

A. J. Pinto and Another

Vs

Smt. Sahebhi Kom Muktum Saheb and Others

Civil Appeals Nos. 901 and 902 of 1966

(CJI S. M. Sikri, V. Bhargava, I. D. Dua JJ)

22.01.1971

JUDGMENT

DUA, J. -

1. These two appeals by special leave (Nos. 901 and 902 of 1966) are directed against the judgments and orders of the Mysore High Court at Bangalore dated June 30, 1964 and October 30, 1964 respectively. By means of the judgment and order dated October 30, 1964 the High Court rejected application for review of its order dated June 30, 1964. Civil Appeal No. 902 of 1966 was not pressed by the Learned Counsel for the appellant with the result that appeal must be dismissed. We make no order as to costs in that appeal.

2. The present controversy arises out of execution proceedings in respect of decree in a partition suit instituted by on Sahebhi, a member of a Muslim family. The suit was instituted by her for partition by metes and bounds and for possession of her share in the property left by her grandfather Mirsab. It would be helpful at this stage to reproduce the pedigree table of the family :

Original ancestor Mirsab | ----- || |Hafix Saheb Hussainsab
Hajaratsab(deceased) (deceased) (1st Defdt.) || | ----- || | Shajadbi SabeB Bi |
(deceased) (Plaintiff) | |-----| |Isamohiddin Abdul Karim(2nd Defdt.) (3rd Defdt.)##

In the plaint reference was made to some alienations, which, it was pleaded, were not binding on the plaintiff. In this appeal we are only concerned with the mortgage decree obtained by one L. B. Pinto (Original defendant No. 12 in the suit) on whose death A. J. Pinto (appellant No. 1 in this Court) was impleaded as defendant No. 12-A in his capacity as legal representative of the deceased. The said mortgage decree was stated to have been obtained by defendant No. 12 against Hajaratsab, defendant No. 1 in respect of some land situated in Gabbur village of Hubli taluk and R.S. 48/1 situated at Krishnapuram. The suit for partition was initially instituted in forma pauperis in 1939. At that time the mortgage decree in favour of defendant No. 1 was being executed and an injunction restraining him from executing the decree and from taking possession of the property was also sought. Defendant No. 12 and after his death, defendant No. 12-A resisted the plaintiff's suit assailing the mortgage decree. It appears that the mortgaged property was sold but it did not fetch sufficient funds to satisfy the full claim under the mortgage decree with the result that Pinto secured a personal decree against Hajaratsab and in execution of that decree sought to sell certain properties belonging to the estate of Mirsab. On objection to sale in execution of the personal decree being raised by the plaintiff, the court made an order that the properties sought to be proceeded against be sold but the sale would be subject to the result of the partition suit. It was further directed that in the proclamation of sale the fact of the pendency of the partition suit be also mentioned. That sale, it

seems, was held sometime in 1942. On November 16, 1942 a sale certificate in respect thereof was issued in favour of Pinto. According to that sale certificate Pinto was declared as purchaser of the right, title and interest of Hajaratsab in the various properties described therein. The partition suit was compromised between the plaintiff and all the defendants except Pinto. The civil Judge, Senior Division, Dharwar to whose court the suit was transferred sometime in 1948 took the view that even though Pinto was not a party to the compromise between the plaintiff and the other defendants the compromise was not unfair and there being no equity in favour of Pinto who had purchased the right, title and interest of Hajaratsab in the suit property subject to the result of the suit, a decree should be passed in terms of the compromise against all the defendants including Pinto. An appeal was preferred against this decree by the appellant and a learned single Judge of the Bombay High Court on July 26, 1954 set aside the decree as against Pinto and remanded the case back to the trial Court with the direction that the suit be proceeded with in accordance with law. After remand the trial Judge held that the plaintiff was entitled to 1/5th share in the three properties which alone were the subject-matter of the controversy after remand. She was held entitled to claim 1/5th share from the present appellant in R.S. No. 104/4 of Gabbur village in R.S. No. 45/4 of Krishnapuram an village and in G.T.S. No. 3540 of Hubli. The partition and possession of the two pieces of land were to be effected through the Collector and that of the site in Hubli through a commissioner to be appointed by the Court in the proceedings for passing the final decree. The Collector was directed to effect the partition in the two pieces of land so as not to conflict with the Bombay Prevention of Fragmentation and Consolidation of Holdings Act No. LXII of 1947. The appellant was to pay the past and future mesne profits from the date of the cause of action mentioned in the plaint till the date of the decree or till the delivery of possession, whichever might be earlier, at the rate to be determined under Order 20, Rule 12, C.P.C. in respect of the plaintiff's 1/5th share in the three properties. The appellant was also to pay 1/4th of the court fee claimed by the plaintiff against him. It was also observed that the decree between the plaintiff and the other defendants should be in terms of the earlier compromise as already ordered. This decree was made on February 11, 1955 and one consolidated decree against all the defendants was framed in which the decrees against defendant No. 12-A and the other defendants were distinctly specified. Against this judgment and decree the appellant preferred an appeal to the High Court of Mysore at Bangalore. A Bench of that Court on December 13, 1961 dismissed the appeal. It appears that an attempt was made there to raise some points in respect of properties other than the three properties which were the subject-matter of the decree appealed from. But the High Court did not consider it necessary to go into those points in that appeal, leaving them to be decided if and when an occasion arose later. The High Court was quite clearly of the opinion that the plaintiff had secured a decree against the appellant in respect of the three properties mentioned in the decree and it was observed that the appellant had no grievance as regards any of the reliefs granted to the plaintiff by that decree. The present controversy arises out of the proceedings in respect of the execution of the decree dated February 11, 1955 affirmed by the Mysore high court and it is common ground that now the controversy is confined to the properties described as G.T.S. 3547 to 3549-A (houses let by Pinto, appellant No. 1 to Dawood Mirza, appellant No. 2) and property No. 1122 (house sold by Pinto to Beopari respondent No. 2). These properties are described by the parties as lot No. 1. The remaining properties described as lot No. 2 also claimed by the appellant are not in this appeal.

3. After disposal of the appeal by the Mysore High Court the execution proceedings were revived and the appellant urged in the executing Court that the Bombay High Court had set aside the entire compromise decree as against him with the result although his appeal to that Court was only confined to three items of property he was entitled to ignore the compromise decree dated November 16, 1949 against him even in regard to the other properties in respect of which he had not

appealed. In other words the appellant claimed that he stood in the same position in which he was immediately before the compromise. This plea was rejected with the observation "That there was no dispute after remand as regards the disputed properties viz., G.T.S. Nos. 1122-B, 3547, 3547-A, 3548-A, 3549 and 3549-A". That Court expressed its opinion after hearing the argument on behalf of the appellant that "the revised judgment passed on February 11, 1955 covers the disputed properties as well". The appellant was accordingly held liable to hand over possession to the plaintiff who was entitled to get actual possession. The final conclusions so far as relevant were expressed in these word :

"The plaintiff has already been put in possession of the property on September 23, 1962. In an earlier stage of the present execution proceedings it was ordered that the delivery of possession effected on September 23, 1962 should be struck down and judgment debtor No. 12-A should be restored to the possession of the properties from which he has been dispossessed. However Judgment debtor No. 12-A has been restored to the possession of the disputed properties. The plaintiff continued in possession of them. Even so, a warrant for delivery of actual possession of the properties to the plaintiff under Order 21, Rule 35 of the civil procedure Code will issue. The plaintiff has recovered money in execution of the warrant already issued. She has, however, credited Rs. 302.57 into the court on August 27, 1963. She will be at liberty to withdraw those money from the court. There is, therefore, no need to issue any further warrant in that behalf.

The result therefore is the contentions of judgment debtors Nos. 12-A, 12-B and 12-C have to be over-ruled. The following order is passed.

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