REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 5158 OF 2013

MOHAMMED SALIM (D) THROUGH LRS. & ORS. ..APPELLANTS

VERSUS

SHAMSUDEEN (D) THROUGH LRS. & ORS. ..RESPONDENTS

J U D G M E N T

MOHAN M. SHANTANAGOUDAR, J.

The judgment dated 05.09.2007 passed in S.A. No. 693 of 1994 by the High Court of Kerala at Ernakulam is the subject matter of this appeal. By the impugned judgment, the High Court set aside the judgment of the District Court, Thiruvananthapuram dated 12.07.1994 passed in AS No. 264/1989 and restored the judgment and decree passed in O.S. No. 144/1984 by the Additional Sub Court, Thiruvananthapuram dated 17.07.1989.

2. The facts leading to this appeal are that a suit for partition and possession of 14/16th share in the Plaint Schedule 'A' property and half the rights over Plaint Schedule 'B' property was filed by the Respondent No. 1 herein (original plaintiff). Defendant No. 1 in the suit, Mohammed Idris, is the brother of Mohammed Ilias, the father of the plaintiff, and Defendant Nos. 2 to 7 are the children of Mohammed Idris. Both the plaintiff's father and Defendant No. 1 are the sons of Zainam Beevi, who expired in 1955. Both Plaint properties belonged to her. Plaint Schedule 'A' property was gifted to Mohammed Ilias, based on a gift deed executed by Zainam Beevi.

The case of the plaintiff is that Defendant No. 8 namely Saidat, was the first wife of Mohammed Ilias, and no issue was born out of the said wedlock. Thereafter, Mohammed Ilias married Valliamma in 1120 M.E. (as per the Malayalam Calendar, which corresponds to 1945 AD in the Gregorian system). Valliamma was a Hindu at the time of her marriage with Mohammed Ilias. Both Mohammed Ilias and Valliamma lived together as husband and wife at Thiruvananthapuram. Later, Valliamma was renamed Souda Beebi. Out of the said wedlock, Shamsudeen (the plaintiff) was born. Subsequent to the death of

Mohammed Ilias in 1947 AD, Valliamma (Souda Beebi) married Aliyarkunju.

The plaintiff claimed that he was the only son of Mohammed Ilias and on his death, he became entitled to 14/16th of the share in Schedule 'A' property. He also claimed half the share in Schedule 'B' property through inheritance after the demise of Zainam Beevi, as the same would have devolved upon the plaintiff, being the son of the predeceased son of Zainam Beevi, and Mohammed Idris, Defendant No. 1, being the only surviving son of Zainam Beevi. Hence, the suit was filed.

3. It is the case of the defendants that Valliamma was not the legally wedded wife of Mohammed Ilias and that she was a Hindu by religion at the time of marriage. She had not converted to Islam at the time of her marriage, and thus the plaintiff being the son of Valliamma, is not entitled to any share in the property of Mohammed Ilias. It is their further case that Mohammed Ilias had died two years prior to the birth of the plaintiff.

4. As mentioned supra, the trial Court decreed the suit and the first appellate Court allowed the appeal and dismissed the suit by setting aside the judgment and decree of the trial Court. However, the High Court by the impugned judgment set aside the

judgment passed by the first appellate Court and confirmed the judgment and decree passed by the trial Court. Hence, the instant appeal was filed by the original defendants and the legal representatives of those among them who have since died.

5. Mr. Guru Krishnakumar, learned Senior Counsel, taking us through the material on record, submitted that the Trial Court and the High Court were not justified in decreeing the suit, inasmuch as the plaintiff himself had admitted that he was born in the year 1949, whereas his alleged father Mohammed Ilias expired in the year 1947. Therefore, the plaintiff could not be treated as the son of Mohammed Ilias. He further submitted that since Valliamma was a Hindu by religion, she would not have any right over the property of Mohammed Ilias, and consequently the plaintiff would not get any share in the property of Mohammed Ilias.

6. It is not in dispute that Zainam Beevi gifted Plaint Schedule 'A' property to her son Mohammed Ilias. In view of the gift deed in favour of Mohammed Ilias, upon his death, Schedule 'A' property would have devolved upon his legal heirs as an absolute property as provided under Muslim law. Plaint Schedule 'B' property admittedly belonged to Zainam Beevi and

upon her death, it devolved on her legal heirs. Since Zainam Beevi had two sons, both the sons/their respective legal heirs would have inherited half a share each after the death of Zainam Beevi.

7. It is also not in dispute that Defendant No. 8, Saidat is the widow (first wife) of Mohammed Ilias. She has clearly admitted in her written statement that Mohammed Ilias married Valliamma, Defendant No. 9, and out of the said wedlock, the plaintiff was born. Exhibit A3 is the birth register extract of the plaintiff maintained by the statutory authorities, which indicates that the plaintiff is the son of Mohammed Ilias and Valliamma. It is a public document. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law in accordance with which such book, register or record is kept, is itself a relevant fact, as per section 35 of the Indian Evidence Act, 1872. Exhibit A3 being a public document is relevant to resolve the dispute at hand. Additionally, a specific pleading was found in the plaint that Mohammed Ilias and Valliamma were living together as husband and wife in House No.

T.C.13 of Poojappura Ward in Thiruvananthapuram, which has not been denied in the written statement of the defendants.

As per Exhibit A3 mentioned above, the plaintiff was born on 01.07.1124 M.E. (12.02.1949 as per the Gregorian Calendar) and the same has not been seriously disputed. Admittedly, Mohammed Ilias died on 10.09.1124 M.E. The said date corresponds to 22.04.1949 in the Gregorian Calendar, as seen from the Government Almanac, which cannot be disputed inasmuch as it is a public record maintained by the Trivandrum Public Library (Government of Kerala). Thus, it can be concluded that the plaintiff was born two months prior to the death of Mohammed Ilias.

Under these circumstances, in our considered opinion, the Trial Court and the High Court were justified in concluding, based on the preponderance of probabilities, that Valliamma was the legally wedded wife of Mohammed Ilias, and the plaintiff was the child born out of the said wedlock.

8. The High Court, in our considered opinion, was also justified in concluding that though the plaintiff was born out of a *fasid* (irregular) marriage, he cannot be termed as an illegitimate son of Mohammed Ilias. On the contrary, he is the legitimate son

of Mohammed Ilias, and consequently is entitled to inherit the shares claimed in the estate of his father. The High Court relied upon various texts, including Mulla's *Principles of Mahommedan Law* (for brevity "*Mulla*") and Syed Ameer Ali's *Principles of Mahommedan Law*, to conclude that Muslim law does not treat the marriage of a Muslim with a Hindu woman as void, and confers legitimacy upon children born out of such wedlock.

In the 21st edition of Mulla, at page 338, § 250, marriage is defined as follows:-

> "Marriage (*nikah*) is defined to be a contract which has for its object the procreation and the legalizing of children."

Thus it appears that a marriage according to Muslim law is not a sacrament but a civil contract. Essentials of a marriage are dealt with in § 252 at page 340 of Mulla (21st edition) as follows:

> "It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mohamedans. The proposal and acceptance must both be expressed at one meeting; a proposal made at one meeting and an acceptance made at another meeting do not constitute a valid marriage. Neither writing nor any religious ceremony is essential."

§ 259(1) at page 345 of the 21st edition deals with difference of religion, providing that marriage of a Muslim man with a non-Muslim woman who is an idolatress or fire worshipper is not void, but merely irregular. It reads:

> "A Mahomedan male may contract a valid marriage not only with a Mahomedan woman, but also with a *Kitabia*, that is, a Jewess or a Christian, but not with an idolatress or a fire-worshipper. A marriage however, with an idolatress or a fire-worshipper, is not void, but merely irregular."

Before proceeding further, it is crucial to note that under Muslim law, there are three types of marriage—valid, irregular and void, which are dealt with in § 253 at page 342 of *Mulla* (21st edition):

> "A marriage may be valid (*sahih*), or irregular (*fasid*) or void from the beginning (*batil*)."

The High Court, while dealing with the contention that the correct translation of the Arabic word "*fasid*" was "invalid", and not "irregular", and that therefore a *fasid* marriage was a void marriage, considered the changes over time in the interpretation of "*fasid*". It would be worthwhile for us to refer to these changes as well. In the 6th edition of *Mulla*, at §§ 197, 199 and 200, *fasid*

marriage is interpreted as "invalid". So also in §§ 197, 199 and 204A of the 8th edition of *Mulla*, *fasid* is stated to mean "invalid". For instance, in the 6th edition of *Mulla*, § 200 at page 162, dealing with the difference of religion, reads:

> "(1) A Mahomedan male may contract a valid marriage not only with a Mahomedan woman but with a *Kitabia*, that is, a Jewess of a Christian, but not with an idolatress or a fire-worshipper. If he does marry an idolatress or a fire-worshipper the marriage is not void (*batil*), but merely **invalid** (*fasid*)."
>
> (emphasis supplied)

§ 204A at page 164 of the same edition deals with the distinction between void (*batil*) and invalid (*fasid*) marriage. It provides that a marriage which is not valid may be either void (*batil*) or invalid (*fasid*). A void marriage is one which is unlawful in itself, the prohibition against such a marriage being perpetual and absolute. An invalid marriage (*fasid* marriage) is described as one which is not unlawful in itself, but unlawful "for something else", as here the prohibition is temporary or relative, or when the invalidity arises from an accidental circumstance such as the absence of a witness. § 204A(3) at page 165 of the 6th edition of *Mulla* reads:

> "…Thus the following marriages are ***invalid***, namely—
> (a) a marriage contracted without witnesses, (ss. 196-197);
> (b) a marriage by a person having four wives with a fifth wife (s. 198);
> (c) a marriage with a woman who is the wife of another, (s. 198A);
> (d) a marriage with a woman undergoing *iddat* (s.199);
> **(e) a marriage prohibited by reason of difference of religion (s. 200);**
> (f) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (s. 204)…"
>
> (emphasis supplied)

The reason why the aforesaid marriages are invalid and not void has also been provided later in the same paragraph. With respect to marriages prohibited by reason of difference of religion, it is stated thus:

> "…in cl. (e) the objection may be removed by the wife becoming a convert to the Mussulman, Christian or Jewish religion, or the husband adopting the Moslem faith…"

In the 10th edition, a change has been made to the meaning of *fasid* marriage. In § 196A, valid, irregular and void marriages are dealt with. It reads:

> "A marriage may be valid (*sahih*) or **irregular** (*fasid*), or void from the beginning (*batil*)."
>
> (emphasis supplied)

From the 10th edition onwards, *fasid* marriage has been described as an irregular marriage, instead of invalid, but there has been no change with regard to the *effect* of a *fasid* marriage from the 6th edition onwards. The effects of an invalid (*fasid*) marriage have been dealt with in the 6th edition of *Mulla* at § 206 at page 166, clauses (1) and (2) of which read:

> "(1) An invalid marriage has no legal effect before consummation.
>
> (2) If consummation has taken place, the wife is entitled to dower ["proper" (s. 220) or specified (s. 218), whichever is less], and children conceived and born during the subsistence of the marriage are legitimate as in the case of a valid marriage. But an invalid marriage does not, even after consummation, create mutual rights of inheritance between the parties."

In the 8th edition of *Mulla*, the effects of a *fasid* marriage have been dealt with in § 206 at page 173. As in the 6th edition, it is stated that children conceived and born during the subsistence of a *fasid* marriage are legitimate, as in the case of a valid marriage. As noted supra, the same position has been followed in the subsequent editions also, except that *fasid* has been described as "irregular" from the 10th edition onwards rather than as "invalid".

Irrespective of the word used, the legal effect of a *fasid* marriage is that in case of consummation, though the wife is entitled to get dower, she is not entitled to inherit the properties of the husband. But the child born in that marriage is legitimate just like in the case of a valid marriage, and is entitled to inherit the property of the father.

9. Evidently, Muslim law clearly distinguishes between a valid marriage (*sahih*), void marriage (*batil*), and invalid/irregular marriage (*fasid*). Thus, it cannot be stated that a *batil* (void) marriage and a *fasid* (invalid/irregular) marriage are one and the same. The effect of a *batil* (void) marriage is that it is void *ab initio* and does not create any civil right or obligations between the parties. So also, the offspring of a void marriage are illegitimate (§ 205A of the 6th and 8th editions and §§ 205A of the 10th edition, and 266 of the 18th edition of *Mulla*). Therefore, the High Court correctly concluded that the marriage of Defendant No. 9 with Mohammed Ilias cannot be held to be a *batil* marriage but only a *fasid* marriage.

10. We find that the same position has been reiterated in the 21st edition of *Mulla* as follows. The distinction between void and irregular marriages has been dealt with in § 264 at page 349:

> "(1) A marriage which is not valid may be either void or irregular.
>
> (2) A void marriage is one which is unlawful in itself, the prohibition against the marriage being perpetual and absolute. Thus, a marriage with a woman prohibited by reason of consanguinity (§260), affinity (§261), or fosterage (§262), is void, the prohibition against marriage with such a woman being perpetual and absolute.
>
> (3) An irregular marriage is one which is not unlawful in itself, but unlawful 'for something else,' as where the prohibition is temporary or relative, or when the irregularity arises from an accidental circumstance, such as the absence of witnesses. Thus the following marriages are irregular, namely —
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> (*a*) a marriage contracted without witnesses (§ 254);
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> (*b*) a marriage with a fifth wife by a person having four wives (§ 255);
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> (*c*) a marriage with a woman undergoing *iddat* (§ 257);
>
> (*d*) ***a marriage prohibited by reason of difference of religion*** **(§ 259)**;
>
> (*e*) a marriage with a woman so related to the wife that if one of them had been a male, they could not have lawfully intermarried (§ 263).

The reason why the aforesaid marriages are irregular, and not void, is that in Clause (*a*) the irregularity arises from an accidental circumstance; in Clause (*b*) the objection may be removed by the man divorcing one of his four wives; in Clause (*c*) the impediment ceases on the expiration of the period of *iddat*; ***in Clause (d) the objection may be removed by the wife becoming a convert to the Mussalman, Christian or Jewish religion, or the husband adopting the Moslem faith;*** and in Clause (*e*) the objection may be removed by the man divorcing the wife who constitutes the obstacle; thus if a man who has already married one sister marries another, he may divorce the first, and make the second lawful to himself."

(emphasis supplied)

The effect of an irregular (*fasid*) marriage has been dealt with in § 267 at pages 350-351 of the 21st edition of *Mulla* as follows:

"267. *Effect of an irregular (fasid) marriage*.—(1) An irregular marriage may be terminated by either party, either before or after consummation, by words showing an intention to separate, as where either party says to the other "I have relinquished you". An irregular marriage has no legal effect before consummation.

(2) If consummation has taken place—

(*i*) the wife is entitled to dower, proper or specified, whichever is less (§ 286, 289);

(*ii*) she is bound to observe the *iddat*, but the duration of the *iddat* both on divorce and death is three course (see § 257(2));

(*iii*) ***the issue of the marriage is legitimate***. But an irregular marriage, though consummated, does not create mutual rights of inheritance between husband and wife…"

(emphasis supplied)

The Supreme Court, in ***Chand Patel v. Bismillah Begum***, (2008) 4 SCC 774, while considering the question of the validity of a marriage of a Muslim man with the sister of his existing wife, referred to the above passages from *Mulla* (from an earlier edition, as reproduced in the 21st edition) while discussing the difference between void and irregular marriages and the effects of an irregular marriage.

11. In Syed Ameer Ali's *Mohamedan Law* also, the same principle has been enunciated. The learned author, while dealing with the issue of the legitimacy of the children, observed at page 203 of Vol. II, 5th edition:

"The subject of invalid marriages, unions that are merely invalid (fasid) but not void (batil) ab initio under the Sunni Law, will be dealt with later in detail, but it may be stated here that the issue of invalid marriage are without question legitimate according to all the sects.

> For example, if a man were to marry a non-scriptural woman, the marriage would be only invalid, for she might at any time adopt Islam or any other revealed faith, and thus remove the cause of invalidity. The children of such marriage, therefore, would be legitimate."

Tahrir Mahmood in his book *Muslim Law in India and Abroad*, (2nd edition) at page 151 also affirms that the child of a couple whose marriage is *fasid*, i.e., unlawful but not void, under Muslim law will be legitimate. Only a child born outside of wedlock or born of a *batil* marriage is not legitimate.

A.A.A. Fyzee, at page 76 of his book *Outlines of Muhammadan Law* (5th edition) reiterates by citing *Mulla* that the *nikah* of a Muslim man with an idolater or fire-worshipper is only irregular and not void. He also refers to Ameer Ali's proposition that such a marriage would not affect the legitimacy of the offspring, as the polytheistic woman may at any time adopt Islam, which would at once remove the bar and validate the marriage.

12. The position that a marriage between a Hindu woman and Muslim man is merely irregular and the issue from such wedlock is legitimate has also been affirmed by various High Courts. (See

Aisha Bi v. Saraswathi Fathima, (2012) 3 LW 937 (Mad), ***Ihsan Hassan Khan v. Panna Lal*,** AIR 1928 Pat 19).

13. Thus, based on the above consistent view, we conclude that the marriage of a Muslim man with an idolater or fire-worshipper is neither a valid (*sahih*) nor a void (*batil*) marriage, but is merely an irregular (*fasid*) marriage. Any child born out of such wedlock (*fasid* marriage) is entitled to claim a share in his father's property. It would not be out of place to emphasise at this juncture that since Hindus are idol worshippers, which includes worship of physical images/statues through offering of flowers, adornment, etc., it is clear that the marriage of a Hindu female with a Muslim male is not a regular or valid (*sahih*) marriage, but merely an irregular (*fasid*) marriage.

14. In this view of the matter, the trial Court and the High Court were justified in concluding that the plaintiff is the legitimate son of Mohammed Ilias and Valliamma, and is entitled to his share in the property as per law. The High Court was also justified in modifying the decree passed by the trial Court and awarding the appropriate share in favour of the plaintiff. No

issue has been raised before us relating to the quantum of share.

Accordingly, the appeal fails and stands dismissed.

.....J.
[N.V. Ramana]

.....J.
[Mohan M. Shantanagoudar]

New Delhi;
January 22, 2019.