

(2016) 05 GUJ CK 0035
In the Gujarat High Court
Case No : Second Appeal No. 231 of 2008

Prabhudanbhai Govindsinh Gadhvi

APPELLANT

Vs

Ahemadsha Bachusha Fakir

RESPONDENT

Date of Decision : 02-05-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2017) 1 GLR 490

Hon'ble Judges : Mr. Mohinder Pal, J.

Bench : Single Bench

Advocate : Mr. G.C. Mazmudar, Advocate, for the Appellant Nos. 1, 5.5.3 and 6;
Mr H.G. Mazmudar, Advocate, for the Appellant Nos. 1 - 5.4 , 5.5.1 and 5.5.3, 6;
Mr Hriday Buch, Advocate, for the Respondent No. 1.1 and 1.2

Final Decision : Allowed

Judgement

Mr. Mohinder Pal, J.—Present Second Appeal has been preferred against the judgment and order of learned Fast Track Court No.2 vide which Regular Civil Appeal No.40 of 2004 preferred by the original plaintiff has been allowed. The original plaintiff has come in appeal as his civil suit being Regular Civil Suit No.303 of 1993 was partly decreed in his favour.

2. The plaintiff Ahmedsha Bachusha Fakir (present respondent) filed Regular Civil Suit No.303 of 1993 before the Court of Civil Judge (J.D.) Kalol claiming that he was owner and in possession of the suit land and the defendants (present appellants) have no concern or right to disturb his possession. Ahmedsha Bachusha Fakir died on 9.8.1996, however, LR of the deceased were never brought on record, therefore, the suit was abated but the Court proceeded further and decided the suit on 31st March, 1999 partly in favour of the plaintiff/ present respondent.

3. The present respondent (defendant in the trial Court) preferred the appeal before the District Court, Mehsana being Civil Appeal No.89 of 1999 against the

judgment passed by the learned trial Court, Mehsana. Similarly, son of the original plaintiff also filed civil appeal before the District Court, Mehsana. Because of the change in districts, both these appeals were transferred at District Court, Gandhinagar where new numbers were given as Regular Civil Appeal No.41 of 2004 and Regular Civil Appeal No.40 of 2004 respectively. Civil Appeal No.40 of 2004 filed by the present respondent and Civil Appeal No.41 of 2004 filed by the present appellant were transferred to the Fast Track Court, Kalol. Fast Track Court, Kalol decided Regular Civil Appeal No.40 of 2004 on 29.12.2006 though Civil Appeal No.41 of 2004 was also pending before that Court on that day. The said appeal was decided on 29.12.2006. Being aggrieved from the judgment and decree passed by the Civil Court and by the Appellate Court, the present appellant has come in appeal which is pending for disposal.

4. At the time of entertaining of appeal by this Court, following substantial questions of law have been framed :-

(1) In the facts and circumstances of the case whether decree passed in favour of a dead person and appeal preferred by a dead person are maintainable at law?

(2) In the facts and circumstances of the case whether the trial Court has jurisdiction to decide issue of agricultural tenancy?

5. The facts of this case are not in dispute. However, some of the relevant dates are reproduced as under:-

(I) The date of filing of Civil Suit by the original plaintiff being Regular Civil Suit No.303 of 1993, dated 27.12.1993.

(II) Ahmedsha Bachusha Fakir, original plaintiff died on 9.8.1996.

(III) Civil Suit came to be decided on 31.3.1999.

(IV) Regular Civil Appeal (impugned judgment) decided on 29.12.2006.

6. While arguing on behalf of the appellant, learned counsel Mr.G.C.Mazmudar has submitted that the trial Court as well as Appellate Court could not have decreed the suit and decided the appeal because the sole appellant had died even during the pendency of the suit. It is submitted that Court entirely lacked jurisdiction as one of the parties to suit in whose favour decree came to be passed as the original plaintiff died much prior to the decision of the suit. He further referred to the cross examination of son of the deceased, namely, Bhikhusa, who claimed himself to be the Administrator. Bhikhusa in his cross examination has admitted that his father expired in the year 1996. He further pointed out that against the decision of the trial Court, both sides have come in appeal and appeals being Regular Civil Appeal Nos.40 and 41 of 2004 were pending for disposal. However, the Appellate Court for the reasons best known decided the appeal of present respondent i.e. Regular Civil Appeal No.40 of 2004 on 29.12.2006 while keeping the appeal preferred by the present appellant i.e. Civil Appeal No.41 of 2004 pending. He has also referred to the decision of this

Court in the case of Radhakrishnan Biharilal v. Chatur Singh Govindsingh Thakar reported in AIR 1987 Gujarat 220; wherein, it has been held that after death of the plaintiff, if legal heirs are not substituted, the decree in favour of dead person was a nullity. While relying upon this submission, it has been submitted that findings of the trial Court as well as appellate Court in the suit and in the appeal were liable to be reversed.

7. On the other hand, Mr. Hriday Buch, learned advocate for the respondents has not raised any issue regarding the death of the plaintiff before 31st March, 1999. However, it has been submitted that the appeal was required to be remanded to the appellate Court for deciding afresh.

8. This Court has considered the submissions of both the sides. It appears that legal heirs of the deceased have not taken care to take action in time. Unless and until the legal heirs were brought on record, the decree by the trial Court was nullity. It is interesting to note that son of the deceased, namely, Bhikusha, who claimed himself to be Administrator was put to cross examination; wherein, he has admitted that his father has died on 9.8.1996. Despite this admission, no effort has been made to bring the LRs of the deceased on record. The decree came to be passed in favour of a dead person. Things do not end here. Even the appeal has been filed in the name of the dead person. The appellate Court once again recorded the findings in favour of a dead person while allowing the appeal.

9. Another interesting fact has come to notice of this Court that both the appeals were pending before the same Court and perhaps on the same day, the appellate Court preferred to decide the appeal of the present respondents while kept the appeal of the present appellants pending.

10. It is settled principle that power of the Court to pass a decree in civil suit is not in dispute, however, in the present case, it would lack inherent jurisdiction because the sole appellant was died and no application for bringing legal heirs on record was made within the period of limitation. In absence of legal heirs having been brought on record, the proceedings in the suit or the appeal was liable to be abated even without passing of any formal order in this regard. Therefore, in a case where single or sole appellant died during the pendency of the appeal and in absence of his legal heirs having been brought on record, the further proceedings in the suit and that of the appeal will be nullity as the appellate Court was not seized of the case on account of death of the sole appellant and lacked inherent jurisdiction to pass any decree in such an appeal. In this view of the situation, the conclusion of decision of the trial Court as well as appellate Court was incorrect and is liable to be set aside.

11. Arguments of learned counsel for the respondent that the matter is required to be remanded to the appellate Court could not be sustained in view of the fact that limitation will come into play in this case. The specific limitation has been provided in which LRs of the deceased can be brought on record in a civil suit. Admittedly, the matter pertains to the year 1993 and now remanding the case

after approximately 23 years, will amount to miscarriage of justice. This is particularly so, when the son of the plaintiff was aware of the fact and deliberately chosen not to bring LR of the deceased.

12. For the aforementioned reasons, the present appeal is allowed. Findings of the trial Court as well as of the appellate Court are reversed and set aside. However, parties are left to bear their own cost.