

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**R/SECOND APPEAL NO. 428 of 2018
With
CIVIL APPLICATION (FOR INTERIM RELIEF) NO. 1 of 2018
In R/SECOND APPEAL NO. 428 of 2018**

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DEVIDAS MAKANDAS SINDHAV

Versus

NARBHERAM KESHAVDAS PARMAR & 1 other(s)

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Appearance:

**MR HASIT H JOSHI(2480) for the Appellant(s) No. 1
for the Respondent(s) No. 1,2**

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CORAM: HONOURABLE MR.JUSTICE B.N. KARIA

Date : 08/03/2019

ORAL ORDER

Order in Second Appeal:

1. The present appellant, who is the original plaintiff in Regular Civil Suit No. 35 of 2000, preferred before the Court of learned Principal Civil Judge, Dhrol, District: Jamnagar, has challenged the judgment and order dated 05.10.2018, passed by the learned Principal District Judge, Jamnagar in Regular Civil Appeal No. 122 of 2009.

2. Heard, learned counsel Mr. Hasit Joshi for the appellant. It was submitted that the suit filed by the plaintiff against the defendants for permanent injunction and mandatory order restricting the defendant No. 1 to make any construction on the suit property as well as to remove encroachment made by the defendant No. 2, was allowed. However, the first appellate Court, without any issue or argument advanced by any of the parties, framed the issue as to whether the concerned Court has failed to appreciate the provisions of O.1 R.8 of the Civil Procedure Code, 1908. It is further submitted that the first appellate Court has completely overlooked the fact that nagar palika was joined as defendant No. 2 and thereby, has erred in holding that the plaintiff has no *locus standi* to file the suit as there is no cause of action for filing the suit. The issue raised by the appellant requires consideration. Hence, the present **appeal is admitted.**

3. Following substantial questions of law are framed for deciding this appeal:

i) *Whether the lower appellant court has erred in law and*

facts in deciding the appeal of the respondent no. 1 on the point which is not at all raised or pleaded either by respondent no. 1 or 2 either before the trial court or before the lower appellate court?

ii) Whether the lower appellate court has erred in law and facts in deciding the appeal of respondent no. 1 on such issue without giving any opportunity to the original defendant to have his say on such point because if such opportunity would have been given, then, the appellant would have a chance to explain the same on such issue.

iii) Whether the lower appellate court has erred in law and facts in not appreciating the appeal cannot be decided on the issue which is not pleaded or contended by the appellant before him?

Order in Civil Application:

Notice returnable on 5th April 2019.

[B. N. Karia, J.]

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