

(2020) 07 GUJ CK 0075

In the Gujarat High Court

Case No : R/Special Civil Application No. 5412 Of 2019, Civil Application (For Direction) No. 1 Of 2019

Koli Rajabhai Rupabhai

APPELLANT

Vs

Dadamben Bherabhai Dhukh

RESPONDENT

Date of Decision : 21-07-2020

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Mamlatdars Courts Act, 1906 — Section 5(2)

Citation : (2020) 07 GUJ CK 0075

Hon'ble Judges : Dr A. P. Thaker, J

Bench : Single Bench

Advocate : Archana R Acharya, Karishma R Chauhan, Dipen F Chaudhari

Final Decision : Disposed Of

Judgement

Â Dr. A. P. Thaker, J

1. By way of present petition under Articles 226 and 227 of the Constitution of India, the petitioner - original respondent No.6 in the Appellate Court

as well as Trial Court has challenged the legality and validity of the order dated 31.12.2018 passed by the learned 6th Additional District Judge,

Banaskantha at Palanpur (hereinafter be referred to as "the Appellate Court") in Misc. Civil Appeal No.9 of 2015 whereby the Appellate Court

has allowed the appeal filed by respondents No.1 to 7 and set aside the order dated 08.05.2015 passed by the learned 6th Additional Civil Judge,

Banaskantha at Palanpur (hereinafter be referred to as "the Trial Court") below application Exhibit 5 in Regular Civil Suit No.150 of 2012

rejecting the application Exhibit 5 filed by respondents No.1 to 7, who are the original appellants "plaintiffs.

2. Brief facts of the present case is that the present petitioner and respondents No.8 to 25 are the original defendants of the aforesaid suit and are the original respondents in the above-mentioned Misc. Civil Appeal. Whereas, respondents No.1 to 7 herein are the original plaintiffs in the aforesaid suit and the appellants in the appeal. That the defendants side are the owners and in possession of agricultural land bearing Revenue Survey No. 131 paiki 1, 131 paiki 2, 131 paiki 7, 131 paiki 4 and 131 paiki 5 situated at Village : Antroli, Taluka : Palanpur, District: Banaskantha. Whereas, the plaintiffs are the owners and in possession of agricultural land bearing Revenue Survey No.130 paiki 1 and 130 paiki 2 of same village. It is contended that the lands of the parties are adjacent to each other. According to the petitioner, there is customary way existing in the lands of the plaintiffs for entering into the lands of the defendants and they are using the same from the time of their forefathers. It is also contended that except the customary way from the lands of the plaintiffs, there is no other alternative way for the defendants for all the purposes.

2.1 It is contended that in the year 2012, the plaintiffs informed the defendants that they have sold their lands and henceforth, the defendants should not used the customary way and also threatened the defendants not to use the customary way in any manner or they would have to face dire consequences. It is contended that since the defendants had no other right of way to enter into in their lands and there was threatened by the plaintiffs and the plaintiffs obstructed and prevented the defendants from using the customary right of way, on 04.10.2012, the defendants filed Mamlatdar Suit No.11 of 2012 before the Mamlatdar, Palanpur under Section 5(2) of the Mamlatdar Court's Act, 1906 inter alia praying for injunction against the plaintiffs. It is contended that in the said matter, the defendants also filed application for temporary injunction and on 09.10.2012, the Mamlatdar, Palanpur issued notice to the plaintiffs and granted interim injunction. It is also contended that on 11.12.2012, the defendants filed an application before the Mamlatdar for implementation of the order and on that application, the Mamlatdar directed to implement the said order. It is further contended that in pursuance of such direction, the Circle Officer carried out site inspection on 16.10.2012 and found that the plaintiffs are standing at the customary way with deadly weapons and threatening the defendants and accordingly, the Circle Officer made a report to the Mamlatdar.

2.2 It is alleged by the petitioner that on 13.12.2012, the plaintiffs filed the aforesaid suit against the defendants for declaration that there is no right of way of the defendants leading to their lands existing in the lands of the plaintiffs and for restraining the defendants from using the way allegedly newly created on the western side of the land of the plaintiffs. According to the petitioner, the said suit was filed by the plaintiffs with an intention to frustrate the order of the Mamlatdar passed under the Mamlatdar Courtsâ?? Act and to avoid compliance thereof. It is contended that along with the suit, the plaintiffs have filed application for interim injunction. That the Court Commissioner carried out the panchnama of the subject path on 26.12.2012 and the defendants filed written statement to the application below Exhibit 5.

2.3 It is contended that meanwhile, in the year 2014, the plaintiffs filed Civil Revision Application No.72 of 2014 which was converted into Special Civil Application No.527 of 2013 before this Court inter alia praying to decide the interim application filed in Mamlatdar Suit afresh after giving opportunity of hearing to both the parties which came to be disposed of by this Court directing the Mamlatdar to decide the Mamlatdar Suit No.11 of 2012 pending before the Mamlatdar.

2.4 It is contended that on 08.05.2015, after considering various submissions of both the sides, the Trial Court rejected the application below Exhibit 5 filed by the plaintiffs. That on 16.06.2015, against the said order, an appeal was filed by the plaintiffs. Meanwhile, the Mamlatdar vide order dated 23.10.2015 allowed the Mamlatdar Suit No.11 of 2012 and confirmed its earlier order dated 09.10.2012, against which, the plaintiffs filed Revision Application No.3 of 2016 before the Deputy Collector, Palanpur whereby the Deputy Collector, Palanpur, on 12.12.2018, dismissed the revision application and confirmed the order dated 23.10.2015 passed by the Mamlatdar.

2.5 It is contended by the petitioner that on 31.12.2018, the Appellate Court has allowed the appeal filed by the original plaintiffs. It is contended that the Appellate Court has committed serious error of facts and law in allowing the appeal of the plaintiffs. It is contended that the Appellate Court has not considered the fact that the Mamlatdar Court has already granted injunction in favour of the respondents as they have no other alternative right of way to enter into their lands and the plaintiffs have closed the customary right of way. It is contended that even from the bare perusal of google map,

it is clearly found that there is only way available to the defendants to enter into their lands i.e. the suit path.

2.6 While referring to the certain decisions, it is contended that as there is no alternative way available to the defendants, the Appellate Court ought

not to have disturbed the findings of the Trial Court and the Appellate Court ought to have considered the fact that there is order of the Mamlatdar

regarding right of way as there is no alternative way available to the defendants, the Appellate Court ought not to have interfered with the order of the

Trial Court in rejecting the application of the plaintiffs. The petitioner has prayed to allow the present petition and quash and set aside the impugned

judgment and order of the Appellate Court.

3. Heard Ms.Archana Acharya, learned advocate for the petitioner and Mr.Chaudhari, learned advocate for the contesting party. Perused the material placed on record.

4. Ms.Archana Acharya, learned advocate for the petitioner has vehemently submitted the same facts which are narrated in the petition and also

referred to all the documents and has also submitted that from the photographs, it is clearly found that there is only way available to the defendants to

enter into their land and there are panchnama also drawn during the pendency of this petition. She has submitted that the concerned party approached

the Mamlatdar for its customary right of way.

She has submitted that the concerned Mamlatdar has passed the order to the effect that the right of way of the original plaintiff should not be

disturbed and this order was passed after hearing both the sides and, therefore, this order ought to have been given due weight-age by the Appellate

Court. According to her submissions, as the plaintiff has no other alternative right of way available and the respondents were trying to interfere with

the said customary right of way, they have approached the Mamlatdar. She has submitted that the order of the Mamlatdar was also believed by the

Trial Court. She has submitted that considering the dispute of the customary right of way, the opposite party may be directed to open the way for the

present petitioner and as the suit is at the recording of evidence stage, it may be expedited and during the pendency of the suit, the otherside may be

directed to open the right of way. While referring to the various panchnamas carried out, she has submitted that the Court Commissioners have not

properly drawn the panchnamas and there is affidavit filed by the concerned owner of the land that the panchnamas of their lands have been prepared

instead of the disputed right of way. While referring to the photographs, she has submitted that from the photographs, it appears that there is way on

the road which has been digged by the opposite party. She has prayed to allow the present petition and requested to direct the opposite party to open

of way and permit the present petitioner to pass from their land as there is no other alternative way available to the petitioner.

4.1 According to her submission, the customary way available to the petitioner is in the field of the original plaintiffs. It is her submission that the order

of interfering with the said way, the party concerned has approached the Mamlatdar and Mamlatdar has passed the order restraining the otherside

from interfering with the right of way of the petitioner. She has stated that thereafter, the Circle Inspector has also made report to the effect that the

right of way is available in the field of the plaintiffs. She has stated that in view of this fact, the plaintiffs ought to have obeyed the order of the

Mamlatdar and should not have made any hindrance in the right of way of the present petitioner. While referring to the various materials on record,

she has submitted that thereafter, the impugned suit was filed and the interim injunction application was also filed wherein the Trial Court has passed

the order in favour of the plaintiffs and against that order, the otherside has preferred appeal before the Appellate Court which has granted injunction

in the form of mandatory injunction, which has resulted into injustice to the party concerned. While referring to the panchnama, she has submitted that

there are different averments in the plaint and the panchnama. She has submitted that the description of the property with four dimension is not

mentioned in the sale deed and there is no mention of the customary way in the sale deed. She has submitted that no proper reasoning has been

afforded by the Appellate Court and the order of the Mamlatdar is still in existence and it is not set aside by the higher forum. She has relied upon the

decision in the case of Sorabji Derabji Vesuna & Others Vs. Nanjibhai Jirabhai Umarigar & Others, reported in 2001 (3) GLH 759 for her preposition

that when there is previous order of the revenue authority, then, it is to be respected by the Court. She has prayed to allow the present petition.

5. Per contra, Mr.Chaudhari, learned advocate for the contesting party has vehemently submitted that the present petitioner has other right of way

available and this fact was not considered properly by the Trial Court and, therefore, the Appellate Court has properly appreciated the facts and rightly rejected the application for interim injunction filed by the concerned party. He has submitted that the panchnama is drawn at the instance of this Court and there are panchnamas on record and the Appellate Court has not committed any serious error of law and fact in setting aside the order of the Trial Court and properly passed the impugned order and there is no perversity in it. He has submitted that the alternative right of way is available to the concerned party and, therefore, no mandatory injunction should be passed at the revision stage and party may be directed to lead their evidence before the Trial Court and the Trial Court may decide the entire suit proceedings on merits and in accordance with law. He has also submitted that the order passed by the Mamlatdar is ex parte order and the otherside was not heard at all by the Mamlatdar and, therefore, the ex parte order passed by the Mamlatdar cannot be basis for creating any right.

6. Considering the submissions and contentions raised by both the sides and materials placed on record, it is crystal clear that there is dispute regarding right of way. It is also an admitted fact that prior to filing of the present suit, the defendants have moved the Mamlatdar for passing necessary order under the Mamlatdars' Courts Act, 1906. Initially, the Mamlatdar has passed the ex parte order and has also called for the report from the Circle Inspector. It also appears from the record that meanwhile, the plaintiffs have filed the suit before the Trial Court seeking ad-interim injunction against the defendants from using the land of the plaintiffs for passing through and going to the land of the defendants. After perusing the materials placed on record, the Trial Court has rejected the application of the plaintiffs. Against that order, the plaintiffs have moved the Appellate Court which has ultimately set aside the order of the Trial Court and passed the injunction in favour of the original plaintiffs. Now, according to the petitioner herein, the order passed by the Appellate Court is nothing but passing of final decree at the interim stage. It appears from the record that the petitioner herein has relied upon the google map for his submissions that he has no other alternative way except passing through the plaintiffs' land. Now, on perusal of the said google map, the ways are shown in the said map, but internal ways are not shown therein. It is difficult to find out the exact location of the field of

parties and there is need of evidence regarding the way of both the sides. Further, the petitioner has also referred to various photographs showing that the right of way is passing through the land of the plaintiffs. But at the same time, the petitioner has also produced the documents showing that there are ditches made in the disputed way. Now, the question is who has made that ditches. This fact requires necessary evidence. Thus, there is factual dispute regarding existence of right of way and there is no proper material produced by both the sides to decide the point at the interim stage during the pendency of the suit more particularly the facts as to the present situation on the ground level. If the say of the petitioner is accepted as it is, then, the photographs produced by the petitioner would reflect that at present there are ditches on the alleged right of way and way is not in usable condition. All these facts need evidence.

7. Now, so far as the submissions of the petitioner that by passing the impugned order by the Appellate Court, it amounts to passing of a decree in favour of the plaintiffs is concerned, the same principle would apply in case of passing of order in favour of the petitioner herein. Further, the panchnamas drawn in this case have also controversial in nature as certain persons have filed affidavits to the tune that instead of drawing panchnama of the right of way, the Commissioners have drawn the panchnamas in their respective lands which are not subject matter of the suit. Thus, the factum narrated in the panchnama is in dispute. All these facts need proper evidence on record. This is a peculiar matter wherein neither side has produced any prima facie material regarding their alleged averments in the petition. Under these circumstances, it is desirable that both the sides would have to lead the evidence in the matter and the question of right of way is decided by the Trial Court on the basis of the evidence led by both the sides. At the same time, the interim order passed by the Appellate Court would always be subject to the final outcome of the suit. The Trial Court is required to decide the disputed question of right of way independently without being influence by the observation of the Appellate Court which was qua the interim stage.

8. In view of this fact, the present petition is required to be disposed of with a direction to the Trial Court to see to it that the suit is disposed of, as expeditiously as possible preferably, within a period of three months from the

date of receipt of the writ of this order. The parties are directed to cooperate with the Trial Court in deciding and disposing of the suit in time bound manner.

9. With these observations, the present petition stands disposed of accordingly. Record and Proceedings be sent back to the concerned Trial Court

immediately. No order as to costs.

10. In view of the disposal of the main petition, the civil application does not survive and it is disposed of accordingly.