

(2013) 12 GUJ CK 0041

In the Gujarat High Court

Case No : Special Civil Application No. 12256 of 2013

Ram Shyam Traders

APPELLANT

Vs

Kamlaben Ramanbhai Patel and Others

RESPONDENT

Date of Decision : 26-12-2013

Acts Referred:

Citation : (2013) 12 GUJ CK 0041

Hon'ble Judges : R.D. Kothari, J

Bench : Single Bench

Advocate : Y.N. Oza, with Mr. Rajesh K. Savjani, for the Appellant; Viral K. Shah, Advocate for the Respondent(s) No. 1-4, for the Respondent

Final Decision : Disposed Off

Judgement

R.D. Kothari, J.—In the present petition under Article 227 of the Constitution of India, the petitioner prays to quash the suit instituted before the City Civil Court, Ahmedabad by the present respondents.

1.1. The main prayers of the petitioner in the petition are as under:--

(A)

(B) Be pleased to issue a writ of mandamus, writ of prohibition and/or writ of certiorari declaring the decision making process of City Civil Court, Ahmedabad in issuance of notice and proceedings of Civil Suit No. 1784 of 2013 as illegal, without jurisdiction and contrary to the mandatory provisions of Gujarat Co-operative Societies Act, 1961 and be further pleased to quash and set aside the proceedings of Civil Suit No. 1784 of 2013 pending before City Civil Court, Ahmedabad.

(C) Be pleased to issue a writ of mandamus and/or writ of certiorari or any other appropriate writ, order or direction in the nature of mandamus declaring the proceedings initiated by respondent No. 1 to 4 (original plaintiffs) of Civil Suit No. 1784 of 2013 before City Civil Court, Ahmedabad is an abuse of process of Court

and be further pleased to quash and set aside the proceedings of Civil Suit No. 1784 of 2013 and orders passed in said proceedings.

(D) Pending hearing and final disposal of this Special Civil Application be pleased to stay the further proceedings of Civil Suit No. 1784 of 2013 pending before City Civil Court, Ahmedabad and orders passed in Civil Suit No. 1784 of 2013.

(E)

Heard learned Senior Advocate Shri Y.N. Oza for learned advocate Mr. Rajesh K. Savjani for the petitioner and Mr. Viral K. Shah for the respondents.

2. Primary undisputed facts emerge from the record are thus:--

3.1 Nutan Nagrik Sahakari Bank Ltd. had instituted Lavad Case No. 509/1991 against the defendants-debtors. The plaintiffs in Civil Suit No. 1784/2013 are the heirs of one Ramanbhai Nathabhai, who is defendant No. 5 in Lavad Case.

3.2 The said Ramanbhai Nathabhai was Director in two Companies. These Companies had availed of loan from the bank. The Companies defaulted in payment of loan amount. Hence, these Lavad Cases were filed against them.

3.3 The present petitioner has paid up the dues of the debtors to Nutan Nagrik Sahakari Bank and had applied before the Lavad Court to join him as party in Lavad Case. Lavad Court had granted the application of the petitioner and the petitioner was joined as plaintiff No. 2 in Lavad Case.

3.4 Upon receiving debt, bank has executed "transfer of mortgage deed" in favour of the petitioner.

3.5 Defendant Nos. 3 & 5 before Lavad Court had not filed any written statement, nor defendant Nos. 3 & 5 have cross-examined any witness of the plaintiff of that case, nor they have led any evidence before Lavad Court.

3. Learned Senior Advocate Shri Y.N. Oza referring and relying on the decree passed in the Lavad Case has urged that defendant Nos. 3 & 5 have not contested the proceedings before the Lavad Court. Not only that, but the defendants have executed Indemnity Bond in favour of the present petitioner. In the circumstances of the case, therefore, the present respondent now cannot agitate and challenge the property transferred in favour of the present petitioner by the bank by executing "transfer of mortgage deed". It was submitted by the learned advocate that allowing the present respondent to pursue the suit is nothing, but abuse of process of Court. Shri Oza has submitted that the suit instituted by the present respondent is barred u/s 166 of the Gujarat Cooperative Societies Act. Shri Oza placed reliance on the unreported judgment of Kerala High Court, reference of which may be made hereinafter.

4. On the other hand, learned advocate Mr. Shah for the respondent has drawn attention of the Court to the cause of action stated by the respondent in the plaint and prayers made by the plaintiffs in the plaint. It was submitted by the

learned advocate that the present respondent had derived title and interest in the suit property from the decree passed in the earlier proceedings. It was submitted that the plaint of the present respondent is fairly exhaustive and no suppression of facts is made by the present respondents, therefore, this Court in exercise of powers of writ petition should not interfere in the matter. The main submission of the learned advocate is that the remedy which would be available to the petitioner is under the Code of Civil Procedure, and the petitioner can file application under Order-7 Rule 11 of CPC. The learned advocate has placed reliance on *Vinod Seth Vs. Devinder Bajaj and Another*, *Alka Gupta Vs. Narender Kumar Gupta*,

5. In *Alka Gupta's* case (*supra*), the appellant and the respondent had entered into a partnership to run an Institute to prepare students for competitive examinations. The appellant has agreed to sell to the respondent the property, wherein they were running the Institute, along with goodwill. Part of the amount was paid by the respondent to the appellant. The appellant had filed suit for recovery of unpaid amount. Said suit was decreed. Then another Suit was filed by the appellant claiming rendition of account for the period mentioned in the suit. On the other hand, the respondent had filed suit against the appellant and others. It was suit for injunction. The appellant's suit for accounts was resisted by the respondent. Three main pleas raised by the respondent were; (i) plea of *res judicata*, (ii) that the suit is bad, as it is hit by section 69 of the Partnership Act, and (iii) that the plaintiff had suppressed the material facts and he has come before the Court with unclean hands.

6. It appears that during the pendency of the suit, in fact, at the stage when issues were also framed in the suit, party had approached the High Court for quashing of the suit proceedings. The trial Court had not only framed the issues, but it had ordered to try the issue of *res judicata* as preliminary issue. On approaching the High Court by the respondent, the High Court had dismissed the Suit holding that; (i) the appellant had abused the process of court; (ii) the appellant was an unscrupulous person and the suit was based on falsehoods; (iii) the partnership deed dated 5.4.2004 was illegal and unenforceable, as the appellant was a government servant; and (iv) the suit was barred by Order 2 Rule 2 CPC and also barred by the principle of constructive *res judicata* (para-8). Being aggrieved by the dismissal of the suit, the original plaintiff had moved the Supreme Court. The Supreme Court allowing the appeal has mainly held as under:--

(1) Suit cannot be dismissed as barred under Order 2 Rule 2, in absence of plea by the defendant to that effect and in absence of an issue thereon;

(2) since the cause of action in first suit and the second suit are completely different, bar under Order 2 Rule 2 CPC is not attracted;

(3) second suit is not barred under constructive *res judicata*.

(4) suit cannot be dismissed without trial merely because Court feels dissatisfied

with the conduct of the plaintiff.

7. In Vinod Seth's case (supra), the appellant claims to be builder. He filed suit for specific performance. His suit was based on oral agreement. Though agreement was oral one, plaintiff had mentioned various conditions that were agreed upon between the parties. In the said suit, passing of order by the Court for filing an undertaking to the effect that in case the plaintiff fails in his suit, he will pay Rs. 25 Lacs to the defendant had led the plaintiff to challenge the same. It is this order of undertaking that came up for consideration before the Supreme Court. The Supreme Court after considering the case of the parties in quite detail, has reduced the amount of Rs. 25 Lacs to Rs. 3 Lacs. In other words, order to give undertaking was not interfered with.

8. On the other hand, learned Senior Advocate Shri Yatin Oza has drawn attention of the Court to an unreported judgment of Kerala High Court in O.P.(C) No. 1792/2011 decided on 27.10.2011. The learned Single Judge in para-1 has framed question thus:--

Can a plaint be quashed under Articles 226 or 227 of the Constitution? This important question arises for consideration in this petition".

After considering the case quite elaborately, Kerala High Court was pleased to quash the suit proceedings initiated by the plaintiff.

9. The petitioner herein prays to dismiss the suit in exercise of powers under Article 227 of the Constitution of India. In the oft quoted case of Waryam Singh and Another Vs. Amarnath and Another, it is laid down that jurisdiction of the Court under Article 227 is neither original nor appellate. It is supervisory jurisdiction. That, High Court would supervise the proceedings before lower courts, subordinate courts and tribunals and such superintendence would include to have judicial as well as administrative control.

10. In order to consider the case of the present petitioner, let us consider the facts of the case in little detail: The plaintiffs are heirs and legal representatives of one Ramanbhai Nathabhai Patel. Omnibus title of the suit says that it is a suit for redemption of mortgage and for declaration and injunction. Though the suit is instituted against nine defendants, relief is claimed only against defendant No. 1. Defendant Nos. 2 & 3 are companies known as "Dayaram Printers" and "Javanika Fabrics" respectively. Defendant Nos. 4 & 5 are Directors of Dayaram Printers and defendant Nos. 6 to 9 are Directors of Javanika Fabrics. Ramanbhai Nathabhai and his son Jogesh were Directors in these companies. In 1986-87 these two companies had obtained loan from the Bank. The property pledged as equitable mortgage against loan includes the suit properties viz. Survey Nos. 556 and 557. Since the companies could not repay the loan amount, the Bank had instituted two Lavad Suits, i.e. Lavad Suit Nos. 506/1991 and 509/1991 before the Board of Nominees against these companies. It is at that stage, defendant No. 1 comes into picture. It is not in dispute between the parties that defendant No. 1,- petitioner herein,- had paid up all the dues of both these companies to

the Bank. An application to join present petitioner as a party was allowed and in Lavad Suits instituted by the Bank, defendant No. 1-present petitioner was joined as plaintiff No. 2. Pursuant to the payment of all the debts by the petitioner-defendant No. 1 to the Bank, Bank had executed transfer of mortgage deed in favour of defendant No. 1-petitioner on 27.3.1992. In substance, the case of the plaintiff is thus: The suit properties stand redeemed for two reasons; firstly, because defendant-Ramanbhai Nathabhai, whose heirs and legal representatives are plaintiffs herein, and his son (plaintiff No. 2) have resigned from these companies on 31.3.1990, that is prior to the filing of the Lavad Suits by the Bank in 1991; and secondly, on payment of all the dues by the petitioner-defendant No. 1 to the Bank, suit properties stand redeemed. These, in substance, are the assertions of the plaintiffs. Then, as to the transfer of mortgage deed and executing indemnity bond, it is the say of the plaintiffs that these documents were executed without their knowledge and consent and secondly, since the suit property was valued much higher than the debts of the Bank, it was not made part of the deed or indemnity bond. This stand is taken by plaintiffs qua transfer of mortgaged deed and indemnity bond. This assertion of the plaintiffs, it may be stated, appears to be false and contrary to the record, inasmuch as suit properties are clearly mentioned in the order of Lavad Court and in the Indemnity Bond. Then, it is also the say of the plaintiffs that the claim of defendant No. 1 has become barred by limitation.

11. There appears to be considerable force in the submissions of learned Senior Advocate Shri Yatin Oza that the plaintiffs' case has no merits. However, unless it can be said that institution of suit by the plaintiffs is abuse of process of Court, the suit cannot be dismissed. The petitioner has yet not even appeared before the trial Court.

12. The learned advocate for the respondents at the time of hearing submitted that the trial Court had passed order of status-quo in the injunction application of the plaintiffs. Learned Senior Advocate Shri Oza submitted that his client has not received any order of injunction and has received only summons and notice of institution of plaint.

13. In the case before Kerala High Court, the facts were quite startling. This would be clear from reading paras 1 to 8 of the judgment. It was a petition filed by the tenant against the landlord. Original landlord and the tenant had expired since long,- heirs of deceased-tenant were occupying the premises and heirs of the landlord having failed in their all attempts to recover possession forcibly, filed suit against the defendant-tenant. In the circumstances of that case, tenant had moved the High Court. Considering the consistent conduct of the landlord-respondent, High Court was pleased to allow the petition and quashed the suit proceedings.

14. When suit proceeding can be quashed in exercise of power under Article 227? Plain answer that comes to one's mind on the first reaction is,- when the institution of suit is abuse of process of Court. In other words, in case where

institution of suit itself amounts to abuse of process of Court, it would give cause to the other side to seek relief under Article 227. However, it may also be added that propriety of entertaining and granting relief in exercise of powers under Article 227 depends on various circumstances, including at what stage the suit proceeding is. Before dealing with the submissions of learned Senior Advocate Shri Oza in this regard, reference may be made to one aspect that appears from the record. In Lavad Suit Nos. 506/1991 & 509/1991, though said Ramanbhai Nathabhai was duly served and had engaged advocates in both the suits, they have remained absent. Further, it would appear from para-8 of the judgment in Lavad Suit No. 506/1991 that the defendant No. 3 before the Nominee Court has filed purshis admitting and agreeing transfer of their debts. Reference to filing of the purshis in the judgment of the Nominee Court is in favour of the present petitioner.

15. Learned Senior Advocate Shri Yatin Oza in support of his submission that this is a fit case for interference by this Court, as continuance of the suit is nothing, but abuse of process of Court, has submitted that the present petitioner is not an outsider or not that with an idea to invest, he has jumped into the litigation between the Bank and its debtors, i.e. present respondents. It was submitted that the present petitioner is also creditor of the respondent-companies. It was submitted that the respondents owe very huge amount to the present petitioner and that being so, petitioner has moved forward to pay the debts of the respondents to the Bank. In support of this submissions, attention of the Court was drawn to page 241-E of the compilation. The learned Senior Advocate submitted that debt of the present respondents qua the petitioner was of the huge amount and the petitioner has to forgo the said debt and has paid up the debts of the Bank and pursuant to that, the respondents had executed indemnity bond. On the face of the decree of the Lavad Court, wherein the present petitioner is also a party and execution of the indemnity bond by one from whom the respondents derive right, title and interest,- filing of the suit by the respondents is nothing, but abuse of process of Court. Learned Senior Advocate Shri Oza also submitted that filing of suit by the heirs and legal representatives of deceased Ramanbhai after the death of Ramanbhai in 2012 and after lapse of nearly 19 years from the date of order of Lavad Court by the present respondents, is nothing but abuse of process of court. Further, it was also contended that suit is barred u/s 166 of the Gujarat Cooperative Societies Act.

16. As to section 166 of the Gujarat Cooperative Societies Act, it can be said that its applicability cannot be said to be a pure question of law. It is a mixed question of facts and law. In the circumstance of the present case, it cannot be said to be pure question of law. Its applicability depends on the nature of relief sought by the plaintiffs in the civil suit instituted by them. In any case, it cannot be said that ex-facie, section 166 of the Gujarat Cooperative Societies Act is attracted and that the suit is barred under the said provision. Then, in both the Lavad Cases, it would appear that in the operative order, Lavad Court has specifically referred each of the defendants except Ramanbhai Nathalal. Such

exclusion is clear and specific. It is so in both the cases. The reason for his exclusion is not clear. It may imply that decree does not bind to non-referred person, i.e. Ramanbhai Nathalal. It was submitted at the time of hearing by the learned advocate for the petitioner that the suit property is very much referred and included in the order of the Lavad Court. This assertion appears to be correct. Exclusion of Ramanbhai in both the Lavad cases, however, requires some consideration. Therefore, interference by this Court in exercise of powers under Article 227 of the Constitution would not be just, proper and legal. Further, in view of law laid down by the Apex Court in Alka Gupta's case (supra) and in Vinod Seth's case (supra), it would not be proper for this Court to intervene and quash the suit proceedings.

17. In contrast, to have a right to appeal, person inheres right to sue. The say of Supreme Court in Smt. Ganga Bai Vs. Vijay Kumar and Others, if read in the context of the present discussion, it would give us an idea not only of width of right to sue, but it also hints at peril at which one may invoke jurisdiction by filing suit. It reads thus:--

There is an inherent right in every person to bring a suit of a civil nature and unless the suit is barred by statute, one may, at one's peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit.

17.1 The petitioner has a remedy under the CPC also. Party can apply for discovery and interrogatories under Order 11 Rule 1, Rule 14 etc. of CPC. Then the Civil Court has very wide powers under Order 10 CPC to test veracity of the allegations made in the pleadings. At any stage of the case, application under Order 7 Rule 11 CPC can be considered. If in real sense of term "plaint" does not disclose the cause of action that deserves to be tried, then such a plaint can be rejected under Order 7 Rule 11(a). Objection as to the bar of jurisdiction of Civil Court in view of section 166 of the Gujarat Cooperative Societies Act can be considered under Order 7 Rule 11(d) CPC.

18. In view of the above discussion, no interference in the institution of Civil Suit No. 1784/2013 in exercise of powers under Article 227 of the Constitution is called for. However, on the facts and circumstances discussed hereinabove, it is just and proper to order that order of status-quo granted by the Civil Court, as submitted by the learned advocate for the respondents, - requires to be vacated. Status-quo means stay. It is form of injunction. The facts and circumstances of the case do not call for issuance of status quo. On the other hand, if the assertion of the plaintiffs has substance, Lis Pendens would take case of it.

19. At the request of learned Senior Advocate Shri Oza, learned trial Court is directed that in case present petitioner files an application under Order 7 Rule 11 CPC, then the trial Court would take up the said application for hearing before deciding any other issues on merits.

20. Relying on Vinod Seth's case (supra) it was also submitted by Shri Oza that the respondents be directed to furnish Bank guarantee so that interest of the present petitioner can be suitably protected. It was submitted that the respondents be asked to furnish bank guarantee of the amount not less than Rs. One crore, since the suit property, as per the say of the respondents themselves, is worth Rs. 20 Crores. In Vinod Seth's case (supra), the Court had not directed to furnish bank guarantee, but a direction was given only to give an undertaking. In that case, plaintiffs claimed to have paid Rs. 51,000/- for agreement to sell and it appears from the record that the property was valued at more than 20 Lacs. Relying on Order-25 Rule 1 CPC, Court was pleased to ask the plaintiffs to file an undertaking, as the Court found that the plaintiff's chance to succeed was remote. It is also important to note that in that case the plaintiffs had not prayed for any interim relief, yet the Court had passed an order to give an undertaking. Following Vinod Seth's case (supra), respondents herein are directed to file an undertaking on oath before the trial Court to the effect that in case the plaintiffs fail in the suit, plaintiffs would pay Rs. 3 Lakhs to the present petitioner. The respondents shall file such undertaking within one month from the date of receipt of writ by the learned trial Court. The respondents shall file an undertaking to the effect that in case they fail in their present suit, then without requiring the petitioner to file legal proceeding, the respondents would pay the said amount, i.e. Rs. 3 Lacs to the present petitioner.

21. Considering the facts and circumstances of the case, learned trial Court is directed to decide and dispose of the suit expeditiously. The learned advocate for the petitioner submitted that the petitioner would cooperate the Court in expeditious disposal of the suit. With the cooperation of the parties, the trial Court shall dispose of the suit within six months from today. I have made discussion on the basis of submissions made by the learned advocates for the parties and considering the material available on record. The trial Court would consider suit/application, as the case may be, on merits of it and in accordance with law. Obviously observations are not to pre-empt any future decision.

With the above observations and directions, the present petition is disposed of. Rule discharged. No costs.