
(2010) 08 GUJ CK 0043

In the Gujarat High Court

Case No : Second Appeal No. 42 of 1983 and Civil Application No. 6982 of 2010

Aminabai and Others

APPELLANT

Vs

Bakali Alimamad Bachau and Others

RESPONDENT

Date of Decision : 05-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2011) 1 GLH 94

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : P. M. Thakkar, for the Appellant; A. J. Memon, N. V. Anjaria and Mr. Shivang M. Shah, for the Respondent

Final Decision : Dismissed

Judgement

MR. K.A. Puj, J.—The appellants - original defendant Nos. 1, 2 and 3 have filed this Second Appeal u/s 100 of the CPC challenging the judgment and decree 02.08.1982 passed by the learned Assistant Judge, Kutch at Bhuj in Regular Civil Appeal No. 143 of 1979 allowing the appeal of the respondent - original plaintiff No. 1 and setting aside the judgment and decree dated 31.07.1979 passed by the learned Civil Judge (J.D.), Mandvi - Kutch in Regular Civil Suit No. 218 of 1976.

2. This Second Appeal was admitted by the Court on 30.06.1983 and following substantial questions of law were formulated for the determination and consideration of this Court:-

i. Whether in the facts and circumstances of the case, the lower Appellate Court is right in holding that the respondent No. 1 - original plaintiff has succeeded in proving that he is entitled to get half share in the suit property?

ii. Whether in the facts and circumstances of the case, the lower Appellate Court has committed a grave error of law as well as of facts in holding that the respondent No. 1 -original plaintiff is entitled to the relief of partition and

separate possession as claimed by them?

3. After the Second Appeal was admitted, respondent Nos. 5 to 9 were joined as party - respondents by an order of this Court passed on 16.09.1990 in Civil Application No. 1616 of 1990. Thereafter, respondent Nos. 1 to 23 were joined as party - respondents by an order of this Court in Civil Application No. 5990 of 1997.

4. After the Second Appeal was admitted, the respondent No. 1 moved Civil Application No. 1677 of 1990 praying for stay which was granted. Thereafter, the respondent No. 1 expired on 23.03.2009 and hence, legal heirs of respondent No. 1 filed Civil Application (St.) No. 5474 of 2009 for bringing them on record. However, the office objections were not removed and hence, the said application was rejected for non-removal of office objections on 04.09.2009.

5. Despite this fact, the legal heirs of respondent No. 1 filed Civil Application No. 6982 of 2010 praying for vacating the interim relief granted earlier in respect of the Plots bearing Nos. 2 to 7 and 9 to 16 as well as 19 to 31 and 34, 36, 37 and 40 to 43 and 47 to 60, totalling 48 plots out of 63 plots i.e. the subject matter of Civil Application No. 1677 of 1990 in view of the compromise arrived at between the parties and stay with respect to the said plots was required to be vacated.

6. So far as Civil Application for joining the legal heirs is concerned, the same was rejected for want of prosecution as office objections were not removed. Civil Application No. 6982 of 2010 preferred for vacating the interim relief in respect of few plots is tagged along with the main matter and hence, the parties are heard in respect of the said Civil Application.

7. The brief facts giving rise to the present Appeal are that the respondent No. 1 ori. plaintiff filed a Civil Suit No. 218 of 1976 before the learned Civil Judge (J.D.) at Mandvi, Kutch on the ground that the respondent No. 1 - ori. plaintiff and the appellants - ori. defendants are relatives and the appellant - ori. defendants are in occupation of the suit land bearing Survey No. 211/1 admeasuring 6 Acres and 30 Gunthas, and four houses of joint ownership and the said property belonged to the father of the respondent No. 1 - ori. plaintiff in which the respondent No. 1 - ori. plaintiff had got equal share. Thus, the respondent No. 1 - ori. plaintiff was entitled to get one half share by way of partition as the property was ancestral property. The learned Civil Judge after perusing the papers, records and evidence adduced before him, came to the conclusion that the suit filed by the respondent No. 1 - ori. plaintiff for the purpose of getting his share from the suit property on the ground that the property belongs to joint ownership of the respondents and the Appeal is not tenable in as much as the respondent No. 1 - ori. plaintiff failed to prove that the suit property is of joint property and, therefore, the learned Civil Judge dismissed the suit filed by the respondent No. 1 - ori. plaintiff.

8. Being aggrieved by the judgment and decree passed by the learned Civil Judge (J.D.) Mandvi, Kutch dated 31.7.1979, the respondent No. 1 - ori. plaintiff has preferred Regular Civil Appeal No. 143 of 1979 before the learned Assistant

Judge, Kutch at Bhuj. The learned Assistant Judge, after perusing the papers and the records came to the conclusion that the respondent No. 1 - ori. plaintiff is entitled to get one half share from the suit property as the properties described in the plaint are joint properties and, therefore, the learned Assistant Judge allowed the Appeal and set aside the judgment and decree passed by the trial Court, vide its judgment and order dated 2.8.1982.

9. It is this judgment and order of the learned Assistant Judge which is under challenge in this Second Appeal.

10. Mr.Dipak N. Thakkar, learned Advocate appearing for the appellants has submitted that the learned Assistant Judge has committed a grave error in holding that the respondent No. 1 - ori. plaintiff has succeeded in proving that he is entitled to one half share in the suit property. He has further submitted that the learned Assistant Judge has further committed an error in holding that the appellants - ori. defendants have failed to prove their ownership of the suit property by adverse possession. He has further submitted that despite the fact that the respondent No. 1 - ori. plaintiff is not entitled to the relief of partition and separate possession as claimed by him, the learned Assistant Judge has allowed the said claim of respondent No. 1 - ori. plaintiff. Mr.Thakkar further submitted that the appellants were in possession of the disputed land and they were managing the said land for the last 30 years. He has further submitted that, even otherwise, the appellants - ori. defendants have become the owners of the suit property by adverse possession as per the Limitation Act. He has further submitted that the partition of joint ownership was already taken place and hence the respondent No. 1 - ori. plaintiff is not entitled to partition as per his claim. He has further submitted that the revenue record shows the names of the appellants - ori. defendants as owners for the last several years. He has further submitted that there is no justification on the part of the learned Assistant Judge to hold that the revenue record was prepared as far back as in 1961 and suit land was entered in the name of elder brother of the respondent No. 1 - ori. plaintiff and after his death the suit land was entered in the name of the present appellants and the same was continued in the name of the appellants. Mr.Thakkar further submitted that previously partition was taken place in which 2 Acres and 33 Gunthas of land out of Survey No. 211/1 was given to the respondent No. 1 - ori. plaintiff and the same was in the name of the respondent's son Fakir Mamad. Mr.Thakkar further submitted that the learned Assistant Judge has committed substantial error of law as well as of facts in not taking judicial notice of the partition of India and Pakistan which was taken place as far back as 1947. The respondent No. 1 - ori. plaintiffs witness No. 4 his brother-in-law - Ali Mahmad Jumma deposed that at the time of partition the land in his possession was handed over to Fakir Mamad. In other words the partition of India and Pakistan was taken place before 30 years from the date of filing of the suit whereas Fakir Mamad was aged about 22 to 23 years as admitted by the respondent No. 1 - ori. plaintiff. Thus, the learned Assistant Judge failed to appreciate that the question of giving the land to Fakir Mamad

does not arise inasmuch as Fakir Mamad himself was not in existence when the partition took place. He has further submitted that entries in the revenue record at Ex. 61 to 64 and 80 clearly prove that the partition has already taken place between the parties and the respondent No. 1 - ori. plaintiff has got his share at the time of said partition. He has, therefore, submitted that the order and judgment passed by the learned Assistant Judge deserves to be quashed and set aside and the Appeal deserves to be allowed.

11. Mr.A.J.Memon, learned Advocate appearing for the respondent, on the other hand, has supported the decree and judgment passed by the lower Appellate Court. He has submitted that it is admitted fact that the properties in dispute belonged to Shri Bachu Usman. The said Bachu Usman partitioned his properties among his two sons, Ali Mahmad, plaintiff -respondent and Usman Bachu whose heirs are defendants - present appellants. The defendant No. 1 -present respondent No. 1 has admitted in her deposition at Ex. 88 about partition in writing and it is with her son, respondent No. 1, but it has never been produced by appellants Nos. 1 to 3. Thus, it is crystal clear that Bachu Usman never partitioned his properties in his life time among his two sons Ali Mamad and Usman. The appellant No. 1 has denied knowledge of number of utensils, of ornaments and of presence of persons during the said partition. She has admitted that land on the East of disputed vadi is cultivated by Fakir Mamad - son of respondent No. 1. It belongs to Ali Mamad Jumma, maternal uncle of Fakir Mamad. This land is not part of disputed field bearing Survey No. 211/1. He has further submitted that Bachu Usman did not partition his property and four delas and vadi were not given to Usman. Bachu Usman died in 1939-40 when respondent No. 1 was 7 to 8 years old, therefore partition could not take place in 1946. Thus, no such partition between brothers in presence of their father was ever made. He has further submitted that Usman was occupying and enjoying most of the properties of his father and subsequently appellants occupied and enjoyed and have been occupying and enjoying them after the death of Usman Bachu. The appellants could not say any word about the share of the respondent No. 1. He has further submitted that the land was in possession of the son of the respondent No. 1. The said land was given by his brother-in-law to his wife and Entry No. 389 was made. The trial Court has, therefore, drawn an inference of partition from the fact of possession of some land by Fakir Mamad since 1968-69 and some of land by appellant Nos. 1 to 3 since 1970-71. The respondent No. 1 did not object to entry in the name of appellants in Revenue records in 1968-69 because they were his nephews. He has further submitted that the appellants have failed to prove when their possession became adverse. He has, therefore, submitted that the decree and judgment passed by the trial Court was rightly quashed and set aside by the Appellate Court and it does not warrant any interference by this Court.

12. Mr.Memon has also made certain legal submissions about abatement of Appeal and its maintainability now. He submitted that the respondent No. 1 - Ali Bachu Usman expired on 23.3.2009. The legal heirs of Ali Bachu Usman has

moved Civil Application (Stamp) No. 5474 of 2009 for joining them as party. A copy of the Civil Application was given to the appellants' learned Advocate. Thus, the fact regarding the death of respondent No. 1 was brought to the notice of this Court as well as the appellants. No action was, however, taken by the appellants to bring the legal heirs on record. The Appeal, therefore, stood abated on expiry of the period of 90 days. Even after the abatement of Appeal, no application was filed for setting aside of the abatement or for bringing the legal heirs of the respondent No. 1 on record. The Appeal, therefore, deserves to be dismissed on this ground.

13. In support of his submissions, Mr.Memon relied on the decision of the Apex Court in the case of Madan Naik (Dead) by Legal Representatives and Others Vs. Hansubala Devi and Others, wherein it is held that no specific order for abatement of a proceeding under one or the other provisions of 0.22 is envisaged, the abatement takes place on its own force by passage of time. In fact, a specific order is necessary under 0.22, R.9, C.P.C. for setting aside the abatement.

14. Mr.Memon further relied on the decision of Apex Court in the case of Mahant Niranjan Dass Vs. Shiromani Gurudwara Prabandhak Committee, Amritsar, wherein an application was not filed by a person claiming himself to be Chela of Mahant for bringing him on record within 90 days of the death of the Mahant. The Court held that such application is liable to be dismissed. It is more so when application was filed beyond 90 days even from knowledge of suit as claimed.

15. Mr.Memon further relied on the decision of Apex Court in the case of Kenchegowda (Since Deceased) by Legal representatives Vs. Siddegowda alias Motegowda, wherein it is held that on the death of defendant No. 1, failure to bring on record his legal representatives, and the deletion of his name from the array of parties would result in the abatement of that suit. The finding of the trial Court became final and conclusive and binding between the parties. Therefore, to hold, as the High Court has done, that the cause of action will survive as against second defendant is incorrect.

16. Mr.Memon further submitted that it is not within domain of this Court to investigate the ground on which the findings were arrived by the last Court of fact being the first Appellate Court. The mere appreciation of facts, the documentary evidence or the meaning of entries and the contents of the document cannot be held to be raising a substantial question of law.

17. In support of this submission he relied on the decision of Apex Court in the case of Kondiba Dagadu Kadam Vs. Savitribai Sopan Gujar and Others, wherein it is held that the lower appellate Court should not ordinarily reject witnesses accepted by the trial Court in respect of credibility but even where it has rejected the witnesses accepted by the trial Court, the same is no ground for interference in second appeal when it is found that the appellate Court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two

inferences are possible, one drawn by the lower appellate Court is binding on the High Court in second appeal. Adopting any other approach is not permissible. The Court further held that High Court cannot substitute its opinion for the opinion of the first appellate Court unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the apex Court, or was based upon inadmissible evidence or arrived at without evidence.

18. Considering all these factual as well as legal submissions Mr.Memon submitted that there is no substance in the Second Appeal preferred by the appellants and hence it deserves to be dismissed with costs.

19. Having heard learned Advocates appearing for the parties and having considered their rival submissions in light of orders passed by the Courts below and the documents available on record as well as legal position, the Court is of the view that the Appeal preferred by the appellants is lacking merits and deserves to be dismissed, both in law as well as on facts. The facts on record reveal that the respondent No. 1 expired on 23.3.2009. The said fact is brought on record by way of Civil Application (Stamp) No. 5474 of 2009 moved by the legal heirs of the respondent No. 1. It is true that the said application was rejected for non-removal of office objection. However, taking clue from the said application, the appellants should have moved proper application before this Court for bringing the legal heirs of the respondent No. 1 on record. Since this has not been done till this date, the Appeal stands abated as per the settled legal position pointed out by Mr.Memon. The Court would have condoned the delay and would have possibly set aside the abatement, had an application been filed by the appellants. Since this has not been done till the Appeal is finally heard and disposed of and hence there is no question of setting aside the abatement.

20. There is another reason in not interfering with the judgment and decree passed by the lower Appellate Court and i.e. that the lower Appellate Court had appreciated the evidence on record, formulated necessary points for its decision and after examining oral as well as documentary evidence on record and after going through the judgment and decree passed by the Trial Court and applying the correct principles of law to the facts on record, the lower Appellate Court had arrived at the conclusion that the properties described in the plant are joint properties and the plaintiff had got one half share in them. A partition should be affected by the Trial Court and separate possession of one half share of the plaintiff is required to be handed over to him. The lower Appellate Court has also taken note of the fact and, therefore, observed that at the time of making partition by metes and bounds, the portion of land sold to defendant No. 6 to be taken as fallen to the share of defendant Nos. 1 to 5. The Appellate Court has also discussed the evidence relied upon by the Trial Court in support of its decision and hence it is observed that the trial Court seems to be impressed by the fact that property of Survey No. 211/1 was running in the name of Usman

Bachu and after his death in the name of his sons and hence there must be a partition. The lower Appellate Court has further observed that when there is no land running in the name of plaintiff exclusively in the revenue record, the fact that the land was running in the name of his elder brother will not be sufficient to prove that the plaintiff has no share in it. The lower Appellate Court has further observed that when Usman Bachu has elder brother and he was actually cultivating the land as the plaintiff was serving at Jamnagar, if the revenue authority made the entries in his name, it cannot be said that co-owner's right of the plaintiff is lost. Simply because the entry in revenue record is in the name of defendants it cannot be assumed that the partition has already taken place, especially when there is no other property which is said to have gone to the share of the plaintiff during partition. The lower Appellate Court has, therefore, not agreed with the findings of the trial Court and held that the suit properties described in the plaint are joint properties and plaintiff has got one half share in the said properties.

21. In the above view of the matter and considering the entire facts and circumstances as well as legal position, the Court does not find any substance in the present Second Appeal and it is accordingly dismissed. There shall be no order as to costs.

22. In view of order passed in Second Appeal, the Civil Application does not survive and hence it is accordingly disposed of.