

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 112 of 2001
With
CIVIL APPLICATION No. 9222 of 2004
In
APPEAL FROM ORDER No. 112 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of
the judgment ?

4 Whether this case involves a substantial question of
law as to the interpretation of the constitution of
India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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SARVAJANIK TRUST - NARHARI MANAV KALYAN TRUST AND

OTHERS

Versus

VIPUL MANILAL MALKAN

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Appearance :

MR DIPEN C SHAH for Appellant No.1.

MR DF AMIN for Appellant Nos.2 - 14.

MR KS NANAVATI, Senior Counsel assisted by MR JITENDRA MALKAN
for Respondent.

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 31/01/2007

ORAL JUDGMENT

1) The appellants herein are the original plaintiffs of Special Civil Suit No.499/1994. Aforesaid suit is filed for declaration and permanent injunction with a prayer that the defendants may be restrained from using the suit property. In the aforesaid suit, applications at Exh.68, 71 and 91 were submitted. Out of which Exh.71 application was preferred by the defendant under Order XI Rule 12 of the Civil Procedure Code with a prayer to direct the plaintiffs to produce certain documents.

2) While deciding said application, learned trial Judge came to the conclusion that the plaintiffs have willfully withheld the information available with them and accordingly, learned trial Judge dismissed the suit by his order dated 20th May, 2000, which is under challenge before this Court in this Appeal from Order.

3) This Court is informed that prior to that order, trial Court has also passed an order below Exh.68 by which the trial Court has come to the conclusion that since the concerned trustees have not been joined as co-plaintiffs, the suit fails. That order was also passed on the same date, i.e., on 20th May, 2000.

4) Mr.Dipen Shah, learned advocate for the appellant submitted that when the learned trial Judge has already passed an order below Exh.68 and as per the observations made in the operative part of that order it is clear that the suit is not maintainable, there was no question of deciding other two applications below Exh.71 and 91.

5) Mr.K.S.Nanavati, learned Senior Counsel assisted by Mr.J.M.Malkan submitted that in view of the order passed below Exh.68

the suit stands dismissed on the ground that all the trustees were not joined and that order is not challenged further. It is submitted by Mr.Nanavati that it is true that when the learned trial Judge has dismissed the suit in view of the order passed below Exh.68, there was no question of deciding Exh.71 and Exh.91 applications, as the suit was already dismissed. He, however, submitted that the order passed below Exh.68 is not challenged by the original plaintiffs and, therefore, that order has become final and the point raised in this Appeal from Order has become academic.

6) Mr.Dipen Shah, learned advocate for the appellant submitted that belatedly the appellants have now challenged the order passed below Exh.68 by filing First Appeal and said matter is under office objection. He also submitted that a separate application for condonation of delay is also filed along with aforesaid First Appeal.

7) Considering the aforesaid aspect of the matter and considering the fact that the suit stands dismissed as on today in view of the order passed below Exh.68, it is submitted by both the sides that this Appeal from Order may be disposed of by holding that in case the original suit, which stands dismissed by virtue of order passed below Exh.68, is revived, the learned trial Judge may be directed to decide Exh.71 and Exh.91 applications *de novo*.

8) Since by a separate order passed below Exh.68, the suit is already dismissed, there was no question of deciding Exh.71 and Exh.91 applications and learned trial Judge should not have decided these two applications. Considering the submission of both the sides and consensus prevailing between the parties, this Appeal from Order is disposed of with a direction that in case Special Civil Suit No.499/1994 is revived by

an order which may be passed in appeal, as it is informed by Mr.Shah that an appeal is preferred by the appellants against order below Exh.68, then in that case, learned trial Judge shall decide Exh.71 and Exh.91 applications *de novo* and while deciding both these applications, observations made earlier by the trial Court may not be taken into account and after hearing the concerned parties, fresh order may be passed on both the aforesaid applications. It is clarified that this order will come into picture only when the order of dismissal of the suit passed below Exh.68 is set aside by the competent Court and the suit is restored to file of the trial Court. It is clarified that this Court has not expressed any opinion so far as order passed by trial Court below Exh.68 is concerned or whether the appellant has any case against the order below Exh.68 as it is not the subject matter before this Court.

9) Accordingly, orders passed by the trial Court below Exh.71 and Exh.91 are set aside subject to what is stated herein above and in case the suit is restored to file of the trial Court, the trial Court may re-hear Exh.71 and Exh.91 applications *de novo*.

10) During the course of arguments, it is also submitted by Mr.Nanavati that in this appeal trustees are not joined as party and, therefore, this appeal is not required to be entertained. When an order is already passed below Exh.68, it is not necessary for this Court to decide that question and, if any appeal is preferred against order below Exh.68 it is for the concerned Court to decide said question at that time.

11) This Appeal is allowed to the aforesaid extent with no order as to costs.

12) In view of above order on main appeal, no order on Civil Application No.9222/2004.

(P.B.Majmudar, J.)

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