

(2011) 05 GUJ CK 0154

In the Gujarat High Court

Case No : Civil Revision Application No. 323 of 1997

Babarbhair Dahyabhai Vankar and Another

APPELLANT

Vs

Prabhakar Parshotambhai Patel

RESPONDENT

Date of Decision : 10-05-2011

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 18, 2(8)
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : (2011) 05 GUJ CK 0154

Hon'ble Judges : Rajesh H. Shukla, J

Bench : Single Bench

Advocate : Shailesh C. Parikh, s 1 - 2, for the Appellant; H.M. Parikh, for Opponents 1.2.1, 1.2.2, 1.2.5, for the Respondent

Judgement

Rajesh H. Shukla, J.—The present Civil Revision Application has been preferred by the applicant-original Defendant for the prayer that the judgment and Order passed in Civil Appeal No. 48 of 1990 by the 3rd Extra Assistant Judge, Nadiad dated 24.01.1997 confirming the judgment and Order passed in Regular Civil Suit No. 197 of 1981 by the Civil Judge (JD), Borsad dated 31.12.1985 may be quashed and set aside on the grounds stated in the memo of Revision Application inter alia that the Courts below have failed to appreciate the contentions raised or advanced on behalf of the applicant that the case was required to be referred to the Tenancy Court. It is also contended that in view of the provisions of the Bombay Tenancy and Agricultural Act, 1948, issue raised could not have been decided by the Civil Court as the Civil Court has no jurisdiction. Therefore, it has been contended that both the Courts below have committed a grave error in deciding the Issue No. 5, which had no jurisdiction. It is also contended that the Courts below have also committed an error while deciding Exh. 19 as the Issue No. 5 was required to be referred to Mamlatdar and Krushi Panch. It is also contended that both the Courts below have failed to appreciate that the applicant has been residing in the suit premises for more than 40 years, therefore, the Civil Revision Application may be allowed.

2. Learned Counsel, Mr. Sailesh Parikh appearing for the applicant submitted that whether the decree passed by the Trial Court was inseparable or separable was required to be considered. He submitted that after the death of the Respondent, heirs became the co-owners of the suit premises, therefore, it cannot be said that the decree is inseparable. He referred to the papers as well as judgment of both the Courts below and submitted that the lower appellate court has not framed the point of determination and has only framed the issues, which are stated on Page No. 18, which are contrary to the provisions of law. In support of his submission, learned Counsel, Mr. Sailesh Parikh has referred to and relied upon the judgment of this Court reported in G. Amalorpavam and Others Vs. R.C. Diocese of Madurai and Others,

3. Learned Counsel, Mr. Sailesh Parikh submitted that in fact, it was a tenancy under the Bombay Land Agricultural Tenancy Act and whether the Tenancy Act would apply or Rent Act would apply could be decided with reference to the provisions of the Tenancy Act, which both the Courts below have failed to consider. He further submitted that the applicant was agricultural labour and he was given the permission to cultivate the land and accordingly, he acquired right under the Bombay Agricultural Tenancy Act as labour for cultivating land. He, therefore, submitted that this aspect has not been considered by the Courts below resulting into miscarriage of justice. He pointedly referred to the observations made in the order passed in the proceedings and also order passed in Civil Suit, Exh. 64. He has also referred to Annexure-A to this Revision Application and pointedly referred to the entries made to support his submission with regard to the provisions of Tenancy Act. He also referred to the issues framed by the trial court in Civil Suit No. 197 of 1981 particularly, Issue No. 5 and submitted that Issue No. 5 suggests that whether as per Section 18 of the Agricultural Tenancy Act, such land could be purchased. He submitted that the Agricultural Tenancy Act is a special statute and it could have been decided as provided therein and Civil Court has no jurisdiction. He again referred Exh. 19 and submitted that the findings given by the Civil Court that it is not an agricultural land is erroneous as it was not for the Civil Court to decide as to whether it is an agricultural land or not. He submitted that Section 2(8) of the Tenancy Act as well as other provisions refer to this aspect and, therefore, the Civil Court had no jurisdiction. He, therefore, submitted that the judgment and order passed by the Appellate Court confirming the lower Appellate Court are erroneous and the present Revision Application may be allowed.

4. Learned Counsel, Mr. H.M. Parikh submitted that as per the Plaintiff's case, premises was let out. He submitted that the dispute is with regard to letting out of the premises and not the land and, therefore, it is not contended that the land was given on lease for cultivation. He submitted that the suit premises is appurtenant and is very small and, therefore, it would be evident that what was let out was the premises with land and, therefore, Rent Act would apply and not the Tenancy Act.

5. Learned Counsel, Mr. H.M. Parikh submitted that the issue regarding tenancy is required to be decided on the basis of the averments made in the plaint and not as per the contentions in the written statement.

6. Learned Counsel, Mr. H.M. Parikh submitted that the submission that the Tenancy Act would be applicable is misconceived. In support of this submission, he has referred to and relied upon the judgment reported in 1996 (2) GLH 626 (SC) in case of Nalanikant Ramadas Gujjar v. Tulasibai (dead) by L.Rs. and Ors. and submitted that as observed in this judgment, once the piece of land, which was an agricultural land, is put to a non-agricultural use, it shall be covered within the definition of the premises. He, therefore, submitted that Section 5(8) of the Rent Act defines the premises and it has been discussed in this judgment. Therefore, learned Counsel, Mr. H.M. Parikh submitted that the agricultural land or small portion of agricultural land was let out for non-agricultural purpose, which would attract the provisions of the Rent Act inasmuch as it is not the land, which was leased out but it was the premises with the land, which was leased out. He submitted that this contention was raised as per the application, Exh. 19, which has been decided and if there was any grievance, same could have been carried further, which has not been challenged and, therefore, in the present Revision Application, it cannot be permitted to be raised.

7. Learned Counsel, Mr. H.M. Parikh submitted that in fact, the present Civil Revision Application would stand abated as the judgment of the Appellate Court confirming the decree is inseparable. He submitted that it was combine decree for the possession and once such a decree is not separable and the decree has become final in the year 2004, the Revision Application would not be maintainable. He has referred to and relied upon the judgment reported in 2010(2) GLH 551 in case of Prajapati Ambaram Nagarbhai and Anr. v. Prajapati Harjibhai and Ors.

8. In view of the rival submissions, it is required to be considered whether the present application can be entertained or not.

9. As can be seen from the judgment of both the Courts below, it is an admitted fact that the father of the Plaintiff had given premises to the father of the Defendant for which rent note was executed, Exh. 33. It is not in dispute that the Defendants are in use and in occupation of the premises for many years. The father of the Defendants used to make the payment of rent to the father of the Plaintiff and the taxes of Panchayat were paid by the Defendants. The cross-examination of the Plaintiff also refers to this aspects and the Defendant is examined at Exh. 42 and has also produced the documentary evidence with regard to the payment of panchayat tax. It is an admitted fact that the rent note, Exh. 33 was executed by the father or the elders of both the Plaintiffs and the Defendants and the rent was also being received or deposited by the Defendants. It is in this background, Issue Nos. 4 and 5 answer respectively in affirmative and negative. Therefore, Issue No. 4 stands established that it is proved by the Defendants that the premises was constructed by the father of the Defendants

and they are occupying since years. Issue No. 5 states that whether Tenancy Act would be applicable and whether the Defendants would be entitled to purchase in light of the provisions of the Tenancy Act and it answered in negative. Issue No. 4, therefore, though in affirmative, the Suit is decreed on the ground of arrears though it is also admitted that the rent was deposited in the Court. The Issue No. 2 with regard to tenant in arrears has been discussed and answered in affirmative and the discussion in the judgment of the trial Court suggests that after the notice was given, Babarbhair, who is examined at Exh. 52 has stated about the numbers given to the premises by the Panchayat that it was shown in the father of the Plaintiff and, thereafter, it is shown in his name. He further stated that no rent was paid and he has also disputed the existence of the rent note, Exh. 33. The trial Court has accepted the rent note, Exh. 33 and on that basis, findings have been given, but, the trial court has only considered the tenants in arrears because the rent was not paid for three months. It is required to be considered that the lower Appellate Court also while confirming the judgment has not framed the specific point of determination particularly when very existence of the rent note is disputed and it was necessary for the lower Appellate Court to examine this issue. Assuming that it was an agricultural land put to non-agricultural use and, therefore, as per the judgment reported in 1996 (2) GLH 626, Rent Act would apply and the rent note was executed at Exh. 33. Still the lower Appellate Court was also required to examine about the provisions of Section 12(3)(a) and/or Section 13(2)(b) of the Rent Act. The lower Appellate Court in its discussion in Para No. 16 has observed that after the institution of the Suit and even on the date of framing of the issues, the Defendants have not deposited the arrears of rent and, therefore, Section 12(3)(b) of the Rent Act would be applicable. At the same time, it has also been observed that the Appellants-original Defendants have deposited the amount after two years of the institution of the Suit, meaning thereby, before the decree was passed or issue was decided, the amount was deposited. The provisions of Section 12(3)(b) clearly provides "in any other case, no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due"

10. Thus, the language employed in this section is in negative form that no decree for eviction shall be passed if on the first day of hearing or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due".

11. Sub-section (4) also provides that "pending the disposal of any such suit, the Court may out of any amount paid or tendered by the tenant pay to the landlord such amount towards payment of rent or permitted increases due to him as the court thinks fit". In the facts of the present case, therefore, both the Courts below have failed to consider the provisions of Section 12(3)(b) of the Rent Act and also failed to appreciate about the tenant in arrears.

12. The submissions, which have been made by both the sites referring to the Tenancy Act and the learned Counsel, Mr. Sailesh Parikh that the Rent Act would not be attracted at all and the Tenancy Act would be applicable, cannot be readily accepted in view of the judgment reported in 1996(2) GLH 262 as well as rent note, Exh. 33, which has been executed by respective elders of the parties. It is in this background, even assuming in favour of the Plaintiff that the Rent Act would be applicable and rent note is executed still while passing the decree on the ground of arrears of rent, the Courts below have failed to consider the provisions of the Rent Act. It is an Act for the beneficial interest of the tenant. It has also failed to consider that the premises have been constructed by the Defendants, they have been using and occupying for years and even the taxes of the panchayat have been paid, meaning thereby, it was yearly tenancy and not the monthly tenancy. It is in this circumstances, considering the provisions of Section 12(3)(b) of the Rent Act, the submission made by the learned Counsel, Mr. H.M. Parikh that and Revision would stand abated in view of the provisions of the CPC and the decree is not separable cannot be readily accepted in view of the judgment of the Hon"ble Apex Court reported in S. Amarjit Singh Kalra (dead) by Lrs. and Others and Smt. Ram Piari (dead) by L.Rs. and Others Vs. Smt. Pramod Gupta (dead) by Lrs. and Others, which has considered this aspect of abatement as to when the decree passed would be considered as separable and inseparable. The Hon"ble Apex Court in Para No. 34 of the said judgment observed as under:

In the light of the above discussion, we hold:

(1) Wherever the Plaintiffs or Appellants or Petitioners are found to have distinct, separate and independent rights of their own and for purpose of convenience or otherwise, joined together in a single litigation to vindicate their rights, the decree passed by the Court thereon is to be viewed in substance as the combination of several decrees in favour of one or the other parties and not as a joint and inseverable decree. The same would be the position in the case of Defendants or Respondents having similar rights contesting the claims against them.

(2) Whenever different and distinct claims of more than one are sought to be vindicated in one single proceedings, as the one now before us, under the Land Acquisition Act or in similar nature of proceedings and/or claims in assertion of individual rights of parties are clubbed, consolidated and dealt with together by the Courts concerned and a single judgment or decree has been passed, it should be treated as a mere combination of several decrees in favour of or against one or more of the parties and not as joint and inseparable decrees.

(3) The mere fact that the claims or rights asserted or sought to be vindicated by more than one are similar or identical in nature or by joining together of more than one of such claimants of a particular nature, by itself would not be sufficient in law to treat them as joint claims, so as to render the judgment or decree passed thereon a joint and inseverable one.

(4) The question as to whether in a given case the decree is joint and inseverable or joint and severable or separable has to be decided, for the purposes of abatement or dismissal of the entire appeal as not being properly and duly constituted or rendered incompetent for being further proceeded with, requires to be determined only with reference to the fact as to whether the judgment/decree passed in the proceedings vis--vis the remaining parties would suffer the vice of contradictory or inconsistent decrees. For that reason, a decree can be said to be contradictory or inconsistent with another decree only when the two decrees are incapable of enforcement or would be mutually self-destructive and that the enforcement of one would negate or render impossible the enforcement of the other.

13. Another facts of arguments that though there are concurrent findings of facts, normally the Court would not in revisional jurisdiction interfere with the concurrent findings of facts. However, Section 29(2) of the Rent Act enables the Court to satisfy itself that the decision in Appeal was according to law or not.

14. A useful reference can be made to the observation made in the case of Patel Valmik Himatlal and Others Vs. Patel Mohanlal Muljibhai (Dead) Through L.Rs.,

5. The ambit and scope of the said section came up for consideration before this Court in Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri and Others, and after referring to a catena of authorities, Sabyasachi Mukharji, J. drew a distinction between the appellate and the revisional jurisdictions of the Courts and opined that the distinction was a real one. It was held that the right to appeal carries with it the right of rehearing both on questions of law and fact, unless the statute conferring the right to appeal itself limits the rehearing in some way, while the power to hear a revision is generally given to a particular case is decided according to law. The Bench opined that although the High Court had wider powers than that which could be exercised u/s 115 of the Code of Civil Procedure, yet its revisional jurisdiction could only be exercised for a limited purpose with a view to satisfying itself that the decision under challenge before it is according to law. The High Court cannot substitute its own findings on a question of fact for the findings recorded by the Courts below on reappraisal of evidence. Did the High Court exceed its jurisdiction?

15. Therefore, it is clearly laid down that when the error which makes a decision contrary to the law or which goes to the root of the decision while empowering the High Court to satisfy itself in exercise of power u/s 29 of the Rent Act to satisfy itself about the propriety and illegality to the judgment of the lower appellate Court, at the same time, merely because different view is possible on appreciation of evidence, it would not justify the exercise of revisional jurisdiction. In other words, when the Courts below have misdirected itself in its approach while construing or interpreting the provisions of law or correct provisions of law, which goes to the root of the matter, it would require scrutiny of such decision u/s 29(2) of the Act. The Hon''ble Apex Court has also in this judgment reported in earlier judgment of the Hon''ble Apex Court in the case of

Helper Girdharbhai Vs. Saiyed Mohmad Mirasaheb Kadri and Others, has clearly observed that jurisdiction of High Court to correct all errors of law going to root of the decision which would, in such cases, include the findings of facts which a reasonable person would arrive at such findings on such evidence is required to be considered. Therefore, as it transpires from the material and evidence as well as discussion in both the judgments of the Courts below that there is no consideration of the provisions of Rent Act, particularly, Section 13(2)(b). Both the Courts below have considered on one hand the rent note, Exh. 33 and the validity and/or have referred to other aspects but have failed to consider whether it could be said to be a tenant in arrears and whether Section 13(2)(b) is attracted. It is required to be mentioned that when Section 13(2)(b) is attracted and the tenancy is not monthly then in that case, the language employed in Section 13(2)(b) has to be considered that normally, no such decree could be passed. Admittedly, some amount has also been deposited pending Suit and the taxes of the Panchayat have also been deposited by the Defendants. It is in these circumstances though normally the Court would not exercise the revisional jurisdiction to interfere with the concurrent findings of facts arrived at by both the Courts below would call for exercise on such jurisdiction.

16. It may be noted that both the Courts below have not properly appreciated the evidence and the conclusion arrived at on the basis of the evidence is without any reference to Section 12(3)(b). Therefore, this Court would be justified in exercise of revisional jurisdiction u/s 29(2) of the Rent Act satisfying it self as to whether the judgment of both the Courts below is according to law or not. Therefore, in light of the discussion made herein above, the present revision application deserves to be allowed.

17. Though the aforesaid judgment is also requires to be considered and the Hon"ble Apex Court in a judgment reported in G. Amalorpavam and Others Vs. R.C. Diocese of Madurai and Others, has also made observation about the framing of point of determination and the compliance with the said requirements, in fact, considering these aspects also, the present application deserves to be allowed.

18. Accordingly, the present Civil Revision Application stands allowed. The impugned judgment and Order passed in Civil Appeal No. 48 of 1990 by the 3rd Extra Assistant Judge, Nadiad dated 24.01.1997 confirming the judgment and Order passed in Regular Civil Suit No. 197 of 1981 by the Civil Judge (JD), Borsad dated 31.12.1985 is hereby quashed and set aside. Rule is made absolute.