2026:CGHC:5625

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

SA No. 195 of 2016

Judgment reserved on 28/01/2026

Judgment delivered on 02/02/2026

Smt. Jaibun Nisha Wd/o Late Abdul Sattar Lodhiya, Aged About 64 Years R/o Rani Road, Purani Basti Korba, Tahsil And Distt. Korba, Chhattisgarh .....Plaintiff

... Appellant

versus

1 - Mohd. Sikandar S/o Gulam Mustafa, Aged About 27 Years R/o Main Road, Urga, Tahsil And Distt. Korba, Chhattisgarh

2 - The State Of Chhattisgarh, Through The District Collector, Korba, Chhattisgarh .....Defendants

... **Respondents**

For Appellant(s)	:	Mr. Parag Kotecha, Advocate
For Resp. No. 1	:	Ms. Meera Ansari, Advocate along with Mr. Aman Ansari, Advocate
For State/Resp. No. 2:		Mr. Anand Gupta, Dy. Govt. Advocate

Hon'ble Shri Bibhu Datta Guru, Judge

C A V Judgment

1. The present Second Appeal has been filed by the appellant/plaintiff under Section 100 of the Code of Civil Procedure, 1908, assailing the judgment and decree dated 28.01.2016 passed by the learned Second Additional District Judge, Korba (C.G.) in Civil Appeal No. 12-A/2015 (Smt. Jaibun Nisha vs. Mohd. Sikandar & Anr.), whereby the judgment and decree dated 07.02.2015 passed by the learned Civil Judge, Class-II, Korba (C.G.), in Civil Suit No. 20-A/2014 (Smt. Jaibun Nisha vs. Mohd. Sikandar & Anr.) has been affirmed. For the sake of convenience, the parties are referred to as per their status before the Trial Court.

2. The instant appeal was admitted by this Court on 17.08.2023 on the following substantial questions of law:

> *"(i) Whether both the Courts below were justified in shifting the burden of proof on the appellant/ plaintiff to establish the fact of genuineness of Will and consent given in respect to Will?*
> *(ii) Whether in the facts and circumstances of the case, Courts below were justified in dismissing the suit in toto instead of specific share of the plaintiff as per Section 117 and 118 of the Muslim Law?"*

3. The plaintiff preferred the suit seeking declaration against the defendants in respect of land bearing Khasra No. 1045/3 admeasuring 0.004 Acre (eight dismil) along with the house constructed thereon, situated at Village Korba, Patwari Halka No. 4, Tahsil and District Korba

(Chhattisgarh), pleading *inter alia* that the appellant is the wife of Abdul Sattar Lodhiya, resident of Rani Road, Korba, who died on 19.05.2004, and she is entitled to acquire the suit property, over which her husband remained in possession as owner throughout his lifetime. In November 2007, when the plaintiff came to know that in the revenue records, along with her name, the name of defendant No.1, who is the son of brother of her husband namely; Abdul Sattar, had also been entered, she learned that on 17.12.2007, defendant No.1 had submitted an application for recording his name along with the plaintiff's name in the revenue records, wherein he described himself as the son of Abdul Sattar. In fact, he is not the son of Abdul Sattar but is the son of Ghulam Mustafa, who is the brother of Abdul Sattar. Defendant No.1 has stated before the revenue Court that he is the adopted (foster) son of Abdul Sattar, whereas during his lifetime, Abdul Sattar never recognized him as his adopted son. The Will dated 27.04.2004 was not voluntarily executed by Abdul Sattar, and he had no authority to execute a Will in respect of the suit property without the consent of the plaintiff. The said document is forged and fabricated. Therefore, this suit has been filed for a declaration that the plaintiff alone is the exclusive owner of the suit property.

4. Defendant No.1 filed the written statement, wherein it was pleaded that Abdul Sattar, being issueless, had brought up Defendant No.1 since childhood as his own son, and after Abdul Sattar's death, Defendant

No.1 continued to reside with the plaintiff and remained in possession of the suit property. With the plaintiff's knowledge, the Tahsildar, Korba, by order dated 07.12.2004, directed joint recording of the names of the plaintiff and Defendant No.1 in the revenue records. The plaintiff's claim of gaining knowledge only in November 2007 was found to be incorrect, and her appeal was dismissed by the Sub-Divisional Officer, Korba. It was further pleaded that Abdul Sattar always projected Defendant No.1 as his son in society, and in the year 1998, the Bilaspur Young Memon Association recorded Defendant No.1 as his son in its publication *"Naya Daur"*. The suit property being the self-acquired property of Abdul Sattar, he voluntarily executed a Will dated 27.04.2004 in the presence of witnesses. Defendant No.1 further pleaded that he continued to take care of the plaintiff, and that the present suit has been filed at the instance of certain members of the Korba Memon community by misleading the plaintiff, and therefore, the suit is false and liable to be dismissed.

5. On the basis of the pleadings of both the parties, the learned Trial Court framed the issues. After recording the evidence of both sides and upon hearing the final arguments, the learned Trial Court came to the conclusion that the appellant/plaintiff failed to prove her claim and, accordingly, dismissed the suit.

6. Being aggrieved by the said judgment and decree, the plaintiff have preferred the first appeal before the learned First Appellate Court. After

hearing the parties, it was held by the First Appellate Court that under Muslim law, a person is competent to bequeath only up to one-third of his property without the consent of other heirs, and even assuming the validity of the Will, the respondent could at best claim rights to one-third of the property. Since the plaintiff sought a declaration of exclusive ownership over the entire suit property and did not seek any alternative or partial relief, she failed to establish her claim. The Will was duly proved by the respondent through evidence and was sufficient to negate the plaintiff's claim of absolute title. The plaintiff also failed to prove lack of consent or to take timely action despite having knowledge of the revenue entries. Consequently, the learned First Appellate Court found no illegality or perversity in the judgment and decree dated 07.02.2015 passed by the trial Court and accordingly dismissed the appeal, directing the parties to bear their own costs. In view of the aforesaid circumstances, the learned First Appellate Court observed that the said facts stood fully proved from the evidence of the defendant and the witnesses examined on his behalf. After recording a categorical finding and considering all the aforesaid circumstances, the learned First Appellate Court held that the claim of the plaintiff deserved to be dismissed and accordingly dismissed the appeal. Hence, this Second Appeal by the plaintiff.

7. (i) Learned counsel for the appellant/plaintiff contended that the appellant/plaintiff had filed a suit for declaration in respect of land

bearing Khasra No. 1045/3 admeasuring 0.08 acre along with the house constructed thereon, situated at Village Korba, Patwari Halka No. 04, Tahsil and District Korba, which was dismissed by the trial Court vide judgment dated 07.02.2015, and against which an appeal has been preferred before the learned First Appellate Court. It is contended that the trial Court passed the impugned judgment in violation of settled principles of law. It is further submitted that it is an admitted fact that the appellant is the wife of late Abdul Sattar Lodhiya and that the disputed land was recorded in his name in the revenue records. Without the knowledge or consent of the appellant, the respondent/defendant got his own name entered jointly in the revenue records. Upon coming to know of the same, the appellant challenged the order dated 07.12.2004 passed by the Tahsildar, Korba, but the appeal was dismissed by the Sub-Divisional Officer on 26.10.2008 on the ground of limitation, whereafter the appellant filed the declaratory suit.

(ii) Learned counsel further submits that both the parties are governed by Muslim law and there is no concept of adoption therein, which fact has also been admitted by the respondent in paragraph 17 of the written statement; therefore, the respondent’s claim of being an adopted son is legally untenable. It is also argued that the respondent made contradictory statements before the revenue authorities by describing himself as the son of Abdul Sattar in one document and as the son of Gulam Mustafa in another, clearly indicating mala fide intention.

Further, before the Tahsildar, the respondent stated that Abdul Sattar had died issueless and made no reference to any Will, whereas before the trial Court he relied upon an alleged Will, for which no satisfactory explanation has been given. Learned counsel submits that even otherwise, the alleged Will is contrary to the settled Principles of Mahomedan Law, which provide that a bequest in favour of an heir is invalid unless the other heirs consent thereto after the death of the testator, and that a Mahomedan cannot, by Will, dispose of more than one-third of his estate without such consent. It is contended that the alleged Will purports to bequeath the entire property in favour of the respondent without the consent of the appellant, who is a legal heir, rendering the bequest void and unenforceable. It is further argued that the Will is doubtful and invalid as the beneficiary has signed as a witness, and the respondent himself admitted that he never acted upon the alleged Will for mutation purposes, thereby casting serious doubt on its existence and validity. Lastly, it is contended that the allegations against the appellant's power-of-attorney holder are unsupported by any evidence, whereas the appellant has proved her possession and title over the suit property. Despite this, the trial Court had wrongly dismissed the suit, and subsequently the learned First Appellate Court affirmed the judgment passed by the learned trial Court, therefore, the impugned judgments and decree deserve to be set aside.

8. *Per contra*, learned counsel for the respondent No.1/defendant, while

supporting the impugned judgments, opposes the submissions of learned counsel for the appellant and submits that both the Courts have rightly passed the judgment and decree that too after proper appreciation of evidence. It is contended that the Will executed by late Abdul Sattar Lodhiya in favour of the respondent was voluntary and duly proved by independent attesting witnesses, and the appellant had consented to its execution and herself handed over the Will to the respondent for mutation after Abdul Sattar's death. It is further submitted that the respondent intentionally did not produce the Will before the revenue authorities as he wanted the names of both the appellant and himself to be jointly recorded, which demonstrates his bona fide intention. The alleged contradictions regarding the respondent's parentage are inconsequential, as despite having the Will, he did not seek exclusive mutation. It is also argued that the appellant remained silent for several years despite having knowledge of the revenue entries, did not seek cancellation of the Will, and appointed a power-of-attorney holder without explanation, indicating that the litigation has been initiated at the instance of third parties. The respondent was always treated as a son by late Abdul Sattar and the appellant, which is supported by documentary evidence, and therefore, the present appeal being devoid of merit deserves to be dismissed.

9. I have heard learned counsel for the parties and perused the pleadings, impugned judgment and the material available on record.

10. Upon hearing learned counsel for the parties at length and upon careful perusal of the pleadings, evidence on record, and the impugned judgments passed by both the learned Courts, this Court finds that the present appeal raises substantial questions of law which go to the root of the matter and warrant interference under Section 100 of the Code of Civil Procedure. The core dispute between the parties relates to the nature and extent of rights flowing from the alleged Will dated 27.04.2004 (Ex.D/1) said to have been executed by late Abdul Sattar Lodhiya, and whether, in view of the settled principles of Mahomedan Law, the appellant/plaintiff could be non-suited *in toto* despite being an undisputed legal heir. It is an admitted and undisputed fact that the appellant is the legally wedded wife of late Abdul Sattar Lodhiya and, therefore, a Class-I heir under Muslim personal law. It is also undisputed that the suit property stood recorded in the name of Abdul Sattar during his lifetime. The respondent/defendant does not claim inheritance by blood but bases his claim solely on the alleged Will.

11. After a deep appreciation of evidence and statements of the witnesses, this Court finds that the respondent examined himself and relied upon the testimony of Mohd. Isha and Mohd. Shibu to prove the execution of the Will. Even assuming, for the sake of argument, that the Will stands duly proved in terms of execution and attestation, the legal effect of such Will must still be tested on the anvil of Sections 117 and 118 of the Principles of Mahomedan Law.

12. The appellant/plaintiff consistently disputed her consent to the Will. The evidence relied upon by the respondent to prove such consent is, at best, inferential and circumstantial. Mere silence or delay in initiating proceedings cannot, by itself, be elevated to the status of consent, particularly when consent under Mahomedan Law must be free, conscious, and post-death consent of the heirs.

13. Importantly, none of the witnesses examined on behalf of the respondent categorically proved that the appellant gave express consent after the death of the testator for bequeathing more than one-third of the estate. The statements of the witnesses only indicate handing over of the document, which cannot be equated with legal consent as contemplated under Mahomedan Law.

14. This Court finds the substance in the submission of learned counsel for the appellant that both the learned Courts committed a serious error in law by shifting the burden of proof upon the appellant to disprove the Will and establish absence of consent. Once the respondent relied upon a Will bequeathing the entire property, the onus squarely lay upon him to establish compliance with Sections 117 and 118 of Mahomedan Law. For the sake of convenience, Sections 117 & 118 is reproduced hereinbelow:-

> *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. Any single heir may consent so as to bind his own share.

XXXX

XXXX

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."*

15. Under Section 118, a Mahomedan cannot dispose of more than one-third of his property by Will without the consent of other heirs. Under Section 117, a bequest in favour of an heir is invalid unless consent is obtained after the death of the testator. These provisions are mandatory and admit of no presumption.

16. The learned First Appellate Court itself recorded a categorical finding that, even if the Will were valid, the respondent could not claim more than one-third share. Having so held, the learned First Appellate Court fell into grave legal error in dismissing the suit *in toto*, instead of moulding the relief in accordance with settled law.

17. Reverting to the facts that the appellant sought declaration of title as a legal heir. Merely because she claimed exclusive ownership, both the learned Courts could not deny her legitimate statutory share flowing

from succession law.

18. In this case, the alleged Will disposes of more than one-third of the estate of the deceased in favour of the defendant No.1, however, there is no evidence that the heir i.e. the plaintiff herein has consented to such a bequest.

19. The High Court of Madras in the matter of **Noorunissa Vs. Rahaman Bi & others**[1], 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 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

1 (2001) 3 MLJ 141

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."

(Emphasis added)

20. The High Court of Karnataka in case of **Sri. Mohammed Ashraf Vs. Smt. Tabbasum**[2], has examined Section 117 of the Mahomedan Law and has held at paragraph 13 as under:-

2 ILR 2014 Kar 6861

> "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."

21. Furthermore, the Coordinate Bench of this Court in the matter of **Sulaxani and Another vs. Sattar Ali and and Others**[3] has held thus at paragraphs 27 & 28 :-

> "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 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

3 2022 SCC OnLine Chh 803

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."

22. It is well settled that misdescription or overstatement of relief cannot defeat a lawful claim, especially when the plaintiff's status as an heir is undisputed. The approach adopted by both the learned Courts defeats the very object of Sections 117 and 118 of Mahomedan Law and results in unjust enrichment of the respondent to the detriment of a lawful heir.

23. In view of the foregoing discussion and applying well settled principles of law to the facts of the present case, this Court answers the substantial questions of law framed in this Second Appeal in favour of the appellant/plaintiff and against the respondent/defendant.

24. Resultantly, the Second Appeal stands **allowed**. The judgments and decrees dated 07.02.2015 passed by the learned Trial Court in Civil Suit No. 20-A/2014 and 28.01.2016 passed by the learned First Appellate Court in Civil Appeal No. 12-A/2015 are hereby set aside.

25. Parties shall bear their own costs.

26. Decree be drawn accordingly.

Sd/-

(BIBHU DATTA GURU)
JUDGE

$. Bhilwar/Gowri

HEAD NOTE

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.

मुस्लिम व्यक्ति केवल अपने एक तिहाई संपत्ति का ही वसीयत कर सकता है, एक तिहाई से अधिक का वसीयत तभी वैध होगा, जब वह उन उत्तराधिकारियों की सहमति से किया गया हो, जिनके अधिकारों का अतिलंधन होता हो या संपत्ति का कोई उत्तराधिकारी न हो।