
(2014) 09 BOM CK 0073

In the Bombay High Court

Case No : Second Appeal No. 99 of 2009

Naveen Shanker Lokure

APPELLANT

Vs

Nascimento Milgaes Pereira

RESPONDENT

Date of Decision : 19-09-2014

Acts Referred:

Citation : (2014) 09 BOM CK 0073

Final Decision : Disposed Off

Judgement

U.V. Bakre, J.—Heard Mr. Usgaonkar, learned Counsel appearing on behalf of the appellants and Mr. D'Costa, learned Senior Counsel appearing on behalf of the respondents no. 1, 2 and 10(a) to 10(d), 10(e) to 10(g).

2. This Second Appeal is directed against the judgment and decree dated 19/05/2009 passed by the learned District Judge-4, South Goa, Margao (First Appellate Court, for short) in Regular Civil Appeal No. 70/1999. The said Regular Civil Appeal No. 70/1999 was filed against the judgment and decree dated 29/04/1999 passed by the learned Civil Judge, Senior Division, Margao (trial Judge, for short) in Special Civil Suit No. 32/1972/A. The appellant was the defendant no. 2(a) and legal representative No. 1(a) of the original defendant no. 1, whereas the respondents no. 1 to 26 were the legal representatives of the original plaintiffs, in the said Civil Suit. Parties shall, hereinafter, be referred to as per their status in the said suit.

3. The original plaintiffs namely Jose Francisco Pereira and his wife Ana Francisca Dias had filed the said suit for a declaration that they are exclusive owners in possession of the property referred in paragraph (1) of the plaint, including the disputed area allegedly purchased by the defendants no. 1 and 2 namely Shankar Krishnappa Lokure and Shivagundappa Krishnappa Lokure from the defendant no. 3, namely Aniquinha Maria Apolonia Dias. The plaintiffs had also prayed for recovery of possession of the said portion and for declaration that the sale deed in favour of the defendants no. 1 and 2 is null and void and for payment of compensation, etc. Inter alia, the plaintiffs claimed that the original

transferor of the suit property in favour of the defendants no. 1 and 2 i.e. the defendant no. 3 had no title to the suit property. By judgment and order dated 29/04/1999, the said suit was dismissed. Plaintiffs filed Regular Civil Appeal No. 70/1999 against the judgment and decree of the trial Judge.

4. The original defendant no. 3 had died during the pendency of the suit and her legal representatives, namely Jose Filomena Dias alias Joseph Michael Dias and his wife Mrs. Cintia Dias, together as 3(i); Francisco Rosario Dias alias Frank Dias and his wife, Mrs Catherina Ana Dias, together as 3(ii) along with other legal representatives at serial nos. 3(iii), 3(iv) and 3(v) were brought on record, in the said suit. However, the legal representative Mrs. Catherina Ana Dias had also expired during the pendency of the suit on 23/09/1994. However, her heirs were not brought on record. Since, the husband of the said Mrs. Catherina, namely Francisco Rosario Dias was on record, there was no abatement of the suit. In the Regular Civil Appeal No. 70/1999, the deceased Mrs. Catherina Dias was, however, impleaded as the respondent no. 7, as if she was alive. During the pendency of the said Regular Civil Appeal, the husband of the said deceased Catherina Dias, namely Francisco Rosario Dias impleaded as respondent no. 6, died on 01/02/2002. The legal representatives of the deceased Francisco Rosario Dias were not brought on record, in the said Regular Civil Appeal No. 70/1999. Thus the Regular Civil Appeal No. 70/1999, has been decided against two dead persons. In the circumstances above, one of the substantial questions of law which arises in the present appeal and is formulated by consent of both the parties, is as follows :

"Whether the judgment and decree dated 19/05/2009 allowing the First Appeal filed by the respondents no. 1 to 11 herein, is a nullity being the judgment and decree against the dead person as original defendant no. 3(ii) i.e. respondent no. 31 had expired during the pendency of the appeal on 01/02/2002 and his wife also impleaded as original defendant no. 3(ii) i.e. respondent no. 32 herein, had expired on 23/04/1994 during the pendency of the suit before the trial Court."

5. Mr. Usgaonkar, learned Counsel appearing on behalf of the defendant no. 1(a) or 2(a) submitted that since Francisco Rosario Dias, the defendant no. 3(ii) had died during the pendency of the Regular Civil Appeal and though he had legal representatives, they were not brought on record, there was abatement of the said appeal as against the deceased respondent no. 6 and his wife i.e. respondent no. 7 (defendants no. 3(ii)). He relied upon the following judgments :

- (i) Amarsangji Indrasangji Vs. Desai Umed,
- (ii) The State of Punjab Vs. Nathu Ram,
- (iii) Udai Ram Vs. Dharam Chand,
- (iv) Budh Ram and Others Vs. Bansi and Others,
- (v) Judgment of this Court dated 21/03/2013 in F.A. No. 267 of 2005.

6. On the other hand, Mr. D"Costa, learned Senior Counsel submitted that after the death of original defendant no. 3 namely Aniquinha Maria Apolonia Pereira, her legal representatives were all duly brought on record and, therefore, the estate of the defendant no. 3 was duly represented in the suit. He submitted that the fact regarding the death of Catherina as well as Francisco [defendants no. 3(ii)] was not brought to the notice of the Court and, therefore, the legal representatives could not be brought on record, in the suit as well as in the appeal. He submitted that since the estate of the original defendant no. 3 was duly represented, the appeal could not abate. He submitted that in the Regular Civil Appeal, respondents no. 8, 9, 10, 11 and 12 represented the estate of the original defendant no. 3. He relied upon the judgment of Supreme Court in the case of Mohd. Hussain (dead) by LR's and Others Vs. Occhavilal and Others,

7. I have perused the material on record and considered the arguments advanced by the learned Counsel for the parties.

8. In the case of "Mohd. Hussain (Dead) by L.R.s" (supra), one of the questions to be decided was as under:

(I) Whether the second appeal of Respondents herein, who were the appellants in the High Court, had abated as they had failed to make an application to bring the legal heirs and representatives of Mohd. Hussain, one of the respondents in the High Court who had died during the pendency of that second appeal?

Said Mohd. Hussain had died on 19/11/1991 and the application for substitution after setting aside abatement caused on the death of Mohd. Hussain was filed by the appellants in the second appeal to bring on record his heirs and legal representatives on 03/03/1992 after the Judgment was already signed by the learned Judge. Admittedly, some of the heirs and legal representatives of Mohd. Hussain were already on record in the file of the second appeal. It was held that the question of abatement of the second appeal on the death of Mohd. Hussain could not arise at all as some of his heirs and legal representatives were admittedly on record. It was held that only the question of noting the death of Mohd. Hussain could arise and his name could be deleted from the array of the respondents in the second appeal and the rest of the heirs and legal representatives who were not brought on record could be added in the cause-title of the memorandum of appeal. It was held that it would be considered too technical to set aside the entire judgment of the High Court on the ground of not bringing the entire body of heirs and legal representatives of Mohd. Hussain because some of his heirs and legal representatives were on record and the left out heirs and legal representatives were sufficiently represented by the other heirs on record.

9. The judgment of the Apex Court in the case of "Mohd Hussain" (supra), may be applicable to the facts of the case insofar as the Special Civil Suit is concerned. In the said suit when the original defendant no. 3 namely Aniquinha Maria Apolonia Pereira died, her heirs and legal representatives were all brought

on record. One of the said heirs and legal representatives namely Smt. Catherina Ana D'Souza e Dias also died on 23/09/1994 i.e. during the pendency of the said suit. The final Judgment came to be passed in the said suit on 29/04/1999, without deleting the name of the deceased defendant namely Smt. Catherina Ana D'Souza e Dias and without bringing on record the other heirs and legal representatives of the said deceased Catherina on record. However, since admittedly the husband of deceased Catherina, namely Francisco was already on record, thereby representing her estate, applying the ratio of the Judgment of the Apex Court in the case of "Mohd Hussain" (supra), the said Special Civil Suit could not be held to have been abated.

10. But, in the Regular Civil Appeal No. 70/1999 also said Catherina Ana D'Souza e Dias had been shown as alive and as respondent no. 7. Her heirs and legal representatives were not on record in the said Regular Civil appeal. During the pendency of the said Regular Civil appeal, even the respondent no. 6, namely Shri Francisco Rosario Dias, the husband of the deceased respondent no. 7, died. The said deceased respondents no. 6 and 7 were two of the heirs and legal representatives of deceased original defendant no. 3. The other heirs and legal representatives of the said deceased original defendant no. 3 were on record as respondents no. 8, 9, 10 and 11. But these respondents no. 8, 9, 10 and 11 are not the heirs and legal representatives of deceased respondents no. 6 and 7. The heirs and legal representatives of deceased respondents no. 6 and 7 were not brought on record in the said Regular Civil Appeal. Hence the said Regular Civil Appeal No. 70/1999 had abated, as against the deceased respondents no. 6 and 7. The Judgment of the Apex Court in the case of "Mohd Hussain" (supra), is not applicable to the Regular Civil Appeal No. 70/1999.

11. In the Special Civil Suit No. 32/1972/A, the original plaintiffs i.e. the respondents no. 1 and 2 of the present second appeal had claimed that the original transferor of the suit property to the defendants no. 1 and 2 i.e. the defendant no. 3, Aniquinha Maria Apolonia Dias, had no title to the suit properties and they be declared as owners in possession of the suit property. The said suit was dismissed. Due to the dismissal of the said suit, the position was that the sale deed by which the original defendant no. 3 sold the portion of the property to the defendants no. 1 and 2 became valid and legal. However, vide Judgment passed in the Regular Civil Appeal No. 70/1999, the suit of the plaintiffs was partly decreed to the extent of the property shown by Shri Rui Rebeiro in Exhibit PW10/A. But the said decree in Regular Civil appeal No. 70/1999 was against dead persons namely the respondents no. 6 and 7. Thus, insofar as the heirs and legal representatives of the respondents no. 6 and 7 [defendants no. 3(ii)], who were not brought on record, are concerned, the decree of dismissal of said Special Civil Suit No. 32/1972/A remained intact. The sale deed by which the original defendant no. 3 sold the property to the defendants no. 1 and 2 remained good with regard to the heirs and legal representatives of respondents no. 6 and 7 i.e. the defendants no. 3(ii), but was set aside as against the other heirs and legal representatives namely the

respondents no. 4, 5, 8, 9, 10 and 11 i.e. the defendants no. 3(i), 3(iii), 3(iv) and 3(v). The Regular Civil Appeal No. 70/1999 between the appellants and the respondents, therein, besides being against the dead persons, without participation of the heirs and legal representatives of deceased Francisco Rosario Dias and his wife Catherina Ana D'Souza e Dias could not be said to be properly constituted or could not be said to have all the necessary parties for the decision of the controversy before the First Appellate Court. Since the said respondents no. 6 and 7 were deceased and their heirs and legal representatives were not brought on record, the said appeal cannot be said to be properly constituted. The decree in favour of the plaintiffs in Regular Civil Appeal No 70/1999 cannot be successfully executed since the same is not binding on the heirs and legal representatives of deceased respondents no. 6 and 7. The said success of the said appeal has led to the First Appellate Court's coming to a decision which is in conflict with the decision of the trial Court between the appellants and the deceased respondents, since as far as the deceased respondents are concerned, the suit has been dismissed but as far as the other respondents are concerned, the suit has been partly decreed. Therefore, the failure of bringing on record the heirs and legal representatives of deceased respondents no. 6 and 7, in Regular Civil Appeal No. 70/1999 led to the Court's passing a decree which is contradictory to the decree which had become final with respect to the same subject matter between the appellant and the deceased respondents. The appellants in Regular Civil Appeal No. 70/1999 could not have brought the action for the necessary relief against those respondents alone who were still before the Court. The decree of dismissal of the suit, passed by the trial Court was joint and indivisible one. The decree of allowing the suit partly, passed in Regular Civil Appeal No. 70/1999, was against dead persons.

12. In the case of "Nathu Ram" (supra), the Hon'ble Supreme Court has, inter alia, held thus:

"It follows, therefore, that if the Court can deal with the matter in controversy so far as regards the rights and interests of the appellant and the respondents other than the deceased respondent, it has to proceed with the appeal and decide it. It is only when it is not possible for the Court to deal with such matters, that it will have to refuse to proceed further with the appeal and therefore dismiss it.

The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision

between the appellant and the deceased respondent and therefore which 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 the 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."

13. In the case of "Budh Ram and Ors." (supra), the Hon"ble Supreme Court has held as follows:

"17. Therefore, the law on the issue stands crystallised to the effect as to whether non- substitution of LR's of the respondents-defendants would abate the appeal in toto or only qua the deceased respondents-defendants, depends upon the facts and circumstances of an individual case. Where each one of the parties has an independent and distinct right of his own, not inter-dependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the Court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two contradictory decrees on the same subject matter in the same suit. Thus, whether the judgment/decreed passed in the proceedings vis-a-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test.

18. The instant case requires to be examined in view of the aforesaid settled legal propositions. Every co-owner has a right to possession and enjoyment of each and every part of the property equal to that of other co-owners. Therefore, in theory, every co-owner has an interest in every infinitesimal portion of the subject matter, each has a right irrespective of the quantity of its interest, to be in possession of every part and parcel of the property jointly with others. A co-owner of a property owns every part of the composite property along with others and he cannot be held to be a fractional owner of the property unless partition takes place.

19. In the instant case a declaratory decree was passed in favour of respondents-plaintiffs and Smt Parwatu to the effect that they were co- owners, though, they had specific shares but were held entitled to be in "joint possession". The appellants/applicants had sought relief against Smt. Parwatu before the 1st Appellate court as there was a decree in her favour, passed by the Trial Court where Smt. Parwatu had been impleaded by the appellants/applicants as proforma respondent. In such a fact-situation, she had a right to contest the appeal. Once a decree had been passed in her favour, a right had vested in her favour. On her death on 19.11.2000, the said vested right devolved upon her heirs. Thus, appeal against Smt Parwatu stood abated. In the instant case, the

1st Appellate Court rejected the application for condonation of delay as well as the substitution of LRs of Smt Parwatu, respondent No. 4 therein.

20. The only question remains as to whether the appeal is abated in toto or only in respect of the share of Smt. Parwatu. The High Court has rightly reached the conclusion that there was a possibility for the Appellate Court to reverse the Judgment of the Trial Court and in such an eventuality, there could have been two contradictory decrees, one in favour of Smt. Parwatu and the other, in favour of the present appellants. The view taken by the High Court is in consonance with the law laid down by this Court consistently. The facts of the case do not warrant any further examination of the matter."

14. Vide Judgment dated 21/03/2013, passed in First Appeal No. 267/2005 (Devappa Shaba Naik Dessai and Ors. Vs. Kesar Ganesh Naik Dessai and Ors.), this Court, in paragraph 13 thereof, has held as under :

"13. In the case of "Udai Ram" (supra), during the pendency of appeal before the lower appellate Court, one of the defendants respondents namely Hazari died on 1/3/1984 but his legal representatives were not brought on record at any time. It was contended that the appeal before the Additional District Judge, Chittorgarh had abated so far as Hazari was concerned and as the decree of dismissal of the suit was joint and indivisible one, the appeal against remaining respondents also could not have proceeded and the decree having been passed against dead persons was nullity and cannot be sustained. The learned Single Judge of the Rajasthan High Court observed that the consensus of legal opinion, in such circumstances, appears to be that where in an appeal a decree is passed in ignorance of death of one of the defendants respondents during the pendency of that appeal, the appeal abates against the dead person. The High Court in appeal against such a decree cannot itself set aside the abatement nor can it affirm the decree passed by the lower appellate Court. The proper course in such a case is to set aside the ineffective decree passed by the lower appellate Court and remand the case to the court where abatement has taken place leaving the parties to take necessary steps to have the effect of abatement set aside if they so desire and if they can satisfy the Court that parties are entitled to get the abatement set aside under law. I am in respectful agreement with the view taken in the above judgment."

15. The learned Senior Counsel for the plaintiffs submits that the plaintiffs were not aware of the death of the said parties. In the circumstances above, it appears that in the Regular Civil Appeal No. 70/1999, the decree is passed in ignorance of death of two of the defendants/respondents, the respondent no.7 having died during the pendency of the suit and the respondent no. 6 having died during the pendency of the said appeal due to which the appeal had abated against the dead persons. The High Court in Second Appeal against such a decree cannot itself set aside the abatement nor can it affirm the decree passed by the lower appellate Court. The proper course in such a case is to set aside the ineffective decree passed by the lower appellate Court and remand the case to

the court where abatement has taken place leaving the parties to take necessary steps to have the effect of abatement set aside if they so desire and if they can satisfy the Court that parties are entitled to get the abatement set aside under law.

16. In the result, the substantial question of law as framed in paragraph 4 above is answered in the affirmative, i.e. in favour of the defendants. The Judgment and decree dated 19/05/2009, in Regular Civil Appeal No. 70/1999 is quashed and set aside. The matter is remanded to the First Appellate Court, leaving the plaintiffs (appellants thereof) to take necessary steps to have the effect of abatement set aside if they so desire and if they can satisfy the Court that parties are entitled to get the abatement set aside under law.

17. Appeal stand disposed of accordingly.