

(1976) 07 GUJ CK 0012
In the Gujarat High Court

Jadavji Devshanker (since deceased by his heirs)	APPELLANT
Vs	
Jiviben Lavji Rugnath	RESPONDENT

Date of Decision : 20-07-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35, Order 21 Rule 35, 47

Citation : (1977) 18 GLR 504

Hon'ble Judges : N.H. Bhatt, J

Bench : Single Bench

Judgement

N.H. Bhatt, J.—This second appeal arises out of execution proceedings. The appellants are heirs of the original judgment debtor against whom a decree of eviction from rented premises had come to be passed for the first time by the High Court in Second Appeal No 589 of 1965 decided by this High Court on 25-3-71. Lavji Ragnath, the husband of the respondent had filed the said suit for possession of the rented premises under the provisions of the Saurashtra Rent Act and the ground of eviction was non-payment of rent. Both the trial court and the appellate court, namely, the District Court, had dismissed the plaintiff's suit against which the above-mentioned Second Appeal had come to be filed in the High Court in the year 1965, as the number indicates. During the pendency of the said Second Appeal, said Lavji Ragnath died on 3-4-68, but the High Court and the respondents in the High Court did not know of the death of the sole appellant before the High Court. The High Court came to decide the said appeal and reversed the judgments and decrees of the lower courts and decreed the original plaintiff's suit for possession. When the execution proceedings came to be filed by the widow of the said plaintiff-landlord Lavji Ragnath as the heir and legal representative of the judgment-creditor, a question arose whether there was any competent decree which could be executed. The darkhast that was filed by Jiviben, the widow of the original plaintiff Lavji Ragnath, was registered as darkhast No. 62 of 1973 by the learned Civil Judge (S.D.) Rajkot. The trial court held that the decree could not be Slid to be a nullity and as the executing court it had no powers to go behind the decree. The court, therefore, passed an order to

issue warrant under Order 21 Rule 35 of the CPC for effecting delivery of possession of the property to Bai Jivi. The original judgment debtor-tenant, who was alive at that time, filed Civil Appeal No. 125 of 1974 before the District Judge, Rajkot, who came to concur with the view of the learned executing court. The result was that the appeal was dismissed. It is against this order in the execution application confirmed by the District Judge that the present second appeal has been filed u/s 100 read with Section 47 of the Civil Procedure Code.

2. The only question that arises for consideration is whether in view of the admitted facts, the decree was executable or not. During the pendency of this second appeal, the original judgment-debtor had died and his seven heirs have been brought on record and they have been prosecuting this appeal.

3. On behalf of the appellants, it was contended that the sole appellant before the High Court in Second Appeal No. 589 of 1965 having died, the appeal had automatically abated result being that the District Court's decree held the field since 1968-69. As the appeal had abated by statutory force, nothing was required to be done by any of the parties. There was in fact no appeal on the record of the High Court and the decree was passed by the High Court in a matter which was not there, and so it would obviously be a nullity, and there cannot be any execution founded on such a non est decree.

4. On the other side, it was contended on behalf of the respondent that a decree against a dead person may be a nullity, but it cannot be a nullity in favour of a dead man. On behalf of both the sides, some authorities were cited before me and the controversy is to be resolved in the light of the law dealt with in those authorities. On behalf of the heirs of the original tenant, reliance was placed on the Division Bench judgment of the Bombay High Court in the case of *Amarsangji Indrasangji Vs. Desai Umed*, . In that case there was a bunch of about 33 matters, out of which the question arose before the High Court in respect of four appeals. A rather curious technical position had emerged in that case. In all those cases there was a sole defendant and the judgment of the trial court was against that sole defendant. In each of those four cases, the sole defendant had appealed to the District Court but before the appeals came up for hearing, the sole defendant in each of those cases had died. The legal advisers appear to have been unaware of that death and accordingly the appeals were heard and allowed. The result was that the trial court's decree was set aside in favour of the defendant, who was no longer there. Even the original plaintiffs in each of those suits were apparently unaware of the fact of death of the sole defendant in those cases. The original plaintiffs then presented second appeals to the High Court. Those appeals were heard and dismissed as far as 29 companion cases were concerned. The question that was raised before the Division Bench of the High Court was whether the judgment of the lower court in the four suits would stand in as much as in fact the suit or the appeal had abated before the appeal was heard, as far as the four appeals before the Division Bench of the Bombay High Court were concerned, Marten J. made the following observation, which was

agreed to by his companion Fawcett, J. The words to be noted are:

In the events which have happened, the lower appeal court had really no jurisdiction to hear the appeals as there was no appellant before it. Accordingly, the order which I would suggest is that the decree of the lower appellate court in each of those four appeals be set aside, and that in each case the appeal to the lower appellate court from the trial court be remanded to be dealt with by the lower appellate court according to law.

The above conclusion reached by the Division Bench of the Bombay High Court at least clearly lays down one principle that the judgment of the District Court in appeals was no judgment in law because there were no appeals. Only on this ground and no other, the Division Bench of the Bombay High Court allowed all the four appeals of the original plaintiffs and restored the position that would be there before the District Court in appeals by the original defendant, the appeals, which, as a matter of fact, had already abated. Still the learned Judges of the Bombay High Court restored the situation which was there prior to the four decrees under appeals before they had come to be passed, enabling the heirs of the original respective defendant to apply to the District Court for setting aside the abatement which had occurred due to the force of the statute. This view of the Bombay by necessary implication negatives the view that a decree passed in favour of a dead man would not be a nullity.

5. This judgment of the Bombay High Court, therefore, is binding on us, being the judgment and, therefore, the law of the State of Bombay as applicable to the State of Gujarat. The Full Bench of the Gujarat High Court in the case of Anand Municipality v. The Union of India 1 G.L.R. 82 has held that the judgments of the Bombay High Court delivered prior to 1st of May 1960 have the force of law as far as Gujarat High Court is concerned, unless the judgment of the Bombay High Court delivered prior to 1-5-60 is dissented from by a properly constituted bench of this High Court.

6. As against this, the learned advocate appearing for the respondent-landlady invited my attention to the judgment of the Supreme Court in the case of Hira Lai v. Sri Kali Nath AIR 1962 98 sc and he urged that the executing court could not go behind the decree. The pertinent observations to which my attention was called by the learned advocate are to be found in paragraph 4 and they are as follow:

The validity of a decree can be challenged in execution proceedings only on the ground that the court which passed the decree was lacking in inherent jurisdiction in the sense that it could not have seizin of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it.

Emphasis was laid on one of the circumstances, namely, the defendant was dead

at the time the decree was passed. It was urged that implicit in this observation of the Supreme Court is a view that if at the time the decree is passed the plaintiff is dead, the court's inherent lack of jurisdiction is not to be assumed. I am afraid, the illustration referred to by the Supreme Court is sought to be treated by the learned advocate as the implicit proposition of law. The basic principle laid down by the Supreme Court is that if in a case it appears that the court could not have passed the decree, the executing court can examine the question. The case like the one on hand would fall under the last category of "some such other ground which could have the effect of rendering the court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it."

7. When the matter came to be handled by the High Court in second appeal, there was in fact no second appeal before the High Court, it having abated automatically as far back as on the expiry of 90 days from 3-4-68, the date of the death of the sole appellant, the original plaintiff in the suit. It is a matter of common knowledge that courts pass decrees only in matters which are competently before them and not in non existent matters. Courts have no jurisdiction to pass such decrees and consequently the above quoted judgment of the Supreme Court stands in on good stead to the respondent-landlady.

8. In this connection, the views of the other High Courts and particularly the consistently held view of the Patna High Court were brought to my notice and some authorities also were cited in support of this proposition. The authorities are 1937 Pat 321 1958 Pat 261 : 1954 Cal 205 over and above the two other authorities. As far as the first of the cited authorities namely. Ghasiram Marwari v. Raja Shiba Prasad Singh 1937 Pat 321, is concerned, it does support the view canvassed by the respondent. Relying upon some observations of a Privy Council judgment, the Patna High Court in that case held that the decree in favour of a dead man can never be a nullity and the authority appears to have gone so far as to say that a decree even against a dead man would not be a nullity. Similarly, in the case of Noai Chowkidur and Ors. v. Official Trustee of Bangui AIR 1979 Cal 527 , it has been held that an order passed against a dead person would surely be a nullity, but an order passed in favour of a dead person is not altogether and in all circumstances a nullity. The Calcutta view is, therefore, a qualified view and does not lay down an absolute proposition that a decree in favour of a dead man would ever be a nullity. The case of Himangshu Bhusan Kar and Others Vs. Manindra Mohan Saha, was specifically referred to by the learned advocate for the respondent and in particular paragraph 9 thereof was pressed in aid for the proposition that as far as the executing court is concerned, it was bound to execute the decree according to its terms. Even this judgment of the Calcutta High Court on the first question says that "generally speaking, a decree passed in favour of a dead person is not a nullity. On the second question of course it clearly supports the respondent's contention. But in view of the Supreme Court judgment quoted above, this cannot be held to be good law.

I am bound by the judgment of the Bombay High Court and the judgments of the other High Courts appear to be more or less arising from cases where there were more than one parties out of whom one dies and the matter was proceeded with by the courts concerned. Whatever may be the view, the judgment of the Bombay High Court is too clear to be bypassed. On the facts that were admitted even before the executing court, the decree of the High Court could not have been passed. It would be a decree without jurisdiction, and therefore, no decree in law. Execution based on such a decree cannot be entertained.

9. The result is that the appeal is allowed. The order passed by the executing court regarding issuance of a warrant under Order 21 Rule 35 of the CPC is set aside and the darkhast filed by the respondent is dismissed. In the circumstances of the case, there will be no order as to costs throughout.