

(2009) 07 GUJ CK 0010

In the Gujarat High Court

Case No : Special Civil Application No. 7148 of 2004

Shree Swaminarayan Gurukul

APPELLANT

Vs

Maresh Trading Company and Others

RESPONDENT

Date of Decision : 01-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 17A
Constitution of India, 1950 — Article 227

Citation : (2009) 07 GUJ CK 0010

Hon'ble Judges : K.A. Puj, J

Bench : Single Bench

Advocate : J.J. Yajnik, for the Appellant; Amar D. Mithani, for Respondents 1-2 and Anshin H. Desai, for Respondent 3, for the Respondent

Final Decision : Dismissed

Judgement

K.A. Puj, J.—The petitioner has filed this petition under Article 227 of the Constitution of India, praying for issuance of a writ of certiorari or prohibition, or any other appropriate writ, order or direction allowing the petitioner to lead further/additional evidence in Regular Civil Suit No. 402/1989 pending in the Court of learned Civil Judge (S.D), Junagadh.

2. This Court had issued notice on 25.6.2004. The petition was admitted and Rule was issued on 27.10.2004 and further proceedings of Regular Civil Suit No. 402/1989 were stayed.

3. Heard Mr. J.J. Yagnik, learned advocate appearing for the petitioner and Mr. Amar Mithani, learned advocate, who appears for respondent Nos. 1 & 2, and Mr. Anshin H.Desai, learned advocate, who appears for respondent No. 3. Respondent No. 3 was subsequently joined as a party-respondent vide order of this Court dated 5.4.2005. An affidavit-in-reply is filed by respondent No. 2 on 9.10.2004.

4. It is the case of the petitioner that the petitioner is a Public Charitable Trust,

registered under the provisions of the Bombay Public Trust Act, and is carrying on various educational and spiritual activities at Ahmedabad, Rajkot, Mumbai, Junagadh, Surat, Hyderabad and other places. The petitioner-Trust has been imparting education with utmost highest standard. It is the case of the petitioner that Shree Swaminarayan Gurukul, Junagadh has set up in its property at Junagadh a School and Hostel. It has also given on rent certain parts of the area, which was on the main road side of the said land. The lease-deed dated 8.5.1969 was for 20 years and it expired in 1989 and was not renewed thereafter. It is also the case of the petitioner that the land was given to respondent No. 2 and respondent No. 2 had sublet the same contrary to the provisions of the lease-deed. Since the respondent has committed breach of the terms and conditions of the tenancy agreement, the petitioner-Trust has filed suit being Regular Civil Suit No. 402/1989 in the Court of learned Civil Judge (SD), Junagadh. The said Suit is still pending for adjudication and examination of witnesses of the respondent was going on and the stage for leading evidence of the petitioner was closed. It is also the case of the petitioner that the petitioner submitted an application at the stage when evidence of the defendant was going on, to permit the petitioner to lead additional evidence in the said suit. The said application was rejected by the trial Court by order dated 9.1.2003. Though the petitioner is aggrieved by this order, a specific prayer to that effect is not made in the present petition and on the contrary, writ jurisdiction of this Court is invoked seeking direction from the Court to permit the petitioner to lead further/additional evidence in the said Suit.

5. Mr. J.J. Yagnik, learned advocate appearing for the petitioner, has submitted that respondent No. 2 has created a fake partnership-deed with a view to claiming right over the said land. He has further submitted that respondent No. 2 has sold his right under the lease-deed to the partnership firm. In support of this apprehension, the petitioner submitted an application to the Court to permit the petitioner to lead additional evidence. However, the said application was rejected. Subsequently, the petitioner asked for inspection of the documents, which was also rejected. He has further submitted that at the time of execution of the lease-deed, partnership firm was not in existence, and if the petitioner is not allowed to lead further/additional evidence at this stage, it will cause great injustice and miscarriage of law to the petitioner. He, therefore, submitted that the respondent No. 2 be directed to produce the alleged partnership-deed on record, and if at this stage such an additional evidence is not allowed to be produced, it will create multiplicity of proceedings. He has, therefore, submitted that the aforesaid direction be issued to the respondents.

6. This petition is strongly opposed by the respondents.

7. Mr. Amar D. Mithani, learned advocate appearing for respondent Nos. 1 & 2, has submitted that earlier the learned Civil Judge, Junagadh, had passed an order on 17.10.2003 below application Exh.162, whereby the petitioner's application for additional evidence was rejected. This order has not been challenged by the petitioner in the present petition. He has, therefore, submitted

that no relief can be granted in the present petition, and even otherwise the prayer made by the petitioner is barred by the principles of *res judicata*. Mr. Mithani has further submitted that the plaintiff has brought the suit on the basis that the respondent Nos. 1 & 2 have sublet the rented premises. The Suit is of the year 1989. The issues were already framed and further applications were made by the petitioner only with a view to delay the proceedings. He has further submitted that all the attempts on the part of the petitioner are nothing, but, a belated exercise undertaken for the purpose of removing/filling up lacuna.

8. Mr. Mithani has also raised an issue that the request made by the petitioner in the present petition at the most can be considered in view of the provisions contained in Order XVIII Rule 17A of C.P.C., as it stood at the relevant time. It says that where a party satisfies the Court that, after exercising of the diligence, any evidence was not within his knowledge or cannot be produced by him at the time when that party was leading his evidence, the Court may permit that party to produce the evidence at a later stage on such terms as may appear to it to be just. However, this provision has been deleted by the Legislature by the Act 46 of 1999, which came into effect from 1.7.2002 and the application Exh.162, purported to be under the said provisions, was rejected by the trial Court. He has, therefore, submitted that in view of this legal position, prayer made in the present petition cannot and should not be granted by this Court.

9. Mr. Mithani has further submitted that the petitioner was aware about the relationship of defendant No. 3 with the other defendants and the petitioner was also aware to discharge such burden of proof by framing issues under Exh.20. However, this has not been done and now it is not open for the petitioner after closure of the evidence of the plaintiffs and that too after rejection of an application to lead additional evidence. He has, therefore, submitted that in view of the above position the present petition be dismissed.

10. Mr. Anshin Desai, learned advocate for respondent No. 3 has also opposed this petition and submitted that once the petitioner failed before the trial Court in getting any order for production of additional evidence, the petitioner has moved the present petition without challenging the said order. Therefore, this petition should not be entertained and it should be dismissed. He has also submitted that since the Suit is at the final stage, the Court should not permit the petitioner to lead additional evidence. In support of this submission, he relied on the decisions rendered in the cases of (1) Karnataka Board of Wakf Vs. Government of India and Others, , (2) Vasantha Viswanthan and Others Vs. V.K. Elayalwar and Others, , (3) Commissioner of Endowments and Ors. v. Vittal Rao and Ors. 2005 (4) SCC 1290 -D, (4) Taluka Development Officer Vs. Sadaji Kuvarji Thakore, , and (5) U.P. State Road Transport Corporation Vs. State of U.P. and Another,

11. Based on the aforesaid factual and legal position, Mr. Desai and Mr. Mithani, both, have submitted that the prayer made in the present petition may not be granted and the petition may be dismissed with costs.

12. Having heard the learned advocates appearing for the parties and having considered the averments made in the petition as well as in the affidavit-in-reply, and having gone through the order passed by the trial Court rejecting the application for production of additional evidence and having taken into consideration the relevant statutory provisions contained in the CPC as well as judicial pronouncements on the subject, this Court is of the view that the prayer made in the present petition cannot be granted, more particularly when the petitioner has earlier made an attempt before the trial Court by giving an application and making the same prayer and having failed in the said attempt, the petitioner can not file this petition before this Court without making any challenge to the said order. The Court is, therefore, of the view that such an action on the part of the petitioner is clearly hit by the principles of res judicata. Even otherwise, the Suit is of the year 1989 and more than 20 years have passed and the Suit is now ripe for final disposal. At this stage, if such an application is presented, it would delay the final outcome of the suit.

13. Even on equitable ground, it is not just and proper for this Court to exercise its writ jurisdiction for the purpose of granting the relief prayed for in the present petition. The petitioner's interest is properly safeguarded by the trial Court and it is specifically observed while rejecting the petitioner's application that the burden is on the defendants/respondents to prove that there is a partnership firm in which respondent No. 3 is a partner and to discharge this burden, it is only on the part of defendant No. 1 to lead such evidence. If such a evidence is not led by the defendant No. 1, certainly the Court would draw an adverse inference. Therefore, this aspect be certainly taken into consideration by the trial Court at the time of final disposal of the Suit. Since it is observed by the trial Court, no further direction is issued in the present petition.

14. For the foregoing reasons, the petition is dismissed, keeping it open for the petitioner to raise such contentions before the trial Court at the time of final disposal of the Suit that despite a request was made for production of documents, necessary evidence has not come on record and hence, adverse inference may be drawn against the defendants/respondents as already observed by the trial Court. The trial Court, while disposing of the Suit, shall keep this aspect in mind, and needless to say the trial Court will decide the suit in accordance with law and without being influenced by this order.

15. Subject to the aforesaid observations, this petition is dismissed. Rule is discharged. No costs. Interim relief granted earlier stands vacated.