

(2014) 08 GUJ CK 0060

In the Gujarat High Court

Case No : Letters Patent Appeal No. 958 of 2007 in Special Civil Application No. 4969 of 2006

Saritaben Sagarbhai Arora

APPELLANT

Vs

Dineshchandra Jamnadas Gadhiya

RESPONDENT

Date of Decision : 14-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13, 11, 114, 144, 96
Constitution of India, 1950 — Article 226, 227

Citation : (2015) 1 GLR 656

Hon'ble Judges : V.M. Sahai, J; Abdullah Gulamahmed Uraizee, J

Bench : Division Bench

Advocate : Chinmay M. Gandhi and M.B. Gandhi, Advocate for the Appellant;
Suresh M. Shah and Mehul S. Shah, Advocate for the Respondent

Judgement

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Abdullah Gulamahmed Uraizee, J.—Heard Mr. M.B. Gandhi with Mr. Chinmay Gandhi, learned counsel for the appellant and Mr. Mehul Shah, learned counsel for the respondent.

2. The appellant has challenged the judgment dated 12th April 2007 passed by the learned Single Judge in Special Civil Application No. 4969 of 2006 whereby the petition preferred by the respondent came to be allowed and the order dated 19th September 2005 passed by the learned Additional Judge of the Small Causes Court, Rajkot in Civil Misc. Appeal No. 24 of 1998 came to be set aside.

3. The facts, in nutshell, giving rise to the present appeal are that the respondent was in occupation of a part of the residential premises situated at Sheri No. 9, Sardarnagar, Rajkot, in the property known as "Chiratan" (hereinafter referred as "the suit land"). The deleted opponent no. 1-original landlord filed rent suit being Rent Suit No. 877 of 1979 against the present respondent-tenant for eviction wherein an ex parte decree for eviction

was passed by the Rent Court on 15th July, 1980. The respondent-tenant preferred appeal being Appeal No. 433 of 1980 which came to be allowed by order dated 14th December, 1983 and the ex parte decree was set aside. In the meantime, during the pendency of the said appeal, the landlord had filed Execution Petition No. 68 of 1980 which had remained pending. Upon the remand of the suit in Appeal No. 433 of 1980, the landlord again got ex parte decree on 30th April 1984. The respondent challenged the ex parte decree in the appellate Court by filing Civil Misc. Application No. 344 of 1984 which was allowed by the Appellate Court on 30th September, 1987 and ex parte decree was set aside. As noted in the foregoing, though the first ex parte order of eviction passed on 15th July, 1980 was set aside by the Appellate Court on 14th December, 1983, the Execution Petition No. 68 of 1980 remained pending, which ought to have become infructuous. Be it as it may, after passing of the second ex parte decree on 30th April 1984, Execution Petition No. 68 of 1980 filed on the basis of first ex parte decree was prosecuted by the landlord and the possession of the suit premises was taken from the respondent on 25th June 1984. The suit being Rent Suit No. 877 of 1979 was listed for hearing on 30th September 1987, upon remand from the appellate court, after second ex parte decree came to be dismissed for want of prosecution on 29th December 1987. This order of 29th December 1987 dismissing the suit for non-prosecution has attained finality as it has not been challenged before the higher forum. The present appellant purchased the suit premises from the original landlord in the year 2000. The respondent preferred an application being Civil Misc. Application No. 24 of 1988 in the Small Causes Court, Rajkot for restoration of possession. The learned trial Judge rejected this application by his order dated 19th September 2005 on the ground that it is barred by constructive res judicata and principles of estoppel as the prayer for restoration of possession of the suit premises was rejected by the appellate court while setting aside the second ex parte decree. The respondent, being aggrieved and dissatisfied with the above order of the learned trial Judge dated 19th September 2005 preferred Special Civil Application No. 4969 of 2006, which came to be allowed by the learned Single Judge, which is impugned in this appeal.

4. Mr. Gandhi, learned advocate for the appellant submits that the order of the learned trial Judge was under Section 114 of the Civil Procedure Code, 1908, which is appealable under Section 96 of the CPC and therefore the writ petition was not maintainable. In support of his argument, he has relied upon the following decisions:

- (1) Swetambar Sthanakwasi Jain Samiti and another Vs. The Alleged Committee of Management, Sri R.J.I. College, Agra and others, .
- (2) Jamnabai Ramchandra Vadekar Vs. Modern Auto and Machinery Agency, .
- (3) L.K. Verma Vs. H.M.T. Ltd. and Another,
- (4) Punjab National Bank Vs. O.C. Krishnan and Others,

(5) Sheela Devi Vs. Jaspal Singh,

(6) R.I. Tekriwala v. Collector, Ahmedabad, 2000(1) GCD 229

(7) Unchamala Mahila Dudh Utpadak Sahakari Mandli Ltd. Vs. District Registrar, Co-Operative Society

(8) S. Jagadeesan Vs. Ayya Nadar Janaki Ammal College and Another, .

4.1. It is his further contention that the maintainability of the petition is a pure question of law, which can be raised at any stage. In support of his argument, he has relied upon the decision of the Apex Court delivered in the case of Tarini Kamal Pandit and Others Vs. Prafulla Kumar Chatterjee (Dead) by Legal Representatives, .

4.2. Mr. Gandhi next contended that the order passed by the learned Single Judge is without jurisdiction and therefore the judgment of the larger Bench of this Court in the case of Revaben W d/o Ambalal Motibhai, and others v. Vinubhai Purshottambhai Patel and others, 2013(1) GLH 440 cannot be pressed into service and the appeal against the order of the learned Single Judge is maintainable.

4.3. Mr. Gandhi has next contended that the application filed by the respondent for restoration of possession was under Section 144 of the Civil Procedure Code, 1908 and any order passed below such an application is appealable under Section 96 of the Code of Civil Procedure, 1908.

5. Per contra, Mr. Mehul Shah, learned advocate for the respondent has contended that the petition cannot be dismissed on the ground of availability of an alternative remedy of appeal and since the petition was entertained by the learned Single Judge. In support of his contention, he has relied upon the decision of the Apex Court in the case of Durga Enterprises (P) Ltd. v. Principal Secretary, Government of UP & Ors., (2004) 13 SCC 665.

5.1. Mr. Shah has further contended that maintainability or otherwise of the writ petition was never argued before the learned Single Judge and therefore the appellant cannot now raise this question in this appeal at appellate stage. It is submitted by him that the writ petition preferred by his client was entertained by the learned Single Judge and after hearing the parties the same was allowed and the appellant cannot raise that contention before this Court now in view of decision of L. Hirday Narain Vs. Income Tax Officer, Bareilly, and Durga Enterprises (P) Ltd. v. Principal Secretary, Government of UP & Ors. (supra).

6. The contour of history of the litigation between the appellant and the respondent as depicted in the foregoing and as rightly observed by the learned Single Judge, has a checkered history. Undisputedly, the suit for eviction filed by the landlord in the writ petition came to be decreed ex parte in 1980. The ex parte decree was challenged by the present appellant in the appellate court, which set aside the ex parte decree and remanded the case to the trial court for

further hearing. When the appeal was pending the original landlord took out Execution Petition No. 68 of 1980, but did not prosecute it. During the pendency of the execution proceedings, the appeal preferred by the appellant was allowed and the ex parte decree was set aside. The suit went back to the trial court for trial. Once again, the suit was decreed ex parte. It was subject matter of appeal before the appellate Court, which, once again, set aside the ex parte decree and remitted the case to the trial court. Thereafter, the original landlord remained indolent and did not prosecute the suit, as a result it came to be dismissed for want of prosecution. This dismissal of the suit has attained finality as it has not been challenged in any of the appellate forums. Between the second ex parte decree in 1980 and dismissal of the suit for want of prosecution in the year 1987 the original landlord prosecuted the Execution Petition No. 68 of 1990, which he had filed on the basis of the first ex parte decree and took the possession from the opponent in the year 1984. Upon the dismissal of the suit for non-prosecution, the respondent preferred Misc. Civil Application No. 24 of 1988 for restoration of possession. This application is dismissed by the learned trial Judge by the order on the following premises:

"13. In my view, the principles of estoppel by conduct between the parties may come into operation on the facts and circumstances of the case. e.g. where a petition has been withdrawn unconditionally, a second petition on the same cause of action is not competent unless liberty is reserved at the time of withdrawal of the earlier petition. In the earlier petition there is specific finding recorded by the court that the applicant prayer of restoration of possession the suit premises is rejected and it will bar the subsequent proceedings. As found by me hereinabove when the applicant tenant prayer for restoration of possession was rejected. Thus, he would be estopped from raising the same issue again in another proceeding, viz. by way of a substantive application under sec. 144 of C.P.C. on the principle that *MEMO DEBIT BIS VEXARI, SI CONSTAT CURIAE QUOD SIT PRO UNA ET EADEM CAUSA* means No man ought to be twice vexed, if it be proved to the court that it be for one and the same cause. I have come to the conclusion, that although sec. 11 by itself does not directly create a bar to the subsequent proceedings taken out by the applicant-tenant in the form of an application under sec. 144 of C.P.C. the same, however will be barred by principles analogous to *res judicata* and also on account of principles of estoppel operating against the tenant. It is clear that the applicant-tenant having exercised his statutory right under 0-9 R- 13 of C.P.C. has been decided that he is not entitled for restoration of possession and has by such conduct therefore, now fresh exercise of such right would clearly be barred on the same facts and cannot be exercised as it is barred under sec. 11 of C.P.C. Hence, it decided point No. 1 in negative. In the interest of justice. I passed the following order as under:

ORDER

The application of the applicant under Sec. 144 of C.P.C. for restoration of possession of the suit premises is hereby rejected.

No. Order as to costs.

Pronounced in the open court on this 19/9/05."

7. The main contention raised by Mr. Gandhi, learned advocate for the appellant is that the order passed by the learned trial Judge is under Section 144 of the CPC, which is an appealable order and therefore the petition preferred by the respondent was not maintainable. To buttress his submission, he has relied upon the judgment encapsulated hereinabove. It is true that the Honourable Supreme Court in a catena of decisions has laid down a general proposition that when an alternative remedy is available the petitions under Article 226/ 227 cannot ordinarily be entertained and the High Court should be slow in exercising its power under Article 226 of the Constitution of India, if an alternative remedy is available. However, the Honourable Supreme Court has, at the same time, in *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, , relied upon by Mr. Shah, learned advocate for the respondent has held that this rule cannot be said to have an universal application. The Honourable Supreme Court in the case of *L. Hirday Narain Vs. Income Tax Officer, Bareilly*, and in the case of *Durga Enterprises (P) Ltd. (supra)* has held that once the petition is entertained by the High Court despite availability of alternative remedy, then, the petition cannot thereafter be rejected on the ground that the alternative remedy was not existed. Despite existence of an alternative remedy, the High Court may still exercise its discretionary jurisdiction of judicial review where the Court or the Tribunal lacks inherent jurisdiction and still exercised the jurisdiction or refused to exercise the jurisdiction vested in it, in case of enforcement of fundamental rights or in case of violation of principles of natural justice or where the vires of an Act is in question. Having referred to the above settled principle of law, we are unable to accept the contention raised on behalf of the appellant and have to grant our approval to the submission made on behalf of the respondent.

8. The learned Single Judge has, in the impugned judgment, rightly observed as under:

"5. First and foremost it may be recalled that the execution application 68/80 was filed seeking to execute an ex-parte decree passed by the trial Court on 15th July, 1980. This decree was however, set aside by an order dated 14th December, 1983. Once this decree did not survive, execution application no. 68/80 could not have been pressed in service to evict the tenant from the suit premises because the decree which was sought to be executed no longer survived. Secondly and most importantly as noted earlier, eventually the suit itself stood dismissed, of-course, it was dismissal for default, nevertheless, it was dismissal all the same. Admittedly, till date the suit has not been restored. In-fact no application has been filed by or on behalf of the plaintiff for restoration of suit which came to be dismissed for default on 29th December, 1987 or for recalling the said order. Once the suit is dismissed, the execution of a decree also cannot survive. On two occasions, the landlord had succeeded in securing ex-parte decree against the tenant which according to the tenant were through

fraud. Be that as it may, on both occasions the ex-parte decrees were set aside and eventually the suit itself came to be dismissed. The landlord therefore, cannot hold on the possession of the suit premises which he had secured from the tenant by way of purported execution of a decree when neither the decree survived nor the suit itself survived. The suit having been dismissed and no further steps taken to challenge such an order, the landlord cannot refuse to restore possession of the suit premises to the tenant. Thus on both counts, tenant was entitled to restoration of the possession.

6. Learned Judge materially erred in holding that the application of the tenant is barred by constructive Res judicata and principles of estoppel. The order passed by the Court while setting aside the decree was at a stage where the suit was still pending and alive. In exercise of judicial discretion and in its wisdom, Appellate Bench of the Small Causes Court found it inappropriate to put the tenant back in possession during the pendency of the suit which possession tenant had lost under a decree which of-course was ex-parte. The exercise or rather refusal to exercise discretionary power at that stage certainly cannot debar the tenant from seeking restoration of possession of suit premises once the suit itself stood dismissed."

9. The maintainability of the petition was not at all argued before the learned Single Judge. The learned advocate Mr. Gandhi for the appellant has relied upon the judgment of the Honourable Supreme Court in the case of Tarinikamal Pandit and Others v. Perfulla Kumar Chatterjee (dead) by L.Rs., (supra) to submit that a law point can be raised at any stage of the proceedings. As against that, Mr. Shah, learned counsel for the respondent has relied upon the decision of this Court in the case of Jenusan Textile v. Rajkot Municipal Corporation, 1999(1) GLR 460 and has submitted that the contention which was not raised and argued before the learned Single Judge cannot be allowed to be argued in the Letters Patent Appeal. We are afraid that the submission of learned advocate for the appellant cannot be countenanced. In the judgment relied upon by the learned advocate, Mr. Gandhi the Honourable Supreme Court has permitted the learned counsel to raise the pure question of law for the first time though it was not taken before the courts below as it did not involve any investigation of facts and did not affect the root of the matter. We cannot dismiss the writ petition preferred by the respondent because of the availability of an alternative remedy, as held by us in the foregoing more particularly when the learned trial Judge refused to exercise the jurisdiction vested in him on the basis of a misconceived understanding of the principles of res judicata and estoppel and therefore despite the availability of alternative remedy, the petition preferred by the respondent was maintainable.

10. Thus, it is clear that the learned trial Judge refused to exercise the jurisdiction vested in him on misconceived understanding of the concept of constructive res judicata and principle of estoppel. We are, therefore, of the opinion that when the learned trial Judge refused to exercise the jurisdiction

vested in him on the basis of a misconceived understanding of the principles of law despite availability of alternative remedy, the learned Single Judge was perfectly justified in the peculiar facts of the litigation between the appellant and the respondent in entertaining the writ petition. The respondent was dispossessed from the suit premises in a very unusual manner as the ex parte decree, on the basis of which the execution petition was taken out, has been set aside by the appellate forum as a result, the execution petition itself had become infructuous and could not have been prosecuted by the landlord. Therefore, dispossession of the respondent from the suit premises itself, according to us, was illegal. Had the learned Single Judge refused to entertain the writ petition, we feel that it would have resulted into causing miscarriage of justice to the respondent in taking away the possession of the suit premises though the suit was still pending between the respondent and the erstwhile landlord.

We are in complete agreement with the view taken by the learned Single Judge as the learned Single Judge has not committed any error in passing the impugned judgment and order. The appeal lacks merits and therefore the same deserves to be dismissed and is, accordingly, dismissed. No order as to costs.

Further Order:

After pronouncement of the aforesaid judgment, Mr. Chinmay Gandhi, learned counsel for the appellant submits that the aforesaid order may be kept in abeyance and the operation of the impugned order passed by the learned Single Judge, which has continued during the pendency of the appeal may be extended for a period of 10 weeks so as to enable the appellant to approach the higher forum. For the reasons recorded in paragraph 11 of this order as the dispossession of the respondent from the suit premises was held to be illegal, the aforesaid request made by learned counsel for the appellant is rejected.