

(2008) 05 GUJ CK 0046
In the Gujarat High Court

Case No : Misc. Civil Application No. 3177 of 2006 in Special Civil Application No. 16145 of 2004

Vepar Vikas Co Operative Bank Ltd.

APPELLANT

Vs

Jubilee Motor Stores and Others

RESPONDENT

Date of Decision : 06-05-2008

Acts Referred:

Citation : (2008) 05 GUJ CK 0046

Hon'ble Judges : Jayant Patel, J

Bench : Single Bench

Advocate : Shirish Joshi, for the Appellant; S.P. Majmudar, for Opponent 1, for the Respondent

Judgement

Jayant Patel, J.—The present application is with the prayer that the grant of extension of time be rejected and the Board of Nominee be directed to drop the proceedings initiated by the present opponents. Mr. Joshi, during the course of hearing has tendered the draft amendment, whereby the prayer is also made to declare that the proceeding made in Misc. Civil Application No. 2799/06 was coram-non-judicata and the order passed therein be declared as nullity or in alternative, it is prayed that the opponents be directed to deposit the entire decretal amount with interest calculated till date.

2. Heard Mr. Joshi, learned Counsel for the applicant and Mr. Majmudar, for the opponent.

3. It appears that the amended prayer by way of draft amendment for declaration that the order passed by the Coordinate Bench of this Court (Coram:M.R. Shah, J.) in Misc. Civil Application No. 2799/06 is a nullity, can neither be heard nor can be entertained by this Court sitting as a Coordinate Bench. Further, the pertinent aspect is that the basis of the present application is the very order passed by this Court (Coram:M.R. Shah, J.). If the application is entertained and the prayer is also entertained, it would result into allowing the applicant to abrogate and reprobate at the same time, which cannot be

permitted. Therefore, the said prayer for declaring the order as nullity deserves to be rejected outright.

4. The alternative prayer for giving directions to the opponents to deposit the amount, if considered with the principal prayer made, it deserves to be recorded that it is an admitted position that the main Special Civil Application No. 16145/04 has been permitted to be withdrawn. Therefore, the moment, the final proceedings are terminated, in normal circumstances, the interim order passed therein shall automatically stand vacated. It appears that this Court (Coram:M.R. Shah, J.) further exercised the power for extension of time and such powers were exercised on the condition that the applicant therein who is opponent herein deposits the amount of Rs. 10,000/- by way of costs. Therefore, such power was exercised keeping in mind the consequence thereof and on the contrary, it appears that the Court wanted to compensate the respondent Bank who is the applicant herein by suitable cost and on that condition, the time was extended. However, it appears that the Court had observed that the respondent Bank may move before the Tribunal or before the Single Judge of this Court, who passed the interlocutory order for necessary clarification. Therefore, the present application.

5. The main Special Civil Application has been disposed of on withdrawal and further, pursuant to the earlier order passed by this Court in Misc. Civil Application No. 3177/06 dated 11.07.2006, the remaining amount as per the order of the Tribunal is already deposited. In normal circumstances, there would not be any requirement for directing to deposit the further amount keeping in view the peculiar circumstance in the present case that the award passed by the Nominee was ex parte and the opponent had no opportunity to put forward his case by way of defence.

6. It deserves to be recorded that in normal circumstances, when the award is passed ex parte, the discretion could be exercised by the Tribunal to restore the proceedings and such discretion has been exercised by directing the opponent to deposit 33% of the suit amount and such amount has been deposited. Therefore, when the petition against the said order of the Tribunal has been withdrawn, it would not be a case to direct the petitioner therein who is opponent herein to further deposit the amount at the instance of the Bank who has accepted the order of the Tribunal.

7. The attempt on the part of the learned Counsel for the applicant is that, since the original petitioner-opponent herein enjoyed the interim protection granted by this Court pending the proceedings of Special Civil Application No. 16145/04, at the time of withdrawal, the Court could exercise the power for putting the original petitioner on condition to deposit additional amount. He also submitted that pending the litigation before this Court and also before the Tribunal and the Nominee, the interest has accrued over the suit claim and therefore, this Court may consider for directing the original petitioner to deposit more amount than the amount so ordered by the Tribunal, more particularly when the original

petitioner has enjoyed the interim protection and as a result thereof, the Award did not become final.

8. Such contention might have assumed importance had it been a by-parte award. The peculiar circumstance in the present case is that it is an ex parte award. Even in all Summary Suit, leave to defend can be granted on the condition to deposit the amount and the maximum power to put such condition is of 33% of the amount. Such 33% of the amount is to be considered based on the suit claim and not of the further liability of the litigation pending the adjudication of the suit. In the present case, 33% of the amount is already ordered to be deposited by the Tribunal against which the petition being Special Civil Application No. 16145/04 was preferred and the same has been withdrawn. Now, it is not in dispute that 33% of the amount of the suit claim is not deposited. Therefore, if 33% of the amount is already deposited and the suit is yet to be tried by the Nominee after giving opportunity to both the sides, it would not be a case to exercise the discretion even on the equitable consideration by directing the opponent-original petitioner to deposit additional amount than 33%. In any case, the Bank if succeeds in the suit proceedings would also be entitled to the interest in the suit claim and therefore also, at this stage, it is not a case to direct for depositing of the additional amount.

9. In view of the aforesaid, the decision upon which the reliance is placed by Mr. Joshi in the case of Food Corporation of India and Another Vs. SEIL Ltd. and Others, is of no help to the applicant, more particularly in the peculiar circumstance that the matter is at the stage of ex parte award passed by the Nominee and the original petitioner had no opportunity to defend the suit.

10. In view of the above, the prayers made in the application cannot be granted. However, considering the facts and circumstances, it is directed that the learned Nominee shall take up the suit for adjudication on priority basis and make an attempt to dispose of the Suit as early as possible, preferably within a period of four months from the receipt of the order of this Court.

11. Application disposed of accordingly.