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Received on: 28.12.2017
Registered on: 28.12.2017
Decided on: 05.05.2023
Duration: Yrs.Mths.Days.

IN THE COURT OF 3RD ADDITIONAL DISTRICT JUDGE,
B.K. DISTRICT, AT:PALANPUR.

REG. CIVIL APPEAL NO.31/2017

APPELLANTS(Original Plaintiffs):

1. Nai Chuniben W/o Dhudabhai
Khetabhai, Age - 75,
2. Nai Jayantibhai Dhudabhai,
Age - 52 years,
3. Nai Taraben Dhudabhai,
Age - 50 years,
4. Nai Bharatbhai Dhudabhai,
Age - 46 years,
5. Legal heirs of deceased
Nai Naranbhai Dhudabhai,

5/1 Nai Manjulaben Naranbhai,
Age - 55 years,
5/2 Nai Vishnubhai Naranbhai,
Age - 35 years,
5/3 Nai Prakashbhai Naranbhai,
Age - 32 years,

Occupation of all Agriculture,
All are R/o Moriya,
Tal. Palanpur, Dist. B.K.

Versus

RESPONDENTS (Original Defendants):

Legal heirs of deceased Patel
Shamalbhai Bhaichandbhai:

1/1 Chamanbhai Shamalbhai Patel,
1/2 Deepakbhai Shamalbhai Patel,
1/3 Nareshbhai Shamalbhai Patel,
1/4 Laxmiben Shamalbhai Patel,
1/5 Bhartiben Shamalbhai Patel,

2. Patel Narsinhbhai Maganbhai,

3. Patel Revaben Amrutbhai,

4. Patel Maganbhai Umabhai Medat,

No.1/1 to 1/5 are R/o B/s Yogvedant
Ashram, Nava Laxmipura, Becharpura,
Palanpur, Dist. Banaskantha.

No.2 is R/o Nava Laxmpura, Palanpur,

No.3 and 4 are R/o Juna Laxmpura,
Palanpur, Tal. Palanpur, Dist. B.K.

5. Nai Popatbhai Dhudabhai,

6. Nai Devabhai Khetabhai,

7. Nai Shivabhai Khetabhai,

No. 5 to 7 are R/o Moriya,

Tal. Palanpur, Dist. B.K.

Appeal:- Appeal under Order 41, Rule-1 and 2, r.w.s. 96 of Civil Procedure Code, 1908 against the Judgment and decree dated 28.11.2017 passed by learned 2nd Addl. Civil Judge, Palanpur in R.C.S.No.51/2011.

Appearance:

Mr. R.M. Modh, L. A. for the Appellants.

Opponents No.1/1 and 5 to 7 Ex-Parte.

Mr. P.P. Chaudhary, L.A. for the Respondents 1/2 to 1/5, 2, 3 and 4.

J U D G M E N T

- 1) The present appeal under Order-41 r.w.s. 96 of the Civil Procedure Code, 1908 (herein after be referred to as the "Code" for the sake of convenience and brevity) is directed against the judgment and decree dated 28.11.2017 passed by learned 2nd Additional Civil Judge, Palanpur in Reg. Civil Suit No.51/2011 whereby and whereunder, the suit preferred by the appellants for cancellation of sale deed and permanent injunction came to be dismissed. The appellants are the original plaintiffs, while the respondents are the original defendants. Hence, for the sake of convenience, the parties

of the present appeal shall be referred to as the plaintiffs and the defendants as they were arrayed before the trial Court.

- 2) The shorn of the unnecessary details, facts necessary for the disposal of the present appeal are that the ancestral agricultural land of the plaintiffs is situated at village Moriya having Survey No.17, 18 and 149 and the said land is in the joint ownership of the father of plaintiffs No.1 to 4, father in law of plaintiff No.5(1), grand father of the plaintiffs No.5(2) & 5(3), father of defendant No.5 and defendants No.6 and 7. It is also case of the plaintiffs that the said land is joint property and partition is not made and they are jointly cultivating in the said land. That a loan of Rs.10,000/- has been obtained in the year of 1994 from Moriya Seva Sahkari Mandali on the said land and an entry in respect of the same is made in village record vide entry No.634. Thereafter in the year of 1995 a loan of Rs.36,000/- was obtained on the said land from Gujarat State Cooperative Agriculture and Rural Development Bank, Palanpur branch and an entry No.655 was made in the record of right

regarding the same. Thus, there is a charge of the Bank on the said land and till the loan is not paid, the said land cannot be sold out. Further the land is non irrigated land and hence, if there is less than three acres in that case there is a breach of portion consolidation. There was no reason to sale the said land and also there was no need of money, though the defendant No.3 had stated to Dhudabhai Khetabhai father of the plaintiffs and defendants No.7 and 5 that as he wants to purchase a land they have to make signatures as witnesses and thus, he brought them to Palanpur in the year of December 2003 and obtained their signatures on a paper and they returned to home. It is further case of the plaintiffs that they have no knowledge that why their signatures have obtained. Thereafter, on 23.10.2004 Nai Dhudabhai Khetabhai died and hence, heirship entry No.898, dated 15.12.2004 was granted and their names were entered in the revenue record. But there was joint possession over the suit land at the place. Further on 14.6.2005, plaintiff No.5 also died and hence, entry No.962 dated 31.5.2006 was made regarding

his heirs brought on record and on the said entry names of the plaintiffs No.5(1) to 5(3) were entered in the revenue record.

- 3) That it is further stated by the plaintiffs that suddenly one notice was received at the end of year 2009 and in which it has been stated that survey No.149 was sold out and entry No.1115 was made. It is further stated that the said land of S.No.149 was never sold out and hence, given objection and made representation that defendants No.1 to 4 in the guise to make signature as witnesses and called at Palanpur and at that time obtained signatures of late Dhudabhai Khetabhai and defendants No.5 to 7 and misused the same. It is also stated that to conceal the said fact they have made late entry in the record. It is also facts of the plaintiffs that the defendants No.1 to 4 have misused the signatures and created bogus sale deed of the joint ownership land admsng. Acre 2-16 guntha and entered the said land. It is also stated that the plaintiffs have objected about the same before the Mamlatdar, Palanpur, but vide order dated 06.08.2010 the said objection was

dismissed and stated to file suit before the Civil Court to cancel the sale deed. Hence, the plaintiffs have constrained to file the present suit. It is also stated that the defendants tried to snatch away the possession of the plaintiffs and also tried to diminish the rights of the plaintiffs. That at the time of this sale deed plaintiffs No.5(1) To 5(3) were minors and the defendants No.1 to 4 have no rights to sale the property of minor and the sale deed was made by fraud. That there is joint possession over the land of plaintiffs and defendants No.6 and 7. The defendants No.1 to 4 were never in possession of the suit land or also not paid any amount of the sale deed and misused the signatures and prepared bogus document. As and when the plaintiffs came to know about the sale deed entry No.1115 in December 2009, they have filed objection before Mamlatdar, Palanpur and on 6.8.2010 Mamlatdar had approved the said entry and stated that the plaintiffs have to go before the Civil Court to cancel the sale deed. Therefore, the plaintiffs filed R.C.Suit No.51/2011 in the Court of learned 2nd Additional Civil Judge, Palanpur

for cancellation of sale deed and permanent injunction.

- 4) The defendants were duly served with the notice of the suit. The defendants No.2 to 4 appeared in the suit by their advocate and resisted the suit by filing reply Ex.16, wherein inter alia they contended that the facts of the suit are not true and correct. They have stated that on 2.12.2003 they have purchased the suit land S.No.149 Admsng. Acre 2-16 guntha = Hec.Are 0-97-13 Sq.Mt. vide registered sale deed from the husband of plaintiff No.1, father of plaintiffs No.2 to 4 and grand father of plaintiffs No.5/1 to 5/3 and defendant No.7 and since then they are in possession and cultivating the suit land and produced sale deed on record. They have also paid consideration for the same. It is also contended that though the plaintiffs have very well in knowledge about the same, but to grab money and with an intention of breach of trust and cheating they have filed this false and fabricated suit by creating false story. Moreover, they have joined defendants No.5 to 7 in collusion. It is also contended that the plaintiffs have not paid the due loan of

Rs.96,799/- along with interest, hence, the defendants have paid the said loan on 16.12.2009 and thereafter made sale deed and thereby they have mutated the entry No.1115 in the village form No.6 on 22.12.2009 and notice u/s.135-D of the Land Revenue Code was also served to the plaintiffs, at that time they have objected for the same. Hence, R.T.S. Dispute case No.19/10 was filed before the Mamlatdar and then vide order dated 6.8.2010 the Mamlatdar had granted the said entry. Thus, it is contended that the suit filed by the plaintiffs is baseless without any reason and also the suit is time barred. Therefore, it was urged that the suit be dismissed with costs and also prayed to pass necessary order that the plaintiffs have to pay the loan amount of Rs.96,799/- which has been paid by the defendants which was due to the plaintiffs.

- 5) Issues came to be raised vide Ex.28 and after recording the evidence of both the sides and after hearing the arguments of L.As. for the contesting parties, the learned trial Judge was pleased to dismiss the suit and directed the parties to bear their own costs vide

judgment and decree dated 28.11.2017. Hence, this appeal.

- 6) Heard L.A. Mr. R.M. Modh for the plaintiffs and L.A. Mr. P.P. Chaudhary for the defendants. Perused the record of the trial Court. Also perused written arguments of L.A. for the appellants at Ex.19.
- 7) The following points arise for my determination in this appeal:
 - 1) Whether the learned trial Judge has erred in holding that the plaintiffs and defendants No.5 to 7 are not owners and in actual possession of the suit property?
 - 2) Whether the learned trial Judge has erred in not believing that the signature of the plaintiff's father and defendants No.5 to 7 were obtained by fraud?
 - 3) Whether the learned trial Judge has erred in holding that the defendants No.1 to 4 have right to transfer the suit property in their name and also erred in not believing that the defendants No.1 to 4

have fraudulently transferred the property in their name by way of sale deed?

- 4) Whether the learned trial Judge has erred in refusing to decree the suit and whether reason and finding reviewed by Ld. Trial Court requires interference?
- 5) What order?
- 8) My findings to the aforesaid points are as under:
 - 1) In the negative. .
 - 2) In the negative.
 - 3) In the negative.
 - 4) In the negative.
 - 5) As per final order.

R E A S O N S

Points No.1 to 4:

- 9) As all these points for determination are inter-connected with each other therefore, for the sake of convenience and with a view to avoid repetition, all are discussed together.

- 10) The L.A. for the appellants original plaintiffs has argued that the learned trial Judge has not properly appreciated the oral and documentary evidence found on the record. It is his contention that though the issue Nos. 1 to 6 were in favour of the plaintiffs, learned trial Judge has dismissed the suit and further the learned trial Judge has erred in not believing that the suit land is joint property of the plaintiffs and defendants No5 to 7 and the defendants No.1 to 4 have fraudulently made the disputed sale deed by illegally taking signatures and though the sale deed was void ab initio, but the learned trial Judge has erred in accepting the said sale deed. It is also contended that though the sale deed was made on 2.12.2003 and deceased Dhudabhai Khetabhai Nai died on 23.4.2004, but the entry in respect of the sale deed was made on 22.12.2009 vide entry No.1115 and also the defendants No.1 to 4 have made the aforesaid entry after 6 years which shows their malafide and malice intention, though the learned trial Judge has given the decision in favour of the defendants. It is

also contended that though the suit land was joint property of plaintiffs and defendants No.5 to 7 and at the time of sale deed plaintiffs No.5(2) and 5(3) were minors and though deceased Dhudabhai Khetabhai have no right to sale the joint property and they have only right to sale his share as the land was not his self earned property, though the learned trial Judge has erred in not considering this fact. Hence, it is contended that the learned trial Judge has committed serious error. Therefore, he has urged that the impugned judgment and decree may be quashed and set-aside.

- 11) On the other hand L.A. for the respondents No.1/2 to 1/5 and 2 to 4 has also argued that the appeal of the appellants is not true and hence, not binding and he has argued that the judgment and decree passed by the learned trial Judge is correct and no interference is required in this regard. It is also contended that the suit land is purchased by the appellants by way of registered sale deed and the said fact is already proved by oral as well as documentary evidence. It is also

contended that as the appellants have filed this false suit with a malafide and malice intention to grab money, and the plaintiffs have no relation in respect of the said suit land. Therefore, it is urged to dismiss the appeal and to confirm the judgment and decree of the trial Court.

- 12) The present appeal is preferred under section 96 read with order 41 of C.P.C. It is well settled principle of law that the appeal is a continuation of suit, in as much as an appeal is rehearing of a matter, the appellate court can re-appreciate the entire evidence, oral as well as documentary evidence, and can arrive its own conclusion. At the same time, however, the appellate court will bear in mind the findings recorded by the trial Court on oral evidence. It should not forget that the trial Court has an advantage and opportunity of watching the demeanour of witnesses and hence the trial court's conclusion should not normally be disturbed. No doubt, the appellate court has the same power as the original court but they have to be exercised with the proper care, caution and circumspections with a

finding of fact has been erred by the trial court by mainly appreciating the oral evidence, it should not be lightly disturbed, unless the approach of the trial court in appraisal of evidence is materially erroneous, contrary to well settled and established principles, or perverse. By keeping aforesaid all principles, I have considered the entire controversy of present matter.

- 13) The L.A. for the plaintiffs has submitted that as the suit land is ancestral property and is also joint property of the plaintiffs and defendants No.5 to 7, the said land cannot be sold without consent of each and every co-owners. Further the defendants No.1 to 4 have taken signatures of deceased Dhudabhai Khetabhai and defendants No.5 to 7 fraudulently on the sale deed as they did not know that the suit land is sold to the defendants No.1 to 4 and the bogus and false sale deed without giving any consideration of the land was made by the defendants No.1 to 4. Therefore, the same is required to be cancelled and also permanent injunction is required to be granted in favour of the

plaintiffs. Now on perusal of the deposition of witness Jayantibhai Dhudabhai at Ex.41 who had reiterated the facts of the suit in his examination in chief. But in cross examination of this witness he has admitted the fact that the defendants No.1 to 4 have purchased the suit land from the father of the plaintiffs No.2 to 4, grand father of plaintiffs No.5/1 to 5/3 and father of defendant No.2 Nai Dhudabhai Khetabhai and from defendant No.7 Shivabhai Khetabhai by registered sale deed and true copy of the said sale deed is produced on record at Ex.40. This witness has also admitted that the said sale deed was done on 1.12.2003 and in which there is signatures of Nai Shivabhai Khetabhai and Nai Dhudabhai Khetabhai and also signatures of Chamanbhai Dhanabhai Nai and Nai Popatlal Dhudabhai as witnesses. Further there is also thumb impression of Raval Sardarbhai Okhabhai. He has also admitted that Nai Shivabhai Khetabhai and Nai Dhudabhai Khetabhai had not made any procedure or filed suit to cancel the said sale deed Ex.40 during their life time. He has also admitted that an entry in respect of the

aforesaid sale deed was made in the village form No.6 vide entry No.1115 dated 22.12.2009, in which they filed their objection before Mamlatdar, but the said objection was rejected by Mamlatdar and said entry was granted on 9.8.2010 and said entry is produced at Ex.44. He has also admitted that an entry No.38 was entered on 16.12.2009 which shows that the encumbrance over the land was fully paid and the receipt of the same is produced on record by the defendants vide mark 27/5. He has also admitted that the suit land of S.No.149 paiki 2 was running in the name of the defendants No.1 to 4 in the revenue record and also admitted that they have not prepared Court Commissioner's Panchanama showing their possession over the suit land. He has also admitted that they have not filed any appeal before the Prant against the order of R.T.S. case No.19/10. He has also admitted that at page No.6 of the said sale deed at Ex.6 it has been return that there is three equal shares of three brothers in the suit land.

- 14) Another witness Vashrambhai Ramsungbhai Od (Chaudhary) is examined by the plaintiffs at

Ex.48. In his deposition by way of affidavit, he has supported the version of the plaintiffs, but in his cross examination he has stated that his land is situated adjacent to the land which has been purchased by the defendants No.1 to 4. Now on perusal of the Registered Sale deed of the suit land which is produced on record at Ex.40, it appears that the said sale deed is duly registered vide Index No.3994 dated 2.12.2003 before the Sub-Registrar, Palanpur in which there is signatures of Nai Shivabhai Khetabhai and Nai Dhudabhai Khetabhai and also signatures of witnesses Chamanbhai Dhanabhai Nai and Nai Popatlal Dhudabhai as witnesses and there is also thumb impression of Raval Sardarabhai Okhabhai as witness. Thus, there is no doubt about the sale deed. On further perusal of the sale deed in which it is clearly mentioned that total land of survey No.149 is admsng. Acre 3-24 guntha and there are three co-owners of the suit land and from the said land 2/3rd portion of the land admsng. Acre 2-16 guntha was sold out by Nai Shivabhai Khetabhai and Nai Dhudabhai Khetabhai which is coming in

their share. Thus, it is also an admitted fact on record that total land was not sold by Nai Shivabhai Khetabhai and Nai Dhudabhai Khetabhai. Moreover, Exh.64 is the entry No.1115 dated 22.12.2009 which shows that on the basis of the aforesaid Registered sale deed No.3994 dated 2.12.2003, produced on record at Ex.40 and 63, the names of defendants No.1 to 4 are entered in the village form No.6 means records of right. Though the plaintiffs have challenged the aforesaid entry before the Mamlatdar vide R.T.S. Appeal No.19/10, the same was dismissed by order of Mamlatdar dated 6.8.2010 and thus, names of the defendants No.1 to 4 are entered in the revenue record.

- 15) The defendants No.1 to 4 have also examined defendant No.4 Patel Maganbhai Umabhai Medat at Ex.52 and he has stated in his deposition that the defendants No.1 to 4 have purchased the suit land from Nai Shivabhai Khetabhai and Nai Dhudabhai Khetabhai by registered sale deed No.3994 dated 2.12.2003 and their names were also entered in the revenue record vide Entry No.1115 dated 22.12.2009 and also

supported the case of the defendants. In his cross examination this witness has admitted that till 6 to 7 years after sale deed revenue entry was not made but for which he has stated that there was charge over the said land. In reply of a question that whether any conversation about the partition of the land with other partners took place? He has stated that there was talked with the other co-owners of the land and they have stated that they have no objection if they sale the share of the land of their portion. He has denied that they have prepared and executed the sale deed by misguiding the plaintiffs and taken their signatures in it by fraud and stated that you have to make signatures as witness in it. He has denied that the sale deed was executed by the defendants without paying consideration to the plaintiffs. Thus, the defendants have proved their case by way of oral as well as documentary evidence.

- 16) It appears from the record that if the sale deed was false or fabricated then the plaintiffs have to examined the Bond writer of

who had drafted the Ex.40 and 53 sale deed. But the plaintiffs have not examined him. Further the plaintiffs have also not examined the witnesses of the aforesaid sale deed. Therefore, the contention of the plaintiffs that the sale deed executed by the defendants No.1 to 4 is false and fabricated is devoid of substance. In Civil cases, the preponderance of evidence is required to be considered while evaluating the evidence, ocular and documentary, adduced by the parties.

- 17) Plaintiffs had come with a case that the sale deed produced on record is false and fabricated and no such sale deed was executed by Nai Shivabhai Khetabhai and Nai Dhudabhai Khetabhai in favour of the defendants No.1 to 4. But as discussed earlier and also as per the admission of the witness Jayantibhai Dhudabhai at Ex.41 that the sale deed was executed by Nai Shivabhai Khetabhai and Nai Dhudabhai Khetabhai in favour of the defendants No.1 to 4 and necessary entry was also entered in the records of right vide entry No.1115 dated 22.12.2009, no further

discussion is required to be made. At the same time the evidence available on the record shows that a mutation entry No.1115 dated 22.12.2009 came to be made in favour of the defendants in the revenue records. The plaintiffs unsuccessfully pursued R.T.S. Appeal in Mamlatdar Court. But the learned trial Judge has rightly considered this point in the impugned judgment and has rightly held that the defendants are shown as in possession of the suit land in village form No.7/12. Moreover, as discussed earlier the entry No.1115 dated 22.12.2009 is also entered in the name of the defendants No.1 to 4. When the plaintiffs have tried to put forth a case that the sale deed was falsely executed and there was no possession executed in favour of the defendants, the documentary evidence particularly, Ex.64 Records of right and Ex.66 and 67 village form No.7/12 reflects that defendants themselves have tilled the suit land and had taken crop of Millet seed in 2015-2016 and onwards. This fact also demolishes the case of the plaintiffs on this count. The plaintiffs had canvassed this very

argument before the learned trial Judge who has in Para-7 of the impugned judgment has discussed the argument and has not believed it on assigning cogent reasons. Hence, this argument cannot be accepted.

- 18) The learned trial Judge has in the impugned judgment has rightly observed that none of the witnesses examined by the parties have stated that the sale deed Ex.40 and 63 was not executed. I have gone through the ocular evidence adduced by the rival parties. The evaluation of the oral evidence viz-a-viz the documentary evidence more particularly Ex.40 and 63 sale deed, Ex.64 entry of village form No.6 records of right and abstract of village from No.7/12 and form No.8-A at Ex.66 and 67, that the sale deed was drafted and executed in presence of the Nai Shivabhai Khetabhai and Nai Dhadabhai Khetabhai who had before putting their signatures properly understood the nature of document, they were executing in favour of the defendants. The totality of the oral and documentary evidence nowhere creates an impression that Nai Shivabhai Khetabhai and Nai Dhadabhai Khetabhai were made to put their

signatures on a sale deed Ex.40 in the guise of witnesses in sale deed for other land. Hence, this argument does not hold ground and deserves to be rejected. Hence, it cannot be said by stretch of any reasoning that the learned trial Judge has erred in holding that that suit land was not sold out to the defendants in consideration of Rs.32,000/- and also no possession was handed over to the defendants and that the sale deed Ex.40 was not registered by fraud and accordingly the learned trial Judge has not committed any error in refusing to decree the suit. Hence, the judgment and decree passed by the learned trial Judge does not warrant any interference in this appeal. Hence, points No.1 to 4 are answered in the negative.

Point No.5:

19) Therefore, following order is passed:

O R D E R

The appeal fails and is hereby dismissed.

The judgment and decree dated 28.11.2017 passed by the learned 2nd Additional Civil Judge,

Palanpur in R.C. Suit No.51/2011 is hereby confirmed.

In the facts and circumstances of the case, parties to bear their own costs.

Decree be drawn accordingly.

R & P be remitted to trial Court forthwith.

Pronounced in the open Court today, this 5th day of May, 2023.

P A L A N P U R.

Dated:05/05/2023.

**(Jatin Natvarlal Thakkar)
3rd Addil. District Judge,
B.K.DISTRICT, PALANPUR.
Code No.00542**

SNJ