



IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 7688 of 2009

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE R.D.KOTHARI

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- 1 Whether Reporters of Local Papers may be allowed to see the judgment ?
- 2 To be referred to the Reporter or not ?
- 3 Whether their Lordships wish to see the fair copy of the judgment ?
- 4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?
- 5 Whether it is to be circulated to the civil judge ?

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MAS UDKHANJI KARIMKHANJI TALUKDAR & 1....Petitioner(s)

Versus

VISHNUBHAI GAFURBHAI RABARI & 8....Respondent(s)

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Appearance:

MR ASIFKHAN I PATHAN, ADVOCATE for the Petitioner(s) No. 1 - 2

MS BENAZIR M HAKIM, ADVOCATE for the Respondent(s) No. 1

RULE SERVED for the Respondent(s) No. 2 - 9

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CORAM: **HONOURABLE MR.JUSTICE R.D.KOTHARI**

Date : 16-20/01/2014

ORAL JUDGMENT

1. The petitioners have challenged the order dated 02.07.2009



passed by lower Appellate Court i.e. Presiding Officer, Fast Track Court, Ahmedabad (Rural) in Civil Miscellaneous Application No.142 of 2008, whereby, the said Court was pleased to quash and set aside the order dated 22.10.2008 passed by Principal Civil Judge, Dholka, in Regular Civil Suit No.19 of 2007 at Exh.61. The learned Civil Judge, Dholka, by order dated 22.10.2008, was pleased to allow the plaintiffs-petitioner's application and the Court has ordered to appoint Court Commissioner on payment of necessary charges by the plaintiffs-petitioners. The said Court has ordered that the Commissioner would remain present at the time of carrying out of fencing work surrounding the suit property.

2. The petitioners-plaintiffs had filed suit for declaration and injunction against the present respondents who are defendants in the said suit. The suit property referred as Tika No.5, City Survey No.387, 388, 389, 398. In substance, the petitioners-plaintiffs had prayed that the respondents-defendants be restrained from causing interference in any manner in enjoyment of the suit property of the petitioners-plaintiffs.

3. Heard learned advocate Mr.Asifkhan Pathan for the petitioners. Learned advocate for the respondents absent.

4. Learned advocate for the petitioners has drawn attention of this Court to reply filed by the respondents-defendants in Regular Civil Suit No.19 of 2007 (Annexure-'C', page 60 to this petition), wherein, the respondents have declared that they have no connection or relation with the suit property of the plaintiffs and the plaintiffs have instituted the suit only to harass the defendants. It appears that in extremely short reply of two para filed by the defendants, the Defendants do not refer any other details.



5. Learned advocate Mr.Pathan for the petitioners has submitted that the petitioners-plaintiffs have prayed for interim injunction in Regular Civil Suit No.19 of 2007 and the said application (Exh.5) of the plaintiffs was allowed by the trial Court by order dated 23.05.2008. The defendants had filed Civil Appeal No.83 of 2008 against the said order and the said appeal came to be dismissed by the Appellate Court. Against that, original defendants had filed Special Civil Application No.11563 of 2008 before this Court and the same was withdrawn by the original defendants and by order dated 17.09.2009, the original defendants were permitted to withdraw the petition being Special Civil Application No.11563 of 2008.

6. Thereafter, the petitioners-plaintiffs had filed an application (Exh.61) praying for granting police protection while carrying out fencing work surrounding the suit property. The trial Court has passed order dated 22.10.2008 for appointment of Court Commissioner as referred above and, order dated 22.10.2008 passed by the trial Court came to be set aside by the lower Appellate Court by order dated 02.07.2009. Hence present petition.

7. Learned advocate Mr.Pathan for the petitioners has drawn attention to order dated 06.08.2009 passed by this Court (Coram : Honourable Smt.Justice Abhilasha Kumari) and, after hearing both the sides, interim relief was granted and the order of learned lower Appellate Court is stayed till further orders by this Court.

8. Learned advocate Mr.Pathan for the petitioners has submitted that learned lower Appellate Court has erroneously entertained the appeal inasmuch as the petitioners-plaintiff's application before the trial Court was under Section 151 of the Code of Civil Procedure and it was not under Order 39. If that being so, the appeal is not maintainable before



the lower Appellate Court. The submission has substance. The party can pray for police protection under Section 151 of the Code of Civil Procedure. In this regard, learned advocate Mr.Pathan for the petitioners has placed reliance on the decision in *Shashi Kapur v. O.P. Gogne* [AIR 1982 DELHI 245] and *P. Shanker Rao v. Smt. B. Susheela* [AIR 2000 ANDHRA PRADESH 214].

9. Learned lower Appellate Court has interfered with the order of the trial Court holding that suit property is not identified by the specific measurement and in such circumstances, prayer for police protection cannot be granted to the plaintiffs. Learned advocate Mr.Pathan for the petitioners has drawn attention to a plaint filed by the plaintiffs before the trial Court, wherein, specific measurement is given by the plaintiffs and suit property is duly identified in the pleadings. Interference with the order of the trial Court on the above ground by learned lower Appellate Court is, therefore, not proper and legal.

10. The order dated 02.07.2009 passed by lower Appellate Court in Civil Miscellaneous Application No.142 of 2008 is, therefore, quashed and set aside. Learned advocate for the petitioners has submitted that petitioners-plaintiffs are ready and willing to deposit necessary amount for police protection. The order of the trial Court dated 22.10.2008 is required to be restored. It is further directed that petitioners-plaintiffs be provided police protection for carrying out fencing of the suit property upon prior deposit of necessary charges for police protection by the petitioners-plaintiffs.

11. With the aforesaid, this petition is allowed. Rule is made absolute to the aforesaid extent. Direct service is permitted.





Date : 20/01/2014

FURTHER ORDER

12. After the order was dictated, in fact, after, two days thereafter, and before this order is signed, learned advocate Ms.Benazir M. Hakim appears for respondent No.1 and makes a request to rehear the matter. The said prayer was declined. The other prayer made was to stay the operation of the order for a period of three months. Learned advocate for the petitioners opposes this request. Learned advocate Ms.Hakim for respondent No.1 submits that the matter is nearly 7 years' old and no prejudice would be caused to the petitioners if the order is stayed for a period of three months. Considering the submissions made by the learned advocates for the parties, operation of the order is stayed for eight weeks from today.

(R.D.KOTHARI, J.)

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