
(1972) 11 GUJ CK 0002
In the Gujarat High Court
Case No : First Appeal No. 661 of 1965

Karimbhai alias Abdul Karim and Others	APPELLANT
Vs	
Bai Mariambibi and Others	RESPONDENT

Date of Decision : 20-11-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 11, Order 22 Rule 4

Citation : AIR 1974 Guj 91

Hon'ble Judges : J.M. Sheth, J;C.V. Rane, J

Bench : Division Bench

Advocate : V.J. Desai, for the Appellant; S.S. Majmudar and Kiranben V. Desai, for the Respondent

Judgement

J.M. Sheth, J.—This appeal is filed by the appellants (original defendants Nos 1 and 2) against the judgment and preliminary decree passed in Special Suit No 47 of 1962. That suit was filed by the plaintiffs (respondents No 1 to 3) against the appellants (original defendants Nos 1 and 2), respondent No 4 (original defendant No 3). And respondents Nos 5,6 and 7 (original defendants Nos 4 , 5 and 6). Appellant No 1 having died during the pendency of appeal his heirs and legal representatives have been brought on the record. Respondents Nos 5 and 6 died during the pendency of appeal. Their heirs and legal representatives were not brought on the record within the period of limitation Civil Application No 367 of 1972 filed for bringing on record the legal representatives of defendant No 6 beyond the period of limitation has been rejected by this Court on 23-10-1972 . It is therefore evident that so far as respondents Nos 6 and 7 (original defendants Nos 5 and 6) are concerned, the appeal has abated . On behalf of the respondents , contention is raised that the appeal in its entirety abates and this appeal cannot be heard . It is significant to note that the suit filed by the plaintiff's (Respondent Nos 1 and 3) who was a suit for the partition of the suit property . It belong to one Malangbhai Hasanbhai in the appeal we are concerned with the suit house bearing survey No 41 , situate in Baroda , as the decree for partition has been passed in respect of that property only .

2.The appellants are the son's of that Malangbhai Hasanbhai plaintiff's (Respondents Nos 1 to 3 are the heirs of deceased Hasanbhai Malangbhai another son of Malangbhai . Respondents Nos 5 to 7 are sisters of the appellants i.e daughters of Malangbhai .

3.It was the case of the plaintiffs (Respondents Nos 1 to 3) that the property in question belonged to Malangbhai and they being the heirs and legal representatives of deceased Hasanbhai , they were also entitled to share according to Mohomedan Law . The appellants contended that Bai Mariam plaintiff No 1 was not the legally wedded wife of Hasanbhai Malangbhai and consequently plaintiff's Nos 2 and 3 were not the legitimate children of the deceased . It was their contention on that basis that they were not entitled to any share in the property in dispute . It was their further contention that their sisters viz . respondents No.s 6 and 7 were also the heirs of Malangbhai and consequently they were necessary parties to the suit . In view of the contention of theirs those sisters of the appellants were added as parties to the suit and they supported the plaintiff contention . It was the further case of the appellant that they had become the exclusive owners of the property in dispute by adverse possession for a period over twelve years . Issues were accordingly framed on the basis of the pleading at Exhibit 13 .

4.The learned Trial Judge found that the plaintiff are the heirs of the deceased Hasangbhai Malangbhai . The property in dispute is therefore liable to be shared by the parties and the property to be shared is the suit house bearing survey No 41 situated in Baroda Issue No 6 was " whether the defendants Nos 1 and 2 prove that they are the owners of the suit property by adverse position " ? that contention of theirs is negatived . In view of his findings the learned Trial Judge has directed that the property in dispute be partitioned between the plaintiffs and the defendants as under

2/9th share to plaintiffs and the defendants No 3

2/9th share to defendants No 1

2/9th share to defendants No 2

1/9th share to defendants No 4

1/9th share to defendants No 5

1/9th share to defendants No 6

It is this preliminary decree which is the subject-matter of the appeal in question.

5.Mr V.J.Desai , learned Advocate appearing for the appellants has contended before us that by this preliminary decree , each of the parties is found to be entitled to a definite share. Respondents Nos 6 and 7 who have died during the pendency of the appeal and whose heirs and legal representatives have not been brought on the record had each one-ninth share. As the appeal has abated against them, the result would be that the decree , so far as respondents Nos 6

and 7 are concerned has become final and the appellants would not be in a position to challenge that finding of the learned trial Judge. But so far as other respondents are concerned who have been found to be entitled to a particular share in the property in question, his appeal can proceed against them. In support of his arguments, he has invited attention to several decisions to which we will make reference at an appropriate stage.

6. In reply to these submissions made by Mr. Desai, Mr. Majumdar appearing for the plaintiffs respondents has in terms found that the appellants (original defendants Nos 1 and 2) have not become the owners of the suit house by adverse possession. As the appeal has abated against respondents Nos 6 and 7, the decree which has been passed in their favour on the basis that respondents Nos 6 and 7 have not become owners by adverse possession, will remain. In case this court in appeal accepts this contention of the appellants, there would be two conflicting decisions. Secondly Mr. Majumdar has submitted that in a partition suit, all these persons including respondents Nos 6 and 7 were necessary parties. This very contention was raised by the appellants in the trial court and on that basis those persons were added as parties and it is found that they are entitled to a particular share in the suit house. It means that respondents Nos 6 and 7 are necessary parties and consequently the appeal in their absence could not be maintained. It is therefore, urged that the two tests, first and second laid down by the Supreme Court in the decision to which we will make reference at an appropriate stage are clearly satisfied in this case. He has, therefore, contended that the appeal will abate in toto.

7. In our opinion, submissions made by Mr. Majumdar are well founded. Before we advert to the authorities cited at the Bar, we will refer to the relevant provisions of Order 22, Rule 4, (1) and (3) of the Civil Procedure Code.

"4 (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a Party and shall proceed with the suit.

(3) Where within the time limited by law no applications made under sub-rule (1), the suit shall abate as against the deceased defendant"

We have to read this Rule 4 (1) and (3) of Order 22 along with Rule 11 of O. 22 of the Civil Procedure Code. as we are dealing with appeal and not a suit. That Rule 11 reads:

"In the application of this order to appeals so far as may be the word "Plaintiff" shall be held to include an appellant the word "defendant" a respondent, and the word "suit" an appeal."

8. In *Raghunath Keshava Kharkar Vs. Ganesh and Others*, at pages 243 and 244 in para 35. the Supreme Court has observed: I

""The respondents contend that as the heirs of Jaigopal Naravandas were not brought on the record within the time allowed by law the entire appeal abates. We are of opinion that the interests of the various defendants who are in Possession of various properties are Independent and, therefore, the whole of the appeal cannot abate because the heirs of certain deceased defendant In possession of one property have not been brought on the record. So far as lot No. 8 is concerned It was the common Property of Shamdas Naravandas and Jaigopal Narayandas which they apparently acquired by one sale-deed. We are not Prepared to condone the delay in bringing the heirs of -Jaigopal Narayandas an the record and therefore dismiss the application dated April 3. 1963. The affect of this will be that the suit will abate In so far as the property In lot No. 8 Is concerned ."

It Is significant to note that even in that decision though one of the co-sharers was a party to the appeal- the Supreme Court held that so far as that lot No. 8 was concerned on account of not bringing on -the record the legal representatives of the other co-sharer Jaigopal Narayandas the appeal will abate against both the co-sharers. In-our opinion. this decision cited by Mr. Desai does not Support his contention On the contrary. It supports the contention raised by Mr Majmudar.

9. Mr. Desai has laid considerable emphasis on the decision of the High Court of Jammu and Kashmir in Mul Singh v. Mst. Indru AIR 1966 J & K 110. in support of his contention. If we read para. 23 at Page 113, the relevant observations made are:

"On a careful consideration of the authorities mentioned above and Particularly of the Supreme Court the tests laid down when applied to the facts of the present case reveal that the result of the suit will not ensue in a conflict of decision between the~ case of the deceased defendants and those who are living. nor could the plaintiffs not bring a suit for the necessary relief"s against the surviving defendants and the suit will not be Ineffective if It is decreed partly against the surviving defendants".

It Is thus evident that in that case the two tests laid down by the Supreme Court were not satisfied and that is why the High Court of Jammu and Kashmir came to the aforesaid conclusion.

10. In an unreported decision of the Supreme Court in Civil Appeals Nos. 1711 of 1967 and 1985 of 1968. decided on 3-4-1972 - (Since Reported in Ramagya Prasad Gupta and Others Vs. Shri Murli Prasad and Others, the Supreme Court has dealt with this question elaborately and reiterated the ratio of the previous Supreme Court decisions. It is observed:

""Under Rule 4 (3) read with R 11 of order XXII. Civil P. C.. the appeal abates as against the deceased respondent where within the time limited by law no application Is made to bring his heirs or legal representatives on record As pointed out by this Court in The State of Punjab Vs. Nathu Ram, , it to not

correct to say that the appeal abates against the other respondents. Under certain circumstances the appeal may not be proceeded with and is liable, to be dismissed But that is not because of the procedural defect but because as Mulla has pointed out. it is part of the substantive law. (See Mulla's C. P. C., Vol. 1. Thirteenth Edition, page 620 under note Non-joinder of Parties). No exhaustive statement can be made as to the circumstances under which an appeal in such cases cannot proceed. But the Courts, as pointed out in the above decision, have applied -one or the other of three tests The Courts will not proceed with an appeal (1) when the success of the appeal may lead to the Court's coming to a decision which will be in conflict with the decision between the appellant and the deceased respondent, and, therefore, it would lead to the Court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent,, (b) when the appellant could not have brought the action for necessary relief against those respondents alone who are still before the Court; and (c) when the decree against the surviving respondents. If the appeal succeeds, be ineffective, that is to say, it could not be successfully executed. These three tests: as pointed out by the Court in Pandit Sri Chand and Others Vs. Jagdish Parshad Kishan Chand and Others, are not cumulative tests. Even if one of them is satisfied, -the Court may dismiss the appeal

It is contended by learned, counsel for Murli Prasad that this case is covered by the first two tests. His client Murli Prasad has not obtained a decree from the High Court holding that he is entitled to the whole of the subject-matter of the suit and no one else including, the deceased Jagdish Narain is entitled to claim any share in the same against him. This is a decree which is passed, in his favour. so far as deceased Jagdish Narain is concerned and it has become final as the heirs of Jagdish Narain are not on record in these appeals. On the other hand. If the present appellants were to succeed and be entitled as they claim to the decree of the trial Court being restored, it will have to be said, that deceased Jagdish Narain, was entitled to a share as awarded by the trial Court. And since the various parties in these appeals and the suit stand both in the position of a Plaintiff and a defendant the decision will lead to deceased Jagdish Narain being given a share in the subject-matter of the suit which, would be in conflict with the decree passed by the High Court and has become final as between himself and deceased Jagdish Narain. It is further contended that the second test is also satisfied because the two appellants before us could not have brought an appeal for the relief claimed by them, against only the surviving sharers to the exclusion of deceased Jagdish Narain. in view of the fact that Jagdish Narain has been declared to be owner of a share along with other partners."

It is significant to note that in that case also a similar contention was raised before the Supreme Court as has been raised by Mr. Desai before us It was urged on behalf of the appellant

"There is no bar to proceed with the appeals in spite of the legal heirs of

deceased Jagdish Narain not having been brought on record. In the first Place. To was contended that though Jagdish Narain is dead he is fully represented because he was a member of the Joint family of which Parasnath was the Manager and since Parasnath Is a respondent in these appeals it was not necessary to bring the personal heirs of Jagdish Narain on record . Secondly it was contended that Jagdish Narain was not himself a partner in the Partnership and since a stranger to the Partnership is not entitled to join as a party to the Suit his omission In appeal is not fatal ."

Both these contentions were negatived. It was observed:

"Having regard to the clear position of law in this respect the failure to brine on record the heirs or legal representatives of deceased Jagdiah Narain one of the sharers In the subject-matter of the suit must Inevitably lead to the dismissal of the appeals. That brings the case squarely in the second test referred to In the decision of this Court In Nathu Ram''s case referred to above

In all such cases even the first test would be satisfied. There Is a High Court decree which says , that neither deceased Jagdish Narain nor anybody else was entitled to a share In the subject-matter as against Murli Prasad who is held to be the sole Proprietor of the business it the present appellants were to succeed it would lead to the Courts coming to a decision that the deceased Jagdish Narain was entitled to a share In the subject matter of the suit as against Murli Prasad and the other alleged Partners a decision which would be In conflict with the decision of the High Court and will be contradictory to it though it has become final with respect to the subject-matter between Murli Prasad end the deceased respondent."

In the instant case if the trial courts decree stands as It stands, so far as respondents Nos. 6 and, 7 are concerned, respondents Nos. 6 and 7 each has got one-ninth share In the suit house. it being the property of deceased Malambhai Parties to the suit accordant to Mohamedan Law are sharers and each of them Is, therefore, entitled to a particular share- If now the contention of the appellants is accepted, that they have become the owners of the suit house by adverse possession for a period over twelve years, there will be conflicting decision , First test is clearly satisfied. In the partition suit sisters who have got a share, according to the Mohammedan Law. are necessary parties. In. the appeal also they would be necessary parties . Their legal representatives have not been brought on the record. The present case is, therefore, a case where both the tests, viz. first and second, referred to by the Supreme Court, are satisfied. The appeal , therefore cannot proceed in the absence of the legal representatives of respondents Nos 6 and 7. The appeal will have therefore to be dismissed on that ground.

11. Mr .Desai has invited out attention to the decision of a Full Bench of the Madras High Court in Rangasavi v. Nagarathnamma AIR 1933 Mad 890 (FB) . It is observed therein at page 907:

"..... Right of partition is a right to property. Prima facie such a suit , if properly instituted, should not abate. But on plaintiffs death his legal representatives should be in a position to carry on the litigation."

In our opinion, this decision has no bearing. We are not concerned with the question regarding abatement of the suit filed for partition of the property. We are concerned with an appeal against a preliminary decree in a partition suit where the shares of the parties are determined and the contention of the appellants(original defendants Nos 1 and 2) that they were the exclusive owners of the suit house, has been negated.

12.The result is that the appeal cannot be proceeded with. It is liable to be dismissed on the aforesaid grounds.

The appeal is dismissed . In the circumstances of the case no order as to costs is made in this appeal .

It is not necessary to emphasise that interim stay granted will stand vacated as the appeal has been dismissed .

The appeal has been placed before us for considering the question regarding the abatement of the appeal in its entirety on the note filed by Mr. Majmudar on behalf of the plaintiffs (respondents Nos 1 to 3).

13. Appeal dismissed