

(2011) 02 GUJ CK 0022
In the Gujarat High Court

Case No : Letters Patent Appeal No. 1514 of 2010 in Special Civil Application No. 11473 of 2008 and Civil Application No. 7320 of 2010 in Letters Patent Appeal No. 1514 of 2010

Mahalaxmi Construction Co. and Others	APPELLANT
Vs	
Amita Corporation and Others	RESPONDENT

Date of Decision : 14-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10A
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 73

Citation : (2011) 02 GUJ CK 0022

Hon'ble Judges : S.J. Mukhopadhaya, C.J;K.M. Thaker, J

Bench : Division Bench

Advocate : M.B. Gandhi,s 1-3, for the Appellant; Ashwin V. Bhatt, for Respondents 1-3, for the Respondent

Final Decision : Dismissed

Judgement

K.M. Thaker, J.—Present appeal under Clause 15 of the Letters Patent is directed against the order dated 3.3.2010 passed by the learned Single Judge rejecting the petition preferred by the present Appellants against the order passed by the learned trial Court, at an interlocutory stage, below Exh.283 in Civil Suit No. 915 of 1989.

2. The Petitioners before the learned Single Judge are the original Defendant Nos. 1 to 3 before the trial Court.

3. The facts, which emerge from the record, can be summarized thus:

3.1 Present opponents i.e. the original Plaintiffs have filed a suit for enforcement of the development agreement executed between the Plaintiffs and the original Defendants i.e. the Petitioners-Appellants.

3.2 During the pendency of the suit, after the evidence of the Plaintiffs was

concluded, the original Defendants i.e. present Petitioners-Appellants filed an application (Exh.283) requesting the Court to pass an order to appoint a Handwriting Expert and refer the document in question for the opinion of Handwriting Expert. The said document in question was already available on record before the Court at Exh.203.

3.3 The said application Exh.283 filed by the Defendants was opposed by the Plaintiffs on diverse grounds. The Plaintiffs contended that the application Exh.283 amounted to requesting the Court to collect the evidence on behalf of the Defendants. The Plaintiffs also contended that the Defendant No. 1 had not examined himself and the witness of the Defendant No. 1 had filed examination-in-chief on 15.3.2005 (Exh.262) and until then, any dispute about the signature of the Defendant No. 1 was not raised by the said Defendant. The Plaintiffs also contended that the agreement in question (Exh.203) dated 31.3.1986 and the suit was filed in 1989 whereas the application (Exh.283) making the aforesaid request came to be filed in 2007 i.e. after almost 18 years since the presentation of the suit and that too without the evidence of the Defendant No. 1 being on record. In this background, the Plaintiffs contended that the sole intention of the Plaintiffs was to delay the proceedings.

3.4 The learned trial Court heard the contesting parties and by its order (below Exh.283) dated 15.7.2008 rejected the application Exh.283 filed by the Defendants.

3.5 Aggrieved by the said order, passed at an interlocutory stage by the learned trial Court, the Defendants preferred the writ petition and the learned Single Judge by order dated 3.3.2010 rejected the said petition. It is against the said order that the present appeal is preferred.

4. We have heard Mr. Gandhi, learned advocate for the Petitioners-Appellants and Mr. Bhatt, learned advocate for the Respondents-original Plaintiffs.

5. The Appellants-Petitioner original Defendants, have contended that they have disputed the agreement in question in their reply and that therefore, it is necessary that evidence of independent witness viz. Handwriting Expert may come on record in connection with the signature, of the Defendant No. 1. The Defendants have contended that to support their submission, the said independent evidence is necessary.

6. It is not in dispute that the agreement in question is dated 31.3.1986. It is also not in dispute that the subject suit No. 915 of 1989 has been filed by the opponents for specific performance of the said agreement dated 31.3.1986 (Exh.203).

6.1 It is also not in dispute that though the suit has been filed since 1989, the disputed application (Exh.283) came to be submitted by the Defendants in July-2007 i.e. after almost 18 years.

6.2 The Petitioner-Appellant has not disputed the Plaintiff's (present

Respondent) assertion that the original Defendant No. 1 (whose signature is sought to be disputed) has not deposed before the Court and has not disputed his signature by his own evidence.

6.3 In this background, as aforesaid, the Plaintiffs opposed the application.

7. It is pertinent that the Defendant No. 1 (whose signature is sought to be now disputed) has not deposed i.e. has not given his own oral evidence and has not himself disputed his signature by his own evidence before the Court.

7.1 Furthermore, any opinion of expert was not placed on record and/or any expert was not examined by the Defendants i.e. present Appellants, before tendering the application (Exh:283).

7.2 Under the circumstances, there was no base and there is no base or foundation and justification for making an application seeking appointment of Handwriting Expert and referring the document in question for his opinion.

7.3 The objection of the Plaintiffs against the said application to the effect that the application has been filed with an ill-intention to delay and derail the suit proceedings, appears justified in background of facts of present case.

8. Having regard to the rival contentions and after hearing the parties, the learned trial Court in the order impugned before the learned Single Judge has observed that:

It is not in dispute that the document contending the disputed signature is produced at Exh.203. As to what is the evidentiary value of the said document or the signature, etc. is a question of appreciation at the time of finally hearing the arguments of the parties.

8.1 The trial Court, after having observed, as aforesaid, also recorded that:

If the party is aware of the facts on record, it is for the party to decide as to when and how it should meet with the facts and it is not for the Court to assist the party in getting the witness examined. It is also a settled legal position that one who asserts must prove and therefore, once the Plaintiff having produced a particular document claiming that it is a document showing contract between the Plaintiff and the 1st Defendant, it is for the 1st Defendant now to deal with the said document by leading appropriate evidence because it is the Defendant No. 1 who is asserting that the document does not contain his signature.

8.2 It is pertinent to note that the learned trial Court also noted that the Defendant No. 1 was the best person to say as to whether or not the document in question contained the signature.

9. The opponents i.e. the original Plaintiffs have, before us, contended that until the said application Exh.283 came to be submitted and even thereafter until the impugned order came to be passed, the Defendant No. 1 had not given his evidence and had not disputed his signature by his own evidence. The said

assertion by the Plaintiffs-opponents is not disputed before us by the Appellants-Plaintiffs.

9.1 The original Plaintiffs also asserted before us that even during the evidence of the Plaintiffs particularly during the cross-examination such dispute was not raised or such suggestion was not put (during cross examination) to the Plaintiffs/Plaintiffs" witness. In the submission of the Plaintiffs" the conjoint effect of the aforesaid prominent factual aspect was clear i.e. the Plaintiffs intended to delay the proceedings. The learned trial Court has then, while concluding the order, observed thus in the impugned order:

...The fact as to whether the document in question contains the signature of Defendant is in personal knowledge of the Defendant No. 1 because the Defendant No. 1 possesses or might be possessing its admitted signatures and therefore, it is for the Defendant No. 1 to discharge his part of the burden. It may be clarified that this is not to say that the Plaintiff has successfully proved the document in question or the contents thereof, that aspect will have to be dealt with at the time of arguments keeping in view the necessary legal provisions and the position of law. At this stage, the Court is dealing with the question of appointment of the Handwriting Expert at the instance of the Court for the first Defendant. In the opinion of this Court, such an application cannot be maintained for the simple reason that it is the choice of the first Defendant to decide as to how the first Defendant should proceed in the matter and the Court is not for appointment of a witness for enabling the party to lead evidence....

9.2 The learned Single Judge has taken note of the aforesaid aspects and noted the contentions of the Petitioners-Appellants that Rule-10(A) of Order XXVI of the CPC does provide for commission for scientific investigation. The learned Single Judge also noted that the contention of the Petitioners based on the provision u/s 73 of the Indian Evidence Act which provides for comparison of signature. The learned Single Judge has also noted the Petitioners" submission based on the observations in the judgments between Ashok kumar Uttamchand Shah v. Patel Mohmad Asmal Chanchand 1998(2) GLH 257 and Gaudiya Mission v. Shobha Bose and Anr. 2008 (1) GLH 488.

9.3 The learned Single Judge has observed that the said decisions have no application to the facts of the case and that the provision u/s 73 of the Evidence Act does not make it compulsory for the Court to follow only one course of action. The learned Single Judge, after detailed discussion, did not find merits in the Petitioners" contention and rejected the petition.

9.4 Mr. Gandhi, learned advocate for the Petitioners-Appellants, has reiterated the same submissions before us. In our view, the appeal does not merit consideration and we are not inclined to interfere with the order passed by the learned Single Judge confirming and approving the interlocutory order passed by the learned trial Court.

9.5 In the first instance, the writ petition does not deserve to be entertained

against an interlocutory order.

9.6 Furthermore, when the Defendants i.e. the Petitioners-Appellants submit an application after pendency of the suit for about 20 years and raise objection after the evidence of the Plaintiffs is over, then, the prima facie impression which the conduct of the Defendants would generate is that the Defendants are interested in delaying the proceedings. Besides this, it does not come out from the record that the Plaintiffs-Appellants have, before tendering the said application, tried to place on record any independent opinion of Handwriting Expert, which might have been or could have been obtained by them. In absence of such attempt i.e. without examining any witness or without placing on record opinion of any independent Handwriting Expert when the Defendants submitted such an application and the learned trial Court rejected the same with the aforesaid observation then, we do not find any error in the said order.

9.7 The Appellant, instead of tendering the application (exhibit 283) and prosecuting it over a period of some adjournments and inviting order and then challenging the order in a petition and then preferring Letters Paten Appeal, could have examined their own witness. The conduct justifies Plaintiff's contention that the Defendant simply intends to delay the suit.

10. The trial Court has, evidentially, examined the rival contentions in detail and has, as noted earlier, observed, and rightly so, that "...one who asserts must prove and therefore, once the Plaintiff having produced a particular document claiming that it is a document showing a contract between the Plaintiff and the first Defendant, it is for the first Defendant now to deal with the said document by leading appropriate evidence...." The said observations by the learned trial Court clinches the issue and we do not find any error in the said observations in light of which the application preferred by the present Appellants came to be rejected.

11. When the application (exhibit-283) is submitted almost 18 years after presentation of the suit and much time after the presentation of the document in question on the record and when the Defendant No. 1(whose signature is sought to be disputed) himself has not deposed before the Court and has not disputed his signature and when during the Plaintiff's evidence, particularly in cross-examination, any question-suggestion to the said effect is not put and when the original Defendants i.e. present Appellant-Petitioners have not examined any witness (even an expert) on the issue of hand-writing/signature (though they could have done so) and when the learned Trial Court after examining all the aspects found it appropriate to not to allow the application (exhibit 283) then, we, in an appeal preferred against an order passed in a petition under Article 227 of the Constitution of India and that too in respect of an interlocutory order, are not only not inclined to interfere but upon examination of the order in light of the facts noted in this order, we do not find any infirmity in the order by the trial Court and by the learned Single Judge.

12. In our considered view, the order passed by the learned trial Court does not suffer from any infirmity. Furthermore, the appeal arising from a writ petition preferred against interlocutory order even otherwise, does not deserve to be entertained and therefore, we are not inclined to entertain such appeal. More so, when the interlocutory order impugned in the petition does not deprive the Defendants, in any manner whatsoever of any of their legal rights and also does not suffer from any error.

The appeal, therefore, fails and deserves to be rejected and the same is rejected.

In view of disposal of main Letters Patent Appeal, Civil Application also stands disposed of.