

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**SECOND APPEAL NO. 51 of 2002****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE N.V.ANJARIA**

- =====
- | | | |
|---|---|----|
| 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 |
- =====

PATEL VASHRAMBHAI SHANKARBHAI....Appellant(s)

Versus

PATEL JIVRAJBHAI VITHALBHAI....Respondent(s)

=====

Appearance:

MR BD KARIA, ADVOCATE for the Appellant(s) No. 1

MR VC VAGHELA, ADVOCATE for the Respondent(s) No. 1

=====

CORAM: HONOURABLE MR.JUSTICE N.V.ANJARIA

Date :30/06/2014

CAV JUDGMENT

The present Second Appeal preferred by the appellant-original plaintiff is directed against judgment and order dated 2nd April, 2002 of learned Joint District Judge, Dhrangadhra, allowing Regular Civil Appeal No. 30 of 1998, in turn setting aside the

judgment and decree of the trial court. The said Civil Appeal was by the aggrieved defendant-respondent herein, as learned Civil Judge(S.D.) decreed Regular Civil Suit No. 73 of 1984 of the plaintiff on 30th October, 1997.

1.1 The Suit was for relief of permanent injunction. The trial court granted injunction against the defendant, injuncting him permanently in respect of 29 gunthas of the suit land from interfering with the plaintiff's possession thereof, further restraining the defendant from demolishing "Vandi" on the North of the said land.

2. This Appeal came to be admitted on 24.06.2002 on the following substantial questions of law:

"(A) In the facts and circumstances of the case, whether the learned Judge of the lower appellate court committed substantial error of law in assuming the jurisdiction in respect of the revenue matter, in contravention of section 36A of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947, which bars jurisdiction of civil court and further in disregard to law laid down in case of Manubhai Bhagabhai Patel, 1995(2) GLR page 1369?

(B) In the facts and circumstances of the case whether the ld. appellate Judge omitted to consider and/ or misread the pleadings and documentary evidence on record and has committed an error inasmuch as, as per the sale documents

at exh.60 and exh.84 on record, brother of the plaintiff sold only 4 acres of land of survey no.16 to Dahya Megha by sale deed at exh.84 and in his turn Dahya Megha could sell the said land of 4 acres to the defendant and therefore, by plain reading of this sale documents on record the defendant is not in possession of said land admeasuring 29 gunthas of survey no.16?"

3. For appreciating the controversy, and in order to address the aforesaid questions, the relevant facts may be set out. The case of the appellant-plaintiff in his Civil Suit was that the land bearing survey No. 16, admeasuring 4 Acres and 29 gunthas, situated at Village Dudapar, Taluka Dhrangadhra, was of the ownership and possession of his real brother Patel Ganesh Shankar. The plaintiff, and his said brother exchanged their respective lands by mutual understanding arrived at on 16th January, 1967. Thereby, the plaintiff gave to his brother-Patel Ganesh Shankar, his own another agricultural land known as "Dhori" bearing survey No. 398 paiki 4 Acres and 34 gunthas. Against that, the plaintiff got 3 Acres and 10 gunthas of land known as "Kakravalu", out of aforesaid survey No.16 of his brother. A registered sale deed dated 8th August, 1975 was executed in that regard by said Shri Ganesh Shankar.

3.1 It was the case of the plaintiff that in the aforementioned sale deed, by mistake, the measurement of the land was mentioned as 0-29 gunthas only. Therefore, Ganesh Shankar executed rectification deed

dated 12th August, 1976. It was stated that thus, said Ganesh Shankar had admitted to have sold 3 Acres and 10 gunthas; that the crops standing on the respective fields were reaped by respective brothers, and possession was handed over to each other. The plaintiff stated that accordingly, he had have been in possession of 3 Acres and 10 gunthas of survey No.16 since 1967. It was averred that in the Well which was located on the North of the said field, both the plaintiff, and his said brother had equal right.

3.2 It was the further case of the plaintiff that after the aforesaid exchange, about 3 ½ years later, his brother-Patel Ganesh Shankar sold 4 Acres of land from survey No.16 to one Harijan Dahya Megha without his knowledge. The plaintiff further stated that according to his knowledge, 7-8 years later, said Harijan Dahya Megha sold out the land of 4 Acres to the defendant by executing the sale document. It was stated in the plaint further that subsequent to the said sale in favour of the defendant, the proceedings under the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947 were initiated against the defendant, and brother-Patel Genesh Shankar in the court of Assistant Collector. As per the decision of the Assistant Collector, the sale document executed by Patel Ganesh Shankar in favour of Harijan Dahya Megha, as well as subsequent sale effected by Harijan Dahya Megha in favour of the defendant were held to be in breach of section 9 of the Act, and those sale deeds were ordered to be cancelled. The plaintiff asserted that out of survey

No.16, possession of 3 Acres and 10 gunthas land remained with him since 1967. It was pleaded that 2-3 weeks back, the defendant had come, and threatened to take possession of his land. It was stated that the defendant was indebted to him, and for recovery of the amount, he had initiated the legal proceedings which held in his favour. Therefore, the defendant started threatening.

3.3 The defendant filed his written statement (Exh.21), and contested the Suit.

3.4 The trial court framed the issues at Exh.38, "1. Whether plaintiff proves that, defendant is doing business of Money-Lending.? 2. Whether plaintiff proves the averment made in para-3 of plaint.? 3. Whether writing of dated 16-1-67 is legal & valid and right are acquire by vertue of that agreement.? Whether plaintiff proves that he is in possession of 3-10 Land of S. No. 16 Since 1967.? 5. If yes, Whether plaintiff proves that, defendant trying to disturbs him.? 6. Whether defendants proves that, plaintiff has no right title and ownership on S. No.16, A-3-10 Guntha Land. 7. Whether defendant proves that supplymentry deed is not order the position of law and signed has been taken by mis-representat-tion? 8. Whether plaintiff entitled to get any relief? What order and decree.?"

3.5 The plaintiff offered himself for examination at Exh.59, and produced documents at Exh.60 to Exh.64 in support. At Exh.71, one Mohanbhai Kanjibhai was

examined as plaintiff's witness. The defendant was examined at Exh.82, and his witness one Kodhabhai Umedbhai deposed at Exh.95. After appreciating the oral and documentary evidence produced by both the sides, the trial court answered issues Nos. 1 to 4 in the negative. Issue No. 5 was answered in favour of the plaintiff, whereas issue No. 6 was held partially in favour of the plaintiff. The trial court held that the supplementary deed was proper and valid.

4. Heard learned advocate Mr. Bhargav Karia for the appellant, and learned advocate Mr. V. C. Vaghela for the respondent. The court took into account the relevant documents on record having bearing on the controversy, and carefully considered the judgments of both the courts below.

5. The sale deed dated 8th April, 1968 executed by Ganesh Shankar-brother of the plaintiff in favour of Dahya Megha Harijan was produced at Exh.84. The subsequent sale by said Dahya Megha in favour of respondent-defendant was by a deed dated 21st February, 1975(Exh.83). The document dated 8th August, 1975 was at Exh.16, whereas rectification deed dated 12th August, 1976 was also produced.

5.1 The document dated 8th August, 1975, and its execution was held proved on evidence by the trial court, and the thumb mark of said Ganesh Shankar was identified by witness-Mohanbhai Kanjibhai at Exh.71. The trial court further considered and relied on the map(Exh.64) prepared by the surveyer, and the

measurement undertaken of land survey No.16. It was recorded that the said survey number admeasured 4 Acres and 29 gunthas, and was in two parts being survey No.16/1 and survey No. 16/2. The measurement of land survey No.16/1 as per Exh.64 matched, and was found to be in possession of the plaintiff, whereas the measurement of other part survey No. 16/2 could not be tallied with the *Tippen*. It was held that the plaintiff was in possession of the land only to the extent which was sold to him by his brother on 8th August, 1975, and was not in possession of any of the portions of the said survey number.

5.2 Recording the findings on the basis of material on record, the trial court found that brother of appellant-plaintiff Ganesh Shankar sold 4 Acres of land out of survey No. 16 to one Dahya Megha by sale deed dated 8th April, 1968. The said 4 Acres sold was out of total land admeasuring 4 Acres and 29 gunthas of the said survey number.

5.3 It is rightly recorded by the trial court that said Dahya Megha could not have ownership, and title in respect of land in excess of 4 Acres sold to him as above by Ganesh Shankar. In other words, Ganesh Shankar was having possession of land of 29 gunthas with him, and as on 8th August, 1975-the date of execution of sale deed Exh. 60, he was entitled to sell and validly sold 29 gunthas. It was a valid conclusion reached by the trial court that Dahya Megha could not have sold 4 Acres and 29 gunthas of land, as he had no title over and above 4 Acres which was the

extent of land sold to him under the registered sale deed of 1968. The trial court also considered the contention raised from the side of defendant-respondent regarding violation of law on fragmentation of land holding, while decreeing the suit in favour of the plaintiff.

6. In reversing the judgment of the trial court, the first appellate court entirely misdirected itself. It completely overlooked the factual aspect, and finding of fact that the appellant-plaintiff was in possession of 29 gunthas of land since 1975. According to the reasoning of the first appellate court, Ganesh Shankar was expected to execute deed of correction in favour of the seller of the defendant-Dahya Megha which is not forthcoming on record, and Dahya Megha had already sold 4 Acres 29 gunthas to the appellant. The first appellate court further erred in relying on the revenue proceedings, where the appellant herein was not a party, and in any case, before the revenue authorities, the possession of the appellant-plaintiff was not in dispute.

6.1 Once the documentary evidence in the nature of sale deeds Exh. 60 and Exh.84 on record demonstrated a factual position about possession of land with the appellant-plaintiff, and that brother of the plaintiff sold only 4 Acres of land out of survey No.16 to Dahya Megha and thus, the defendant was not in possession of 29 gunthas of land being remainder part of survey No.16, which remained with the possession of the appellant-plaintiff, the first appellate court was

entirely not justified in allowing the Appeal, and reversing the findings recorded by the trial court on the above basis. Differently stated, the first appellate court did not take into account the factual position in respect of possession of the land of the appellant-plaintiff clearly emanating from the documents, and proceeded on conjectures and surmises to commit an error to conclude that it was not a legal possession, or that it was against the law of fragmentation, for which there was no basis. The second question of law above stand answered emphatically leaving no other question to survive.

7. The Appeal deserves to be allowed, and the same is **allowed** by setting aside the judgment and order dated 2nd April, 2002 passed in Regular Civil Appeal No. 30 of 1998 by learned Joint District Judge at Dhrangadhra, and thereby, upholding the judgment and decree dated 30th October, 1997 passed in Regular Civil Suit No. 73 of 1984 by learned Civil Judge(S.D.), at Dhrangadhra.

8. Record and proceedings shall be sent back.

(N.V.ANJARIA, J.)

chandrashekhar