

(2017) 04 GUJ CK 0009
In the Gujarat High Court
Case No : 10907 of 2015

SHAILESHBHAI SHANTILAL PATEL

APPELLANT

Vs

KEYURBHAI UMESHBHAI PATEL & ORS.

RESPONDENT

Date of Decision : 12-04-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 9Rule 4](#), [Order 9Rule 9](#), [Order 9Rule 8](#), [Order 9Rule 3](#) -
[Limitation Act, 1963](#), [Section 5](#) -
Extension of prescribed period in certain cases

Citation : (2017) 04 GUJ CK 0009

Hon'ble Judges : A.J.Desai

Bench : Single Bench

Advocate : NIRAV C. THAKKAR, ?KULDEEP D SHARMA,?YASH H JOSHI, ?
NACHIKET A DAVE, ?SHAIVANG D MEHTA, ?SP MAJMUDAR,?H J KARATHIYA

Judgement

1. Rule. Mr. S.P. Majmudar, Mr. Nachiket A. Dave and Mr. Kuldeep D. Sharma, learned advocates appearing for the respective respondents waives service of rule. With the consent of parties, the matters are taken up for final disposal today itself.

2. The brief facts arises from the record are as under :-

2.1. The petitioner of Special Civil Application No.10907 and 10908 i.e. Shaileshbhai Shantilal Patel and petitioner of Special Civil Application No.13825 and 13826 of 2015 i.e. Jagdishbhai Shantilal Patel jointly preferred two suits i.e. Special Civil Suit No.158 of 2011 and Special Civil Suit No.159 of 2011 before the learned Principal Senior Civil Judge, Surat (hereinafter referred to as "the learned Trial Court") for cancellation of registered Sale Deed and partition and permanent injunction.

2.2 In pursuance of the summons issued by the learned Trial Court, the

respondents appeared before the learned Trial Court.

2.3 The said suits were pending for hearing of application Exh.5 and on 10.9.2014, neither the plaintiffs - petitioners herein and/or their advocate nor the defendants and/or their advocate remained present before the learned Trial Court. Hence, the learned Trial Court by the impugned order dated 10.9.2014 dismissed both the suits for non-prosecution. The impugned order dated 10.9.2014 reads as under :-

"[1] Considering the facts of the suit and the record, the matter is so old and in view of the endorsement whichever made by the Bailiff, the Notice / Summons of the parties which kept with record and exhibited accordingly. Though, sufficient time have been given to the plaintiff / defendant and their Ld. Advocates to be proceeded with the matter but neither the plaintiff / defendant or their advocates presented before the Court nor any adjournment application proceeded before the Court thereon. The parties and their Advocates remained absent while called out repeatedly today.

[2] In this circumstance, the said matter could not be proceeded when absence of the parties or their advocates hence in the interest of justice, considering circumstances, this application and the matter is hereby DD under Order IX Rule 3 / Order IX Rule 8 on as per pertaining the provisions of Code of Civil Procedure, 1908. No order as to costs."

2.4 Having come to know about the dismissal of the suits for non-prosecution, the present petitioners filed Restoration Applications No.16 and 15 of 2015 under Order IX, Rule 4 and 9 of the Code of Civil Procedure, 1908 for restoration of the suits along with an application under Section 5 of the Limitation Act for condonation of delay of 5 days caused in preferring restoration applications. The learned Trial Court by the impugned order dated 31.3.2015 condoned the delay in preferring restoration applications, however, did not restore the suits and rejected the restoration applications.

2.5 Hence, the present petitions.

3. Mr. Nirav C. Thakkar, learned advocate appearing with Mr. Kuldeep D. Sharma and Mr. Yash H. Joshi appearing for the petitioner in Special Civil Application No.10907 of 2015 and 10908 of 2015 as well as Mr. Shivang Mehta, learned advocate appearing for the petitioner in Special Civil Application No.13825 and 13826 of 2015 would submit that the advocate appearing on behalf of the petitioners before the learned Trial Court did not remain present on the date of hearing of application Exh.5 and, therefore, the learned Trial Court dismissed the suits for want of prosecution. He would further submit that on 10.9.2014, even the defendants or their advocates did not remain present before the learned Trial Court. He would further submit that there was no intention on the part of the plaintiffs not to remain present before the learned Trial Court. He

would further submit that upon becoming aware about the dismissal of the suits, the plaintiffs immediately preferred restoration applications. However, the restoration applications

were not granted. He, therefore, would submit that if the suits are restored, there would be no prejudice to the other side. He, therefore, would submit that the impugned order dated 10.9.2014 passed in the Suits as well as impugned order dated 31.3.2015 passed below Restoration Applications be quashed and set aside and the present petitions be allowed.

4. Mr. S.P. Majmudar, learned advocate with Mr. Nachiket A. Dave appearing for the respondents would submit that the suits were filed by the petitioners in the year 2011 and the same were pending for hearing of application Exh.5 and the same were adjourned time and again by the learned Trial Court on account of the adjournment applications submitted by the advocate appearing for the plaintiffs. He, therefore, would submit that the plaintiffs themselves were not interested in proceeding further with the suits and, therefore, the learned Trial Court has rightly dismissed the suits. He would further submit that after dismissal of the suits as well as restoration applications, petitioner of Special Civil Application No.13825 of 2015 and Special Civil Application No.13826 of 2015 i.e. Jagdishbhai Shantilal Patel filed another suits being Special Civil Suit Nos.329 and 330 of 2015 against the same defendants for the same relief and the said fact was suppressed by the petitioner in the memo of petitions. He, therefore, would submit that the impugned orders do not require any interference and hence, the present petitions be dismissed.

5. Mr. Shivang D. Mehta, learned advocate appearing for the petitioner in Special Civil Application No.13825 of 2015 and Special Civil Application No.13826 of 2015 has submitted that draft amendment has already been submitted by the petitioner before filing of the reply by the respondents and the fact of filing of separate suits has already been placed on the record of this Court. He would further submit that the petitioner i.e. Jagdishbhai Shantilal Patel will withdraw Special Civil Suit No.329 and 330 of 2015 within a period of one week from today. He would further submit that the petitioner shall file a purshish of withdrawal of the suits before the learned Trial Court within a period of one week from today.

6. I have heard learned advocates appearing for the respective parties and perused the impugned orders passed by the learned Trial Court. It appears that the learned Trial Court has dismissed the suits in view of absence of learned advocates appearing for the petitioners. Though the restoration applications were preferred by the petitioners immediately, the learned Trial Court did not grant the said applications. However, in my opinion, due to absence of advocate before the learned Trial Court, the parties should not suffer.

7. In this view of the matter, I am of the opinion that the present petitions require consideration and hence, the same are allowed. The order dated

10.9.2014 passed by learned 9th Additional Senior Civil Judge, Surat in Special Civil Suit Nos.158 and 159 of 2011 as well as the order dated 31.3.2015 passed by learned 9th Additional Senior Civil Judge, Surat in Restoration Application Nos.15 and 16 of 2015 are hereby quashed and set aside. Special Civil Suit Nos.158 and 159 of 2011 are restored to their original files.

8. As submitted by learned advocate Mr. Shivang D. Mehta, the petitioner of Special Civil Application No.13825 and 13826 of 2015 i.e. Jagdishbhai Shantilal Patel is hereby directed to withdraw Special Civil Suit Nos.329 and 330 of 2015 within a period of one week from today. The petitioner shall file a purshish of withdrawal of both the above referred suits before the learned Trial Court within a period of one week from today.

9. Rule is made absolute to the above extent. Direct service is permitted.