Gujarat High Court
Gujarat vs Gujarat on 21 April, 2010
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Gujarat High Court Case Information System

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AO/21/2010 13/ 16 ORDER

IN
THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL
FROM ORDER No. 21 of 2010

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GUJARAT
INSTITUTE OF HOUSING & ESTATE DEVELOPERS & 2 - Appellant(s)

Versus

GUJARAT
INSTITUTE OF HOUSING & ESTATE DEVELOPERS LTD & 7 -
Respondent(s)

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Appearance
:
MR BM MANGUKIYA for
Appellant(s) : 1 - 3.MR TARAK DAMANI for Appellant(s) : 1 - 3.
MR
MIHIR JOSHI, SENIOR ADVOCATE with SINGHI & CO for Respondent(s) :
1 - 8.
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CORAM
:

HONOURABLE
MR.JUSTICE RAVI R.TRIPATHI

Date
: 21/04/2010

ORAL
ORDER

1.0 Present appeal is filed by 03 (three) appellants. The appellant no. 1 is described as, The Gujarat Institute of Housing and Estate Developers, a Non-trading Corporation, established under the Bombay Non-trading Corporations Act, 1959, bearing Registration No. GJ-318, through its Chairman/Secretary and its address, as set out therein. The appellant no. 2 is one Shri Janak Barot. No further descriptions are given. Similarly, the appellant no. 3 is one Shri Rasmin Patel. No further descriptions are given, except, stating in the title that nos. 2 and 3 having office address as set out therein. As against that the opponents, which are impleaded in this Appeal from Order are as: 1) Gujarat Institute of Housing and Estate Developers Ltd., a company incorporated under the Companies Act, 1956, setting out the address of its office. Incidentally, the address set out for appellant no. 1 and address set out for opponent no. 1 is the verbatim same. Besides the opponent no. 1, there are individual opponents nos. 2 to 8. As nothing significant about the same, their names are not reproduced in this order.

2.0 The present Appeal from Order is filed against an order passed below application exh. 32 filed in Civil Suit No. 2263 of 2007, a copy of that application is produced at Annexure 'A' and in the memo of application, exh. 32, the Subject is cited as under:

Stay Application under Order-39 Rule-2 and also under Section 151 of the Code of Civil Procedure, 1908. (emphasis supplied) 2.1 Para 9 of that application (exh. 32), sets out the prayers, which are made in Civil Suit No. 2001 of 2007 and Para 10, sets out the prayers which made in application exhs. 6 and 7 filed in the said suit, which are referred to as Notice of Motion. Thereafter, in Para 11, the prayers sought for in exh. 48 filed in the same suit i.e. Civil Suit No. 2001 of 2007 are set out.

2.2 What follows is important. The appellants, then, has reproduced the observations made by the learned Judge in an order deciding exhs. 6, 7 and 48, filed in Civil Suit No. 2001 of 2007 and exhs. 6 and 7 in Civil Suit No. 2263 of 2007, which were decided by a common order dated 8th April 2008. The observations run into as many as 04 (four) pages approximately.

2.3 This is required to be referred because the case of the appellants herein is that they did not know that an order, which is against them, but contains the aforesaid observations, is required to be challenged. It was only at a later stage i.e. on 4th September 2009, an Appeal from Order is filed before this Court, wherein, a Civil Application for condonation of delay is filed and the said matter is pending before this Court. The appellants were satisfied with the observations made by the learned Judge, which according to them, were enough for their satisfaction because, according to their understanding, those observations were in their favour and the appellants were not required to do anything further after having obtained those observations in the order.

2.4 This submission is not only curious but is well designed. It is a different thing as to how far this submission can have a bearing on the merits of the present matter. As and when this submission is required to be considered by the Court for deciding as to whether the delay caused in filing the other Appeal from Order challenging order dated 8th April 2008, it will be considered by the concerned Court.

2.5 So far as this Court is concerned, it is required to consider the legality and validity of the order passed below exh. 32 in Civil Suit No. 2263 of 2007. The learned advocate for the appellants read the entire order of 52 pages passed below exhs. 6, 7 and 48 in Civil Suit No. 2001 of 2007 and exhs. 6 and 7 in Civil Suit No. 2263 of 2007 dated 8th April 2008, obliging the court by making certain exemptions from reading like citations of the decisions which were cited before the Court below. This 52 pages' order, the Court is not required to consider on merits of this matter, otherwise, much can be said about the merits of that order. But the Court is conscious of the judicial discipline and therefore, restrains itself from making any comment on the merits of that order.

2.6 Taking into consideration the history from which the present litigation has arisen, it is having its roots in the Bombay Non-trading Corporations Act, 1959 (hereinafter referred as 'the said Act'), which is repealed by Act No. 6 of 2005 (hereinafter referred as 'the Repeal Act'). So far as the object of putting that enactment on the statute book is also reflected from the Statement of Objects and Reasons of the Repeal Act. This Court deems it fit to reproduce the Statement of Objects and Reasons of the Repealed Act, to have the exact object of the Act.

The Bombay Non-trading Corporations Act, 1959 provides for incorporation, regulation and winding up of non-trading corporations, which are formed for the purpose of promoting or encouraging commerce, industry, literature, arts, science, diffusion of useful knowledge, foundation and maintenance of libraries, museums or such other purposes... (emphasis supplied) 2.7 This was the object of putting the aforesaid Act on the statute book. What follows in the Statement of Objects and Reasons of the Repeal Act is the reason for which the said Act came to be repealed;

...On gaining experience, it has been observed that these types of activities can be undertaken by forming a society under the Societies Registration Act, 1860 or under the Bombay Public Trusts Act, 1950 and therefore, it does not seem necessary to have such a special legislation for the above referred purposes. It is, therefore, considered necessary to repeal the said Act. This Bill seeks to repeal the Bombay Non-trading Corporations Act, 1959, in its application to the State of Gujarat...

2.8 Besides this Statement of Objects and Reasons, Sec. 2 of the Repeal Act is also material for our purpose. Sec. 2 reads as under:

2. Repeal and saving: (1) The Bombay Non-trading Corporations Act, 1959 (Bombay XXVI of 1959) in its application to the State of Gujarat is hereby repealed.

2) Notwithstanding such repeal, the provisions of Sec. 7 of the Bombay General Clauses Act, 1904 (Bombay I of 1904) shall apply in relation to the repeal of the Bombay Non-trading Corporations Act, 1959 (Bombay XXVI of 1959) as if the Act had been an enactment within the meaning of the

said Sec. 7. (emphasis supplied) 2.9 To appreciate the aforesaid provisions of the Repeal Act, it will be necessary to look at Sec. 7 of the Bombay General Clauses Act, which provides the effect of 'Repeal'. The section reads as under:

7. Effect of repeal: - Where, this act or any Bombay Act (or Maharashtra Act) made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made then, unless a different intention appears, the repeal shall not-

a) revive anything not in force or existing at the time at which the repeal takes effect; or

b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder; or

c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed; or

d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any enactment so repealed; or

e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act had not been passed.

2.10 The submission made by the learned advocate for the appellants is that the learned Judge, while deciding exhs. 6, 7 and 48 in Civil Suit No. 2001 of 2007 and exhs. 6 and 7 in Civil Suit No. 2263 of 2007 has taken into consideration the aforesaid provisions of Sec. 7 and has then made observations, which according to the learned advocate for the appellants, are in favour of the appellants and it was only in view of those observations that the appellants decided not to challenge the order dated 8th April 2008, though the injunction, as prayed for, was not granted. It will be appropriate that the observations, which the appellants have found to be in their favour, which are reproduced in application exh. 32, are also reproduced:

12....'Therefore in the opinion of this Court, a direction by license, would be necessary to Registrar of Companies if an association intends to form a company of the nature contemplated under section 25 of the Act of 1956 and if the association desires dispensation of the use of the aforesaid phrase to the name of the company. Further more, as can be seen from sub section 2 the section 25 of 1956, it is only upon the direction by the licence that the company may be registered as contemplated under section 25 of the Act of 1956. Thus, at the time when the association resorts to sub section 1 and 2 of the section 25 of the Act of 1956, the association is yet to be formed as company. The question of formation of such company would arise, only when such directions by licence are communicated to the Registrar of the Companies, who would then examine the application for formation of a

company and it it upon his satisfaction that the necessary provisions for formation of a company are complied with, the company would be registered. It is worthwhile to note that section 25 of the Act of 1956 does not contemplate other requirements necessary for formation and incorporation of the company. To put it in the form of illustration, the mode of formation of a company is contemplated under section 12, wherein, 7 or more persons for formation of the company and two or more persons, if the company to be formed is a private company, must form an association for the lawful purpose by subscribing their names to the memorandum of association and otherwise comply with the requirement of the Act of 1956 etc. Now, this is the basic requirement of formation of company, which is not contemplated under section 25 of the Act of 1956. That does not mean that for the purpose of the company of the nature contemplated under section 25 of the Act of 1956, such a requirement is dispensed with. Had section 25 been a complete code as argued by the learned Counsel for the defendants, all the basic requirements for the purpose of formation of company would have been contemplated under section 25 of the Act of 1956 itself...' 'Now, section 25(1) of the Act presupposes existence of an association. It is obvious that the association has to be group of more than one person. Such group of persons may be natural persons or incorporated legal entities or combination of both. Unincorporated association, like a partnership firm is also an association within the meaning of sub section 1 of section 25 of the Act of 1956. Since the incorporated body is a single legal person, it individually can not be regarded as an association within the meaning of sub section 1 of section 25 of the Act of 1956. It is however true that an incorporated company is an association of persons, but when the fiction of law treats such an association as a single legal entity upon its incorporation, it is a single person for the purpose of section 25(1) of the Act of 1956 or section 12 of the said Act. Now, section 12 of the Act of 1956 contemplates at least two persons to form an association for the purpose of formation of a company. This Court is of the opinion that an individual incorporated body can not obtain a licence under section 25 of the Act of 1956 except, those as are provided under section 25(3) of the Act of 1956. It is however true that since the date of repeal of the reprealed Act, GIHED was rendered as an unregistered association and therefore, it was a body of individuals i.e. an association and therefore, it could have invokes section 25 of the Act and could have formed a company by complying with necessary provisions of the Act of 1956.' 'It is true that section 565 of the Act of 1956 does not permit the registration of companies (other than those referred to under the Companies Act, 1956) having objects similar to the one mentioned under section 25 of the Act of 1956 from being issued a licence under section 25 of the Act of 1956. If the Legislature deemed it fit to impose such a ban, it would not be justifiable to invoke another provision of law i.e. Section 25 of the Act in this case if the ingredients of section 25 of the Act are satisfied for what is banned can not be achieved indirectly. Further more nobody could have prevented the members of the association of the non trading corporation to form a company to bring all the assets in such company and obtain licence under section 25 of the Act of 1956. However, what appears to have been done in the present case is that few of the members of the association have applied for licence under section 25 of the Act of 1956. This would not divest the interest of other members of the NTC neither it would result into vesting of the properties of the N.T.C. into few such persons. Prima facie, the assets of the unincorporated N.T.C. now collectively vest in the members of unregistered NTC and it would not be permissible for few members to carry such assets, just by obtaining licence under section 25 of the Act of 1956. As the arguments of the learned Counsels for the defendants that it is the N.T.C. which has been registered as a company under section 25 of the Act of 1956 fails, there is no question of vesting of any of the properties of incorporated or

unincorporated N.T.C. in the so-called company.

2.11 These observations howsoever favourable they may be, they do not confer any right on the appellants. What is important is the final operative order and the final operative order dated 8th April 2008 reads as under:

The N. Ms. exh. 6, 7 and 48 in Civil Suit No. 2001 of 2007 and N. Ms. exh. 6 and 7 in Civil Suit No. 2263 of 2007 are dismissed...

2.12 This is the operative part of the order. Meaning thereby, no injunction, as prayed for by the appellants original plaintiffs was granted by the Court. To appreciate as to what was passing in the mind of the learned Judge, it will be appropriate to refer to Para 23 of the order, which reads as under:

To conclude, in the opinion of this Court, the plaintiff prima facie fails to show that future operation of the N.T.C. continues. The defendants also fails to show that by mere grant of licence under section 25 of the Act of 1956, the N.T.C. is now a company registered under the Act of 1956. It is required to be observed that as such, the suit itself may not lie by a unregistered association without invoking provisions of O. 1 Rule 8 of the CPC. Therefore, this Court finds no prima facie case in favour of the plaintiffs& (emphasis supplied) 2.13 Reverting back to the order, which is under challenge in the present Appeal from Order, the learned Judge has taken all pains to consider the ambit and scope of exh. 32. The learned Judge has recorded in Para 6 as under:

Looking to the above arguments of both the parties and considering the documentary evidence on record I have gone through the evidence produced by the parties. The plaintiff has prayed present injunction application for the relief as stated above. It is an undisputed fact that the plaintiff had filed an injunction application Exh. 7 and the same was rejected by this Court. Looking to the prayer of the present applicant and in Exh. 7 are similar. Looking to the prayer made in the injunction application Exh. 7 it reads as follows:..... (emphasis supplied) 2.14 The learned Judge has referred thereafter the relevant prayers made in the erstwhile exhibit, which came to be rejected by order dated 8th April 2008.

2.15 The learned Judge has then considered the scope of granting of relief as prayed for in Para 8 and has come to the conclusion that;

In my view, order passed by this Court on Exh. 6/7 is very clear and now by present injunction application plaintiff are praying restraining defendants from using Logo, Stationeries, Papers, Properties, and organizing show and restraining from operating bank accounts, such prayer has been rejected by the Court order vide dated 8th April 2008 and now by present injunction application, similar prayer has been prayed by the plaintiff. In my view such relief can not be granted when earlier injunction application has been rejected. (emphasis supplied) 2.16 It is not that the learned Judge has shirked his duty to consider the contents of exh. 32 on its own merits. The learned Judge has taken into consideration the delay and laches aspect in the matter and in this regard the learned Judge has observed as under:

&In my view, all these facts are in knowledge of plaintiff and plaintiff are (sic. have) remained inactive for approximately one and half year and so, in the instant case, here is also ground of delay, laches and accusation& 2.17 The learned Judge has also taken into consideration another aspect of the matter and referred the same only with a view to draw support to the order passed by him and that aspect is that the suit itself is prima facie found to be not maintainable by his predecessor (the learned Judge who passed order dated 8th April 2008) and observed as under:

Looking to earlier order in that order, it is observed and held by this Court that plaintiff No. 1 is not in existence and therefore, plaintiffs have no right to file injunction application and on that ground injunction application was rejected and after rejection order, till yet, the plaintiffs have not amended the suit plaint. Looking to order passed below exh. 6/7 that 'suit itself may not lie by a unregistered association without invoking provision of O. 1 Rule 8 of CPC...

This is referred by the learned Judge while considering the question of maintainability of present application.

3.0 In the considered opinion of this Court, the learned Judge has taken all pains to appreciate the submissions made by both the parties, the merits of the matter, the conduct of the plaintiffs, and the well designed attempt (the deep rooted ill design) of the appellants in filing application exh. 32, only after lapse of almost one and a half years (exh. 6/7 were rejected by order dated 8th April 2008, exh. 32 was filed on 28th August 2009). The learned advocate for the appellants did not disclose as to why it was selected to file exh. 32 application in the month of August 2009. It was disclosed by the learned senior advocate Mr. Joshi appearing for the opponents herein that, as in the month of September the opponent no. 1 herein was organizing a Property Show , the appellants thought of obstructing the same and therefore, filed exh. 32 application .

3.1 The learned senior advocate for the opponents herein invited attention of the Court to a decision of the Honourable the Apex Court in the matter of Arjun Singh Vs. Mohindrakumar and others, reported in AIR 1964 SC 993, wherein, the Honourable the Apex Court, while considering the various provisions of the Civil Procedure Code like Sec. 11, O. 9 R. 7, 13, O. 43 R. 1 had occasion to observe in Para 13, relevant part of which, reads as under:

Interlocutory orders are of various kinds; some like orders of stay, injunction or receiver are designed to preserve the status quo pending the litigation and to ensure that the parties might not be prejudiced by the normal delay which the proceedings before the court usually take. They do not, in that sense, decide in any manner the merits of the controversy in issue in the suit and do not, of course, put an end to it even in part. Such orders are certainly capable of being altered or varied by subsequent applications for the same relief, though normally only on proof of new facts or new situations which subsequently emerge. As they do not impinge upon the legal rights of parties to the litigation the principle of res judicata does not apply to the findings on which these orders are based, though if applications were made for relief on the same basis after the same has once been dis-posed of the court would be justified in rejecting the same as an abuse of the process, of court...

3.2 The learned senior advocate for the opponents also invited attention of the Court to the Memorandum and Article of Association of opponent no. 1. The Court refused to look at the same because the Court is not concerned with the same in this matter.

4.0 In view of the aforesaid discussion, the Court has no hesitation in recording that this Appeal from Order is not only devoid of merits but is in furtherance of well designed attempt on the part of the appellants to abuse the process of law and to obstruct the working of opponent no. 1 for which they have failed in their attempt. The appeal is dismissed having found no substance.

[Ravi R. Tripathi, J.] hiren Top