

(2022) 09 GUJ CK 0126

In the Gujarat High Court

Case No : R/Second Appeal No. 305 Of 2022, Civil Application (For Interim Relief) No. 1 Of 2022

Osman Ramjubhai Dhobhi

APPELLANT

Vs

State Of Gujarat

RESPONDENT

Date of Decision : 21-09-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Section 96, 100, 100(1), Order 10 Rule 1, Order 10 Rule 1(5), Order 20 Rule 5, Order 28 Rule 2, Order 28 Rule 3, Order 41 Rule 11, Order 41 Rule 14, Order 41 Rule 15, Order 41 Rule 31, Order 41 Rule 33
Provincial Insolvency Act, 1920 — Section 54

Citation : (2022) 09 GUJ CK 0126

Hon'ble Judges : Hemant M. Prachchhak, J

Bench : Single Bench

Advocate : ??Ma Kharadi, Aditya Jadeja

Final Decision : Disposed Of

Judgement

Hemant M. Prachchhak, J

1. Being aggrieved and dissatisfied with the judgment and order dated 31.05.2022 passed by the learned Principal District Judge, Kachchh – Bhuj in Regular Civil Appeal No.46 of 2006, whereby the learned Principal District Judge has confirmed the judgment and decree dated 29.07.2006 passed by the learned Principal Senior Civil Judge, Kachchh – Bhuj in Regular Civil Suit No.121 of 1997, the original plaintiff / appellant has filed the present second appeal.

2. Feeling aggrieved and dissatisfied with the impugned judgment and orders passed by both the Courts below, the present appeal is preferred.

3. Heard learned counsel appearing for the respective parties and perused the material available on record of the appeal.

4. Considering the above fact, the first Appellate Court has to determine the substantial questions of law independently, however, the same has not been

done. The provisions of Order

41 of Civil Procedure Code provides that how the Appellate Court has to deal with the appeal under Section 96 of the Code and the procedure is to be followed as per Order 41 of Civil Procedure Code.

5. In the recent judgment of the Hon'ble Apex Court in case of K. Karuppuraj Vs M. Ganesan reported in 2021 (10) SCC 777 , the Hon'ble Apex Court has held that while deciding the appeal, compliance of Order 41 Rule 31 of C.P.C. is mandatory.

6. It is worthwhile to refer to the decision in case of Ajitsinh Babubhai Jadav Vs. Wadhwan Mahajan Panjarapol reported in 2013 LawSuit(Guj) 251, the Court has held as under:

"6. Now considering the points, which are formulated by the lower Appellate Court, I am of the opinion that, the lower Appellate Court has committed error in not properly formulating the points for determination. The lower Appellate Court ought to have framed points for determination in accordance with Order 41 Rules 11, 14, 15 and 31 of the Code as well as Para No. 414 of the Bombay Civil Manual and ought to have given reasons for its decision on each point independently. The Apex Court in the case of H.Siddiqui (dead) by LRs. (supra) in the context of Order- 41 Rule-31 of the Code of Civil Procedure, has observed in paras 21 and 22 as under:

"21. The said provisions provided guidelines for the appellate Court as to how the Court has to proceed and decide the case. The provisions should be read in such a way as to require that the various particulars mentioned therein should be taken into consideration. Thus, it must be evident from the judgment of the appellate Court that the Court has properly appreciated the facts/evidence, applied its mind and decided case considering the material on record. It would amount to substantial compliance of the said provisions if the appellate Court's judgment is based on the independent assessment of the relevant evidence on all important aspect of the matter and the findings of the appellate Court are well founded and quite convincing. It is mandatory for the appellate Court to independently assess the evidence of the parties and consider the relevant points which arise for adjudication and the bearing of the evidence on those points. Being the final Court of fact, the first appellate court must not record mere general expression of concurrence with the trial Court judgment rather it must give reasons for its decision on such point independently to that of the trial Court. Thus, the entire evidence must be considered and discussed in detail. Such exercise should be done after formulating the points for consideration in terms of the said provisions and the Court must proceed in adherence to the requirements of the said statutory provisions. (Vide: Sukhpal Singh v. Kalyan Singh, AIR 1963 SC 146; Girijanandini Devi v. Bijendra Narain Choudhary, AIR 1967 SC 1124; G. Amalorpavam v. R.C. Diocese of Madurai, 2006 (3) SCC 224; Shiv Kumar Sharma v. Santosh Kumari, 2007 (8) SCC 600; and Gannmani

Anasuya v. Parvatini Amarendra Chowdhari, AIR 2007 (SC 2380: 2007 (10) SCC 296.

"22. In B.V. Nagesh v. H.V. Sreenivasa Murthy reported in JT 2010(10) SC 551: 2010 (13) SCC 530, while dealing with the issue, this Court held as under:

"4. The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for re- hearing both on questions of fact and law. The judgment of the appellate Court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth and pressed by the parties for decision of the appellate Court. Sitting as a Court of appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide : Santosh Hazari v. Purushottam Tiwari, 2001 (3) SCC 179 and Madhukar v. Sangram, 2001 (4) SCC 756."

7. In a recent case of Budhabhai Bhikhabhai Parmarand and another Vs. Shantaben Wd/o Bhalabhai Becharbhai, 2013(1)G.L.H.127, this Court, while dealing with the provision of Section 100 of the Code of Civil Procedure and the provisions of Order 41, Rule 31 of the Code by relying upon the case of H. Siddiqui (dead) by Lrs. (supra), has held that the first Appellate Court has to decide the Appeal in accordance with law, on merits and after framing points for determination as envisaged under Order- 41, Rule-31 of the Code of Civil Procedure. It has also been observed that on each point, the Appellate Court has to give its own finding that too after re-appreciation of entire evidence on record.

8. In addition to the above principles of provisions of Order 41 Rule 31 of the Code of Civil Procedure, Bombay Civil Manual, which has been made applicable to the State of Gujarat, provides in detail the Civil Courts' functioning. Different Chapters provided therein make the provisions of the Code of Civil Procedure amply clear that how the original Court, first appellate Court and second appellate Court has to function. To ensure the uniformity with regard to practice and procedure of civil proceedings, the Manual is an exhaustive guiding factors for a Court, who is deciding disputes between the parties of a civil nature.

8.1 As far as Appeals arising from the Trial Courts' judgment, decree and order are concerned, Chapter-XX of the Code deals with the same. Para/Rule-414 of the Bombay Civil Manual provides about the manner, in which the appellate Court should frame the suitable points for determination while deciding the Appeal. Rule-414 of the Bombay Civil Manual reads as under:

"414. The appellate Court should frame suitable points for determination in appeals in accordance with the same principles on which issues are framed in the

trial Court.”

2. In my opinion, combined reading of the Order-41 Rule- 31 of the Code as well as Rule-414 of the Bombay Civil Manual make it clear that the first appellate Court is bound to frame points for consideration as if it is framing the issues provided under the provisions of the Code of Civil Procedure. Paras/Rules-53 and 54 of the Bombay Civil Manual provides the method of settlement / framing issues. Rules-53 and 54 read as under:

“53. Issues should be framed by the Presiding Judge on the date fixed for the purpose. They indicate the points in controversy, on which the parties are to go trial and give them notice of the matters which they are required to establish by adducing evidence or otherwise. No trial is likely to be satisfactory unless the issues are complete and precise. It should be observed that a party has to produce evidence in support of the issues, which he is bound to prove (Order XVIII, rules 2 and 3) and that the judgment of the Court shall record its findings on the issues (Order XX, rule- 5). These provisions should make it plain that an essential preliminary to a satisfactory trial is the settlement of full and precise issues. A judicious use of the provisions of rule 1 of Order X and sub-rule (5) of rule 1 of Order XIV may be found of help for collecting material necessary for framing issues in seriously contested cases. The duty of framing issues under the law must be performed by the Court and the presiding Judge should not leave it to the parties or lawyers to frame the issues but should apply his own mind to the subject. There is however, no reason why the Court should not take suggestions from the parties as to the issues to be framed.”

“54. In framing issues the Court should proceed as follows:-

a) Every issue of fact shall be so framed as to indicate on whom the burden of proof lies.

(b) Every issue of law shall be so framed as to indicate the precise question of law to be decided.

Note : When the claim or any portion of it is alleged to be barred by any law the issue shall also state the Act and section or rule or other provision under which it is so barred.

(c) When the question is whether a certain section of law applies, the issue should be framed in the words of that section e.g., if the question is whether a transfer should be set aside under section 54 of the Provincial Insolvency Act, the issue should not be “Is the transfer bogus and fraudulent”?

(d) Issues should be self-contained. The framing of issues such as “Is the sale liable to be set aside for the reasons stated by the defendant in his written statement, dated...” should be avoided

(e) Every issue should form a single question and as far as possible should not be put in an alternative form.

(f) No proposition of fact which is not itself a material proposition, but is relevant only as tending to prove a material proposition, shall be made the subject of an issue.

(g) No question regarding admissibility of evidence shall be made the subject of an issue.”

8.3 Now in the present case, it is apparent from the judgment and order of the lower Appellate Court that the provisions of Order-41 Rule-31 of the Code of Civil Procedure and Rule-414 of the Bombay Civil Manual are not followed.

9. Even otherwise, the learned Appellate Court, in my opinion, has not re-appreciated the entire evidence and has not arrived at its own conclusion on each issues, which were in controversy between the parties.

10. A similar view was taken by this Court in the case of Mahmad Ahmadbhai v. Fatmaben Abdulla & Ors. reported in 2007(4) GLR 2789; in the case of Prajapati Abraham Nagarbhai & Anr. v. Prajapati Harjibhai & Ors., reported in 2010(2) GLH 551 as well as in the case of Dumala Vahpara Gram Panchayat v. Chunilal Tribhovandas Patel & Ors., reported in 1999(2) GLH 959”

7. It is also worthwhile to referred to the decision of the Apex Court in the case of Kirpa Ram (Deceased) Through Legal Representatives and others Vs. Surendra Deo Gaur and others, reported in 2020 LawSuit (SC) 707 = AIR 2021 SC 57 wherein the Apex Court has observed in paragraphs no.21 as under:-

[21] In view of the above, we find that the High Court did not commit any illegality in not framing any substantial question of law while dismissing the appeal filed by the appellants.

[22] The argument of Mr. Mehta is that substantial question of law is required to be framed by the High Court while deciding the second appeal. We don't find any merit in the argument. Section 100 of the Code reads as under:

"100. Second appeal.-(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte.

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not

involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

[23] Sub-Section (1) of Section 100 of the Code contemplates that an appeal shall lie to the High Court if it is satisfied that the case involves a substantial question of law. The substantial question of law is required to be precisely stated in the memorandum of appeal. If the High Court is satisfied that such substantial question of law is involved, it is required to formulate that question. The appeal has to be heard on the question so formulated. However, the Court has the power to hear appeal on any other substantial question of law on satisfaction of the conditions laid down in the proviso of Section 100 of the Code. Therefore, if the substantial question of law framed by the appellants are found to be arising in the case, only then the High Court is required to formulate the same for consideration. If no such question arises, it is not necessary for the High Court to frame any substantial question of law. The formulation of substantial question of law or re-formulation of the same in terms of the proviso arises only if there are some questions of law and not in the absence of any substantial question of law. The High Court is not obliged to frame substantial question of law, in case, it finds no error in the findings recorded by the First Appellate Court.

8. On bare perusal of the decision of the First Appellate Court passed in aforesaid Regular Civil Appeal, it is clearly borne out that the First Appellate Court has committed serious error in not deciding the appeal in accordance with the provisions of Order 41 of Civil Procedure Code and, therefore, present appeal is required to be remanded back to the First Appellate Court to determine the appeal in accordance with the provision of Order 41 Rule 11, 15, 31 and 33 of the Civil Procedure Code.

9. In view of the above settled principles of law by delivering the judgment, the First Appellate Court is required to substantially comply with the provision of Order 41 Rule 31 of the Civil Procedure Code.

10. On perusal of the impugned judgment and order of the First Appellate Court, it is abundantly clear that the First Appellate Court has failed to discharge obligation placed on it as a First Appellate Court and, therefore, in my opinion the impugned judgment and order of the First Appellate Court deserves to be quashed and set aside and the same is required to be remanded to the First Appellate Court for fresh consideration on merits and in accordance with law after framing points of determination in accordance with Order 41 Rule 11, 14, 15, 31 and 33 of the Code.

11. In the result, impugned judgment and order dated 31.05.2022 passed by the learned Principal District Judge, Kachchh – Bhuj in Regular Civil Appeal No.46 of 2006 is hereby quashed and set aside and the matter is remanded back to the

First Appellate Court to decide the same a fresh on merits and in accordance with law after formulating the points of determination.

12. Accordingly the proceedings of Regular Civil Appeal No. 46 of 2006 is hereby restored to original file. The First Appellate Court shall decide the matter as expeditiously as possible and preferably within a period of six months from the date of receipt of certified copy of present order without being influenced by the earlier order passed by First Appellate Court after affording opportunity of hearing to the learned advocates for respective parties. The parties shall maintain status-quo of the property in question as on today, till the final disposal of the matter. It is clarified that the matter is remanded only on the ground as referred to hereinabove.

13. Accordingly, present Second Appeal stands disposed of accordingly.

14. Since the main Second Appeal is disposed of, present Civil Application does not survive and the same stands disposed of accordingly.