

## **Mohammad Mustafa vs Sri Abu Bakar And Ors. on 8 December, 1970**

**Equivalent citations: AIR1971SC361, (1970)3SCC891, 1971(III)UJ109(SC), AIR 1971 SUPREME COURT 361**

**Author: K.S. Hegde**

**Bench: A.N. Grover, J.C. Shah, K.S. Hegde**

### **JUDGMENT**

K.S. Hegde, J.

1. This is a defendant's appeal by special leave from a suit for partition in a Muslim family. The appellant was the first defendant in that suit. The first respondent brought the suit for partition claiming 14/88 share in the properties detailed in the plaint schedules. The parties to the suit are the heirs of one Sanaullah. The family genealogy is given in the plaint. The correctness of that genealogy is not disputed. It was alleged in the plaint that the properties detailed in the plaint schedules are the joint properties of the parties to the suit. The appellant contented the suit. He contended that his father Sanaullah had three pharmacies sometime before his death he gifted to each one of his three sons one pharmacy. The pharmacy which was originally known as Darul Adviya was gifted to him; therefore he is the exclusive owner of that pharmacy. He further contended that some of the other items shown in the plaint schedules are his self acquisitions and hence they are not partible. But it may be noted that the appellant did not take the alternative plea that in the event the Court holding that the gift pleaded by him is not true, the other two pharmacies should be considered as joint properties. But he did take a bald plea that the suit was bad for partial partition. On the basis of the pleadings the trial Court framed several issues. The only issue that is relevant for our present purpose is issue No. 1 namely:

Whether the concern known as Hindi C.C.Works (Formerly known as Darul Adviya) was the joint property of the parties? If so, what is the plaintiff's share?

2. No issue was struck in respect of the appellant's plea that the suit was bad for being one for partial partition.

3. The trial Court came to the conclusion that the properties shown in List A-1, A-2 and B are joint properties and hence liable to be partitioned. It gave the plaintiff 14/88 share in the same. It held that the properties mentioned in C-1, C-2, D-1 and F are individual properties of the appellant.

4. Both the parties appealed to the High Court as against the decree of the trial Court. During the pendency of the appeal, the appellant applied to the High Court on April 1, 1966 to permit him to amend his written statement and take the plea that the two pharmacies alleged to have been gifted to the other sons of Sanaullah should also be considered as joint properties. The High Court rejected that application by its order dated April 5, 1966.

5. The High Court by its judgment dated April 7, 1966 dismissed the appeal of the appellant 1st defendant but partly allowed the cross-appeal of the respondent. It held that the properties mentioned in List C-1, C-2, D-1 and F are also joint properties. In the course of its judgment it observed.

The 'true position appears to be this. Sanaullah had three pharmacies. He was getting old. He placed the three pharmacies in charge of his three sons for purposes of management. There was no gift as alleged by the appellant Management of three pharmacies by the three sons separately continued after Sanaullah's death. As each brother was incharge of one pharmacy, profits were not distributed. This arrangement continued upto the date of the suit.

This finding having been reached without proper pleadings and necessary issues the same cannot bind any of the parties to the suit though it does indicate the serious injustice that is likely to happen to the appellant because of his defective pleadings.

6. Dealing with the contention of the appellant that the suit was bad for being one for partial partition, the Court rejected that contention on the ground that the trial Court did not strike any issue in respect of that plea though that plea was taken both in the written statement as well as in the appeal memo. As Mst. Rukaia Bibi, wife of Sanaullah (respondent No 3 in the appeal) had died during the pendency of the appeal, the High Court enhanced the share of the plaintiff to 16-1/5 /88 share.

7. Both the trial Court as well as the High Court have come to the conclusion that the gift pleaded by the appellant is not true. In fact the High Court has specifically come to the conclusion that all the three pharmacies referred to in the appellant's written statement belonged to Sanaullah. If that conclusion is correct those pharmacies should also be considered as joint properties of the parties to the suit. But the High Court refused to grant any relief in respect of those items of properties on the sole ground that the appellant did not take the plea that those items of properties are joint properties of the parties to the suit. As such earlier it rejected the appellant's contention that the suit is bad for partial partition on the ground that no issue had been framed as regards that plea. In our opinion the High Court took a highly technical view of the matter. On the facts and circumstances of this case, the High Court should have allowed the amendment application moved by the appellant on April 1, 1966. We think that in the interest of justice, we should now allow that application and permit the appellant to amend his written statement. We order accordingly. As a result of this decision of ours, it is now necessary to set aside the judgment and decree of the High Court as well as the trial Court and remand the case to the trial Court. We direct the trial Court to permit the defendant to carry out the necessary amendments in his written statement, permit the respondents to file their rejoinders, raise proper issues on the new pleadings, give parties an opportunity to

adduce evidence on the newly raised issues and decide the case on merits But the decision of the trial Court as modified by the High Court regarding the items of property already held to be joint property of the parties is not to be reopened. That decision is final. The further trial will be confined to the new issues that may be raised on the basis of the pleas put forward in the amendment application The case is remanded only for that purpose. The trial Court shall now proceed to hear the case expeditiously and pass a fresh preliminary decree.

8. So far as the costs are concerned, under the circumstances of the case we direct that the appellant do bear his own costs uptill this stage in all the Courts. The costs of the plaintiff-1st respondent in all the Courts uptill this stage shall come out of the estate. The other respondents shall bear their own costs throughout.

9. Civil Miscellaneous petition No. 1881 of 1970 is dismissed-no costs.