

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1357 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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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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PATEL DUNGARBHAI MOTIBHAI - Petitioner(s)

Versus

PATEL SAMIRBHAI SHANKERBHAI & 4 - Respondent(s)

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Appearance :

MR PS CHAMPANERI for Petitioner(s) : 1, 1.2.1,1.2.2

RULE SERVED for Respondent(s) : 1 - 5.

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 30/04/2008

ORAL JUDGMENT

1. By way of this petition under Article 227 of the
Constitution of India, the petitioners - original defendants
have prayed for an appropriate writ, order and/or
direction quashing and setting aside the order

dtd.14/12/2000 passed by the learned Civil Judge (SD), Surendranagar below application Ex.32 in Special Civil Suit No.2 of 1998, whereby the learned trial court has held by raising preliminary issue that the suit filed by the plaintiffs is not barred by resjudicata.

2. The respondents herein - original plaintiffs ("the plaintiffs" for short) have filed Special Civil Suit No.2 of 1998 in the court of learned Civil Judge (SD), Surendranagar for declaration of partition and claiming 1/15th share in the properties of deceased Motibhai Khodabhai and accordingly prayed for partition. The petitioners - original defendants ("the defendants" for short) appeared in the said suit and filed Written Statement. That thereafter, the learned Civil Judge framed issues at Ex.16. As the defendants were not satisfied with the framing of the issues by the learned trial court and they were of the opinion that the issues have not been properly framed, they submitted application Ex.32 before the learned Civil Judge contending that the issues have not been properly framed and requested for framing the necessary issues arising out of the pleadings of the defendants. The

defendants vide aforesaid application Ex.32 requested to frame the following issues:-

- (i) Whether the suit filed by the plaintiffs is barred by resjudicata?
- (ii) Whether the suit filed by the plaintiffs is barred by non-joinder of necessary parties?
- (iii) Whether the defendant Nos.1 and 2 prove that there is already partition of ancestral property between deceased Motibhai Khodabhai and defendant Nos.1, 2 and 3 during the lifetime of deceased Motibhai Khodabhai?
- (iv) Whether the plaintiffs prove that they are entitled to file suit for partition against defendant Nos.1 and 2?

3. In spite of the fact that the said application Ex.32 filed by the defendants was to frame proper issues, the learned Civil Judge (SD), Surendranagar treated the same as the application raising preliminary issue with respect to maintainability of the suit on the ground of resjudicata and by the impugned order dtd.14/12/2000 answered the Issue No.7 in negative and held that the suit filed by the plaintiffs is not barred by resjudicata. Being aggrieved by and dissatisfied with the order passed by the learned Civil

Judge (SD), Surendranagar dtd.14/12/2000 below application Ex.32, the petitioners – original defendants have preferred the present Special Civil Application under Article 227 of the Constitution of India.

4. Mr.P.S. Champaneri, learned advocate appearing on behalf of the petitioners – original defendants has submitted that though in the present Special Civil Application the petitioners have also contended on merits that the suit filed by the plaintiffs is barred by resjudicata and the learned trial court has committed an error in holding that the suit filed by the plaintiffs is not barred by resjudicata, considering the fact that even there was no issue framed by the trial court with regard to resjudicata and the application Ex.32 was, as such, for framing proper issues, inclusive of issue with respect to resjudicata and the learned trial court has wrongly construed the same as an application for raising preliminary issue, if the impugned order is set aside and the matter is remanded back to the trial court for deciding the application Ex.32 for framing additional issues and thereafter on an appropriate application for raising the same as preliminary issues, he has no

objection.

5. Though served, nobody appears on behalf of the respondents – original plaintiffs.

6. Heard Mr.P.S. Champaneri, learned advocate appearing on behalf of the petitioners – defendants and considered the application Ex.32. It appears that the learned trial court framed the issues at Ex.16 and as the defendants were not satisfied with framing of the issues properly, they submitted application Ex.32 for framing proper issues. Considering the Written Statement filed on behalf of the defendants and one of the proposed issue was with respect to resjudicata. Looking to the application Ex.32, it cannot be said that the same is for raising issue with respect to resjudicata as preliminary issue and it was proposed issue. Still, the learned trial court misdirected himself and has passed the impugned order as if the application Ex.32 was for raising preliminary issue with respect to resjudicata. The issue in respect to resjudicata was yet to be framed and as if the issue No.7 is already framed, the learned trial court has answered the same. The learned trial court has committed an error in

considering the contents of the application Ex.32 as application raising preliminary issue. As stated above, application Ex.32 was for framing additional issues as narrated in the said application, inclusive of additional issue in respect to resjudicata. Under the circumstances, unless and until the additional issues are framed by the learned trial court, there was no question of treating the same as preliminary issue and deciding the same. Under the circumstances, the impugned order passed below application Ex.32 in Special Civil Suit No.2 of 1998 dtd.14/12/2000, answering the issue No.7 in negative (which is yet not framed) and holding that the suit filed by the plaintiffs is not barred by resjudicata, requires to be set aside and the learned Civil Judge (SD), Surendranagar is required to be directed to decide the application Ex.32 afresh for additional issue and if the said application is allowed and the additional issues are framed in that case on an appropriate application by the defendants or the plaintiffs raising preliminary issues, the same may be decided in accordance with law and on merits. However, the impugned order dtd.14/12/2000 passed by the trial court below application Ex.32 in Special Civil Suit No.2 of 1998 cannot sustain.

7. For the reasons stated above, the petition succeeds. The impugned order passed by the learned Civil Judge (SD), Surendranagar below application Ex.32 in Special Civil Suit No.2 of 1998 dtd.14/12/2000 is hereby quashed and set aside and the learned trial court is directed to decide and dispose of the application Ex.32 afresh, which is for framing additional issue. If the application Ex.32 is allowed and the additional issues are framed, in that case, on an appropriate application by the defendants or the plaintiffs raising preliminary issue, the same may be decided in accordance with law and on merits. Rule is made absolute accordingly with no order as to costs.

[M.R. SHAH, J.]

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