

(2011) 11 GUJ CK 0072

In the Gujarat High Court

Case No : Special Civil Application No. 6382 of 2004

Kumarpal Nagardas Shah and 2

APPELLANT

Vs

Hardaben and Others

RESPONDENT

Date of Decision : 08-11-2011

Acts Referred:

Civil Procedure Code Amendment Act, 1999 — Order 16 Rule 1(3) , Order 16 Rule 1A,
Order 18 Rule 17, Order 18 Rule 17(1)
Constitution of India, 1950 — Article 227

Citation : (2011) 11 GUJ CK 0072

Hon'ble Judges : J.B. Pardiwala, J

Bench : Single Bench

Advocate : P.M. Bhatt for Petitioners -3, for the Appellant; Rule Served for Respondent(s) 1 -3 and Mr. Amar D. Mithani for Respondent(s) 1 -4., for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice J.B. Pardiwala

1. By way of this petition under Article 227 of the Constitution of India, petitioners No.1 and 2 - original plaintiffs and petitioner No.3 - witness examined on behalf of the original plaintiffs have challenged the order dated

13.05.2004 passed by the 2nd Joint Civil Judge (S.D.), Ahmedabad (Rural) below Ex. 142 in Special Civil Suit No.53 of 1999 whereby the application Ex. 142 preferred by the petitioner No.3 in his capacity as a witness of the original plaintiffs for production of the documents, after his examination-in-chief was over, came to be rejected.

2. The brief facts giving rise to this petition can be summarized as under :

The petitioners No.1 and 2 are the original plaintiffs who have filed Special Civil Suit No.53 of 1999 in the Court of Civil Judge (S.D.), Ahmedabad Rural for specific performance of the contract against the original defendants. It appears

that the petitioners No.1 and 2 examined the petitioner No.3 as their witness. After examination-in-chief of petitioner No.3 as a witness of the original plaintiffs came to an end. Subsequently, an application came to be preferred Ex. 142 by the petitioner No.3 in his capacity as witness seeking permission to once again to enter the witness box and produce certain document which inadvertently he failed to adduce as evidence during the course of his examination-in-chief. It is pertinent to note that in the application Ex. 142 it has been averred that such documents which contained signature of the plaintiffs and the contents are also in the handwriting of the original plaintiffs was in possession of the petitioner No.3 as witness, but inadvertently he failed to produce the same during the course of his examination-in-chief. Having realized this witness i.e. petitioner No.3 preferred an application Ex. 142.

3. This application Ex. 142 was adjudicated by learned Civil Judge and after taking into consideration the objections in writing filed by the original defendants i.e. original respondents herein, the learned Civil Judge in exercise of his discretionary powers rejected the application. Learned Civil Judge in the facts and circumstances of the case refused to exercise its discretion in this regard after assigning cogent reasons.

4. It would be expedient at this stage to state that earlier there was a provision in the CPC in the form of Order 18, Rule 17-A permitting production of evidence not previously known or which could not be produced despite due diligent. Order 18, Rule 17-A came to be omitted by the CPC (Amendment) by Act 46 of 1999. Order 18, Rule 17-A was inserted by amendment in 1976 with a view to give an opportunity to have party to adduce the evidence under the circumstances mentioned therein. By the Amendment Act, 2002, this sub rule has been deleted. It is quite evident that Rule 17-A has been deleted with a view that unnecessarily applications are not filed primary with a view to prolong the matter. However, I do not propose to say that deletion of Order 18, Rule 17-A disentitles a party to produce evidence at a later stage. If a party satisfies the Court that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at latter stage. In this regard, it would be appropriate to quote paragraph No.14 of Supreme Court ruling in the case of Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI), as under :

In Salem Advocates Bar Association's case, it has been clarified that on deletion of Order XVIII, Rule 17-A which provided for leading of additional evidence, the law existing before the introduction of the amendment, i.e. 1st July, 2002, would stand restored. The Rule was deleted by Amendment Act of 2002. Even before insertion of Order XVIII Rule 17-A, the Court had inbuilt power to permit parties to produce evidence not known to them earlier or which could not be produced in spite of due diligence. Order XVIII Rule 17-A did not create any new right but only clarified the position. Therefore, deletion of Order XVIII Rule 17-A does not disentitle production of evidence at a later stage. On a party satisfying the Court

that after exercise of due diligence that evidence was not within his knowledge or could not be produced at the time the party was leading evidence, the Court may permit leading of such evidence at a later stage on such terms as may appear to be just."

5. Learned Counsel Mr.P. M. Bhatt appearing for the petitioners - original plaintiffs has relied on the decision of the Supreme Court in the case of Ashok Sharma Vs. Ram Adhar Sharma, in support of his contentions that the Civil Judge ought to have allowed the application Ex. 142 keeping in mind Order-16, Rule1-A of the Civil Procedure Code. I am afraid this ruling of the Supreme Court, would not be of any help to the petitioners as the issue involved in this case is all together different. In the case before the Supreme Court, the trial Court refused the prayer of production of the documents on a simple interpretation of the word "production" as used in Order 16 Rule 1 of the Code which, according to the trial court, would mean that the witness can be summoned to bring the record to prove the documents placed on record by the parties to the suit. In the case before the Supreme Court, the document was not produced by the plaintiffs either along with the plaint or at the time of framing of the issues. The High Court permitted the document to be taken on record at the instance of the witnesses. In these facts Supreme Court held that Order 16 Rules 1 and 1-A of the Code, if read together, would clearly indicate that it is open to a party to summon a witness to the court or even may, without applying for summons, bring a witness to give evidence or to produce documents. The Supreme Court clarified that since Rule 1-A is subject to the provisions of sub-rule (3) of Rule 1, all that can be contended is that before proceeding to examine any witness, who might have been brought by a party for the purpose, the leave of the court may be necessary.

6. In the present case, petitioner Nos.1 and 2 as original plaintiffs preferred application before the learned Civil Judge praying that the petitioner No.3 may be permitted to be examined as their witness and that application was allowed and accordingly petitioner No.3 in his capacity as a witness of the original plaintiffs stepped into the witness box. His examination-in-chief was recorded and after examination-in-chief was closed at a later stage, application Ex. 142 came to be preferred stating that he may be permitted once again to enter the witness box to produce the documents which he could not produce when his examination-in-chief was in progress. Learned Civil Judge found that the explanation was too lame and feeble and did not deem fit to exercise his discretion in favour of the petitioner No.3.

7. It is not the case of the petitioner No.3 that when he led the evidence, the evidence now sought to be produced, was not within his knowledge and could not be produced despite due diligence. The reason for non-production of such evidence at the relevant time is that it could not be produced due to inadvertence. Inadvertence is a form of negligence, therefore, non-production of the evidence sought to be now produced, is attributable to negligence and failure

to produce such evidence because of inadvertence / negligence, is not a lawful ground to permit a party to lead additional evidence within the ambit and scope of Rule 17A of Order 18 of the Code as it stood before amendment.

8. Having considered the entire matter threadbare, I am of the view that no jurisdictional error can be said to have been committed by the learned Civil Judge in rejecting the application Ex. 142 warranting any interference in this petition Article 227 of the Constitution of India. In the above view of the matter, this petition is accordingly rejected with no order as to costs. Rule is discharged.

9. It has been brought to my notice that there are two civil suits in progress and which have been ordered to be consolidated. Special Civil Suit No.53 of 1999 and Special Civil Suit No.978 of 1997, both are now more than almost 13 years old, I deem it fit and proper to direct the concerned Civil Court to take up both the civil suits for hearing and dispose them of in accordance with law on or before 30th April 2012. It is also brought to my notice that the issues in both the suits were already framed way back in the year 1999. It is needless to clarify that both the civil suits shall be decided by the concerned Court without being any influence by any finding recorded in the order passed below Ex. 142 dated 13.05.2004 passed in Special Civil Suit No.53 of 1999.