

ORDER BELOW EXH.-5

IN

REGULAR CIVIL APPEAL NO. 12 OF 2021

*(Gitaben Rameshbhai Solanki through P.O.A. Rameshbhai Babulal Solanki Vs.
Ramniklal Govindbhai Parsaniya etc.2)*

APPEARANCES:

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Mr.S.D.Chaglani, M.S.Chaglani, L.A.s for the Appellant.

Mr.R.D.Thakar, L.A. for the Respondent No.1

Mr.R.B.Sarvaiya, L.A. for the Respondent No.2

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1. That present appellant has filed Regular Civil Appeal under Section 96 of the Code of Civil Procedure (here-in-after referred in short as C.P.C.) and along with it, they have preferred the present stay application under Order 41 Rule 5 of C.P.C. to pass an order in their favour by staying the impugned Judgment and Decree passed in Regular Civil Suit No.181/2017 by the Ld. 2nd Additional Civil Judge, Junagadh on dated 11/05/2021.

2. Following is the say of the appellant and reasons for staying that has been duly considered and to avoid repetition, I am not reproducing those reasons as stated in their application.

3. On issuance of notice the respondent No.1 has appeared through his Ld.Advocate Mr.R.D.Thakar and filed written objections cum arguments vide Exh.-8 whereas respondent No.2 has appeared through their Ld.Advocate Mr.R.B.Sarvaiya.

4. Heard the Ld. Advocate for the appellant and Ld. Advocates for the respondents and also gone through

written objections cum arguments filed by the Ld. Advocate for the respondent No.1 vide Exh.-8.

5. Now, after hearing the Ld. Advocates following points arises for determination of the present application.

-:: POINTS FOR DETERMINATION ::-

1. Whether the appellant is liable for the relief of para 5 of the petition as prayed for?

2. What's order ?

5.1 My findings to the above points are:

1. **PARTLY IN AFFIRMATIVE.**

2. As per **FINAL ORDER.**

-:: REASONS ::-

POINT Nos.1 and 2:

6. Now, most of the submission of both the Ld. Advocates are touching the merits of the case but as per the considered view of this Court, at this stage, it is advisable not to determine the fact of any particular document produced by either party, otherwise, that will affect the merits of the appeal. Moreover, looking to Exh.-5 after appearance of the Ld. Advocates for respondents and after considering both the Ld. Advocates' submission, this Court has also considered the nature of dispute involved between the parties to grant stay for the reasons as recorded and mentioned in the present petition.

7. Now, I would like to go through the provision of Order 41 Rule 5 of the C.P.C. Which provide as under:

Order 41 Rule 5 of C.P.C.

"5.Stay by Appellate Court.-

(1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate court may order, nor shall execution of a decree be stayed by reason only for an appeal having been preferred from the decree; but the Appellate Court may for sufficient cause order stay of execution of such decree.

8. While passing the order of stay under Order 41 Rule 5 of the C.P.C. is concerned, it is settled by the Hon'ble Supreme Court in the case of **Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd., (2005) 1 SCC 705 and Anderson Wright & Company Vs. Amar Nath Roy, 2005 DNJ (SC) 562**, that the Appellate Court has jurisdiction to put the applicant under Order 41 Rule 5 of the C.P.C. on reasonable terms as of its opinion.

9. The Ld.Advocate for the appellant, Mr.M.S.Chaglani, has respectfully submitted that the appellant has constructed the dwelling house as per the permission of the respondent No.2 – Municipal Corporation. He has mainly relied on Exh.-63 and Exh.-64 i.e. permission and approved plan for construction. It is further respectfully submitted that as per the approved plan, he does not require to keep the margin space on the western side of his property. Therefore, the order of the Ld.Trial Court is required to be stayed at this stage and if the impugned Judgment and Decree is not stayed, the

appeal will become infructuous. It is further submitted that the respondent No.1 has not claimed the easementary rights and Civil Court has no right to order for demolition. The Ld.Advocate for the appellant has argued at length on the points of easement as well as maintainability of the appeal and legal position of Sec.260 of G.P.M.C. Act as well as determination of the margin/set back in the eyes of Law. However, the application at Exh.-5 is filed for the stay of the Judgment and Decree passed by the Ld.Trial Court. Therefore, I do not find it fit to discuss the merits of the appeal in detail. The Ld.Advocate for the appellant has concluded his argument by making submission that if the impugned Judgment and Decree is not stayed, he will have to suffer irreparable loss. Relying on the authorities and regulations cited during the course of his argument, as under, he has prayed to stay the impugned Judgment and Decree of the Ld.Trial Court.

1. AIR 1990 Karnataka 236: Dr.K.Panduranga Nayak Vs. Smt.Jayashree and others
2. Comprehensive General Development Control Regulations-2017
3. AIR 2007 Supreme Court 38: Muni Suvrat Swami Jain S.M.P. Sangh Vs. Arun Nathuram Gaikwad & Ors.
4. Extract of B.P.M.C. Act.
5. Decision delivered by the Hon'ble High Court of Kerala at Ernakulam in OP(C) No.1403/2016 dated 09/06/2016: Painkuttikandy Shaji Vs. Painkuttikandy Prasad
6. Decision delivered by the Hon'ble High Court of Gujarat in Special Civil Application No.6408/2019 dated 14/06/2019: Chitra Publicity Co. Thru. Bakulesh Kantilal Mehta Vs. Satish

Yashwantrav Chikhlikar

9.1 The Ld.Advocate for the respondent No.1, Mr.R.D.Thakar, has respectfully submitted that the appellant is defendant No.1 in the original suit and he has not produced any documentary evidence before the Ld.Trial Court. It is further argued that Ld.Trial Court has rightly appreciated the facts in consonance with the Law and the principles of the Hon'ble Supreme Court and Hon'ble High Courts. Therefore, the impugned Judgment and Decree does not suffer from illegality and hence, it is not required to be stayed and lastly prayed to reject the application. The Ld.Advocate for the respondent No.1 has relied on the following case laws:

1. 1974 LawSuit(SC) 224: K. Ramadas Shenoy Vs. Chief Officers, Town Municipal Council UDIPI
2. 1999 LawSuit(SC) 707: M. I. Builders Private Limited Vs. Radhey Shyam Sahu
3. 2009 LawSuit(SC) 1315: Shanti Sports Club Vs. Union of India
4. 2019 LawSuit(SC) 1783: Municipal Corporation of Greater Mumbai & Ors. Vs. M/s.Sunbeam High Tech Developers Private Ltd.
5. 2009 LawSuit(SC) 1531: Priyanka Estates International Pvt. Ltd. Vs. State of Assam
6. 2004 LawSuit(SC) 1306: Friends Colony Development Committee Vs. State of Orissa
7. 1991 LawSuit(SC) 280: Pratibha Co-operative Housing Society Limited Vs. State of Maharashtra
8. 1995 LawSuit(SC) 1020: Cantonment Board, Jabalpur Vs. S. N. Awasthi
9. 1995 LawSuit(SC) 890: Pleasant Stay Hotel; Pleasant Stay Hotel; Pleasant Stay Hotel; State of Tamil Nadu Vs. Palani Hills Conservation Council
10. 1994 LawSuit(SC) 1078: Virender Gaur Vs. State

Order below Exh.-5 in R.C.A. No.12/2021

Principal District Judge
Junagadh

of Haryana

9.2 The Ld.Advocate for the respondent No.2, Mr.R.B.Sarvaiya, has submitted his Vakalatnama and application for granting of time to file the objections. Moreover, he has argued on application at Exh.-5 for stay of the impugned Judgment and Decree that Corporation, respondent No.2, has taken all the legal steps and filed the documents before the Ld.Trial Court. Hence, the Ld.Trial Court has passed the order as per the Law and it does not require any interference.

10. I have heard the Ld.Advocates for the respective parties and gone through the Judgments cited by the respective Ld.Advocates. The appellant has prayed to stay the impugned Judgment and Decree of the Ld.Trial Court as the appeal is pending and contended that he will have to suffer irreparable loss if as per the order of Ld.Trial Court, he has to remove the construction within thirty days of the order of the Ld.Trial Court.

11. Thus, upon perusing and gone through the above legal provisions, considering the submissions of both the parties, considering the ratio laid down by the Hon'ble Supreme Court and Hon'ble High Courts, looking to the nature and dispute involved between the parties, it seems that till the rights and merits of the appeal is adjudicated and determined by this Appellate Court, it is advisable to have the subject

matter be stayed till it is finally decided as appellant has successfully shown sufficient cause to stay the impugned Judgment and Decree. Hence, in view of the above, this Court is of view to exercise its discretion as given and provided under Order 41 Rule 5 to the Appellate Court. Therefore, this being a case wherein the relief as prayed by the appellant is required to be granted. Hence, I reply for the above stated reasons, the point No.1 in **PARTLY-IN-AFFIRMATIVE** and pass the following order in the interest of justice towards the Point No.2:

:: O R D E R ::

- This application is partly allowed.
- The execution of Judgment and Decree passed in Regular Civil Suit No.181/2017 passed by the Id. 2nd Additional Civil Judge, Junagadh, on dated 11/05/2021, is stayed till the final disposal of the appeal.
- The concerned Trial Court be intimated accordingly with the certified copy of this order.
- Parties to bear their own costs.

Signed and pronounced in the open Court, today on this **10th day of June, 2021.**

Junagadh
Date:10/06/2021

(RIZVANA BUKHARI)
Principal District Judge
Junagadh
UIC NO.GJ00916