

(2009) 06 GUJ CK 0023

In the Gujarat High Court

Case No : Special Civil Application No. 5048 of 2009

Ashwinbhai Somabhai Patel and Another	APPELLANT
Vs	
Nrugendraprasadji Ajendraprasadji Pandey and Others	RESPONDENT

Date of Decision : 24-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 29 Rule 1, Order 39 Rule 1 , Order 39 Rule 2
Constitution of India, 1950 — Article 226 , 227
Evidence Act, 1872 — Section 1, 3, 65, 65(1), 65(2)
Registration Act, 1908 — Section 17

Citation : (2009) 3 GLH 138 : (2009) 3 GLR 2352

Hon'ble Judges : M.R. Shah, J

Bench : Single Bench

Advocate : S.N. Shelat and Mrugen K. Purohit, for the Appellant; S.P. Majmudar and P.P. Majmudar, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Shah, J.—Rule. Mr. S.P. Majmudar, learned Advocate waives service of notice of rule on behalf of the respondent No. 1 original-defendant No. 1, who is main contesting party so far as the present Special Civil Application is concerned. With the consent of the learned Advocates appearing on behalf of the respective parties, the matter is taken up for final hearing today.

2. By way of this petition under Article 227 of the Constitution of India, petitioner has prayed for an appropriate writ, direction and order quashing and setting aside impugned order dated 14-5-2009 passed by the learned Principal Senior Civil Judge, Anand below application Exh. 167 in Special Civil Suit No. 86 of 2008, by which the learned trial Court has allowed the said application submitted by the respondent No. 1 herein original-defendant No. 1 to read the documents as produced vide Exh. 54/1 and to appreciate the same for the purpose of hearing and adjudication of application Exh. 5. At the outset, it is required to be noted that the said documents are in the form of Compact Disc (CD.).

3. Petitioners original-plaintiffs (hereinafter referred to as the "plaintiffs".) have instituted Special Civil Suit No. 86 of 2008 in the Court of learned Principal Senior Civil Judge, Anand for declaration and permanent injunction declaring that respondent No. 1 herein original-defendant No. 1 shall not declare himself to be Acharya of various Swaminarayan Temples at Vadtal, Junagadh, Gadhda etc. In the said suit, original-plaintiffs submitted application Exh. 5 for interim injunction and it appears that learned trial Court has granted ex parte ad interim injunction in terms of Paras 28(A) and 28(B) of the application, vide ex parte interim injunction dated 15-5-2008 and the said application is still pending for final disposal. That the respondent No. 1 herein original-defendant No. 1 (hereinafter referred to as the "defendant No. 1") submitted the reply to the said application along with certain documents. Defendant No. 1 also produced the documents vide Exh. 54/1 which was in the Electronic Form i.e. Compact Disc. Therefore, the defendant No. 1 submitted application Exh. 167 requesting the learned trial Court to read, produce, and accordingly, appreciate the same for the purpose of hearing and adjudication of the application Exh. 5. It was contended on behalf of the defendant No. 1 that the said Electronic record/documents in Electronic Form i.e. Video Tape depicting happening/fact or event/incident having occurred in the year 1984 i.e. the nomination of defendant No. 1 as the future Acharya being caused in the event having occurred in the year 1984. It was submitted that in the course of argument on behalf of the defendant and the learned Advocate requested the learned trial Court to read the said Electronic documents through medium of computer, learned Advocate for the plaintiffs has opposed said essential process of only reading the documents in Electronic Form, and therefore, the said application was given to read, peruse and appreciate by using computer. It was submitted that the said documents in the form of CD./which was in the Electronic Form is required to be read and appreciate for the purpose of hearing and adjudication of the application Exh. 5. Therefore, it was requested to read, peruse, and accordingly, appreciate the said documents which was in Electronic Form for the purpose of hearing and adjudication of the application Exh. 5 and for the aforesaid purpose and appreciate to use the computer for the purpose of reading the said documents.

4. The aforesaid application was opposed by the plaintiffs by submitting the application Exh. 168 by submitting that the documents in question are not admissible in evidence. It was also submitted that considering the various provisions under the Information Technology (Certifying Authorities) Rules, 2000; the Information Technology (Certifying Authorities) Regulation, 2001; the Information Technology (Qualification and Experience of Adjudicating Officer and manner on holding inquiry) Rules, 2003; the Information Technology (Security Procedure) Rules, 2004 and the provisions of Sections 3 and 65(a) of the Evidence Act, the documents produced and sought to be relied upon are not admissible in evidence, and therefore, it was requested to dismiss the said application and not to read/consider those documents unless and until they are held to be admissible in evidence. In the said reply, however learned Advocate

for the plaintiffs have not made any submissions on other points other than what are stated hereinafter, therefore, this Court is not reproducing all the objections which are stated in reply to the application Exh. 167. It appears that the main objection on behalf of the original-plaintiffs was that the documents sought to be relied upon and to be read is inadmissible in evidence considering the provisions of Evidence Act.

5. The learned trial Court after considering the rival submissions made on behalf of the respective parties and considering the application as well as reply to the same, by impugned order allowed the said application permitting to read the documents produced vide mark/Exh. 54/1 through computer for the purpose of deciding the application Exh. 5 by further observing/clarifying that it will be open for the plaintiffs to make further submissions on the admissibility of the aforesaid documents at the time of hearing of the application Exh. 5. Being aggrieved and dissatisfied with the impugned order passed by the learned Principal Senior Civil Judge, Anand dated 14-5-2009 passed below Exh. 167 passed in Special Civil Suit No. 86 of 2008, the petitioners original-plaintiffs have preferred the present Special Civil Application under Article 227 of the Constitution of India. At the outset, it is required to be noted that though in the petition it is stated that the present petition is filed under Article 226 of the Constitution of India, however as what is challenged in the present petition is the order passed by the learned trial Court, and therefore, the present petition is as such under Article 227 of the Constitution of India.

6. Shri S.N. Shelat, learned Senior Advocate appearing with Shri M. K. Purohit has appeared on behalf of the petitioners-original-plaintiffs and Shri S.P. Majmudar, learned Advocate has appeared on behalf of the respondent No. 1 herein original-defendant No. 1.

7. Shri S.N. Shelat, learned Senior Advocate appearing on behalf of the petitioners-original-plaintiffs has made following submissions in support of his prayer to allow the present petition and to quash and set aside the impugned order.

(i) That the learned trial Court has committed an error in holding that the documents produced at Exh. 54/1 i.e. Video CD. Is Electronic Record and is admissible under Sections 65(A) and 65(B) of the Evidence Act.

(ii) Exh. 54/1 is a Video CD. There is no evidence to suggest that it is electronic record as per the provisions of Information Technology Act, 2000 and as per Sections 65A and B or amended Evidence Act.

(iii) The documents produced vide Exh. 54/1 does not satisfy the condition laid down in Section 65B(1) and Section 65B(2) of the Evidence Act. The entire reasoning of the learned trial Court is solely contrary to the Evidence Act and Information Technology Act.

(iv) Learned trial Court has committed an error granting application and not

examining the submissions on behalf of the plaintiffs to the effect that (1) Video tape is tampered, (2) Video tape is not the original, (3) That it is not genuine, (4) That it was intended to have legal effect, (5) That it is accurately timed and dated, (6) That it has come from particular person, (7) That it is a hearsay evidence.

(v) That the learned trial Court while deciding the application Exh. 5 is required to decide application on the basis of legal evidence before the Court. That the learned trial Court cannot ignore the provisions of Sections 1 and 3 of the Evidence Act. It is submitted that since the affidavits are now considered to be legal evidence as provided under Order 39 of the Code of Civil Procedure, the Courts of law are required to consider the affidavit for deciding the prima facie case, balance of convenience and irreparable loss. No Court can decide the matter either at the interim stage or at the time of final hearing in absence of legal evidence i.e. the evidence otherwise legally admissible in the evidence.

(vi) It is further submitted that it is true that while deciding interim injunction application the document produced by the parties can be taken into consideration without compelling the parties to prove the same as per the provisions of Evidence Act at that stage and proving of the document according to the provisions of the Evidence Act is dispensed with at that stage, however, the document which is otherwise inadmissible in evidence as per the provisions of any statute cannot be looked into for deciding the interim injunction application since inadmissibility of the document itself is different mode of proving. It is submitted that what is dispensed with at this stage is the mode of proving the document and that does not permit the party to take the advantage at this stage which is otherwise inadmissible in evidence.

(vii) It is further submitted that the condition contemplated by Sub-section (2) of Section 65 of the Evidence Act are not satisfied, and therefore, Video CD. itself is inadmissible in the evidence.

(viii) It is further submitted that there can be two types of objections regarding admissibility of evidence i.e. (1) regarding the mode of proof, and (2) the admissibility of the documents itself in evidence. It is submitted that so far as the first objection is concerned, that relates to the mode of proof and requires to be read at the initial stage when the document is tendered in evidence. So far as the objection regarding admissibility of the document itself in evidence is concerned, same can be read at any time even at the appellate stage. It is submitted that this gives the right to the party to raise such objection at the later stage if he fails to raise the same at the initial stage. It is submitted that does not mean the party has prevented from raising such objection at the initial stage.

(ix) It is submitted that document which is apparently not in evidence cannot be read as evidence even for deciding the prima facie case. It is submitted that for example unregistered of the document of the transfer of property requiring registration u/s 17 of the Registration Act, cannot be looked into for the purpose

of interim injunction application.

Shri S.N. Shelat, learned Senior Advocate appearing on behalf of the plaintiffs has relied upon the decision of the Hon"ble Supreme Court in the case of R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, and the decision of this Court in the case of Kanbi Mavji Khimji and Anr. v. Kanbi Manjibhai Abjibhai and Ors. reported in AIR 1968 Guj. 198. No other submissions have been made. By making above submissions and relying upon the above decisions, it is requested to allow present Special Civil Application.

8. Petition is opposed by Shri S.P. Majmudar, learned Advocate appearing on behalf of the respondent No. 1 herein original-defendant No. 1. An affidavit-in-reply is filed on behalf of the respondent No. 1. It is submitted that by passing the impugned order, learned trial Court has not committed any error and/or illegality and/or has not passed any order exercising the jurisdiction much less which calls for interference of this Court in exercise of power under Article 227 of the Constitution of India. It is submitted that the submissions made on behalf of the original-plaintiffs by impugned order learned trial Court has held that the documents in question are admissible in evidence is not correct. It is submitted that as such the learned trial Court has not entered into the question with respect to the admissibility of document in question in evidence. It is submitted that as such the learned trial Court has already made clear even in the operative portion of the order that the original-plaintiffs can make further submissions with respect to the admissibility of the evidence and/or to consider the document in question at the time of application Exh. 5. Therefore, all the questions with respect to the admissibility of the evidence are kept open. It is submitted that any documents which are produced either along with application Exh. 5 or produced along with the suit and/or produced along with reply to the application Exh. 5 can be considered by the learned trial Court while deciding the application Exh. 5 for interim injunction under Order 39, Rules 1 and 2 of the CPC without further holding any inquiry with respect to the admissibility of such document in evidence. It is submitted that for considering the prima facie case, it is permissible for the learned trial Court to consider the document produced and such an inquiry with respect to the admissibility of the document in evidence at this stage while deciding the application Exh. 5 is not permissible and warranted. It is submitted that the question with respect to the admissibility of the document in evidence is required to be considered at the time of leading the evidence in the suit and on proving that those documents are admissible in evidence the said documents are required to be exhibited at an appropriate stage of the suit/trial and not at the time of deciding application Exh. 5. It is submitted that such an exercise at this stage while deciding the application Exh. 5 i.e. interim injunction application is unknown to law. It is further submitted that in fact, the documents in question it is in electronic form is already forming part of the proceeding of the suit and by the application Exh. 167 it was requested to read, per use and consider the said document for the purpose of deciding the application Exh. 5, by using the computer. It is submitted that only question

whether electronic document can be read or appreciate for adjudication of application Exh. 5.

9. It is further submitted by Shri Majmudar, learned Advocate for the original defendant No. 1 that at this stage the defendant No. 1 has only requested the learned Civil Judge to read the electronic document which is legally produced and forming part of the record as regards the hearing and process of adjudication of interim injunction. It is submitted that issue of proving said electronic document and accepting it as provided documentary evidence will be subsequently decided as and when the trial and process of regarding the evidence comes before the Civil Court. It is submitted, that therefore, all the objections of the petitioner are in fact premature at this stage since issued involved is only reading and appreciating the document in the course of hearing of the injunction application as the issue does not at all involved inadmissibility or otherwise of the document all the submissions by petitioners in that regard are required to be discarded. It is submitted that in fact, by defendant No. 1, the video tape is tampered in any manner.

10. It is further submitted that as such there is no statutory provision prohibiting in any manner the process of reading and considering the document in fact (may be electronic document) for the purpose of hearing Exh. 5 application for injunction. It is submitted that by the impugned order learned trial Court has passed an order only to read the electronic document while deciding the application Exh. 5 only and for reading a document, manner and process of proving the same cannot be a issue at all at this stage.

11. It is submitted that for the purpose of appreciating the nature of controversy and for proper adjudication of the application Exh. 5 and to appreciate the facts the document is in question is required to be read and peruse and consider at this stage. Therefore, it is submitted that the learned trial Court has not committed any error in allowing the application to read and peruse and consider the document which is in the electronic form produced at Exh. 54/1 for the purpose of deciding the application Exh. 5 keeping all the question with respect to the admissibility of the document in evidence open even keeping the submission on the same upon to be made at the time of hearing of the application Exh. 5.

12. It is further submitted by Shri Majmudar, learned Advocate for the respondent No. 1 herein original defendant No. 1 that such type of frivolous objections are raised by the plaintiffs unnecessary only with a view to delay the matter since ex parte injunction is already granted in favour of the petitioner which is continued since March, 2008. It is submitted that as such considering the Order 39, Rule 2 of the CPC when ex parte ad interim injunction is granted the same is required to be decided within 30 days. By making above submissions, it is requested to dismiss the present Special Civil Application.

13. Heard the learned Advocates appearing on behalf of the respective parties at

length.

14. At the outset, it is required to be noted that by passing impugned order while considering the application Exh. 5 submitted under Order 39, Rules 1 and 2 of the Code of Civil Procedure, the learned trial Court has allowed the application Exh. 167 submitted by the original defendant No. 1 to use computer for the purpose of reading, perusing and considering the document produced at Exh. 54/1, which is in the electronic form only for the purpose of considering the Exh. 5 application keeping all the questions with respect to the admissibility of the said document in evidence open and even clarifying/observing that it will be open for the plaintiffs to make submission on admissibility of such document and/or considering the said document at the time of even making submission on application Exh. 5. From the submission made on behalf of the respective parties recorded hereinabove, the sum and substance of the submissions made on behalf of the petitioners original-plaintiffs is that the document produced at Exh. 54/1 which is in electronic form is not admissible in evidence in view of the statutory provision, more particularly Sections 65(1) and 65(2) of the Evidence Act, and therefore, the said document cannot be looked into by the learned trial Court while deciding the application Exh. 5. Therefore, the sum and substance of the submission on behalf of the plaintiffs is that the learned trial Court should hold the inquiry at this stage, with respect to the admissibility of the document in question in evidence or otherwise, while deciding the application Exh. 5. It is also the contention on behalf of the plaintiffs that by passing the impugned order learned trial Court has already held that document in question is admissible in evidence in view of Sections 65(1) and 65(2) of the Evidence Act. Now, considering the impugned order passed by the learned trial Court the submission made on behalf of the plaintiffs are as such factually incorrect to the effect that the learned trial Court has already held that the document in question is inadmissible evidence considering Sections 65(1) and 65(2) of the Evidence Act or on apprehension on the part of the plaintiffs is not well founded and/or submissions/objections made on behalf of the plaintiffs are absolutely premature.

15. Even, from the submissions made on behalf of the plaintiffs recorded hereinabove, it is not disputed by the learned Advocate for the plaintiffs that while deciding the interim injunction application the document produced by the parties can be taken into consideration without compelling the parties to prove the same as per the provision of the Evidence Act at that stage. It is also admitted by the learned Advocate for the plaintiffs that it is permissible to take into consideration the pleadings of the parties and affidavit and document produced by the parties at the stage of deciding the interim injunction application. However, it is the contention on behalf of the plaintiffs that it does not permit the Court to consider the documents which are otherwise inadmissible in evidence. In short by making above submissions, the plaintiffs indirectly wants at this stage to hold inquiry with respect to admissibility of the document in question in evidence while deciding the application Exh. 5. Therefore, the short question which is posed for the consideration of this Court is that whether such

an inquiry at this stage i.e. at the stage of deciding the Exh. 5 application for interim injunction submitted under Order 39, Rules 1 and 2 of the CPC is warranted/permissible at this stage or not. At this stage, the decision of the Andhra Pradesh High Court in the case of S. Ravindrer v. G. Dasarath, reported in 2004 (IV) ALD 851 is required to be referred and considered. Identical question came to be considered by the Andhra Pradesh High Court in the aforesaid decision. While dealing with the objection as to the admissibility of the agreement at the stage of considering the application filed under Order 39, Rule 1 of the CPC on the ground that it was not registered or stamped, learned single Judge of the Andhra Pradesh High Court in Paras 4 and 5 has observed as under:

4. The petitioner raised an objection as to the admissibility of the agreement of sale on the ground that it was not registered or stamped. The matter is at the stage of consideration of application filed under Order 29, Rule 1 C.P.C. At this stage, the facts that are necessary for adjudication of the applications are to be proved for under Rule 60 of the Civil Rules of Practice. It is true that depending on the circumstances of the case, the Court may record oral and documentary evidence at that stage also. It is only when the Court decides to record oral evidence instead of deciding the matter on affidavits, that the procedure for marking documents as in the case of recording of the evidence in the suit, needs to be followed. In the absence of recording of oral evidence, at the stage of interlocutory applications marking of documents cannot be on the same plane as is done at that stage of recording evidence in the suit. Such a course of action may, in fact, result in a contradiction in terms. If a document is subjected to rules of evidence even at the stage of consideration of interlocutory applications, without there being any oral evidence, by the same logic, they should be permitted to be on record of the suit without any further subjection to oral evidence or scrutiny as to relevancy and proof. This is not at all in the contemplation of the CPC or the Evidence Act, 1872.

5. At the stage of consideration of interlocutory applications, particularly, those under Order 39, Rule 1 C.P.C., the Courts are required to take totality of the circumstances into account and consider the material before it. Merely, because a document is cited before it, and it is taken into account, it cannot be said that the Court has pronounced upon its admissibility or relevancy much less proof. Such a stage is to be relegated to the one of recording evidence for the disposal of the suit.

16. Thus, considering the submissions made on behalf of the respective Counsels recorded hereinabove; considering the impugned order passed, learned trial Court and considering the provision of the Order 39, Rules 1 and 2 and the relevant provisions of the Evidence Act and CPC with respect to proving the document at an appropriate stage and the decision of the Andhra Pradesh High Court in the case of S. Ravindrer (supra) it is to be held that at the stage of deciding the application Exh. 5 for interim injunction the Court can look into the supporting affidavits and the documents produced along with the application Exh.

5 and/or produced along with reply to the interim injunction application for the purpose of finding out a prima facie case and at that stage a detailed inquiry with respect to admissibility of those documents in evidence is neither permissible nor warranted. The admissibility of the documents in question are required to be considered and proved at an appropriate stage considering the provisions of CPC as well as Evidence Act. If at all a decision or interim injunction is based upon certain document and if the aggrieved party is of the opinion that such document ought not to have been taken into consideration while considering the prima facie case, in that case aggrieved party can very well make out a ground in the appeal before the higher forum. But a detailed inquiry with respect to admissibility of the documents in evidence, at the stage of deciding interim injunction under Order 39, Rules 1 and 2 is not required to be conducted. It cannot be disputed that even without production of any documents even on affidavits learned trial Court can form an opinion on prima facie case while deciding the interim injunction.

17. Even otherwise, it is also required to be noted that in the present case, while passing the impugned order, the learned trial Court has taken care of the situation and has specifically clarified in the operative portion of the order that at the time of making submission on Exh. 5 application, plaintiffs can make submission with respect to the document in question. It appears that, the learned trial Court wants to consider and peruse the document in question Exh.54/1 which is in the electronic format for the purpose of considering the prima facie and while deciding the application Exh. 5 only. The learned trial Court cannot be restrained from considering the documents inclusive of affidavit for the purpose of forming an opinion on prima facie case while deciding the interim injunction application. Under the circumstances, it cannot be said that learned trial Court has committed any error and/or illegality and/or impugned order is without jurisdiction and/or exceeded jurisdiction not vested in it, which call for interference of this Court in exercise of powers under Article 227 of the Constitution of India. On the contrary, it appears that learned trial Court has tried to strike balance and kept all the question with respect to the admissibility of document in question in evidence kept open. Still, while dismissing the present Special Civil Application, it is specifically observed that all the questions with respect to admissibility of the documents in question is kept open and the same is required to be considered at an appropriate stage of the trial. Even as observed by the learned trial Court, the petitioners original-plaintiffs can make submission with respect to the document in question at the time of hearing of the application Exh. 5. Any observations made by the learned trial Court in the impugned order with respect to admissibility of document in question in evidence as per Sections 65A and B of the Evidence Act are to be treated as tentative while deciding the said application only and by which it cannot be construed that learned trial Court has held that the said document in question is admissible in evidence. As stated above, the said question is kept open to be considered at an appropriate stage in the trial.

18. In view of the above and for the reasons stated above, present Special Civil Application deserves to be dismissed, and is accordingly dismissed. Rule discharged. Ad-interim relief granted earlier, if any, stands vacated forthwith.