

**HIGH COURT OF GUJARAT**

**THAKOR BHIKHAJI VAGHAJI**

*Versus*

**PRADYUMANBHAI RAGHUNATHBHAI BAROT & ORS**

**Date of Decision:** 11 March 2011

**Citation:** 2011 LawSuit(Guj) 1428

**Hon'ble Judges:** [K S Jhaveri](#)

**Eq. Citations:** **2011 3 GLR 2464**

**Case Type:** Special Civil Application; Civil Appeal

**Case No:** 8967 of 2007; 11705 of 2008

**Subject:** Civil, Tenancy

**Editor's Note:**

**Civil Procedure Code, 1908 - Order 21 Rules 35, 36 - Sec 151 - In execution proceedings court issued warrant for possession without issuing notice to other side - Held, the order requires to be quashed as it violates principles of natural justice, warrant is issue without giving opportunities to the affected party & it is passed in under hasty - Direction given to decree-holder to restore possession - Direction given to decree-holder to deposit mesne profits - Respondents no.1 directed to pay Rs. 50,000/- by way of cost advocates fees - Inquiry ordered to be held against the Executing Judge - Action ordered to be taken against respondents no.1 under Contempt of Court Act, 1971 for not obeying orders to restore possession - Petition disposed of**

**Acts Referred:**

[Code Of Civil Procedure, 1908 Or 21R 36, Sec 151, Or 21R 35](#)

**Advocates:** [Amit C Nanavati](#), [Chinmay M Gandhi](#), [M B Gandhi](#), [R C Jani](#)

**K. S. Jhaveri, J.**

**[1]** This petition has been preferred against the order dated 17th March, 2007 passed by the learned Principal Civil Judge, Kheralu below application Exh. 85 preferred in Regular Darkhast No. 12 of 1983, whereby the said application was allowed and

possession warrant in respect of the property mentioned in Regular Darkhast No. 12 of 1993 was ordered to be issued.

**[2]** The facts in brief are that respondent No. 1 herein was the owner of the agricultural lands bearing Survey Nos. 448, 492 and 495 situated in Village Kheralu. On 22-5-1953 respondent No. 1 had mortgaged the said lands with one Chaudhari Ramjibhai Dhanjibhai. However, in the year 1966, respondent No. 1 preferred a suit being Civil Suit No. 48 of 1966 for redemption of the mortgage. In the said suit, final decree came to be passed on 31-7-1980. Against the said decree, respondent No. 2 and others preferred First Appeal No. 192 of 1980 before the District Court. However, the said appeal was dismissed.

**[3]** In the year 1983, respondent No. 1 preferred Regular Darkhast No. 12 of 1983, wherein, possession warrant under Order 21, Rules 35 and 36 of Code of Civil Procedure was issued in respect of the said property. In the said proceedings, the petitioner preferred application Exh. 77 raising objections against the execution of decree passed in Civil Suit No. 48 of 1966. After considering the objections, the Court below passed order dated 8-3-1990 below application Exh. 1, whereby, it was ordered that until the proceedings under the Bombay Tenancy and Agricultural Lands Act, pending before the Mamlatdar & A.L.T. concerned are over, the decree-holder of Civil Suit No. 48 of 1966 shall not take possession of the property in question from the 'tenant', the petitioner herein. Pursuant to the passing of the order dated 8-3-1990, the execution proceedings remained stayed for a long period.

**[4]** In the meantime, the petitioner had also preferred a suit being Civil Suit No. 68 of 1988 praying for a declaration that the decree for redemption dated 31-7-1980 was not binding upon him. However, subsequently, the said suit was withdrawn on 20-2-1992.

**[5]** Respondent No. 1 herein challenged the said order dated 8-3-1990 passed in the execution proceedings by way of filing Civil Revision Application No. 1232 of 1990 before this Court. The said application was rejected by order dated 17-6-1995.

**[6]** Thereafter, in the year 2007, respondent No. 1 preferred application dated 17-3-2007 (Exh. 85) in the pending Regular Darkhast No. 12 of 1983 praying to issue a possession warrant in respect of the suit property. On the same day, the learned Principal Civil Judge, Kheralu, allowed the said application, by impugned order dated 17-3-2007. Respondent No. 1 had also preferred a separate application Exh. 788 before the Executing Court praying to provide police protection to him, which was also granted.

**[7]** Thereafter, on 19-3-2007, the petitioner preferred application Exh. 792 praying that the order passed on 17-3-2007 below application Exh. 85 and the possession taken by the bailiff in pursuance thereof, be cancelled. However, the said application came to be rejected on the same day vide order dated 19-3-2007.

**[8]** On 21-3-2007 respondent No. 1 preferred application Exh. 794 praying to direct the defendants to execute re-conveyance deed on the basis of the decree passed in Civil Suit No. 48 of 1966. The said application was also allowed on the same day by order dated 21-3-2007.

**[9]** On the same day, i.e. on 21-3-2007, the petitioner had preferred application Exh. 797 for contempt of Court for committing breach of the earlier order of the Executing Court. The said application was rejected by order dated 2-4-2007.

**[10]** In the meanwhile, on 23-3-2007, respondent No. 1 preferred application Exh. 100 praying for modification of the order dated 8-3-1990. The said application came to be allowed vide order dated 2-4-2007.

**[11]** Thereafter, on 10-4-2007 respondent No. 1 preferred another application Exh. 107 in the pending proceedings praying to execute the reconveyance deed as per the decree or in the alternative, to appoint a Commissioner for execution of the reconveyance deed. The said application Exh. 107 came to be allowed on the same day vide order dated 10-4-2007.

**[12]** Being aggrieved by the order passed below application Exh. 85 dated 17-3-2007, the petitioner has preferred the present petition.

**[13]** It appears from the records of the case that some revenue proceedings were also pending between the parties and that in the said proceedings, a final order came to be passed by the Gujarat Revenue Tribunal, Ahmedabad in Revision Application No. TEN/BA/62 of 2008 dated 31-7-2008, whereby it has been held that there is no 'tenant' in the lands in question. Apart from that another writ petition being Special Civil Application No. 12984 of 2008 between the same parties is pending before this Court. Essentially, in this case, the issue pertains to the legality or otherwise of the order passed below application Exh. 85 and not about the orders passed by the revenue authorities concerned or for that matter, the Gujarat Revenue Tribunal.

**[14]** It is true that the execution proceedings came to be stayed, vide order dated 8-3-1990, mainly on the ground of pendency of the revenue proceedings. However, in this petition, as is evident from the reliefs claimed, this Court is required to consider the legality and validity of the order passed below application Exh. 85 filed in Regular Darkhast No. 12 of 1993 only and is not required to look into the revenue proceedings.

Apart from that the present petition was filed on 30-3-2007 during which time the revenue proceedings were still pending. Therefore, this Court is not required to look into the revenue proceedings and the final decision rendered therein, in any manner, in the present petition.

**[15]** Mr. M.B. Gandhi, learned Counsel appearing on behalf of the petitioner, submitted that the execution proceedings were stayed way back on 8-3-1990 on account of the pendency of the tenancy proceedings before the competent authority. However, when respondent No. 1 preferred application Exh. 85 on 17-3-2007, i.e. after a period of more than seventeen years, the Court below ought to have at least issued a Notice of hearing to the petitioner, but instead, the Court below proceeded ex-parte and passed the impugned order and that too on the very same day.

15.1 Learned Counsel submitted that there was no immediate need to pass the impugned order on the very day on which the application Exh. 85 was tendered by respondent No. 1 and that too without affording any opportunity of hearing to the petitioner. He has, therefore, submitted that the impugned order passed below application Exh. 85 is in gross violation of the principles of natural justice and a serious view deserves to be taken about the hasty manner in which the concerned trial Judge has disposed of the application Exh. 85.

**[16]** Mr. R.C. Jani, learned Counsel appearing on behalf of respondent No. 1, submitted that in 1953 respondent No. 1 had placed the suit property under mortgage with Chaudhari Ramjibhai Dhanjibhai. The mortgagee, Chaudhari Ramjibhai Dhanjibhai, was never declared a 'tenant' of the mortgaged land. The petitioner herein is also not a 'tenant' of the suit properties. Therefore, the Court below was completely justified in passing the impugned order below application Exh. 85.

**[17]** Heard learned Counsel for the respective parties and perused the documents on record. Before dealing with the matter on merits, it would be relevant to refer to the order dated 1-5-2007 passed by this Court while admitting the matter :

Rule returnable on 11th July, 2007. Mr. R.C. Jani, learned Advocate waives service of Rule on behalf of respondent No. 1. Mr. Amit C. Nanavati, learned Advocate waives for respondent Nos. 2(a) to 2(g), 4 and 6. Interim relief in terms of Para 17(c).

**[18]** Against the aforesaid interim order passed by this Court, Letters Patent Appeal No. 1037 of 2007 was preferred by respondent No. 1. In the said L.P.A., on 11th June, 2007, the Division Bench of this Court passed the following order :

Heard learned Counsel for the parties. This appeal is arising out of an interim order dated 1-5-2007 passed by the learned Single Judge in Special Civil Application No. 8967 of 2007, by which the learned Single Judge has directed the appellant to restore the possession of the suit property to the mortgagee and also directed the learned Civil Judge (Junior Division), Kheralu to revoke all his orders.

From the record, it appears that respondent No. 1 in the main petition-appellant herein, on 17-3-2007 moved an application in the Executing Court for possession, and on the same day, direction was given to take possession of the suit property. The case of the respondent is that respondent was declared as tenant in 1990 by the Mamlatdar and the matter is still pending, and since then, respondent was in possession of the land.

Considering the fact that respondent was in possession of the suit property all throughout, there is nothing wrong in the direction given by the learned Single Judge. The appeal stands dismissed.

Accordingly, status-quo granted by this Court on 15-6-2007 stands vacated. Civil Application stands rejected.

**[19]** Being aggrieved by the aforesaid order passed in L.P.A. No. 1037 of 2007 dated 11-7-2007, respondent No. 1 had preferred Special Leave Petition (Civil) No. 14533 of 2007 before the Apex Court. However, the same was also rejected.

**[20]** In view of the above position, respondent No. 1 was immediately required to restore possession of the suit property in favour of the petitioner. However, respondent No. 1 has flouted the orders of this Court as also of the Apex Court inasmuch as he has not handed over possession of the suit property to the petitioner. Respondent No. 1 has over-reached the Court process by taking shelter of the tenancy proceedings, which does not have any bearing on the facts of the present case since in this case, the issue pertains to the legality or otherwise of the order passed below application Exh. 85. The action of respondent No. 1 of not handing over possession of the suit property to the petitioner is in utter disregard of the orders passed by this Court as also by the Apex Court. Therefore, appropriate action is required to be taken against respondent No. 1 under the Contempt of Courts Act.

**[21]** So far as the merits of the case are concerned, it is pertinent to note that application Exh. 85 was preferred by respondent No. 1 on 17-3-2007. Without issuing any notice to the other side, the said application was heard by the trial Judge on the same day and the final order on that application was also passed on the same day, i.e. on 17-3-2007. Admittedly, the impugned order has been passed in gross violation of the principles of natural justice. Before passing the impugned order dated 17-3-2007,

no opportunity of hearing was given to the petitioner. Hence, only on this ground, the impugned order deserves to be quashed and set aside.

**[22]** It is pertinent to note that the execution proceedings were stayed way back in the year 1990. Even if the revenue proceedings were over at the relevant point of time, orders should have been passed after hearing the affected parties. However, the same has not been done and order came to be passed ex-parte and that too on the same day on which the application Exh. 85 was preferred.

**[23]** Another notable aspect is that on 19-3-2007 the petitioner had preferred application Exh. 792 before the Court below praying that the order dated 17-3-2007 passed below application Exh. 85 may be quashed and the possession taken in pursuance of the said order may be restored. However, the said application was rejected on the same day vide order dated 19-3-2007. Similarly, on 21-3-2007, respondent No. 1 had preferred application Exh. 794 praying to direct the original defendants to execute the reconveyance deed on the basis of the decree passed in Civil Suit No. 48 of 1966. The said application was allowed on the same day by order dated 21-3-2007.

**[24]** Having gone through the records of the case, it appears that the orders below application Exhs. 92 and 94 were passed mechanically and without any application of mind. The matter requires examination since what made the trial Judge concerned to reject the application Exh. 92 on the same day on which it was preferred. The prayer in said application Exh. 92 pertained to setting aside the order dated 17-3-2007 passed below application Exh. 85. It is required to be kept in mind that the impugned order dated 17-3-2007 passed below application Exh. 85 was passed without issuing any notice to the other side and was passed on an application that was preferred in execution proceedings that had remained stayed for a period of more than seventeen years. What prompted the trial Judge to entertain such an application (Exh. 85) and pass the final order on the said application on the very same day, without issuing notice or without affording any opportunity of hearing to the other side is required to be investigated. Learned Counsel for respondent No. 1 was not in a position to show from the record that a copy of application Exh. 85 was served either upon the learned Counsel who appeared on behalf of the petitioner in the Court below or upon the petitioner himself.

**[25]** Further, the trial Judge has allowed application Exh. 94 preferred by respondent No. 1 on the same day on which the application was filed, i.e. on 21-3-2007, without issuing any notice or without affording any opportunity of hearing to the petitioner.

**[26]** The entire sequel of events that unfolded in the execution proceedings raise suspicion in our minds when we look at the manner in which the proceedings were conducted before the Court below. Hence, it is expedient that necessary inquiry is conducted in the matter by the Registry of this Court on the administrative side since no one can be permitted to misuse the Court process.

**[27]** In view of the above discussion, I am of the opinion that the possession of the petitioner in respect of the suit property is required to be restored immediately since the same has been taken away without following due process of law and also in view of the orders passed by the Division Bench of this Court and the Apex Court. The impugned order passed below application Exh. 85, being in gross violation of the principles of natural justice, deserves to be quashed and set aside.

**[28]** For the foregoing reasons, the following order is passed :

(i) The impugned order dated 17-3-2007 passed by the learned Principal Civil Judge, Kheralu below application Exh. 85 filed in Regular Darkhast No. 12 of 1983 is quashed and set aside.

(ii) Further, the orders passed below application Exhs. 92 and 94 dated 19-3-2007 and 21-3-2007 respectively are also quashed and set aside. The Court below is directed to restore both the applications on file, and thereafter, shall reconsider the same and render its decision on the said applications expeditiously after hearing both the sides.

(iii) The Court below is directed to see that the possession of the petitioner is restored within a period of one week from the date of receipt of writ of this order.

(iv) The respondent No. 1 was in possession of the suit property for a period of more than four years. Since, the order granting him possession has been set aside by this Court and it has been found that respondent No. 1 has retained the possession in utter disregard of the orders passed by this Court and also by the Apex Court, it would be appropriate to grant mesne profit to the petitioner for the said period in order to compensate the loss sustained by the petitioner. Looking to the facts of the case, the mesne profit is quantified at Rs. 2,000/- (Rupees two thousand only) per month. Accordingly, respondent No. 1 is directed to deposit an amount of Rs. 96,000/- (Rupees ninety-six thousand only), being the amount of mesne profit for the period of four years, before the Executing Court within a period of one month from today.

On such deposit being made, the petitioner shall be permitted to withdraw the said amount, after necessary verification.

The aforesaid order has been passed under Sec. 151 of the Code of Civil Procedure since this is a clear case where the Court process has been abused by respondent No. 1 and a person who has no respect to orders passed by Courts shall have to be appropriately dealt with in order to meet the ends of justice.

(v) The petitioner was constrained to file the present petition on account of the actions of respondent No. 1 by which the petitioner has been deprived of his legal rights for a considerably long period of time. Therefore, an actual cost of Rs. 55,000/- (Rupees fifty-five thousand only) towards Advocate Fees is imposed, which shall be recovered from respondent No. 1.

Before parting, the Court would like to take a serious note about the manner in which the concerned trial Judge has conducted the matters and passed orders below application Exhs. 85, 92 and 94. Undoubtedly, the proceedings were conducted in a very hasty manner and also against the well-settled judicial process.

**[29]** With the above observations and directions, the petition as well as the Civil Application stand disposed of. Rule is made absolute to the above extent. Direct Service is permitted.