

(2006) 09 GUJ CK 0034
In the Gujarat High Court

Case No : Special Civil Application No's. 17391 and 18987 of 2006

Gautam Trading Company

APPELLANT

Vs

Uma Transport Trading Co. and Another

RESPONDENT

Date of Decision : 06-09-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 101, Order 21 Rule 104, Order 21 Rule 36, Order 21 Rule 85, Order 21 Rule 97
Constitution of India, 1950 — Article 226, 227

Citation : (2007) 1 GLR 754

Hon'ble Judges : D.A. Mehta, J

Bench : Single Bench

Advocate : M.J. Thakore, M.B. Gandhi and B.K. Damani, for the Appellant; K.V. Shelat, for the Respondent

Final Decision : Dismissed

Judgement

D.A. Mehta, J.—Special Civil Application No. 17391 of 2006 : This petition, though styled as a petition under Articles 226 and 227 of the Constitution, is in effect a petition under Article 227 of the Constitution of India. The petitioner herein is a third party obstructor, respondent No. 1 is the original plaintiff of H.R.P. No. 475 of 1988 while respondent No. 2 is defendant in H.R.P.No. 475 of 1988. The suit came to be decreed in favour of the plaintiff and the defendant, after carrying the matter right upto Supreme Court, failed to get the judgment and order reversed. The plaintiff, accordingly, moved execution proceedings bearing Darkhast No. 255 of 2003. The plaintiff is thus the decree-holder and the defendant is the judgment-debtor while the petitioner herein is the third party applicant. For the sake of convenience, the parties shall be accordingly referred to hereinafter.

2. During pendency of execution proceedings, on 24th June, 2003 the third party applicant moved an application Exh. 10, which according to third party applicant, was an obstruction application. The said application was accompanied by another

application of even date being Exh. 11 wherein the third party applicant sought permission to exhibit documents annexed with the said application. On the same day one more application came to be moved by the third party applicant being Exh. 18 whereunder the third party applicant sought opportunity to examine judgment-creditor. These three applications were followed by an application Exh. 26 dated 31st March, 2005 seeking stay of execution proceedings.

3. The trial Court rejected all the four applications by common order dated 7th April, 2005. The third party applicant carried the same in appeal being Civil Appeal No. 40 of 2005 which came to be dismissed vide impugned order dated 26th July, 2006. It is this order which is in challenge.

4. Mr. M. J. Thakore, learned Senior Advocate, assailing the impugned order submitted that neither the trial Court nor the appellate Court had appreciated the facts in proper perspective and had proceeded to decide the application moved by the third party applicant on absolutely erroneous grounds. It was submitted that the third party applicant was in possession of the property in question bearing Shop No. 498 since 1986 and had been carrying on business since then in the name and style of Gautam Trading Company. That the third party applicant had taken over the said premises because the defendant-judgment debtor was not using the premises and was not running any business in the said premises. That in this connection, the third party applicant had filed Civil Suit No. 1289 of 2003 on 13th/14th May, 2003 on the ground of having become an owner by adverse possession. That on 24th May, 2003 an ad-interim relief came to be granted requiring the parties to maintain status-quo. That the said suit is stated to be pending.

5. It was submitted that in light of provisions of Order XXI, Rule 97 of the Code of Civil Procedure, once an obstruction had been filed it was incumbent upon the judgment-creditor or the decree-holder to file an application and in absence of any such application no order could have been made by the trial Court in execution proceedings. Referring to Rule 101 and Rule 104 of Order XXI of Code of Civil Procedure, it was submitted that once there was a prior suit pending and an obstruction had been filed, any order made in execution proceedings would be subject to that. A further contention was that both the trial Court and the appellate Court had committed an error in law while holding that the proceedings i.e. the order made by the trial Court in H.R.P. No. 475 of 1988 stood merged with the order made by the Supreme Court, and hence, the City Civil Court could not have made any order in Civil Suit No. 1289 of 2003, or that the said order was not a valid order. According to him, till the order made by the City Civil Court was set aside in appropriate proceedings by a competent Court, it would be binding on the parties.

6. In support of the submissions made, he has placed reliance on the following four decisions:

(i) Bhavnagar Transport Company Vs. Valmikibhai Himatlal Patel and Another,

(ii) Smt. Mira Chatterjee Vs. Sunil Kumar Chatterjee,

(iii) N.S.S. Narayana Sarma and Others Vs. Goldstone Exports (P) Ltd. and Others,

(iv) Chandravati Co-op. Housing Society Ltd., Maninagar v. Bhairavnath Education & Cultural Society Trust and Ors. 1993 (1) GLR 116 Dated 7-9-2006:

7. Rule 97 of Order XXI of CPC reads as under:

97. Resistance or obstruction to possession of immovable property .-(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

[(2) Where any application is made under Sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.]

8. On a plain reading the said Rule stipulates that where a decree-holder or a purchaser of any immovable property sold in execution of a decree is resisted or obstructed by any person from obtaining possession of the property, such decree-holder or auction-purchaser may make an application to the Court complaining of such resistance or obstruction. Sub-rule (2) of Rule 97 of Order XXI of the CPC stipulates that where any application as envisaged in Sub-rule (1) is moved the Court shall proceed to adjudicate upon the application in accordance with the provisions which follow Rule 97. Therefore, in the first instance, there has to be an obstruction or resistance by any person, who is other than the decree-holder and the judgment-debtor, resisting or obstructing the decree-holder from obtaining possession of the immovable property in relation to which a decree has already been made in his favour; in the event such an obstruction or resistance application has been moved at the next stage the provision grants an option to the decree-holder to make an application to the Court complaining of such resistance or obstruction. The final stage is a mandate to the Court to make an order on such complaint being received.

9. The contention that merely because an obstruction is raised by a third party the Court is bound to make an order in accordance with the provisions of Rules following Rule 97, more particularly under Rules 101 and 104 of Order XXI of Code of Civil Procedure, is an incorrect proposition of law. By filing an obstruction per se the third party cannot claim a right which is not granted to the third party, viz., to have his contentions tested and his claims adjudicated. After the third party files an application of obstruction or resistance the decree-holder may opt to move an application complaining about such resistance or obstruction, but the option definitely rests with the decree-holder. If the decree-holder does not make any such complaint the third party cannot insist that his claim must be adjudicated by the Court.

10. The provisions of Rules 101 and 104 of Order XXI of CPC cannot be read so as to mean that under Rule 97 whether the decree-holder files a complaint or not, the Court is under a mandate to determine questions raised by the third party. In fact, Rule 101 specifically states that all questions arising between the parties to a proceeding on an application under Rule 97 shall be determined by the Court dealing with the application. The language of the Rule does not state that all questions arising between the parties on an obstruction under Rule 97. Thus, it is not possible to read the words which are not employed by the legislature in the provision. The reason is not far to seek. It is always open to a third party to establish his right, title and interest to a property by filing a suit in accordance with law.

11. One can derive support from the decision in case of Chandravati Coop. Housing Society Ltd., Maninagar v. Bhairavnath Education & Cultural Society Trust and Ors. 1993 (1) GLR 116 rendered by this Court wherein this Court in Paragraph No. 7 of the judgment has specifically observed that on an obstruction by third party the holder of decree for possession - (i) may proceed under Rule 97; (ii) may apply again in execution of decree under Rules 85 and 36; and (iii) may institute a regular suit for possession. Therefore, the option rests with the decree-holder as to what remedy he would like to pursue.

12. To the same effect is the decision of the Apex Court in case of N.S.S. Narayana Sarma and Others Vs. Goldstone Exports (P) Ltd. and Others, , wherein the entire scheme has been discussed and after referring to earlier decision in case of Silverline Forum Pvt. Ltd. Vs. Rajiv Trust and another, , it is laid down "When a decree-holder complains of resistance to the execution of a decree it is incumbent on the execution Court to adjudicate upon it....""...A decree-holder, in such a case, may make an application to the executing Court complaining such resistance for delivery of possession of the property. Sub-clause (2) after 1976 substitution empowers the executing Courts when such claim is made to proceed to adjudicate upon the applicant's claim in accordance with the provisions contained hereinafter...."

13. In none of the decisions cited on behalf of the petitioner the proposition which has been canvassed has been enunciated. In fact, all throughout consistently this Court has held that the option rests with the decree-holder, whether to move the Court by filing an application of complaint or not. Therefore, this contention does not merit acceptance. Reference to provisions of Rules 101 and 104 of the Code of Civil Procedure, in the circumstances, do not carry the case of the petitioner any further.

14. Even if for the sake of argument, it could be stated that the Court was required to adjudicate the claim made by the third party-obstructionist, on facts as can be seen hereinafter, the Court has found that the third party applicant has no legs to stand on.

15. The trial Court, while making the order on 24th June, 2003 on applications

Exhs. 10, 11, 18 and 26 in Darkhast No. 255 of 2003, has recorded as under:

5. The contention of third party is not acceptable. The record shows that D.H. has filed suit against the J.D., in the year 1988, then J.D. took up the matter upto Supreme Court of India. At last, all the efforts of J.D. turned in vain. His SLP before Hon''ble Supreme Court was dismissed on 11-11-2002. According to me both fought tooth and nail till 14 years. According to me if D.H. was in the collusion with J.D. litigation would not have taken such long time. Litigation would have ended in short period. Actually, J.D. and third party are in collusion. So, just to defeat the rightful claim of D.H. they have made a collusion with each other.

Further, in Paragraph No. 7 of the order it is once again found:

...It also appears from the record of H.R.P.S. No. 475 of 1988 that third party and J.D. are relatives.

In Paragraph No. 10 of the order, the Court records:

10. It is clear that the suit premises is constructed shop, and when the litigation had been going on between D.H. and J.D. since many years, it is impossible to believe that the third party was enjoying a possession of shop openly, publicly or to the knowledge of D.H. and D.H. had never objected such use by third party. The third party has come with totally false story.

16. This order of the trial Court has been upheld by the appellate Court in order made on 26th July, 2006 in Civil Appeal No. 40 of 2005. Not only has the appellate Court not found any substance in the contentions raised by the third party applicant but the appellate Court has also recorded:

...We have also observed that the learned trial Judge has taken the note that third party appellant has not come with clean hands. He has suppressed the material facts from the Court and if he has disclosed the true facts before the City Civil Court then his suit would have been dismissed. Moreover, learned trial Judge has also observed that when a decree becomes final, it becomes part of the estate of the landlord. Any representative or landlord can execute the Darkhast. It is clear that the petitioner is a partnership firm so in case of death of the partner, the other partners can execute the Darkhast.

...We have also observed the consideration of the learned trial Judge that the suit premises is constructed shop and when the litigation had been going on between D.H. and J.D. since many years, it is impossible to believe that the third party was enjoying a possession of a shop openly publicly or to the knowledge of D.H. and D.H. had never objected such use by third party, thus, the third party has came with totally false story. Learned trial judge has also observed that the J.D. is defeated up to the highest Court of India. So, he made a conclusion with the third party who is his relative. Both have made their best efforts to keep the D.H. from putting the fruits of the decree. He also believed that both the persons are also liable to be prosecuted because they have flouted the orders of the Court.

Even, they dared to flout the judgment of the Hon''ble Supreme Court of India and, therefore, the learned trial Judge has rightly rejected all the applications made by the appellant-third party.

17. To satisfy the conscience of the Court as to whether the finding by the lower Courts that there was collusion between the third party applicant and the judgment-debtor is justified or not the evidence which is available on record has been closely perused. It is an admitted fact that the civil suit was filed by the third party applicant only after the period granted to the judgment-debtor to hand over possession expired. The second material factor is the sketch forming part of the Court Commissioner's report to which attention was invited by the learned Counsel for the petitioner. The said sketch shows that the suit property is having an area of 10 feet 9 inch x 23 feet. In which there was only one table and one chair. The report records that on the said table there are various registers, cheque books, files, etc. and it also records that in the said part there are no other goods. Thus, on a perusal of the sketch and the Commissioner's report it is apparent that only for the purposes of the visit of the Commissioner the table and chair and some files had been placed in the suit premises. If the property is being used for a period of nearly 20 years, and that too a property having such a large area, it is inconceivable and against human probabilities that a running concern would have one table and one chair to conduct its business. This becomes more stark and glaring when one sees the immediately adjoining property bearing shop No. 502 wherein there is a chamber in the shop, at least three tables and other furniture and fixtures. The case of the decree-holder plaintiff was that the defendant judgment-debtor was not using the property, which was let out, and hence, the suit for possession in which the defendant-judgment-debtor lost upto Supreme Court.

18. Both the lower Courts are also justified in holding that there was merger of the order made by the Small Causes Court in the order made by the Apex Court when the appeal of the defendant judgment-debtor came to be dismissed. The property in question is one and the same and once right upto Apex Court the said property has been found as being of the ownership of the decree-holder and possession is directed to be handed over to the decree-holder, there is no question of the third party applicant staking a claim on the ground of adverse possession, the third party applicant having failed to establish by independent evidence its possession.

19. In the aforesaid factual scenario, the only question that survives is whether this Court, in exercise of jurisdiction under Article 227 of the Constitution, can interfere with the concurrent findings recorded by the lower Courts. The principles are well-settled. This is not a case, and it has not even been urged that the lower Courts do not have jurisdiction to pass the orders made by them, nor is it a case where in exercise of jurisdiction vested with them, the lower Courts have exceeded their jurisdiction, nor is it a case that the lower Courts have failed to exercise the jurisdiction vested in them. The only other ground, on which this

Court can interfere, is the ground of perversity. The extracts of the orders reproduced hereinabove go to show that the orders of the lower Courts cannot be said to suffer from the vice of perversity. Nothing has been brought on record to support the ground of perversity. In fact, it has not even been urged. In these circumstances, once the legal contentions are not found tenable, if on the same set of facts, circumstances and evidence on record the orders of the lower Courts are justified, even if the High Court is in a position to take another view of the matter on the same set of facts, circumstances and evidence on record that by itself would not be sufficient to permit this Court to exercise jurisdiction under Article 227 of the Constitution to interfere in the orders made by the lower Courts. In the result, the petition is summarily rejected.

[Rest of the Judgment is not material for the Reports.]