IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 312 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PATEL NATVARBHAI MITHBHAI

Versus

PATEL CHHAGANBHAI T

Appearance:

MS PATEL FOR MR AJ PATEL for Appellant

MR UM PANCHAL FOR MR DD VYAS for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 29/09/2000

ORAL JUDGEMENT

1. This is a second appeal under Section 100 of the Code of Civil Procedure by original defendant in Regular Civil Suit No.141 of 1979 in the Court of Civil Judge (J.D.), at Sankheda, over which an appeal was preferred in the District Court at Baroda vide Civil Appeal No.330

of 1980.

2. The appellant was the defendant in Civil Suit No.141 of 1979 preferred by present respondent. The suit was preferred for declaration and injunction against the present appellant. The case of the plaintiff was that survey No.399 admeasuring 7 Vighas and 19 Vasa of village Parvata, taluka Sankheda was originally owned by Patel Mathurbhai Garbadbhai and Mithabhai Kalidas of village Krushnapara. Out of the said survey number, 7 Vighas of land of the northern side was purchased by the forefathers of the plaintiff and one Motibhai Ranchhodbhai Patel, Mathurbhai Dajibhai, Tribhovan Dajibhai, Abhurbhai Hajibhai, Manor Chhitabhai, Parshottam Varadhabhai, Babubhai Becharbhai, Bhikha Parshottam and Bhagvanbhai Desaibhai on May 16, 1919 and since then, the land is in possession of the purchasers and their heirs. Over the said survey No.399 purchased by the forefathers of the plaintiff and others, as stated above, a village named Krushnapara was established. Each of the partners left open certain land for providing passage/way to the occupants while making construction in their respective shares in the property. One road from village Krushnapara leads to village Kalediya. There is another road leads to village Sandhiya from village Krushnapara and there is a third road which leads to the river bank. These three roads of village Krushnapara were being used by the people of the village since the establishment of that village without any obstruction. According to the plaintiff, road No.1 which leads to village Kalediya passes through the land of the defendant as also the lands of one Harilal Harji and Kantilal Zaverbhai, and the land of the width of 25' was kept open. Village Krushnapara and village Parvata are suburbs of Kalediya village Panchayat. Kalediya has a railway station and a market too. Residents of Parvata and Krushnapara are required to go to village Kalediya for their domestic requirements and, therefore, this road No.1 is lifeline of village Krushnapara and, therefore, Taluka Panchayat has constructed a Pucca road from Krushnapara to Kalediya. Around November 1978, the defendant erected a hut in his land through which the road passes and which was kept open till then. The measurement of the hut is 17' x 12'. The said construction was made without permission from the Panchayat. As a result of this construction of hut, the road to village Kalediya for the residents of Krushnapara is obstructed and the plaintiff and other village people are not able to go through that road by bullock carts and are put to great harassment. According to the plaintiff, the hut is constructed on public road without permission

from the Panchayat and, therefore, a notice was served by the Panchayat. The defendant paid no heed to the notice and had continued to obstruct the right of way of the residents of the village as well as the plaintiff and the suit was, therefore, required to be brought. The plaintiff sought permission under Order 1, Rule 8 of the Code of Civil Procedure by a separate application which was granted by the Trial Court. According to the plaintiff, the cause of action arose in November 1978 and the suit was brought on the 6th August, 1979, seeking declaration that the defendant has no right to erect the hut on the public road between Krushnapara and Kalediya and he may be mandatorily directed to remove the construction made by him and not to make any construction in future.

3. The suit was opposed by the defendant by filing written statement at Ex.14. In the written statement, the defendant denied the case of the plaintiff and came with a contention that the land admeasuring 1.82.00 hectare forming part of survey No.399/1 of village Parvata, taluka Sankheda, stands in the name of Ramanbhai Tribhovandas, a family member of the defendant and the defendant and his family members are in occupation thereof since the time of their forefathers, i.e. since 1919. The defendant did not admit the factum of land having been purchased by the forefathers of the plaintiff along with other persons. It was admitted that village Krushnapara was established on the 7 Vighas of land. It is the case of the defendant that while making construction, each sharer/owner had left some portion of his land open for his own use and passage and neither the plaintiff nor anybody else has any right over the land of the defendant. The defendant denied that the piece of land over which the hut is constructed was used by the residents of the village as road for more than 60 years. According to the defendant, the land over which the hut is constructed does not obstruct the Krushnapara Kalediya road in any manner. There is altogether a different road leading to village Kalediya, Sandhiya and Parvata. According to him, there is one road on the west and one on the east of the disputed land, which lead to village Kalediya. According to the defendant, no right of the plaintiff is affected in any manner and the suit is, therefore, false and may be dismissed.

4. After considering rival side contentions, the Trial Court framed issues at Ex.10 as under :-

(1) Whether the plaintiff proves that Survey No.399 admeasuring at 7 Vingha and 19 Vasa was of the

ownership of Patel Mathur Garbad and Mithabhai Kalidas and out of that land 7 Vingha land of the ownership of Mitha Kalidas has been purchased by his ancestor on 16.5.1919 for the consideration of Rs.700/- and since then they are in actual possession of the land?

(2) Whether the plaintiff proves that the colony of village Krishnapara has been established in S. No.399 admeasuring at 7 Vingha and 19 Vasa and each partner has spared certain land for the use of public roads for public at large, i.e. mentioned in para (2) of the plaint and the villagers are enjoying that road since last 60 years without any interruption?

(3) Whether the plaintiff further proves that the defendant has constructed Kachi Chhapri admeasuring at 7' x 12' with a view to cause obstruction in the road leads to village Kalediya from Krishnapara?

(3-A) Whether the suit is bad for want of necessary parties?

(3-B) Whether the suit is bad for want of non-joinder of the parties?

(4) Whether the plaintiff is entitled to declaration and injunction as prayed for?

(5) What order and decree?

The findings are given as under :-

(1) Yes
(2) Yes
(3) No
(3-A) No
(3-B) No
(4) No
(5) No

Ultimately, the Trial Court dismissed the plaintiff's suit with costs by judgment dated the 27th August, 1980.

5. Aggrieved by the said judgment, the plaintiff approached the District Court with Civil Appeal No.330 of 1980. The Appellate Court, after considering rival side contentions, in light of the evidence led before the Trial Court, came to conclusion that the Trial Court had

committed an error in dismissing the plaintiff's suit. The First Appellate Court, therefore, allowed the appeal and set aside the judgment and decree impugned before it while decreeing the suit.

6. Aggrieved by the said judgment and decree of the First Appellate Court dated the 15th July, 1982, the original defendant has preferred this Second Appeal raising number of contentions and formulating following questions in the appeal :-

(A) Whether on the facts and in the circumstances of the case, the suit filed by the plaintiff was maintainable in law when a resort to the provisions of section 91 of the Civil Procedure Code.

(B) Whether on the facts and in the circumstances of the case, the plaintiff was entitled to have an injunction under the provisions of the Specific Relief Act, notwithstanding the fact that he had moved the court after two years of the construction of the hut.

(C) Whether on the facts and in the circumstances of the case, the relief of mandatory injunction could be granted to the plaintiff when admittedly he was sluggish in moving the court for injunction.

(D) Whether on the facts and in the circumstances of the case, suit at the instance of the plaintiff without filing a representative suit under Order 1, Rule 8 of the Code of Civil Procedure is maintainable.

(E) Whether on the facts and in the circumstances of the case, the appellate court was right in law in making out a new case not pleaded by the plaintiff.

(F) Whether on the facts and in the circumstances of the case, the appellate court is right in law in granting a decree and issuing mandatory injunction even when the suit of the plaintiff was on the ground that there was no alternative road but the road upon which the construction has been made.

(G) Whether on the facts and in the circumstances of the case, the court below is right in law in

throwing the entire burden on the appellant notwithstanding the fact that it was the plaintiff who sought the relief of mandatory injunction and, therefore, he had to prove his right in respect of the land in question.

This Court, while admitting this appeal, by order dated January 20, 1984, formulated the following questions not accepting the remaining questions raised in the appeal:-

(A) Whether on the facts and in the circumstances of the case, the suit filed by the plaintiff was maintainable in law when a resort to the provisions of section 91 of the Civil Procedure Code.

(D) Whether on the facts and in the circumstances of the case, suit at the instance of the plaintiff without filing a representative suit under Order 1, Rule 8 of the Code of Civil Procedure is maintainable.

7. Ms. Patel, learned advocate appearing for learned advocate Mr. A.J. Patel for the appellants, has raised number of contentions. She submitted that the suit is preferred by the plaintiff not only to assert his right but also to assert the right of residents of village Krushnapara. It is suit preferred in representative capacity and, therefore, in order that the suit could have been entertained, requirements of Section 91 of Code of Civil Procedure ought to have been satisfied. She submitted that such suit can be preferred either by the Advocate General or with the leave of the Court by two or more persons, even though no special damage has been caused to such persons by reason of the public nuisance or other wrongful act. She submitted that the suit is preferred by only one plaintiff and leave of the Court is not obtained. The requirement of Section 91, therefore, is not fulfilled and the suit itself, therefore, would not be maintainable.

7.1 Ms. Patel submitted further that the plaintiffs have approached the Court at a very belated stage. Mandatory injunction is sought after a long lapse of time and, therefore, principle of delay, laches and acquiescence ought to have been considered by the First Appellate Court.

7.2 Ms. Patel has taken this Court through the judgment and the evidence on record in support of her

contention that the First Appellate Court has arrived at its conclusions on surmises, assumptions and conjectures dehors the evidence on record. The First Appellate Court has culled out altogether a new case which was not even the case of the respondent-plaintiff originally. In support of her say, she submitted that the First Appellate Court has observed that the right of way through the road which is asserted by the plaintiff could be a private street as against the plaintiff's own case of the road being a public road. The First Appellate Court has, therefore, transgressed its jurisdiction and has arrived at conclusions on material non-existent and on basis of a misread evidence. According to Ms. Patel, the findings of the First Appellate Court are perverse. She submitted that the First Appellate Court has made certain observations with regard to the written statement by the defendant-appellant at Ex.14, which are nothing but gross misreading of the pleading. The First Appellate Court has observed that certain admissions are made by the defendant in the written statement. As such no such admissions are made. To support her say, she has taken this Court through the written statement filed by the defendant-appellant in the Trial Court.

7.3 Ms. Patel submitted that the First Appellate Court has ignored the evidence regarding availability of alternative ways contrary to the case of the plaintiff. She urged that the questions suggested in the memo of this appeal as questions No.(B), (E) and (G) may be formulated at this stage. She submitted that these are pure questions of law and are required to be formulated in order to settle the dispute between the parties substantially. She submitted that, so far as suggested question (B) is concerned, the Trial Court's finding on that question is not dealt with by the First Appellate Court at all and, therefore also, it requires to be formulated by this Court, so that the dispute is conclusively decided. In support of her contentions, she has placed reliance on number of decisions.

8. The case of the respondent-original plaintiff is canvassed by learned advocate Mr. U.M. Panchal appearing for learned Senior Counsel, Mr. D.D. Vyas. He submitted that the suit was filed almost immediately after the way was obstructed. He submitted that the suit was filed within 8 to 9 months and not two years, as contended by Ms. Patel. He has drawn attention of this Court to the evidence and pleading in this regard.

8.1 Mr. Panchal has drawn attention of this Court to the fact that the plaintiff had preferred an application

Ex.5 seeking permission of the Court for filing the suit as contemplated in Order 1, Rule 8, which was granted by the Trial Court and, therefore, the suit can be said to have been filed with permission of the Court.

8.2 As regards formulating questions at this stage by this Court, as suggested by Ms. Patel, particularly questions No. (B), (E) and (G), Mr. Panchal submitted that question (B) is not relevant as there is only delay of 8 to 9 months and not two years, as contended. Therefore, it is not required to be formulated.

8.2.1 On suggested question (E), Mr. Panchal submitted that the finding given by the First Appellate Court regarding providing way is not outcome of any presumption, assumption or surmises by that Court. In fact, the plaintiff has approached the Court with a specific case that the entire village was developed on Survey No.399 and roads were made by mutual understanding and each of the owners/occupants had kept open certain portion of his land required for providing passage. He submitted that there is evidence to indicate that land was kept open for "Chowk Chal", which means a private road and, therefore, it is not a new case that is evolved by the First Appellate Court and, therefore, that question is also not required to be formulated.

8.2.2 As regards question (G) suggested by the appellant, Mr. Panchal submitted that finding on issue No.1 indicates that the defendant has not challenged the ownership of the plaintiff and, as such this question is also not required to be formulated.

8.3 Mr. Panchal submitted that the Court, while admitting the appeal, has accepted only the questions which were deemed necessary to be formulated and has formulated only two questions rejecting rest of the questions. No special grounds exist for again formulating these rejected questions and, therefore, the questions may not be formulated. He submitted that the conclusions are arrived at by the First Appellate Court on sound principles of law and no interference is called for in this Second Appeal before this Court. He, therefore, submitted that the appeal may be dismissed.

9. In reply, Ms. Patel submitted that "Chowk Chal" appearing on record of the case does not mean a right of way or a road. Relying on Bhagwat Gomandal, she submitted that "Chowk" indicates "Garthar", meaning a house. Word "Chal" indicates passage or road. Chowk Chal is not found in the dictionary and the word is

segregated. As indicated, it would mean 'household' or 'house' or 'a land kept open for use of the owner of the house'. She submitted that the evidence is that the land is kept open for our use and passage and, therefore, the contention of Mr. Panchal that the concept of private road existed on the record of the case may not be accepted.

9.1 On question (B), she submitted that what is tried to be emphasized by suggested question (B) is the delay in preferring the suit and not the quantum of delay. According to hear, even 8 to 9 months of delay is also substantial delay, which may have a bearing on the ultimate merit of the suit. She, therefore, submitted that the question may be formulated rejecting the contention of Mr. Panchal.

9.2 Ms. Patel further submitted that the permission which was taken by the plaintiff was under Order 1, Rule 8 and not under Section 91 of the Code of Civil Procedure and her contention, therefore, stands unanswered by the respondent.

9.3 As regards question (C), replying to Mr. Panchal's submission, Ms. Patel submitted that the plaintiff's case from the beginning is that the defendant having made construction on a public road, is causing obstruction in the right of way. She submitted that there is evidence to indicate that there is no public road and the finding of the First Appellate Court regarding private road is, therefore, in absence of and contrary to the material on record. She, therefore, urged that the appeal may be allowed.

10. At the outset, it requires to be determined whether the new questions suggested to be formulated by this Court, at this stage, can be formulated. In this regard, Section 100 of Code of Civil Procedure, within the purview of which the present appeal is preferred, needs to be perused. The said provision provides that an appeal shall lie to the High Court for every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law. It is also provided in the said section that where a High Court is satisfied that a substantial question of law is involved in any case, it shall formulate such question and that the appeal shall be heard on the question so formulated. The respondent shall be allowed at the hearing of the appeal to argue that the case does not involve such a question. Under the circumstances, the Court has to

formulate questions at the admission stage and address the same at the final hearing. Proviso to sub-section (5) of Section 100, however, provides that sub-section (5) shall not be deemed to take away or abridge the power of the Court to hear the appeal on any other substantial question of law not formulated by it, if it is satisfied that the case involves such question. However, reasons are required to be recorded by the Court. Thus, this Court can formulate questions at this stage, if it finds that such questions are required to be formulated.

10.1 The dispute between the parties is regarding obstruction of right of passage through a road and it would be proper to appreciate and determine as to whether assertion of such right can be entertained even in a belated claim. Likewise, it is pointed out that the First Appellate court evolved an altogether new case, which is not pleaded by the plaintiff-respondent. Whether that was permissible for the First Appellate Court and to arrive at a conclusion on that basis and, if it was so permissible, whether the Court was right in doing so, are the question that need to be decided to determine the lis between the parties.

10.2 Likewise, it is indicated that the First Appellate Court, while appreciating the case of the parties, observed that certain facts are not established by the defendant. The question that is suggested to be raised is whether in such case where the plaintiff asserts the right, the Court could have, in law expected the defendant to establish certain factors.

10.3 Mr. Panchal, learned advocate appearing for the respondent, tried to oppose the formulation of such questions by stating that delay of only 8 to 9 months is caused and not 2 years as suggested in question (B). But he overlooked the aspect that the material question is whether principle of delay and laches would be applicable in such cases is the crux of suggested question and not the period and, in the given set of circumstances, it would be very material to decide this question.

10.4 Likewise, question (E) also he tried to show as immaterial from the evidence of the defendant. Here again, the question is whether the theory culled out by the First Appellate Court was on basis of the contentions raised by the parties or whether it was altogether a new case. From one sentence or one word, nothing can be accepted or rejected and question is whether the First Appellate Court could have done this. Thereafter, the question would be whether, in facts of the present case,

the Court's conclusion was correct or not. These questions are required to be determined for deciding the appeal. In view of the above aspects, this Court is of the view that the questions suggested on behalf of the appellant-defendant need to be formulated and decided by this Court. This Court, therefore, formulates the following questions, in addition to the questions already formulated :-

(1) Whether on the facts and in the circumstances of the case, the plaintiff was entitled to have an injunction under the provisions of the Specific Relief Act, notwithstanding the fact that he had moved the court after two years of the construction of the hut.

(2) Whether on the facts and in the circumstances of the case, the appellate court was right in law in making out a new case not pleaded by the plaintiff.

(3) Whether on the facts and in the circumstances of the case, the court below is right in law in throwing the entire burden on the appellant notwithstanding the fact that it was the plaintiff who sought the relief of mandatory injunction and, therefore, he had to prove his right in respect of the land in question.

11. It requires also to be considered whether this Court can, in exercise of powers under Section 100 of the Code of Civil Procedure, enter into consideration of question of facts which have already been decided by the final Court of fact finding. In this regard, the following decisions may be considered :-

(1) Balvantrai Chhabildas Mehta v. State Bank of Saurashtra, 1998(2) GLH 204.

(2) Ratanlal Bansilal and Others v. Kishorilal Goenka & Others, AIR 1993 (Calcutta) 144.

(3) Jadu Gopal Chakravarty v. Pannalal Bhowmick & Ors., AIR 1978 SC 1329.

(4) Madanlal v. Gopi & Another, AIR 1980 SC 1754.

11.1 In Madanlal v. Gopi & Another (supra), the Apex Court held that, though whether a person was in a fit state of mind to execute the adoption is a question of

fact, where both Courts below ignored the weight of preponderating circumstances and allowed the judgments to be influenced by inconsequential matters, the High Court would be justified in reappreciating the evidence and in coming to the its own independent conclusions. In that very judgment, however, the Apex Court observed that their decision may not be understood to be a charter for interference by the High courts with findings of facts recorded by the final Court of facts. However, in Balvantrai Chhabildas Mehta (supra), this Court has observed that, in second appeal, interference with findings of fact would be justified if the approach of the Lower Court is unwarranted and the findings of the Lower Court are based on improper appreciation of documents and overlooking the weight of evidence.

11.2 Madhya Pradesh High Court in Mohammed Haroon and others v. Central Bank of India and others, AIR 1994 Madhya Pradesh 24 observed that, if the findings are based on conjectures and surmises, they can be interfered with in second appeal. That was a case of a second appeal arising out of First Appeal filed in 1986 from Civil Suit of 1981, i.e. subsequent to the amendment of Code of Civil Procedure, by which the scope of second appeal has been narrowed down. Thus, in second appeal, in an exceptional case, where finding of the Trial Court is based on no material or those contrary to the pleadings of the party, the Court may enter into the question of fact in order to determine the question of law.

12. In the instant case, the case of the plaintiff from the beginning is that the defendant has made a construction on land over which there was a road used by the residents of the village Krushnapara. In his plaint, he has categorically stated that this is a public road and considering its importance, the Panchayat has also made the road and that the hut is constructed on the public road by the defendant without permission of the Panchayat and, therefore, Panchayat has also given him notice to remove the construction. The declaration that is sought in paragraph 8 of the plaint is to the effect that it be declared that the defendant has no right to construct a hut and thereby obstruct the road/public road from Krushnapara to Kalediya. Thus, the case of the plaintiff from the beginning is that it is on the public road that the hut is constructed by the defendant so as to obstruct the passage. A slightly contradictory plea is also taken by the plaintiff that the said road is a private land of the defendant over which thrashing floor is situated. So the plea of the construction being on

public road on one hand and it being on a private land of the defendant over which the thrashing floor is made do not make a harmonious pleading. Apart from this, it may be noted that the plaintiff's own witness-Madhusudan Chimanlal Shah (Ex.24), who is Talati-cum-Mantri of Parvata Juth Gram Panchayat, has categorically stated in his examination-in-chief that there is no Government/public road in the village, but each of the sharer have let some piece of land open to provide way. He has, however, stated further that road from Krushnapara to Kalediya is sanctioned by the Taluka Panchayat and some portion of it is constructed also. In cross-examination, he admits in paragraph 4 that he does not know for certain that village people have a right over the disputed road. Claim of the plaintiff about his right and right of other residents of village-Krushnapara is based on averment that by mutual agreement, the roads were made. But he has no personal knowledge about any such agreement. No witness is examined to support this say of his and he has not been able to produce any documentary evidence. Keeping all these aspects in mind, the Trial Court did not accept the case of the plaintiff.

12.1 Against that, the First Appellate Court came to conclusion that this may not be a public road but a private way. To arrive at this conclusion, the First Appellate Court observed that, admittedly, these houses were for residential purpose and, therefore, it is but natural that they would keep certain open land for the purpose of road or way. It observed that when there is no evidence on record that there was any partition over the land and when they keep some portion of the joint land for the purpose of right of way, it must be that the land was of joint ownership of all the persons of the said village-Krushnapara. In fact, this is not to be found from the contentions raised in the plaint. According to the plaintiff, the road passes through the land of the defendant, meaning thereby that the disputed piece of land belongs to the defendant and, therefore, the First Appellate Court has drawn inference in absence of any material or circumstances to support the drawing such an inference. The First Appellate Court further observed that the land can be kept open by all the purchasers and can be of co-ownership of all of them for the purpose of right of way and that the land or the way can be said to be a private street land over which they have a right of way. This observation of the First Appellate Court is also not in consonance either with the pleading of the plaintiff or with the evidence led by the plaintiff. The First Appellate Court has evolved an altogether new case dehors the pleadings and evidence of

parties. It was not open for the First Appellate Court to draw presumptions and conclude a theory not even pleaded by the plaintiff. It is arrived at without any basis and, therefore, although the findings of the Appellate Court are of fact, they are found to be erroneous and perverse as they are not based on any material.

12.2 The First Appellate Court observed that in paragraph 11 of the written statement, the defendant has admitted that, at the time of construction of house, each of the co-owners had kept certain land open for the purpose of right of way. Upon reading paragraph 11 of the written statement, this Court does not find anything to support this observation made by the First Appellate Court. What is contended is that while making constructions, each partner left some piece of land open out of their respective shares for their own use and passage (Chawk Chal). In that very paragraph, in the next sentence, it is made clear that, therefore, it is not correct that either the plaintiff or anybody else had any right over the said land. The observation of the First Appellate Court, therefore, is gross misreading or misinterpretation of the pleading of the defendant-appellant. Under the circumstances, this Court is of the view that the First Appellate Court ran into an error in accepting the appeal. The First Appellate Court evolved an altogether new case which was not the part of pleading of the plaintiff nor could it have been culled out of the evidence led by the parties. Question No.2, therefore, desrves to be answered in the negative. It requires to be held that the First Appellate Court was not right in law in making out a new case not pleaded by the plaintiff.

13. Coming to question No.1, as formulated above, it is not a matter in dispute that the suit was filed by the plaintiff on August 6, 1979. According to the plaintiff, the construction was made in November 1978 and that at that point of time, cause of action arose because the right of the plaintiff was obstructed. Thus, the suit is filed after about 8 to 9 months of the so called obstruction of the right. According to the plaintiff, the hut is so constructed that it is not possible to pass through the road in a bullock cart. If that was so, objection ought to have been raised immediately and the right ought to have been asserted immediately. Not resorting to any remedy for about 8 to 9 months is a time long enough to bring into operation the principle of delay, laches and acquiescence. In this regard, decision in case of Narain Dass v. Atma Ram and Others, AIR 1974

Rajasthan 144 may be taken into consideration. It has been held therein that suit for mandatory directions brought only after defendants constructed a pucca gate in 'Sal'; the plaintiffs' exclusive possession and ownership over Sal is not proved and, therefore, mandatory injunction for demolishing impugned construction cannot be granted. There, in paragraph 11, it was observed that the dispute between the parties can be disposed of on the short point that the plaintiff has not succeeded in proving his exclusive ownership nor his exclusive possession over the Sal. It further appeared that the suit was brought only after construction had been completed. The case before this Court is also very similar where the suit was brought after a delay of about 8 to 9 months of construction of the hut and, admittedly, the land belongs to the defendant and there is no material to indicate that the land on which the hut is constructed was a public road. Under the circumstances the suit for mandatory injunction also could not have been entertained on ground of delay and laches. The question is, therefore, answered in the negative.

14. Coming to question No.3, the First Appellate Court has observed that the defendant has admitted that he has raised a hut over the disputed land. But he denies that he had raised it on the land of co-ownership. He has not specifically stated in so many words that he has raised a hut on the land of his ownership and possession. It may be observed that it was not the case of the plaintiff that the land was of co-ownership of all the land owners. On the contrary, the plaint indicates that the land was of the defendant and the road passed through the thrashing floor, whereon now a hut is erected. The ownership of land in question is, therefore, admitted by the plaintiff to be that of defendant. If the plaintiff asserts a right, it is for him to establish that right. He has to construct his case on his own pleadings and evidence. He cannot take advantage of any mistake or lacuna in pleading of the defendant or weakness of the case of the defendant. When the plaintiff himself has come with a case admitting defendant's ownership of the land in question, the defendant could not have been expected to prove that admitted fact that he has raised the hut on the land of his ownership and possession. In this regard, reference may be had to the decision of this Court in the case of State of Gujarat v. Mali Ranchhod Kheta & Ors., 1996(2) GLR 501, wherein it has been observed that the plaintiff must succeed on the strength of his own title and not by any weakness in the case of the defendant. There it was a case based on the title. In Parmar Gogji Kana v.

Parmar Ganesh Moti, AIR 1968 Gujarat 287, it was observed that in a suit for injunction restraining the adjoining owner from using open space in front of the defendant's house, onus to prove title and ownership over such open land is that of the plaintiff. Under the circumstances, the First Appellate Court clearly erred in making the above stated observations. The answer to question No.3 is in the negative.

15. At this stage, Ms. Patel appearing for the appellant submits that she does not press for a finding on substantial questions (A) and (D) formulated by this Court while admitting this appeal.

16. For the foregoing reasons, the appeal deserves to be allowed and the same is allowed. The judgment and decree of the First Appellate Court in Civil Appeal No.330 of 1980 dated the 15th July, 1982 is hereby quashed and set aside and the plaintiff's suit stands dismissed as held by the Trial Court. No orders as to costs.

[A.L. DAVE, J.]

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