

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SPECIAL CIVIL APPLICATION NO. 13317 of 2012****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE G.B.SHAH**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	No
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
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 ?	No
5	Whether it is to be circulated to the civil judge ?	No

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KAMALSHA ALLARAKHASHA DIWAN TRUSTEE OF MADARSHA DIWAN &

2....Petitioner(s)

Versus

HUSSAINSHA AKBARSHA SAIYED & 1....Respondent(s)

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Appearance:

MR JB DASTOOR, ADVOCATE for the Petitioner(s) No. 1 - 3

DELETED for the Respondent(s) No. 2

MR ZUBIN F BHARDA, ADVOCATE for the Respondent(s) No. 1

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CORAM: HONOURABLE MR.JUSTICE G.B.SHAH

Date : 30/08/2013

CAV JUDGEMENT

1. This Special Civil Application has been filed by the petitioners-original plaintiffs under Articles 226 and 227 of the Constitution of India challenging the order passed below Exh. 56 in Civil Suit No. 1451 of 1997 dated 10.9.2012 by the learned Judge, Court No. 21, City Civil Court, Ahmedabad.

2. The petitioners-original plaintiffs have preferred Civil Suit No. 1451 of 1997 before the City Civil Court, Ahmedabad praying for removal of encroachment and illegal construction work made by the respondents-original defendants over the open land boundaries and for handing over peaceful vacant possession of the suit land to the petitioners and for means profit at the rate of Rs. 100/- per month for illegal use of the suit land. On 6.2.2012 the petitioners have filed amendment application under the provision of Order 6 Rule 17 of the Code of Civil Procedure, 1908 for amending para 1 of the suit by deleting survey No. 4558 to 4167 survey no. 4190 to 4193 and permit them to add survey no. 4158 to 4183. The said application Exh. 56 was resisted by the defendant by filing reply at Exh. 60 dated 19.3.2012 contending that this application is given at a belated stage with malafide intention. The written statement filed by the defendant is at Exh. 13. The plaintiffs have filed

affidavit of examination-in-chief at Exh.26 and thereafter the amendment application was filed at Exh. 56.

3. The court below has observed that the amendment application was filed after an inordinate delay and that there is a dispute of property and by changing the survey numbers as prayed for, the nature of the suit will be changed as well as prejudice will be caused to the defendants and new cause of action would arise. It is also observed that allowing of the amendment application would defeat the law of limitation. The court below rejected the application with costs by order dated 10.9.2012 in Civil Suit No. 1451 of 1997. Hence this petition.

4. Learned Advocate Mr J.B. Dastoor for the petitioners-original plaintiffs has submitted that there is a bona fide mistake on the part of the plaintiff and by such amendment, the nature of the suit will not be changed and no prejudice will be caused to the respondent or no new cause of action will arise as observed by the learned trial Judge. He has submitted that the trial court has erred in not considering the fact that nature of the suit would not be changed by substitution of correct survey number describing the suit property when the petitioners have not sought for any

amendment in the prayer clause. Learned Advocate for the petitioners have relied upon following decisions of various courts in support of his case which are as under:

- (i) AIR 1969 SC 1267
- (ii) AIR 2002 SC 3369
- (iii) (2006) 6 SCC 498
- (iv) (2007) 1 SCC 765
- (v) (2008) 3 SCC 717
- (vi) (2009) 10 SCC 626
- (vii) (2012) 5 SCC 337

5. Mr Zubin Bharda, learned Advocate for the respondent has submitted that it was well within the knowledge of the petitioners about the survey numbers of the land. The amendment application is filed with an inordinate delay. It is submitted that while filing the suit, the disputed survey numbers have been written in hand writing in the blank space kept for in the typed plaint. He has drawn attention of this court to some relevant dates i.e. the suit was filed in 1997, written statement was filed by respondent on 3.3.1998, issues were framed on 1.7.2009 and the petitioners filed affidavit of examination-in-chief on 22.9.2009. He has further submitted

that as the disputed property bearing survey numbers is the essence of the suit and if survey numbers are changed by permitting the amendment, the nature of the suit will be changed and prejudice will be caused to the respondents. In this connection, placing reliance of a decision in ***Bhubaneswar Patel v. Janak Patel and ors (AIR 1976 Orissa 216)*** the learned Advocate for the respondent has submitted that the amendment application was rightly rejected by the trial court and that this Court should not interfere with the same.

6. In light of the submissions made by the learned Advocate for the parties, I have carefully perused the averments made in application at Exh. 56 dated 6.2.2012 and in light of the same, I have also carefully perused the handwritten survey numbers written in the third line of para 1 of the plaint of Civil Suit No. 1451/1997 at page No.15. I have also carefully perused the averments made in para 8 of the written statement dated 3.3.1998 filed by the respondent-defendant in the above referred Civil Suit No. 1451/1997, a copy of which is at page No.19. Referring to the averments made in para 3 and the prayer made in para 6(A) of the application at Exh. 56, it appears that the petitioners-plaintiffs

want to add survey Nos. '4158 to 4183' after deleting the words 'survey no. 4558 to 4167' and 'survey no. 4190 to 4193'. Perusal of para 1 of the plaint of Civil Suit No. 1451/1997 at page No.15 reveals that as such the words 'survey no. 4158 to 4167' has been written and so in substance, the petitioners-plaintiffs want to delete the last two figures '67' from survey no.4167 and in place of the same they want to add '83' i.e. survey No. 4183. Under the circumstances, in my view, this is nothing but an error occurred on the part of the petitioners-plaintiffs herein but in my view, in fact, the due care which was required to be taken by the petitioners-plaintiffs as well as the trial court has not been taken and in fact they have not carefully perused the averments made in the plaint and accordingly in my view, the order passed below Exh. 56 dated 10.9.2012 by the concerned court appears to be without application of mind. If the error referred hereinabove, if permitted to be carried out, in my view, the nature of the suit would not be changed and no prejudice would be caused to the respondent-defendant. Under the circumstances, the impugned order dated 10.9.2012 passed in Civil Suit No. 1451/1997 is hereby dismissed. The petitioner-plaintiff is hereby permitted to delete the figure '67' from 4167 and permitted to add '83' i.e.

4183 in third line of para 1 of the plaint at page No.15 i.e. Exh.1 of the said suit and further permitted to delete the survey nos. '4190 to 4193' as prayed for in the application at Exh. 56.

7. In the result, this Special Civil Application is allowed. Rule is made absolute accordingly.

[G. B. SHAH, J.]

msp