Bhavan Vaja And Ors. vs Solanki Hanuji Khodaji Mansang And Anr. on 3 February, 1972

Equivalent citations: AIR1972SC1371, (1973)2SCC40, 1972(4)UJ689(SC), AIR 1972 SUPREME COURT 1371, 1973 2 SCC 40 1972 SCD 361, 1972 SCD 361, 1972 SCD 361 1973 2 SCC 40, 1973 2 SCC 40

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Bench: K.K. Mathew, K.S. Hegde, P. Jaganmohan Reddy

JUDGMENT

K.S. Hegde, J.

1. This is an execution appeal by special leave. In common with many other execution appeals, it has a long history. This litigation started as far back as in the year 1955.

2. The two contentions urged before us are: (1) that the decree under appeal does not include the properties concerned in this appeal and (2) having regard to the occupancy certificates issued under the Saurashtra Land Reforms Act, 1951 (to be hereinafter referred to as the Land Reforms Act), it was not open, to the decree-holder to ask for possession of some of the lands concerned in this appeal.

3. Leaving aside unnecessary details, the facts relevant for deciding the aforementioned contentions may now be stated :

4. The father of respondent No. 1 Khodaji Mansangi applied to the court of Civil Judge, Senior Division, Surendranagar under Section 4 of the Saurashtra Agricultural Debtors Relief Act, 1954 (to be hereinafter referred to as debtors' Relief Act) for adjustment of his debts. To that petition he made all his creditors including Malek Alladatkhanji and the heirs of the deceased Hanifa Begum, wife of Malek Alladatkhanji parties. He sought adjustment of not only debts incurred by him but also the debts due from his family, which had been borrowed by his ancestors jointly with the ancestors of respondent No. 2. Khodaji having died during the pendency of the proceedings, respondent No. 1, his son was impleaded as his legal representative. At about the same time respondent No. 2 Gulabsing Harising also made an application for the adjustment of debts incurred by him as well as the debts jointly borrowed by his ancestors along with the ancestors of Khodaji. Malek Alladakhanji also applied for adjustment of debts due to him as well as to his deceased wife from Kohadaji and respondent No. 2. All these applications were clubbed together and tried together.

5. The Civil Judge, Senior Divisions Surendranagar who tried the aforementioned three applications as a debt adjustment Board (which will be hereinafter called 'Board'), made his award on January 3, 1959. Therein he held that no amount was due to any of the creditOrs. Consequently the creditors were directed to restore possession of the houses and fields mortgaged to them excepting those in respect of which occupancy rights under the Land Reforms Act had been granted to the tenants. The fields in respect of which occupancy rights had been granted were specifically mentioned in the award. We shall refer to them more fully at the appropriate stage. The debtors who are respondents I and 2 did not appeal against that order. But appellants Nos. 1, 5, 7 and 9 as well as Malek Alladatkhan ji went up in appeal against that award to the District Judge, Surendranagar. The learned District Judge allowed those appeals. He held that the application for redemption of the two houses in Kathada mortgaged by Lakha ji, was barred by limitation. In respect of certain other claims, which were the subject matter of the appeal, he remanded the case to the Board to dispose of those claims in accordance with the directions given in his judgment. No appeal was taken against that decision. After remand a fresh award was made by the Debt Adjustment Board (which will be hereinafter referred to as the fresh award'). Respondents 1 and 2 went up in appeal against the fresh award made. That appeal was mainly directed against the direction of the Board regarding the debts due to Malek Alladatkhanji and his deceased wife. The said Malek Alladatkhanji as well as the heirs of his deceased wife also applied against the fresh award. The appellate court made some changes in that award. We shall refer to the various orders made by the Board as well as the appellate court while dealing with individual items of properties that are in dispute.

6. Ten items of property enumerated in the Darkhast are in dispute in this appeal. Out of them 1 to 8 are fields. 9th item is a "Vado" and the 10th item consists of two houses situated at Kathada. We shall now take up each one of those items to ascertain whether the same is included in the decree under execution.

7. The 7th item is a field known as "Vankad". The possession of that field is claimed from the appellant Ajmal Malu. The High Court and the courts below have come to the conclusion that field is included in the decree under execution. They have held that respondents 1 and 2 are entitled to seek possession of the same from Ajmal Malu who alone is interested in that field. Ajmal Malu died during the pendency of this appeal. His legal representatives have not been brought on record. Hence the appeal in respect of that item of property has abated.

8. Item No. 1 in the Darkhast is a field known as "Boriu". Its extent is 12 Bighas. Its possession is claimed from Jesang Khoda. Item No. 2 is another field known as "Boriu" which is also known as "unchannu Boriyun". Its extent is 10 Bighas. Its possession is also claimed from Jesang Khoda. In the first award passed by the Board, the Board directed that both these fields should be delivered back to the debtOrs. The fresh award passed after remand also directed creditors Nos. 1 and 2 to restore possession of these fields to the debtOrs. The appellate order confirmed that decision. Hence the appeal in respect of these fields is unsustainable. The same is accordingly dismissed.

9. We shall next take up item No. 8 which relates to the field known as "Dosima's katki". Its extent is 5 Bighas. The original award directed the restoration of that property to the debtOrs. After remand the fresh award again directed creditors Nos. 1 and 2 to restore possession of that field to the

debtors (respondents 1 and 2). The appellate order confirmed that decision. Hence the appeal in respect of that item also fails.

10. No arguments were advanced before us as regards item No. 9 "Vado". Hence the appeal in respect of that item also fails.

11. From our above conclusions, it follows that the appeal in respect of item Nos. 1. "Boriu", 2. "Boriu", 7. "Vankad", 8. "Dosima's Katki" and 9. "Vado" in the Darkhast fails and to that extent the appeal is dismissed.

12. Now we shall turn to the other items mentioned in the Darkhast. We shall first take up item No. 10 i.e. the two houses that are situated at Kathada. Before the Board, the creditors contended that the claim for redemption of those houses was barred by limitation. Hence the debtors were not entitled to claim possession of those houses. That contention was rejected by the Board. In the original award made by the Board, a direction to restore possession of those houses to the debtors was given. But the creditors appealed against that decision. The contentions relating to those house were the subject matter of Issues Nos. 2 and 4 before the appellate court. The appellate court came to the conclusion that the claim to redeem the mortgage in respect of those houses was barred by limitation and hence the debtors were not entitled to claim possession of those houses. It accordingly reversed the order of the Board directing delivery of possession of those two houses to respondents 1 and 2. The decretal portion of the appellate order relating to those houses reads thus :

> The order awarding possession of the houses mortgaged under the mortgage deeds Exhs. 58 and 59 in favour of the ancestors of the appellant Bhavan Vaja and his brother is set aside.
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> While remanding the case, the appellate court ordered :
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> the judgment and award are set aside and modified to the extent mentioned above.

13. Respondent 1 and 2 did not go up in appeal against the appellate court's order. Hence the decision of that court relating to those houses became final. After remand the Board could not have gone into the question whether respondents 1 and 2 were entitled to the possession of those houses ; nor did it go into that question. In the fresh award there is no reference to those two houses ; nor were those two houses the subject matter of the appeal filed against the fresh award. Hence the appellate court could not and in fact did not go into that question. But unfortunately at the end of the judgment of the appellate court it is mentioned :

> For the reasons aforesaid, S.A.D.R. Appeal Nos. 5 of 1963 and and 6 of 1963 are allowed and S.A.D.R. Appeal No. 8 of 1963 is dismissed and the order of the learned Board Court in so far as it relates to the recovery of the dues by the editors from the two debtors is concerned, is set aside and it is held that the mortgage debts due to the creditors are wiped out and therefore the creditors should restore possession of the mortgage properties in their possession to the debtors without recovering any

amount.

14. But this order must be read in the context in which it was made. It can only refer to the mortgaged properties which were the subject matter of the appeal.

15. We shall now come to the lands mentioned as items 3, 4, 5 and 6 in the Darkhast. Item 3 is a field known as "Bhandeiu". Its extent is 20 Bighas. The possession of that field is claimed from Bhavan Vaja, the 1st appellant. 5th item is a field known as "Bhanderiu". Its possession is also claimed from Bhavan Vaja. Its extent is 22 Bighas. 5th item is a field known as "Jaliu", 16 Bighas in extent. Its possession is claimed from Jesang Khoda and Varsang Sava and the 6th item is a field known as Patdo, 31 Bighas in extent. Its possession is claimed from Bhavan Vaja. All these fields had been mortgaged in favour of the ancestors of Bhavan Vaja.

16. The Board declined to direct delivery of "Bhanderiu" item No. 4 and "Parado" item No 6 to respondents 1 and 2 on the ground that occupancy certificates had been given to the tenants in respect of those lands. For the same reason it refused to direct delivery of possession of "Bhanderiu" item No. 3 and "Jaliu" item No. 5. As mentioned earlier the respondents did not appeal against that order. Therefore it was not open to the appellate court to examine the correctness of the order of the Board in that regard. The judgment of the appellate court does not deal with that question. After remand the Board again naturally did not go into that question. On the other hand, it reiterated the. earlier findings. In the appeal filed by respondents 1 and 2 against the fresh award, no ground was taken relating to those fields. But on the other hand they took specific grounds in respect of several other items of property. Further at the foot of the appeal memos (separate appeals were filed by respondents 1 and 2), it was stated :

> Respondents Nos. 3 to 15 are joined as formal parties and no relief is claimed against any of them. So there is no necessity to issue notices against any of them.

17. The fields mentioned above are in the possession of respondent No. 3 and respondent No. 5. From all these facts, it is obvious that those fields were not the subject matter of the appeal against the fresh award. In the body of the judgment, the appellate court did not refer to those fields. No argument appear to have been advanced in respect of those fields. Hence, when the appellate court directed delivery of the mortgaged properties, it can only mean those mortgaged properties which were the subject matter of the appeal.

18. From the above discussion, it follows that the claim of respondents 1 and 2 in respect of items 3, 4, 5, 6 and 10 shown in the Darkhast had been positively negatived at the trial stage.

19. It is true that an executing court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading up to the decree. In order to find out the meaning of the words employed in a decree the court, often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution court and if that court fails to discharge that duty it has plainly failed to

exercise the jurisdiction vested in it. Evidently the execution court in this case thought that its jurisdiction began & ended with merely looking at the decree as it was finally drafted. Despite the fact that the pleadings as well as the earlier judgments rendered by the Board as well as by the appellate court had been placed before it, the execution court does not appear to have considered those documents. If one reads the order of that court, it is clear that it failed to construe the decree though it purported to have construed the decree. In its order there is no reference to the documents to which we have made reference earlier. It appears to have been unduly influenced by the words of the decree under execution. The appellate court fell into the same error. When the matter was taken up in revision to the High Court, the High Court declined to go into the question of the construction of the decree on the ground that a wrong construction of a decree merely raises a question of law and it involves no question of jurisdiction to bring the case within Section 115, Civil Procedure Code. As seen earlier in this case the executing court and the appellate court had not construed the decree at all. They had not even referred to the relevant documents. They had merely gone by the words used in the decree under execution. It is clear that they had failed to construe the decree. Their omission to construe the decree is really an omission to exercise the jurisdiction vested in them.

20. There are several misstatements of fact in the judgment of the High Court. In the course of its judgment the High Court observed that the Board in paragraph 44 of its fresh award "had directed various creditors to deliver possession of the various properties which included 9 fields and two houses". This is clearly a misstatement. The Board made no such direction. On the other hand the Board while considering the case after remand did not go into question of the two houses, as it could not, in view of the appellate court's order. So far as the fields are concerned, it definitely stated that the fields' mentioned at item 3, 4, 5 and 6 of the Darkhast could not be ordered to be delivered to the debtors as the tenants had obtained occupancy certificates in respect of those fields. The High Court was also not correct in thinking that the contention of the appellants relating to the two houses mentioned above were taken for the first time in the High Court. These and other erroneous impressions gathered by the High Court appear to have persuaded that court that there was no merit in the appellants' case.

21. In view of our above conclusion, it is not necessary for us to go into the question whether the executing court could have directed the delivery of the properties for which occupancy certificates had been granted under the Land Reforms Act. At the trial stage, the parties had chosen to put into issue the effect to those certificates. The Board had gone into the matter and had pronounced on the same. The pronouncement has not been challenged in appeal. Therefore, whether the order of the Board is correct or not, it is binding on the parties to the litigation.

22. For the reasons mentioned above this appeal is partly allowed and the execution petition in respect of items Nos. 3, 4, 5, 6 and 10 in the Darkhast is dismissed. In other respects this appeal is dismissed. As the contesting parties have partly succeeded and partly failed, they will bear their own costs in all the courts.