

(2010) 12 GUJ CK 0040

In the Gujarat High Court

Case No : Special Civil Application No. 8976 of 2007

Kanabhai Vishrambhai Gadhvi

APPELLANT

Vs

Jenabai Ali Bhukea and Others

RESPONDENT

Date of Decision : 03-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 9
Constitution of India, 1950 — Article 227

Citation : (2010) 12 GUJ CK 0040

Hon'ble Judges : S.R. Brahmbhatt, J

Bench : Single Bench

Advocate : Kirtidev R. Dave and Rahul K. Dave, for the Appellant; Hitesh N. Acharya, for Respondents 1 - 4 and Viral Vyas, for Ashish M. Dagli, for Respondent 5, for the Respondent

Final Decision : Dismissed

Judgement

S.R. Brahmbhatt, J.—Heard learned advocates for the parties.

2. The Petitioners-original Plaintiff in Regular Civil Suit No. 23 of 2006 has approached this Court under Article 227 of the Constitution of India challenging the order dated 23.2.2007 passed below Exh. 35 under Order 26 Rule 9 of the CPC rejecting the application for appointing the Court Commissioner for ascertaining the aspect of possession in respect of the suit premises.

3. The Plaintiff and Defendants in present petition Petitioner and Respondents are hereinafter referred to as Plaintiff and Defendants for convenience.

4. Facts in brief deserve to be set out as under:

The Plaintiff was constrained to file the suit in question for declaration that the sale deed dated 4.2.2000 was null and void and sought perpetual injunction in respect to the suit premises during the pendency of the proceedings and pendency of the application Exh. 5 for interim injunction, the Plaintiff preferred application Exh. 35 under Order 26 Rule 9 of the Code of CPC for appointment of

Court Commissioner for preparing panchnama of the disputed land, which came to be rejected by the concerned court vide order dated 23.2.2007 by learned Principal Civil Judge, which is impugned in the present petition under Article 227 of the Constitution of India.

5. Learned Counsel for the Petitioner, placing reliance upon the decision of the Apex Court in case of *Rajinder and Co. Vs. Union of India (UOI) and Others*, contended that appointment of Court Commissioner in peculiar facts and circumstances of the present case was essential and therefore, the Court ought not to have rejected the application for appointment of the court Commissioner.

6. Learned Counsel appearing for the Respondent contended that Court Commissioner in present facts could not have been appointed as it would have amounted to helping the Petitioner in creating evidence as it is not a dispute with regard to boundary and overlapping boundaries but the very title of the suit premises in question. Learned Counsel for the Respondent relied on two decisions: (i) 1991 (2) GLH 580 in case of *Basanta Kumar Swain Vs. Baidya Kumar Parida and Others*, in case of *Basanta Kumar Swain v. Baidya Kumar Parida and Ors.*, contended that the Court Commissioner in the facts and circumstances could not have been appointed.

7. I have learned Counsel for the parties at length and perused the application as well as the order made there under. The facts remain to be noted that the prayers made in the original suit is in respect of the suit premises. It is contended by the Plaintiff in suit that Respondents have unlawfully sold that property by dubbing himself as a tenant in question. The land in question could not have been said to be in any way belonging to the Defendants as the appropriate entry in the revenue record also helps the case of the Plaintiff. The Plaintiff sought declaration that the sale deed of the subject land made by the Defendant was therefore required to be declared null and void and Defendants be restrained from interfering with the possession of the Plaintiff of the suit premises. In view of this prayer, it can well be said that the dispute in question for the boundaries and overlapping boundaries of land, which would have warranted any local investigation, in fact, the title of the suit land is to be determined and when such a prayer is made, and especially when there is no dispute with regard to overlapping boundaries or any dispute requiring local investigation as envisaged under Order 26 Rule 9 of the Code of Civil Procedure, the Court Commissioner could not have been appointed or else it would amount to giving an opportunity to parties to have the evidences or creating the evidences. The parties are at before the Court and they will have to avail the opportunity of establishing their case for all the contentions and therefore, in my view, the application for appointment of Court commissioner has rightly been rejected. This being so, the petition being bereft of merits and it deserves to be rejected and is accordingly rejected. Rule discharged. Interim relief, if any, stands vacated. No costs.