

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO. 660 OF 2012
ALONGWITH
CIVIL APPLICATION NO. 1589 OF 2015
ALONGWITH
CIVIL APPLICATION NO. 1273 OF 2012

Shri. Fathubai Vithalbhai Chauhan
and Ors.**Appellants**
V/s.

Smt. Dhanuben Rathod and Ors.**Respondents**

* * * *

Mr. Harshad Inamdar, Advocate for the appellants.

Ms. Jaya Joil Bagwe, Advocate for respondent no.1.

CORAM : SANDEEP K. SHINDE, J.

Wednesday, 24th March, 2021.

ORAL JUDGMENT :

1. Admit. Counsel for the respondent waives notice. With consent of the Counsel, appeal is heard finally at the admission stage.

FACTS OF THE CASE :

2. Respondent no.1-plaintiff, instituted Regular Civil Suit No.23/1999 for partition and separate possession of the suit property against brothers and sisters. The Suit was decreed by the Civil Judge, Dadra and Nagar Haveli, Silvassa on 30th August, 2006. This decree, was assailed in Regular Civil Appeal No. 4/2006 before the District Judge, Dadra & Nagar Haveli at Silvassa. Pending Appeal, one of the appellants, Savitaben Vithalbhai Chauhan, (original defendant no.3) died on 20th February, 2011. May be for reasons, not known, legal representatives of Savitaben Vithalbhai Chauhan were not brought on record. Neither this fact was not brought to the notice of the learned District Judge. Appeal was heard and partly allowed by judgment and order dated 20th March, 2012. Feeling aggrieved, defendants no.1, 2 and 4 have preferred this Second Appeal.

3. Mr. Inamdar, learned Counsel for the appellants, submits that, considering the nature of the controversy wherein the suit was for partition, the death of one of the appellants, and his legal representatives not being brought on record, may result in conflicting and/or contradictory decrees. In support of his submission, he has relied on the judgment of this Court in the case of **Ramrao Joti Godase and Others Vs. Kisan Joti Godase and Ors**¹. Learned Counsel has relied on paragraphs-10 and 11 of the cited judgment and would submit that in the circumstances, the entire appeal stood abated. Paragraphs-10 and 11 read as under :

10. The Supreme Court of India in the case of Jaladi Suguna v/s. Satya Sai Central Trust & ors. 2008 (7) SCR 734 has held thus :

“14. When a respondent in an appeal dies, and the right to sue survives, the legal representatives of the deceased respondent have to be brought on record before the court can proceed further in the appeal. Where the respondent-plaintiff who has succeeded in a suit, dies during

¹ 2012(2)Mh.L.J.741

the pendency of the appeal, any judgment rendered on hearing the appeal filed by the defendant, without bringing the legal representatives of the deceased respondent - plaintiff on record, will be a nullity. In the appeal before the High Court, the first respondent therein (Suguna) was the contesting respondent and the second respondent (tenant) was only a proforma respondent. When first respondent in the appeal died, the right to prosecute the appeal survived against her estate. Therefore it was necessary to bring the legal representative/s of the deceased Suguna on record to proceed with the appeal."

The Supreme Court has clearly held that if the entire Appeal abates, then Judgment delivered in such an Appeal is a nullity. This principle of law is also restated in the Judgment of Ambalal v/s. Gopal & ors AIR 2001 SCW 1996.

11. Present case is obviously one which falls within the category of 3 cases laid down by the Supreme court. The suit is for partition and separate possession. Different shares had been allotted to the Plaintiff and Defendants. The Defendant Nos. 3 and 6 were aggrieved by the shares allotted and hence filed an Appeal alongwith the other Defendants. The Defendant No. 3 died during the pendency of the Appeal and it is an admitted position that the heirs are not brought on record. Obviously the Appeal abates as against the Defendant No. 3. However, considering the nature of the controversy where the Suit was for partition, success of such an Appeal would have led to the Courts coming to a decision which may be in conflict with the decision between the deceased

Appellant and the Respondent and that would have resulted in the Court passing a Decree which will be contradictory to the Decree which has become final with respect to the same subject matter between the deceased Appellants and the Respondents. Remaining Appellants could not have independently filed an Appeal when the deceased Defendant Nos. 3 and 6 were not being represented before the Court. The District Court in the present case was not well informed about the dates of death of Bhagirathibai and Gangubai and ignorant of such fact, the Appeal was dismissed but the cross-objection filed by the original Plaintiffs were allowed. Even the original Plaintiffs have not taken any steps for bringing heirs of Appellant Nos. 3 and 6 on record in their cross-objections. Consequently not only the entire Appeal but the entire cross-objections abate.”

4. In consideration of the facts of the case and the ratio laid down in the *Ramrao Joti* (supra), the Second Appeal is allowed. The impugned judgment and decree dated 20th March, 2012 passed in Regular Civil Appeal No.4/2006 passed by District Judge, Dadra and Nagar Haveli at Silvassa, is quashed and set aside. Resultantly, the decree of the trial Court stands restored. Hence, I pass the following order :

ORDER

(i) Second Appeal is allowed.

(ii) The impugned judgment and decree dated 20th March, 2012 passed by the Principal District Judge, Dadra and Nagar Haveli at Silvassa in Regular Civil Appeal No.4/2006 is quashed and set aside. It is held that the said Appeal had abated in its entirety.

(iii) Consequently the judgment and decree dated 30th August, 2006 passed by the Civil Judge, Dadra and Nagar Haveli, Silvassa in Regular Civil Suit No.23/1999 is restored.

5. Appeal is allowed and disposed off accordingly.

6. In view of the disposal of the Appeal, Civil Applications No. 1589/2015 and 1273/2012 become

infructuous and do not survive. The same are accordingly
disposed of.

Neeta
S.
Sawant

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Neeta S.
Sawant
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(SANDEEP K. SHINDE, J.)