IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1072 of 1998

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? No

2. To be referred to the Reporter or not? Yes

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

ZAKINABEN D/O GULAMHUSEN KAMRUDDIN LOKHANDWALA

Versus

BABUBHAI ALIMOHMAD KAPADIA

Appearance:

MR SK JHAVERI for Petitioners

MR JB PARDIWALA for Respondent No. 1, 2, 3, 4

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 31/08/98

ORAL JUDGEMENT

1. This revision, under Section 115 of the Code of Civil Procedure, has been filed against the order of the trial Court rejecting an application of the plaintiff revisionist for consolidation of two suits Nos.64 of 1989 and 9 of 1997 pending in the Court of Civil Judge (S.D.), Navsari. The revision has not been admitted so far.

Strangely enough this Court vide its order dated 27.7.1998 straight away issued notice for final disposal of this revision. As such Revision is taken up for final disposal.

2. Learned Counsel for the parties have been heard. The revision has to be admitted. I do not find any force in the contention that an order under Section 151 of the Code of Civil Procedure being discretionary is not revisable. An order under Section 151 C.P.C. is not appeallable hence revision is maintainable against such order.

3. Brief facts have not been naratted in the order under revision. However, from the Memo of revision the brief facts can be noted down as under :

Civil Suit No.64 of 1989 was filed by the father of the revisionist for recovery of possession of house No.668 and in the alternative for recovery of Rs.14,65,000/- with agreed interest at the rate of 24 % p.a. This house, according to the revisionist, was proposed to be purchased by the respondents No.1 to 4 for a sum of Rs.15 lacs. However, in order to avoid problems in the Income-tax Department two Agreements to sell were executed and a sum of Rs.35,000/- was paid on 23.5.1986. The remaining amount was not paid whereafter the father of the revisionist filed Suit No.64 of 1989 for recovery of possession and in the alternative for recovery of Rs.14,65,000/- together with 24% p.a. interest. During pendency of the Suit the father of the revisionists died, whereupon the revisionists were substituted as legal representatives of the deceased plaintiff.

4. The Suit was contested on various grounds. Main ground was that the Agreements to Sell were cancelled on 1.9.1986 and that the receipts were forged and the deceased plaintiff wanted to usurp the property. During pendency of the said suit prayer was made for relinquishment of certain reliefs. Amendment was sought in the plaint which was refused. Keeping in view the aforesaid defence the revisionists filed subsequent Suit No.9 of 1997 in which they claimed possession on ground of title without prejudice to their claim in the earlier Suit No.64 of 1989.

5. The two suits were pending in different courts. Both the Suits were transferred by the concerned District Judge to one court and thereafter the revisionists moved an application for consolidation of the two Suits. That application was rejected by the trial Court, hence this

revision.

6. The trial Court has assigned several reasons for holding that the application for consolidation is not maintainable. The first reason is that there is no provision in the Code of Civil Procedure for consolidation of the Suits. The second reason is that order for consolidation cannot be passed without consent of the other side. The third reason is that the evidence in one suit cannot be considered to be evidence in the other Suit without the consent of the other side. Another reason is that the cause of action in the two suit is not the same. Hence it is not desirable to consolidate the two Suits.

7. All these reasons indicate that the discretion provided under Section 151 C.P.C. was arbitrarily and illegally exercised by the trial Court. The trial Court has not at all considered the scope of Section 151 C.P.C. which contemplates that nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

8. Normally inherent powers are exercised in those cases where there is no specific provision in the Code of Civil Procedure. If on certain point there is specific provision in the Code of Civil Procedure, inherent jurisdiction under Section 151 C.P.C. cannot be exercised to over-ride or to ignore the express provision in the Code. The powers under Section 151 C.P.C. do not limit or otherwise affect the inherent powers of the Court to pass certain orders. Such orders are which are necessary for the ends of justice or to prevent abuse of the process of the Court. Thus, under Section 151 C.P.C. a Court in exercise of inherent powers can pass orders on a matter not provided in the Code of Civil Procedure where such order is necessary in the ends of justice or where such order is necessary to prevent abuse of the process of the Court. Section 151 C.P.C. nowhere provides that such orders can be passed only with the consent of the other side, viz. opposite party. Thus, the first reasoning of the trial Court that in the absence of specific provision for consolidation of suits no such order can be passed is contrary to Section 151 C.P.C. Generally the suits and proceedings are consolidated under Section 151 C.P.C. in exercise of inherent powers.

9. In the Code of Civil Procedure certain amendments

have been made by certain States. The State of U.P. by Act No.57 of 1976 has incorporated Order : IV-A making specific provision for consolidation of suits and proceedings. There is no such amendment in the State of Gujarat. However, the UP State amendment also indicates that when two or more suits or proceedings are pending in the same court and the court is of opinion that it is expedient in the interest of justice, it may by order direct their joint trial whereupon all such suits and proceedings may be decided upon the evidence in all or any of such suits or proceedings. The above amendment made by the UP State may not be directly applicable to the State of Gujarat, but this amendment also indicates that for consolidation of suits consent of the other side is not necessary and order for consolidation can be passed where the court is of the opinion that it is expedient in the interest of justice to do so. The words "interest of justice" in the UP State amendment are the same and synonimous with the word "in the ends of justice" in Section 151 C.P.C. Thus, even under Section 151 C.P.C. the trial Court could have ordered consolidation of the two suits provided it was necessary for the ends of justice. The consent of the other side being not necessary for exercise of jurisdiction under Section 151 C.P.C. the reasoning of the trial Court on this score is wholly uncalled for and unacceptable. Thus, the trial Court committed manifest error of jurisdiction and law in holding that the consolidation application is not maintainable for want of specific provision in the Code and it cannot be allowed without consent of the other side.

10. The next reasoning of the trial Court that the evidence in one suit cannot be considered as evidence in the other suit without consent of the other side is equally untenable. Normally, after consolidation of suits the procedure is that the earlier suit is made the leading suit. Issues may be framed in the two suits seperately, but oral evidence is to be recorded in the leading suit which will cover issues and controversy involved in the two suits. Likewise documentary evidence may be filed either in the leading suit or in the two suits seperately and may be proved by oral evidence to be adduced in the leading suit. There is no question for reading the evidence of the other suit in the main suit after consolidation. If the two suits are consolidated and the evidence is to be recorded in the leading suit the consent of the other side is hardly required for reading such evidence while deciding the two suits. Thus, this reasoning of the trial Court is also contrary to law.

11. So far as the last reasoning is concerned, viz. cause of action being different, this is also not a good reasoning for refusing consolidation of suits. When the two suits are filed, on some of the relief claimed, the cause of action is bound to differ. However, only on this ground the prayer for consolidation cannot be refused. The words "in the ends of justice" used in Section 151 C.P.C. and further words "to prevent abuse of the process of the court" in the said section mean that if it is desirable in the interest of justice to consolidate the suits and it is further desirable to prevent abuse of the process of the Court order for consolidation can be passed. Abuse of the process of the Court can be prevented by not compelling the parties to adduce the same or similar evidence in the two suits twice. Likewise if the evidence slightly differs and the main evidence remains the same it would amount to abuse of the process of the Court to compel the parties to adduce seperate evidence in the two suits. The ends of justice also require that the interest of the parties should be kept in mind and it is not only in the interest of justice, but also in the interest of parties to avoid multiplicity of evidence and to avoid unnecessary contradiction in the evidence if the same is recorded after lapse of some time. Naturally the evidence in the two suits cannot be simultaneously recorded on one and the same date and if the evidence in the two suits is recorded on different dates unnecessary contradictions in examination-in-chief and cross - examination are bound to occurred.

12. In the instant case parties to the two suits are the same. Both the suits are pending in the same court. Earlier suit was filed for recovery of possession in persuance of agreement to sell and in the alternative for recovery of balance price together with interest. In the earlier suit claim for recovery of possession is proposed to be given up. The defence was that the two agreements to sell were cancelled on 1.9.1986 and the receipts filed by the deceased plaintiff were forged. The revisionists pleaded that the agreements were never cancelled. Still they filed subsequent Suit No.9 of 1997 for recovery of possession on the basis of their title in the property. Thus, the two suits germinated from the two agreements to sell and it cannot be said that the cause of action in the two suits being different order for cosolidation could not be passed.

13. Another reasoning of the trial Court that the question of limitation raised by the defendants will

suffer is equally untenable. If the defendants have raised the plea of limitation or can raise the said plea, such raising of plea will never be barred simply by order for consolidation of the two suits.

14. Thus, in view of what has been discussed above it is manifest that the discretion was arbitrarily and illegally exercised by the trial Court. The revision has therefore to be allowed and is hereby allowed. The order under revision is set aside. The trial Court is directed to consolidate Suits No.64 of 1989 and 9 of 1997 and shall make Suit No.64 of 1989 the leading case in which oral evidence of the parties will be recorded. The documentary evidence will also be accepted in the leading suit and if some documents have been filed in subsequent suit the same may be permitted to be proved by the parties in accordance with law by adducing oral evidence in the leading case. Thereafter the issues in the two suits will be decided by a common Judgment in accordance with law. In the circumstances of the case the parties shall bear their own costs of this revision.

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