

(2010) 12 GUJ CK 0044

In the Gujarat High Court

Case No : Special Civil Application No. 2154 of 2009

Patel Ramabhai Visabhai

APPELLANT

Vs

Khodabhai Khushalbhai Patel

RESPONDENT

Date of Decision : 08-12-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17
Constitution of India, 1950 — Article 226, 227

Citation : (2010) 12 GUJ CK 0044

Hon'ble Judges : M.D. Shah, J

Bench : Single Bench

Advocate : I.M. Pandya and Hemal Dave, for the Appellant; Rule Served, for the Respondent

Final Decision : Allowed

Judgement

M.D. Shah, J.—The Petitioner - original Plaintiff has filed this petition under Articles 226 and 227 of the Constitution of India with a prayer to quash and set aside the impugned order dated 11.12.2008 passed by the learned Principal Civil Judge, Kadi below Exh.65 in Regular Civil Suit No. 80 of 2002.

2. The brief facts giving rise to this petition are as under:

2.1 The Petitioner - original Plaintiff had filed a Regular Civil Suit No. 80 of 2002 before the trial court for declaration and permanent injunction that the Respondent - original Defendant be restrained from in any way interfering with the way of Petitioner to approach his land bearing Survey No. 824/5 through the land bearing Survey No. 827/1. It is also prayed in the suit seeking declaration that the Petitioner - original Plaintiff has right to go to his land bearing Survey No. 824/5 and to carry plough bullock, bullock cart, tractor through pakka road of Daran-Kolad through land bearing Survey No. 827/1. Along with the said suit, the Petitioner - original Plaintiff had also preferred injunction application Exh.5. The trial court vide order dated 16.12.2002 rejected the said application. Thereafter the Petitioner filed appeal before the learned Additional

District Judge and Presiding Officer, 5th Fast Track Court, District Mehsana which is numbered as Civil Misc. Appeal No. 1 of 2003.

2.2 After hearing both the parties, the learned appellate Judge has allowed the appeal and also granted injunction in favour of the Plaintiff.

2.3 However, during the pendency of the suit, it is alleged by the Plaintiff that the Defendant had put up compound wall (warandi) of 89 feet in the disputed land and therefore he preferred application under Order 6 Rule 17 of CPC for amendment with a prayer to remove the obstruction put up by the Defendant and also to remove the compound wall as it was carried out during the pendency of the suit. The trial court vide order dated 11.12.2008 rejected the said application by observing that if the amendment is allowed then the nature of the suit would be changed. Hence this petition.

3. Heard learned advocate Mr. Hemal Dave for learned advocate Mr. I.M. Pandya for the Petitioner. The Respondent, though duly served, did not appear either personally or through advocate.

4. This Court has gone through the order passed by the trial court. It is an admitted fact that when the suit was filed, panchnama was prepared, and from the panchnama, it was found that there was no construction. However, subsequently during the pendency of the suit, the Defendant has carried out construction though injunction was granted by the appellate court in favour of Plaintiff. In view of the subsequent development, and in the opinion of this Court, if the amendment is allowed, there was no change of relief sought for by the Plaintiff. In my view, the learned trial Judge has committed error in rejecting the said application.

5. In view of the above, this petition is allowed. The impugned order dated 11.12.2008 passed by the learned Principal Civil Judge, Kadi below Exh.65 in Regular Civil Suit No. 80 of 2002 is hereby quashed and set aside on condition of the Petitioner paying an amount of Rs. 2,000/- to the Defendant towards the cost as the application for amendment has been submitted by the Petitioner - original Plaintiff after one and half years of framing of the issue. Rule is made absolute to the aforesaid extent.