IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 16873 of 2024

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE MAULIK J.SHELAT

==========

Approved for Reporting	Yes	No
	yes	

==========

VICKY HIRALAL (VEDLIYA) SHAH
Versus
BHARATBHAI MAGANBHAI DESAI & ORS.

==========

Appearance:
MR JAMSHED KAVINA(11236) for the Petitioner(s) No. 1
MR SP MAJMUDAR(3456) for the Petitioner(s) No. 1
DS AFF.NOT FILED (N) for the Respondent(s) No. 1
MR MANISH R RAVAL(1250) for the Respondent(s) No. 2,3

==========

CORAM:**HONOURABLE MR. JUSTICE MAULIK J.SHELAT**

Date : 10/07/2025

ORAL JUDGMENT

1. **Rule** returnable forthwith. Learned advocate Mr. Manish R. Raval waives service of notice of rule on behalf of respondents No. 2 & 3.

2. Learned advocate Mr. Majmudar for the petitioner seeks permission to delete respondent No.1 from the array of the parties.

3. Permission as sought for, is granted. Respondent No.1 is hereby deleted. Amendment be carried out forthwith.

4. With the consent of the parties, the matter is taken up for final hearing. Heard learned advocates appearing for the respective parties at length.

5. The present writ application is filed under Article 227 of the Constitution of India seeking following relief :-

> *"(A) YOUR LORDSHIPS may be pleased to issue a writ of mandamus/ certiorari or a writ in the nature of mandamus/certiorari or any other appropriate writ, order or aside direction quashing and setting impugned order dated 30.11.2024 below Exh.19 in Regular Civil Appeal No.06/2022 passed by the Additional Dist. Judge Banaskantha Deodar (ANNEXURE-I) in the interest of justice;*
>
> *(B) During the pendency and final disposal of the present petition, YOUR LORDSHIPS may be pleased implementation of to the stay the order dated 30.11.2024 below Exh.19 in Regular Civil Appeal No.06/2022 passed by the Additional Dist. Judge Banaskantha-Deodar (ANNEXURE-I) pleased to and further be proceedings of the stay Regular Civil Appeal No.06/2022 pending before Additional Dist. Judge Banaskantha- Deodar;*
>
> *(C) Pass and/or further such other any orders that may be thought just and proper, in the facts and circumstances of the present case."*

6. The parties will be referred as far as possible as per their original position in the suit.

Short facts of the case

7. The petitioner herein was original defendant No.1, whereas respondent No.1 was original plaintiff and respondents No.2 and 3 were original defendants No.2 and 3 respectively in Regular Civil Suit No.1 of 2020, which was filed for specific performance of an agreement to sell allegedly executed by defendant No.1 in favour of the plaintiff, and for cancellation of the subsequent sale deed executed by defendant No.1 in favour of defendants No.2 and 3.

7.1 The suit was proceeded ex-parte against defendant No.1 who neither filed any written statement nor any evidence nor as such never remained present. The defendants No. 2 & 3 had appeared and contested the suit by filing their written statement and also led oral evidence.

7.2 After hearing the parties at length, the trial Court vide its judgment and decree dated 08.02.2022 allowed the suit whereby quashed the sale-deed executed by the defendant No.1 in favour of defendants No. 2 & 3 on 24.07.2018. It is further ordered the execution of sale-deed in favour of plaintiff by way of registered sale-deed be done by defendant No.1 and to hand over the possession of the suit land to the plaintiff, failing which it can be done through the Court Commissioner.

7.3 The defendants No. 2 & 3 appear to have challenged the aforesaid judgement and decree before the District Court by filing Regular Civil Appeal No. 6 of 2022 wherein, they have sought for interim injunction by filing an application below Exh.5 under Order 41 rule 5 of CPC.

7.4 For the first time, the defendant No.1 appeared and filed an affidavit in the said appeal, which was titled as Reply and Affidavit against Regular Civil Appeal No. 6 of 2022 which was exhibited as Exh. 10 in the aforesaid appeal on 22.03.2022. The tenor of said reply would be like filing written statement in the suit.

7.5 After hearing the parties, the appellate Court vide its order dated 07.04.2022 has rejected the injunction application of the appellants – defendant Nos. 2 & 3 on the ground that operative portion of the judgment / decree of the trial Court is complied with, thereby question of granting any injunction would not arise.

7.6 After about two years have passed, the appellants had filed the impugned application below Exh. 19 in the aforesaid appeal on 06.01.2024 contending inter-alia that the Affidavit and Reply filed by defendant No.1 in the

aforesaid appeal (Ex. 10) is not sustainable and maintainable as per the provisions of CPC and requires to be taken off from the record of the appeal. The defendant No.1 appears to have filed his reply thereby contested the impugned application.

7.7 After hearing the parties, the appellate Court vide its impugned order dated 30.11.2024 has allowed the impugned application, whereby passed an order that Reply and Affidavit of defendant No.1 filed below Ex. 10 would not be considered at time of hearing of aforesaid appeal.

7.8 Being aggrieved and dissatisfied with the impugned order, the defendant No.1 has preferred the present writ application.

Submission of the petitioner-defendant No.1

8. Learned advocate Mr. S.P. Majmudar for the petitioner would submit that there is gross error of law committed by the trial Court in allowing the impugned application. He would further submit that once a reply filed by the defendant No.1 in appeal which is already exhibited at Exh. 10, it could not have been discarded by the appellate Court. It is further submitted that there is no prohibition under

Order 41 of CPC, not to accept such Affidavit/Reply.

8.1 Learned advocate Mr. Majmudar would further submit that such affidavit filed below Exh. 10 was also referred by the appellate Court while rejecting the injunction application filed by the defendant No.2 & 3 (appellants) and in that circumstances such reply cannot be ignored in law. He would respectfully submit that as per settled legal position of law that once any document is exhibited and received in evidence and at that point of time, it was neither challenged nor disputed by any of other party to proceeding, later on such document cannot be de-exhibited and or questioned.

8.2 To buttress his arguments, learned advocate Mr. Majmudar would refer and rely upon the following decisions:-

(i) Javer Chand Vs. Pukhraj Surana reported in AIR 1961 SC 1655.

(ii) Haribhai Khodabhai through Lrs. Vs. Mayursinh Aniruddhsinh Jadeja reported in 2019 (0) AIJEL-HC 241251

Submission of the respondents No. 2 & 3 - defendant Nos. 2 & 3

9.0 Learned advocate Mr. K.V. Shelat with learned advocate Mr. Manish Raval for the respondents No.2 & 3 would submit that there is no error inasmuch any gross error of law committed by the Appellate Court while allowing the impugned application. He would further submit that Affidavit and Reply filed by defendant No.1 (Ex.10) is unknown to procedure law as while defending Regular Civil Appeal. It is submitted that as such defendant No.1 has tried to do mischief by submitting such affidavit knowing fully well that he had not contested the suit and not filed written statement, despite that tried to overreach process of law by filing such Affidavit/Reply.

9.1 Learned advocate Mr. Shelat would further submit that when such mischievous act of defendant No.1 was noticed by the defendants No.2 & 3 (appellants) the impugned application came to be filed and after taking note of it, the appellate Court has allowed the impugned application. He would further submit that the appeal was filed under Order 41 of CPC and none of the rule of Order 41 of CPC entitled any respondents to file such affidavit and reply while opposing / defending regular appeal. It is submitted that when defendant No.1 knowingly did file affidavit and reply below Exh. 10 through his Lawyer, the same is required to be

taken off from the record of the appeal.

9.2 Learned advocate Mr. Shelat would further submit that after duly appreciating the position of law and in absence of any express provision of CPC, defendant No.1 has filed such reply in regular appeal, the appellate Court has correctly exercised its power so vested in it, thereby observed that affidavit and reply filed by defendant No.1 below Exh. 10 in appeal could not be considered while deciding /adjudicating the appeal filed by the defendants No. 2 & 3.

9.3 Lastly, he would submit that even as per Order 41 rule 27 of CPC, even to submit any oral or documentary evidence to be placed before the appellate Court in the appeal, necessary application need to be filed, which was not done so in the present case, thereby, no fault can be found with the impugned order. According to learned advocate Mr. Shelat, the present writ application is nothing but abuse of process of law, which requires to be rejected with costs.

10. No other and further submissions made by any of learned advocates appearing for the respective parties.

Point for determination

(i) Whether respondents to Regular Civil Appeal who having not filed any written statement, can file Reply and Affidavit in Appeal?

(ii) Whether any illegality, irregularity and or jurisdictional error committed by the Appellate Court while allowing impugned application filed below Exh. 19 by defendants No. 2 & 3 in Regular Civil Appeal?

Analysis

11. The facts which are narrated hereinabove are not in dispute. It is remain undisputed that defendant No.1 during pendency of the suit never appeared and nor contested the suit thereby, not even filed written statement. Nonetheless, when the appeal came to be filed by defendants No. 2 & 3 against the evidence of plaintiff, being party to the appeal, even though not appeared in suit but filed Reply and Affidavit in the appeal filed by defendants No. 2 & 3. Such Reply and Affidavit having filed on 22.03.2022 given exhibit i.e. Exhibit 10 by the appellate Court.

11.1 When it came to the notice of the appellants - defendants No. 2 & 3 that such Reply and Affidavit was filed contrary to the provisions of CPC, they have requested the

appellate Court on 06.01.2024 by way of filing the impugned application below Exh. 19 that it may be taken off – discard from the record of appeal. It is true that the impugned application was filed after about two years from Reply and Affidavit of defendant No.1 given exhibit at Exhibit 10, so also referred while rejecting the injunction application of the appellants by the appellate Court vide its order dated 07.04.2022.

11.2 When this Court has put query to learned advocate Mr. Majmudar appearing for the petitioner, that under which provision of law of CPC, such Reply and Affidavit of defendant No.1 (petitioner herein) could have been filed, learned advocate Mr. Majmudar could not in a position to show any provision under CPC which allows respondent to appeal who never filed written statement in the suit, still can file Reply and Affidavit in appeal. Nonetheless, at his eloquent style, learned advocate Mr. Majmudar submitted that once such reply and affidavit is given exhibit i.e. Exh. 10, irrespective of fact that it could not have been permitted and or filed, such documents cannot be discarded and de-exhibited by the appellate Court.

11.3 Learned advocate Mr. Majmudar has placed heavy reliance upon the decision of the Hon'ble Apex Court in the

case of ***Javer Chand*** (supra) and decision of Co-ordinate Bench of this Court in the case of ***Haribhai Khodabhai through Lrs.*** (supra), thereby would contended that *all said and done*, once reply and affidavit is part of the appeal then, it could not have been discarded by the appellate Court by observing that it should not be considered at the time of final adjudication of appeal.

12. I am not at all impressed with such reply of learned advocate Mr. Majmudar for simple reason that when no provision under CPC especially entire Order 41 of CPC allows the petitioner to file any such Reply and Affidavit at the stage of defending Regular Civil Appeal filed under Section 96 read with Order 41 of CPC, unmistakably for any reason, the Court has accepted such Reply and Affidavit and given exhibit, it would neither consider as a matter of right nor any vested right accrued in favour of such party to agitate that Court having realized its mistake, later on cannot rectified it. It is now well settled legal position of law that ***Actus Curiae Neminem Gravabi*** means an act of the Court shall prejudice no man. A party should not suffer due to errors, mistakes, or delays caused by the Court itself. This principle is rooted in justice and good conscience, emphasizing that the court's actions should not negatively impact those involved in legal proceedings.

12.1 The judgments which are cited by the learned advocate Mr. Majmudar would not at all be applicable to the facts of the present case, inasmuch as received document in evidence by giving it exhibit would stand on different footing than any reply and affidavit filed by the respondents in Regular Civil Appeal filed under Section 96 read with Order 41 of CPC as it would not be considered as an evidence unless permission as sought for under Order 41 Rule 27 of CPC obtained and granted by Appellate Court to receive such document/evidence in any form. It is undisputed that such permission was never sought for and in fact not granted by Appellate Court. When there is no procedure envisage to file such reply and affidavit at the stage of appeal, the respondent of appeal cannot be allowed to file such reply and affidavit unless it was directed by the Court for any purpose / reason.

13. It is also required to be noticed here that such reply and affidavit of defendant No.1 filed at Exh. 10 in the appeal is not a *bona-fide* mistake committed by the defendant No.1 which can be seen from his conduct and tenor of reply filed through his lawyer. The defendant No.1 not only contested the impugned application but also carried the matter upto this Court by challenging the impugned

order before this Court, which clearly indicate that the lacuna remained at the end of defendant No.1 during the course of trial of the suit, having neither appeared nor filed written statement, he has tried to fill such lacuna by filing such reply and affidavit at Exh. 10. Such recourse is neither permissible in law nor can be allowed to operate once noticed by the Court.

13.1 Whenever, it is found by the Court that any mischievous act or misdeed committed by the party to the proceedings and erroneously, the Court became ploy of such mischievous act of litigant, it would be incumbent upon the Court to rectify its own mistake when brought to its notice. ***[Actus Curiae Neminem Gravabi]***

14. When there is no express or implied the provision under CPC which entitled defendant No.1 – respondent No.1 to file any reply / affidavit while appearing in appeal, having found such mistake of allowing such reply/ affidavit on record at Exh. 10, the Appellate Court well within its right to allow the impugned application whereby, observed that such reply / affidavit would not be considered while adjudicating Regular Civil Appeal No. 6 of 2022, in that situation, no fault can be found with such impugned order passed by the Appellate Court.

15. As such the appellate Court has tried to rectify its own mistake by passing the impugned order and as such it has not taken off reply/ affidavit of defendant No.1 to be produced at Exh. 10 but observed that it would not be considered while adjudicating the appeal. According to my view, such Reply and Affidavit (Ex.10) to be taken off – discarded it from record of the appeal as if not filed. The Appellate Court is hereby directed not to consider anything stated by defendant No.1 – respondent No.1 of aforesaid appeal in its Reply and Affidavit (Ex.10) when decide the appeal pending before it.

16. Lastly, it is now well settled legal position of law that mere error of law in passing any order by the Civil Court would not be a ground to interfere with the order passed by the Civil Court while exercising power under Article 227 of the Constitution of India by this Court unless such order is either erroneous, perverse, arbitrary, and or contrary to the provisions of law and or made without jurisdiction. The petitioner could not made out any of such grounds in his present writ application and as such none of the said ingredients have been found in the present case [See – ***(i) Sameer Suresh Gupta TR PA Holder vs. Rahul Kumar Agarwal, reported in 2013 (9) SCC 374 (Para 6 and 7)*** *and* ***(ii) Garment Craft v. Prakash Chand Goel, reported in***

(2022) 4 SCC 181 (Para 15 and 16)].

17. Before parting, I would like to observe that due to mischief of party, precious time of the Court consumed and if such party found caught doing such mischief, cannot allow to go scot free. To curb such type of litigation and to save the Court's time from such mischievous act of the litigant, cost needs to be imposed upon such litigant. Having so observed herein above such mischievous act of petitioner, present application requires to be rejected with cost.

Conclusion

18. Respondent to Regular Civil Appeal who having not filed any written statement, cannot allow to file Reply and Affidavit in Appeal unless permission sought for granted by Appellate Court having exercised its power under Order 41 Rule 27 of CPC.

18.1 Having considering totality of facts and circumstances of the case, there is no illegality, irregularity and or jurisdictional error committed by the Appellate Court while allowing impugned application filed below Exh. 19 by defendants No. 2 & 3 in Regular Civil Appeal No. 6 of 2022.

19. The upshot of the aforesaid observation, discussion and reasons, I do not find any merit in the present writ application, lacks merit and requires to be dismissed, which is hereby rejected with cost.

20. The petitioner- defendant No.1 is hereby directed to pay the cost of Rs. 10,000/- each to the respondents No. 2 & 3 - original defendants No. 2 & 3 within a period of four weeks from today and also to deposit sum of Rs. 10,000/- with DLSA, Banaskantha-Palanpur within the same period.

21. The compliance of such payment of cost by the petitioner- defendant No.1 be taken care by the Appellate Court.

22. Rule is discharged albeit, with aforesaid cost.

Sd/-
(MAULIK J.SHELAT,J)

SALIM/

Original copy of this order has been signed by the Hon'ble Judge.
Digitally signed by: MOHAMMAD SALIM(HC01108), STENO GR II, at High Court of Gujarat on 14/07/2025 12:11:58