

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SECOND APPEAL NO. 553 of 2024**

With
CIVIL APPLICATION (FOR STAY) NO. 1 of 2024
In R/SECOND APPEAL NO. 553 of 2024

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NASRUBEG FAKRUDDIN MIRZA

Versus

LH OF DECD ABDULGANI GULAMNABI MALEK & ORS.

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Appearance:

MR ARSHAD SHAIKH(11761) for the Appellant(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE DIVYESH A. JOSHI

Date : 18/12/2024

ORAL ORDER

ORDER IN SECOND APPEAL

Learned advocate Mr. Arshad Shaikh appearing for the appellant submits that the appellant herein is the defendant No.4 and the respondent No.1 to 1.3 are the original plaintiffs, who instituted Regular Civil Suit No.326 of 1996 for declaration and permanent injunction, which came to be dismissed by the learned trial court vide order dated 16.01.2003 passed by the 3rd Joint Civil Judge (SD), Nadiad, which was then carried in appeal before the first appellate court, and the first appellate court, while partly allowing the appeal filed by the original plaintiff, directed the appellant-Defendant No.4 to remove the illegal encroachment made by the defendant No.4 from the suit premises, being aggrieved with which direction, the appellant is compelled to file the present appeal. Learned advocate Mr. Shaikh further submits that, in fact, at the time of

filing a suit, an application was preferred to carry out the inspection and prepare a report by the surveyor, pursuant to which, an officer from the DILR Officer had been appointed as the Court Commissioner, who made a spot inspection and prepared a map of the disputed property. However, he would like to draw the attention of this Court to the fact that at the time of leading evidence, the said surveyor has not been examined, and without examining the maker of the report, solely on the basis of the report of the Court Commissioner, which is non-adjudicatory in nature and merely an opinion, it cannot be held that the appellant-defendant No.4 has made any encroachment on the disputed property and, therefore, the findings recorded by the first appellate court, directing the appellant-defendant No.4 to remove the construction considering it to be the illegal encroachment is required to be quashed and set aside.

Hence, issue notice, making it returnable on 20.01.2025.

ORDER IN CIVIL APPLICATION

Notice as also notice as to interim relief, making it returnable on 20.01.2025.

Till then, let there be an ad-interim relief in terms of Para-10(B).

VAHID

(DIVYESH A. JOSHI,J)