
(2011) 04 GUJ CK 0085

In the Gujarat High Court

Case No : Civil Revision Application No. 305 of 2001

Fr. Koshy Alex T

APPELLANT

Vs

Tansukhlal Maganlal Sameja

RESPONDENT

Date of Decision : 20-04-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 41, 115

Citation : (2011) 04 GUJ CK 0085

Hon'ble Judges : Bela Trivedi, J

Bench : Single Bench

Advocate : G.M. Joshi, for the Appellant;

Final Decision : Allowed

Judgement

Bela Trivedi, J.—The present Petitioners (Ori. Plaintiffs/applicants) have filed the revision application u/s 115 of CPC challenging the legality and validity of the order dated 15.11.2000 passed by the learned 3rd Jt. Civil Judge (S.D.), at Rajkot (hereinafter referred to as the "Executing Court") in Special Civil Darkhast No. 7/1998.

2. The short facts giving rise to the present application are that the present Petitioner - Trust, through its trustees, had filed a suit being the Special Civil Suit No. 253/1988 against the present Respondent (Original Defendant) seeking recovery of Rs. 55,460/-, in the Court of Civil Judge (S.D.) Rajkot. It was alleged, inter alia, that the Defendant had not returned the amount of Rs. 55,460/-paid by the Plaintiff to the Defendant as per the agreement dated 2.1.1988 entered into between the parties in respect of the sale of plot of land bearing survey No. 80 of village Nana Mava of District Rajkot. It appears that the RespondentDefendant was served with the summons in the said suit and the learned advocate Mr. K.C. Vora had also filed his appearance on behalf of the Respondent-Defendant. However, subsequently, the said advocate filed "no instructions" purshish in the said Court. It appears that thereafter the Court had adjourned the matter from time to time to enable the said advocate to inform

the Defendant, and that the said advocate having informed the Defendant about his retirement from the case by serving notice through registered post, the said Court permitted him to retire from the case. It further appears that thereafter, nobody was engaged by the Defendant and the said suit was proceeded further in absence of the advocate for the Defendant. Ultimately, the said suit came to be decreed by the trial Court vide the judgment and order dated 31.12.1997.

3. The Petitioner-Plaintiff, thereafter, filed the execution application being Special Civil Darkhast No. 7/1998 on 23.2.1998 before the executing court, seeking execution of the said decree. It further appears that in the said Execution Petition, the notice was served to the opponent (Defendant) and order of attachment was also passed, however, since the property sought to be attached did not belong to the opponent, the said application was dismissed by the Executing Court. The applicant-Plaintiff, thereafter, filed the supplementary execution application ex. 31. The said application was resisted by the opponent by filing the objections at Ex. 44. It appears that the applicant also filed an application Ex. 38, under Order 21 Rule 41 of CPC for attachment of the movable properties of the opponent, which was resisted by the opponent by filing the objections at Ex. 45. The executing Court, thereafter, hearing the learned advocates for the parties, dismissed the execution application and supplementary execution application of the Petitioners Plaintiffs vide order dated 15.11.2000, mainly on the ground that the judgment and decree in the civil suit was obtained by the Plaintiffs by committing fraud. Being aggrieved by the said judgment and order, the trustees of the Plaintiff trust have preferred the present civil revision application u/s 115 of Code of Civil Procedure. In the present revisional proceedings, nobody appears for the Respondent (original Defendant-judgment debtor) though duly served.

4. It has been submitted by the learned advocate Mr. G.M. Joshi for the Petitioners that the executing court has traveled beyond her jurisdiction by going behind the decree and by dismissing the execution application of the Plaintiffs. Mr. Joshi, taking the court to the impugned order passed by the executing court, submitted that admittedly decree passed in the suit was not challenged by the opponent Defendant either by way of filing an appeal or other proceedings, and the executing court without following the procedure under Order 21 of CPC for the execution of the money decree, transgressed her jurisdiction by holding that the decree was obtained by the Plaintiffs exercising the fraud. According to Mr. Joshi, such a plea was never raised by the Defendant in the suit and therefore, the executing court could not have set aside the decree passed by the competent court raising new plea of alleged fraud. He urged that this is a fit case to exercise the revisional jurisdiction of this Court and set aside the said order passed by the executing court.

5. Having regard to the submissions made by the learned advocate Mr. G.M. Joshi for the Petitioners and the documents on record, more particularly, the impugned judgment and order dated 15.11.2000 passed by the executing court

in Special Civil Darkhast No. 7/1997, it transpires that the present Respondent-original Defendant had not challenged the decree passed by the competent court in favour of the Petitioners-Plaintiffs in Special Civil Suit No. 253/1988 either by filing an Appeal or other proceedings and therefore, the said decree had attained finality. The Plaintiff had filed the execution proceedings for the recovery of decretal amount under the provisions contained in Order 21 of CPC. It is needless to say that as per Order 21, R. 30, of CPC, every decree for payment of money may be executed by the detention in the civil prison of judgment debtor, or by the attachment and sale of his property or by both. In the instant case, the Petitioner - judgment creditor had sought to execute the said money decree by making an application for attachment of the property of the opponent (judgment-debtor). However, it transpires that the executing court, instead of following the provisions of Order 21 of CPC, traveled beyond the decree, and held that since the Defendant-opponent was unable to attend the court during the trial of the suit, the court had wrongly proceeded further with the suit and passed the decree in favour of the Plaintiffs. As per the findings of the executing court, the fraud was allegedly committed by the Plaintiffs as the land in question was granted by the Collector to the Plaintiff-trust as per the permission dated 21.7.1990, and in that case, there was no necessity to execute the registered sale-deed in favour of the Plaintiffs. This Court fails to understand as to how the said permission granted by the Collector subsequent to the filing of the suit had any relevance to the Plaintiff's claim for recovery of amount against Defendant, on the agreement between the parties having not been materialised.

6. It is pertinent to note that it was admitted by the opponent - Defendant that the notice given by his advocate about his retirement was received by him, and thereafter he had not engaged any other advocate to defend his case. It was also not disputed that the amount claimed in the suit was paid by the Plaintiff to the Defendant as per the agreement, and same was to be returned to the Plaintiff if the sale of the land could not be materialised. As stated earlier, the decree passed in the suit was not challenged by the Defendant by filing any appeal or other proceedings. Under the circumstances, the Executing Court could not have gone behind the decree passed by the competent court having jurisdiction. At this juncture, a very pertinent observation by the Hon''ble Supreme Court in the case of Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, are required to be reproduced as under:

6. A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

The said legal position has been reiterated in catena of decisions by the Hon''ble Supreme Court.

7. Having regard to the impugned order passed by the executing court, it clearly

transpires that the executing court had totally misdirected itself in going behind the decree and dismissing the execution application of the Plaintiff-applicant on extraneous grounds, without considering the provisions contained in Order 21 of CPC with regard to the execution of decree for the recovery of money. In the present proceedings also, the Respondent-Defendant has chosen to remain absent though duly served. The findings and conclusions arrived at by the executing court being totally perverse and without jurisdiction, the impugned order passed by it, deserve to be quashed and set aside. In that view of the matter, the present revision application is required to be allowed.

8. Accordingly, the impugned order dated 15.11.2000 passed by the Executing Court in Special Civil Darkhast No. 7/1998 is quashed and set aside and Special Civil Darkhast along with the supplementary Darkhast is restored on file. The Executing Court is directed to proceed further with the Execution proceedings in accordance with law. The revision application stands allowed. Rule is made absolute.