

(2010) 01 GUJ CK 0036
In the Gujarat High Court

Case No : Special Civil Application No's. 12185 and 12190 of 2009

Maheshbhai S. Vadhvani

APPELLANT

Vs

Jagdishbhai Manilal Bhojani and Another

RESPONDENT

Date of Decision : 13-01-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Constitution of India, 1950 — Article 227

Citation : (2010) 51 GLR 628

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : Y.N. Oza and Ashish B. Desai, for the Appellant; Vimal M. Patel and S.P. Majmudar, for the Respondent

Judgement

Abhilasha Kumari, J.—Rule. Mr. Vimal M. Patel, learned Advocate waives service of notice of Rule for respondent No. 1 and Mr. S.P. Majmudar, learned Advocate waives service of notice of Rule for respondent No. 2. With the consent of the learned Counsel for the respective parties, the petition is being heard and finally decided today.

2. As both petitions deal with common questions of law and fact, they are being heard and decided by a common judgment. For the sake of brevity, the facts of Special Civil Application No. 12185 of 2009 have been referred to. This petition, filed under Article 227 of the Constitution of India challenges order dated 16-9-2008 passed below application at Exh. 24 and order dated 3-11-2009 passed below application at Exh. 76, both of which have been rendered by the trial Court.

3. At the very outset, Mr. Y.N. Oza, learned Senior Advocate appearing with Mr. Ashish B. Desai for the petitioner, has submitted that the interest of justice would be met if the Court does not go into the merits of the case, but only decides the petition with respect to the issue regarding the so-called "undertaking" that is purported to have been given by the learned Counsel for the petitioner before

the trial Court, as recorded in impugned order dated 16-9-2008, and on the basis of which the impugned order dated 3-11-2009 has been passed.

4. The brief factual background leading to the filing of the petitions is that the respondent No. 1 (original plaintiff) preferred a civil suit, being Special Civil Suit No. 131 of 2008, for grant of declaration and permanent injunction against four defendants, out of which only two defendants i.e. petitioner (Original defendant No. 2) and respondent No. 2 (original defendant No. 1) are impleaded in the present petition.

5. The petitioner (original defendant No. 2) filed an application at Exh. 11 under the provisions of Order 7, Rule 11 of the CPC for dismissal of the plaint, which was rejected by order dated 16-9-2008. However, that is not the subject-matter of the present petition. On that very day, respondent No. 1 (original plaintiff) filed an application at Exh. 24, with a prayer to grant an order of status-quo regarding the suit property, till the application at Exh. 5 filed by him is decided. The learned Advocate for the petitioner (original defendant No. 2) and respondent No. 2 (original defendant No. 1) before the trial Court was served with a copy of the application at Exh. 24. He made a specific endorsement on the said application in the vernacular, to the effect that:

We are opposing this application. Today, the Hon'ble Court was to pronounce the order. The order is pronounced today in the afternoon. Appeal is to be preferred against the order before the Hon'ble Gujarat High Court. In this situation reply/objections are not filed. I request that appropriate order may be passed for hearing and to file reply/objections.

The Court below disposed of application at Exh. 24 on the same day, that is 16-9-2008, by passing an order which reads;

In view of undertaking by L.A. of deft application is disposed of accordingly. 16-9-2008.

6. Thereafter, the respondent No. 1 (original plaintiff) moved an application at Exh. 76, as according to the plaintiff, both defendants Nos. 1 and 2 (the petitioner and respondent No. 2) are violating the undertaking and one person of the defendant No. 2 (petitioner) is cultivating the suit land by plying a tractor. An order of status-quo, was therefore, prayed for. This application has been allowed by order dated 3-11-2009 on the ground that there was an undertaking by the learned Advocate for the petitioner (original defendant No. 2). Aggrieved by the orders dated 16-9-2008 and 3-11-2009 passed below applications at Exh. 24 and Exh. 76, the petitioner has approached this Court by filing the petition.

7. Mr. Y.N. Oza, learned Senior Advocate for the petitioner has submitted that the order passed below application at Exh. 24 on 16-9-2008 is erroneous as the endorsement made by the learned Advocate for the petitioner before the trial Court is clearly visible on the left hand side of the application and there is no mention of an undertaking in the said endorsement. In fact, the application at

Exh. 24 contains a prayer to grant an order of status-quo, and nowhere is it reflected in the body of the said application, that any undertaking has been given by the learned Advocate for the petitioner, before the trial Court. The said application has been opposed and it is clearly endorsed that an appeal is to be preferred before the High Court and in this situation, the reply/objections are not filed and an appropriate order may be passed for hearing and to file reply/objections. It is emphasised that this endorsement can, in no manner, be construed as a undertaking. The learned Senior Advocate for the petitioner further submitted that the order of the Court wherein the word of "undertaking" has been mentioned does not specify what is the nature of the undertaking, when it was given, and what is the duration for the undertaking, therefore, any order passed on the basis of this order, cannot be permitted to stand. It is further contended that the order below application at Exh. 76 has been passed in view of the so-called "undertaking" but nowhere has it been mentioned what the nature or content of the undertaking was/is. It is denied that any "undertaking" has been given by the petitioner. It is further urged, on behalf of the petitioner, that the respondent No. 2, solely with a view to binding down the petitioner has filed the application at Exh. 29, wherein it is declared that an "undertaking" has been given by the learned Advocate for the petitioner. It is further submitted that the respondent No. 2 (original defendant No. 1), who had supported the case of the petitioner before the trial Court as a co-defendant and was defended by the same learned Advocate, has now colluded with the respondent No. 1, which is proved by the affidavit-in-reply filed by him before this Court, supporting the stand of the respondent No. 1, whereas, such a stand was never taken before the trial Court. The learned Senior Advocate for the petitioner has relied upon a judgment of the Supreme Court in Babu Ram Gupta Vs. Sudhir Bhasin and Another, wherein it has been held that in the absence of any express undertaking in writing given by a party or any undertaking incorporated in the order of the Court, it would be difficult to hold that the appellant (in that case) willfully disobeyed or committed breach of such an undertaking. It is further submitted that the case of the petitioner is squarely covered by the above-mentioned judgment. As there is no express undertaking in writing and nor has the Court recorded the nature or content of the undertaking, (though denied) it cannot be said that the petitioner has committed a breach of any undertaking so as to justify the passing of the impugned order below Exh. 76.

8. Mr. Vimal M. Patel, learned Counsel for the respondent No. 1 (original plaintiff) has vehemently contested the petition and has submitted that, though there is no written undertaking by the petitioner on record, the learned Advocate who was earlier appearing for the petitioner before the trial Court, has given a verbal undertaking, and that undertaking has been mentioned by the trial Court in the impugned orders. It is further submitted that the petitioner is now trying to take advantage of the change of Advocate before the trial Court. In order to bring to the notice of the new Advocate engaged by the petitioner before the trial Court, the respondent No. 1 has supplied a copy of the application at Exh. 29 to him,

wherein it is stated that the undertaking has been given, and the same has been received by the said Advocate. That the conduct of the petitioner is such that no relief can be granted in his favour, as the petitioner is now trying to take undue advantage by resiling from a verbal undertaking that was given by his Advocate before the trial Court regarding maintenance of status-quo qua the suit property. It is further contended that the impugned orders have been correctly passed and do not deserve to be interfered with, by this Court.

9. Mr. S.P. Majmudar, learned Counsel for the respondent No. 2 (original defendant No. 1) has supported the stand of the respondent No. 1 (original plaintiff) before this Court and has reiterated the averments made in the affidavit-in-reply filed by him wherein it is stated that the petitioner has given an oral undertaking.

10. Having heard the learned Counsel for the respective parties and having considered the material on record, I would like to make it clear at the very outset, that this Court is not inclined to go into the merits of the case, or the issues that are in dispute between the parties before the trial Court. The entire controversy has arisen due to the "undertaking" purported to have been given by the learned Advocate for the petitioner before the trial Court. It is not for this Court to decide whether an undertaking was given or not, and if given, what was the nature and content of the undertaking, or the duration for which it would operate. In my considered view, these details ought to have been recorded by the trial Court itself. Had an oral undertaking been given by any of the parties or their learned Advocate(s), the Court should have expressly recorded the exact terms of the undertaking in its order. The record and proceedings of the case have been called for and perused. It transpires that there is no written undertaking on record, and this position is not disputed by the learned Counsel for the respondents, as well. The stand of the respondents is that an oral undertaking was given by the learned Advocate for the petitioner before the trial Court, to the effect that the petitioner shall maintain status quo, in respect of the suit property till the final decision of the application at Exh. 5. Having perused the contents of the impugned orders and the record of the case, I am unable to find any record of such an undertaking. No undertaking has expressly been given in writing by the petitioner or his learned Advocate. The Court has also not recorded any undertaking. If the contents of the application at Exh. 24 filed by the respondent No. 1 (original plaintiff) on which the Court has recorded the order dated 16-9-2008 regarding the undertaking are perused, it is clear that the prayer made therein is for grant of status-quo till the hearing of application at Exh. 5-Nowhere has it been mentioned that an undertaking, oral or in writing, has been given. It is true that the respondent No. 1 (original plaintiff) has filed another application/purshis at Exh. 29 on 22-9-2008, declaring that on the last date of hearing that is 16-9-2008, the learned Advocate appearing for the petitioner and respondent No. 2 has given an undertaking on behalf of his clients that status-quo qua the suit property would be maintained, but strangely enough, the order of the Court dated 16-9-2008 passed below this application

does not disclose whether the undertaking was an oral one, or in writing, and what were the express terms of the said undertaking. The impugned order below the application at Exh. 76 also mentions an undertaking and appears to have been passed on the basis of the undertaking referred to in order dated 16-9-2008. However, the nature and contents of the undertaking and duration of its operation, has not been referred to.

11. On these facts and circumstances, this Court is faced with a situation where there is no material on record to indicate what are the contents and terms of the undertaking referred to, its nature or the duration of time for which it would remain in place. Assuming there may have been an oral undertaking, the terms and conditions thereof ought to have been expressly recorded by the trial Court. Merely, by mentioning the word "undertaking" it cannot be gauged what the exact terms of the undertaking were. In a situation where the rival parties are engaged in litigation against each other, it would neither be prudent, nor proper, to place complete reliance on the construction given by the respondent No. 1 in Exh. 29, "declaring" the nature of the undertaking, in the absence of any order recording the same. It is the bounden duty of the Courts to pass judicial orders precisely and clearly, as orders of the Courts below are amenable to appeal/judicial review by superior Courts. It ought to be kept in mind that recording correct events and giving proper reasons is necessary, so that the superior Court is in a position to understand the factual position regarding what transpired before the concerned Court. It is only through the orders of the Courts that superior Courts can get a fair idea of the happenings that transpired. Judicial orders of the trial Court form the basis of proceedings and should contain a clear and precise reflection of judicial proceedings. Undertakings given by any party can be of various kinds. There can be a complete undertaking, or a partial or conditional one. The exact nature and contents of an undertaking cannot be gauged unless it is expressed in writing or, if oral, incorporated clearly in the order of the Court before which it is given. Just by writing the word "undertaking" in the order does not absolve the Court from its responsibility to record the exact terms of the undertaking given by any party or its Advocate, (in this case the learned Advocate for the petitioner, before the trial Court), as such an undertaking would affect the rights of parties, and could also invite certain consequences, if it is flouted.

12. In the present case, in the absence of the undertaking being recorded in the impugned orders of the Court, it is only the word of the respondent No. 1 against the word of the petitioner that the Court is faced with. In such a situation, the Court will not enter into the arena of disputed questions of fact.

13. In *Babu Ram Gupta v. Sudhir Bhasin* (supra), the Supreme Court was dealing with the issue regarding contempt of a compromise decree. In Paragraph 10 of the said judgment, certain tests have been laid down, which are extremely pertinent for the decision of the case in hand. The relevant extract is reproduced below:

10. *** ** In the absence of any express undertaking given by the appellant or any undertaking incorporated in the order impugned, it will be difficult to hold that the appellant willfully disobeyed or committed breach of such an undertaking. What the High Court appears to have done is that it took the consent order passed which was agreed to by the parties and by which a receiver was appointed, to include an undertaking given by the contemner to carry out the directions contained in the order. With due respects, we are unable to agree with this view taken by the High Court. ***** In these circumstances, we are satisfied that unless there is an express undertaking given in writing before the Court by the contemner or incorporated by the Court in its order, there can be no question of willful disobedience of such an undertaking. In the instant case, we have already held that there is neither any written undertaking filed by the appellant nor was any such undertaking impliedly or expressly incorporated in the order impugned. Thus, there being no undertaking at all the question of breach of such undertaking does not arise.

14. Applying the principles of law enunciated by the Supreme Court to the present case, it is the admitted position that no express undertaking has been given in writing by the petitioner or his learned Advocate before the trial Court. It is also clear that the date of the undertaking (if any), its nature, contents, terms and duration, have not been recorded by the trial Court. It cannot, therefore, be decided whether the petitioner has fully or partially, if at all, committed a breach of an undertaking. The impugned orders refer casually to an "undertaking" without any further detail. By not clearly recording the express terms of the undertaking if given, confusion and multiplicity of litigation has arisen. In such circumstances, with nothing concrete to go by, the impugned orders deserve to be set aside. The trial Court has committed an error by not exercising jurisdiction vested in it, in accordance with law.

15. For the reasons stated hereinabove, the order dated 16-9-2008 passed below application at Exh. 24 and order dated 3-11-2009 passed below application at Exh. 76 are quashed and set aside, in both the petitions. The petitions are partly allowed, as above. Rule is made absolute to the above extent, in each petition.

It is clarified that the Court has not gone into the merits of the case and the trial Court is at liberty to decide the issues before it, after hearing the parties, and in accordance with law. It is also open to the respondent No. 1 to move the trial Court for an early hearing of the application at Exh. 5. If so moved, the trial Court shall decide the same, as expeditiously as possible.

The Record and proceedings be sent back to the concerned Court.