiff has filed Civil Suit No. 13A/2002 before Civil Judge Class-II, Baikunthpur, District- Korea (C.G.) for declaration and possession mainly contending that defendants No. 1 to 4 are Sunni Mahomedan and they are governed by Sunni Hanifi Law whereas, defendants No. 5 & 6 are Hindus and they are governed by Hindu Law. It has been contended that the agricultural land bearing Khasra No. 685, 782, 920 area

admeasuring 0.25, 0.10 & 0.65 R.A. respectively is situated at Village- Targawan, Patwari Halka No. 24, Revenue Circle- Patana (Suit Property) belonging to Late Noor Mohammad S/o Radhan Ali. Late Noor Mohammad was residing in the house built up in the suit property and doing agricultural work. Noor Mohammad expired on 29.08.1992 and his wife expired prior to his death. He died issue-less. It has been further contended that due to old age, he was unable to look after agricultural work, therefore, in the year 1989, he kept the plaintiff to look after him as well as to take care of his agricultural work. The plaintiff was living with Late Noor Mohammad with his wisdom. The plaintiff is nephew of Late Noor Mohammad.

6. It has also been further contended that looking to the care taken by the plaintiff, in the month of March, 1990, Late Noor Mohammad shown his intention in presence of prominent persons of Village- Targawan that he intends to make the plaintiff as his legal heir and intended to transfer his movable and immovable property in the name of the plaintiff for that he is willing to execute a Will. It has been further contended that on 23.03.1990, Late Noor Mohammad has expressed before Patel & Panch of Village- Targawan, Sarpanch of Village- Kasra, the then Sarpanch and citizen that he became old and ill, the plaintiff is looking after him for the last one year, therefore, being satisfied with the care taken by the plaintiff, he is handing over his immovable property i.e. house and the land area admeasuring 2.82 acres to the plaintiff and a Will was executed to that effect in stamp paper of Rs. 10/-. Late Noor Mohammad has executed the Will in favour of the plaintiff on his own wisdom and put his thumb impression on the stamp paper on his own wisdom. The Will was written by Secretary of Gram Panchayat-Kasra namely Jaiprakash on 23.03.1990. The plaintiff was appointed as executant of the Will by Late Noor Mohammad. It has been specifically mentioned in the Will that on 16.03.1992, he has executed the Will in favour of Jasimuddin who is not

looking after him, therefore, the said Will is cancelled from today itself.

7. It has been further contended that as per the Will executed in favour of the plaintiff, he became legal owner of the entire property owned by Late Noor Mohammad. Defendants No. 1 & 2 have no right over the suit property. Despite this, they mutated the entire property in their name on 13.09.1992 with collusion with revenue officer without intimating to the plaintiff. After knowing this fact, the plaintiff received certified copy of order dated 13.09.1992 with regard to the mutation proceeding from revenue department and against that order, the plaintiff filed an appeal before the Court of Sub Divisional Officer, Baikunthpur. It has been further contended that since defendants No. 1 to 4 are not in possession of the suit property, therefore, decree of possession may kindly be confirmed in favour of the plaintiff.

8. It has been further contended that on 29.10.1992, defendants No. 1 to 4 have sold the suit property bearing Khasra No. 650 & 920 area admeasuring 0.25 & 0.65 respectively to defendants No. 5 & 6 through registered sale-deed. Defendants No. 5 & 6 are well aware of the fact that defendants No. 1 to 4 are not owner of the property, despite that they have executed the sale-deed in less market value. It has been further contended that defendants No. 5 & 6 have purchased the land and mutated the same, but could not get possession from defendants No. 1 to 4 because they were never in possession of the land. It has been further contended that the plaintiff may kindly be declared as owner of the land as mentioned at paragraph 2 of the plaint.

9. Defendants No. 1 to 4 have not filed their written statement and they were proceeded exparte before the trial Court. Defendants No. 5 & 6 have filed their written statement mainly contending that Late Noor Mohammad was issue-less and it has been denied that the plaintiff was taking care of Noor Mohammad. It has also been denied that the Will has been executed in favour of the plaintiff and the said Will is forged, fabricated and without

any authority. It has also been denied that the plaintiff is owner of the suit property after death of Noor Mohammad. The suit property was recorded in the name of defendants No. 1 to 4 and as per the succession right, it has been transferred in their favour. After that they have sold the suit property and presently defendants No. 5 & 6 are title holder of the suit property. It has also been denied that defendants No. 1 to 4 are not in possession of the suit property and all the adverse allegation made in the plaint has also been vehemently denied by defendants No. 5 to 6.

10. It has been further contended that after death of Noor Mohammad, the revenue officer has recorded name of defendants No. 1 to 4 by due process of law and by publishing notice in newspaper and there was no objection, thereafter as per the procedure of law, their names have been mutated on 13.09.1992. The plaintiff has never raised any objection on the transfer of mutation before competent revenue officer. Defendants No. 1 to 4 are real successors of Late Noor Mohammad as they are sons of real brother of Noor Mohammad namely Abdul & Jurhul, whereas the plaintiff has no blood relation with Late Noor Mohammad, therefore, he cannot fall within category of successor or legal heirs of Noor Mohammad. The plaintiff is stranger and he is claiming title on the basis of forged documents i.e. Will.

11. It has been further contended that as per Section 117/118 of the Sunni Hanifi Law, the executant of the Will with the consent of legal heirs can execute entire share through Will otherwise without consent of legal heirs, the Will for entire property has been executed, is illegal. It has been further contended that as per provisions of law, the executant of Will cannot execute the Will for more than 1/3rd share of his property. If the same has been done, it is required the consent of all the legal heirs. It has been contended that the Will has to be executed the property after providing funeral expenses of executant. The Will has to be

established as per the law, but the pleading which has been made by the plaintiff, does not indicate that the Will has been executed as per Sunni Hanifi Law, therefore, on the basis of Will, the plaintiff has no right and interest, the Will is *void ab initio*. After death of Late Noor Mohammad, all the properties were mutated in the name of defendants No. 1 to 4 and same has been purchased by defendants No. 1 to 4 from defendants No. 5 & 6 by registered sale-deed dated 29.10.1992 which is valid document. On the basis of registered sale-deed, defendants No. 5 & 5 are in possession of the suit property. As per the revenue record, defendants No. 1 to 4 are ostensible owner of the suit property, they have paid the sale consideration and they are the bonafide purchaser of the property. Hence, it is prayed for dismissal of the suit.

12. On pleadings of the parties, the trial Court has framed as many as six issues. To substantiate the case, the plaintiff examined himself as PW-1, Mohammad Ali (PW-2), Amar Singh (PW-3) & Mannu Lal (PW-4) and exhibited documents namely Will (P/1), registered Will (P/2), Mutation registered (P/3) & B-1 (P/4). In the cross-examination, the plaintiff has submitted that Late Noor Mohammad is his grand maternal father. The plaintiff has admitted that the Will has been executed as he is looking after Noor Mohammad for last two years, therefore, Noor Mohammad has executed Will in his favour. He has also admitted that he has called Amar Singh, Patel and Jethu who at relevant time was Sarpanch of Village- Targawan. He has also admitted that when all the persons were present at Panchayat, then he said that Noor Mohammad had told him that he intended to execute Will in favour of the plaintiff, then the Will was written.

13. Mohammad Ali (PW-2) has stated that Noor Mohammad has called him and told him that he intended to execute Will. He also stated that he is intended to cancel the earlier Will, which was written by him. He has admitted that the Will has not been written by Sattar Ali, but Noor Mohammad has written the Will.

He has also admitted that Sattar Ali is his neighbour and they were used to visiting each other house occasionally.

14. Amar Singh (PW-3) has admitted that if he is not able to say that the document in which he has put signature, writing work was done or not.

15. Mannu Lal (PW-4) stated before the trial Court that Noor Mohammad was old and unable to move. He has stated in his cross-examination that Noor Mohammad was unable to move and unable to travel beyond his residential house. He has also admitted that 4-5 months of execution of the Will, Noor Mohammad expired.

16. To substantiate the case, defendant examined himself as DW-1, Bhagirathi (DW-2). The Defendant (DW-1) examined before the trial Court wherein she has stated that no Will was executed by Noor Mohammad on 23.03.1990 & 16.03.1992 in favour of Sattar Ali. She has stated that she is aware about Noor Mohammad and his family. She is aware that Raghan Ali was father of Noor Mohammad. She has stated that Noor Mohammad has four brothers, out of which she knew about three brothers and she is not aware about fourth brother of Noor Mohammad. She has stated that wife of Noor Mohammad was her grand-mother, but this fact has not been mentioned in the written statement. She has admitted that she is saying this for first time. She has stated that Sattar Ali was not doing agricultural work in the lifetime of Noor Mohammad. She has denied that Late Noor Mohammad has executed any Will in favour of Sattar Ali. She has admitted that at the time of mutation, she has not given any notice to Sattar Ali.

17. Bhagirathi (DW-2) was examined before the trial Court wherein he has stated that grand-son of Noor Mohammad namely Jasim, Baiju & others were residing with him and they were looking after Noor Mohammad and his agricultural work. Plaintiff- Sattar Ali was neither doing agricultural work nor residing with Noor Mohammad and he was not looking after Noor Mohammad. He

has stated that Noor Mohammad has never stayed with Sattar Ali. He has also stated that Noor Mohammad has neither called any panchayat in lifetime nor executed any Will in his favour. It has been further contended that after death of Noor Mohammad name of Jasimuddin & others have been recorded. He has also stated that he has never seen Sattar Ali doing agricultural work in the land of Noor Mohammad.

18. Learned trial Court after appreciating the evidence, material on record has recorded its finding that the document Ex.P/1 & P/2 were forged and fabricated. Learned trial Court while deciding issue No. 3 with regard to validity of the execution of Will has recorded its finding that the witness has admitted in his evidence that Noor Mohammad has executed Will with regard to which property is not clear to him. He has also admitted that the Will was executed on 16.03.1992 and in the office of Registrar, the sign and registration date has been mentioned as 17.03.1992, which is suspicious circumstances, as such, it has been recorded finding that the Will is forged and fabricated, therefore, the plaintiff is not entitled to get any declaration and the suit was dismissed.

19. Against the dismissal of the suit, plaintiff has preferred appeal before the District Judge, Korea, District- Baikunthpur which was registered as Civil Appeal No. 07A/2006. Learned District Judge vide its judgment and decree dated 20.09.2007 has allowed the appeal by recording finding that there is no suspicious circumstances prevailing at the time of execution of Will and the Will has been proved by evidence of attesting witness, therefore, the judgment and decree passed by the trial Court has been set aside and it has been held that the plaintiff is title holder of the suit property and his possession over the suit property has also been affirmed.

20. Being aggrieved by the judgment and decree passed by the First Appellate Court, defendants No. 5 & 6 have preferred this second appeal, which has been admitted for hearing by this

Court framing the substantial question of law as extracted above.

21. It is not in dispute that the execution of Will is Sunni Muslim Sect is governed by Hanifi Law. Since all the substantial questions of law are interconnected, therefore, they are being deciding analogously. Before examining the Will under Mahomedan Law, it is expedient for this Court to understand the requisite conditions for a valid Will. Chapter IX of Mulla's Principles of Mahomedan Law, deals Will and Section 115 provides for the person capable of making Wills. Section 116 provides that the forms of Will is immaterial. Section 117 provides for bequest of heirs & Section 118 provides limit of testamentary power. Sections 115, 116, 117 & 118 are as under:-

> "**115. Persons capable of making wills**- Subject to the limitations hereinafter set forth, every Mahomedan of sound mind and not a minor may dispose of his property by will.
>
> **116. Form of will immaterial**- A will (Vasiyat may be made either verbally or in writing.
>
> **117. Bequests to heirs**- A bequest to an heir is not valid unless the other heirs consent to the bequest after the death of the testator (l). Any single heir may consent so as to bind his own share (m).
>
> **118. Limit of testamentary power**- 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 (e)."

22. From the above stated provisions, it is quite vivid that following conditions must be filled up for a valid Will executed by Mahomedan.

(a) A bequest may be executed by any Muslim to another including institution and a class of people.

(b) The persons entitled to make or take a Will must have capacity to make or take a Will.

(c) A bequest must be made of some subject.

(d) Formalities of making a Will must be fulfilled.

(e) Only one-third property can be bequeathed.

(f) Bequest to heirs is restricted.

(g) Conditional contingent and future bequest are void.

23. The essentials of a valid Will have been explained in a very lucid manner by Hon'ble High Court of Patna in **Abdul Manan Khan Vs. Murtuza Khan**[1], as under:-

(i) Any Mahomedan having a sound mind and not a minor, may make a valid will to dispose of the property.

(ii) So far as a deed of will is concerned, no formality or a particular form is required in law for the purpose of creating a valid will. An unequivocal expression by the testator serves the purpose.

(iii) A bequest in favour of an heir is invalid unless the other heirs consent to it after the testator's death. For the purpose of giving effect to a will whereby a testator has bequeathed more than 1/3rd interest either to a testator or to a heir, consent is required in relation thereto of the heirs only after the death of the testator. Thus even a consent by the heirs of the testator during his lifetime in such a case does not sub-serve the requirement of law. For these reasons only, a provision has been made to obtain consent of the heirs after the death of the testator; if by reason of a will more than 1/3rd of the properties is sought to be bequeathed to an outsider, and to any extent to a heir.

24. Hon'ble the High Court of Karnataka in **Narunnisa Vs. Shek Abdul Hamid**[2], has held at paragraph 15 & 16 as under:-

> “15. We find it difficult to approve this reasoning. Assuming that express consent is not the requirement of law, nevertheless, the implied consent can be inferred only by some act or dealings in respect of the property, which is sought to be bequeathed. In Mullas Book, referred to

1 AIR 1991 Pat. 154 at 159, 16 & 161
2 AIR 1987 Kant 222 at 225-226

above, we find the following :

> "Silence not consent : Where a Will contained a bequest excluding the female heirs and mutation of names took place, it was held that consent of the heirs could not be implied from mere silence on their part at the mutation proceedings." (Page 138).

16. It appears, to us neither inaction nor silence can be the basis of implied consent. If the 5th defendant's actions were such by which such inference could be drawn there may be justification to imply consent. Without-being exhaustive, if in some proceedings, pertaining to property in dispute, say, before the revenue authorities or other similar authorities, the fifth defendant had given any statement or held out a belief that she had relinquished her rights that material may afford a basis for implied consent. Or if for a number of years, she has kept herself silent, watching the enjoyment of share, under her nose or actively supporting first defendant's enjoyment that may afford a situation to draw an inference. But to defeat the legal right on the sole ground that she has remained absent cannot be countenanced. It would be fallacious and unjust, if an illiterate pardanashin lady's rights are allowed to be defeated solely on the ground of her absence from the proceedings, which act may be innocent and cannot be attributed to her knowledge or termed as deliberate. She may not know the consequences of her remaining absent : her financial position may be such that she may not be in a position to engage a Counsel and take part in the proceedings. These possibilities cannot be ruled out. Unless strong circumstances exist and conclusion becomes inevitable consent cannot be implied.

25. Hon'ble High Court Madras in **Noorunissa Vs. Rahaman Bi & others**[3], has held at paragraph 13 as under:-

> "13. In support of the abovesaid views that the testator or testatrix cannot bequeath more than one-third share of his own assets the following legal positions are taken into consideration:
>
> (i) In Chapter XXIII of Mohammadan Law of Wills Second Edition 1965, by T.R. Gopalakrishnan, under the head Limits of testamentary power in Mohammadan Law, it has been commented that the power of Mohammadan to dispose of by Will is

3 (2001) 3 MLJ 141

circumscribed in two ways and the first limit is to the extent. A Mohammadan. can validly bequeath only one third of his net assets, when there are heirs. This rule is based on a tradition of the prophet and the Courts in India have enforced the rule from early times. The object of this rule is to protect the rights of the heirs and where there is no heirs and when all the heirs agree and give their consent the one-third limit may be exceeded. While the rule is that a muslim can bequeath only one third of his assets, a bequest in excess of one third is rendered valid by the consent of the heirs whose rights are infringed thereby or where there are no heirs at all.

(ii) Sec. 189 in Chapter XIII of Mohammedan Law deals with Bequest to heirs. A bequest to an heir is not valid except to the extent to which the persons who are the heirs of the testator at the time of his death, expressly or impliedly consent to the bequest after his death. It is evident from the abovesaid section of Mohammedan Law that while it permits the making of a Will to a limited extent in favour of stranger or strangers, it does not allow undue preference being given to a particular heir or heirs and be quest to such heir or heirs without the consent of other heirs. It is also evident from the abovesaid provision of law that bequest to an heir or heirs without the consent of other heirs Will be altogether invalid. It is also evident from Sec. 195 of the Mohammedan Law that testator may revoke a bequest at any time either expressly or impliedly.

(iii) In Bayabai v. Bayahai and another, A.I.R. 1942 Bom. 328 (2), it has been held by His Lordship Chagla, J. as follows:

> Under Sunni Mahammedan Law, by which the parties are governed, there is a two fold restriction on the testamentary capacity of a testator. He cannot dispose more than one-third of his property, and even with regard to that one-third he cannot bequeath it to his heirs. In this case the deceased had purported to dispose of the whole of his estate, and all the affective bequests made by him are in favour of his heirs. These bequests could have been validated by the consent of the heirs after the death of the testator.

(iv) In Yasim Imambhai Shaikh (deceased by L.Rs.) v. Hajarabi and others, A.I.R. 1986 Bom. 357, it has been held as follows: A Mohammedan cannot by Will dispose of more than 1/3rd of the surplus of his estate after payment of funeral expenses and debts. That bequest in excess of 1/3rd cannot take effect, unless the heirs consent thereto after the death of testator.

(v) The learned counsel for the plaintiff has brought to the notice of this Court the decision reported in Valashiyil Kunhi Avulla and others v. Eengayil Peetikayil Kunhi Avulla and others, A.I.R. 1964 Ker. 200 for deciding the dispute between the parties. In that case the properties of a Mohammedan 'M' were divided between his sons 'A', 'B', 'C', 'D', and 'E', 'D' and 'E' were allotted more shares than what they were entitled to. In that deed of partition it was mentioned that if any property of 'M' was omitted to be included in the said document for division, 'A', 'B' and 'C' alone will be entitled to divide the such properties between themselves and not 'D' and 'E' as they were already allotted more properties than what they were entitled to. For division of some other properties omitted to be considered at the time of partition, 'D' and 'E' filed a suit and the said suit was resisted relying on the clause in the partition deed wherein claim for omitted property was given only to 'A', 'B' and 'C' and not to 'D' and 'E' In that case it was held as follows:

> The bequest to A, B, C by M in respect of the aforesaid properties not having been consented to after his death by the other heirs, viz., D and E was not valid under Mohammedan Law.
>
> The relinquishment or the agreement to relinquish by the D and E being within the mischief of Sec. 23 of the Contract Act read with Sec. 6(a) of the Transfer of property Act was void and D and E were bound by them. As D and E had nothing to give nor to give up but only to take, they could not be said to have been parties to a family arrangement.

(vi) In Rahumath Ammal and another v. Mohammed Mydeen Rowther and others, (**1978) 2 M.L.J. 499**, a Division Bench of this Court has held as follows:

> The bequest to an heir coupled with a bequest to a non-heir has to be reconciled as far as possible and the totality of the instrument cannot, on a hypertechnical ground be rejected in toto. If this is the method by which such an instrument has to be understood and interpreted, then it should be held that the bequest to the first

> defendant, who is an heir in this case, is not valid, because it is against the personal law, but in so far as the bequest to a non-heir, namely, the second defendant is concerned, it would be operative to the extent of a third of the estate of Seeni Rowther.
>
> The principles laid down with regard to bequeathing of property of a Mohammedan would clearly go to show that a Mohammedan cannot bequeath more than one third of his property and even with regard to that one third he cannot bequeath it to his heirs. If the bequest is to an heir it can be validated by the consent of all the heirs after the death of the testator. It is also clear that bequest in excess of one third of estate cannot take effect unless such bequest is consented by heirs after the death of the testator. In this case, the bequest under Ex.B-2 is only in favour of the heirs of late Mohammed Ali Maraicair and the 1st defendant. Except the beneficiaries under the said Will, other heirs have not consented for such bequeath after the death of late Mohammed Ali Maraicair. It is relevant to point out at this stage that the 1st defendant who is one of the testatrix of Ex.B-2 is still alive and she has alienated part of the property included in the Will Ex.B-2, immediately after the death of her husband, late Mohammed Ali Maraicair. That will also lead to infer that the Will has been cancelled impliedly by the act of the 1st defendant."

26. Hon'ble High Court of Karnataka in case of **Sri. Mohammed Ashraf Vs. Smt. Tabbasum**[4], has examined Section 117 of the Mahomedan Law and has held at paragraph 13 as under:-

> "13. On the other hand, the trial Court has committed a serious error in not noticing the mandatory provisions of Sec. 117 of the Muslim Law more particularly explained in the case of *Narunnisa* by this Court. In this view of the matter, only 1/3 share will go to Tabassum and the remaining 2/3 will go to Ashraff. Hence, the trial Court's approach is incorrect and not according to the mandatory provisions of Muslim Law."

27. Now coming to the facts of the case, the deceased Noor Mohammad expired issueless and the defendants No. 1 to 4 were sons of brothers, therefore, they fall within the ambit of residuary as per Category III descendants of a father and fall within Clause IX i.e. Full Brother's son. The defendants in their

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written statement has categorically pleaded that they are sons of brother of Noor Mohammad and this fact has never been denied by the plaintiff. On the contrary, during evidence DW-1 i.e. defendant No. 5 has in clear terms stated in her evidence that Noor Mohammad has four brothers, she is aware of three brothers and Jasimuddin and three other defendants are his brother's son. She has also stated that what is relation between the plaintiff and Noor Mohammad is not known to her. She has also denied that Sattar Ali was looking after Noor Mohammad. Since defendants No. 1 to 4 are the residuary as defined in Section 65 and there is no sharer of Noor Mohammad, therefore, residuaries are entitled to inherent the property. Section 65 of the Mahomedan Law is extracted below:-

> "**65. Residuaries**- If there are no Sharers, or if there are Sharerr, but there is a residue left after satisfying their claims, the whole inheritance or the residue as the case may be, devolves upon Residuaries in the order set forth in the annexed table (p. 54A)."

28. In the present case, no consent from the other residuaries in absence of sharers has been obtained, therefore, the Will has not been executed as per the procedure provided under the Mahomedan Law. The learned First Appellate Court while allowing the appeal has recorded the finding that the Will has been proved beyond doubt by the evidence of attesting witness as well as plaintiff witness. Learned trial Court recorded a finding that no suspicious circumstances is available against the Will which is perverse and contrary finding as the defendants in their written statement before the trial Court clearly pleaded that the Will has been executed ignoring the provisions of Mahomedan Law, therefore, the Will is not a valid Will. Learned First Appellate Court has not considered the provisions of Mahomedan Law and the pleadings made by the defendants in their written statement more precisely paragraph 25 of the written statement wherein the defendants have taken defence of non-compliance of Mahomedan Law, as such, the finding

recorded by the First Appellate Court that the Will duly executed is contrary to the law and accordingly, the judgment and decree passed by the First Appellate Court deserves to be set aside. Thus, the substantial questions of law framed by this Court is answered in favour of the appellant by recording a finding that the Mahomedan cannot by Will dispose of more than a third of his estate after payment of funeral expenses and debts.

29. Similarly, the substantial question No. 1 is answered in favour of the appellant.

30. On substantial question of law No. 3, it is quite vivid that the plaintiff in his evidence has categorically admitted in his evidence that he has called the witness Amar Singh, Patel and Jethuram who was Sarpanch of Dabripara, when all these persons were gathered then he has got the Will executed. This shows that the Will has been written on the instance of the plaintiff, which is sufficient to establish that the Will is not free Will and suspicious circumstances are available on record. Thus, it is held that the Will (Ex.P/2) is suspicious document and accordingly the appeal is allowed.

31. Accordingly, the instant Second Appeal is allowed and the judgment and decree dated 20.09.2007 passed by First Appellate Court i.e. District Judge, Korea (Baikunthpur)(C.G.) in Civil Appeal No. 07A/2006 is set aside and the judgment and decree dated 29.03.2005 passed by the trial Court i.e. Civil Judge Class-II, Baikunthpur, District- Korea (C.G.) in Civil Suit No. 13A/2002 is restored for different reasons mentioned hereinabove.

32. A decree be drawn up accordingly.

Sd/-
(Narendra Kumar Vyas)
Judge

Arun

HEAD-NOTE

A Mahomedan cannot execute Will for more than 1/3rd share of his property without consent of all the legal heirs.

एक मुस्लिम अपनी संपत्ति का एक तिहाई से अधिक भाग का वसीयत समस्त उत्तराधिकारियों की सहमति के बिना निष्पादित नहीं कर सकता है।