

(2016) 10 GUJ CK 0022

In the Gujarat High Court

Case No : Civil Revision Application No. 434 of 2016

Devraj Mesa

APPELLANT

Vs

Ranchhodbhai Becharbhai-Decd. Through Legal Heirs

RESPONDENT

Date of Decision : 05-10-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, Section 115 (2)

Citation : (2017) 169 AIC 287

Hon'ble Judges : Mr. Z.K. Saiyed, J.

Bench : Single Bench

Advocate : Mr. Harshil C. Dattani, Advocate, for the Opponents No. 1.1 - 1.3, 2;
Mr. Rajesh K. Savjani, Advocate, for the Applicant No. 1

Final Decision : Dismissed

Judgement

Mr. Z.K. Saiyed, J. (CAV) - Present Civil Revision Application preferred under Section 115 of the Code of Civil Procedure by the applicant challenging the order passed by the learned Additional District Judge, Porbandar, in Misc. Civil Appeal No.46 of 2002 below Exhibit 18, dated 1.5.2014, whereby the learned Additional District Judge dismissed the said appeal and confirmed the order passed by the learned Joint Civil Judge (J.D.), Porbandar in Civil Misc. Application No.9 of 1993 dated 31.3.1998.

2. The brief facts of the present applicant are as under: The applicant is owner of the residential house situated at City Survey Ward No.3 bearing Survey No.2904 having municipal No.11-2-112, situated at Avadhpuri Society, Nr. Kamla Nehru Park, Porbandar i.e. the suit property. The said suit property came to be purchased by the applicant by executing the registered sale deed on 5.10.1981 and construction permission was granted by the Porbandar Municipality. It is also the case of the applicant that on the western side of the suit property, there is existence of 15-00 ft. road and on southern side, there is existing road having 20-00 ft. through which the applicant is having access to suit property owned by the applicant. On the southern side of the suit property, there is open land of

20-00 ft. which is being used by the applicant for access to suit property on the same land, the respondents started construction on eastern and northern part of the suit property in such manner which will result into stoppage of passage for the applicant to his residential suit premises. Therefore, the applicant filed Regular Civil Suit No.311 of 1990 for declaration and injunction came to be instituted by the applicant before the Court of learned Civil Judge (J.D.), Porbandar. In the said suit, learned trial Judge while issuing notice, passed order of status-quo with regard to the suit property. The respondents filed written statement in the said suit. The application below Exhibit 6 for interim injunction came to be rejected by the trial Court on 22.3.1991 and against the same, Civil Misc. Appeal No.9 of 1991 came to be filed by the applicant before District Court, Porbandar. Thereafter, the learned Assistant Judge, Porbandar, by order dated 23.8.1991 was pleased to allow Civil Misc. Application and set aside the order dated 22.3.1991 passed below Exhibit 6 in Regular Civil Suit No.311 of 1990, whereby restrained the respondents from making any construction on the said disputed way on 20 ft. which is towards southern side from the house of the applicant pending final disposal of the suit. Against the said order, the respondents filed Civil Misc. Appeal No.9 of 1991 before lower Appellate Court and same came to be dismissed vide order 22.8.1991. The respondent against the said order, preferred Civil Revision Application before this Court, which also came to be rejected. Thereafter, the trial Court on 26.8.1991, allowed the application below Exhibit 6 filed by the applicant. Thereafter, on 26.3.1992, the witness list is not produced and for the purpose of evidence, the case is adjourned for the purpose of compliance of clause No.187 of the Civil Manual and not for recording of the evidence and therefore, provisions of Order 17 is not attracted. It is the case of the applicant that on 9.4.1992, for the first time, the applicant was not present and the trial Judge passed an order and dismissed the suit for the want of prosecution. On 13.1.1993, an application being Civil Misc. Application No.7 of 1993 under Order 9, Rule 9 read with Section 151 of the CPC, came to be filed by the applicant for restoration of the Regular Civil Suit No.311 of 1990. The learned trial Judge dismissed the application by order dated 31.3.1998 on the ground that after receipt of the record from the Appeal Court on 26.8.1991, the case was adjourned on 3.10.1991 for submission of D.E. List at that point of time, the applicant and his advocate were not present. As per the case of the applicant, the applicant was not aware about the receipt of the record by the trial Court from the Appeal Court on 26.8.1991. As per the applicant, it was not in the knowledge of the applicant about the submission of D.E. List, the presence of the applicant is required. Against the order dated 31.3.1998, the applicant preferred Civil Misc. Appeal No.46 of 2002 before the District Court, Porbandar and said Appeal was rejected vide order dated 1.5.2014 by the learned Additional District Judge, Porbandar. Hence, present Revision Application is filed by the applicant.

3. Learned advocate Mr. Rajesh K. Savjani appearing for the applicant states that the applicant suffered and received stroke in Middle Cerebral Artery Ischemic

Stroke described as the sudden onset of focal neurologic deficit resulting from brain infarction on Ischemia in the territory supplied by Middle Cerebral Artery and is under the medical treatment since 7.4.2007 and said treatment is continued at present and therefore, the ground for rejection as held by the learned trial Judge that the applicant has failed in establishing sufficient cause for non appearance when the suit was called out for hearing, is not reasonable. He also states that the case applied by the trial Judge on wrong footing because in that case, the matter was adjourned for 30 times to lead the evidence from the plaintiff side. Herein present case, the applicant remained present on every date and on 20.9.1999, the applicant was not present for giving his deposition and for the first time, the applicant was remained absent and on the said date, the trial Court dismissed the case due to want of prosecution.

4. Learned advocate Mr. Rajesh K. Savjani appearing for the applicant states that present Civil Revision Application is maintainable in view of the ratio laid down in the cases i.e. (1) (2003) 6 SCC 659 (Shiv Shakti Coop. Housing Society v. Swaraj Developers); (2) 1986 GLH 782 (Subodhchandra Champaklal Mehta v. Keshavlal Jeshingbhai Patel), (3) Madhya Pradesh High Court 2010 (1) MPLJ 98 (4) Civil Revision Application No. 347 of 2007 decided by Madhya Pradesh High Court and (5) Calcutta High Court 1988 (2) DMC 394. He further submitted that the parties should not suffer because of fault of the advocates and in support that submission, he relied upon the decisions in the case of Rafiq and Another v. Munshilal and Another reported in (1981) 2 Supreme Court Cases 788 and in the case of Smt. Lachi Tewari and Ors. v. Director of Land Records and Others reported in 1984 Supp Supreme Court Case 431.

5. Learned advocate Mr. Savjani in his further submission states that for the maintainability of Civil Revision Application, there are wide scope and powers under Section 115 of the Code of Civil Procedure and submits that the High Court has jurisdiction. He relief upon the decision in the case of Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat reported in 1969 (0) GLHEL - SC 26071 and therefore, the present Revision is maintainable in law. He therefore, prayed to allow present Revision Application.

6. As against, learned advocate Mr. Harshil C. Dattani appearing for the respondents vehemently opposed the Civil Revision Application filed by the applicant and submitted that the due to absence of the applicant, the trial passed the order of dismissal of the suit under Order 17, Rule 1 and 2 as well as Order 9, Rule 8 of the Code of Civil Procedure, vide order 9.4.1992. Thereafter, on 13.1.1993, an application for restoration was filed by the applicant, wherein the respondent filed reply against the said application for restoration and after considering facts and circumstances of the case, the application was dismissed. Learned advocate submitted that the said order admittedly remained unchallenged for a period of more than 4 years. He also submitted that thereafter, appeal under the provisions of Order 43, Rule 1 of the Code of Civil Procedure, came to be filed against the order dated 31.1.1998 and the lower

Appellate Court vide order dated 1.5.2014 dismissed the appeal with a reasoned order. Learned advocate further submits that thereafter, applicant preferred present Civil Revision Application, wherein one delay application came to be filed and the said application is allowed by this Court vide order 10.8.2016.

7. Learned advocate Mr. Dattani has drawn the attention to the provisions of Section 115 of the Code of Civil Procedure and also the proviso to Sub-section (1) of Section 115, of after amendment act 1999, states "case decided". In support this submission, learned advocate states that the applicant has failed to bring before this Hon'ble Court about the maintainability of the present Revision Application under Section 115 of the Code of Civil Procedure. He, therefore, states that this Court would have not have jurisdiction to entertain present application considering the settled proposition of law and if such application, which is filed by the applicant stands allowed, then the suit proceedings which are already ended, would start afresh. He further submits that the revisionist-applicant is required to show that if the present application is allowed then it would have disposed the suit.

8. Learned advocate Mr. Dattani in support of the submission regarding maintainability of the revision under Section 115, relied upon the case of Parakramsinh Vikramsinh Jadeja v. Yogi Corporation and others reported in 2002 (3) GLR 2040 and states that in view of the ratio laid down in the aforesaid case, present Revision is not maintainable.

9. Learned advocate Mr. Dattani states that by way of filing present Revision, the applicant has tried to create new ground of medical as well as another ground of mistake on the part of the advocate with a view to quash the order passed by the trial Court. He also relied upon the decisions in the cases of Sri Madan Mohan Kotal v. Sri Gobinda Kotal and Anr. reported in JT 1999 (10) 376, Manik Chandra Nandy v. Debdas Nandy and Ors. reported in AIR 1986 SC 446 and also in the case of Binode Hembram v. State of West Bengal reported in AIR 1972 SC 2378 for the issues of powers as well as maintainability of the Revision before this Court. He lastly prayed to dismiss the present Civil Revision Application.

10. Perused the contents of the application along with other record and considered the submissions made by the learned advocates for the respective parties. Here in the present case, the applicant filed Regular Civil Suit No.311 of 1990 for declaration and injunction. In that suit, the applicant filed application below Exhibit 5 which was rejected vide order dated 22.3.1991. Said order was challenged before the lower Appellate Court by way of Regular Civil Appeal No.9 of 1991 and said appeal came to be allowed vide order dated 23.8.1991. It also appears that the trial Court framed issues after receiving the record and proceedings from the Appellate Court and thereafter, the trial Court adjourned the case on various dates and on 9.4.1992 the trial Court dismissed the suit under Order 17, Rule 1 and 2 and Order 9, Rule 8 of CPC. Thereafter, the applicant filed Misc. Civil Application for restoration of the suit and said restoration application came to be rejected and therefore, appeal came to be

filed against the said order dated 31.3.1998 passed in restoration application and said Appeal being Misc. Civil Appeal No.46 of 2002 came to be rejected by the lower Appellate Court and therefore, present Revision is filed by the applicant.

11. In support of the submissions made by the learned advocate with regard to the maintainability of the revision, they have cited various cases. This Court has minutely examined the said cases and more particularly, the provisions under Section 115 of the Code of Civil Procedure, which reads as under:

115. Revision.

[(1)] The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears -

(a) to have exercised a jurisdiction not vested in it by law or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit:

[Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings.]

[(2)] The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto]

[(3)] A revision shall not operate as a stay of suit or other proceeding before the Court except in so far as such suit or other proceeding is stayed by the High Court.]

[Explanation - In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue in the course of a suit or other proceeding.]

12. This Court has perused the entire records as well as the decisions relied upon by the learned advocates for the respective parties and also the provisions of the Code Civil Procedure and the fact that the suit is not decided on merit because the applicant herein has challenged the order passed in Misc. Civil Appeal No.46 of 2002 dated 1.5.2014 by way of present Revision Application. It transpires that the Regular Civil Suit No.311 of 1990 was pending for applicant's evidence and on the date of hearing the plaintiff has not produced evidence and after some adjournments were granted to the applicant and even at the time, when the trial Court dismissed the suit for default, the evidence of the plaintiff was led or produced. Therefore, this Court is of the view that if the Revision application is to be considered then the same will hit the provisions of Section 115(2) of the Code

of Civil Procedure and therefore, revision application is not maintainable. Here the applicant seeks quashing of the order, which would not decide the suit finally and therefore, the prayer to quash and set aside the order impugned is contrary to the provisions of Section 115 of the Code of Civil Procedure.

With this observation, present Civil Revision Application stands dismissed.