CIVIL REVISION APPLICATION

Before the Hon'ble Mr. Justice S. D. Shah

MOHANBHAI DAHYABHAI & ORS. v. DIRASBHAI HASUBHAI MALEK & ORS.*

Civil Procedure Code, 1908 (V of 1908) — Order 17 Rule 3 as amended in 1976 — The word "may" should be read as "shall" — Otherwise the *non-obstante clause* would be meaningless.

The trial Court passed an order on 21-5-1993 clearly stating that many adjournments were granted to the plaintiff to produce his evidence and that he has failed to remain present or to produce his evidence and therefore, his evidence was closed under Order 17 Rule 3 of C.P.C. and since the plaintiff has failed to prove his case by evidence the suit was disposed of under the provisions of Order 17 Rule 3 of C.P. Code. (Para 7)

After trial Court having already disposed of the suit under Order 17 Rule 3(a), it has no jurisdiction to entertain the application at Exh. 76 and thereafter to entertain the application for restoring the suit to file under Order 9 Rule 4 C.P.C. as the suit would be said to have been decided by the trial Court by the order which it passed under Order 17 Rule 3(a) thereby dismissing the suit of the plaintiff. (Para 10)

After such amendment which is brought about by the Amendment Act 104 of 1976 the Parliament has advisedly and with purpose introduced *non-abstante clause* requiring the Court to proceed to decide the suit forthwith notwithstanding the default of the party to the suit to whom the time has been granted to produce his evidence or to cause attendance of witnesses or to perform any other act necessary for further progress of the suit. This amendment which as purposively employed the *non-abstante clause* would make it obligatory for the Court to proceed with the suit forthwith even if it has employed words "Court may". The resort to *non-abstante clause* would become absolutely meaningless if the word "may" is to be read as giving discretionary power to the Court either to proceed or not to proceed with the suit. It would be exercise in futility by the Parliament and ordinarily when a purposeful amendment is made by using *non-abstante clause*, the Court cannot render the employment of *non-abstante clause* ineffective, meaningless or otiose. Held that the words "that Court may" shall have to be read as "Court shall". The *non-abstante clause* always gives overriding effect to the provision. (Para 41)

Gopal Goundar v. Amnuiammal (1), Dakshinamoorthi v. Ponnusami (2), Shantilal v. State (3), Krishna Kumar v. Raghubir Prasad Yadav (4), Junaram Bora v. Saruchoali Kuchuni (5), relied on.

S. B. Vakil, for the Petitioners.
K. S. Nanavati, for Respondent No. 1.
P. M. Thakker, for Respondent No. 2.
Government Pleader for Respondent No. 5.

S. D. SHAH, J. The present C.R.A. is filed by the original defendant Nos. 6 to 22 on being dissatisfied by the judgment and order dated 2-4-1994 passed by the 4th Jt. Civil Judge (J.D.), Surat below Exh. 1 which was restoration Application

*Decided on 19-8-1997. Civil Revision Application No. 740 of 1994 against the order passed by the Jt. Civil Judge (S.D.), on 2-4-1994 allowing restoration Application No. 75 of 1993.

(1) AIR 1968 Mad. 222 (2) AIR 1949 Mad. 78 (3) AIR 1958 Raj. 7
(4) AIR 1979 Patna 49 (5) AIR 1976 Gauhati 3

No. 75 of 1993 which was filed under Order 9 Rule 4 of C. P. Code for setting aside the abatement of Spl. C. S. No. 270 of 1995 and for restoring the said suit on file and to decide the same thereafter in accordance with law.

2. It appears that one Abbashbhai Hasubhai Malek, the respondent No. 1 in the present C.R.A. is the original plaintiff who filed the suit against opponent Nos. 2 to 5 and the present petitioners and one Bai Kani, W/o. Dahyabhai Bavjibhai and Shantilal Dahyabhai for specific performance of agreement, dated 26-5-1964 for the sale of land situated at Surat bearing Revenue S. No. 116 of village Majura admeasuring 3 acres 7 gunthas and which was reconstituted in Final Plot Nos. 10A and 10B admeasuring respectively 6,789 and 1,831 Sq. Mtrs. totaling to 8,620 Sq. Mtrs. The plaintiff also applied for interim injunction by application Exh. 5 for restraining the defendant Nos. 1 to 22 from transferring the land or its possession and from making any construction thereon. The trial Court initially granted *ex-parte ad-interim* injunction operative upto 28th October, 1991. Said *ex parte* injunction was extended, from time to time, but the trial Court by its judgment and order dated 24-2-1994 dismissed the application for temporary injunction and vacated the *ex parte ad-interim* injunction.

3. Opponents challenged the said decision by filing A.O. 195 of 1992 in this Court which came to be dismissed by this Court (Coram : S. D. Shah, J.) on 17th June, 1992 by issuing certain directions to the trial Court to dispose of the suit after recording evidence as early as possible and preferably by 31st July, 1993.

4. Unfortunately, thereafter, the original defendant No. 4 Bai Kani died and her heirs and legal representatives being defendant Nos. 5 to 8 were to be brought on record. The application to bring the heirs and legal representatives on record was not filed within time, i.e., on or before 27-9-1992 and the suit abated on 27-9-1992. Another defendant being defendant No. 5 expired on or about 22-11-1993 and the defendant Nos. 14 to 17 were his heirs and legal representatives.

5. The grievance of the petitioner before this Court is that pursuant to the order of this Court in A.O. 195 of 1992, dated 17th June, 1992 the suit did not make any progress excepting that the issues were framed on 18th January, 1993 and the suit was fixed for recording of evidence of the plaintiff on 21-1-1993. The suit was thereafter adjourned to number of days, i.e., on 1-2-1993, 8-2-1993, 16-2-1993 and 17-2-1993 but the same could not be taken for hearing on account of disturbances in the State of Gujarat. The Advocates of the parties were present and the plaintiff was not present in the Court and on behalf of the plaintiff application at Exh. 71 was given for adjournment. Suit was adjourned to 20-2-1993. On that day also plaintiff did not remain present and the Advocate gave an application at Exh. 72 for adjournment and grant of relief. The trial Court passed speaking order on Exh. 72 and as a last chance the matter was adjourned to 23-2-1993. On that day also the plaintiff was not present though the Advocate of the defendants and the Advocate for plaintiff were present. Advocate for plaintiff applied for adjournment. Once again the suit was adjourned and the plaintiff did not remain present nor did he produce medical certificate and on 21-2-1993 he remained absent and his Advocate applied for adjournment by application Exh. 74. The trial Court, once again, passed the speaking order clearly noting that there was direction of the High Court to decide

the suit by July, 1993 and that the plaintiff was not co-operating and simply applying for adjournment. As a last chance, the matter was adjourned to 25-2-1993 and on that day also plaintiff applied for adjournment and matter was adjourned to 1-3-1993. On that day also plaintiff did not remain present nor gave any application through his Advocate. Once again the Court on its own adjourned the matter on 2-3-1993 and on which day also the plaintiff did not remain present and Court adjourned the matter to 10-3-1993 and thereafter to 30-3-1993, 12-4-1993 and 26-4-1993. On all these days no application for adjournment was given by the Advocate for the plaintiff and on that day the Court adjourned the matter to 4-5-1993 for enabling the plaintiff to produce evidence. On that day also none remained present on behalf of plaintiff. It is the case of the petitioners that on that day also the Court informed the Advocate for plaintiff that there was direction of the High Court and therefore, matter will be fixed even during vacation and the hearing was fixed on 21-5-1993.

6. It is the case of petitioners before this Court who are original defendants that even on 4-5-1993 when the plaintiff and/or his Advocate failed to remain present the Assistant Advocate of Mr. R. G. Shah appeared. He was informed by the Court that though it was the civil suit it was required to be finished by July, 1993 as per the directions of this Court and therefore, the suit would be taken up for hearing even during the vacation and therefore, the suit was fixed on 21-5-1993.

7. It appears that on 21-5-1993 the Advocate for the plaintiff Mr. R. G. Shah applied by application Exh. 76 that the civil suit appears to have been fixed during vacation through oversight and that it should be adjourned beyond vacation. Below that Exh. 76 the trial Court passed order on 21-5-1993 clearly stating that many adjournments were granted to the plaintiff to produce his evidence and that he has failed to remain present or to produce his evidence and therefore, his evidence was closed under Order 17 Rule 3 of C.P.C. and since the plaintiff has failed to prove his case by evidence the suit was disposed of under the provisions of Order 17 Rule 3 of C.P. Code.

8. Now it is pertinent to note that this Court while deciding the Appeal From Order No. 195 of 1992 by judgment and order dated 17th June, 1992 after hearing both parties passed a detailed speaking order and this Court confirmed the order passed below Exh. 5 but directed that since the suit involved claims of various parties over the same parcel of land and in view of the fact that the parties literally fighting for the same parcel of land it was just and proper to expedite the hearing of the suit and to direct the trial Court to *dispose of the suit by evidence as early as possible by 31st July, 1993.* Said direction was given by this Court on 17th June, 1992 and the suit was directed to be disposed of by recording evidence preferably by 31st July, 1993. Period of more than one year was thus granted and thereafter as pointed out hereinabove the suit was adjourned, from time to time, at the instance of the plaintiff and/or his Advocate. During the vacation the Court had to proceed with suit because there was specific direction of this Court to decide the suit finally by specific date. The fixing of suit during vacation by the trial Court and consistent failure of the plaintiff to appear on all adjournments would leave no room for doubt that having realised that this Court has not interfered against the order of temporary

injunction the proceeding may be indefinitely prolonged and with that view the plaintiff and his Advocate appears to have prolonged the hearing of the suit for a period of one year. On 21-5-1993 when the suit was fixed for hearing consistent with the direction issued by this Court, an application was given by the Advocate for the plaintiff that the suit was perhaps fixed through oversight by the trial Court during vacation for final hearing and therefore, the suit should be adjourned beyond vacation so that the suit could be decided after vacation. The said application which was at Exh. 76 on 21-5-1993 was in the opinion of this Court an unfortunate attempt both on the part of the Advocate for plaintiff as well as plaintiff himself to unduly prolong the hearing of the suit and to compel the trial Court to flout the positive direction of this Court. However, since there was direction of this Court to finally dispose of the suit by 31st July, 1993 and since the plaintiff and his Advocate consistently failed to appear before the Court, the trial Court proceeded to decide the suit under Order 17 Rule 3(a) C.P.C. The said rule being relevant for the purpose of this C.R.A. is required to be reproduced in its entirety herein :

> "Order 17 Rule 3 : *Court may proceed notwithstanding either party fails to produce evidence etc. :-*
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> Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform another act necessary to the further progress of the suit, for which time has been allowed, the Court may notwithstanding such default -
>
> (a) if the parties are present, proceed to decide the suit forthwith, or
>
> (b) if the parties are, or any of them is, absent, proceed under Rule 2."

9. The said Rule provides, *inter alia*, that any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, the Court may notwithstanding such default, (i) if the parties are present, proceed to decide the suit forthwith. It may be noted that while enacting Rule 3 of Order 17 the Parliament has employed *non-abstante clause* and has used the word "may" if it has given discretion to the Court that notwithstanding the default of the party who has failed to produce his evidence or to cause the attendance of his witnesses, the Court may proceed to decide the suit forthwith if the parties are present. In the present case since there was positive direction of this Court to decide the suit by a particular date necessarily impliedly also mean that even during the vacation in case of need the suit was required to be heard. There is no total prohibition against hearing of urgent civil matters even during vacation and when there is direction of the High Court to decide the suit by 31st July, 1993 it would also include the period of vacation and when the plaintiff and his Advocate has failed to appear consistently on all occasions, the trial Court ought to have proceeded to decide the suit under Order 17 Rule 3(a). In the present case when the trial Court proceeded to pass the order on 21st May, 1993 when the application for adjournment was given by the learned Advocate for the plaintiff it clearly observed that the plaintiff has failed to produce his evidence and therefore, the evidence of the plaintiff was closed under Order 17 Rule 3 of C.P.C. and since the plaintiff has failed to prove his case by producing any evidence, whatsoever, the suit was decided under Order 17 Rule 3(a) and this order was pronounced in the open Court on 21-5-1993.

10. It appears that after the summer vacation the plaintiff filed an application on 14th June, 1993 for restoring the suit on file on the ground that the same was dismissed in the absence of plaintiff. In reply to the application defendant Nos. 4 & 5 were joined as parties. Thereafter on 18th August, 1993 the plaintiff gave an application in the restoration application for amendment of application by deleting the names of said two defendant Nos. 4 & 5 as they had expired. In the restoration application the present petitioners made an application for raising proper issues which was rejected only on the ground that the Court was simply required to decide as to whether the suit should be restored to file or not. Even at that stage present petitioner by giving application at Exh. 27 brought to the notice of the Court that as the heirs of original defendant Nos. 4 & 5 were not brought on record the application had abated and the Court has no jurisdiction thereafter to grant the application. It appears that thereafter the trial Court was pleased to pass order, dated 2-4-1994 granting the amendment in the restoration application and was also pleased to pass the order on that very day, i.e., 2-4-1994 to restore the suit to file under Order 9 Rule 4, C.P.C. and was pleased to further direct that the suit shall be heard on 13-4-1994. After trial Court having already disposed of the suit under Order 17 Rule 3(a), it has no jurisdiction to entertain the application at Exh. 76 and thereafter to entertain the application for restoring the suit to file under Order 9 Rule 4, C.P.C. as the suit would be said to have been decided by the trial Court by the order which it passed under Order 17 Rule 3(a) thereby dismissing the suit of the plaintiff.

11. It is by the subsequent order of the trial Court, dated 2-4-1994 restoring the suit to file under Order 9 Rule 4, the present petitioners are aggrieved and have moved this Court on the ground that the trial Court lacked jurisdiction to entertain application when it had already decided the suit under Order 17 Rule 3(a), C.P.C.

12. Caption of Rule 3 Order 17 which reads as *"Court may proceed notwithstanding either party fails to produce evidence etc."* and the use of *non-abstante clause* empowering the Court to proceed with the suit despite default of the party to produce his evidence or to cause attendance of witnesses or to perform any other act necessary to the further progress of the suit will leave no room for doubt that though the legislature has used the word "Court may" it shall have to be read as "Court shall" proceed to decide the suit notwithstanding the default of the party as parties must be deemed to be present on the day on which the Court informed the Advocate of the plaintiff that it shall proceed to decide the suit and in fact proceeded to decide the suit and decided the suit under Order 17 Rule 3(a).

13. Mr. A. S. Vakil, learned Advocate appearing for the petitioners invited attention of this Court to the decision of Madras High Court in the case of *Gopal Goundar v. Amnuiammal*, reported in AIR 1968 Mad. 222, where the order was passed by the Court under Order 17 Rule 3. In the case before the Madras High Court after the plaintiff-witness was examined, she apprehended that she may not obtain fair trial in Court and she applied for transfer of the case and such application for transfer was dismissed. It was in such a situation that the Madras High Court took the view that the plaintiff must be deemed to have appeared before the Court on day when the suit was dismissed and the disposal of the suit by the trial Court

must be deemed to be one under Order 17 Rule 3 of C.P.C. Following the earlier decision of the Division Bench of the Madras High Court in the case of *Dakshinamoorthi v. Ponnusami,* reported in AIR 1949 Mad. 78 the learned Judge took the view that the plaintiff should be deemed to have appeared before the Court on the day when the suit was dismissed and the disposal of the suit by the trial Court must be deemed to be one under Order 17 Rule 3 of C.P.C.

14. On the question as to whether any such order is passed under Order 17 Rule 3(a) and appeal would lie to the District Court or a revision under Sec. 115 C.P.C was maintainable, Wanchoo, C.J. (as His Lordship then was) of Rajasthan High Court speaking for the Division Bench in the case of *Shantilal v. State & Anr.*, reported in AIR 1958 Raj. 7, took the view that when time has been granted to the party and he fails to appear and thus failed to produce evidence it is open to the Court to proceed under Order 17 Rule 3, but there the Court took the view that it was discretionary and it was open to the Court in the absence of the party to proceed under Rule 2. *However, the Court observed that when the party was present and has failed to produce evidence Rule 2 will have no application and the Court will have no option except to proceed under Rule 3 unless it decides to grant further adjournment.* That was not the case before the trial Court because the Court has, in fact, proceeded to decide the suit under Order 17 Rule 3(a), C.P.C. It may also be noted that when the Rajasthan High Court was called upon to decide the aforesaid question, the Court held that there was discretion in the Court because at the relevant time the language employed in Order 17 Rule 3 was different from the one which is employed in the present Order 17 Rule 3 after amendment of C.P.C. in the year 1976. After such amendment which is brought about by the Amendment Act 104 of 1976 the Parliament has advisedly and with purpose introduced *non-abstante clause* requiring the Court to proceed to decide the suit forthwith notwithstanding the default of the party to the suit to whom the time has been granted to produce his evidence or to cause attendance of witnesses or to perform any other act necessary for further progress of the suit. This amendment which has purposively employed the *non-abstante clause* would make it obligatory for the Court to proceed with the suit forthwith even if it has employed words "Court may". The resort to *non-abstante clause* would become absolutely meaningless if the word "may" is to be read as giving discretionary power to the Court either to proceed or not to proceed with the suit. It would be exercise in futility by the Parliament and ordinarily when a purposeful amendment is made by using *non-abstante clause,* the Court cannot render the employment of *non-abstante clause* ineffective, meaningless or otiose. In my opinion, therefore, the words "that Court may" shall have to be read as "Court shall". The *non-abstante clause* always gives overriding effect to the provision.

15. Mr. A. S. Vakil also invited the attention of this Court to the decision of Patna High Court in the case of *Krishna Kumar v. Raghubir Prasad Yadav,* reported in AIR 1979 Patna 49, where the Court proceeded to decide the suit under Order 17 Rule 3 and thereafter an application was moved under Order 9 Rule 13 for restoring the suit to file as the earlier order was rendered in the absence of the party. The Court took the view that an application for restoration of the suit under Order 9 Rule 13 would not be a proper remedy as the case would fall squarely under Order

17 Rule 3(a) to which provisions of Order 9 Rule 13 do not apply. This view of the Patna High Court also supports the view which this Court is inclined to take undoubtedly on its own interpretation of Order 17 Rule 3 without reference to *non-abstante clause.* In fact, the learned single Judge of Patna High Court found that the suit of the plaintiff was in fact disposed of under Order 17 Rule 3 and therefore, subsequent application under Order 9 Rule 13, C.P.C. for restoring the suit to file was not a proper remedy.

16. Similar view is taken by Gauhati High Court by Hon'ble Mr. Baharul Islam, C.J. in the case of *Junaram Bora v. Sarucholi Kuchuni,* reported in AIR 1976 Gauhati 3, that where time is granted to the party to cause the attendance of his witnesses and/or to do anything contemplated by Order 17 Rule 3, C.P.C. and when the party has failed to comply with such requirement the Court in fact proceeds to decide the suit under Order 17 Rule 3(a).

17. In view of the aforesaid position of law, and in view of the fact that there is specific direction contained in the order of this Court to decide the suit by 31st July, 1993 which would also include the period of vacation of May, 1993, the trial Court rightly proceeded to dispose of the suit under Order 17 Rule 3(a) of C.P.C. and it lacked jurisdiction thereafter to entertain the application under Order 9 Rule 4 so as to restore the suit to file to set aside the abatement and to proceed further with the suit. That in substance, would amount to permit the trial Court not only to bypass the judgment and order which it has already delivered under Order 17 Rule 3(a) but it would also amount to permitting the trial Court to totally ignore the directions issued by this Court and to grant time to itself to decide the suit even if the date is peremptorily fixed by this Court for final disposal of the suit. The said course of action cannot be appreciated and deserves to be denounced by this Court, firstly, because there was specific direction contained in the order of this Court to decide the suit by a particular date which impliedly would include the period of vacation also and it would require the trial Court to hear the suit even during vacation also because the suit was of urgent nature, and secondly after amendment of Order 17 Rule 3 and employment of *non-abstante clause* by the Parliament there is no room for doubt in holding that the trial Court shall have to proceed with the suit even during vacation as if the party was already present before it. Unfortunately, the trial Court has by the impugned order not only flouted the positive directions issued by this Court but has granted time to itself not only to proceed with the suit beyond the deadline fixed by this Court, but also it has also brazen facedly flouted the direction of this Court and has granted time to itself to proceed to decide the suit beyond the deadline fixed by this Court. In fact this Court would have proceeded to take some action against the learned Judge by passing remarks against him, but in the facts and circumstances of the case, and in view of the position of amended law stricter view of the matter is not taken this time.

18. It would not be out of place to mention here at this stage that even before this Court every attempt is made by the original plaintiff-respondent No. 1 herein to see that the matter before this Court does not proceed further firstly by engaging Advocate Mr. C. J. Vin, thereafter changing the Advocate and filing Vakalatnama of Mr. P. M. Thakker and thereafter, once again, changing Advocate and filing

Vakalatnama of Mr. K. S. Nanavati who has also no instructions to appear and he has thus before this Court also made every attempt to see that the suit does not proceed further on merits and that the judgment of the Court rendered under Order 17 Rule 3(a) does not become effective and operative. This fact is simply noticed with a view to emphasise the fact that before this Court also the attempt of the original plaintiff is to avoid consistently by changing Advocates after Advocates, the final disposal of this proceeding.

19. In the result this C.R.A. succeeds. The judgment and order of the trial Court, dated 2-4-1994 is quashed and set aside and its judgment and order passed under Order 17 Rule 3(a) is made operative. Rule is made absolute accordingly. No costs.

20. In view of the judgment and order on main C.R.A. no order on C. A. No. 2246 of 1995 and it stands disposed of.

(ATP) *Application granted.*

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SPECIAL CIVIL APPLICATION

Before the Hon'ble Mr. Justice R. K. Abichandani

KANTIBHAI NANUBHAI PATEL & ANR. v. URBAN LAND TRIBUNAL & ORS.*

(A) HIGH COURT ORDERS — Forgery of — Constitution of India, 1950 — Art. 226 — Xerox copy of order purporting to be of the High Court, produced before Urban Land Ceiling Tribunal which acted on it — Fraud discovered due to vigilance by the Competent Authority — Enquiry by C.B.I. ordered besides departmental action again personnel in Government as well as High Court Registry — Extensive directions issued.

In proceedings before the Urban Land Tribunal the appellant before the Tribunal produced zerox copy of an order purporting to be of the High Court which was certified as xerox copy by an Executive Magistrate. The Competent Authority suspected about the order and moved the Government, the Government Pleader and High Court Registry. It was found that petition was still pending in the High Court and order as produced before the Tribunal was never passed by the High Court.

Extensive directions issued by Court including C.B.I. enquiry into the entire episode. (*See* Para 7)

(B) PRACTICE & PROCEDURE — Certified copies of judicial orders — Evidence Act, 1872 (I of 1972) — Sec. 76 — Gujarat High Court Rules, 1993 — Chapter XIII — It is only the High Court Registry which can issue certified copies of orders passed by High Court — No Executive Magistrate or any other authority can lend authenticity to the judgments of the High Court — Tribunals and authorities should insist on genuine certified copies rather than act upon xerox copies authenticated by Executive Magistrates etc. — Direction for action issued.

It has been brought to the notice of this Court, which fact is also taken note of in the earlier orders of this Court dated 19th August, 1997 and 27th August, 1997, that

*Decided on 19-9-1997. Special Civil Application No. 3322 of 1994 challenging order of Urban Land Ceiling Tribunal in Appeal No. 164 of 1987.