

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No(s). 230 OF 2019
(Arising out of SLP (C) No.12794 of 2014)

KUSUMBEN INDERSINH DHUPIA

Appellant(s)

VERSUS

SUDHABEN BIHARILALJI BHAIYA & ANR.

Respondent(s)

J U D G M E N T

BANUMATHI, J.:

(1) Leave granted.

(2) This appeal arises out of judgment and order dated 28th January, 2014 passed by the High Court of Gujarat at Ahmedabad in Special Civil Application NO.16821 of 2011 in and by which the High Court affirmed the order of the Trial Court and thereby declining to restore the suit.

(3) The appellant-plaintiff filed Civil Suit NO.217 of 1994 against respondents No.1 and 2 for declaration and injunction in respect of plot no.16-E, admeasuring 250 sq. yds. on Revenue Survey No.62-65, Village Althan, Surat. The issues were framed on 3rd October, 2008 and the suit was dismissed for default on 6th November, 2008.

(4) The appellant-plaintiff immediately filed an application under Order IX, Rule 9 of the C.P.C. for restoration of the said suit on 4th December, 2008 which came to be dismissed on

21st July, 2011 on the ground that the plaintiff and his advocate are continuously remaining absent and the plaintiff is not interested in pursuing the matter. The revision petition, Special Civil Application No.16821 of 2011, preferred by the appellant-plaintiff before the High Court also came to be dismissed. Being aggrieved, the appellant-plaintiff is before us.

(5) The first respondent is represented by Mrs. Saroj Haresh Raichura, Advocate. Second respondent-Bhagwandas Nandlal Bagdi, remained unserved in spite of issuance of notice. By Order dated 4th December, 2018, substituted service was ordered. In compliance thereof, the appellant-plaintiff effected service through paper publication in 'Gujarati Daily' and has also filed affidavit to that effect. Service on the second respondent is held to be sufficient.

(6) We have heard Mr. Shamik Sanjanwala, learned counsel appearing for the appellant-plaintiff and Mrs. Saroj Haresh Raichura, learned counsel appearing for respondent No.1 and also perused the impugned judgment and other materials on record.

(7) Mr. Shamik Sanjanwala, learned counsel appearing for the appellant-plaintiff, has drawn our attention to the *RojKam-order sheet* of the 11th Additional Senior Civil Judge, Surat, and submitted that after filing the application for restoration of the suit, the appellant-plaintiff remained present in almost

all the hearings but the matter could not be taken up as the business of the court did not permit. Mr. Shamik further submitted that only on the date of hearing i.e. 21st July, 2011, the appellant-plaintiff could not be present and on that date the Trial Court has dismissed the application filed under Order IX, Rule 9 of the C.P.C., by observing that the appellant-plaintiff was remaining absent continuously.

(8) Mr. Shamik has taken us through the various dates of hearing before the Trial Court in support of his contention. In the *Rojkam-order sheet*, of the Trial Court it is seen that although the application (under Order IX, Rule 9 of the C.P.C.) for restoration of the suit was filed as early as on 4th December, 2008, which was well within the period of limitation and the appellant-plaintiff was present in most of the hearings, the application could not be taken up as the business of the Trial Court did not permit to proceed with the matter. By perusal of *Rojkam-order sheet*, it also appears that though the appellant-plaintiff was present number of times and the respondents-defendants were not present. The appellant-plaintiff remained present before the Trial Court on 02.02.2009, 20.04.2009, 25.06.2009, 24.08.2009, 29.09.2009, 11.11.2009, 09.12.2009, 11.01.2010, 16.02.2010, 16.03.2010, 17.04.2010, 26.07.2010, 07.08.2010, 18.11.2010, 05.01.2011, 05.02.2011, 24.02.2011, 16.03.2011, 22.03.2011 and 11.05.2011 as per the *Rojkam-order sheet*.

(9) Having regard to the *Rojkam-order sheet* of the Trial Court, we are of the view that both the Trial Court as well as the High Court were not right in observing that the appellant-plaintiff was not interested in pursuing the restoration application. As pointed out earlier, application for restoration of the suit filed by the appellant-plaintiff was well within the period of limitation. The appellant-plaintiff was present in almost all hearings before the Trial Court which indicates that he was genuinely pursuing the matter. The appellant-plaintiff having filed the suit for declaration and injunction in our considered view ought to be given an opportunity to pursue his suit.

(10) In the result, the impugned order of the High Court is set aside and this appeal is allowed. Civil Suit No.217 of 1994, shall stand restored on the file of Additional Senior Civil Judge, Surat. The Trial Court shall accord sufficient opportunity to both the parties and proceed with the matter in accordance with law. The Trial Court shall expedite the trial of the suit and both the parties shall co-operate for the early disposal of the suit. No costs.

.....J.
(R. BANUMATHI)

.....J.
(INDIRA BANERJEE)

NEW DELHI,
JANUARY 9, 2019.