

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SECOND APPEAL No. 259 of 2011****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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NARENDRAKUMAR HASMUKHBHAI MODI & 5 - Appellant(s)

Versus

SAVITABEN THAKOREBHAI MODI & 4 - Respondent(s)

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Appearance :

MR MA KHARADI for Appellant(s) : 1 - 6.

None for Respondent(s) : 1, 5,

UNSERVED-EXPIRED (N) for Respondent(s) : 1.2.1

NOTICE SERVED BY DS for Respondent(s) : 1.2.2, 1.2.3, 1.2.4, 1.2.5, 1.2.6,1.2.7

MR VIJAY H NANGESH for Respondent(s) : 2 - 5, 5.2.2,5.2.3

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 29/06/2012

ORAL JUDGMENT

1. The present Second Appeal under Section 100 of the Code of Civil Procedure has been preferred by the appellants-original plaintiffs to quash and set aside the impugned judgment and decree passed by the learned Civil Judge (Junior Division), Olpad dated 31/01/2002 in

Regular Civil Suit No. 5/1981 by which the learned trial Court has dismissed the said suit preferred by the original plaintiff for declaration and permanent injunction. The appellants-original plaintiffs has also prayed to quash and set aside the impugned judgment and order passed by the learned Principal District Judge, Surat dated 22/04/2009 in Regular Civil Appeal No. 14/2002 by which the learned appellate Court has dismissed the said appeal confirming the judgment and decree passed by the learned trial Court dismissing the suit.

2. The original plaintiff instituted Regular Civil Suit No. 5/1981 in the Court of learned Civil Judge (Junior Division), Olpad for declaration that he is the owner of th suit property and in possession of the suit property and, therefore, prayed for permanent injunction also. It is required to be noted that subsequently by way of amendment the appellants-original plaintiffs prayed for specific performance of 'satakhat' dated 23/03/1977 produced at Exh. 141. It is also required to be noted that during the course of the submission the appellants-original plaintiffs claimed tenancy rights under the Bombay Tenancy Act.

3. The suit was resisted by the respondents-original defendants by filing the written statement. On appreciation of evidence, the learned trial Court held that the original plaintiffs have failed to prove that he is the owner of the suit property and is in possession of the suit property. The learned trial Court also held on appreciation of evidence that the original plaintiff has failed to prove the contents of the 'satakhat' dated 23/03/1977 at Exh. 141. Consequently, the learned trial Court dismissed the suit vide judgment and decree dated 31/01/2002. Being aggrieved and dissatisfied with the judgment and decree passed by the learned trial Court dismissing the suit, the heirs of the original plaintiff preferred Regular Civil Appeal No. 14/2002 before the learned District Court, Surat. It is required to be noted that

during pendency of the suit not only the original plaintiff-Shri Hasmukhbhai Babubhai Modi expired even original defendant no. 1- Thakorebhai Dahyabhai Modi, who is alleged to have executed the 'satakhat' also expired and the order passed below Exh. 57 qua him was dismissed as having been abated. The learned appellate Court vide impugned judgment and order dismissed the appeal, being Regular Civil Appeal No. 14/2002 and confirmed the judgment and decree passed by the learned trial Court dismissing the suit. Being aggrieved and dissatisfied with the impugned judgment and orders passed by both the Courts below the appellants-heirs and legal representatives of the original plaintiffs have preferred the present Second Appeal under Section 100 of the Code of Civil Procedure.

4. Shri Kharadi, learned advocate appearing on behalf of the appellants-original plaintiffs has vehemently submitted that both the Courts below have materially erred in not granting declaration as prayed for and in holding that the appellants-original plaintiffs are not in possession of the suit property. It is further submitted that even when the signature of Thakorebhai Dahyabhai Modi-original owner was there on the 'satakhat' dated 23/07/1977 under which he agreed to sell the suit property to the original plaintiff for a sale consideration of Rs. 4661, both the Courts below have materially erred in not passing the decree of the specific performance of the agreement to sell dated 23/07/1977 and, therefore, it is requested to admit/allow the present Second Appeal. No other submissions have been made.

5. Heard Shri Kharadi, learned advocate appearing on behalf of the appellants-original plaintiffs and the Shri Nangesh, learned advocate appearing on behalf of the contesting respondents and considered and gone through the impugned judgment and orders passed by both the Courts below. At the outset, it is required to be noted that there are concurrent findings of fact given by both the Courts below holding that the original plaintiff has failed to prove that

he was the owner of the suit property and the original plaintiff has failed to prove that he was in possession of the suit property. It is also required to be noted that the said findings of fact by both the Courts below are on appreciation of evidence, which are not required to be interfered with by this Court in exercise of powers under Section 100 of the Code of Civil Procedure.

5.1. Even otherwise, it is required to be noted that on one hand original plaintiff claimed that he was the owner of the suit property and consequently prayed for declaration, however, on the other hand he prayed for specific performance of the 'satakhat' dated 23/03/1977. Not only that but he also claimed tenancy rights under the Bombay Tenancy Act and, therefore, as such the original plaintiff himself was not very clear and his case was self contradictory and, therefore, no illegality has been committed by the learned trial Court dismissing the suit. The learned trial Court has rightly held that the original plaintiff has failed to prove that he is the owner of the suit land and, therefore, has rightly refused to grant declaration as prayed for. On appreciation of evidence, the learned trial Court held that original defendants are in possession of the suit property and original plaintiff has failed to prove his possession and, therefore, the learned trial Court has rightly not granted permanent injunction as prayed for.

5.2. Now so far as the prayer of the original plaintiff for specific performance of the 'satakhat' dated 23/03/1977 produced at Exh. 141 is concerned, it is required to be noted that original defendant no. 1, who is alleged to have executed the 'satakhat' and against whom the prayer for specific performance of the 'satakhat' was prayed had died during pendency of the suit and his heirs are not brought on record and pursuant to the order below Exh. 57 the suit qua him was ordered to be abated. Under the circumstances, no relief can be granted to the original plaintiff for specific performance of the 'satakhat' alleged to have been executed by original defendant no. 1-

Thakorebhai Dahyabhai Modi. Even otherwise, as rightly held by both the Courts below, original plaintiff has failed to prove the contents of the 'satakhat' dated 23/03/1977. It is also required to be noted at this stage that initially original plaintiff did not pray for specific performance of the 'satakhat' dated 23/03/1977 and prayed for declaration only declaring that he is the owner and in possession of suit property. Only by way of amendment, subsequently the original plaintiff prayed for specific performance of the 'satakhat', which was not proved by the original plaintiff.

5.3. Considering the aforesaid facts and circumstances, no illegality has been committed by the learned trial Court dismissing the suit and refusing to grant the relief as prayed for and the same is rightly confirmed by the learned appellate Court.

5.4. Even the learned advocate appearing on behalf of the appellants is not in a position to point out any substantial question of law, which arises in the present Second Appeal.

6. In view of the above, there is no substance in the present Second Appeal, which deserves to be dismissed and is accordingly dismissed.

(M.R. SHAH, J.)

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