R

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

Dated this the 31st day of January, 2015

PRESENT

THE HON'BLE MR. JUSTICE N.KUMAR

AND

THE HON'BLE MR.JUSTICE B.VEERAPPA

R.F.A.No.960/2003

BETWEEN:

1. Mr. Syed Basheer Malik
   S/o late Alhaj S.A. Malik
   Aged about 55 years

2. Mrs. Ahraf Jann Begum
   W/o Basheer Ahmed Malik
   Aged about 50 years

   Both are r/at No.7
   O' Shanganessy Road
   Langford Garden
   Bangalore – 560 025 ...APPELLANTS

(By Sri Y. K. Narayana Sharma, Advocate)

AND:

1. Smt. Jameela Begum
   Aged about 73 years
   W/o R. A. Subhan
   R/at No.6 O' Shanganessy Road
   Bangalore – 560025
   Since dead by L.Rs.

1(1) Sri R. A. Subhan
   S/o late Rasul Shah
   Aged about 72 years

Since dead R1(2) and R1(3) are
the L.Rs of R1(1)

1(2) Sri Salamathulla
S/o R. A. Subhan
Aged about 35 years
No.10, 3rd Cross
Venklataramanapalya
Palace Guttahalli, Bangalore

1(3) Mrs. Afshan Taj
W/o Anwar, Aged about 33 years
R/at No.28, Mahaveernagar
Hosahalli Main Road
Ramanagar

1(4) Mrs. Parveen Taj
W/o Adil, Aged about 30 years
R/at Nos.4828, Mahaveernagar
Hosahalli, Ramanagar

2. Smt. Iqbal Begum
Aged about 57 years
R/at No.6, O' Shanganessy Road
Bangalore – 560025

3. Meheraj Inayath
D/o S. M. Inayathulla
Muslim, Major

4. Javeed Inayath
S/o S. M. Inayathulla
Muslim, Major

5. Sajid Inayath
S/o S. M. Inayathulla, Muslim,
Major, Since dead by his L.Rs.,

5(a) Smt. Arshiya
W/o late Sajid Inayat

Aged about 22 years
No.6, O' Shanganessy Road
Bangalore – 560025

6. Imran Inayath
S/o S. M. Inayathulla
Muslim, Major

7. Smt. R. Mehrunnissa Begum @ Shahataj
W/o S. M. Inayathulla
Muslim, Major
Since dead
(Respondents No.2 to 6 are the
L.Rs., of Respondent No.7

Nos.3 to 7 are r/at No.6
O' Shanganessy Road
Bangalore – 560025

8. Mohammed Anwar R
S/o Abdul Rahaman
Muslim, Major, R/at No.B11,
P. S. Lane, 4th Cross
Cottonpet, Bangalore – 560 053

9. Mohammed Ghouse R
S/o Abdul Rahaman
Muslim, Major, R/at No.5, Fort,
Tirapatur 635 601, Tamil Nadu

10. Mohammed Farook R
S/o Abdul Rahaman
Muslim, Major, R/at No.B11
P. S. Lane, 4th Cross
Cottonpet, Bangalore – 560 053

11. Mohammed Haneef R
S/o Abdul Rahaman
Muslim, Major, C/o Meer Ghouse
Big Matan, M. G. Road, Channapatna

12. Mumtaz Begum
W/o Late Abdul Rasid
Muslim, Major

13. Arifa Begaum
W/o Basha, Muslim, Major

Both No.12 and 13 are
r/ at No.B11, Lane, 4th Cross
Cottonpet, Bangalore – 560 053

14. Zareena Taj
W/o Pyaru Sab, Muslim, Major,
No.3322, Laksher Mohalla,
M. D. Sait Block, Mysore 57,
Since dead by L.Rs.,

14(A) Abdul Rahman @ Pyaru Sab
Aged about 64 years

14(B) Zubaida Begum
W/o Fayaz Ahmed
Aged about 37 years

14(C) Ayesha Begum
W/o late Shaik Saleem
Aged about 35 years

14(D) Rizwana
W/o Mohammed Riyaz
Aged about 32 years

14(E) Mohammed Rafeeq
S/o Abdul Rahman
Aged about 30 years

14(F) Reshma Banu
W/o Syed, Aged about 28 years

14(G) Seema Banu
W/o Babu Shariff
Aged about 24 years

14(H) Salahuddin
S/o Abdul Rahman
Aged about 22 years

14(J) Shabreen Taj
D/o Abdul Rahman
Aged about 20 years

14(K) Maheer Taj
W/o Mohammed Asgar Ali
Aged about 29 years

14(L) Amreen Taj
D/o Abdul Rahman
Aged about 15 years

15. Nigher Sultana
W/o Anwar, Muslim, Major

R/at Puttanna Guddi Bedi
Near S.I.B., Devanahalli Town – 563 110

16. Shamshad Begum
W/o Sadiq Basha
Muslim, Major, C/o City Foot Wear
Kavitha Complex No.189
Pollachi Main Road
Sundarapuram, Gandhinagaram
Coimbatore-24

17. Smt. Hafeeza Bi
D/o late Haji Mohammed Ghouse
Muslim, Major, R/at No.51,
P. V. R. Road, Segavalli Jolly Mohalla
Bangalore – 560 059
Since dead by L.Rs.,

17(A) Abdul Rasheed
Aged about 59 years
S/o Abdul Raheem

17(B) Smt. Naseema Banu
Aged about 55 years
W/o Abdul Hameed

17(C) R. M. Iqbal
Aged about 53 years
S/o Abdul Raheem

17(D) Shameemunnissa
Aged about years
W/o Syed Mihrun Pasha

All are Residing at No.51
PVR Road, Sagavalli Jolly Mohalla
Bangalore – 560 059

18. K. Nazir
S/o Abdul Khayum
Muslim, Major

19. Mohammed Navaz
S/o Abodul Khayum
Muslim, Major

20. Tasleem Kauser
W/o Mukhtiar Pasha
D/o Abdul Khayum, Muslim, Major

Nos.18 to 20 are residing at
No.1/4, 3rd Cross, PSK Lane
OTC Road, Cottonpet
Bangalore – 560 053

21. Sakina Balkis
W/o Abdul Khadeer

Muslim, Major, R/at No.94,
Inami Mosque Road
Rashadnagar, Arabic College Post
Bangalore – 560 045

22. Kamal Pasha
S/o Abdul Khayum
Muslim, Major, R/at No.1/1
K. K. Lane,
Darga Quarters, Cottonpet
Bangalore – 560 045 ...RESPONDENTS

(By Sri Shekar Shetty, Advocate for R-1 (2 & 3);
Sri M.V.Chandrashekar Reddy, Advocate for R-2.)

This RFA filed under section 96 of CPC against the judgment and award dated 05.04.2003 passed in O.S.No.1419/1981 on the file of the II Additional City Civil Judge, Bangalore, CCH No.17, partly decreeing the suit for partition and separate possession.

This RFA coming on for hearing this day, ***N.KUMAR, J.***, delivered the following:

J U D G M E N T

This regular first appeal is preferred by defendant Nos. 9 and 10 in the suit O.S.No.1419/1981 challenging the judgment and decree of the trial Court holding that the sale deeds under which they are claiming title to item No.1 of the 'B' Schedule property is hit by Section 52 of the Transfer of Property Act and consequently null and void and that they are not entitled to the relief of equity. All other parties to the

suit have compromised their claims and, therefore, none of them have preferred any appeal. Thus, the subject matter of this appeal is, all that piece and parcel of house property bearing No. 7, situated in O.Shangnessry Road, Bangalore-25, which is more particularly described as item No.1 in Schedule 'B' to the plaint Schedule.

2. For the purpose of convenience, the parties are referred to as they are referred to in the original suit.

3. One Smt. Jameela Begum and Smt. Iqbal Begum filed suit O.S. No. 1419/1981 for partition and separate possession of their legitimate share in Schedule A, B and C properties. The first plaintiff was the only daughter of late Haji Mohammad Ghouse who died several years ago. He was a prominent business man in Bangalore and had acquired considerable properties, both movable and immovable. She was married to a business associate of her father, one Haji Mohammad Ismail. For the well being of his daughter, Sri Haji Mohammad Ghouse transferred several of his immovable properties to his son-in-law. Subsequently, Haji

Mohammad Ghouse also transferred several items of immovable property to plaintiff No.1. Two children were born to the first plaintiff, namely the second plaintiff and one S.M. Inayathulla. The marriage between the first plaintiff and her husband Haji Mohammad Ismail strained and it was broken in or about the year 1951. Haji Mohammad Ismail divorced the first plaintiff and executed a document under which a small sum of few thousand rupees was supposed to have been given to the plaintiffs, as dower debt. But, on the other hand he retained for himself all the properties he had acquired from his father- in-law. He also took a document styled 'deed of settlement' from the first plaintiff under which all the properties belonging to her which she acquired from her father was gifted by her to her infant son S.M. Inayathulla who was represented by his guardian Mohammad Ismail himself. Thereafter, she entered into a second marriage with a person of poor resources. Haji Mohammad Ismail continued the business of the father of the first plaintiff and in course of time he took his son S.M.Inayathulla as a partner. Haji Mohammad Ismail died

on 2.9.1979, leaving the properties which are set out in Schedule 'A' to the plaint. He left a Will dated 24.11.1978 bequeathing his entire estate in favour of the first plaintiff since she was not the legal heir. She is entitled to only 1/3rd share of the estate of Haji Mohammad and the remaining 2/3rd share to be divided among her heirs according to their legal shares. The only legal heirs of Haji Mohammad Ismail at his death under law was first plaintiff's two children, i.e., second plaintiff and the said S.M. Inayathulla.

4. The second plaintiff is entitled to 1/3rd share and S.M. Inayathulla entitled to the remaining 2/3rd share in the properties left by Haji Mohammad Ismail, namely 'A' schedule properties, i.e., after deducting 1/3rd share of Haji Mohammad Ismail's estate, being the share to be allotted to the first plaintiff by virtue of the above said Will. Thus, Inayathulla would be getting 1/9th share of 'A' schedule properties. The said Inayathulla died on 25.10.1979, leaving his heirs, the first plaintiff-his mother who is a sharer under the Mohammedan Law as also his wife one Smt. R.

Meharunnisa Begum, the fifth defendant who is also a sharer and, the minor defendants 1 to 4 being his children who are the residuaries under the Mohammadan Law.

5. The plaintiffs claim that, first plaintiff and 5th defendant are each entitled to 28/168th share and 21/168th share respectively of the 4/9th share in the properties that had fallen to the share of Inayathulla in the 'A' Schedule properties. As 5th defendant was unsteady, the husband of the second plaintiff was appointed as a guardian of defendants 1 to 4, her minor children, to look after their properties. It is alleged that the 5th defendant has now contracted second marriage too in which case she may cease to be a sharer in the properties. In 'B' schedule are mentioned the properties belonging to S.M. Inayathulla in which the first plaintiff as the mother and the other defendants as the wife and children are entitled to the same shares as aforesaid. i.e., first defendant shall be entitled to 28/168th share and the fifth defendant shall get 21/168th share and the first defendant shall get 17/168th share and the defendants 2, 3 and 4 shall each get 34/168th share.

6. It is also stated that item No.1 of the Schedule 'A' property was settled by the plaintiff in favour of her son Arifulla who as a sharer of her husband she is entitled to 1/6th share. i.e., first plaintiff is entitled to 1/12th share of immovable property of item No.1 of Schedule 'A' property and the remaining 11/12th undivided share of immovable property item No.1 of Schedule A alone became the estate of Haji Mohammad Ismail, out of which the first plaintiff is entitled to 1/3rd share by virtue of the Will stated above.

7. The 5th defendant is a wayward and it is no longer possible for the plaintiffs to continue like this. The first plaintiff wants to live separately. Therefore, the suit is filed for partition and separate possession of their legitimate share in the schedule property.

8. After service of summons, defendants 1 to 5 filed a common written statement. At this stage, it is to be remembered that defendants 1 to 4 were minors represented by a guardian who is none other than the husband of the second plaintiff who is appointed as guardian by the Court

in this case. The sum and substance of their defence is that, the entire rights of the first plaintiff in respect of 'A' schedule properties belonging to Haji Mohammad Ismail has ceased on the day of divorce. They admitted that the first plaintiff has executed a deed of settlement in favour of her son out of her own free will at the relevant time as she was getting into marital relationship with another person. Therefore, she felt the infant son should be taken care of. Thus, she relinquished all her rights over the said properties. The first plaintiff has lost her right of 'A' schedule because of the divorce as long back as in 1951. However, second plaintiff and late S.M. Inayathulla continued to be one of the heirs. They admitted that the second plaintiff is entitled to 1/3rd share and defendants 1 to 15 are entitled to 2/3rd share through S.M. Inayathulla. It is specifically stated that the 5th defendant is not unsteady at any point of time and it is absolutely false she has contracted the second marriage. Hence, she has not ceased to be a sharer in the properties. They admit that the first plaintiff and the fifth defendant are entitled to 1/6th share each and the remaining defendants

are entitled to remaining properties. Then, they have set out, in terms of Hanif Law of Inheritance how the properties which stood in the name of Mohammad Ismail and S.M.Inayathulla has to be partitioned.

9. In so far as properties standing in the name of S.M. Inayathulla is concerned, it is stated that the first plaintiff as mother is entitled to 1/6th share, 5th defendant as wife is entitled to 1/8th share and the residual properties falls to the share of the first defendant-daughter and defendants 2 to 4 sons, i.e., the first defendant-daughter gets 1/7th share, defendants 2, 3, 4-minor sons get 2/7th share each. They denied that the defendants 6 to 9 who are impleaded subsequently have any right to this property. Therefore, they prayed for a decree for partition being passed in terms of the shares of defendants as set out in the written statement.

10. Defendants 2 and 3 after attaining majority have filed one more written statement which roughly runs to 120 pages. After setting out their defence which runs counter to

the written statement filed earlier they prayed for declaration of the plaintiffs and the fifth defendant in the alienated portions of the properties. They also wanted a declaration that the portions in the properties alienated by the plaintiffs and the fifth defendant more than their share is null and void. Further, they wanted a declaration that the properties alienated by the plaintiffs and the fifth defendant over and above their share shall be released to defendants 1 to 4 and the defendants 1 to 4 shall jointly be put in possession of the same including the properties falling legitimately to their shares. They wanted an enquiry to be conducted in respect of mesne profits.

11. In fact, these defendants 2 and 3 after filing the written statement on 5.11.1993 filed one more additional written statement on 25.5.1998 seeking for dismissal of the claim of the plaintiffs for declaration of the share of defendants 2 to 5 in accordance with law and to put them in respective possession of their portions.

12. The plaintiffs filed an application to implead the purchasers of item No.1 of 'B' schedule during the pendency of the suit from the 5th defendant. In the affidavit filed in support of the application, Abdul Suban, the husband of the first plaintiff has sworn to the fact that the plaintiffs came to know that the defendants without the knowledge and consent of the plaintiffs in the suit have sold by different sale deeds premises bearing Old No.3, New No. 7 of O.Shangnessry Road, Langford Town, in favour of defendants 9 and 10. The documents are stamped and they are proper and necessary parties. Defendants 9 and 10 are trying to put up construction on the said properties. The said sale deed is not binding on the plaintiffs, the impleading defendants is a necessary and proper party for the above suit, otherwise it may lead to miscarriage of justice. In fact, he also filed an application under Order 39 Rule 1 and 2 of CPC for an injunction restraining them from putting up any construction on the property which they have purchased under the sale deeds. Application for impleadment was allowed. Thereafter, defendants 9 and 10 filed their written

statement. They have pleaded their ignorance about the events which took place in the family of the first plaintiff as set out in the plaint. They also denied the claim of the plaintiffs. After denying the allegations in the plaint, they have set out their specific case. They admit that the first plaintiff gifted the properties in favour of S.M. Inayathulla. She executed a deed of settlement on 4.3.1955 in respect of premises No. 3 and 3/A situated at Langford Town, Bangalore, in favour of her son Mohammad Inayathulla which has been duly registered as document No. 3874, Volume No. 1393, in the office of the Sub-Registrar, Civil Station, Bangalore. Smt. Mehrunnisa Begum married Inayathulla on 7.8.1961. Sri Inayathulla by a Mehr settlement gifted premises bearing No.3 and New No. 7, i.e., item No.1 of 'B' Schedule property in favour of Smt. Mehrunnisa Begum. After the settlement, Bangalore City Corporation have made out the katha in the name of Smt. Mehrunnisa Begum in respect of item No.1 of the 'B' Schedule property. Mehrunnisa Begum being the absolute owner was in possession and was exercising all acts of

ownership. Sri Inayathulla died on 26.10.1979. The property belongs absolutely to Merhrunnisa Begum.

13. Smt. Mehrunnisa Begum offered to sell the Schedule property in favour of defendants 9 and 10 and executed two sale deeds on the condition that in the event of loss of the said property, the same shall be set right to the extent lost, in the same area. She sold the property in favour of the appellants/defendants 9 and 10 by two sale deeds dated 31.3.1986 and 8.12.1986 which have been duly registered. They also gave the schedule of the property which they purchased. Further they stated that, the first plaintiff has sworn to an affidavit to the effect that she was ill advised in filing the suit and that she had instructed her advocate to withdraw the suit and that she is getting a bigger share in another property. She further declared that she has no right, title or interest in the Schedule property and further declaration that the suit property belongs to Smt. Mehrunnisa Begum.

14. Sajid-the third respondent by a deed of sale dated 23.2.1996 sold his undivided 2/16th share in property bearing No. 6, O.Shangnessry, Langford Town, Bangalore, in favour of these defendants consisting of 18 square ACC and tiled roofed building. The said document was duly registered. By a deed of release dated 26.7.1993, third defendant released his interest in the Schedule property in favour of 9th defendant. Thereafter, by a deed of sale, Mehrunnisa Begum, represented by her Power of Attorney Holder, sold the Schedule property in favour of 9th defendant. The first plaintiff has also sworn to an affidavit and the same has been delivered to the defendants. By an agreement to sell, recorded in writing, executed by Mehrunnisa Begum, recites that she has executed a Power of Attorney in favour of A. Nazeeruddin. The first plaintiff has attested the said agreement and she is estopped from contending otherwise. She has received various sums of money. These defendants are in possession of the property. The suit is in pursuance of wrongful gain, greed and laverishesness. It is to make unjust gain. The suit is barred

by limitation as the plaintiff did not get the cancellation of the agreement and sale deed. Therefore, they wanted the suit be dismissed.

15. On the aforesaid pleadings, the trial Court has framed 9 issues initially and after the filing of the written statement by defendants 9 and 10 two additional issues have been framed. They are as under:-

1. *Whether plaintiffs prove that the gift deed was obtained by Haji Mohammed Ismail taking advantage of lack of wordly knowledge of plaintiff No.1 as pleaded in para 7 of the plaintiff?*

2. *Whether the plaintiffs prove that they are the heirs of the properties of Haji Mohammed Ismail under Mohammedan Law?*

3. *Whether the first plaintiff has lost her right of heirship as a result of her divorce in 1951?*

4. *Whether defendant No.5 has contracted second marriage and lost her right as sharer?*

5. *To what shares the plaintiffs are entitled in "A" and "B" schedule properties?*

6. *Whether defendant Nos.6 to 8 prove that they are the daughters of Haji Mohammed Ghouse by his second wife Smt. Syadanibee?*

7. *Whether defendant Nos.6 to 8 are entitled to any share, if so what share?*

8. *To what share defendant Nos.1 to 4 are entitled?*

9. *What a decree or order?*

Additional Issues:

1. *Whether the defendant Nos.9 and 10 prove that the defendant No.5 was given the suit property vide Item No.1 of Schedule "B" by her husband S.M. Inayathulla as Mehar?*

2. *Whether Section 52 of the T.P. Act 1882, comes as a bar for the claim maintained by the defendant Nos.9 and 10 for portion of the suit properties purchased vide Item No.1 of Schedule "B"?*

16. The plaintiffs in order to substantiate their claim examined R.A. Subhan – Power of Attorney Holder of the first plaintiff and second plaintiff as PW1 and Sri Abdul Khaleel - a witness as PW2. They also produced 20 documents which are marked as Exs. P1 to P20. On behalf of the defendants Javeed Inayath-the second defendant was examined as DW1 and Sri Abdul Rashid on behalf of defendant Nos. 6 to 8 was examined as DW2 and 9th defendant Sri Syed Basheer Ahmed Malik was examined as DW3 and they have produced in all 72 documents which are marked as Exs. D1 to D72. In fact, Exhibits D22 to 72 are produced by defendants 9 and 10.

17. During the pendency of the proceedings, defendants 1 to 5 and plaintiffs presented a compromise petition on 11.4.2000 which is marked as Ex. P1 reporting settlement and agreeing to partition the properties in terms of the compromise petition. Defendant Nos. 7 to 10 are not parties to the compromise. In fact, a memo was filed for deletion of defendants 9 to 10, which was allowed. The suit was

decreed in terms of the compromise, by the judgment and decree dated 11.4.2000. As defendants 9 and 10 were deleted from the suit and they were not parties to the compromise, they have no grievance in so far as decree is concerned. However, defendant No.7 who was a party to the suit but was not a party to the compromise, being aggrieved by the compromise decree preferred an appeal before this Court in RFA No. 749/2010. This Court after hearing both the parties held that the trial Court could have given quietus to the controversy before it on the basis of a compromise only if the parties to the suit before it had all agreed to that course. So long as any one of the parties to the suit did not subscribe to the compromise or agree to the disposal of the matter in a particular fashion, the trial Court could not have recognized the compromise and disposed of the suit without adjudicating upon the interest of the party, who had stayed away from such a settlement. A reading of the judgment and order under appeal in fact shows that the trial Court had proceeded on a totally wrong premise. The trial Court has observed that defendants 6 to 8 had neither filed any written

statement nor taken any part in the proceedings. It further observed that defendants 6 to 8 had not made any claim in the suit property in the manner known to law. This Court observed that defendants 6 to 8 had in fact filed a written statement, in which they had made a claim for a share out of the suit schedule property. The trial Court did not obviously care to verify the record before making the observation that no such written statement had been submitted. The trial Court does not even appear to have looked into the issue that it had framed on the basis of the pleadings. This Court after taking exception to the conduct of the Presiding Officer called for a report and after perusing the report it was of the view that it is not satisfactory, they proceeded to pass strictures on the Presiding Officer to the effect that the cavalier attitude with which the Court below appears to have proceeded during the dispensation of a matter involving valuable rights of the parties, needs to be deprecated. They found that the Court had already made appropriate observations in regard to the conduct of the Presiding Officer and directed the said observations to be recorded in his

service book. Therefore, without pronouncing on merits, on the validity of the compromise, the appeal was allowed, judgment and decree passed by the trial Court was set aside, the matter was remitted back to the trial Court for disposal in accordance with law from the stage of framing of issues. After such remand, as the direction was to dispose of the suit from the stage of framing of issues, again notices were issued to defendants 9 and 10 who had been deleted by filing a memo. After service of notice, defendants 9 and 10 entered appearance, they participated in the proceedings, contesting the claim of the plaintiffs.

18. The trial Court after hearing the arguments of the learned Counsel for the parties and on appreciation of the evidence on record, decided Issue Nos.1 to 5 and 8 on the basis of the compromise Ex.P-10 entered into earlier between the plaintiffs and defendants-1 to 5. In fact, the Court did not accept the compromise in its entirety. In so far as Issue Nos.6 to 8 is concerned, it was decided on merits. In so far as additional issues are concerned, the said issues were also decided on merits on appreciation of the oral and

documentary evidence on record. It recorded a categorical finding on additional Issue No.1 that defendants-9 and 10 failed to prove that the schedule property was given to Smt. Mehrunnisa Begum by her husband S.M. Inayathulla to her as Mahr. It also recorded a finding on additional Issue No.2 to the effect that as defendants-9 and 10 have purchased the schedule property during the pendency of the suit, it is hit by the provisions of Section 52 of the Transfer of Property Act and the sale is null and void. It also held that as defendants-9 and 10 have purchased the property during the pendency of the proceedings, the question of any equity being extended to them would not arise. Therefore the claim of defendants-9 and 10 in respect of the schedule property was negatived. Aggrieved by the said judgment and decree, defendants-9 and 10 have preferred this appeal.

19. **Sri. Y.K.N. Sharma,** the learned Counsel appearing for defendants-9 and 10 submitted that the schedule property admittedly exclusively belongs to 5th defendant's husband S.M. Inayathulla. During his lifetime, he gave this property towards Mahr settlement. Thus she became the

absolute owner of the property. The first plaintiff has filed a suit for partition and in the course of the proceedings she has sworn to an affidavit as per Ex.D-8 dated 24.08.1985 disclaiming any right over the property and conceding that 5th defendant is the absolute owner of the property. In fact, the agreement entered into between 5th defendant and defendants-9 and 10 as per Ex.D-3 is attested by her. In the sale deed Ex.D-22 and Ex.D-66 under which this property was sold to defendants-9 and 10, it is clearly recited that 5th defendant got this property by way of Mahr from her husband. Defendants-9 and 10 are put in possession of the property. Subsequently, they have improved the property, renovated and put up new construction and are in peaceful possession and enjoyment of the same. They are the bonafide purchasers and they have paid consideration for the entire extent of the property. The trial Court without properly appreciating the aforesaid documentary evidence on record erred in holding that the 5th defendant is not the absolute owner of the property. Therefore he submits that the said finding is to be set aside.

20. In so far as additional Issue No.2 is concerned, it is contended that the law on the point is well settled. The sale which is hit by Section 52 would not become void. Only in the event of the vendor losing the legal battle and if it is held that he has no right to the property, then the purchaser would get no right under the sale deed. Therefore the sale as such is neither illegal nor void, as held by the trial Court. Once, a party to the proceedings sells the property which is the subject matter of the litigation, the purchaser steps into the shoes of such party by virtue of Order 22 Rule 10 of CPC. All the rights which the said party has in the property devolves on the said purchaser. Therefore it cannot be said that the said purchaser acquires no right in the property nor any equity comes in his way. However, after declaration of the share of such party, by virtue of the sale during the pendency of the proceedings, in the Final Decree Proceedings, that share has to be worked out. In such a proceedings, certainly the purchaser is entitled to equitable considerations. Merely because the sale was during the pendency of the proceedings, he is not deprived of getting the

appropriate share in equity. Therefore the finding recorded by the trial Court is unsustainable and requires to be set aside.

21. He also contended that during the pendency of the proceedings, the 3rd defendant has relinquished his share in property No.7 under a registered release deed dated 26.07.1993 Ex.D-24 and thus defendants-9 and 10 have become the owners of the said portion of the property. Similarly the 3rd defendant has executed a sale deed in respect of his share in property No.6 under a registered sale deed dated 23.02.1996 Ex.D-25. Thus defendants-9 and 10 have acquired title to the said portion of the property also. The plaintiffs and defendants-1 to 5 in the compromise filed have distributed this property in terms of the sketch enclosed to the same. That partition is not binding on these defendants. Under these circumstances, while effecting partition by metes and bounds, in Final Decree Proceedings, the Final Decree Court is expected to take note of not only the sale deeds Ex.D-22 and Ex.D-66 but they should also take note of Ex.D-24 the release deed and Ex.D-25, the sale

deed. That apart, the recitals in Ex.D-22 and D-66 makes it clear that what 5th defendant sold is not her share in the property, but the entire property. She has also undertaken in Clause (4) of the sale deed that in the event of any defect in title, she would make good the title from other properties in the schedule properties. Therefore, while effecting partition, all these aspects have to be taken note of by the Final Decree Court and as far as possible the property which he has purchased under the sale deed Ex.D-22 and Ex.D-66 is to be allotted exclusively to defendants-9 and 10. Therefore, he prays for allowing of the appeal.

22. Per contra, **Sri. S. Shekar Setty,** the learned Counsel for the first plaintiff contended that the decree in question is a compromise decree. No appeal under Section 96 of the CPC is maintainable against the compromise decree. In support of his contention he relies on the judgment of the Apex Court. Secondly he contended that the conditions precedent for defendants-9 and 10 succeeding in the suit is that they should prove the sale deeds Ex.D-22 and Ex.D-66 in accordance law. Mere marking of the document is not the

proof. The executant of the sale deed is not examined. The attesting witnesses are not examined and therefore the sale deeds are not proved. Further, the case pleaded by defendants-9 and 10 is of an oral gift. Admittedly, the value of the property is more than Rs.100/-. The said gift is not evidenced by any documents. Even otherwise, such a gift ought to have been by way of registered document in view of Section 54 of the Transfer of Property Act. In support of his contention, he relied on the judgment of the Allahabad High Court. Lastly, he contended that if the sale deed is proved, defendants-9 and 10 may be entitled to a share of 5th defendant in the properties. As the purchase is subsequent to the institution of the suit, they are not entitled to any equitable consideration. Therefore, he submits that no case for interference with the judgment of the trial Court is made out.

23. **Sri. S.A. Sami,** the learned Counsel for the defendants-1 to 4, submits that the case pleaded by defendants-9 and 10 is that the oral gift was in lieu of Mahr. Therefore it is not a Hiba simplicitor. Such a transaction

falls under Section 54 of the Transfer of Property Act and as the value of the subject matter of Mahr is more than Rs.100/- it ought to have been by way of a registered document. Even otherwise, there is no material placed on record to show what is the Mahr agreed to be paid? Is it a prompt Mahr or is it a deferred Mahr? The same is not forthcoming. The date of Mahr is also not forthcoming. There is no whisper of this Mahr in the written statement filed by the 5th defendant in the suit which was on 12.11.1987 subsequent to sale deed Ex.D-22 and Ex.D-66. The katha of the property stood in the name of S.M. Inayathulla till his death. Only in 1982 the katha was made out in her name as the wife of S.M. Inayathulla, after his demise. There is nothing on record also to show that the 5th defendant ever exercised her right over the schedule property as an absolute owner. Even in the compromise petition filed, which is made basis for the decree, there is no whisper about the Mahr. In Ex.D-23, the agreement also, there is no reference to Mahr. Even Ex.D-8, on which reliance is placed, there is no mention to Mahr. Therefore the trial Court, on

proper appreciation of the oral and documentary evidence on record rightly held that the Mahr set up by defendants-9 and 10 is not proved.

24. He further submits that as admittedly Ex.D-22 and Ex.D-66 has come into existence during the pendency of the proceedings, defendants-9 and 10 are not entitled to any equity at the time of partition of the property by metes and bounds. In fact, it is specifically pleaded by defendants-1 to 4 in the additional written statement filed, that it is a sham transaction. The sale deeds are not proved and therefore the trial Court was justified in holding that defendants-9 and 10 have no right in the property and they have no voice to contest the proceedings. Therefore he submits that no case for interference is made out.

25. The learned Counsel for other parties adopted the aforesaid arguments.

26. In the light of the aforesaid facts and rival contentions, the point that arise for our consideration in this appeal are as under:

(1) *Whether the appeal preferred by defendants-9 and 10 is maintainable or not?*

(2) *Whether defendants-9 and 10 have proved the execution of the sale deeds Ex.D-22 and Ex.D-66?*

(3) *Whether the 5th defendant became the absolute owner of the schedule property by virtue of* Mahr *Settlement as pleaded by defendants-9 and 10?*

(4) *Whether the sale deeds Ex.D-22 and Ex.D-66 are void as they came into existence during the pendency of the proceedings?*

(5) *Whether defendants-9 and 10, are entitled to equitable partition being purchases during the pendency of the proceedings?*

(6) *What order?*

POINT NO.1

27. **Sri. S. Shekar Setty,** the learned Counsel for the first plaintiff contended that the impugned judgment and decree in this appeal is a consent decree and against a consent decree, no appeal is maintainable under Section 96 of CPC. In support of his contention, he relied on the judgment of the

Apex Court in the case of ***PUSHPA DEVI BHAGAT Vs. RAJINDER SINGH AND OTHERS*** reported in ***(2006) 5 SCC 566.***

28. In this regard, it is useful to refer to Order 23 Rule 3 CPC. It reads as under:

> ***"WITHDRAWAL AND ADJUSTMENT OF SUITS***
>
> ***3. Compromise of suit.-*** *Where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit -*
>
> *Provided that where it is alleged by one party and denied by the other than an adjustment or satisfaction has been arrived at, the court shall decide the question; but no*

adjournment shall be granted for the purpose of deciding the question, unless the court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation : An agreement or compromise which is void or avoidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.

29. Interpreting this provision, the Apex Court in the case of ***PUSHPA DEVI BHAGAT*** referred to supra has held as under:

16. Section 96 provides for appeals from original decrees. Sub-section (3) of section 96, however, provided that no appeal shall lie from a decree passed by the court with the consent of the parties. We may notice here that Order 43 Rule 1 (m) of CPC had earlier provided for an appeal against the order under Rule 3 Order 23 recording or refusing to record an agreement, compromise or satisfaction. But clause (m) of Rule 1 Order 43 was omitted by Act 104 of 1976 with effect from 1.2.1977. Simultaneously, a

proviso was added to Rule 3 Order 23 with effect from 1.2.1977. We extract below the relevant portion of the said proviso:

"Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the court shall decide the question"

Rule 3A was also added in Order 23 with effect from 1.2.1977 barring any suit to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

17. The position that emerges from the amended provisions of Order 23, can be summed up thus :

(i) No appeal is maintainable against a consent decree having regard to the specific bar contained in section 96(3) CPC.

(ii) No appeal is maintainable against the order of the court recording the compromise (or refusing to record a compromise) in view of the deletion of clause (m) Rule 1 Order 43.

(iii) No independent suit can be filed for setting aside a compromise decree on the ground that the compromise was not lawful in view of the bar contained in Rule 3A.

(iv) A consent decree operates as an estoppel and is valid and binding unless it is set aside by the court which passed the consent decree, by an order on an application under the proviso to Rule 3 of Order 23.

Therefore, the only remedy available to a party to a consent decree to avoid such consent decree, is to approach the court which recorded the compromise and made a decree in terms of it, and establish that there was no compromise. In that event, the court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. This is so because a consent decree, is nothing but contract between parties superimposed with the seal of approval of the court. The validity of a consent decree depends wholly on the validity of the agreement or compromise on which it is made. The second defendant, who

challenged the consent compromise decree was fully aware of this position as she filed an application for setting aside the consent decree on 21.8.2001 by alleging that there was no valid compromise in accordance with law. Significantly, none of the other defendants challenged the consent decree. For reasons best known to herself, the second defendant within a few days thereafter (that is on 27.8.2001), filed an appeal and chose not to pursue the application filed before the court which passed the consent decree. Such an appeal by second defendant was not maintainable, having regard to the express bar contained in section 96 (3) of the Code.

18. Order 23 deals with withdrawal and adjustment of suits. Rule 3 relates to compromise of suits, relevant portion of which is extracted below :

"3. Compromise of suit. Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of

the whole or any part of the subject- matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit."

The said Rule consists of two parts. The first part provides that where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, the court shall order such agreement or compromise to be recorded and shall pass a decree in accordance therewith. The second part provides that where a defendant satisfies the plaintiff in respect of the whole or any part of the subject matter of the suit, the court shall order such satisfaction to be recorded and shall pass a decree in accordance therewith. The Rule also makes it clear that the compromise or agreement may relate to issues or disputes which are not the subject-matter of the suit and that

> *such compromise or agreement may be entered not only among the parties to the suit, but others also, but the decree to be passed shall be confined to the parties to the suit whether or not the subject matter of the agreement, compromise or satisfaction is the same as the subject matter of the suit. We are not, however, concerned with this aspect of the Rule in this appeal.*

30. From the aforesaid judgment it is clear that the only remedy available to the party to a consent decree to avoid such consent decree, is to approach the Court which recorded the compromise and made a decree in terms of it and establish that there was no compromise. In that event, the Court which recorded the compromise will itself consider and decide the question as to whether there was a valid compromise or not. No appeal is maintainable against the order of the Court recording the compromise or refusing to record the compromise in view of deletion of clause (m) of Rule 1 Order 3 of CPC. The consent decree operates as estoppel and is valid and binding unless it is set aside by the Court which passed the consent decree, by an order on an

application under the proviso to Rule 3 Order 23 of CPC. Therefore no appeal is maintainable against a consent decree having regard to the specific bar contained in Section 96(3) of CPC.

31. In the instant case, the impugned judgment is not passed as a consent decree. After the Issues were framed, both the parties have adduced oral and documentary evidence. In so far as Issue Nos.1 to 5 and Issue No.8 are concerned, in view of the compromise entered into between plaintiffs-1 and 2 on the one hand and defendants-1 to 5 on the other as per Ex.P-10, the rival contentions taken by them was held to be given up. Therefore it was held that Issue Nos.1 to 5 and 8 do not survive for consideration. In so far as Issue Nos.6 and 7 is concerned, on appreciation of the evidence on record, the finding is recorded. In so far as additional Issue Nos.1 and 2 are concerned, on appreciation of oral and documentary evidence adduced in the case, a finding is given holding both the issues against defendants-9 and 10. Merely because, the Court while deciding the case on merits took note of the terms of the compromise and did

not record a finding on merits in respect of the subject matter of compromise, that would not render the judgment and decree, a compromise decree. Admittedly, defendants-9 and 10 are not parties to the compromise. Their claim and contentions are decided on merits. As they are aggrieved by the said finding, they have a right to prefer an appeal under Section 96 of CPC. Therefore the appeal filed is maintainable and we do not see any substance in the contention that the appeal is not maintainable.

POINT No.2

32. The plaintiffs have filed the suit for partition and separate possession of their legitimate share in all the plaint schedule properties. On the date the suit was filed, they had not impleaded defendants-9 and 10, as they had not acquired any interest in the schedule property. It is only during the pendency of the proceedings, defendant-9 acquired interest in the schedule property under the two sale deeds Ex.D-22 dated 28.12.1986 and Ex.D-66, which is dated 15.12.1987. On coming to know of the said sale deeds being executed by the 5th defendant in their favour during

the pendency of the proceedings coupled with the fact that they were in possession of the property, the plaintiffs filed application to implead them as parties. No doubt in the affidavit filed in support of the application, they have characterized the sale deeds as sham transaction, collusive and fraudulent. The plaintiff is not the executant of the sale deed. The executant of the sale deed is the 5th defendant. Ex.D-22 was executed by her power of attorney holder and it is then executed by her. After execution of the said two sale deeds, defendants-1 to 5 have filed a common written statement on 12.11.1987. In the written statement filed on that day, the 5th defendant has not uttered a word about these two sale deeds. It is not her case that she has not executed the sale deed nor she has taken any steps to get the sale deed annulled. The 9th defendant has stepped into the box, he has produced Ex.D-22 the original sale deed and Ex.D-66 the certified copy of the sale deed. When the said two sale deeds are produced through the 9th defendant, he was not cross examined on behalf of 5th defendant denying the execution of the sale deed or the signature found in the

sale deed. The sale deed is registered and one is a original sale deed and another certified copy. The sale deed is not a document which requires attestation. Therefore when the sale deed after execution is registered in accordance with the provisions of Indian Registration Act, 1908, unless its execution by the person by whom it purported to have been executed is denied, the production of the said document is sufficient to prove the said document. Therefore the contention that the sale deed is not proved is without any substance.

POINT NO.3

33. The specific case pleaded by defendants-9 and 10 in their written statement is that S.M. Inaythulla, by Mahr settlement, gifted the schedule property in favour of his wife 5th defendant. After the settlement, the Banglaore City Corporation made out katha in her name in respect of the schedule property. She is the absolute owner in possession and is exercising all rights of ownership. S.M. Inaythulla died on 25.10.1979. From the aforesaid pleadings it is clear that the gift on which reliance is placed, is made in lieu of

Mahr. In the sale deed Ex.D-22 and Ex.D-66, it is recited that S.M. Inaythulla, has by Mahr settlement gifted the premises in favour of his wife. The Bangalore City Corporation by certificate dated 02.11.1982 certified that katha of the said property stands in the name of 5th defendant. She has been exercising all acts of ownership. Similarly, the recital is found in Ex.D-66 also.

34. Therefore, these are the undisputed facts which are on record. The learned Counsel for defendants-9 and 10 contend that under Mohammedan Law, a gift could be oral and it does not require registration. Therefore non-production of written document or non-registration of such document would not vitiate the gift. In fact, in order to demonstrate the said gift, reliance is placed on Ex.D-8, the affidavit sworn to by the first plaintiff on 24.08.1985, where she has unequivocally sworn to the fact that she has no right in the property and that the 5th defendant is the absolute owner of the said property. Acting on the said Mahr, katha has been made out in her name. The sale agreement Ex.D-23 is attested by the first plaintiff, son of 5th defendant.

Under these circumstances, the aforesaid evidence is sufficient to hold that the 5th defendant became the absolute owner of the property by virtue of the said gift.

35. Before we appreciate the aforesaid contention, it is necessary to look into the legal position governing Mahr.

MAHR OR DOWER

36. Under Mohammedan Law, 'Dower' or 'Mahr' is any amount or property which has some monetary value and the wife is entitled to get it from her husband. 'Mahr' or 'Dower' is a sum of money or other properties which the wife is entitled to receive from the husband in consideration of the marriage. 'Dower' is an obligation imposed upon the husband as a mark of respect to the wife. The husband may settle any amount he likes by way of 'Dower' upon his wife though it may be beyond his means and though nothing may be left to his heirs after payment of the amount. But he cannot in any case settle less than ten dirhams. The amount of 'Dower' may be fixed either before or at the time of marriage or after marriage and can be increased after

marriage. If the amount of 'Dower' is not fixed, wife is entitled to proper 'Dower' even if the marriage was contracted on the express condition that she should not claim any 'Dower'.

37. In determining what is "proper" dower, regard is to be had to the amount of dower settled upon other female members of her father's family such as her father's sisters. The dower becomes confirmed:-(a) by consummation of the marriage or (b) by a valid retirement or (c) by the death of either the husband or the wife. The amount of 'Dower' used is usually split into two parts, one called 'Prompt' which is payable on demand and the other called 'Deferred' which is payable on dissolution of the marriage by death or divorce. The 'Dower' ranks as a debt and the widow is entitled, along with other creditors of her deceased husband, to have it satisfied on his death out of his estate. Her right, however, - is no greater than that of any other unsecured creditor, except that she has a right of retention to the extent mentioned in Sec.296 below. She is not entitled to any

charge on her husband's property, though such a charge may be created by agreement.

38. The right of widow to retain possession of her husband's property under a claim for 'Dower' does not carry with it the right to alienate the property by sale, mortgage, gift or otherwise. If she alienates the property, the alienation is valid to the extent of her own share. It does not affect the shares of other heirs of her husband. The 'Dower' is inherent in the concept of marriage under the Mohammedan Law and it is an integral part of it. It is a sort of deterrent to the husband's absolute power of pronouncing 'divorce' on his wife. So the main object of 'Dower' is to offer protection to the wife against such arbitral power. 'Dower' is something which has some value in terms of money and the wife is entitled to receive it as 'gift' from her husband for entering into a contract of marriage.

HIBA/GIFT

39. "A hiba or gift is "a transfer of property, made immediately, and without any exchange," by one person to another, and accepted by or on behalf of the latter. Every

Mahomedan of sound mind and not a minor may dispose of his property by gift. Writing is not essential to the validity of a gift either of moveable or of immovable property. It is essential to the validity of a gift that the donor should divest himself completely of all ownership and dominion over the subject of the gift.

40. The three essentials of a gift under Mohammedan law are as under: There should be :-

(1) a declaration of gift by the donor
(2) an acceptance of the gift, express or implied, by or on behalf of the donee, and
(3) delivery of possession of the subject of the gift by the donor to the donee.

If these conditions are complied with, the gift is complete.

41. It is essential to the validity of a gift that there should be a delivery of such possession as the subject of the gift is susceptible. Registration of a deed of gift does not cure the want of delivery of possession under Mohammedan Law. There would be gift of immovable property by a husband to the wife or by wife to the husband.

HIBA-BIL-IWAZ

42. Under Mahomedan Law a "hiba-bil-iwaz", as distinguished from a hiba or simple gift, is a gift for a consideration. It is in reality a sale, and has all the incidents of a contract of sale. Accordingly possession is not required to complete the transfer as it is in the case of a hiba, and an undivided, share (mushaa) in property capable of division may be lawfully transferred by it, though this cannot be done in the case of a hiba. Two conditions, however, must concur to make the transaction valid, namely, (1) actual payment of consideration (iwaz) on the part of the donee, and (2) a bona fide intention on the part of the donor to divest himself in praesenti of the property and to confer it upon the donee. The adequacy of consideration is not material; but whatever its amount, it must be actually and bona fide paid. Such a transaction is called the hiba-bil-iwaz of India as distinguished from "true" hiba-bil-iwaz. Therefore**,** hiba-bil-iwaz means, literally, a gift for an exchange. It is of two kinds, one being the true hiba-bil-iwaz, that is, hiba-bil-iwaz as defined by the older jurists, and the other hiba-bil-iwaz of

India. In the former there are two acts, namely, (1) the hiba, which is followed by (2) an independent and uncovenanted iwaz (return-gift, that is, an iwaz not stipulated for at the time of hiba. In the latter there is only one act, the iwaz or exchange being involved in the contract of gift as its direct consideration. In the true hiba-bil-iwaz, the hiba and iwaz, are both governed by the law of gifts. There must be delivery of possession both of the hiba and iwaz, and they are both subject to the doctrine of mushaa. The transaction consists of two distinct acts of donation between two persons each of whom is alternately the donor of one gift and the donee of the other.

43. In one of the judgements relied upon by the learned counsel reported in ***AIR 1991 PATNA 183 (MOSST.SAIMUNISSA V. SK.MOHIUDDIN AND OTHERS)*** following the judgement in AIR 1949 Patna 237:26 Pat 561, it is held as follows:-

> *"One of the essential ingredients of a gift is voluntary transfer of a property by one person in favour of another without any consideration. A dower debt being a debt payable by husband to*

his wife, a gift in lieu of dower debt cannot be held to be valid, inasmuch as, repayment of a dower debt being a consideration, no property can be transferred by way of a gift in lieu thereof."

In another decision reported in AIR 1974 Madras 54 (V 61 C 19) in the case of Amina Bi and others V. Khamurunnissa, it is held as follows:-

7. The learned counsel for the appellants, however, contends that the oral gift as stated in Ex. A-2 is inadmissible in evidence. Section 129 of the Transfer of Property Act saves Mohammedan gifts from the application of the provisions of Chapter VII of the Transfer of Property Act. The result is that the oral gift made by Mahommed Jaffar in favour of his wife Fathima Bi in lieu of her dower debt is valid."

44. A full Bench of the Allahabad High Court in the case of ***'GHULAM ABBAS v. MT. RAZIA BEGUM AND OTHERS'*** reported in ***AIR 1951 ALLAHABAD 86***, dealing with various types of 'gifts' under the Mohammedan Law at paragraphs 10 to 17 has held as under :-

"10. The gifts under the Mahommedan Law may be classified under three heads :

"(1) A hiba, pure and simple ;

(2) A hiba-bil-ewaz (a grant or gift for a consideration) which is more in the nature of an exchange than a gift; and

(3) A hiba ba-shart-ul-ewaz, or a grant made on the condition that the donee or transferee should pay to the donor at some future time or periodically some determinate thing in return for the grant." (Syed Ameer Ali's Mahommedan Law, Vol. I, p. 34, 4th Edn., 1912).

11. In Durr-ul-Mukhtar, a hiba, or gift, pure and simple, is defined as "the transfer of the right of property in the substance?-(tamlik-ul-ain) by one person to another without consideration (ewaz) but the absence of consideration is not a condition in it."

12. Syed Ameer Ali, in his commentary on Mahommedan Law, at p. 40, has amplified the definition in these terms :

"In other words a hiba is a voluntary gift without consideration of property or the substance of a thing by one person to another so as constitute

the donee, the proprietor of the subject-matter of the gift. It requires for its validity three conditions: (a) a manifestation of the wish to give on the part of the donor; (b) the acceptance of the donee, either impliedly or expressly; and (e) the taking possession of the subject matter of the gift by the donee either actually or constructively."

13. Admittedly, the transfer in the presents case was made bil-ewaz-den-mehr (in lieu of dower); consequently, it cannot be regarded as a voluntary gift without consideration, such as has been defined above. It has, however, been argued on behalf of the plaintiff-respondent that the transfer is a combination of gifts, viz., a gift of immoveable property by the husband in favour of his wife and another gift of dower-debt by the wife to the husband, either of" which could be made orally.

14. It is, however, not possible to treat the transaction as a combination of gifts. Obviously, it was a single transaction--a transfer of property by the husband in favour of the wife in consideration of the latter relinquishing an ascertained amount--Rs. 2500 to be exact -- out of the amount of dower-debt due to her. As owner of the property, the husband was entitled to

transfer, and admittedly transferred, the same to his wife. Such a transfer in whole or in part satisfaction of a debt is recognised by law and is not uncommon. The transfer as well as the liquidation of dower debt to the extent of Rs. 2,500 took place simultaneously in one and the same transaction; the two things were so inter-connected that one could not stand without the other. Consequently, the argument that the husband made a gift of property and the wife made a gift of a portion of dower-debt is unsound. The transfer in question is, therefore, not a combination of gifts.

15. Under the Mahommedan Law, writing is not essential to the validity of a gift, either of movable property or of immovable property, which is complete and valid on proof of a declaration of gift by the donor, an acceptance of the gift, express or implied, by or on behalf of the donee, and delivery of possession over the subject of the gift by the donor to the donee ; but whether a gift for considerations (hiba-bil-ewaz) can be made orally depends upon the answer to the question whether it does or does not amount to a sale, as defined in Section 54, T. P. Act.

16. The transfer in the present case not being a hiba or gift pure and simple or a combination of such gifts, it has to be determined whether it is a hiba-bil-ewaz, a grant or gift for consideration, recognised by the Mahommedan Law, and also whether it amounts to a "sale" within the meaning of the term as defined in Section 54, T. P. Act. Syed Ameer Ali has, in his commentary on Mahommedan Law, at p. 158, thus explained ewaz or consideration and the hiba-bil-ewaz or gifts for consideration in the earlier and modern times :

"According to the original conception, which in itself was a development of the earlier rules, 'ewaz' or consideration was of two kinds ; one which was subsequent to the contract (of gift), the other which was conditioned in it. (Fatwai Alamgiri, Vol. 4, p. 549). In other words, in the first case the consideration was delivered to the donor after his gift, and the transaction was treated as a case of mutual gift. There was no stipulation regarding the giving of ewaz, but the moment it was received by the donor his right of revocation dropped.

This evidently was the earliest form of a gift for a consideration. The hiba-bil-ewaz of later times is clearly a development of this kind of gift.

In the other kind, the consideration was expressly stipulated in the contract, and when once it was received the transaction acquired the legal character of a sale. The modern hiba-ba-shart-ul-ewaz has unquestionably sprung from the above."

17. At p. 162, the learned author has further observed :

"In all these cases the consideration is not a part of the contract. And the rules stated above do not, therefore, apply to what in modern times is called a hiba-bil-ewaz, which is a transaction of quite a different nature, and partakes to a certain extent of the second kind of ewaz mentioned in the Fatwai Alamgiri, viz., where it is stipulated in the contract. In this kind of hiba-bil-ewaz the consideration directly opposed to the object of the gift both being in essence; there is no suggestion of one being subsequent to the contract. The grant and the consideration are parts of one transaction. A hiba-bil-ewaz, therefore, is a sale in all its legal incidents. In sale, mutual seisin is not requisite to render the contract valid and the

terms in which a contract of this kind is entered into imply, 'that the articles opposed to each other are present,' and that there is no danger of either party suffering from the other's fraud. 'I have given you this for that' implies that the consideration is present, and that the person will take care to receive it before parting with his property, and the law therefore annexes to it the quality of a sale both with regard to the condition and the effect."

The true nature of a Hiba-bil-iwaz is fully described in Chapter VI, Book VIII of Baillie's Digest of Muhammadan Law, which is only an abbreviated reproduction of Fatwa Alamgiri.

45. From the aforesaid statements of law and Judgments, it is very clear, in Mohammedan Law, there is clear distinction between 'gift' with consideration and 'gift' without consideration.

"Hiba-bil-ewaz" means, literraly, gift for an exchange and it is of two kinds, according as the ewaz or exchange, or not, stipulated for at the time of the gift. In both kinds there

are two distinct acts; first, the original gift, and second, the ewaz or exchange. But in the Hiba-bil-ewaz of India, there is only one act, i.e., ewaz, or exchange, being involved in the contract of gift as it is a direct consideration. The transaction which goes by the name of Hiba-bil-ewaz in India is, therefore, in reality not a proper Hiba-bil-ewaz of either kind, but a sale; and has all the incidence of a consequence. Accordingly, possession is not required to complete the transfer of it, though absolutely necessary in gift, and what is of great importance in India, an undivided share in property capable of division may be lawfully transferred by it, thought that cannot be done by either of the forms of the true Hiba-bil-ewaz. Hibas or gift under the Mohammadan Law is transfer of property made immediately and without any exchange by one person to another and accepted by or on behalf of the latter.

46. Section 122 of the Transfer of Property Act, defines 'Gift' as under:

> *"**122. "Gift" defined.**- "Gift" is the transfer of certain existing moveable or*

immoveable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

***Acceptance when to be made.**-Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.*

If the donee dies before acceptance, the gift is void."

47. Therefore the essential ingredients of a gift is a transfer of an immovable property made voluntarily and without consideration. Similarly, Hiba or Gift under Mohammadan Law is a transfer of property made immediately and without any exchange by one person to another and accepted by or on behalf of the latter. Though Section 123 of the Transfer of Property Act, makes it mandatory that a gift must be effected by a registered instrument, by virtue of Section 129 of the Transfer of Property Act, Chapter VII which deals with gifts under the Transfer of Property Act, does not affect any rule of Mohammdan Law. Therefore, Hiba, the subject matter of

whatever value need not be registered as required by Section 123. It can be oral, but it should be adequately proved.

48. The Apex Court in the case of ***HAFEZA BIBI & ORS, Vs. SHAIKH FARID (DEAD) BY L.Rs & ORS*** reported in ***AIR 2011 SC 1695,*** has clarified and has set at rest the ambiguity on application of Chapter VII to the Muslims. It is held that Section 129 of the Transfer of Property Act, preserves the rule of Mohammadan Law and excludes the applicability of Section 123 of the Transfer of Property Act to a gift of an immovable property by a Mohammadan. A gift without consideration of property or substance of a thing could be oral, it does not require registration once three conditions which are necessary to constitute a valid gift, namely, a declaration of 'gift' by Donor and acceptance of the gift, express or implied by or on behalf of the 'Donee' and delivery of possession of the subject of the gift by Donor to Donee completes the gift.

49. However, Hiba-bil-ewaz in India being a gift for a exchange, it is in the nature of a sale and if the subject

matter is immovable property, then, it can only be by a registered instrument as provided under Section 54 of the Transfer of Property Act. Oral gift, in discharge of money owned to the donee being one for consideration, amounts to sale. It is not pure and simple Hiba but Hiba-bil-ewaz and if the property of the value of Rs.100 or more is involved, it can only be by a registered instrument. Similarly, in the case of gift for consideration such as love and affection, it would be a transfer of ownership in exchange for price paid or promised or part paid and part promised, then it has to be by a registered document.

50. In the instant case, the specific case pleaded is that the gift is in lieu of 'Mahr' settlement. 'Mahr' is a debt. If the amount of 'Dower' is ascertained and the transfer is made in lieu thereof, the transfer would be for a price. Then, it is a gift for consideration having all the legal characteristics of sale and in as much as section 52 of the Transfer of Property Act, applies even to a sale transaction between Muslims. Transfer must be deemed to be sale within the meaning of this section.

51. Admittedly, the 'Mahr' settlement pleaded is oral. It is not conveyance by any registered document. The value of the property is more than Rs.100/- and therefore section 54 of the Transfer of Property Act is attracted. Even otherwise, in the evidence produced by the defendants 9 and 10, the date of 'Mahr' is not forthcoming. The amount agreed to be paid as 'Mahr' is not forthcoming. If really 'Mahr' had taken place during the lifetime and it has been acted upon, the katha of the property should have been in the name of wife. If she was paying tax, tax paid receipt should have been in her name. But, the evidence on record shows that it is only after death of Inayathulla in the year 1979, for the first time, in the year 1982, katha was made in the name of Defendant No.5 by Bangalore City Corporation. There is nothing on record to show that prior to death of Inayathulla, Defendant No.5 exercised any rights over the schedule property as absolute owner. In fact, in the compromise petition to which Defendant No.5 is a party, there is no whisper about 'Mahr' and on the contrary, the shares are carved out in accordance with the Mohammedan Law. Therefore, by merely

mentioning in the sale deed Ex.D22 and Ex.D66, which has come into existence after filing of the suit, that Defendant No.5 became absolute owner by virtue of the 'Mahr', she would not become the absolute owner thereof. Much reliance was placed on Ex.P8 affidavit dated 24.8.1985 of the 1st plaintiff to substantiate the contention that it proves 'Mahr' in favour of the 5th Defendant. In the aforesaid affidavit, the 1st plaintiff has sworn to the fact that after death of her husband Inayathulla, she is entitled to 1/6th share to the estate left behind by him. Out of the misunderstanding or ill advise, she filed the present suit. Subsequently, she has reconciled and compromised all issues including all properties. She has advised her lawyers to withdraw the suit from the Court and that for monetary consideration and for a bigger share in another property, she has relinquished all her rights, title and interest as legal heir of her son over the property Nos. 6 and 7 in favour of her Daughter-in-law – 5th Defendant. The four minor children i.e., Defendants 1 to 4 have been allotted various other properties from their share and therefore the schedule property exclusively and

absolutely belongs to 5th Defendant. She has declared that the said property is free from all encumbrances and no other legal heir of her son have any right, title or interest in it. Defendant No.5 is in complete possession and enjoyment of the entire property. She is also collecting rents from all tenants and she nor any other person has any right in the said property. In the entire affidavit, there is no mention about 'Mahr'. The said affidavit also has come into existence subsequent to filing of the suit. In fact, she has not stepped into the witness box to give any evidence. If she has instructed her Counsel to withdraw the suit, the suit is not withdrawn. At the most, the aforesaid recitals mean that she is giving up her rights if any in the schedule property to the 5th Defendant. Again the property is valued more than Rs.100/-. If she wants to relinquish her right in the property, it has to be by a registered document. By such affidavit, she cannot relinquish her right in immovable property value of which is more than Rs.100/-. At the same time, she cannot swear that Defendants 1 to 4 have no right nor anybody has any right and that only Defendant No.5 is

the absolute owner. By such declarations, absolute title to the property cannot be conferred on the Defendant No.5. Therefore, even if the document is accepted at its face value, it neither proves the 'Mahr' pleaded by Defendants 9 and 10 nor does it confers absolute title on the Defendant No.5. There is no substance in the said contention also. Therefore, in the light of the aforesaid discussion, we are of the view that the finding of the Trial Court that additional issue No.1 is not proved, 'Mahr' is not proved, is based on legal evidence and cannot be found fault with. Accordingly, we affirm the said finding.

Point No.4: Doctrine of lis-pendence

52. Ex.D22 and D66 are the sale deeds. It is Ex.D66 under which defendants 9 and 10 claim to have purchased the entire schedule property from the Defendant No.5. Admittedly they have come into existence subsequent to filing of the suit. Therefore, it is clearly hit by section 52 of the Transfer of Property Act. Now, the question is whether sale deeds which come into existence during the pendency of

the suit are null and void ab initio. If not, what is the legal effect to be attributed to the said sale deeds?

53. The Trial Court has proceeded on the assumption when sale deed comes into existence subsequent to the institution of the suit, it is hit by section 52 of the Transfer of Property Act and consequently it is null and void and the purchaser under sale deed acquires no title to the property which is covered under the sale deed. Further, it is held that purchaser is also not entitled to any equity at the time of partition by metes and bounds.

54. Section 52 of the Transfer of Property Act, reads as under:

> *"52. Transfer of property pending suit relating thereto.-*
>
> *During the pendency in any court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property*

cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose."

Explanation: For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

55. The principle on which the doctrine rests was spoken by Cranworth L.C. in the leading case of *Bellamy v.Sabine ((1857) 44 ER 842 at p. 843)* as:

"It is scarcely correct to speak of lis pendens as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its

operation. It affects him not because it amounts to notice, but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.

Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind required that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end.

5. The Privy Council had adopted the same principle in Faiyaz Husain Khan v. Munshi Frag Narain ((1907) 34 Ind App 102) where they lay stress on the necessity for final adjudication and observation that otherwise there would be no end to litigation and justice would be defeated.

6. Story in his work on Equity IIIrd Edition para 406 expounded the doctrine of lis pendens in the terms as follows;-

"Ordinarily, it is true that the judgment of a court binds only the parties and their privies in representations or estate. But he who purchases during the pendency of an action, is held bound by the judgment that may be against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the action. Where there is a real and fair purchase without any notice, the rule may operate very hardly, But it is a rule founded upon a great public policy; for otherwise, alienations made during an action might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim pendente lite, nihil innovetur; the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them."

56. The Full Bench of the Allahabad High Court in the case of ***SMT RAM PEARY & OTHERS Vs. GAURI AND OTHERS*** reported in ***AIR 1978 ALLAHABAD 318*** has held as under:

"7. In the light of these principles we have got to consider whether in the event of a conflict arising between the doctrine of lis pendens enshrined in S, 52 of the Transfer of Property Act and the rule availing a subsequent transferee without notice, contained in Section 19(b) of the Specific Relief Act either the one or the other should prevail. Ordinarily, it is true that the title acquired by the subsequent purchaser is good, the sale to him being not void. But he who purchases during the pendency of the suit is bound by the decree, that may be made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired (see Samarendra Nath Sinha v. Krishna Kumar Nag (AIR 1967 SC 1440)), As to the vendor and the prior contractor it is as if no such title existed. Section 52 places a complete embargo on the transfer of any right to immoveable property pending suit, which is directly and specifically in question in such a litigation; it enacts that during the pendency of the suit in which any right to immoveable property is "directly and specifically in question, the property cannot be transferred or otherwise alienated by any party to the suit so as

to affect the rights of any other party thereto under any decree."

Thus, in the present case it may be that the subsequent transferee was entirely, ignorant of any tight on the part of (SIC) contractor, and also of the pen-(SIC) of the suit filed against the vendor by such contractor, yet as the transfer was made to him by the vendor after the institution of the suit of the contractor and, while it was pending, the subsequent purchaser cannot set up against the contractor any right from which his vendor is excluded by the decree. The title of the subsequent purchaser is good against him on the ground of breach of covenant, but against the plaintiff contractor who seeks specific performance of the contract against the vendor, the subsequent transferee can be in no way 'better position than the vendor himself. It is well settled that in a suit for specific performance of contract in respect of immoveable property a right to immoveable property is directly and 'specifically in question, (see Gauri Dutt Maharaj v. Sheikh Sukur Mohammad ,(75 Ind App 165) : (AIR 1MB PC 147)).

As Story has put it in the passage above quoted, the effect of the doctrine of lis pendens is

not to annul the conveyance but only to render it subservient to the rights of the parties in the litigation. The conveyance in favour of the subsequent purchaser is treated as if "it never had any existence". The conveyance in favour of the subsequent purchaser thus yields to the adjudication of the rights obtained by the contractor, in the consequence of a decree obtained against the vendor in a suit for specific performance of the contract. In Durga Prasad v. Deep Chand (AIR 1954 SC 75) (supra) their Lordships were dealing with the form of the decree in a suit directing specific performance of contract between the vendor and the plaintiff and in that connection, with a view to convey to the plaintiff, without cancelling the subsequent sale, they without enforcing the contract against the subsequent purchaser, directed him to join in the conveyance so as to pass on the title which resided in him to the plaintiff. It was not a case falling within the mischief of S, 52 of the T. P. Act.

In our opinion, therefore, when the doctrine of lis pendens renders a transfer made during the pendency of the suit subservient to the rights of the plaintiff seeking specific performance of a prior contract entered into by the vendor in his

favour and when 'on account of the operation of the doctrine of lis pendens such conveyance is treated as if it had never any existence, the subsequent transferee, even though he had obtained the transfer without notice of the original contract, cannot set up against plaintiff-contractor any right; for it would defeat the rule of lis pendens which is founded upon public policy. And considered in that manner, Section 52 of the T. P. Act is not subject to S, 19(b) of the Specific Relief Act.

8. We may yet arrive to a similar conclusion in a different manner. "A judgment inter partes raises an estoppel only against the parties to the proceeding in which it is given, and their privies, for example, those claiming or deriving title under them." (Halsbury's Laws of England, Third Edition, Volume 15, para 372). The transferee pendente lite would be treated as a representative in interest of the parties to the suit and the judgment which has been pronounced, in the absence of fraud and collusion, would have the effect of finally determining the rights of the parties and the cause of action which would sustain the suit in which the doctrine of lis pendens applied would be merged in the

judgment duly pronounced in what may be described as the previously decided suit. The decision being res judicata would bind not only the parties thereto but also the transferees pendente lite from them.

In a case to which besides the vendor the subsequent transferee is also impleaded in the array of the defendants, the judgment is final and binding not only on the parties to the original contract but also the transferee pendents lite from vendor. The conveyance in favour of the subsequent purchaser is treated as if it never had any existence. There would then be no lis or action, which would survive, enabling the subsequent purchaser to take the defence of bona fide transfer for value without notice of the original contract. Accordingly, we take the view that lis pendens affects the transferee pendente lite and Section 52 of the T. P. Act is not subject to Section 19(b) of the new Specific Relief Act. The conveyance in favour of the subsequent purchaser pending the suit brought by the plaintiff contractor for! specific performance of the contract between him and the vendor is taken "as if it had never any existence."

57. In the case of ***BALWINDERJIT KAUR Vs. FINANCIAL COMMISSIONER (APPEALS), PUNJAB*** reported in ***AIR 1987 PUNJAB AND HARYANA 189***, it is held as under:

> *"3. ... By now it is well laid down that in the case of a transfer which is hit by the doctrine of lis pendens under S. 52 of the Transfer of Property Act the question of good faith which is essential to be established before an equitable relief can be granted in favour of a subsequent vendee under section 41 or S. 51 of the Transfer of Property Act is totally irrelevant (see Shanu Ram v. Basheshar Nath (1966) 68 Pun LR (D) 44): In the face of this settled legal position, the plea raised on behalf of respondents 5 to 10 that they were bona fide purchasers without notice from Paramjit Singh and Jagjit Singh was obviously of no consequence. Respondents 5 to 10 having purchased the property from these two vendors during the pendency of the civil litigation against them are bound by the decree passed against them, i.e., the vendors and, in view of that, no question of title remained to be settled between the parties, i.e., the petitioner and the subsequent vendees."*

58. The Supreme Court in the case of ***'SARVINDER SINGH v. DALIP SINGH AND OTHERS'*** reported in ***1996 [5] SCC 539***, it was observed in paragraph-6 as follows:

> *"Section 52 of the Transfer of Property Act envisages that "during the pendency in any Court having authority within the limits of India of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the right of any other party thereto under the decree or order which may be made therein, except under the authority of the court and on such terms as it may impose. " It would, therefore, be clear that the defendants in the suit were prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise deal with it in any way affecting the rights of the appellant except with the order or authority of the Court. Admittedly, the authority or order of the Court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lie pendens by operation of Section 52. Under these*

circumstances, the respondents cannot be considered to be either necessary or proper parties to the suit."

59. Following the aforesaid Judgments, the Apex Court in the case of ***'SANJAY VERMA v. MANIK ROY AND OTHERS' [AIR 2007 SC 1332],*** at paragraph-12 held as under:

"The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court."

60. Again in the case of ***'A. NAWAB JOHN AND OTHERS v. V.N. SUBRAMANIYAM'*** reported in ***[2012] 7 SCC 738***, it is held as under:

"It is settled legal position that the effect of Section 52 is not to render transfers affected during the pendency of a suit by a party to the suit void; but only to render such transfers subservient to the rights of the parties to such

suit, as may be, eventually, determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The pendente lite purchaser would be entitled to or suffer the same legal rights and obligations of his vendor as may be eventually determined by the Court."

61. Similarly, Apex Court in the case of '***DHANLAKSHMI & OTHERS VS P. MOHAN & OTHERS'*** [AIR 2007 SC 1062] at paragraph-5 held as under:

"Section 52 deals with a transfer of property pending suit. In the instant case, the appellants have admittedly purchased the undivided shares of the respondents nos.2,3,4 & 6. It is not in dispute that the first respondent P. Mohan has got an undivided share in the said suit property. Because of the purchase by the appellants of the undivided share in the suit property, the rights of the first respondent herein in the suit or proceeding will not affect his right in the suit property by enforcing a partition. Admittedly, the appellants, having purchased the property from the other co-sharers, in our opinion, are entitled to come on record in order to work out the equity in their favour in the final decree proceedings. In our

opinion, the appellants are necessary and proper parties to the suit, which is now pending before the Trial Court. We also make it clear that we are not concerned with the other suit filed by the mortgagee in these proceedings."

62. After considering the aforesaid Judgments, this Court in the case of ***K. SHIVARAMAKRISHNA AND ANOTHER v. NARAYANA AND ANOTHER*** decided on 5.7.2013 in RSA No.2329/2006, held as under :-

"40. Section 52 of the T.P. Act places a complete embargo on the transfer of any right to an immoveable property pending suit, which is directly and specifically in question in such a litigation. It enjoins that during the pendency of the suit in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise alienated by any party to the suit so as to affect the rights of any other party thereto under any decree. The conveyance in favour of the subsequent purchaser is treated as if "it never had any existence". The conveyance in favour of the subsequent purchaser thus yields to the adjudication of the rights obtained by the contracting party. Where a litigation is pending

between plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigating parties, but also on those who derive title through them by alienations made during the pendency of suit, whether such alienees had or not, the notice of pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end. It is a rule founded upon a great public policy. Otherwise, alienations made during an action might defeat its whole purpose, and there would be no end to litigation. Hence arises the maxim pendente lite, nihil innovetur; the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them.

41. A judgment inter partes raises an estoppel only against the parties to the proceeding in which it is given, and their privies, for example, those claiming or deriving title under them. The transferee pendente lite would be treated as a representative in interest of the

parties to the suit and the judgment which has been pronounced, in the absence of fraud and collusion, would have the effect of finally determining the rights of the parties and the cause of action which would sustain the suit in which the doctrine of lis pendens applied would be merged in the judgment duly pronounced in what may be described as the previously decided suit. The decision being res judicata would not only bind the parties thereto but also the transferees pendente lite from them. The title acquired by the subsequent purchaser is good, the sale to him being not void. But he who purchases during the pendency of the suit is bound by the decree, that may be made against the person from whom he derives title. The litigating parties are exempted from the necessity of taking any notice of a title so acquired, as to the vendor and the prior contractor as if no such title existed.

63. Therefore, it is clear that it is settled legal position that the effect of section 52 of the Transfer of Property Act is not to render transfers effected during the pendency of the suit by a party to a suit void. It only renders such transfers subservient to the rights of the parties to the said suit as

may be eventually determined in the suit. In other words, the transfer remains valid subject, of course, to the result of the suit. The mere pendency of the suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit. The principle underlying section 52[e] is that the litigating party is exempted from taking notice of title acquired during the pendency of the litigation. The section only postulates a condition that the alienation will in no manner affect the rights of other party under a decree which may be passed in the suit unless the property is alienated with the permission of the Court. Therefore, in the absence of any prescription under statute, from alienating the property during the pendency of the suit, an alienation made by a party to the suit is valid and legal and it is not void ab initio. However, transfer remains valid, subject of course, to the result of the suit. If the person from whom the property is purchased succeeds in the suit, the purchaser succeeds. If the party loses, the purchaser loses and therefore the question whether alienation is valid or not

is determined after determination of rights of the parties in the suit finally.

64. In the instant case, though Defendants 9 and 10 contend that the Defendant No.5 is the absolute owner of the property and she has conveyed absolute title to the schedule property in their favour under the two sale deeds, as the basis for such claim is a 'Mahr' settlement which is not proved, the claim that Defendant No.5 is the absolute owner fails. But, at the same time, in law, as wife of deceased Inayathulla is the owner of the property, she is entitled to 1/8th share. In fact, this right is conceded by other legal heirs in the compromise petition. Therefore, though the entire property is purported to have been conveyed under said two sale deeds by Defendant No.5 in favour of Defendants 9 and 10, the said sale is a valid sale insofar as the right of Defendant No.5 in the property, namely, 1/8th share. Therefore, the sale is not null and void. But, the said deed only conveys that right Defendant No.5 had in the property in favour of Defendants 9 and 10. To that extent,

the finding recorded by the Trial Court cannot be sustained and accordingly it is hereby set aside.

POINT No.5:

65. It was contended that under the sale deed, consideration is paid for the entire property. The entire property is conveyed. Clause-4 of the sale deed provides for indemnification. Defendant No.5 is entitled to 1/8th share in all the properties of her husband, which are, particularly, the said suit in the plaint schedule. Even in the compromise entered into between the family members, she has been conferred 1/8th share in all the properties. Therefore, it was contended that even though while passing preliminary decree, portion of the property is to be given to Defendants 9 and 10 cannot be determined by this Court in final decree proceedings, this aspect has to be taken note of by the final decree Court and after determining 1/8th share of Defendant No.5 in all the properties, the property purchased by Defendant Nos.9 and 10 under Ex.D22 and Ex.D66 in its entirety is to be allotted to them. That is a matter which is to be considered at the stage of passing final decree by final

decree Court and not by this Court. Further, it was submitted that the 3rd defendant during the pendency of the suit has relinquished his interest in the property by way of release deed Ex.D24 and under registered sale deed Ex.D25 his 2/16th share in property No.6 is conveyed to Defendants 9 and 10. That also has to be taken into consideration in the final decree proceedings while effecting partition by metes and bounds and allotting shares to Defendants 9 and 10, on the Defendants 9 and 10 proving that they have acquired such rights under the aforesaid deeds.

66. It was contended that as these rights were acquired during the pendency of the suit, not only Defendants 9 and 10 are not bonafide purchasers, but they are not entitled to such equitable distribution.

67. Countering the said document, learned Counsel for Defendants 9 and 10, relied on the Judgment of the Apex Court in the case of ***'KHEMCHAND SHANKAR CHOUDHARY AND ANOTHER v. VISHNU HARI PATIL AND OTHERS'*** reported in ***1983 [1] SCC 18***, where dealing with

the purchaser pendente lite, locus standi to claim equitable partition before the Collector in Final Decree Proceedings under section 54 of the Civil Procedure Code, it was held as under:

> *"Section 52 of the Transfer of Property Act no doubt lays down that a transferee pendente lite of an interest in an immovable property which is the subject matter of a suit from any of the parties to the suit will be bound in so far as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Code of Civil Procedure clearly recognises the right of a transferee to be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard. He can also prefer an appeal against an order made in the said proceedings but with the leave of the appellate court where he is not already brought on record. The position of a person on whom any interest has devolved on account of a transfer during the*

pendency of any suit or a proceeding is somewhat similar to the position of an heir or a legatee of a party who dies during the pendency of a suit or a proceeding, or an official receiver who takes over the assets of such a party on his insolvency. An heir or a legatee or an official receiver or a transferee can participate in the execution proceedings even though their names may not have been shown in the decree, preliminary or final. If they apply to the court to be impleaded as parties they cannot be turned out. The Collector who has to effect partition of an estate under section 54 of the Code of Civil Procedure has no doubt to divide it in accordance with the decree sent to him. But if a party to such a decree dies leaving some heirs about whose interest there is no dispute should he fold up his hands and return the papers to the civil court ? He need not do so. He may proceed to allot the share of the deceased party to his heirs. Similarly he may, when there is no dispute, allot the shares of a deceased party in favour of his legatees. In the case of insolvency of a party, the official receiver may be allotted the share of the insolvent. In the case of transferees pendente lite also, if there is no dispute, the Collector may proceed to make allotment of properties in an

equitable manner instead of rejecting their claim for such equitable partition on the ground that they have no locus standi. A transferee from a party of a property which is the subject matter of partition can exercise all the rights of the transferor. There is no dispute that a party can ask for an equitable partition. A transferee from him, therefore, can also do so. Such a construction of section 54 of the Code of Civil Procedure advances the cause of justice. Otherwise in every case where a party dies, or where a party is adjudicated as an insolvent or where he transfers some interest in the suit property pendente lite the matter has got to be referred back to the civil court even though there may be no dispute about the succession, devolution or transfer of interest. In any such case where there is no dispute if the Collector makes an equitable partition taking into consideration the interests of all concerned including those on whom any interest in the subject matter has devolved, he would neither be violating the decree nor transgressing any law. His action would not be ultra vires. On the other hand, it would be in conformity with the intention of the Legislature which has placed the work of partition of lands subject to payment of

assessment to the Government in his hands to be carried out 'in accordance with the law (if any) for the time being in force relating to the partition or the separate possession of shares."

68. Therefore, a transferee *pendente lite* steps into the shoes of the transferor who is a party to the suit. He acquires all the rights of the transferor. The pendency of the suit would not come in the way of his acquiring such right, if the transferor has any such right. If the transferor has no right, he acquires none. This is a matter which is finally adjudicated in the suit. The judgment and decree passed in the suit is equally binding on him, as his transferee, whether he is impleaded as a party to the suit or not. Transferee from a party of property which is subject matter of partition can exercise all the rights of the transferor. Such transferee is representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Code of Civil Procedure clearly recognises the right of a transferee to be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any

order passed in the proceedings. The position of a person on whom any interest has devolved on account of a transfer during the pendency of any suit or a proceeding is somewhat similar to the position of an heir or a legatee of a party who dies during the pendency of a suit or a proceeding, or an official receiver who takes over the assets of such a party on his insolvency. When a party to a decree dies, leaving some heirs, in the final decree proceedings, shares may be allotted to such heirs. Similarly, in the case of transferee pendente lite, if there is no dispute, final decree Court can proceed to make allotment of the properties in an equitable manner instead of rejecting their claim for such equitable partition on the ground that they have no locus standi. A transferee from a party of a property which is the subject matter of partition can exercise all the rights of the transferor. There is no dispute that a party can ask for an equitable partition. A transferee from him, therefore, can also seek for an equitable partition, even if the transfer is during the pendency of the suit. Such a construction of section 54 of the Code of Civil Procedure advances the cause of justice.

69. Therefore, Defendants 9 and 10 having purchased the schedule property under two registered sale deeds, have acquired interest Defendant No.5 has in that property. In the final decree proceedings, notwithstanding compromise entered into between them and the partition effected as per the sketch, the final decree Court has to effect partition of the schedule property in accordance with law and keeping in mind the equity in this case, as discussed above, shall proceed to allot the legitimate share to which Defendants 9 and 10 are entitled to in law. That would meet the ends of justice.

70. During the pendency of appeal, several applications are filed. One such application is IA No.1/2013 for comparison of signature on Ex.D8. As the Trial Court held Ex.D8 is not proved and in the Trial Court, an application was filed to refer the signature of the 1st plaintiff on Ex.D8 to a `handwriting expert which was rejected, one more request is` made. In view of the finding recorded by us, even if Ex.D8 is held to be affidavit of the 1st plaintiff, since it makes

no difference as far as rights of the 5th defendant in the property is concerned, it is not necessary to refer to any handwriting expert the purported signature in Ex.D8. Accordingly, IA No.1/2013 is dismissed.

71. IA No.1/2014 is filed by Defendants 9 and 10 bringing to the notice of the Court of certain alleged alienations made during the pendency of this appeal. IA No.2/2014 has been filed for production of the said document. Objections have been filed. All that is not necessary to be taken note of by this Court in deciding the rights of the parties in the property which would alone be subject matter of preliminary decree. Therefore, all those applications are rejected.

72. Similarly, memos are filed in the course of compromise talks. It is settled law that, the particulars of any compromise talks during the pendency of the proceedings, which are disputed cannot be taken note of. Accordingly, memos are dismissed.

73. Hence, we pass the following order:

ORDER

(1) **The appeal is partly allowed.**

(2) In the schedule property, 1st plaintiff is entitled to 1/6th share, 5th defendant is entitled to 1/8th share. After deducting the aforesaid shares, in the remaining properties, the 1st defendant is entitled to 1/70th share, defendants 2, 3 and 4 are entitled to 2/70th share each.

Sd/-
JUDGE

Sd/-
JUDGE

ckl/ksp/An/-