

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

S.A. 770 of 1991

**Md. Sahid, since deceased, represented by
Asgari Banu @ Asgtari Begum & Ors.**

Vs.

Jamrati, since deceased, represented by Memunnessa & Ors.

For the Appellants : Mr. Partha Pratim Roy
Mr. Lutful Haque
Mr. T. Khatun

For the Respondents : Mr. Siva Prasad Ghosh

Heard on : 21.09.2023

Judgment on : 19.12.2023

Ajoy Kumar Mukherjee, J.

1. Predecessor-in-interest of the present appellants Md. Sofi preferred this second appeal challenging the judgment of reversal dated 19th December, 1989 passed by the Assistant District Judge, Sealdah, Alipore, in Title Appeal No. 83 of 1989, on 30th January, 1989. By the impugned judgment, First Appellate Court has set aside the judgment passed by the Learned Munsif 4th Court Sealdah, in Title Suit No. 240 of 1986 and decreed the said suit.

2. Predecessor-in-interest of the respondents herein namely Jumrati had filed a suit for eviction of licensee against Md. Sofi, the predecessor-in-

interest of appellants, alleging that Md. Sofi was inducted as a licensee in respect of one room by Sugia Bibi, alias Sukia Bibi alias Sufia Bibi (hereinafter called as Sugia Bibi) admitted erstwhile owner of the suit property. Plaintiff further alleged that after becoming owner of the suit property and after the death of said Sugia Bibi, he did not renew said licence and as such the defendant/licensee has no right to possess the said premises and as such he filed aforesaid suit for eviction of licensee and recovery of possession and permanent injunction being aforesaid T.S. No. 240 of 1986.

3. Md. Sofi contested the said suit by filing written statement wherein he has specifically denied the allegations made in the plaint and he also denied that the erstwhile owner Sugia Bibi at any point of time had executed any deed of sale in plaintiff's favour. Said Md. Sofi further contended that he got marriage with Sugia Bibi and he resided with her in the suit premises as husband and wife. The proforma defendant Jaigunessa Bibi is the daughter of said Sugia Bibi by her alleged first husband, who is now married and is residing at her matrimonial house.

4. Learned Trial Court framed six issues out of which issue no. 3 is whether the defendant is a licensee under the plaintiff in respect of the suit property or not. While deciding the said issue the court below held that plaintiff claimed that he became owner of the suit property by dint of will executed by Sugia Bibi. Plaintiff is to prove that he is the owner of the suit property and that the will executed by Sugia Bibi in his favour is genuine one. In this context learned Trial Court referred Mohammedan law and observed that since Jaigunessa/the defendant no. 2 is admittedly the

daughter of Sugia Bibi, so Sugia Bibi cannot dispose of her entire properties by the said will without taking consent from Jaigunnessa and there is nothing to show that such consent was obtained by Sugia Bibi. Accordingly plaintiff cannot claim absolute ownership in the suit property and his ownership is under challenge. He further observed that on the contrary defendant no. 1 has claimed himself as the husband of Sugia Bibi and as such he is the co-sharer in respect of the suit property along with plaintiff and as such plaintiff had no authority to file suit for eviction of licensee against the defendant and plaintiff also failed to prove the alleged licence granted to defendant no. 1 and accordingly Trial court held that the plaintiff is not entitled to get decree as prayed for.

5. Learned trial court has specifically held that a person who has no right over the property cannot revoke the grant and file suit for eviction. As defendant No.1 has specifically alleged that after the death of Sugia Bibi, he as husband of Sugia Bibi had inherited share in the suit premises, along with Jaigunnessa and in fact Sugia Bibi had not executed any deed of sale in favour of plaintiff Jamrati in respect of the suit premises and as according to Mohammedan law, a Mohammedan can bequeath legally only one third of his or her estate after meeting of ceremonial and burial expenses and since the entire property has been bequeathed by the said Sugia Bibi in favour of the plaintiff and under Mohammedan law in order to validate the said bequeath, in its entirety all heirs of the deceased testatrix have to give their consent after the death of the testatrix and since no consent was given by the heirs of deceased testatrix, after the death of the testatrix, the plaintiff has not acquired absolute ownership over the suit property and accordingly

plaintiff is not entitled to get decree of eviction of licensee. The Trial Court further held that plaintiff miserably failed to prove the alleged licence granted to the defendant no. 1. Accordingly Trial court dismissed plaintiffs suit.

6. The appellate court while dealt with the submissions of the parties had framed following issues for consideration:-

- 1. Whether the defendant was a mere licensee in the property.*
- 2. Whether the plaintiff acquired title over the property by virtue of her alleged purchase.*
- 3. Whether the defendant has any interest in the property. If so how it was accrued?*
- 4. Whether the judgment and decree of the learned Munsif can be sustained?*

7. Learned first appellate court held that the marriage certificate which has been produced in the case cannot be treated to be a valid document because it does not contain the signature of women witness or the signature of the bride and the bride groom or any Moulavi as witness to the said marriage as per the requirement of the statute. The first appellate court was of clear view that no marriage was held between defendant no. 1 and the original owner of the suit property Sugia Bibi. He further held that the marriage cannot be said to have been presumed even under the Mohammedan law only by continuous co habitation for years together and accordingly Md. Sofi/defendant has absolutely failed to prove the second marriage of Sugia Bibi with him as pleaded by him and as such he cannot claim himself as a co-owner in respect of the suit property and he has no status in the suit property, because original land lady granted licence in favour of the defendant no.1, for residing in one room i.e. the suit premises and said licence automatically had been revoked in the year 1979 with the

death of grantor of licence and since then the defendant is a trespasser in respect of the suit property.

8. While dealing with acquisition of title by the plaintiff in respect of the suit property the first appellate court observed that by the strength of will plaintiff acquired one third share under the Mohammedan law but plaintiff also became the owner of the remaining two third share of the suit property as other legal heir i.e. defendant no., 2 had given implied consent. Court below further held that in any case, by the strength of registered will, the plaintiff became owner of at least one third share in the suit property and as such even being a co-sharer, he is entitled to bring a suit for eviction against trespasser/defendant/ Md. Sofi, who has no interest in the property, because as per settled law any of the co-sharers has right to file suit for eviction and injunction. In such view of the matter court below set aside the judgment passed by the Trial court and granted a decree for recovery of khas possession of the suit property by evicting the defendant no. 1 therefrom.

9. Mr. Roy learned counsel appearing on behalf of the Appellants submits that the first appellate court while taking into consideration the judgment of the Trial court has failed and neglected to consider that no issue was framed with regard to the relationship between Sugia Bibi and Md. Sofi nor such relationship was decided in the earlier Title Suit no. 401 of 1975 between Sugia Bibi and Md. Sofi and as such there is no question of any res judicata with regard to the issue of relationship between the parties or their marriage. He further contended that the defendant no.1 has proved his marriage with Sugia Bibi which took place on 22nd January, 1967 in presence of witnesses and the Imam and Marriage Registrar. The DW-2

appeared before the court with the marriage register Book of 1967 and deposed in favour of marriage. Said marriage dated 22nd January, 1967 took place in presence of three witnesses, one being the lawyer Md. Basir and two witnesses being Sofiullah and Nasar Ahmed. The said marriage register was filled up in Urdu and certificate of marriage was given by marriage registrar and Imam. He further submitted that the Muslim law does not require registration of marriage to validate the marriage and a Muslim marriage can be proved by direct evidence or in the absence of direct evidence by establishing prolonged continuous cohabitation or acknowledgment by the man of the paternity of child or by the acknowledgment that the particular woman is his wife

10. Ld. Court below went wrong in holding that marriage between the parties cannot be said to have presumed under the Mohammedan Law only by continuous cohabitation for years together. He further contended that the plaintiff himself had no knowledge about exhibit-1, and in fact exhibit-1 which was executed in his favour was actually a will but he considered the same to be a registered deed of sale and as such there arose no question to obtain any permission from the heir of the deceased testatrix being her daughter, the profroma defendant and as such aforesaid will executed in respect of entire property of testatrix is not operative in the eye of law and is liable to be rejected. In this context the court below was wrong in finding that there was any implied consent. Mere keeping silence by an heir to the testatrix in respect of bequeathing her entire estate cannot amount to consent. In fact she had no knowledge of execution of any will nor she was informed by any one including the plaintiff and as such there arose no

occasion to give any consent by the said heir of the testatrix after her death which is evident from the pleadings of the parties and the evidence of PW-1.

11. Mr. Roy further contended that the defendant was never a licensee under the erstwhile owner Sugia Bibi and in fact he had paid rent to Sugia Bibi and he has not paid any rent only for last two years. In fact Sugia Bibi admitted the defendant to be an “old tenant under her” which is evident from the judgment passed in earlier Title Suit no. 401/1975 between the parties and the said fact was reiterated in the judgment of T.A. 467 of 1979 and as such suit for eviction of licensee against the present appellant/defendant does not lie and considering all these the finding of the court below is bad in law and has been made on surmise and conjecture and is liable to be set aside.

12. Mr. Ghosh learned counsel appearing on behalf of the respondents relying upon a judgment reported in **1996 (1) CLJ 557 (Radha Prosad Sharma Vs. Smt. Bejoy Sett)** contended that had the defendant been a tenant in respect of the suit property he would have given reply to the notice of eviction sent by plaintiffs on 01.02.1985 and conduct of Md. Safi goes a long way to prove that he was never a tenant in the suit property. Relying upon another judgment of a co-ordinate bench of this court reported in **2018(3) CHN Cal 213 (Biswanath Das Vs. Keshab Dubey)** he contended that the notice dated 01.02.1985 marked as exhibit 4 remains unchallenged from the side of appellant and the suit was filed in the year 1986 for eviction of licensee, when he failed to comply the terms of notice.

13. He further contended that in the written statement the predecessor-in-interest of appellant stated that Sugia Bibi sold out 16 huts comprising

of an area of 3 kathas of land by a registered deed of conveyance on 21.04.1972 which subsequently declared by court as null and void. Plaintiff/ respondents in support of their case relied upon various documents including the registered will and judgment and decree passed in earlier T.S. 401 of 1975 and the judgment passed in T.A. 467 of 1979 arising out of that suit and notice and postal receipt with AD Card, marked as exhibit 4. He further contended that in the plaint plaintiff may have stated that by virtue of registered deed dated 28.07.1978 executed by Sugia Bibi plaintiff became owner of the property but such pleading should be looked in substance and in this context he relied upon a judgment reported in **AIR 1955 SC 590**. Referring a judgment reported in **2007 (11) SCC 736/AIR 2007SC 2349 (Narain Prosad Agarwal Vs. State of MP)** he contended that Mafussal pleadings are not to be construed strictly and it must be construed in their entirety. Referring Apex Court judgment reported in **(2004) 3 SCC 137** he contended that considering the reliefs claimed the pleadings would not mean compartmentalization or segregation in that sense. In the present case defendant failed to prove any rent receipt showing that he was tenant at any point of time in the suit property. In this context he relied upon observation of the Apex court in **2014 (3) CHN SC 57 (Praful Manohar Rele Vs. K.N. Ghosal Kar)**. He also relied upon another judgment reported in **2006 3 CHN 1 (Tarumoni Mondal Vs. Prafulla Kr. Mondal)**. He further contended that marriage certificate marked exhibit B does not bear signature of Sugia Bibi. No witness had put signature therein. Moreover Trial Court held that if marriage is not proved then the defendant no.1 cannot be the owner of the suit property. No cross

appeal against that finding had been made by the appellant herein before the first appellate court. The Imam i.e. DW2 has stated that he has not seen Sugia Bibi and he has no personal knowledge about Md. Sofi and he had not seen the defendant No.1 personally. It is argued that under Sunni Law marriage must be preceded by proposal and acceptance. Marriage under compulsion or without intention is valid if made for suitable dower and to a man who is her equal. Two male or one male and two female witnesses are necessary for the validity of marriage.

14. He further contended that the marriage under Mohammedan law is not a sacrament but a civil contract between two parties of opposite sex for mutual engagement and it is called "Nikah". So the court below rightly held that the marriage between the parties has not been proved. The plaintiff also did not put other witnesses of alleged marriage in the witness box. DW-1 during cross-examination stated that he has paper to show that Sukia Bibi had accepted her as her husband but said DW-1 did not file any such document. In fact Jaigunessa/ Proforma defendant no. 2 adduced evidence in earlier suit and stated that DW1 who is defendant No.1 has not purchased any portion of the suit house from the her mother and in earlier suit she has categorially stated that there was no such marriage. He further contended that where there was finding relating to the marriage by 1st appellate court in earlier suit, that finding will operate as *res judicate* between the parties and in this context he relied upon a privy council judgment reported in **AIR 1932 P.C. 50**. Therefore, the appellant's contention that Md. Sofi was the husband of Sugia Bibi cannot be accepted. He further contended that will executed in favour of the

predecessor of respondents herein is a Mohammedan will and under Section 213 of Indian Succession Act, the right of the legatee can be established before any court of law without obtaining probate of the will and accordingly the ownership of Jamrati/plaintiff has been clearly established and on the contrary defendant appellant has miserably failed to establish his right to stay in the suit property, and as such the court below rightly decreed the suit in favour of plaintiff which does not call for interference in the second appeal.

DECISIONS WITH REASONS

A Co-Ordinate Bench of this court vide its order dated 13.01.2020 has been pleased to formulate the following substantial questions of law for adjudication.

- (1) Whether the learned First Court of Appeal substantially erred in law in holding that the defendant No.1 was not the husband of Sukia Bibi, since deceased, the original owner of the suit property and in view of such relationship between the appellants and the original owner of the suit property, he cannot be regarded as a licensee in respect of the suit property.*
- (2) Whether the learned Court below substantially erred in law in refusing to hold that the defendant No.1/ appellant acquired independent right, title and interest over the suit property by virtue of deed of purchase, executed by Sukia Bibi in favour of him.*
- (3) Whether the learned First Appellate court substantially erred in law in holding that the plaintiff was the owner in respect of the entire suit property on the strength of a will allegedly executed by Sukia Bibi in favour of her without considering the principles of Mohammedan Law that a Mohammedan cannot bequeath more than 1/3rd of his/her property after leaving funeral cost and other essential costs as stated in the Mohammedan Law.*

15. In the present suit for eviction brought by the predecessor of the respondents seeking recovery of possession against the predecessor of the Appellants herein being aforesaid T.S. No. 240 of 1986, the defendant No.1/Appellants filed a written statement and in paragraph 7 of the written statement the defendant no.1 i.e. Md. Sofi admitted that the suit property originally belonged to Sugia Bibi and he further admitted that due to the

wedlock between Sugia Bibi and one Hassan, a daughter was born namely Jaigunnessa who is the proforma defendant No.2 in the said suit. In the present appeal the appellants have primarily challenged plaintiffs locus to file the aforesaid suit, claiming that the plaintiff Jumrati has/had no right title interest in the property. During trial plaintiff/respondents have filed (i) registered will dated 28.07.78 in the name of plaintiffs marked exhibit 1 (ii) judgment and decree passed in T.S. No. 401 of 1975 dated 02.04.79 marked as exhibit 2 (iii) judgment and decree dated 10.04.1980 passed in connection of T.A No. 467 of 1979 marked as exhibit 3, (iv) copy of Notice along with postal slip and A/D card marked exhibit-4 (v) and the entries in record of rights and municipal assessment register and tax receipts which are marked as exhibit 6-11.

16. The registered will executed by Sugia Bibi in favour of plaintiff (marked as exhibit 1) *prima facie* shows plaintiff's locus to file the suit. However, defendant no.1/appellant contended that plaintiff could not prove the legality and validity of the execution of the said will by aforesaid admitted owner Sugia Bibi in accordance with the principles of 118 of Molla's Mohammedan law, whereby it has been specifically stated that no Mohammedan can bequeath more than 1/3rd of his/her property by way of a will after payment of funeral expenses and other debts and furthermore the proforma defendant being the daughter of said executrix Sukia Bibi, has not given her consent after the death of her mother to give effect to the aforesaid bequeath, in its entirety.

17. During the course of argument plaintiff has categorically relied upon a registered deed of release executed by aforesaid proforma defendant namely

Jaigunnesa Bibi dated 06.03.1989 declaring that Md. Sofi was not the husband of Sukia Bibi and that Sukia Bibi executed and registered the will dated 28.07.1978 and thereby bequeathed her property entirely to plaintiff/jamrati to which defendant no.2 had no objection for giving the entire property to plaintiff jamrati and that she has/had no claim and or legal right in respect of the property left by said Sukia Bibi.

18. It is apparent that the will executed by original owner Sukia Bibi in favour of plaintiff and marked as exhibit 1 was never objected by proforma defendant/jaigunnesa. Plaintiff claimed his locus through aforesaid registered will and Section 213 of the Succession Act 1925 clearly postulates that in case of a Mohammedan will, probate is not required to be granted by a court to exercise right as executor or legatee.

19. From the aforesaid discussion and in view of the documents relied by plaintiffs and marked as exhibits as stated above, I find nothing wrong in the first appellate court observation that in any case, by the strength of said will (Marked exhibit 1) plaintiff became the owner of at least 1/3rd share of the property and in the worst case being a co-sharer of the property he is entitled to bring suit for eviction alone unless objected by other co-sharer. In the present case plaintiff though impleaded aforesaid Jaygunnessa as a party but she never objected suit for eviction brought by plaintiff against defendant no.1. On the contrary apart from registered deed of release executed by said jaigunnesa her evidence as DW-2 in T.S 401 of 1976 suggests that she has no objection for giving the entire property to Jamrati/plaintiff. Accordingly it can be said that plaintiff has succeed in proving his locus to file the suit for eviction against defendants.

20. Now the defendant no.1 while defending his case by filing written statement has taken two fold plea. In para 7 of the written statement he contended that admitted original owner Sugia Bibi during his lifetime sold out suit property along with other properties to defendant no.1 Md. Safi by a registered deed dated 21.04.1972 on valuable consideration and that Sugia Bibi married Second time with defendant no.1 and after the death of Sugia he being the legal heir along with said daughter of Sugia, inherited the entire property.

21. It is not in dispute in the present context that said Sugia Bibi herself filed T.S. No. 401 of 1975 for a declaration that two deeds of Kobalas allegedly executed and registered on 21.04.1972 are not binding upon the plaintiff Sugia Bibi and for a declaration that the defendant no.1/Md. Sofi, predecessor-in-interest of the appellant herein, have no right title interest in the suit property and also for injunction. It is worthy to be mentioned that in the said suit, the plaintiff Sugia Bibi described herself as wife of late Hakim Idu Hassan. The Nikahnama by which defendant no. 1 claimed himself as husband of Sugia Bibi is dated 22nd January, 1967. Said T.S. No. 40 of 1975 was ultimately decreed in favour of plaintiff on 02.04.1979 whereby the said two deeds dated 21.04.1972 were declared as illegal and not binding upon the plaintiff as the same were executed by practising fraud. Appeal preferred against said judgment being T.A. No. 467 of 1979 but the learned Appellate court affirmed the said judgment and thereby the declaration of the Trial Court that the deeds dated 21.04.1972 are illegal and not binding upon plaintiff, have attained its finality and in such view of the matter

defendant no. 1 Md Safi cannot have any right to claim ownership in the suit property by dint of said deed dated 21.04.1972.

22. Now the most important question involved herein is whether defendant no.1 acquired title in the suit property after the death of Sugia Bibi, being her second husband. It has already been noted that the marriage certificate by which defendant no.1 claimed himself as husband of original owner of the property Sugia Bibi shows that marriage was allegedly held on 22nd September, 1967. Now Sugia filed suit for cancellation of deed dated 21.04.1972 against defendant No.1 Md. Sofi in the year 1975, describing herself as widow of Late Hakim Idu Hassan. In the said suit in paragraph 4 of the plaint she has categorically stated that the defendant no.1 i.e. Md. Sofi is her old tenant and the plaintiff is an old illiterate “widow” having no other relations except defendant no.2, the defendant no.1 intimated with the plaintiff and assured the plaintiff that he would marry (Nikah) her in near future. She further averred in the said paragraph of the plaint that defendant no.1 actually feigned to be the husband of the plaintiff and he exercised his undue influenced upon her and she became sympathetic with the defendant no.1 and allowed him to live with her in her own room as her husband. Defendant no.1 Md. Safi had not dealt with said paragraph of the plaint in his written statement nor denied specifically averments made therein.

23. Such averment in the plaint was made in the year 1975 and if that be so, the Nikah-nama dated 22.01.1967 by which the defendant no.1 claimed himself as husband of Sugia is not trustworthy. The Trial Court while dealing with the issue held that if the marriage was not proved then the

defendant no. 1 can not be the owner of the suit property by dint of marriage. However learned Trial Court refused to grant decree on the basis of the observation that under Islamic Law a testator cannot bequeath more than 1/3rd share without consent of other co-sharer, so plaintiff cannot claim himself as absolute owner and for which plaintiff is not entitled to get decree. While contradicting the said observation made by the trial court, the appellate court clearly held:-

“The defendant no.1 Md. Safi claims himself to be the second husband of the original landlady and in order to substantiate that case he produced one marriage certificate. During argument it has been practically admitted by the respondent No.1 that no Nikah was celebrated but the marriage was solemnised by continuous co-habitation. The marriage certificate which was produced in this case cannot be treated to be a valid document. Because it does not contain the signature of two women witnesses or the signatures of the bride and bridegroom or of the Moulabi himself as per requirement of the statute. That apart, this marriage certificate was not produced in the earlier suit by the defendant No.1 and at present he would be estopped from claiming any benefit over it and the principle of estoppel will operate in his case. Moreover, from the findings of the Title Appeal 467 of 79 arising out of the decree in title suit 401 of 75 of the 4th court of the learned Munsif of Sealdah, it appears that the plaintiff of that suit Sugia Bibi denied to have married the defendant no.1 Md. Safi under the Nikah form. In view of the all these circumstances and documentary evidence on record and having regard to the legal principles of the statute, I am clearly of the opinion that no marriage was solemnised between the defendant no.1 and the original owner Sugia Bibi. The marriage cannot be said to have been solemnised even under the Mohammadan Law only by continuous co-habitation for years together. Therefore the defendant no.1, Md. Safi has absolutely failed to prove the second marriage as pleaded by him. Therefore, he cannot claim any part of the property as co-owner of the same either on the strength of his alleged relationship of second husband or by virtue of alleged sale which has already been declared as invalid. Therefore the defendant no.1 has absolutely no status on the property.”

24. Referring the averments made in the plaint of Title Suit No. 401 of 1975 the appellants herein contended that the plaintiff Sugia Bibi admitted in plaint that defendant no.1 intimated with the plaintiff and Ma Safi actually feigned to be the husband of the plaintiff and he exercised under influence upon her and out of sympathy she allowed him to live with her in

her own room as her husband and as such plaintiff respondent cannot deny that Sugia Bibi is the wife of the defendant no.1.

25. It is settled proposition of law that court will look to the substance of the pleading and specially in case of mafassal pleadings where pleadings are not to be construed strictly but it must be construed in its entirety. In the present case if the said plaint is read as a whole it is quite clear that the plaintiff never admitted defendant no. 1 as her husband but she clearly alleged that defendant no. 1 actually feigned to be the husband of the plaintiff assured her to marry and on sympathetic ground she allowed him to live with her in her own room. Had she recognized the defendant no. 1 as her husband, she never described herself as the widow of late Hakim Idu Hassan. Though defendant no.1 as DW-1 has stated that he has paper to show that Sukia had accepted him as her husband, but the defendant no.1 failed to substantiate the said claim.

26. Principle laid down in 252 of Mullah's Mohammedan Law provides that in case of valid Mohammedan marriage (i) there should be proposal made by or on behalf of the parties to the marriage and (ii) and acceptance of the proposal by on behalf of the other (iii) in the presence and hearing of two male or one male and two female witnesses who must be sane and adult Mohammedans (iv) the proposal and acceptance must both be expressed at one meeting and a proposal made at one meeting and acceptance made at another meeting do not constitute a valid marriage.

27. In the said marriage certificate Md. Bashir was cited as Vakil and Shafiullah and Nisar Ahmed are shown as witness and one Md. Abdur Rauf shown as Imam and marriage Registrar. Present Imam of Kamarhati Masjid

deposed as DW-2 and he admitted that aforesaid witness Abdur Rauf is alive but defendant no.1 did not bring him as witness to prove marriage. Present Imam as DW-2 admitted that Md Safi and Sugia Bibi did not put their signature. Said DW-2 clearly admitted that as per summon he has only brought the marriage Register and neither Sugia nor defendant no.1 nor the witnesses of marriage are known to him and he has not even seen defendant No.1. Similarly DW-3 Md. Basir, who allegedly acted as Vakil of the said marriage, has stated that he resides in a rented house under Sugia Bibi and he is not aware whether plaintiff Jumarati has filed any suit against him. Apparently he is an interested witness, whose evidence cannot be regarded as conclusive proof of marriage when other witnesses did not face the dock and also when said DW-3 as Vakil has not stated that proposal and acceptance were made in his presence.

28. It is true that the marriage certificate filed by defendant no. 1 is marked exhibit without objection but mere filing or exhibiting of a document does not amount to prove of its contents. A document may be admissible but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of the case (AIR 2010 SC 2933). During cross examination DW2/Imam admitted that he had not seen Sukia Bibi nor he has any personal knowledge about Md. Sofi whom he had not seen. He also stated Md. Sofi and Sukia did not Sign. Accordingly though marriage certificate has been admitted in evidence but when it's probative value is examined from the facts and circumstances of the case it has got no substance. It is stated in the marriage certificate that marriage took place on 22nd January, 1967 but in the year 1975 Sukia Bibi

brought aforesaid suit for declaration and injunction, challenging the purported deed of gift. Therefore, conduct of the parties were also inconsistent with the relations of husband and wife and aforesaid legal battle between the parties appears to be not compatible with the existence of relationship.

29. Under Sunni Law marriage must be preceded by proposal and acceptance. Marriage under compulsion or without intention is valid if made for suitable dower and to a man who is equal. Two male or one male and two female witnesses are necessary for the validity of the marriage. The marriage under the Mohammedan law is not a sacrament but a civil contract between two parties of opposite sex for mutual engagement and it is called "Nikah". Here in the present case, before the appellate court the marriage certificate was marked as exhibit B by the appellate court. There appears to be no explanation why such marriage certificate was not filed in the earlier suit during life time of Sugia Bibi as well as in the present suit before the Trial Court. DW2/Imam was neither witness to the alleged marriage nor was present at the time of alleged marriage. From the exhibit B denmuhar shown as Rs. 125/- but DW2 stated that denmuhar was Rs.75/- and DW2 has clearly admitted that he has neither seen Sukia Bibi nor Md. Sofi. Evidence of DW3 also did not say about proposal or acceptance by Sugia. Other persons shown at witness were not brought to the witness box to prove that bride Sukia Bibi had at all given her consent to the marriage. The words conveying proposal and acceptance must be uttered in each other's presence or in the presence of their agents who are called Vakils. The significance of this requirements lies in the fact that the contract should be understood by

both the parties. In the earlier suit being T.S. No. 401 of 1975 filed by Sugia Bibi against Md. Sofi and present defendant no.2, defendant no. 2 did not contest but defendant no.2 jaigunnesa adduced evidence wherein, she has categorially stated that DW1 has not purchased any portion of the suit house. Though defendant no.1 all along during trial set up his defence relying on the marriage certificate marked Ex-B that Sugia Bibi is his wife but during hearing of Appeal he raised the alternative issue that there can also be valid marriage due to long co-habitation. There is no proof that there was long co-habitation between the parties and in the absence of evidence such alternative plea is not tenable.

30. There appears to be another aspect of the Matter. The Appellate Court while disposing earlier Title Appeal no. 467 of 1979 clearly held :

“Unfortunately for defendant no.1, there is no evidence to show that he legally married the plaintiff as claimed. The plaintiff (Sugia Bibi) was examined on commission being old and sick. She is PW-1. She has denied to have married defendant no.1 under “Nika” form.Form the evidence it is clear that Md. Safi used to behave as husband of the plaintiff”.

31. In this context learned Counsel for the petitioners submits when there was finding relating to alleged marriage/relationship by 1st appellate court in earlier suit, that finding will operate as *res judicata* between the parties and in this context he placed reliance in a judgement reported in **AIR 1932 PC 50 (Krishna Narayana Deo Vs. Challa Ramanna & Other)** wherein it was held that where a point is not properly raised by the plaintiff but both parties have without protest chosen to join issue upon that point,

the decisions on that point would operate as *resjudicata* between the parties.

32. In **AIR 1930 Cal 810 (Md. Ismail & others Vs. Sharfutullah and others)**. It was held when parties go to trial and evidence is given and the court at their invitation decides points, the determination of one of which might have been sufficient for the disposal of the suit, but which are such as it is open for the court to base it's Judgement among others on one or more of them, the matter so decided operates as *res-judicata*. In the present context while considering the issue as to whether deed allegedly executed in favour of defendant no.1 by plaintiff Sugia Bibi is genuine or not and in the context of issue as to whether defendant no.1 was in apposition to procure her signature by practising undue influence or not and whether taking advantage of his intimacy with the plaintiff defendant no.1 practised fraud upon her or not, the Appellate Court had to enquire about relationship between the parties and ultimately lead to above-quoted observation, which might have been sufficient for disposal of that earlier suit and the court based his judgement upon such observation, the issue of relationship between parties operates as *res-judicata*.

33. Referring another Judgement reported in **AIR 2005 SC 454** it can be said that through no issue was framed in earlier suit formally but since issue regarding relationship was material and essential in that suit for decision of case and decision of which issue has attained it's finality would operate as *res-judicata* between the parties. In this context reference has also been made in the case law reported in **2019 SCC OnlineCal 9259**. Since the issue regarding relationship of the parties was necessary to be

decided for the adjudication of the earlier suit and accordingly decided, it is to be treated as “directly and substantially” in issue in earlier suit and hit by res-judicata in later suit. Therefore, the appellants’ contentions that Md. Sofi is the husband of Sugia Bibi cannot be accepted on the basis of exhibit B or by any other means.

34. It is settled law in view of judgment reported in **S.Subramanian Vs. S.Ramasamy etc. 2019 (5) Supreme 233** that It is not permissible for the High Court to re-appreciate the entire evidence on record and come to its own finding when the findings recorded by the court below are on appreciation of evidence. Relying upon an earlier judgement it was held, there are two situations in which interference with finding of facts is permissible First is when material or relevant evidence is not considered, which if considered would have led to an opposite conclusion and the second situation is where the finding has been arrived at by the Appellant Court by placing reliance on inadmissible evidence, which if it was omitted an opposite conclusion was possible. No such situation has arisen in the present context as court below duly considered exhibit-B and evidence and judgement of earlier proceedings. In this context I also find no substance in appellant’s contention that long cohabitation between the parties had established the fact of marriage. In fact there is also no evidence in support of alleged long co habitation in between defendant no.1 and Sugia Bibi.

35. Though defendant no.1/Appellants as a last resort tried to survive by taking the plea that plaintiffs Sugia Bibi has admitted the defendant no.1 to be an old tenant under her and as such in the alternative the suit is bound to fail as said tenancy was never terminated by Sugia Bibi and court cannot

pass decree in the present suit where plaintiff has sought for eviction of licensee. In this context it can be said that if he admits himself as tenant then his other pleas in favour of ownership must go. Such plea is also not tenable as it was never the case of defendant no. 1 that he was a tenant under plaintiff. He also did not give reply to the ejectment notice claiming himself as tenant. He has all along claimed ownership in the suit property. He failed to file any rent receipt to show that he was at all inducted as a tenant by the land lady. A stray statement in pleading by a Pardanasin illiterate lady, indicating contrary intention to entire tenor of the case, cannot be called as admission, (case law reported in **(2006) 4 SCC 507** relied). In the absence of specific pleading and evidence such inconsistent and alternative plea before Second Appellate Court is not sustainable in the eye of law. In view of aforesaid discussion the finding of the court below does not call for any interference. The instant appeal is devoid of any merit and liable to be dismissed.

36. In view of above **SA No. 770 of 1991** is dismissed on contest. The judgment and decree passed by the court below in T.A. No. 83 of 1989 dated 19th December, 1989 is hereby affirmed.

Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)