

(2016) 04 GUJ CK 0089
In the Gujarat High Court

Case No : Special Civil Application Nos. 14910, 8049 of 2015, Civil Application No. 12514 of 2015 in Special Civil Application No. 14910 of 2015, Civil Application No. 12324 of 2015 in Special Civil Application No. 8049 of 2015 and Civil Application No. 9816 of 201

Ujwala Raje Gaekwar

APPELLANT

Vs

Hiren Achyutbhai Shah and Others

RESPONDENT

Date of Decision : 13-04-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10, Order 22 Rule 3, Order 22 Rule 5, Section 2(11)

Constitution of India, 1950 — Article 227

Succession Act, 1925 — Section 263

Citation : (2017) 170 AIC 601 : (2016) AIR(Gujarat) 98 : (2016) 3 CivCC 761 : (2016) 4 GLR 2775 : (2016) 3 HLR 378

Hon'ble Judges : S.H. Vora, J.

Bench : Single Bench

Advocate : Mihir Thakore, Ld. Sr. Adv. for Salil M. Thakore, Advocate, for the Appellant; S.N. Soparkar, Ld. Sr. Adv for Dipen C. Shah, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

S.H. Vora, J.—1. By way of the present petitions preferred under Article 227 of the Constitution of India, the petitioner - original defendant prays to issue writ, order or direction quashing and setting aside the order dated 23.01.2015 passed by the learned 12th Additional Civil Judge & J.M.F.C., Vadodara below Exh. 48 in Regular Civil Suit No. 913 of 2008 and order dated 09.07.2015 passed by the learned 4th Additional Senior Civil Judge, Vadodara below Exh. 53 in Special Civil Suit No. 533 of 2011 whereby, the learned trial Judge allowed the applications preferred by the legal heirs of deceased - original plaintiff under the provisions of Order 22 Rule 3 of the Code of Civil Procedure (for short, the "Code") and impleaded them as legal heirs and representatives of deceased - original plaintiff in the above suits.

2. Briefly stated, original plaintiff - Mr. Achyutbhai H. Shah filed Regular Civil Suit No. 913 of 2008, inter alia, praying for injunction restraining the present petitioner from alienating the property described in the plaint as 1/3rd share in the land bearing Survey No. 86 Paiki and land bearing Survey No. 126 Paiki - 134/95/B Paiki situated at Village: Jetalpur, District: Vadodara known as Shivmahal Palace bequeathed to the deceased plaintiff under Will dated 09.12.1991 executed by Late Princess Smt. Kamla Devi Raje Gaekwar, grandmother of the petitioner, who passed away on 02.02.1992. Similarly, deceased plaintiff - Mr. Achyut Shah also filed Special Civil Suit No. 533 of 2011 against the petitioner and one Mr. Chandrakant Laxmidas Patel, inter alia, praying for cancellation of registered sale deed dated 19.03.2010 in respect of land bearing Survey No. 86 Paiki admeasuring 3000 sq.mtr. situated at Mouje Taluka: Jetalpur, Vadodara City for consideration of Rs. 17,76,06,000/-. Pending hearing of the above suits instituted by plaintiff - Mr. Achyut Shah against the petitioner and also purchaser of the part of the suit property, said Mr. Achyut Shah expired on 28.05.2013 and, therefore, his legal heirs moved applications under the provisions of Order 22 Rule 3 of the Code which came to be allowed by the learned trial Judge in both the suits. Hence, the present petitions preferred by the petitioner (original defendant before the learned trial Court).

3. While assailing the impugned orders, learned Senior Counsel Mr. Mihir Thakore appearing for learned advocate Mr. S.M. Thakore for the petitioner would contend that right to sue does not survive to the deceased plaintiff as he was the alleged executor of Late Princess Smt. Kamla Devi Raje Gaekwar under alleged Will and, therefore, right of executor is a personal in nature and such right would die with him. Therefore, right to sue does not survive to the legal heirs of deceased plaintiff in both the suits. Learned Senior Counsel Mr. Thakore would contend that the alleged Will was not produced before the learned trial Court but the same is placed on record of the present proceedings before this Court and, therefore, the impugned orders are bad in law. Learned Senior Counsel Mr. Thakore would contend that the suit being Regular Civil Suit No. 913 of 2008 is based on succession certificate issued to the deceased plaintiff with respect to immovable properties in Probate Application No. 74 of 2000. Against grant of succession certificate, the petitioner has filed revocation petition being Civil Petition No. 161 of 2008 for revocation of the alleged and completely illegal succession certificate. Vide order dated 19.09.2008, the Civil Court, Vadodara restrained the deceased plaintiff from holding out to have any right in the properties mentioned in the Will and also restrained him from creating any liabilities and rights in the properties and the said order is in force as on today. Learned Senior Counsel Mr. Thakore would contend that by order dated 03.10.2005, the Hon''ble High Court of Judicature at Bombay in Testamentary Petition No. 402 of 2004, granted letter of administration to the petitioner and thus, appointed her to be the sole administrator of Late Princess Smt. Kamla Devi Raje Gaekwar's estate which included assets/properties, both movable or immovable. The said grant of letter of administration is still in force and

operative. Lastly, learned Senior Counsel Mr. Thakore would contend that the learned trial Judge has passed the impugned orders without assigning any reasons and, therefore, the learned trial Judge has committed error of law in accepting the applications of the legal heirs of deceased plaintiff preferred under the provisions of Order 22 Rule 3 of the Code. In support of his submissions, learned Senior Counsel Mr. Thakore pressed into service the decision of the Hon'ble Apex Court rendered in the case of State of Chhattisgarh and others v. Dhirjo Kumar Sengar reported in , AIR 2009 SC 2568 for the proposition of law that the succession certificate merely enables to collect the dues of the deceased and no status gets conferred in favour of any person. By reason of grant of succession certificate, a person under whose favour, succession certificate is granted, becomes a trustee to distribute the amount payable to the deceased to his heirs and legal representatives and he does not derive any right thereunder. Learned Senior Counsel Mr. Thakore also placed reliance upon the decision rendered in the case of Chhangi Devi (through Lrs.) v. General Public and others reported in for the proposition of law that the proceedings for grant of succession certificate lapse on the death of the applicant and legal heirs of such applicant cannot be substituted to continue the proceedings.

4. Per contra, learned Senior Counsel Mr. S.N. Soparkar appearing for learned advocate Mr. D.C. Shah for the respondents - legal heirs of deceased - plaintiff would contend that Will dated 09.12.1991 is produced before this Court and, therefore, the grievance of non-production of Will would not survive nor would it make the orders invalid. Learned Senior Counsel Mr. Soparkar would contend that the deceased plaintiff claimed 1/3rd share as legatee under Will dated 09.12.1991. After drawing attention of this Court to the contents of the said Will, learned Senior Counsel Mr. Soparkar would contend that the deceased plaintiff was bequeathed absolute 1/3rd share in the suit properties under the said Will and he had preferred Regular Civil Suit No. 913 of 2008 in the capacity as owner of those properties and in the capacity as legatee under the Will. The respondents herein are undisputably being legal heirs (wife and sons of deceased plaintiff - Mr. Achyut Shah), legacy and rights therein would devolve upon them. Learned Senior Counsel Mr. Soparkar would contend that the petitioner has not challenged Will dated 09.12.1991 till date and no proceedings questioning the said Will have been brought by the petitioner under which, the respondents herein are claiming as legatee through deceased plaintiff. In absence of any controversy or dispute as regards the respondents being legal heirs/legal representatives of the deceased plaintiff and in absence of any claim to the contrary by petitioner or by any other party, disputing the respondents herein as legal representatives of the deceased plaintiff, question pertaining to whether right to sue survives or not, did not arise for adjudication of the Court. Learned Senior Counsel Mr. Soparkar would contend that the phrase "right to sue survives" used under the provisions of Order 22 Rule 3 of the Code does not relate to the locus or status of the plaintiff or adjudication of an issue in the suit and its determination in an application in question even before the respondents

are joined as legal heirs and representatives of the deceased plaintiff. The said phrase used in Order 22 Rule 3 of the Code is only to the limited extent as to whether there exists legal representative, who can continue with the plaintiff's suit. Learned Senior Counsel Mr. Soparkar would contend that Testamentary Petition No. 402 of 2004 was preferred by the petitioner after 12 years from the date of death of Late Princess Smt. Kamla Devi Raje Gaekwar while suppressing the factum of Will dated 09.12.1991 executed for certain immovable properties situated in Vadodara in favour of the deceased plaintiff. According to him, the petitioner has obtained letter of administration in respect of movable and immovable properties situated in Mumbai and various other parts of Maharashtra only and the petitioner has not been granted any letter of administration with respect to the property situated in Gujarat, more particularly, the suit property bequeathed to the deceased plaintiff under Will dated 09.12.1991 and, therefore, reference to the said testamentary petition is insignificant or has no bearing to the issue involved in the applications preferred under Order 22 Rule 3 of the Code. Learned Senior Counsel Mr. Soparkar would further contend that considering the scope of Order 22 Rule 3 read with Section 2(11) of the Code, the respondents are the legal heirs and representatives of the deceased plaintiff and, therefore, the learned trial Judge has rightly allowed applications in question inasmuch as, no error apparent on the face of record so as to warrant interference at the hands of this Court to invoke supervisory jurisdiction of this Court under Article 227 of the Constitution of India would arise. In support of his submissions, learned Senior Counsel Mr. Soparkar placed reliance upon the decision of the Hon'ble Apex Court rendered in the case of Jaladi Suguna (Deceased) through LRs. v. Satya Sai Central Trust and others reported in , (2008)8 SCC 521, more particularly, observations recorded in paras 12 and 15 which read as under:--

"12. "Legal representative" according to its definition in Section 2(11) of the CPC, means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased. Thus a legatee under a will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased, will be a legal representative.

15. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the Court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the Court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the Court and such legal representative is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative

under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject matter of the suit, vis-?-vis other rival claimants to the estate of the deceased."

5. Learned Senior Counsel Mr. Soparkar also placed reliance upon the following decisions:--

"(i) Amit Kumar Shaw and another v. Farida Khatoon and another reported in , (2005)11 SCC 403:

"10. The power of a Court to add a party to a proceeding cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will necessarily include an enforceable legal right.

12. Under Order 22 Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit."

(ii) Jawaharlal v. Smt. Saraswatibai Babulal Joshi and others reported in , AIR 1987 Bombay 276.

"12. Having regard to the provisions of O.22 R.10, Civil P.C. And the authorities to which I have referred, it is apparent that no detailed enquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution and the question about the existence and validity of the assignment or devolution can be considered at the trial of the suit on merits. This being the legal position the order passed by the learned trial Judge was correct and no interference with the discretion exercised by him is called for."

6. Having heard submissions made at bar by the learned Senior Counsel appearing for the respective parties, the issue raised for consideration of this Court is whether right to sue survives in favour of the respondents herein or not as the deceased plaintiff was an executor under the alleged Will because, he was appointed in his individual and fiduciary capacity and not in any hereditary capacity. The second issue which is raised is such whether order dated 19.09.2008 restraining the deceased plaintiff from acting upon the succession certificate extinguishes right of the deceased plaintiff or locus to file or maintain both the suits and, therefore, question of bringing legal heirs of the deceased plaintiff on record to continue a suit in which, the deceased plaintiff had no

authority to institute and no cause of action survives unto the legal heirs of the deceased plaintiff i.e. the respondents herein.

7. Before merits of the submissions made at bar are considered, it appears that the deceased plaintiff filed Regular Civil Suit No. 913 of 2008, inter alia, praying for injunction restraining the petitioner from alienating the suit property as the deceased plaintiff has 1/3rd share in the suit property as legatee under the Will dated 09.12.1991 executed by Late Princess Smt. Kamla Devi Raje Gaekwar in his favour. The averments made in the plaint indicate that the deceased plaintiff has made reference of order of succession certificate granted in his favour. But, if the Will itself is considered, it becomes clear that the plaintiff was bequeathed 1/3rd share owned by Late Princess Smt. Kamla Devi Raje Gaekwar and, therefore, he is conferred 1/3rd share of Late Princess Smt. Kamla Devi Raje Gaekwar. Learned Senior Counsel Mr. Mihir Thakor made an attempt to convince this Court that the deceased plaintiff was appointed as an executor under the said Will and, therefore, he has no right in the suit property and consequently upon his demise, no right to sue would survive in favour of the respondents herein. Upon careful perusal of the Will itself, it does not appear that the deceased plaintiff was appointed as an executor or administrator of the estate of Late Princess Smt. Kamla Devi Raje Gaekwar and, therefore, the contention raised by the learned Senior Counsel Mr. Thakore for the petitioner to the effect that the respondents being legal heirs of an executor have no right to continue the proceedings is devoid of merits, both on law and facts. Since, both the suits are based on Will and, therefore, an unprobated Will is admissible in evidence for collateral purposes in all the proceedings except probate proceedings and such principle is propounded by the Hon'ble Apex Court in the case of Commissioner, Jalandhar Division and others v. Mohan Krishan Abrol and another reported in , (2004)7 SCC 505. Even otherwise, as per the decision rendered in the case of Minaxiben Shashikantbhai Patel v. Dist. Collector, Gandhinagar reported in , 2007(1) GLR 277, a probate is not compulsory for establishing rights over the property when the property situated in Gujarat and, therefore, legatee under the Will can establish the right pursuant to Will even without probate.

8. There is no dispute for the proposition of law that the proceedings for grant of succession certificate lapses on the death of the applicant and the legal heirs of such applicant cannot be substituted to continue the proceedings. This principle is well settled in the case-law cited at bar by learned Senior Counsel Mr. Mihir Thakore. But, while placing reliance on such proposition of law, learned Senior Counsel Mr. Mihir Thakore assumes that proceeding initiated by the deceased plaintiff with respect to immovable properties comprising of Probate Application No. 74 of 2000 is nothing but the proceeding initiated to obtain succession certificate. No doubt, there are certain and specific averments made in the plaint to the effect that the plaintiff sues on the basis of the succession certificate obtained by him in Probate Application No. 74 of 2000. But, without going into the question whether proceeding initiated by way of Probate Application No. 74 of 2000 was for obtaining probate or for succession certificate, the fact remains

that the respondents herein have applied to bring them on record as legal heirs and representatives of the deceased plaintiff so as to continue the suit proceedings in respect of immovable properties bequeathed to the deceased plaintiff by Late Princess Smt. Kamla Devi Raje Gaekwar and, therefore, without probate/succession certificate, the deceased plaintiff and so, the respondents herein can maintain such applications for being impleaded them as parties on demise of deceased plaintiff i.e. father of respondent No. 1 and 2 and husband of respondent No. 3. Similarly, order dated 03.10.2005 passed by the Hon''ble High Court of Judicature at Bombay in Testamentary Petition No. 402 of 2004 granting letter of administration to the petitioner is not helpful to the petitioner to defend the present applications for impleading the respondents herein as parties because, such grant of letter of administration is only in respect of the movable and immovable properties situated in Mumbai and various other parts of Maharashtra only. In this connection, it is also relevant to consider the submission made by learned Senior Counsel Mr. Mihir Thakore with regard to Civil Petition No. 161 of 2008 for revocation of the succession certificate issued in Probate Application No. 74 of 2000 and order passed therein on 19.09.2008. It is true that the Civil Court restrained the deceased plaintiff from holding out to have any right in the properties mentioned in the Will and also restrained him from creating any liabilities and rights in the properties and further, it is true that such order is in force as on today. Such order does not necessarily restrain the legal heirs and representatives of the deceased plaintiff to move an application under the provisions of Order 22 Rule 3 of the Code. So, emphasis placed on aforementioned submissions, is devoid of merits and, therefore, the Court is not inclined to accept the submissions made by learned Senior Counsel Mr. Mihir Thakore in this regard.

9. Upon perusal of Will dated 09.12.1991, it appears that the deceased plaintiff being legatee, obtained 1/3rd share of Late Princess Smt. Kamla Devi Raje Gaekwar and, therefore, he becomes the legal representative of the estate of Late Princess Smt. Kamla Devi Raje Gaekwar under the said Will and, therefore, the deceased plaintiff is a legal representative as defined under Section 2(11) of the Code. In case of Jaladi Suguna (Deceased) through LRs. (supra), the Hon''ble Apex Court, while explaining meaning of legal representative, observed that the legal representative means a person, who in law, represents the estate of a deceased person and includes any person, who intermeddles with the estate of the deceased. Thus, a legatee under the Will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased, will be a legal representative. So, the determination of an issue as to who is the legal representative under Order 22 Rule 5 of the Code will be for the limited purpose of representation of the estate of deceased, for adjudication of the above suits. Such determination, as held by the Hon''ble Apex Court, would be for the limited purpose and will not confer on the person held to be the legal representative, any right to the property which is the subject matter of the suits, viz-a-viz other rival claimants to the estate of the deceased. In the said case, the

Hon"ble Apex Court observed that the legatee under a Will, who intends to represent the estate of the deceased testator, being an intermeddler with the estate of the deceased, will be a legal representative and consequently, the legal representatives, who succeeded to deceased plaintiff's estate, should be heard in their capacity as persons representing the estate of the deceased. So, it cannot be gainsaid that upon demise of the plaintiff, right to sue would not survive in favour of the respondents and, therefore, the legal heirs of deceased plaintiff have to be brought on record before the Court, who can proceed further with the above suits. In Court's considered opinion, the Court cannot hold inquiry as to whether "right to sue" survives or not without joining legal representatives of the deceased plaintiff and, therefore, such applications for impleadment cannot be rejected without determination of the question whether "right to sue" survives or not and for that limited purpose also, joinder of the legal representatives of the deceased plaintiff is must. In the case on hand, there is no dispute, inter se, amongst the respondents as to who is the legal representative. Therefore, no detailed inquiry is required at the stage of granting leave under Order 22 Rule 5 read with Rule 10 of the Code and such question of validity or otherwise of the Will in question and so, devolution of interest can be considered at the time of final hearing of the proceedings. In nutshell, the question, which the Court is required to address, is whether enforceable right of the respondents would be affected if they are not joined. In light of the contents of the Will in question, there is no doubt in the mind of this Court that the deceased plaintiff was legatee and was bequeathed absolute 1/3rd share in the suit properties and, therefore, he has preferred the suits as the owner of those properties and also in the capacity as legatee under the said Will.

10. Now, this takes to a contention raised by learned Senior Counsel Mr. Mihir Thakore to the effect that the learned trial Judge has passed non-speaking/unreasoned order and has not considered all the contentions raised before this Court which were also raised before the learned trial Court orally and also in the reply to the applications preferred by the respondents herein. It is true that the learned trial Judge has not dealt with the specific contentions raised by the petitioner in her reply before the learned trial Court. In view of this position, the Court could have remanded the matter to the learned trial Judge for re-hearing/fresh hearing of the applications preferred by the respondents for impleadment. Instead of doing so and when the Court has heard learned Senior Counsel at length on this aspect, it would be a futile exercise to remand the matter to the learned trial Judge for re-hearing/fresh hearing of the applications in question and, therefore, this Court, in its supervisory jurisdiction, thought it fit to decide the applications in question in view of various contentions raised by learned Senior Counsel Mr. Mihir Thakore so as to avoid further delay in the matter since learned Senior Counsel Mr. Soparkar raised a grievance that for non-joinder of the respondents in the above suits, the third party has commenced huge construction on the suit premises and, therefore, it is likely that irreversible position may arise. Therefore, this Court heard the learned Senior Counsel

appearing for the respective parties on merits of the applications and, at the end, the Court finds that the applications in question preferred by the present respondents deserve to be accepted and, therefore, for the reasons recorded hereinabove, present petitions are devoid of merits and no interference at the hands of this Court under Article 227 of the Constitution of India is required.

11. However, this Court leaves the question of validity and genuineness of the Will open including the question as to whether succession certificate obtained in the proceedings being Probate Application No. 74 of 2000 is a succession certificate or probate proceedings because, any finding on the said issue may adversely affect Civil Petition No. 161 of 2008 preferred by the petitioner under Section 263 of the Succession Act for revocation of the certificate issued by the Court in the said Probate Application No. 74 of 2000.

12. In view of the legal position, as emerging on record, present petitions, being devoid of merits, both on law and facts, deserve only fate of dismissal and accordingly, the same are dismissed with no order as to costs. Rule is discharged. Consequent to order passed in the present petitions, respective civil applications would not survive and the same are also disposed of.

Further Order

After pronouncement of the judgment today, learned advocate Mr. S.M. Thakore for the petitioner requests this Court to extend interim relief for a further period of six weeks so as to enable him to approach the Hon"ble Apex Court.

Considering the facts and circumstances of the case, interim relief granted earlier is hereby extended for a period of 4 weeks from today with a specific direction that no further extension will be granted on any ground.