
(2013) 12 GUJ CK 0053
In the Gujarat High Court
Case No : Second Appeal No. 139 of 2012

Samjuben Jivabhai Rathod	Vs	APPELLANT
Savitaben Jivabhai Rathod and Another		RESPONDENT

Date of Decision : 21-12-2013

Acts Referred:

Citation : (2013) 12 GUJ CK 0053

Hon'ble Judges : Paresh Upadhyay, J

Bench : Single Bench

Advocate : P.J. Kanabar, for the Appellant; Vishal C. Mehta, for the Respondent

Final Decision : Allowed

Judgement

Paresh Upadhyay, J.—Challenge in this Second Appeal is made by the original plaintiff, to the judgment and decree passed by the Additional District Judge, Una in Regular Civil Appeal No. 91 of 2012 (Old Regular Civil Appeal No. 26 of 2009) dated 04.05.2012, setting aside the judgment and decree passed by the Principal Civil Judge, Kodinar in Regular Civil Suit No. 18 of 1995 dated 15.05.2009, which was in favour of the present appellant-original plaintiff. This Second Appeal was admitted by this Court on the following substantial questions of law.

1. Whether the Appellate Court below was justified in allowing appeal of the respondents by holding that the suit of the appellant was not maintainable in view of the Order 23, Rule 3-A of the CPC and was barred by the provisions of Order 2, Rule 2 of the Civil Procedure Code?

2. Whether the learned Appellate Court was justified in holding that the appellant had relinquished her right in the suit property by way of compromise purshis in Regular Civil Suit No. 139 of 1985?

2. To appreciate the controversy between the parties, the relevant facts, as emerging from the record, needs to be recorded, which are as under.

2.1. One Sagrambhai Rathod had two sons, viz. Jivabhai and Rambhai.

2.2. Jivabhai had married with one Kanuben. From their wedlock, they had two daughters, viz. Savitaben and Manjuben. In the year 1974, Kanuben, (wife of Jivabhai) died.

2.3. Thereafter, in the year 1980, said Jivabhai married again with one Samjuben. They did not have any child from this wedlock.

2.4. Jivabhai died on 29.08.1985, leaving behind widow Samjuben and two daughters Savitaben and Manjuben.

2.5. After the death of Jivabhai, according to Samjuben, his brother-in-law-Rambhai was creating difficulties regarding the joint and ancestral properties. Therefore Regular Civil Suit No. 18 of 1985 came to be instituted by Samjuben (widow of Jivabhai), joining his brother-in-law-Rambhai Sagrambhai as defendant No. 1. Since her two step-daughters-Savitaben and Manjuben, did not co-operate, they were also joined as party defendants in the said suit. Thus, in the said suit, the widow of Jivabhai was plaintiff and Rambhai was contesting defendant No. 1, and since the branch of Jivabhai had two daughters, there were also joined as defendants. Essentially, the grievance agitated therein was that, in the joint and ancestral property of her father-in-law i.e. Sagrambhai Rathod, the share of the two branches i.e. that of her husband-Jivabhai, and that of her brother-in-law Rambhai, be crystallized.

2.6. From above, whatever was to come to the share of branch of Jivabhai, the same was to be shared equally by all three i.e. the widow and two daughters, and there was no dispute on this point at the relevant time nor is even now.

2.7. In the said suit, compromise was arrived at between the parties and decree was drawn accordingly by the Trial Court on 13.02.1992. By the said judgment and decree, essentially the rights of Rambhai vis-a-vis the rights of the branch of Jivabhai got crystallized. Certain properties like residential house etc. passed on to Rambhai, certain properties like agricultural land etc. came to the share of branch of Jivabhai. Since there is no dispute either on the description of the properties or in whose share what has gone, detailed description in that regard is not recorded here. That arrangement has attained finality.

2.8. Thereafter, the widow claimed 1/3 share from the property which had come to the branch of her husband Jivabhai. There is no dispute between the parties on the point that widow and her two step-daughters, each have 1/3 equal share in the said property. Both the daughters are married and are at their in-laws place. Under these circumstances, the widow filed the present suit to claim her 1/3 share from the properties that has come to the share of her husband. In the present suit i.e. Regular Civil Suit No. 18 of 1995, the widow-plaintiff does not claim anything more than 1/3 share from the properties, which have come to the branch of her husband Jivabhai. The plaintiff also does not claim anything from the properties which have gone to the share of Rambhai pursuant to the earlier compromise decree referred above.

2.9. In above circumstances, on the basis of the evidence led before it, the Trial Court decreed the suit in favour of the plaintiff widow.

2.10. The defendant-daughters challenged the said judgment and decree of the Trial Court before the Appellate Court below, not contending that the plaintiff is not entitled to 1/3 share from the suit property but only contending that, this was agreed to be the joint property of this branch. In support of this, reference is made to the earlier proceedings i.e. Regular Civil Suit No. 139 of 1985, where Rambhai-their uncle was original defendant No. 1. It is this contention, which is the sole basis, on which the Appellate Court below has quashed and set aside the judgment and decree of the Trial Court, by referring to Order-2 Rule 2, and Order-23 Rule 3-A of the Code of Civil Procedure, 1908.

2.11. It is this judgment and decree of the Appellate Court below, which is the subject matter of this Second Appeal and the questions of law as framed by this Court at the time of admission of this Second Appeal are quoted above.

3. Mr. Kanabar, learned advocate for the appellant-original plaintiff has contended that, the compromise decree of the earlier suit i.e. Regular Civil Suit No. 139 of 1985 dated 13.02.1992 in no way should have prejudiced the right of the plaintiff to claim her 1/3 share, from the properties which have come to the share of the branch of her husband. The earlier suit was altogether under different circumstances, and in substance was, to crystallize the rights of the parties regarding the joint and ancestral properties of the two branches of her father-in-law, where effectively the contesting party was the brother-in-law. The plaintiff, in the present litigation does not ask anything more than 1/3 share from the properties which has come to the branch of her husband Jivabhai. It is submitted that, there is no dispute between the plaintiff and defendant-daughters on the point that, the suit property in this suit, is concerning the property of Jivabhai only. The plaintiff does not claim anything from the share of properties which have gone to the share of Rambhai. It is submitted that, under these circumstances, the judgment and decree of the Appellate Court below be quashed and set aside. Mr. Kanabar, learned advocate for the appellant, has relied on the following decisions in support of his submission.

(i) AIR 1955 Pepsu 28-Devi Sahai versus Nanar

(ii) Santan Narain Tewari Vs. Saran Narain Tewari and Others,

(iii) S. Jaswant Singh (deceased by L. Rs.) Vs. S. Darshan Singh (deceased by L. R.) and others,

(iv) Vinod Kumar Vs. Lalit Kumar,

4. Mr. Mehta, learned advocate for the respondents has contended that, the Appellate Court below was justified in allowing the appeal of the respondents by holding that the suit of the appellant was not maintainable in view of the Order 23 Rule 3-A of the Civil Procedure Code, and was barred by the provisions of Order 2 Rule 2 of the CPC and further that the learned Appellate Court was also

justified in holding that the appellant before it had relinquished her right in the suit property by way of compromise purshis in Regular Civil Suit No. 139 of 1985. He has also relied on the following judgments in support of his contentions.

(i) Shankar Sitaram Sontakke and Another Vs. Balkrishna Sitaram Sontakke and Others,

(ii) Raja Sri Sailendra Narayan Bhanja Deo Vs. The State of Orissa,

5. Before the questions of law as quoted above, and rival contentions are considered in the light of the relevant facts, as emerging from record, firstly the relevant provisions of law need to be quoted, which are as under.

Order II

2. Suit to include the whole claim-(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

Explanation-For the purpose of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.

Order XXIII

3A. Bar to suit-No suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful.

6. Having heard learned advocates for the respective parties and having gone through the material on record and considering the facts which are narrated in brief hereinabove, and after having gone through the record and proceedings of the Courts below, this Court finds that in the earlier suit, compromise was arrived at between the parties and decree was drawn accordingly by the Trial Court on 13.02.1992, by which essentially the rights of Rambhai vis-a-vis the rights of the branch of Jivabhai got crystallized. That arrangement has attained finality. There is no dispute on the point, as to what is in the share of branch of Rambhai and what is in the share of branch of Jivabhai. This Court finds and holds that, this was the scope, outcome and effect of the judgment and decree recorded by the Trial Court in Regular Civil Suit No. 139 of 1985.

6.1. This Court further finds that, the plaintiff-widow, in the present suit, does

not ask anything more than 1/3 share from the properties which have come to the share of the branch of her husband Jivabhai. The plaintiff also does not claim anything from the share of her brother-in-law Rambhai, who was party defendant No. 1 in the earlier round of litigation and who is not, and rightly not, party defendant in the present suit. Thus, there is no dispute on the point that in this suit, the suit property is, what has come to the share of the branch of Jivabhai only.

6.2. In the light of above findings, this Court further finds that, the institution of the suit in question by the plaintiff widow, is in no way to set aside the earlier decree, on any ground, muchless on the ground that the compromise on which the earlier decree was based, was not lawful. Thus, in my view, the provision of Order XXIII Rule 3-A of the Code of Civil Procedure, 1908 would not be attracted at all in the facts of this case and the Appellate Court below fell in error in law on this count.

6.3. This Court further finds that, in the earlier Civil Suit, the widow had not relinquished any portion of her claim and therefore even Order-23 Rule 3-A of the Code also could not have been resorted to, to upset the judgment and decree of the Trial Court.

6.4. So far the judgments relied on by Mr. Mehta, learned advocate for the defendants are concerned, there cannot be any dispute with regard to the proposition of law enunciated therein, however, considering the facts and findings of this Court, which are narrated above, those judgments will not take the case of the respondents any further.

6.5. In view of the above, both the questions of law quoted above are answered in negative. This Court finds that, the Appellate Court below had misread the evidence on record, while quashing and setting aside the judgment and decree of the Trial Court, which has resulted in miscarriage of justice which needs to be undone in this Second Appeal. This Second Appeal therefore deserves to be allowed by quashing and setting aside the judgment and decree of the Appellate Court below and by restoring the judgment and decree passed by the Trial Court.

For the reasons recorded above, this Second Appeal is allowed.

6.6. The judgment and decree passed by the Appellate Court below i.e. Additional District Judge, Una in Regular Civil Appeal No. 91 of 2012 (Old Regular Civil Appeal No. 26 of 2009), dated 04.05.2012 is quashed and set aside.

6.7. The judgment and decree passed by the Trial Court i.e. Principal Civil Judge, Kodinar in Regular Civil Suit No. 18 of 1995 dated 15.05.2009 is restored.

6.8. Parties to bear their own costs. Decree be drawn accordingly.