
(2014) 08 GUJ CK 0099

In the Gujarat High Court

Case No : Special Civil Application No. 15025 of 2013

Girishchandra Rasiklal Shah

APPELLANT

Vs

Hasumatiben Jayantilal Rana

RESPONDENT

Date of Decision : 08-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 32(5), Order 26 Rule 9, 75
Constitution of India, 1950 — Article 226, 227

Citation : (2015) 1 GLR 245

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : Jinesh H. Kapadia, Advocates for the Appellant; Murli N. Devnani for Nisarg D. Shah, Advocates for the Respondent

Judgement

Abhilasha Kumari, J.—Rule. Mr. Murli N. Devnani, learned Advocate, waives service of notice of Rule for the respondent. On the facts and in the circumstances of the case, and with the consent of learned Counsel for the respective parties, the petition is being heard and decided finally. The challenge in this petition under Arts. 226 and 227 of the Constitution of India, is to the order 22-8-2013, passed by the learned Principal Civil Judge, Dakor ("the executing Court" for short), below the application at Exh. 15, preferred by the petitioner for appointment of a Court Commissioner.

2. The brief facts of the case, relevant to the present proceedings, are that the petitioner is the original plaintiff of Regular Civil Suit No. 3 of 2001, which was instituted, inter alia, with a prayer for declaration, mandatory injunction and prohibitory injunction. According to the petitioner, he is the owner of House No. 2648, in Dakor Nagar Panchayat. The wall of the said house, on the eastern side, is of the independent ownership of the petitioner. It is the case of the petitioner that the respondent (original defendant) has encroached upon the disputed wall and caused a breach of the easementary rights and privacy of the petitioner. The suit of the petitioner was decreed, vide judgment and decree dated 27-2-2012.

Execution Petition No. 35 of 2012, was preferred by the petitioner for implementation of the said judgment and decree. The respondent preferred objections vide Exh. 9, which came to be dismissed, vide order dated 28-3-2012. An appeal has been preferred by the respondent against the above order. The petitioner, thereafter, preferred application at Exh. 15, for the appointment of a Court Commissioner, for removal of the encroachment as per the decree passed by the trial Court. This application has been rejected by the impugned order dated 22-8-2013, passed by the executing Court, on the ground that the provisions of Sec. 75 and Order 26, Rule 9 of the Code of Civil Procedure, 1908 ("the Code" for short) are not applicable to execution proceedings.

3. Mr. Jinesh Kapadia, learned Advocate for the petitioner, has submitted that the impugned order passed by the executing Court is not sustainable in law, as the said Court has failed to appreciate that the executing Court has ample power to execute the decree passed by a competent Court and to direct the removal of the encroachment by appointment of a Court Commissioner. The petitioner has not invoked the provisions of Sec. 75 or Order 26, Rule 9 of the Code in the application filed by him. Though, no provision of law is mentioned in the application, however, the Court ought to have considered that it has ample power under the provisions of Order 21, Rule 32(5) of the Code, which provides for such a situation in execution proceedings. By not exercising the jurisdiction vested in it by law, the executing Court caused injustice to the petitioner. On the above grounds, it is submitted that the petition be allowed.

4. Mr. Murli N. Devnani, learned Advocate for Mr. Nisarg D. Shah, learned Advocate for the respondent, has opposed the submissions advanced by the learned Advocate for the petitioner and has submitted that the impugned order does not suffer from any legal infirmity, so as to warrant interference from this Court.

5. Having heard learned Counsel for the respective parties and upon perusal of the material on record, as well as the contents of the impugned order, this Court is of the view that the submissions advanced by the learned Advocate for the petitioner carry considerable weight.

6. On examination of the reasons rendered by the executing Court for rejecting the application of the petitioner, it transpires that the said Court has considered only the provisions of Sec. 75 and Order 26, Rule 9 of the Code and has stated in the said Order that these provisions are not applicable insofar as the prayers made by the petitioner for removal of the encroachment are concerned.

7. This Court cannot lose sight of the fact that the application at Exh. 15 was moved by the petitioner in execution proceedings and not in the suit. Hence, the executing Court was obliged to consider the application as per the provisions of law applicable to execution proceedings. In this regard, the provisions of Order 21, Rule 32(5) may be noted:

"32. Decree for specific performance for restitution of conjugal rights, or for an

injunction.-

(1) *** **

(2) *** **

(3) *** **

(4) *** **

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

(Explanation:- For the removal of doubts, it is hereby declared that the expression "the act required to be done" covers prohibitory as well as mandatory injunctions.)"

8. As per the said provision of law where a decree for specific performance of a contract or for an injunction has not been obeyed, the executing Court has power to direct that the act required to be done may be done so far as practicable by the decree-holder or any person appointed by the Court. In the present case, the decree for injunction has not been obeyed by the respondent, therefore, the executing Court has ample power under the above provision of law to appoint any person, including a Court Commissioner to perform any necessary act in order to execute the decree.

9. In this view of the matter, the conclusion arrived at by the executing Court that the provisions of Sec. 75 and Order 26, Rule 9 of the Code are not attracted in the case of the petitioner, is misconceived. The impugned order is a result of an incorrect exercise of the jurisdiction vested in the executing Court. The executing Court has failed to exercise the jurisdiction vested in it under Order 21, Rule 32(5) of the Code, therefore, the present is a fit case for the exercise of its supervisory jurisdiction by this Court.

10. For the aforesaid reasons, the impugned order dated 22-8-2013, passed below application Exh. 15, is quashed and set aside. The matter is remanded to the executing Court for fresh decision, in accordance with law, after granting the respective parties an opportunity of hearing. The petition is partly - allowed in the above terms. Rule is made absolute to the above extent. There shall be no orders as to costs.