

(1978) 08 GUJ CK 0005

In the Gujarat High Court

Case No : First Appeal No's. 824 of 1973 and 11 of 1974

State of Gujarat

APPELLANT

Vs

Ramji Mandir Trust, Baroda and Others

RESPONDENT

Date of Decision : 29-08-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 1, Order 6 Rule 1, 9 , 96

Citation : AIR 1979 Guj 113 : (1979) 20 GLR 399

Hon'ble Judges : N.H. Bhatt, J;M.P. Thakkar, J

Bench : Division Bench

Advocate : G.T. Nanavati, Asstt. Govt. Pleader In F.A. No. 824 of 1973, J.U. Mehta, Asstt. Govt. Pleader In F.A. No. 11 of 1974, N.R. Oza and G.T. Nanavati, Asst. Govt. Pleader In F.A. No. 11 of 1974, for the Appellant; N.R. Oza and J.U. Mehta, Asstt. Govt. Pleader In F.A. No. 824 of 1973, N.R. Oza and G.T. Nanavati, Asst. Govt. Pleader In F.A. No. 11 of 1974, for the Respondent

Judgement

Thakkar, J.

1 to 3. x x x x 4. To grant or not to grant leave to urge this new plea of "Act of State" is the question we must resolve at the threshold in our opinion, whether or not the Municipal Court has jurisdiction, to try the suit from the standpoint of the plea of "Act of State" is a mixed question of law and facts. Such a plea must in, the first, place be raised in the written statement. An issue must be framed on this question and parties must have an opportunity to adduce evidence on this plea. It is possible that in a given case a pointed issue may not be raised and yet the parties may have understood that defence of "Act of State" was sought to be urged and parties may adduce evidence on the point. So far as the present case is concerned, apart from the fact that there was no such plea in the written statement and no such issue was raised, the parties never realised that the defence of "Act of State" was sought to be relied upon by the State in order to defeat the present suit. This position is incapable of being disputed having regard to the fact that even the learned Govt. Pleader who appeared in the trial Court did not raise any such contention and did not urge any argument in the context

of this plea. Under the circumstances, we are faced with the question whether we should permit the learned Assistant Govt. Pleader to urge this plea at this juncture. At the cost of repetition it may be stated that even now the State has not come forward with an application for leave to amend the written statement. If the State had applied for the amendment of the written statement and if the Court had granted it, the matter would have had to be remanded to the trial Court in order to enable the plaintiff to lead evidence in order to establish that there was sufficient recognition of his rights either in express terms or by implication or, by conduct. As per the law laid down in *Secretary of State for India v. Kamachee Boye Sahaba* (1859) 7 M I A 476 (PC) which has been quoted, with approval by the Supreme Court in *State of Gujarat Vs. Vora Fiddali Badruddin Mithibarwala*, , a citizen seeking to enforce rights against the new sovereign may show that the rights which were conferred or recognised by the old sovereign were recognised by the new sovereign after the taking over of the sovereign power from the old ruler and that this can be shown by an express agreement of recognition or an implied agreement which may be proved by the circumstantial evidence or by the mode of dealing with them which the new sovereign adopted from which an inference regarding implied election to respect them can be drawn. Such a question can arise only when the State seeks shelter under the doctrine of "Act of State" and in terms pleads it in the written statement in order to resist the suit and to challenge the jurisdiction of the municipal Court or the Civil Court. When no such plea is raised, there is no occasion for the plaintiffs to lead evidence in order to show by producing oral or documentary evidence or evidence pertaining to the relevant circumstances or the mode of dealing with them that their right had been expressly or impliedly recognised by the new sovereign. In the absence of such a plea, the plaintiffs are not obliged to anticipate the plea and to lead evidence on the point. It would be casting an unbearable burden on the plaintiffs to require them to lead positive evidence on the point though no such pleas raised by the State in anticipation of such a plea. It is not obligatory on the State to raise such a plea. If the State itself does not realise that such a plea is open to it and if even the Government Pleader does not realise this position, would it be right to throw the burden on the plaintiffs and their learned advocate to anticipate that such a plea may be raised at a further date and to lead evidence in order to establish that the right had been recognised? To pose the question is to answer it. In the absence of a plea in this behalf, the suit of the plaintiffs cannot be thrown out on the ground they should have anticipated the plea only, not at the stage of the trial but at the stage of a future appeal and should have adduced evidence. Learned Assistant Govt. Pleader called our attention to the ten propositions which are adumbrated in para (52) of *Vora Fiddali's* case (supra). Reliance is placed on propositions Nos. (9) and (10) which read as under:-

"(9) Such an agreement or recognition may be either express or may be implied from circumstances and evidence appearing from the mode of dealing with those rights by the new sovereign. Hence, the Municipal Courts have the jurisdiction to

find out whether the new sovereign has or has not recognised or acknowledged the rights in question, either expressly or by implication, as aforesaid. "

(10) In any controversy as to the existence of the right claimed against the new sovereign, the burden of proof lies on the claimant to establish that the new sovereign had recognised or acknowledged the right in question."

Proposition (9) does not in any manner help the case of the appellant. It is no doubt true that an agreement conferring the right on a citizen or recognising his right may be express or implied from the circumstances and evidence appearing from the mode of dealing with this right by the new sovereign. But then the question is not as to whether it is necessary to establish that there was recognition on the part of the new sovereign. The question is, is it incumbent on a plaintiff to lead evidence in order to show that there was either express or implied recognition from circumstances or the mode of dealing with his rights as soon as it is realised that the rights were created in his favour before the taking over of sovereign power by the defendant State? This aspect we have already discussed at length a moment ago. So far as proposition (10) is concerned, it is indubitably clear that in any controversy as regards the existence of such a right the burden of proof rests on the plaintiffs to establish that the new sovereign had recognised or acknowledged the right in question. If, however, does not mean that a controversy must be anticipated and the plaintiffs must lead evidence in order to discharge a burden which in view of the pleadings and the issue never came to, rest on their shoulders. Proposition (10) opens with the words "in any controversy". Where is the controversy in the present case? It must be first shown that the controversy existed before it can be argued that the burden has not been discharged., In order that a controversy comes into existence, the defendant State has to raise the plea and raise an issue. As no such controversy was raised, the issue never arose. We are not prepared to enlarge the scope of the aforesaid proposition suggested by the Assistant Govt. Pleader by taking the view that the burden requires to be discharged by the plaintiffs whether or not the controversy is raised by anticipating that such a plea may be raised by the State at a future date in a higher forum. The position is so clear that it is not necessary to invest further public time on this point. Suffice it to say that in the absence of such a plea and having regard to the fact (1) that no issue was raised and (2) that even the defendant State and the learned Government pleader did not even realise that such a plea could be raised and did not raise the plea and even did not address any argument in the trial Court, the State cannot be permitted to raise it for the first time in the course of the appeal. This must be so, for serious prejudice would be caused to the other side and it cannot be done without creating a situation where miscarriage of justice takes place not for the fault of the plaintiffs but on account of the fault of the defendant in not raising the plea and in not even arguing the point in the trial Court. We may also mention that having regard to the view we are taking it is not necessary to deal with the argument urged on behalf of the other side that the very stand taken by the Government that the grant in question had been revoked or resumed on

March 3, 1950 postulates that it was once accepted and recognised by the State for the State cannot resume or revoke the grant which it does not treat as being in existence.

(11) Appeals dismissed.