
(1981) 12 GUJ CK 0010
In the Gujarat High Court
Case No : A.F.O. No. 83 of 1981

Patel Kacharabhai Joitaram (by Lrs.) and Others	APPELLANT
Vs	
Patel Keshavial Dungardas	RESPONDENT

Date of Decision : 09-12-1981

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 25, Order 41 Rule 27

Citation : AIR 1982 Guj 230 : (1982) GLH 236 : (1982) 1 GLR 535

Hon'ble Judges : C. Bhatt, J

Bench : Single Bench

Advocate : C.V. Jani, for the Appellant; D.F. Amin and C.N. Desai, for the Respondent

Judgement

1. This appeal from order arises from the judgment and order dated 17?11?1980 and decree passed in Regular Civil Appeal No. 161 of 1977 of the Court of joint District Judge. Mehsana, whereby the learned Judge had allowed the appeal and set aside the judgment and decree passed by the trial Court in Regular Civil Suit No. 211 of 1971.

2. The facts, in short, are that the plaintiff ?present opponent filed a suit to obtain perpetual injunction restraining the defendants from obstructing his possession of the suit Vada land and also to recover the land encroached by the defendants together with the costs of the suit. The plaintiff has averred that in Ladol village of Vijapur Taluka. he possesses "Vadal land facing towards north to South towards western side

*Against decision of V. T. Parikh Joint Dist. Judge Mehsana. in Regular Civil Appeal No. 161 of 1977.

Which consists 61 different measurements, that the suit "vada" land was leased in the year 1954 to Kalyan Oil Mill under a registered lease deed and it had handed over vacant possession in the year 1971. Since then, he is in possession of the entire "Vada" land. According to the plaintiff. the defendants have encroached upon a strip of land on the eastern side of the disputed "Vada" and, therefore, Regular Civil Suit No. 211 of 1971 was filed. The defendants filed their written statement at Ex. 8 and. inter alias, contended that the suit of the plaintiff is not true and they do not admit the allegations made by the plaintiff in the plaint. They further contended that the defendants are the members of Goal Ramji's Patti and they own land adjoining to the land of the plaintiff and they have 22" 3" land to go to their NeliYa land and the" neem tree and Gunda trees are also situated in this very land: that there was hedge towards western side and they have constructed verandah on their land. Even then the Plaintiff has filed the false suit which deserves to be dismissed.

3. The learned Joint Civil Judge (J. D.) of Vijapur who heard the said suit was pleased to dismiss the suit with costs by an order dated 28th Oct. 1977. The original plaintiff thereupon filed the said Regular Civil Appeal No. 161 of 1977 in the District Court at Mehsana and the said appeal had come up for final hearing before the learned Joint District Judge, Mehsana. The learned Joint District Judge who heard the said appeal has allowed the appeal and the judgment and decree passed by the trial Court are set aside and he has further directed that Regular Civil Suit No. 211 of 1971 is remanded back to the trial Court to allow the parties to lead. any further evidence on all the issues if they desire and to decide the matter afresh after considering the evidence. if any, led by them and the trial Court should give priority to this matter as soon as the record is received by it. Original defendants ? present appellants ? have filed the above-mentioned appeal from order.

4. Mr. C. V. Jani, learned counsel for the appellants?defendants, has contended that the appellate Court has no power to remand the whole suit and direct the trial Court to decide the suit on all the issues. He has further contended that the lower appellate Court is wrong in allowing additional evidence, as Per Ex. 8, without considering the entire matter on its merits and without considering all the evidence that was on record. on the other hand, Mr. C. N. Desai, learned counsel for the respondent?plaintiff, has contended that the order that has been passed by the lower appellate Court is quite correct and proper and it does not require any interference in the present appeal from order.

5. In my opinion, this appeal can be disposed of on a question of law without entering into the merits and demerits of the case as the points raised in this appeal can be disposed of without giving any decision on any of the issues relating to the questions of fact as determined by the appellate Court on points Nos. 1 and 2. Therefore, I will now discuss the legal aspects involved in the present appeal from order

6. The lower appellate Court in the present case had formulated two points for its

decision, viz. (1) Whether the plaintiff proved that the defendants have encroached over a strip of land on the eastern side of his disputed wada; and (2) whether the defendants prove that they have 22" 3" wide road up to the compound wall newly constructed by them. Both these points have been decided against the present appellants ?original defendants. Now, if one goes through the reasoning part of the judgment, the lower appellate Court has considered the question whether the additional evidence produced along with application Ex. 8 by the plaintiff was necessary for the purpose of just decision in the matter and after allowing the production of additional evidence as per the application Ex. 8, the appellate Court has come to the conclusion that it would not rely upon Ex. 99 at this stage and chance should. also be given to defendants to explain about that map as also other map sought to be produced as additional evidence. if the defendants so desire and. therefore, the appellate Court remanded the whole matter to the trial Court with a direction that the parties may lead further evidence on all the issues and the trial Court may decide the matter afresh after considering the evidence if any, produced by the parties.

7. Mr. Jani. learned counsel for the appellants, has mainly contended that the appellate Court is not justified in allowing application Ex. 8 for additional evidence contrary to the principles governing the reception of such evidence. Mr. Jani has relied on a judgment of the Supreme Court in the case of Natha Singh and Others Vs. The Financial Commissioner, Taxation, Punjab and Others, . In Para 10 of the said judgment. the Supreme Court has observed:

"So far as the application of the appellants for additional evidence is concerned, it cannot be allowed in view of the well settled principles of law that the discretion given to the appellate Court to receive and admit additional evidence is not an arbitrary one but is a judicial one circumscribed by the limitations specified in O. 41, R. 27 of the Civil P. C. If the additional evidence is allowed to be adduced contrary to the principles governing the reception of such evidence. it will be a case of improper exercise of discretion and the additional evidence so brought on the record will have to be ignored. The true test to be applied in dealing ?with applications for additional evidence is whether the appellate court is able to pronounce judgment on the materials before it, without taking into consideration the additional evidence sought to be adduced."

Mr. Jani has drawn my attention to this fact that the appellate Court has not considered the entire evidence on record before deciding the application Ex. 8 and, therefore, the judgment of the lower appellate Court if? erroneous in view of the Supreme Court judgment. Before considering the application for additional evidence, the appellate Court has to come to the conclusion whether the appellate Court is able to pronounce the judgment on the materials before it without considering the additional evidence which is sought to be adduced,

8. Mr. Jani has also drawn my attention to another judgment in the case of State of Gujarat Vs. Sanubhai Matubhai and Others, , Mr. Justice B. J. Divan (as he then was) has observed therein:

"The only Power of remand that an appellate Court has, is to be found in the provisions of O. 41 R. 23 and O. 41, R. 25, C. P. C. It has been held recently by the Supreme Court that apart from these two provisions to be found in the Civil p. C. there is no other inherent power in the Appellate Court to remand a matter back to the trial Court, Under R, 23 of O, 41. C. P.C., the Appellate Court can remand a matter to the trial Court only if the trial Court has disposed of the suit upon a preliminary point and if the decree of the trial Court is reversed in appeal, in such cases under Rule 23. the Appellate Court may, if it thinks fit. by order remand that case and may further direct that the issue or issues shall be tried in the case so remanded and shall send a copy of his judgment and order to the Court from whose decree the appeal is preferred with appropriate direction The other rule, viz., R. 25 of O. 41, permits not the remand of the whole suit but confers upon the appellate Court power to send down certain issues for trial to the Court from whose decree the appeal is preferred and the additional evidence may be allowed by the trial Court to be recorded but it must be borne in mind that under O. 41, R, 25 it is not open to the appellate Court to remand the whole suit back to the trial Court,"

In the present case, the provisions o I f O, 41, R. 23 are not applicable because decision of the trial Court was not given on a preliminary point but it was given after the evidence was recorded on all issues and the entire atter was decided on merits. Therefore, the only question that will arise in the present case is whether under O, 41, R. 25, Civil P. C., it would be open to the appellate Court to remand the whole suit back to the trial Court, However, the effect of R, 23A is not considered in the present appeal,

9. In my view, it is clear that the lower appellate Court while passing the order dated 17?11?1980 in Regular Civil Appeal No. 161 of 1977 was in error in setting aside the judgment and decree passed by the trial Court and in remanding back to the trial Court the entire suit with liberty to the parties to lead further evidence on all the issues. In the present case, the application Ex. 8 for production of additional evidence has been allowed and findings am given on issues Nos, 1 and 2 against the present appellants and the entire suit is remanded to the trial Court, In view of the decision of the Supreme Court in Natha Singh and Others Vs. The Financial Commissioner, Taxation, Punjab and Others, , (supra) it is clear that the discretion given to the appellate Court to receive and admit additional evidence under O. 41, R. 27 is not an arbitrary one but is a judicial one circumscribed by the limitations specified in that provision, The true test to be applied in dealing with applications for additional evidence is whether the appellate Court is able to, pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced, Therefore, the appellate Court should have first decided the question whether it is necessary to take additional evidence or not, Before deciding that. he must consider the entire evidence led before the trial Court on its merits and thereafter come to the conclusion whether additional evidence is necessary or not. Even so, if the appellate Court feels that additional evidence is necessary, it

will be open to him to allow application Ex. 8 in the present case. There again. there is further problem which he is required to consider whether he should send down certain issues for trial to the trial Court and allow the trial Court to record the evidence on the issues or, direct the trial Court to determine any question of fact or remand the suit under O. 41, R. 23A, C. P. Code, and/or he should at the appellate stage under O. 41, R. 27 allow the production of the additional evidence or documents before him in appeal and take the additional evidence on record in appeal before him, In my view, therefore, the appellate Court should not have remanded the matter wholly after setting aside the judgment and decree of the trial Court without considering the entire evidence in appeal. it will be open to the appellate Court to reconsider the entire matter at the appellate stage and come to its own conclusion whether additional evidence is necessary or not, and whether he should allow the application Ex, 8 and whether the case requires to be remanded on particular issues or facts for recording further evidence allowing both the sides to lead evidence. or the case requires to be remanded under O. 41, R. 23A, C. P. Code.

10. I am not expressing any opinion on the two issues that were determined by the lower appellate Court and I am also not expressing any opinion whether the application Ex. 8 has been rightly granted or not. The entire questions of facts as stated above are kept open to be determined by the appellate Court on its merits.

11. Under the Circumstances, this appeal from order is allowed and the matter is remanded to the lower appellate Court for deciding it on merits, The lower appellate Court shall re-admit Regular Civil Appeal No. 161 of 1977 on its file and decide the case in the light of the observations made herein and the authorities cited above. if it is possible, the appeal may be heard by the same Joint District Judge, Mehsana, who heard this matter. The appeal is accordingly allowed with no order as to costs.

12. Appeal allowed.