

(2019) 12 GUJ CK 0039

In the Gujarat High Court

Case No : R/Civil Revision Application No. 489, 492 Of 2019

Sajniben Ramanlal Patel

APPELLANT

Vs

Virendrabhai R Vaghala

RESPONDENT

Date of Decision : 18-12-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 41 Rules 23, Order 41 Rules 23A, Order 41 Rules 24, Order 41 Rules 25

Citation : (2019) 12 GUJ CK 0039

Hon'ble Judges : Dr. A. P. Thaker, J

Bench : Single Bench

Advocate : Sudhanshu S Patel, FB Brahmhatt, D H Panchal

Judgement

Dr. A. P Thaker, J

1. Present Civil Revision Applications are filed by the applicants against the judgment, order and decree passed by the Appellate Bench, Small Causes Court, Ahmedabad, in Civil Appeal Nos.38 and 39 of 2016.

2. The applicant No.1 is the owner of Bungalow No.13/11/B, Mamtapark, B/h. Navgujarat College, Usmanpura, Ahmedabad, situated in T.P.Scheme No.3, Final Plot No.13, admeasuring 508.36 sq.mts and having constructed area admeasuring 285.83 sq.mts. That the applicant no.2, was appointed as the executor of the will dated 22.2.2004 of one Lt. Smt. Shantaben Motilal Panchal, who was the original owner of the above-mentioned property and that applicant no.1 and her mother Late Smt.Shardaben Somnath Patel (expired during the pendency of the main suit), had purchased the said property by registered sale deed dated 12.2.2007, for consideration of rupees fifty lakhs from applicant no.2 herein, who had been appointed as the executor of the Will, of the original owner of the premises. The Sale deed was registered with the office of the Sub-registrar, Vadaj, Ahmedabad, vide Sr.No.1882 dated 12.2.2007. That initially the HRP No.1998 of 2006 was filed by present respondent against the present applicant no.2 herein and subsequently the applicant no.1 and her mother Late

Smt. Shardaben had been added as the defendants in the said proceedings and simultaneously HRP No.2489 of 2006 was filed by present applicant no.1 herein against the present respondent herein and subsequently applicant no.1 and her mother Late Smt.Shardaben had been added as the plaintiffs in the said proceedings.

3. As per the case of the tenant/ present opponent / original plaintiffs of HRP No.1998 of 2006, the suit property is situated on the eastern portion of the above-mentioned bungalow, a room admeasuring 15 feet length (East-West) X 5 feet width (North-South) and the compound admeasuring 20 feet along with shade, Wash (Chokadi), water tank and toilet where he is running the scooter repairing garage in the name and style of "Bombay Auto Garage". That according to the present opponent, he is the tenant in the suit premises before 1990, for monthly rent of Rs.1,800/- and has to pay electricity bills and municipal tax extra. That he had filed the suit in the Small Causes Court, Ahmedabad, for standard rent, being HRP No.1998 of 2006 on 22.9.2006, as the same rent is much higher and is not the standard rent and had also prayed to restrain the defendant/s from disturbing with his possession, in the suit property. That initially, the suit was filed against present applicant no.2 only and thereafter applicant no.1 and her mother Late Smt.Shardaben Patel, were added as the party defendants, as they have purchased entire property which also includes the suit property.

3.1 That the learned trial Judge, Small Causes Court No.11, Ahmedabad City, vide common judgment, order and decree dated 23.2.2016 passed in HRP No.1998 of 2006 and HRP No.2489 of 2006 had been pleased to dismiss the HRP No.1998 of 2006 (filed by the tenant-present respondent) and partly allowed HRP No.2489 of 2006 (filed by the original owners/present applicants) to the extent that "the defendant-tenant was permanently restrained from using the suit premises as non-residential purpose".

3.2 The original plaintiff/present opponent, being aggrieved and dissatisfied by aforesaid order dated 23.2.2016 passed by learned trial Judge, Small Causes Court, Ahmedabad, had filed two separate appeals being Civil Appeal No.38 of 2016 and Civil Appeal No.39 of 2016 before the Appellate Bench of the Small Causes Court, Ahmedabad. That the appellate forum, by two separate judgments and orders dated 31.8.2019, had been pleased to quash and set aside the common judgment and decree passed by learned trial Judge on 23.2.2016 in HRP No.2489 of 2006 and HRP No.1998 of 2006 and was further pleased to remand back both the suits to the concerned trial Court with further direction to decide the same on merits, afresh by giving opportunity of being heard to the appellant of the appeal.

4. Being aggrieved and dissatisfied by the impugned judgment and order passed by the Appellate Bench, Small Causes Court, Ahmedabad, applicants have preferred present Revision Applications before this Court.

5. Learned advocate for the appellants submitted that the impugned judgment and order dated 31.8.2019 passed by the Appellate Forum of the Small Causes Court, Ahmedabad, is contrary to law and facts as well as the evidence on record. He submitted that though the trial Court ordered to record evidence of both the suits in HRP No.2489 of 2006, evidence of Shri Manilal Manharlal Panchal (plaintiff-applicant no.2 herein) and others have been recorded as evidence of defendants and evidence of Shri Vaghela and others had been recorded as the evidence of the plaintiff. He submitted that the appellate Court had set aside the orders passed by the trial Court on 23.2.2016 only on the ground that before the trial Court no opportunity of hearing was given to the tenant-respondent herein. He submitted that looking to the Rojkam, affidavit-in-chief of the tenant had been filed on 2.4.2013 and it is exhibited as Exh.70. Even at the time of cross-examination of the plaintiff, the tenant did not remain present and ultimately the stage of cross-examination was closed, however, on 4.7.2014, purshis was filed by the plaintiff-original tenant for re-opening his right of cross-examination and the said application was allowed, however, inspite of several opportunities being given, cross-examination was not done, therefore, learned trial Court closed the right of cross-examination of the plaintiff.

5.1 He also submitted that learned trial Judge had been pleased to dismiss HRP No.1998 of 2006 filed by tenant and partly allowed HRP No.2489 of 2006 filed by original owners to the extent that defendant-tenant was permanently restrained from using the suit premises for non-residential purpose. He submitted that in view of above, learned Appellate Court has not taken into consideration record while passing the impugned order and observed that the suit was decided ex-parte.

5.2 He further submitted that the present applicants-original landlord had preferred their cross-objection in the appeals filed by the respondent on 27.2.2017 and the same are on record of the appeal and the original appellants-tenant had also filed reply to cross-examination, therefore, the reasoning of the appellate Court is not correct. He also submitted that the original tenant had not cooperated with the hearing of the matter and not remained present on various occasions, though ample opportunity was granted, therefore, it cannot be said that the tenant was not given opportunity to be heard. He also submitted that the suit was filed in the year 2006 and now after 13 years it would not be in the interest of the parties to remand the matter back to be heard afresh.

5.3 Learned advocate for the applicant submitted that the tenant has not filed any complaint against his advocate for not informing him of the date of hearing of the suit and, therefore, there is no bona fide on the part of the tenant in not producing the evidence at the relevant time.

5.4 He submitted that illness of other person than the party to the proceedings cannot be a ground to remain absent and when the tenant himself was not ill, he was required to remain present. He submitted that even with regard to the illness of his father, the tenant did not produce any evidence.

5.5 In support of his submissions, learned counsel, Mr.Patel has relied upon the following decisions:-

(i) Hameed (D) By Lrs. V, Jummottummam Kunhi P.P.Amma (D) By Lrs. reported in 2007 (15) SCC 155

(ii) Manager, M/s.Zen Pharma v. Lila R. Patel C/o. Gujarat Rajya Kamdar Sabha reported in 2012 (2) GLR 1593

(iii) Hiya Associates v. Nakshatra Properties Pvt. Ltd. reported in 2018 (13) Scale 583.

5.6 In view of all these, he prayed to allow present revision applications.

6. On the other hand, learned advocate for the respondent has supported the impugned judgment and submitted that the lower appellate Court has not committed any mistake in passing the impugned order. He submitted that for the reason of illness and death of his father, the tenant could not remain present to put himself in the box for cross-examination. He also submitted that affidavit-in-chief of the respondent herein was not exhibited and no evidence has been recorded by the trial Court. He also submitted that no opportunity of being heard has been given to the respondent and for the said reason, the lower appellate Court has rightly remanded the matter to the trial Court, which order does not require any interference at the hands of this Court. In view of this, he prayed to dismiss present revision applications.

6.1 In the case of Hameed (D) By Lrs. (supra), the appeal was directed against the order/judgment passed by the High Court of Kerala, whereby the High Court, after setting aside the decree and judgment of the Courts below remanded the matter back to the trial Court for re-consideration. This order of the High Court was assailed before the Supreme Court. While considering the facts and circumstances of the case, it appears that there was prayer by the plaintiff to produce documents at a later stage and there was ample evidence on record. In that view of the matter, the order of the High Court remanding the matter back with liberty to produce documents in order to fill lacunae in the evidence was set aside by the Supreme Court and the High Court was directed to decide the appeal on merits only on the material available on record.

6.2 In the case of Manager, M/s.Zen Pharma (supra), the Labour Court had passed an ex-parte order, which was challenged by the employer and ground was taken that the lawyer did not appear on various dates and, therefore, opportunity to lead evidence be granted to the employer. Considering the material placed on record, it was observed that despite sufficient opportunities, employer had been negligent in prosecuting remedy. The prayer of the employer was rejected. Thus, in that matter also evidence was laid by the party concerned and it was held that if counsel did not appeared in the trial Court for the employer, it was a matter between the employer and his counsel then the appellant should have lodged a complaint in the Bar Council of Gujarat against the concerned counsel. That

inspite of payment of fees, counsel was not appearing and, therefore, action may be taken against the counsel.

6.3 In the case of Hiya Associates (*supra*), there was compromise between the parties and, consent compromise decree was passed and, thereafter, at the time of execution of the decree, concerned party raised objections and revisional Court permitted the defendants to file additional documents, which they had filed for the first time in the execution petition. Considering the factual aspects thereof, it was observed by the Supreme Court that the revisional Court should not have remanded the case back to the Executing Court for its fresh consideration on merits and it should have decided the revision on merits and in accordance with law. It was also held in paragraph 18 as under:-

"18) In our opinion, the remand of a case to the Subordinate Court is considered necessary when the Superior Court while exercising its appellate or revisionary jurisdiction finds that the Subordinate Court has failed to decide some material issues arising in the case or there is some procedural lacuna noticed in the trial, which has adversely affected the rights of the parties while prosecuting the suit/proceedings or when some additional evidence is considered necessary to decide the rights of the parties which was not before the Trial Court etc.(See Order 41 Rules 23, 23-A, 24 and 25 of the Code of Civil Procedure, 1908). Such was not the case here."

7. Heard learned advocates for the parties and perused the material on record. From the record, it is clear that the tenant-respondent herein had filed HRP Suit No.1998 of 2006 against the present appellants for getting permanent injunction restraining them from taking possession of the suit premises without due process of law. Present appellant also filed HRP Suit No.2489 of 2006 against the tenant-respondent herein for getting possession of the suit premises from the tenant and both suits were consolidated by the trial Court and learned trial Judge has passed consolidated judgment on 23.2.2016 in both the suits and dismissed HRP Suit No.1998 of 2006 and partly allowed HRP Suit No.2489 of 2006, however, no eviction decree is passed against the tenant and the tenant is only restrained from permanently using the suit premises for non-residential purpose. As per the finding of the trial Judge, tenant has failed to prove that the defendants are trying to dispossess him unlawfully from the suit premises, therefore, the learned trial Judge has dismissed tenant's HRP Suit No.1998 of 2006. It is also observed by learned trial Judge that deceased Shantaben Motilal Panchal permitted the tenant to use the suit premises for non-residential purpose, however, present appellants issued notice and withdrawn the permission to use the suit premises for non-residential purpose, after purchasing the suit property.

8. It also appears from the Rojkam, a copy of which has been produced in the matter, that several opportunities have been provided to the tenant, however, he did not remain present and nor took the opportunity of hearing. However, the stand of the tenant is that due to illness of his father, he could not remain present in the Court. At this juncture, it is pertinent to note that the appellate

Court has authority/jurisdiction to permit additional evidence to be produced in the appeal and decide the appeal on that basis. In the present case, as there was no evidence recorded on behalf of the defendant, there is no evidence produced in the trial Court. As such, the appellate Court cannot decide the appeal in absence of evidence by the other side.

9. It is also clear that in both the suits, tenant-respondent has filed examination in chief and thereafter, next date has not been informed to him by his learned advocate and upon inquiry, learned advocate did not give any information regarding the proceedings of the matter and, in the meanwhile, health of father of the tenant was not well and he was required to visit the hospital frequently and he could not remain present before the Court. It is also stated that this fact was informed by the tenant to his learned advocate, but learned advocate did not inform it to the Court and due to that the Court has not exhibited the examination in chief and other documents and not considered the same and the matter was proceeded ex-parte. Therefore, it appears that no opportunity of hearing was awarded to the tenant and ex-parte order is passed. On the other hand, the cross-objections were filed by the landlord and a notice was given to the tenant specifically asking to stop the commercial use of suit premises and since the tenant did not act upon it, HRP Suit No.2489 of 2006 is filed. It is also stated that since the tenant has not paid municipal tax, prayer is made to vacate the suit premises. Other allegations of encroachment and making construction without permission are also made. It is also alleged that the tenant is doing the business from the suit premises.

10. From the facts and circumstances stated herein above, it is clear that the suit was ordered to be consolidated ex-parte. Not only that due to the illness and death of father of the tenant, the tenant did not remain present to put himself in the box for cross-examination. It is also clear that tenant's affidavit-in-chief and other documents are not exhibited and no evidence is recorded by the trial Court. The tenant has also produced documents in support of his submission regarding illness and death of his father. Therefore, this Court finds that the lower appellate Court has not committed any error in remanding the matter back to the trial Court with a view to see to it that opportunity of being heard is given to the tenant to produce oral and documentary evidence, if any. That the lower appellate Court has passed the order on the facts of the case and it is not a perverse order, therefore, the same does not require any interference by this Court.

11. In view of above, both these Civil Revision Applications are liable to be dismissed and the same are dismissed. However, considering the facts that original suits are of the year 2006, learned trial Court is hereby directed to dispose of the suits within three months i.e. on or before 31st March 2020. Parties are directed to cooperate with the trial Court in hearing and disposal of the matter, in time bound period. No order as to costs.