IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SECOND APPEAL NO. 117 of 1988

With
CIVIL APPLICATION NO. 1 of 1988
In R/SECOND APPEAL NO. 117 of 1988

FOR APPROVAL AND SIGNATURE:

HONOURABLE DR. JUSTICE A. P. THAKER Sd/-

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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 or any order made thereunder ?	No

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NAVINCHANDRA SOMCHAND, DIED THROUGH HIS HEIRS & 1 other(s)
Versus
HEIRS OF SOMCHAND BECHARDAS & 6 other(s)

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Appearance:
for the Appellant(s) No. 2.1,2.2,2.3,2.4
MR MC BHATT(175) for the Appellant(s) No. 1,1.1,1.1.1,1.1.2,1.1.3,1.1.4,1.2,1.3,1.4,2
DECEASED LITIGANT for the Respondent(s) No. 1
MR H M JADEJA(2437) for the Respondent(s) No. 1.1,1.2,1.3,1.4,1.5,1.6,1.7

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CORAM:**HONOURABLE DR. JUSTICE A. P. THAKER**

Date : 07/07/2022
ORAL JUDGMENT

1. The original defendants have filed the present Second Appeal under Section 100 of the Code of

Civil Procedure against the judgment and decree passed by the 3rd Joint Civil Judge Junior Division, Regular Civil Suit No.350 of 1978 which came to be confirmed by the learned Assistant Judge, Surat by his judgment and decree dated 28.03.1988 passed in Regular Civil Suit No.269 of 1984.

2. The appellants are original defendant and the respondents are the original plaintiff before the Court below. For the brevity and convenience, the parties are referred to in this judgment as per their status before the lower Courts i.e. defendant and plaintiff.

3. The plaintiff has filed Regular Civil Suit No.350 of 1980 in the Court of Civil Judge Junior Division, Surat *inter alia* for declaration that he is the owner of the suit property as well as for possession of the suit property and for permanent injunction against the defendant. It was contended by the plaintiff that the suit property is self acquired property purchased from his personal fund; that the defendants have no right, title and interest in the suit property; that the defendant nos.1 and 2 are the sons of the plaintiff by the first wife; that on 15.06.1907,

owner of the suit property Ambaram Parshottamdas the ancestor of the plaintiff and by Maniben, daughter of Parsottam Hirabhai also the ancestor of plaintiff, mortgaged it with one Vallabh Madhav.

3.1. It is also contended by the plaintiff that by registered sale deed dated 16.12.1905, exhibit-33, Amabaram Parsottamdas and Becharbhai Parsottamdas, father and uncle of he plaintiff respectively got back the suit property. That thereafter, the property has been gifted to Prabhu Haribhai son of Ambaram by his second wife Maniben who sold it by sale deed dated 08.05.1926, exhibit-33, to the plaintiff.

3.2. It is also contended that the suit property was never ancestral property and that the plaintiff was permitting the defendants to stay in some portion of it as the licensee and that the defendants are harassing the plaintiff and therefore the license was terminated by notice dated 30.03.1977. On these grounds the plaintiff filed the aforesaid suit for declaration, injunction and for possession.

4. The defendants have filed their written statement

at exhibit 10 and *inter alia* denied the entire case of the plaintiff. They have contended that the suit property is an ancestral property over which they have got a right to stay. That in fact, the suit property originally belonged to their ancestors Parsottam Hirabhai. That the sale deed executed earlier was bogus and it was executed only with a view to defeat the creditors of Becharbhai Parsottam. It was also contended that the defendants have spent substantial amount in repairing the suit property. On all these grounds, they have prayed to dismiss the suit with cost.

5. On the basis of the pleadings of the parties, the trial Court has framed issues at exhibit 12 to the following effect:-

(i) Whether the plaintiff proves that he is full and independent owner of the suit property, before the nondh no.3181-3182 of ward no.6 in City of Surat as alleged?

(ii) Whether the Court fees paid by the plaintiff is proper?

(iii) Whether the defendants prove that the title deeds as alleged by the plaintiff in respect of the suit property are false, bogus and without consideration in order to escape from the creditors and the suit property is ancestral and

they have got their shares in it as alleged?

(iv) Whether the defendants prove that they have expanded amount for repairation, alteration and extension of the suit property as alleged in the para 4 and 5 of the W.S.?

(v) Whether there is any cause of action to file this suit?

(vi) What relief the plaintiff is entitled to?

(vii) What order and decree?

6. It appears from the record that the learned trial Court has decided the issue nos.1,2 and 5 in affirmative and issue nos.3 and 4 in negative and has ultimately passed the decree in favour of the plaintiff and against the defendants.

7. Being aggrieved by this judgment and decree of the trial Court, the defendants have preferred Regular Civil Appeal No.269 of 1984 in the District Court at Surat which came to be heard by the learned Assistant Judge, Surat who by his impugned judgment and decree dated 28.03.1988 dismissed the appeal with cost.

8. Being aggrieved and dissatisfied with both these judgments of the Court below, the defendants have preferred this appeal raising various

substantial question of law, *inter alia* contending that both the Courts below have not properly appreciated the documentary evidences on record. It is also contended that the lower Courts ought to have held that in any case, since prior to the year 1964, the defendants are in exclusive, actual and physical possession of a portion of the suit property and therefore they have become owners by adverse possession.

8.1. It is also contended that both the Courts below ought to have held that the documents at exhibit 29 to 34 were not genuine documents as since the year 1901, the plaintiff and his predecessors are in continuous possession of the of the suit property premises. According to the defendant, both the Courts below ought to have, in alternative, held that defendants are the tenants of the suit premises and they are protected under the provisions of the Tenancy Act. According to them, the suit property ought to have been held as an ancestral property and the right of the defendants to contradict the contention of the documents ought to have been believed by the Courts below. According to them, the Courts below have failed to consider that the plaintiff could not have purchased the property

back because at that time, he was only 20 years old and could not have his self acquired funds so as to pay the sale consideration.

8.2. According to the defendants both the Courts below have committed error in not considering the facts that the defendants have repaired the suit property and made additional construction with the consent of the plaintiff. It is also contended that both the Courts below have misread and misinterpreted the Hindu Law. On all these grounds, the defendants have prayed to set aside the judgment and decree of the Courts below and to allow the present appeal.

9. The present appeal has been admitted for the following substantial questions of law by this Court:-

(i) Whether the lower Courts have misread and misinterpreted the documentary evidence on record, particularly exhibit 29 to 34?

(ii) Whether the defendants have become the owner of the suit property by adverse possession since they are in occupation of the portion of the suit premises prior to the year 1964?

(iii) Whether in view of the provisions of Section

91 and 92 of the Evidence Act, it is open to the defendants to lead oral evidence to contradict the contents of the documents exhibit 29 to 34?

10. Heard learned advocate Mr.Robin Prasad for the learned counsel Mr.M.C.Bhatt for the appellants and learned advocate Mr.H.M.Jadeja for the respondents at length. Perused the material placed on record.

11. My findings, on the above questions of law, for the reasons given below, are as under:-

(i) In negative.

(ii) In negative.

(iii) In negative.

REASONS

12. Since the facts and evidence on record are interconnected in relation to all these questions of law, to avoid repetition of the same, all are discussed together.

13. Learned advocate Mr.Robin Prasad for the

defendants has vehemently submitted the same facts which are narrated in the appeal memo. He has submitted that the heavy reliance placed upon the documents at exhibit 29 to 34 by both the Courts below are not proper. He has submitted that the suit property is an ancestral property and in the said property, the appellant defendants have equal right. It is also submitted that since, there is a factual dispute regarding the nature of property, the defendants have every right to lead evidence to contradict the averment made in the document at exhibit 29 to 34. He has submitted that the property cannot be treated as a personal property of the plaintiff and considering the facts that the defendants were residing in the suit property prior to the year 1964 and they have incurred expenses for repairing and making alterations, both the Courts below ought to have considered the property as an ancestral property. He has also submitted that even if it is, for the sake of arguments, believed that the property is personal property of the plaintiff, even in that case, considering the conduct of the deceased plaintiff and the factum of long possession of the defendants, the possession of the defendant ought to have been considered as an adverse

possession. He has submitted that both the Courts below have committed serious error of law in appreciating the evidence on record and therefore, the questions raised in this Second Appeal needs to be answered in favour of the defendants and the suit of the plaintiff deserves to be dismissed. He has prayed to allow the present Second Appeal.

14. Per contra, learned advocate Mr.H.M.Jadeja for the respondent plaintiff has vehemently submitted that in the present case, both the Courts below have concurrently held, on facts, that the property was a personal property of the plaintiff and therefore these findings of facts need not be interfered with by this Court in Second Appeal. He has also submitted that the findings regarding the nature of the property being a personal property by both the Courts below is proper one. He has also submitted that in the present case, the sale deed executed in favour of the plaintiff has not been challenged by the defendants/ appellants. He has also submitted that finding of the facts and the ultimate conclusion reached by both the Courts below are in consonance with the evidence on record and therefore this Court may not interfere

with them. He has prayed to dismiss the present Second Appeal accordingly.

15. As one of the substantial questions of law is pertaining to interpretation of Section 91 and 92 of the Evidence Act. Therefore, Section 91 and 92 of the Evidence Act needs to be reproduced which are as under:-

> "91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of documents.—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence1 shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.—When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence2 shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore

contained." Exception 1.—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved. Exception 2.—Wills 2[admitted to probate in 3[India]] may be proved by the probate. Explanation 1.—This section applies equally to cases in which the contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one. Explanation. 2.—Where there are more originals than one, one original only need be proved. Explanation 3.—The statement, in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

92. Exclusion of evidence of oral agreement.—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms: Proviso
(1) .—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 1[want or failure] of

consideration, or mistake in fact or law: (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 3[want or failure] of consideration, or mistake in fact or law\:" Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document: Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved: Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents: Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved: Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract: Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

16. Now, in view of the aforesaid provisions of Section 91 of the Evidence Act, it appears that it relates to lead evidence of terms of contract, grants and other disposition of properties, which are reduced to form of documents. This Section merely forbids proving the contents of writing otherwise than by writing itself. Under this Section, when the terms of contract, grant, or any disposition of any property have been reduced to form the document; or when any matter is required by law to be reduced to form of a document, then the document itself or secondary evidence of its contents, must be put in the evidence. This Section deals with the exclusiveness of documentary evidence.

17. Now, so far as the Section 92 of the Evidence Act is concerned, it deals with the conclusiveness of the documentary evidence. As per the provisions to Section 92, there are certain explanations carved out wherein though the document itself has been put in the evidence, oral evidence regarding its contents can be offered, or accepted. The six exceptions as carved out in Section 92 of the Evidence Act, can be enumerated as under:-

"(1) Any fact which would (i) invalidate any document, or (ii) entitle any person to any decree or order relating thereto may be proved, such as fraud, intimidation, illegality, failure of consideration, mistake in fact or law.

(2) Any separate oral agreement (i) as to any matter on which the document is silent, and (ii) which is not inconsistent with its terms, may be proved.

(3) Any separate oral agreement, constituting a condition precedent to the attacking of any obligation under the document, may be proved.

(4) Any subsequent oral agreement to rescind or modify any such contract, grant, or disposition of property, may be proved, except when such contract or grant (i) is required to be in writing, or (ii) has been registered.

(5) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to such contracts, may be proved if they are not repugnant to, or inconsistent with, its express terms.

(6) Any fact which shows in what manner the language of the document is related to existing un facts, may be proved."

18. At this juncture, it is pertinent to note that the Supreme Court in the case of Bai Hiradevi v/s Official assignee of Bombay, AIR 1958 SC 448

has pointed out the principles underlining Section 91 and the difference between Section 91 and 92 of the Evidence Act. It was observed therein as under:

> “Section 91 is based on what is sometimes described as the "best evidence rule". The best evidence about the contents of a document is the document itself and it is the production of the document that is required by Section 91 in proof of its contents. It is after the document has been produced to prove its terms under Section 91 that the provisions of Section 92 come into operation for the purpose of excluding evidence of any oral agreement or statement, for the purpose of contradicting, varying, adding to or subtracting from its terms. Sections 91 and 92 in effect supplement each other. Section 91 would be frustrated without the aid of Section 92 and Section 92 would be inoperative without the aid of Section 91. The two sections, however, differ in some material particulars. Section 91 applies to all documents, whether they purport to dispose of rights or not, whereas Section 92 applies to documents which dispose of property. Section 91 applies to documents which are both bilateral and unilateral, unlike Section 92 the application of which is confined only to bilateral documents. Section 91 lays down the rule of universal application and is not confined to the executant or executants of the documents. Section 92 on the other hand, applies only between the parties to the instrument or

their representatives in interest"

19. Now, considering the provisions of Evidence Act coupled with the material placed on record, it clearly transpires that the documents produced in this matter from exhibit 29 to 34 are documents relating to disposition of immovable property. There is no facts curved out by the defendants to suggest that their defendant falls under any of the exception of Section 92 of the Evidence Act.

20. Exhibits 29 to 34 are as under:-

(1) Exhibit 34 dated 15.06.1901-Mortgage deed.
(2) Exhibit 33 dated 16.12.1905- sale deed.
(3) Exhibit 29 dated 08.01.1920- sale deed in favour of the plaintiff for half portion.
(4) Exhibit 30 dated 27.01.1920-sale deed in favour of the plaintiff for other half of the property.
(5) Exhibit 31 dated 26.01.1925-Gift deed in favour of the Prabhu Hariram.

21. The defendants have raised one of the plea regarding them becoming owner of the property by adverse possession as well as on the facts that they have spend amount for repairing and alterations of the property in question. It is

pertinent to note that the defendants have raised to inconsistently. At one point of time, they are claiming the ownership over the property and in alternative they are claiming that they are become the owner of the property due to adverse possession. It is pertinent to note that on one point of time they have also stated that with the consent of the plaintiff they have spent for repairing and making addition and alteration in the suit property. Thus, if the defendants have carried out any repair work or alteration or addition with the consent of the plaintiff, then the possession of the defendants could not be said to be an adverse possession against the plaintiff who is the owner of the property. On perusal of the evidence on record, it clearly transpires that the defendants were permitted to use the property by the deceased plaintiff as the defendants are his sons. Under these circumstances, the plea of the adverse possession is raised by the defendants against their own father cannot be accepted. Therefore, in view of the facts and circumstances of this case, it clearly appears that the point of defendants become owner of the suit property by virtue of the adverse possession cannot be accepted.

22. On perusal of the evidence on record, it transpires that the plaintiff has examined himself at exhibit 21 and has also produced documentary evidence in support of his say that the suit property has been purchased by him and it was not ancestral property. Exhibit 34 is the deed executed by Ambaram Parsottamdas and by Mani Parsottam in favour of one Vallabhbhai Madhavbhai, it is a mortgage deed by which the suit property was mortgaged to the said Vallabhbhai Madhavbhai on 15.06.1901 and by the said deed, the suit property was mortgaged for Rs.351/-. It reveals from exhibit 34 that it was came to be mortgaged by uncle of the plaintiff and Mani Parsottamdas. From exhibit 33, which is dated 16.12.1905 and which was executed by Ambaram Parsottamdas and Bechar Parsottam in favour of Jivan Hargovandas, whereby the suit property was sold for Rs.599/-, out of which Rs.451/- was given to Bhula Madhav to redeem the property, who was guardian of Chhagan Vallabh and Ravia Vallabh and Rs.144/- was taken by both of them and it was sold to Jivan Hargovan, who is the brother-in-law of the executors. Thus, from the lease deed, it reveals that it was executed in the year 1905. According

to the defendants these were not sale deed but only a mortgage deed, however, the defendants have not challenged both these documents in any manner.

23. It is pertinent to note that regarding the other documents, both the Courts below have consistently held in favour of the plaintiff, holding him, the owner of the property and considering the facts that when the plaintiff got it purchased the defendants who were his son were never born. On perusal of the entire evidence and the reasonings given by both the Courts below, passing the impugned decree in favour of the plaintiff and against the defendant, it clearly transpires that they have not committed any error of facts and law in appreciating the documentary evidence in question. There is a concurrent finding of facts regarding the nature of the property and the right of the plaintiff to get the possession thereof from his own son.

24. Therefore, considering the facts and circumstances of the case, coupled with the legal questions discussed herein above, it clearly transpires that the reasonings and the observations of both the Courts below are

sustainable in the eyes of law. Therefore, considering the facts and circumstances of the case, I have decided the questions of law in negative accordingly.

25. In view of the above, I pass the following order in the interest of justice.

ORDER

This Second Appeal is dismissed.

The parties are directed to bear the respective cost of this Second Appeal.

Decree be drawn accordingly in this Second Appeal.

Along with the copy of the judgment and decree, Records and Proceedings be sent back to the Trial Court.

Sd/-
(DR. A. P. THAKER, J)

URIL RANA