HIGH COURT OF GUJARAT

OZA TRIKAMBHAI MOHANLAL
Versus
PRAJAPATI MANGALDAS SHIVRAM

Date of Decision: 02 April 1996

Citation: 1996 LawSuit(Guj) 161

Hon'ble Judges: S D Shah

Eq. Citations: **1997 1 GLR 426**

Case Type: Civil Revision Application

Case No: 431 of 1995

Subject: Civil

Acts Referred:
Code Of Civil Procedure, 1908 Sec 115
Registration Act, 1908 Sec 49, Sec 17
Stamp Act, 1899 Sec 35, Sec 36

Final Decision: Rule made absolute

Advocates: R C Jani, P K Jani

Cases Cited in (+): **1**

S. D. SHAH, J.

[1] The petitioner is aggrieved by the order passed by the Civil Judge (J.D.), Unjha in Regular Civil Suit No. 236 of 1990 dated 2-2-1995. By the impugned order the learned trial Judge has refused to exhibit document at Exh. 85/ 6 which purports to be a writing or agreement executed between deceased Mangaldas Shivram and Mohanlal Joitaram Oza on 3-1-1969. Said agreement is executed on a stamped paper of Rs. 1.75 ps. During the evidence of witness Mohanlal Joitaram Oza being witness No. 2 for the plaintiff, in the examination-in-chief the said document dated 3-1-1969 was shown to the witness Mohanlal Joitaram Oza. Said witness deposed that he has signed below the agreement as well as another signature is that of deceased Mangaldas Shivram. He also stated that the said agreement was with respect to prohibition against putting up

construction of lavatory on Otla. He also deposed that the said writing was acceptable to him as well as to deceased Mangaldas Shrivram. He also stated that the two witnesses who have signed such writing or agreement, namely, Jivanlal Ambalal and Dahyaram Amtaram were then not alive and that the writer of the document Lilachand Shankarlal also expired. He also stated that the said stamp paper was purchased by deceased Managaldas Shivram. He also deposed that everyone, namely, deceased Mangaldas Shivram, two witnesses and the writer of the document and he himself had signed the said document.

[2] At that stage when the Court was about to exhibit the said document since the said document was proved, learned Advocate for the defendant objected to the document being exhibited and admitted in evidence firstly on the ground that the document related to the immovable property and it was restricting the right with respect to immoveable property and therefore, it was not on sufficient stamp paper and secondly it was not admissible in evidence because it was not a registered document as required under Sec. 17 of the Indian Registration Act. The Advocate of the plaintiff on the other hand stated that by agreement in question at Mark Exh. 85/6 rights of the parties with respect to immoveable properties were not in any way restricted and it was not therefore, liable to be registered nor was it insufficiently stamped. The trial Court after hearing the learned Advocates for the parties took the view that the said document was restricting the right with respect to immoveable property and therefore, the same was required to be compulsorily registered under Sec. 17 of the Indian Registration Act, and that it was not possible at that stage to decide as to whether the document was sufficiently stamped or not and therefore, he refused to exhibit and admit the document at Mark 85/6 in evidence. Such an order is passed by the learned trial Judge while recording evidence of witness Mohanlal Joitaram Oza, and it is against such order that the plaintiff has preferred the present C.R.A.

[3] While admitting the C.R.A. the learned single Judge of this Court issued Rule as well as notice as to interim relief both returnable on 27-3-1995. Thereafter, the matter was not heard by the learned single Judge.

[4] It appears that thereafter the petitioner-plaintiff moved the C.A. No. 50 of 1996 to grant interim relief as prayed for in C.R.A. or to hear the C.R.A. expeditiously as the trial Court was proceeding further with the suit despite the fact that C.R.A. was pending before this Court. When said C.A. was placed before this Court, the C.R.A. No. 431 of 1995 was fixed peremptorily for hearing on 24-1-1996 and both the learned Advocates for parties were fully heard both on facts as well as on law and now this revision application is being decided by this judgment.

[5] It may be stated that the suit is filed by Mohanlal Joitaram Oza through his Power of Attorney holder being R.C.S. No. 236 of 1990 against the defendant Mangaldas Shivram Prajapati who is now deceased and is represented by his Leagal Representatives and Heirs. It was the case of the petitioner that his house is situated in Kumbhar Khadki, Darji Chakhla at Unjha and that the house of the deceased Mangaldas Shivram is also situated in the same Khadki. It was his case that the houses of plaintiff and defendants are situated in one lane and opposite the houses there was a way towards mohalla. While entering the said Khadki firstly the house of the defendant is situated and thereafter adjoining the said house, the house of the plaintiff is situated. In other words, it was his case that towards North of his house, the house of the defendant is situated and that between the North wall of the house of the plaintiff and the South wall of the house of the defendant there was a common wall of the common ownership of both the parties. It was his further case that the wall of the house of the defendant is just touching the otla and after the otla there are steps and thereafter one can enter the house of the defendant. It is stated that the there was some dispute between the parties and an agreement was entered into which is produced at Exh. 85/6 which was signed both by plaintiff-Mohanlal Joitaram and deceased defendant-Mangaldas Shivram. He also stated that such writing was signed by two witnesses as well as the writer of the agreement and it was on stamp paper of Rs. 1.75 ps.

[6] Thereupon, he referred to the said writing at Mark 85/6 and, more particularly, on condition No. 5 of the said writing wherein it was stated that on Otla portion of the house of Mangaldas Shivram, Mangaldas Shivram shall not put up construction of lavatory but he can put up any other construction excepting that of lavatory. Various other stipulations were made in the writing with which this Court is not concerned at this stage, since the defendant-Managaldas Shivram wanted to construct lavatory on the otla portion the aforesaid suit was filed.

[7] As stated hereinabove during the examination-in-chief of witness Mohanlal Joitaram Oza aforesaid document at Mark 85/6 was proved by duly proving the signature of executants as well as by duly proving the contents of the document. However, the dispute is raised that said document cannot be admitted into evidence and exhibited as the same was not registered and secondly as the same was on insufficiently stamped paper. The trial Court having accepted such objection and having refused to admit and exhibit such document the petitioner-plaintiff has moved this Court.

[8] Mr. P. K. Jani, learned Advocate for opponent-defendant has firstly contended that since the trial Court has exercised the discretion of not admitting and not exhibiting the document in evidence, C.R.A. under Sec. 115 of C.P.C. was not maintainable as it

cannot be said that "any case was decided" by the trial Court by passing the impugned order. He further submitted that if the document is wrongly not exhibited and admitted into evidence, contention can always be taken in appeal before the Appellate Court and against discriminatory order of the trial Court no revisional jurisdiction should be exercised when it is not shown to the Court that the trial Court has gone beyond its jurisdiction or has refused to exercise jurisdiction vested in it by law.

[9] It may be stated at this stage that despite recommendation of Law Commission of India to delete Sec. 115 from the C.P. Code while amending the C. P. Code by Amendment Act, 1976 the legislature has thought it fit to maintain revisional jurisdiction of the High Court, obviously, subject to certain conditions which are now provided by the amended Sec. 115. Under Sec. 115 of C. P. Code the High Court may call for record of "any case which has been decided" by any Court subordinate to such High Court and in which no appeal lies thereto. The three conditions where the High Court can exercise revisional jurisdiction are verbatim maintained and the Parliament has not made any change. The High Court can exercise its revisional jurisdiction if the subordinate Court appears -

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in exercise of its jurisdiction illegally or with material irregularity.

Over and above the existence of any of the three aforesaid requirements, one another condition emerges and is read by the Courts of law and it is that the order of subordinate Court must be one which may amount to "any case which has been decided". If the order passed by the subordinat Court does not amount to "case decided" and the order is merely an interlocutory order, the Courts in India have taken consistent view that even if discretion is rightly or wrongly exercised by the trial Court the High Court will have no revisional jurisdiction under Sec. 115 of C. P. Code. The entire proviso to sub-sec. (1) of Sec. 115 of C. P. Code is added by Amendment Act of 1976 and sub-sec. (2) of Sec. 115 and Explanations are also added by the Amendment Act, 1976. Explanation which is added being material for the purpose of this C.R.A. is reproduced herein :

"Explanation - In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceedings".

[10] From the aforesaid Explanation it becomes clear that the expression used in sub-sec. (1) of Sec. 115, namely, "any case which has been decided" is now explained by

the legislature so as to include any order made or any order deciding an issue in the course of a suit or other proceeding. It would, therefore, include any order made in the course of a suit and if the order is one which attracts the provisions of proviso to Sec. 115(1), the High Court can vary or reverse the order made by the subordinate Court in the course of a suit. The two situations contemplated by the proviso are -

(a) the order, if it had been made in favour of party applying for the revision would have finally disposed of the suit, or;

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.

[11] From the aforesaid two conditions prescribed by the proviso where High Court could interfere in its revisional jurisdiction and vary or reverse any order made by the subordinate Court it becomes clear that if the order is one which attracts the provisions of proviso to Sec. 115(1) of C.P.C. and it had been made in favour of party applying under Sec. 115 of C.P. Code would have finally disposed of a suit, the High Court can interfere. Secondly, if the order passed by the subordinate Court which is under challenge before the High Court, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made, the High Court may vary or reverse any order of the subordinate Court.

[12] The concept of "case decided" under Sec. 115 of C. P. Code has been the subject-matter of judicial pronouncement in large number of decisions of the Apex Court as well as of this Court. The Division Bench of this Court in the case of Shah Prabhudas Ishwardas v. Shah Bhogilal Nathalal, reported in 1967 GLR 649 speaking through His Lordship Mr. Justice P. N. Bhagwati (as His Lordship then was) dealt with an identical question. The question before the Division Bench of this Court was as regards admissibility of a document into evidence and secondly as to whether the decision of the trial Court to admit or not to admit a document would amount to "case decided" or not. The question before the High Court was as to whether the document in question was a promissory note when the subordinate Court decided that it was not a promissory note. The contention was that since the document was a promissory note and was insufficiently stamped it was inadmissible in evidence and the trial Court held that it was not a promissory note and that it was not insufficiently stamped and was, therefore, not admissible in evidence.

[13] In the context of aforesaid situation the Division Bench observed in para 4 of its judgment after making detailed reference to the decision of different High Courts as well as to the decision of the Supreme Court in the case of S. S. Khanna v. F. J. Dillon, reported in AIR 1964 SC 497 as under :

"a case decided within the meaning of Sec. 115 is not confined to an entire suit or proceeding but includes an issue or a part of a suit or proceeding and if an order decides an issue or a part of suit or proceeding, it would be a case decided within the meaning of Sec. 115 of C.P. Code. If an order decides some right or obligation which is in controversy between the parties in the suit or proceeding, a part of the suit or proceeding, whether it forms the subject-matter of a separate issue or not, would be decided and that it would be a decision of a case as contemplated by Sec. 115. Such an order may decide the right or obligation expressly in so many terms or it may decide the right or obligation as a matter of direct or necessary consequence as in the case before the Supreme Court. But, in either case, it would be a case decided, as the right or obligation would be determined and a part of the suit or proceeding relating to the controversy as to such right or obligation would be decided".

[14] From the aforesaid observations of the Division Bench of this Court there is no manner of doubt that the order passed by the trial Court in the case before this Court would also amount to "case which has been decided" by the subordinate Court. The document at Mark 85/6 was in fact the foundation for the suit of the plaintiff and the plaintiff has based his entire suit on condition No. 5 of the said document. To admit such document into evidence or not would finally decide the fate of the suit of the plaintiff because by non-admission of such a document the issue is decided against the plaintiff. This Court must, therefore, hold that the order in question which is passed by the trial Court would amount to "case decided" within the restricted meaning of said term prior to amendment of Sec. 115 of C.P.C. and in any case it would definitely fall within the meaning of said expression because of Explanation which is added to Sec. 115 of C.P. Code.

[15] Second objection advanced by the trial Court for not admitting Mark 85/ 6 into evidence is that the document in question is in the nature of an agreement between the parties and that said agreement was relating to immoveable property and was seeking to restrict the right of the defendant over the suit property and it was, therefore, required to be compulsorily registered under Sec. 17 of the Registration Act. The trial Court has also found that said document was on the stamp paper of Rs. 1.75 ps. and what would be the value of stamp paper required for executing such an agreement was not possible to decide and therefore also on the ground of insufficiency of stamp, the document was not liable to be admitted. In this connection, Mr. P. K. Jani, learned Advocate for defendant has relied upon the decision of the Full Bench of this Court in the case of J. M. Raju v. Krishnamurthy Bhatt, reported in 1976 GLR 210. The question before the Full Bench was as to whether the document which is found improperly or insufficiently stamped and therefore, not admitted into evidence under

Sec. 35 and Proviso A to Sec. 36 of Indian Stamp Act, 1899 is subject to revisional jurisdiction of this Court. The Full Bench of this Court speaking through the Hon'ble Chief Justice B. J. Diwan (as His Lordship then was) took the view that the decision taken has to be final and that neither the appellate Court nor revisional Court can sit in judgment over such decision. The Full Bench in para 8 made following observations :

> "In view of the fact that the principal object of the Indian Stamp Act is to collect revenues for the State and the stringent provisions of the Stamp Act have been enacted with a view to see that the revenues of the State are realised to the utmost extent as provided by law, once the trial Court decides to admit a document as properly or sufficiently stamped, the decision has to be accepted as final and the matter has to be treated as closed and it is not open to any superior Court either in appeal or revision to sit in judgment over the decision to admit the document in evidence or to review judicially the decision of the trial Court to admit the document in evidence. The bar of Sec. 36 of Stamp Act applies only to the decision of the trial Court to admit the document in evidence. If the trial Court decides not to admit a particular document in evidence, it is always open to the aggrieved party to make it a ground of appeal before the Court of Appeal and get the matter decided by the Appellate Court. But so far as the decision to admit the document on record is concerned, once the trial Court, rightly or wrongly, decides to admit the document in evidence, the matter, so far as the parties are concerned, is closed. "
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> In para 12 of its judgment the Full Bench made further observations as under :
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> "Thus, when the trial Court Judge decided to admit the document in evidence, he was exercising jurisdicition vested in him by law and it was obvious that under clause (c) of Sec. 115 the High Court can entertain a revision application only if there was some illegality or material irregularity in the manner of arriving at the decision and not in the decision itself."

[16] The case before this Court, however, is that the trial Court did not decide that the document was insufficiently or improperly stamped. The trial Court only stated that it is required to be decided as to whether such document is properly or sufficiently stamped. Such a decision of the Court which is not at all a decision would attract the provisions of Sec. 115 of C. P. Code. The trial Court has, undoubtedly committed illegality or material irregularity in not agreeing and reaching any definite finding on the question as to whether the document was sufficiently stamped. Under proviso to Sec. 35 the trial Court has power to fix up the amount required to make it sufficient stamp duty together with penalty and to call upon the party to affix the difference between the stamp already affixed and the stamp which is required to be affixed and

to pay the penalty also. The trial Court has unfortunately not recorded any finding at all. It has not applied its mind to the question as to whether the document is insufficiently stamped and it has simply recorded a halting finding that it is required to be decided at the trial as to whether the agreement is on sufficiently stamped paper. The trial Court has observed as under in its judgment :

[17] The third objection raised by the trial Court is that the document was required to be compulsorily registered under Sec. 17 of the Registration Act. The said document is captioned as "Compromise Deed for neighbouring rights". Said deed is entered into between Prajapati Mangaldas Shivram, common ancestor of respondent-defendants on the one hand and Oza Mohanlal Joitaram, the plaintiff of the suit on the other hand. It is stated therein that at village Unjha in Kumbhar Street two houses of the parties having opening towards East are situated. It is also stated that in front of the house of Mangaldas Shivram towards South there is Otla of the ownership of Mangaldas Shivram which is of the measurement of 5 ft. towards North-South and 4 feet 4 inches towards East-West. It is also admitted that said Otla is of the ownership of Mangaldas Shivram. It is also stated that in the inner side there is one Khadki and the house situated in the Khadki purchased by plaintiff-Mohanlal Joitaram. The steps to go to said Khadki are on Eastern side of the Otla of Mangaldas Shivram and that there are three steps to go to Otla and thereafter to enter the Khadki. The measurements of the steps are also given. It is thereafter stated that in future if any dispute arises between the parties about said Otla as well as steps they have entered into compromise or understanding and it is inter alia stipulated that the steps as well as the underground drainage are to be retained as such and are not to be constructed upon. It is also agreed in condition No. 5 that Otla in front of the house of Mangaldas Shivram is of his ownership. It is also admitted that on such Otla Mangaldas and/or his legal representatives can put up another construction excepting lavatory. It is this portion of the agreement which is in the nature of compromise agreement and which contains admission in writing by the defendant against his own interest is not admitted into evidence on the ground that it is not registered. The defendant has in fact admitted such writing and has not disputed execution of such writing. Secondly, the document is sought to be produced for the purpose of proving the admission contained in document which is a compromise agreement which is only regulating inter se rights of the parties but it is not curtailing or restricting the right of the defendants because in fact ownership over Otla portion is accepted and they are also permitted to put up another construction excepting construction of lavatory. In my opinion, therefore, the document is one which cannot be said to restrict the right of the defendants. It only regulates and clearly states the rival rights of the parties with respect to Otla portion. Secondly, it is a compromise agreement entered into with a view to achieving more beneficial enjoyment. Thirdly, the admission contained in the document which is against the

interest of the defendant and for purpose of proving such admission also document is required to be admitted into evidence.

[18] In view of the aforesaid, the judgment and order dated 2-2-1995 of the trial Court is required to be quashed and set aside and is hereby quashed and set aside, and the trial Court is directed to admit Mark 85/6 into evidence. This Court is informed that despite stay granted by this Court the trial Court has proceeded to conduct further hearing of the suit. Said conduct of the trial Court is deprecated and is condemned. The trial Court is directed to restore the case to the stage dated 2-2-1995 the stage at which document Mark 85/6 was not exhibited and admitted into evidence. Rule is accordingly made absolute. No costs. In view of the order on C.R.A. no order on C.A. No. 50 of 1996.

Revision allowed.