

(2009) 08 GUJ CK 0016

In the Gujarat High Court

Case No : Spl. Civil Application No. 3661 of 2009

Muktaben Mohanjibhai Solanki and Another

APPELLANT

Vs

Jagdishbhai Devrajbhai Patel

RESPONDENT

Date of Decision : 27-08-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 115
Constitution of India, 1950 — Article 226 , 227

Citation : AIR 2009 Guj 172

Hon'ble Judges : Abhilasha Kumari, J

Bench : Single Bench

Advocate : Ashish H. Shah, for the Appellant; Utpal M. Panchal, for the Respondent

Final Decision : Allowed

Judgement

Abhilasha Kumari, J.—Rule. Mr. Utpal M. Panchal, learned Counsel states that he has now been engaged by the respondent in place of Mr. D.R. Dalal, who was representing the respondent earlier, and has filed his Vakalatnama in the Registry today. Mr. Utpal M. Panchal, learned Counsel waives service of notice of Rule for the respondent. On the facts and in the circumstances of the case, and with the consent of the learned Counsel for the respective parties, the petition is being heard and finally decided today.

2. This petition has been preferred under Articles 226 and 227 of the Constitution of India with a prayer to quash and set aside the order dated 7-3-2009 passed below application at Exh.42 in Regular Civil Suit No. 595 of 2005 by the learned 4th Addl. Senior Civil Judge, Surat, whereby the said application filed by the respondent (original defendant) for amendment in the written statement has been allowed.

3. The brief facts of the case, as emerging from a perusal of the averments made in the petition, are that land bearing Revenue Survey No. 310, admeasuring 9510 sq.mts. situated at Mouje Adajan, Sub-District Choryasi, District-Surat as

well as land comprised in Revenue Survey No. 311 admeasuring 3845 sq.mts. situated at. Mouje Adajan, Sub-District Choryasi, District-Surat were of the ownership of one Maganbhai Ghelabhai. The total area of the land of the aforesaid two Survey numbers measures 13355 sq.mts. According to the petitioners (original plaintiffs) the said land later on became part of the Town Planning Scheme Surat No. 13 (Adajan). On implementation of the Town Planning Scheme the aforesaid lands were given original plot No. 111 and were sought to be re-constituted into two Final Plots, being Final Plot No. 242 admeasuring 6755 sq.mts. and Final Plot No. 252 admeasuring 4876 sq.mts,. The petitioners have annexed a copy of the Form No. F of the Town Planning Scheme No. 13 (Adajan) showing Final Plot Nos. 242 and 252 at Annexure "A" to the petition, as well as a copy of the map of the District Inspector of Land Records, Surat showing Revenue Survey Nos. 310 and 311 before reconstitution into Final Plot at Annexure "B" to the petition. It is the case of the petitioners that the original land owner, Maganbhai Ghelabhai executed a Deed of Power of Attorney in favour of one Naginbhai Surti. The original land owner as well as the Power of Attorney Holder wanted to organise a society in the name of Radha Krishna Society. According to the petitioners, out of the above two Revenue Survey Nos. 310 and 311; 124 plots were carved out and internal roads were laid down for the purpose of development of the above two Survey numbers. Upon coming into force of the Final Town Planning Scheme, Revenue Survey Nos. 310 and 311 were allotted original Plot No. 111 and were subsequently re-constituted as Final Plot Nos. 242 and 252 of the Town Planning Scheme Surat No. 13(Adajan). The original land owner Maganbhai Ghelabhai, through his Power of Attorney Holder Naginbhai Surti, executed a registered Sale Deed on 15-5-1986 in respect of Plot No. 111 of Revenue Survey No. 310 in favour of Nayankumar Hasmukhlal Nariyelwala for a consideration of Rs. 4,999/-. The said Nayankumar Hasmukhlal Nariyelwala, in turn executed a registered Sale Deed dated 9-5-1988 in favour of the petitioner No. 1 in respect of the Plot No. 111 of Revenue Survey No. 310 for consideration of Rs. 5,999/-. Similarly, in respect of Plot No. 112, the original land owner, through his Power of Attorney Holder executed a registered Sale Deed on 15-5-1986, in favour of one Hasmukhlal Sakarchand Nariyelwala for a consideration of Rs. 4,999/-, and the said Hasmukhlal Sakarchand Nariyelwala, in turn executed a registered Sale Deed, in favour of the petitioner No. 1 on 9-5-1988y for a consideration of Rs. 5,999/-. The original land owner, through his Power of Attorney Holder also executed a registered Sale Deed dated 11-11-1987, in respect of Plot Nos. 113 and 114 of Revenue Survey No. 310, in favour of the petitioner No. 2 for a consideration of Rs. 7,999/- and another" sale deed was executed by the original land owner, through his Power of Attorney" Holder in favour of petitioner No. 2 on 11-11-1987, in respect of Plots Nos. 115 and 166 of Revenue Survey No. 310, for a consideration of Rs. 7,999/-. The sum and substance of the case of the petitioners is that the petitioners have purchased Sub-Plots Nos. 111 to 116 out of Revenue Survey No. 310 by way of registered Sale Deeds through transactions, as described hereinabove.

3.1. According to the petitioners, the entire parcel of Revenue Survey Nos. 310 and 311 was sold by the original land owners to different persons. The respondent herein, purchased land admeasuring 500 sq.mts. of Revenue Survey Nos. 310 and 311, bearing Final Plot No. 252 vide registered Sale Deed dated 21-11-2003, and a revenue entry No. 9154 was mutated to this effect.

3.2. The petitioners apprehending encroachment upon their land from the respondent, filed Civil Suit No. 595 of 2005 for declaration and permanent injunction against the respondent (original defendant). In the said suit, the respondent filed a written statement vide Exh. 19, wherein he categorically admitted that the petitioners are owners of Sub-Plots Nos. 111 to 116 of Revenue Survey No. 310 and the respondent is the owner of 500 sq.mts. of Revenue Survey No. 311, Town Planning Scheme No. 13, which land is in his possession. The respondent also stated therein that he has no intention to make any encroachment upon the land of the petitioners. The respondent did not dispute the Sale Deeds vide which the land was purchased by the petitioners or their ownership of the land in question. The petitioners filed an application below at Exh.5 for grant of temporary injunction which has been allowed by the Trial Court, mainly on the ground that the ownership and possession of the land in question is with the petitioners, which fact is not disputed as it is accepted by the respondent, that the petitioners are, owners in possession of Sub-Plots Nos. 111 to 116. The suit has been instituted by the petitioners on 4-6-2005. The written statement has been filed by the respondent on 13-10-2005. However, by application dated 27-11-2007 at Exh.42 the respondent has sought an amendment in the written statement which, in effect, seeks to withdraw the admissions made by him in the written statement. This application has been allowed by the impugned order, giving rise to the filing of the present petition.

4. Mr. Ashish H. Shah, learned Counsel for the petitioners has forcefully submitted as under:

(a) The impugned order whereby the respondent has been permitted to amend the written statement by withdrawing the admission made by him in the original written statement, to the effect that the petitioners are owners-in-possession of Sub-Plots Nos. 111 to 116 in Revenue Survey No. 310, is against the settled principle of law, as enunciated by the Supreme Court in Gautam Sarup Vs. Leela Jetly and Others, , wherein the Supreme Court has laid down that a categorical admission cannot be resiled from, but in a given case, it may be explained or clarified. It is submitted by the learned Counsel for the petitioners that by the said amendment the respondent seeks to dispute the very ownership and possession of the petitioners on the said plots, after having categorically admitted the same in the original written statement filed by him.

(b) By way of the amendment sought by the respondent, the Sale Deeds vide which the plots are purchased are now being disputed, which is in complete contradiction to the stand taken by the respondent in the earlier written statement. The respondent is now putting up a new case to the effect that the

Sale Deeds vide which the petitioners purchased the land in question are null and void, whereas the respondent has categorically admitted in the original written statement that the petitioners are the owners in possession of the suit property and that the respondent owns 500 sq.mts. of land in Revenue Survey No. 311, which is different from the land owned by the petitioners.

(c) The application for amendment has been filed after about two years from the filing of the suit, and even if the reasons for making the amendment are perused, the same do not inspire confidence and the amendment ought not to have been permitted by the Trial Court.

(d) The findings of the Trial Court in the impugned order granting amendment, are contrary to the factual and legal situation. One of the reasons for granting the amendment is that the Trial Court finds that no prejudice will be caused to the petitioners, if the amendment is granted but on the contrary, the petitioners will be seriously prejudiced, if such an amendment is granted as at this late stage. The very ownership and possession of the petitioners of the suit property, which has been purchased by them by duly executing registered Sale Deeds, is sought to be disturbed and a new case is set up, in a complete reversal of the clear admissions made in the earlier written statement.

(e) The finding of the Trial Court that the petitioners can prove their case on the basis of evidence and not on the basis of an admission which may have been made by the respondent, is contrary to settled principles of law, as laid down in *Gautam Sarup v. Leela Jetly* AIR 2009 SC 363 (supra). Even though it would be permissible to explain the admission made by a party under a mistaken belief, the party cannot be permitted to totally resile from the said admission, as has been permitted by the impugned order.

(f) That permitting the respondent to amend the written statement would amount to setting up a new case and in fact, the said amendment is motivated by a Suit filed by the respondent against the petitioners i.e. Civil Suit No. 387 of 2007, on 23-10-2007, wherein the respondent is claiming to be owner of the property, which is the subject matter of the present suit and is admittedly owned and possessed by the petitioners. The application for amendment has been filed shortly after filing of the said Suit and the finding of the Trial Court that the respondent should be permitted to amend the written statement and withdraw his admission, as he has filed a subsequent suit, has no foundation in law.

(g) That the other reason advanced by the Trial Court for granting the amendment to the effect that there is no bar in the provisions of Order 6 Rule 17 to prevent withdrawal of an admission made in the pleadings is in violation of, and totally contrary to, the settled principles of law as held in *Gautain Sarup v. Leela Jetly* AIR 2009 SC 363 (supra).

(h) The Trial court has placed strong reliance on a judgment of the Supreme Court in *Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another*, which no longer holds the field in view of the recent judgment of the Supreme. Court in

Gautam Sarup v. Leela Jetly AIR 2009 SC 363 (supra). It is held by the Supreme Court that the said judgment has been rendered without noticing the binding precedent in Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., which is a judgment rendered by three Hon'ble Judges of the Supreme Court. The view taken by the Trial Court is, therefore, erroneous and cannot be sustained. The petition may be allowed, and impugned order quashed and set aside.

5. In support of the impugned order, Mr. Utpal M. Panchal, learned Counsel for the respondent has submitted as below:

(a) The respondent has rightly sought an amendment in the written statement filed by him, which has correctly been granted by the Trial Court, as the suit property is in his ownership and possession. The Sale Deeds vide which the petitioners have purchased the land are null and void and the respondent has now filed a Suit to declare the said Sale Deeds as being null and void, therefore the amendment is necessary.

(b) The reliance placed by the Trial Court on the judgment of the Supreme Court in Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another, cannot be said to be misplaced and the respondent is not debarred from withdrawing his admission in the earlier written statement by amending it at a later date, by the provisions of Order 6 Rule 17 and, therefore, the petition be dismissed.

6. No other submissions have been advanced before this Court by the learned Counsel for both sides.

7. I have heard the learned Counsel for the respective parties, perused the averments made in the petition, contents of the impugned order and other documents on record.

8. The question for determination by this Court lies in a narrow compass that is, whether the amendment in the written statement, which amounts to withdrawal of an admission made by the respondent in the original written statement, could have been permitted ? There is no dispute regarding the fact that in the original written statement the respondent has categorically admitted that the petitioners are owners-in-possession of land comprised in Sub-plots Nos. 111 to 116 in Revenue Survey No. 310 and that the respondent is the owner in possession of 500 sq.mts. of land in Revenue Survey No. 311. In the original written statement, the respondent has not disputed the validity of the Sale Deeds vide which the petitioners have purchased the suit property. By making the amendment in the written statement, the respondent seeks to resile completely from the stand taken by him earlier. The respondent not only seeks to deny the ownership and possession of the petitioners regarding Sub-Plots Nos. 111 to 116 of Revenue Survey No. 310, but also seeks to put up a case that the Sale Deeds vide which the petitioners have purchased the said land are null and void. Whereas the respondent had categorically admitted in the written statement that he is the owner in possession of 500 sq.mt. of land in Revenue Survey No. 311,

he now says that he is the owner of the suit property which, as per his earlier admission, is owned by the petitioners. In short, the amendment in the written statement that has been granted by the impugned order, has the effect of permitting the respondent to resile from the admissions made by him earlier, which is not permissible in law. The legal position in this regard is no longer res Integra, and may be examined, at this stage.

9. In *Gautam Sarup v. Leela Jetly* AIR 2009 SC 363 (supra), after discussing a catena of judgments, the Supreme Court has enunciated the following principles of law:

28. What, therefore, emerges from the discussions made hereinbefore is that a categorical admission cannot be resiled from but, in a given case, it may be explained or clarified. Offering explanation in regard to an admission or explaining away the same, however, would depend upon the nature and character thereof. It may be that a defendant is entitled to take an alternative plea. Such alternative pleas, however, cannot be mutually destructive of each other.

29. An explanation can be offered provided there is any scope therefor. A clarification may be made where the same is needed.

30. We will assume that despite the amendments made by the Code of Civil Procedure. (Amendment) Act, 1976, amendment of pleadings being procedural in nature, the same should be liberally granted but as in all other cases while exercising discretion by a court of law, the same shall be done judiciously.

10. Applying the above principles of law to the facts and circumstances of the present case, it is evident that the respondent is not seeking a clarification, or trying to explain the admissions made by him but, in a complete volte-face, is resiling from the categorical admissions made by him. Explaining or offering a clarification regarding an admission stands on one footing whereas resiling from the same, would stand on a totally different footing. In view of the law laid down by the Supreme Court, such a course is not permissible. In the case in hand, the Trial Court had granted a temporary injunction to the petitioners, on the basis of the admitted stand taken by the respondent in the written statement. After about two years from institution of the Suit, the said amendment has been granted by the Trial Court, which is clearly not in consonance with the settled legal position. In the view of this Court, in passing the impugned order, discretion has not been exercised judiciously, by the Trial Court.

11. The reliance placed by the Trial Court in *Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another*, will not come to the aid of the respondent, in view of the later judgment of the Supreme Court in *Gautam Sarup v. Leela Jetly* AIR 2009 SC (Supp) 363 (supra). The judgment in *Panchdeo Narain Srivastava v. Km. Jyoti Sahay* (supra) came up for scrutiny before the Supreme Court in the very same judgment, and this is how the Supreme Court has dealt with the issue.

17. A three-Judge Bench of this Court speaking through Ray, CJ in *Modi Spg. & Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*, opined:

10. It is true that inconsistent pleas can be made in pleadings but the effect of substitution of paras 25 and 26 is not making inconsistent and alternative pleadings but it is seeking to displace the plaintiff completely from the admissions made by the defendants in the written statement. If such amendments are allowed the plaintiff will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. The High Court rightly rejected the application for amendment and agreed with the trial court.

18. A two-Judge Bench of this Court, without noticing the binding precedent in *Modi Spg. in Panchdeo Narain Srivastava v. Jyoti Sahay*, stated:

3. ...But the learned Counsel for the respondents contended that by the device of amendment a very important admission is being withdrawn. An admission made by a party may be withdrawn or may be explained away. Therefore, it cannot be said that by amendment an admission of fact cannot be withdrawn.

19. Yet again, in *Akshaya Restaurant v. P. Anjanappa* the following observations were made by the Court:

5. We find no force in the contention. It is settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. It is seen that in para 6 of the written statement a definite stand was taken by subsequently in the application for amendment it was sought to be modified as indicated in the petition. In that view of the matter, we find that there is no material irregularity committed by the High Court in exercising its power u/s 115, CPC in permitting amendment of the written statement.

20. The question came up for consideration before another Division Bench in *Heeralal v. Kalyan Mal*, wherein noticing the aforementioned decisions, the judgment in *Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*, decision was followed. *Akshaya Restaurant* was held to have been rendered per incuriam.

21. Other decisions which were cited at the Bar were distinguished stating:

10. Consequently it must be held that when the amendment sought in the written statement was of such a nature as to displace the plaintiff's case it could not be allowed as ruled by a three-member Bench of this Court. This aspect was unfortunately not considered by the latter Bench of two learned Judges and to the extent to which the latter decision took a contrary view qua such admission in written statement, it must be held that it was per incuriam being rendered without being given an opportunity to consider the binding decision of a three-member Bench of this Court taking a diametrically opposite view.

11. We were then taken to another decision of this Court in Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another, . In that case the plaintiff was held entitled to amend his plaint by submitting that though earlier he stated that the defendant was uterine brother, the plaintiff by amendment in his plaint could submit that the defendant was his brother and the word "uterine" could be dropped. Even in that case the main case put forward by the plaintiff did not get changed as the plaintiff wanted to submit that the defendant was his brother. Whether he was uterine brother or real brother was a question of decree and depended on the nature of evidence that may be led before the Court. Therefore, the deletion of the word "uterine" was not found to be displacing the earlier case of the plaintiff. On the facts of the present case also, therefore, the said decision cannot be of any assistance to the learned Counsel for the respondents.

12. In our view, therefore, on the facts of this case and as discussed earlier, no case was made out by the respondents, contesting defendants, for amending the written statement and thus attempting to go behind their admission regarding 5 out of 7 remaining items out of 10 listed properties in Schedule A of the plaintiff.

12. The judgment in Akshaya Restaurant Vs. P. Anjanappa and Another, referred to by the Supreme Court in paragraph 19, quoted hereinabove, has been held to be per incuriam in Heeralal Vs. Kalyan Mal and Others, The relevant extract is reproduced herein-below:

The aforesaid observations in the decision in Akshaya Restaurant Vs. P. Anjanappa and Another, proceed on an assumption that it was the settled law that even the admission can be explained and even inconsistent pleas could be taken in the pleadings. However, the aforesaid decision of the three-member Bench of this Court in Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., (supra) is to the effect that while granting such amendments to written statement no inconsistent or alternative plea can be allowed which would displace the plaintiffs case and cause him irretrievable prejudice.

10. Consequently it must be held that when the amendment sought in the written statement was of such a nature as to displace the plaintiff's case it could not be allowed as ruled by a three-member Bench of this Court. This aspect was unfortunately not considered by latter Bench of two learned Judges and to the extent to which the latter decision took a contrary view qua such admission in written statement, it must be held that it was per incuriam being rendered without being given an opportunity to consider the binding decision of a three-member Bench of this Court taking a diametrically opposite view.

11. We were then taken to another decision of this Court in the case of Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another, , It that case the plaintiff was held entitled to amend his plaint by submitting that though earlier he stated that the defendant was uterine brother, the plaintiff by amendment in his plaint could submit that the defendant was his brother and the word "uterine" could be

dropped. Even in that case the main case put forward by the plaintiff did not get changed as the plaintiff wanted to submit that the defendant was his brother. Whether he was uterine brother or real brother was a question of decree and depended on the nature of evidence that may be led before the Court. Therefore, the deletion of word "uterine" was not found to be displacing the earlier case of the plaintiff. On the facts of the present case also, therefore, the said decision cannot be of any assistance to the learned Counsel for respondents.

13. The view taken in Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another, is the same taken in Akshaya Restaurant Vs. P. Anjanappa and Another, , which has been held to be per incuriam. Therefore, the reliance placed upon the judgment in Panchdeo Narain Srivastava v. Km. Jyoti Sahay (supra) by the Trial Court, will not advance the case of the respondent any further, in view of the principles of law enunciated in Gautam Sarup v. Leela Jetly AIR 2009 SC 363 (supra).

14. It is stated in the impugned order that the amendment of the nature sought by the respondent is not barred by the provisions of Order 6, Rule 17. This finding is not tenable, in the light of the settled legal position discussed hereinabove.

15. Taking into consideration the totality of the facts and circumstances of the case, as well as the settled legal position as discussed hereinabove, the interference of this Court is necessitated.

16. In B.K. Muniraju Vs. State of Karnataka and Others, the Supreme Court has held as under:

24. It is clear that whether it is a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby. It is also clear that the High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

17. Examined in the light of the above-mentioned principles of law, it appears that the Trial Court has committed a manifest error by passing the impugned order, which is in contradiction to the settled, principles of law, thereby causing failure of justice.

18. Accordingly, the petition is allowed. The impugned order dated 7-3-2009, passed below application at Exh.42 in Regular Civil Suit No. 595 of 2005, by the learned 4th Addl. Senior Civil Judge, Surat, is quashed and set aside. Rule is made absolute. There shall be no orders as to costs.