**SUPREME COURT OF INDIA**

Mukund Deo

Vs.

Mahadu

C.A.No.406 of 1962

(P. B. Gajendragadkar, C.J.I., J. C. Shah and N. Rajagopala Ayyangar, JJ.)

31.08.1964

**JUDGEMENT**

**SHAH, J.:-**

1. This appeal relates to lands which originally belonged to one Beli Ram son of Ananda. Beli Ram died leaving him surviving his wife Rukhma Bai and his daughter Vitha Bai, and on his death his property devolved upon Rukhma Bai as a limited owner. By a deed dated July 26, 1916 Rukhma Bai sold the lands to one Mukund Deo for Rs. 600/- (O.S.) and delivered possession of the lands to the vendee. Rukhma Bai died in 1940. The respondents to this appeal who were the sons of Vitha Bai commenced on February 21, 1944 an action against the transferee Mukund Deo in the court of the Munsiff, Mominabad Taluk, for a decree for possession of the lands sold by Rukhma Bai. They alleged in their plaint that they were governed by the Mayukha school of Hindu Law, that the sale of the lands by Rukhma Bai was not supported by legal necessity and that on the death of Rukhma Bai they became entitled to the lands as the nearest reversioners to the estate of Beli Ram. Mukund Deo contested the claim contending, inter alia, that the sale by Rukhma Bai was for legal necessity, that Vitha Bai had survived Rukhma Bai and that Vitha Bai had during her lifetime assented to the alienation and had thereafter filed a suit for declaration, that the sale was not binding upon her but had withdrawn the same after entering into a compromise with Mukund Deo, admitting his title to the lands. The Trial Court reflected the contentions noised by Mukund Deo. The Court held that the sale was not for purposes of legal necessity, that Vitha Bai had predeceased Rukhma Bai, and that the plaintiffs as the nearest reversioners to the estate of Beli Ram on the death of Rukhma Bai were entitled to a decree for possession claimed. In appeal to the Additional Sub-Judge, Mominabad the decree of the Trial Court was reversed. The learned Appellate Judge held that the sale was supported by legal necessity and that in any event as Vitha Bai had during the lifetime of Rukhma Bai attempted to impeach the alienation in favour of Mukund Deo, and had thereafter entered into a compromise admitting Mukund Deo's title and acknowledging the validity of the sale, the plaintiffs who could only claim as heirs to Vitha Bai who had survived. her mother Rukhma Bai had no valid claim to the lands.

2. In second appeal No. 544 of 1947 the High Court of Hyderabad by judgment dated July 17, 1953 reversed the decree of the First Appellate Court and restored the decree sale the Trial Court. In the view of the High Court, Mukund Deo failed to establish that the sale was for legal necessity. The High Court also held that the conduct of. Vitha Bai in entering into a compromise and withdrawing her declaratory suit could not confer a valid title on Mukund Deo. They further held that the testimony of the witnesses for the plaintiffs that Vitha Bai had predeceased Rukhma Bai was

"preferable" to the evidence lad by the defendant Mukund Deo. With special leave, the heirs and the legal representatives of Mukund Deo who died since the decree of the High Court have preferred this appeal.

3. The High Court disagreed with the view of the First Appellate Court on the question whether the sale to Mukund Deo was supported by legal necessity and also on the question whether Vitha Bai had predeceased Rukhma Bai, Counsel for the appellants argued that the High Court had, in second appeal, no jurisdiction to set aside the finding of fact recorded by the First Appellate Court. In so arguing, counsel assumed that the jurisdiction of the High Court in deciding the second appeal before it was derived from S. 100, Code of Civil Procedure, 1908. That assumption is, however, not true. When the suit was filed the lands in dispute were situate within the territory of H.E.H. the Nizam of Hyderabad and the suit filed by the respondents had to be heard and disposed of according to the relevant provisions of the code of Cevil Procedure in force in the State of Hyderabad. The Hyderabad Civil Procedure Code (Act 31 of 1328 Fasli) was enacted in the Urdu language, and the following is a rendering into English of the material part of S. 602 of that Code, which has been accepted by counsel appearing before us as correct:

"S. 602. Except as otherwise provided in this Code, or by express order in any other law, a second appeal shall lie to the High Court from every decree which is passed in first appeal by any court subordinate to the High Court. . . . . ."

It is clear that under that Code a second appeal lay to the High Court on questions of fact as well as of law. Counsel for the appellants concedes that this was the position in law at the date when the suit was instituted. But he says that the Hyderabad Code of Civil Procedure was repealed, and the Code of Civil Procedure (Act 5 of 1908) was extended on April 1, 1951 to the Part 'B' State of Hyderabad after it became part of the Indian Union and the power to hear and decide the second appeal before the High Court was derived from S. 100 of the Code of Civil Procedure (Act 5 of 1908), and the High Court could not set aside the findings of fact recorded by the First Appellate Court. We are unable to agree with this contention. It is true that as a general rule, alterations in the law of procedure are retrospective, but a right of appeal to a particular forum is a substantive right and is not lost by alteration in the law, unless provision is made expressly in that behalf, or a necessary implication arises. In Colonial Sugar Refining Co. Ltd. v. Irving, 1905 AC 369, Lord Macnaghten in delivering the judgment of the judicial Committee observed :

"The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

4. In Delhi Cloth and General Mills Co. Ltd. v. Income-tax Commr. Delhi, 54 Ind App421 : (AIR 1927 PC 242) the Judicial Committee denied to an aggrieved litigant a right to appeal to His Majesty in Council under Section 66-A of the Indian Income-tax Act (which for the first time conferred a right of appeal against the judgment of a High Court) when the judgment of the High Court was delivered before the date on which the amendment was made. This Court has also held in Garikapatti Veeraya v. N. Subbiah Choudhury, 1957 SCR 488 : ((S) AIR 1957 SC 540) that a vested

right of appeal is a substantive right, and it governed by the law prevailing at the time of commencement of the suit, and comprises all successive rights of appeal from Court to Court, which really constitute one proceeding. Such a right may be taken away, by a subsequent enactment expressly or by necessary intendment.

5. There is nothing in the Act which applies the Code of Civil Procedure, 1908, to the territory of the State of Hyderabad which either expressly or by necessary intendment invests S. 100 of the Code with retrospective operation. The power of the High Court to deal with the appeal before it must, therefore, be derived from the Hyderabad Code, untrammelled by anything contained in S. 100 of the Code of Civil Procedure, 1908. It is true that by S. 100, Code of Civil Procedure the power of the High Court in dealing with a second appeal was restricted, but the restriction could only apply to cases instituted in the Court of First Instance on or after April 1, 1951, and the jurisdiction of the High Court would, in respect of cases instituted before that date, would continue to be governed by S. 602 of the Hyderabad Code of Civil Procedure.

6. Counsel for the appellants also contended that, the finding of the High Court that Vitha Bai died before Rukhma Bai was based on no evidence. It is true that the High Court has not made an elaborate discussion on this part of the case, and has merely observed :

"As regards the question as to whether Vithabai predeceased Rukhma Bai we are in agreement with trial court that the evidence is more in favour of the conclusion that Vithabai predeceased Rukhma Bai."

The Trial Court summarised the evidence of the witnesses of the plaintiffs and the defendant in some detail, and observed that the revenue record Ext. 2 which was the copy of the order of the Tahsildar directing an enquiry to enter the names of the plaintiffs as the Pattedars and Shikmidars indicated that Vitha Bai could not have survived Rukhma Bai. The learned Judge observed that if Vitha Bai had survived Rukhma Bai the name of Vitha Bai would have been entered in the revenue records and the plaintiffs would have been shown in the records as heirs of Vitha Bai. It is true that the evidence led by the plaintiffs was not very strong. The Trial Judge recognised this infirmity in the evidence, but, in his view even though the plaintiffs evidence was shaky" company to the evidence of defendant Mukund Deo the plaintiff_s evidence "was reliable to some extent". The learned Appellate Judge did not discuss the evidence led by the parties. He merely observed that the statements of Nagoba witness No. 1 and Rama witness No. 3 for the plaintiffs "deserved consideration" and that those witnesses had stated that the land had been retained by Rukhma Bai for her own livelihood and was given alter her death, to her daughter Vitha Bai. From this he inferred that Rukhma Bai died first and Vitha Bai some time thereafter. He expressed the view that if this was not correct the witnesses would have stated that on the death of Rukhma Bai, Vitha Bai inherited the field set apart for Rukhma Bai herself. In the view of the Appellate Judge, therefore, the evidence of the plaintiffs' witnesses established that Vitha Bai had died after Rukhma Bai. We are unable to see how absence of any statement made by the plaintiffs' witnesses that Vitha Bai did not inherit the property was a circumstance from which an inference could be drawn in favour of the defendant. In any event the High Court has preferred the view taken by the Trial Court and has refused to accept the view taken by the First Appellate Court and in an appeal with special leave under Art. 136 of the Constitution this Court will not ordinarily discard the findings of the High Court on what is essentially a question of fact, and on which question the Court was competent under the law governing the appeal before it to arrive.

7. The appeal fails and is dismissed with costs.

Appeal dismissed.

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