

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SECOND APPEAL NO. 392 of 2018****With
CIVIL APPLICATION NO. 1 of 2018**=====

FULABHAI LAVABHAI DAMASIYA

Versus

RAJUBEN TAPUBHAI

=====

Appearance:

MR AMAR D MITHANI(484) for the PETITIONER(s) No. 1,2,3,4,5
for the RESPONDENT(s) No. 1,2,3
=====CORAM: **HONOURABLE MR.JUSTICE B.N. KARIA****Date : 17/01/2019****ORAL ORDER****ORDER IN APPEAL**

1. This appeal is preferred by the appellants (original defendants before the learned trial Court) against the judgment and decree passed by the learned Additional District Judge rejecting the Regular Civil Appeal No.40 of 2017 (Old No.88/2012) dated 13.08.2018 confirming the judgment and decree passed in Regular Civil Suit No.62 of 2005 by the learned Principal Civil Judge, Visavadar dated 25.06.2012.

2. Heard learned counsel for the appellants.

3. Learned counsel for the appellants submits that previously the plaintiffs have filed Civil Suit No.147 of 1984 for the partition which was dismissed for want of prosecution

on 09.07.1991. Even the proceedings for its restoration – application for condonation of delay being Misc. Civil Application No.22 of 1999 was rejected on 17.08.2002. Thereafter on 08.03.2003, fresh Regular Civil Suit No.37 of 2003 was filed and was renumbered as Regular Civil Suit No.62 of 2005 after lapse of 37 years of filing of the said on account of cause of action. Learned Trial Court erred in entertaining the second suit however, it was barred by provisions of Limitation Act. That, under Order IX Rule 4 of the Civil Procedure Code as per the amendment made in the State of Gujarat, concession can be granted only if any application for restoration is made by the party. That shall not be applicable to the fresh suit filed by the plaintiffs. The issue requires consideration.

Admit.

4. Following substantial question of law required to be determined for present appeal:

[a] Whether, the Suit filed in the year 2003, complaining about the alleged illegality of the year 1965, is maintainable, after the lapse of 38 years?

[b] Whether, the delay can be condoned for institution of a Civil Suit?

[c] Whether, in the facts and circumstances of the case, the proceedings under Order 9 Rule 4 of the Civil Procedure Code, can extend the limitation for filing fresh Suit?

[d] Whether, under Order 9 Rule 4 of the Civil Procedure Code, two remedies are available to the party?

[e] Whether, the Plaintiffs, who are not in possession or their name, does not appear in the Property Records, for last 38 years, can legally institute a Suit for partition?

[f] Whether, on equitable grounds, the delay period for institution of a Civil Suit can be condoned?

[g] Whether, the deposition of the Power of Attorney Holder can be relied upon, without the Plaintiff himself entering into the witness box?

[h] Whether, in the Suit for partition the limitation/cause of action start from the day when the names of the plaintiffs are excluded from the record?

[i] Whether, on filing the fresh Suit under Order 9 Rule 4 of the CPC, the limitation starts from the original cause of action or from the date of dismissal of an earlier Suit?

ORDER IN CIVIL APPLICATION

Rule returnable on **14.02.2019**. Interim relief in terms of paragraph 9(A) is granted till then.

(B.N. KARIA, J)