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**IN THE COURT OF HON'BLE ADDITIONAL DISTRICT & SESSIONS
JUDGE, AHMEDBAD [RURAL] AT DHOLKA.**

Regular Civil Appeal No.11/2023

Exh.: _____

Appellants. [Org. Defendants No.1 to 5]	1:	Legal heirs of deceased Kanbhai Babhaibhai Parmar
	1/1	Bhavanbhai Kanbhai Parmar
	1/2	Kalubhai Kanbhai Parmar
	1/3	Babubhai Kanbhai Parmar
	2:	Valjibhai Babhibhai Parmar
	3:	Jagabhai Babhibhai Parmar
	4:	Ambarambhai Babhibhai Parmar
		All R/o Sindhrej, Vankarvas, Taluka-Dholka, District-Ahmedabad.
Versus		
		Legal heirs of Naniben D/o Meethabhai Kuberbai

	and W/o Ramjibhai	
Respondents No.1 to 6.[Org. Plaintiffs].	1:	Pravinbhai Ramjibhai Solanki Age:Major, Occup:Farming, R/o Village-Rupal, Taluka-Bavla, District-Ahmedabad.
	2:	Legal heirs of Bhavanbhai Ramjibhai Solanki
	2/1	Manguben Wd/o Bhavanbhai Solanki
	2/2	Kaushikbhai Bhavanbhai Solanki
	2/3	Sureshbhai Bhavanbhai Solanki
	2/4	Sanjaybhai Bhavanbhai Solanki
		All No.2/1 to 2/4 R/o Village-Rupal, Taluka-Bavla, District-Ahmedabad.
	3:	Kantibhai Ramjibhai Solanki Age:Major, Occup:Farming, R/o Village-Rupal, Taluka-Bavla, District-Ahmedabad.
	4:	Gangaben D/o Ramjibhai Solanki and W/o Rajnikant Chauhan Age:Major, Occup:Household work, R/o Vasana, Taluka-Sanand, District-Ahmedabad.
	5:	Punjiben D/o Ramjibhai Solanki and W/o Jethabhai Makwana Age:Major, Occup:Household work, R/o Maflipur, Taluka-Dholka, District-Ahmedabad.
	6:	Manguben D/o Ramjibhai Solanki and W/o Bachubhai Vaghela Age:Major, Occup:Household work, R/o Moraiya, Taluka-Sanand, District-Ahmedabad.
Respondents [Org. Plaintiffs No.7 to 10]		Legal heirs of Kankuben D/o Meethabhai Kuberbhai and W/o Talsibhai Lakum
As per order below	7:	Legal heirs of Bhikhabhai Talsibhai Lakum

Exh.47 & 49	7/1	Anandiben Wd/o Bhikhabhai Lakum
	7/2	Pankajbhai Bhikhabhai Lakum
	7/3	Kirankumar Bhikhabhai Lakum
	8:	Ratilal Talsibhai Lakum
	9:	Laaliben Talsibhai Lakum
	10:	Manguben Talsibhai Lakum
		All Nos.7 to 9 R/o Rajoda, Taluka-Bavla, District-Ahmedabad.

Sub: Appeal U/s 96 of the CPC.

APPEARANCE:

Ld. Advocate Mr. N.C. Parmar for the appellants.

Ld. Advocate Mr. B.G. Soyantar for the respondents.

:-J U D G M E N T:-

1. The **original defendants** are the the **appellants** herein and the **original plaintiffs** are **respondents** herein. But for the sake of convenience, the **appellants** will be mentioned as **defendants** and **respondents** will be mentioned as **plaintiffs** hereinafter. The **original suit has been filed by the plaintiffs against the defendants.**
2. The plaintiffs have filed the **Regular Civil Suit No.80/2008** before the Ld. Court of Additional Senior Civil Judge, Dholka(herein after referred as “**Ld. trial Court**”) and thereby plaintiffs have sought the declaratory decree and perpetual injunction relief and the Ld. trial

Court has partly allowed the plaintiffs' suit by the judgment and decree vide order dated 06.05.2023 passed below vide Exh.232.

3. Being aggrieved and dissatisfied with the order and decree dated 06.05.2023 passed by the Ld. trial Court, appellants/original defendants have preferred to file the present appeal under Order 96 of the CPC.
4. The appellants have enunciated the following grounds in the Appeal Memo which are as under;
 - A) The judgment and decree passed by the Ld. trial Court is against the record of the case and also against the principle of natural justice, therefore, order and decree passed by the Ld. trial Court is required to be quashed and set aside.
 - B) Order and decree passed by the Ld. trial Court is against the evidences adduced by the rival parties.
 - C) The Ld. trial Court has wrongly evaluated the evidences adduced on record.
 - D) Summons and notices were duly served to the defendants and defendants No.2 to 6 & defendant Nos.8 to 13 of the original suit were appeared before the Court and they have submitted the written statement and adduced the documentary evidence list, wherein, the writing of Motiben on the stamp paper and Will executed by Motiben as well as affidavit of witnesses, affidavits of neighbours surrounding the agricultural land and

tax receipts were adduced. It is further submitted that issues framed by the Ld. trial Court vide Exh.159 under Order 14 of CPC. Defendant No.1/4 has submitted the examination-in-chief affidavit vide Exh.209 and assessment Form of the house of Parmar Chandrakantbhai Jagdishbhai has been adduced vide Exh.210 dated 04.03.2023. Likewise, assessment form as to Lakhmanbhai Nagarbhai's house vide Exh.211 dated 11.12.2020, assessment extract form vide Exh.212 dated 11.02.2020 are the document of house of Valjibhai Babhaibhai. Likewise assessment form of the house of Ambarambhai Babhaibhai vide Exh.213 dated 11.12.2020, the affidavit of Mahobatsang Fulabhai Dabhi has been adduced vide Exh.214 dated 29.04.2008, affidavit of Shivubhai Ranchhodbhai Dabhi vide Exh.215 dated 29.04.2008, the mutation revenue entry No.4582 vide Exh.216 dated 03.02.2021, the tax bill of the house No.559 owner of house Kanabhai Babhaibhai vide Exh.217 as tax receipts dated 20.11.2009 and revenue mutation entry No.3940 vide Exh.225 dated 03.02.2021. The defendant No.1/4 has adduced the witness list vide Exh.218 and cited witness deposition has been adduced. The examination-in-chief order 18 Rule 4 of CPC vide Exh.219 has been adduced by witness Mahobatsang Fulabhai Dabhi. Likewise, examination-in-chief affidavit of Jitendrasinh Shivubhai Dabhi vide Exh.220, examination-in-chief of Kanubhai Somabhai Parmar vide Exh.226 and examination-in-chief vide Exh.227 of Tulsibhai Nagarbhai has adduced.

- E) It is further contended that the Ld. trial Court has recorded the deposition of plaintiff No.1 Pravinbhai Ramjibhai Solanki vide Exh.163. Plaintiffs have suppressed the material facts on record. Defendants have prima-facie case, balance of convenience are in favour of the defendants. Plaintiffs are failed to prove the issue No.1 to 3 and defendants No.1 to 13 have proved issue No.4. The disputed properties are in the occupation and possession of the defendant No.1 to 13, at this juncture, plaintiffs are not entitled to seek relief as prayed for.
- F) Ld. trial Court has given erroneous findings and made false observations, defendants are in the occupation and possession of the property since long back. The right of plaintiffs are extinguished as per the provision of Limitation Act. The Ld. trial Court has wrongly recognized the succession right of the plaintiffs and whatever evaluation have been made by the Ld. trial Court in favour of plaintiffs are absolutely erroneous, against the provision of Law and arbitrarily in nature and findings are perverse, defendants are in the occupation and possession of the property since the predecessor of the property late Babhaibhai despite, Ld. trial Court has not considered the said issues and false presumption has been made, therefore, order & decree passed by the Ld. trial Court are deserves to be quashed and set aside.

5. The brief facts of the plaintiffs' suit are as under:

- (a) The following suit lands have got by the original owner i.e. plaintiffs' grand-mother(Nani) Khaniben W/o Meethabhai

Kuberbhai Vankar as an agricultural tenant under Tenancy Act by the order of Competent Authority vide TNC 327 Case No.1819 dated 12.07.60 and the list of all those suit lands are as under:-

- 1) Account No.72, Block/Survey No.402, admeasuring 2-79-23 hq.sq.mtrs,
- 2) Account No.77, Block/Survey No.290 Paiki 2, admeasuring 0-28-33 hq.sq.mtrs,
- 3) Account No.77, Block/Survey No.47, admeasuring 0-14-16 hq.sq.mtrs,
- 4) Account No.77, Block/Survey No.110, admeasuring 2-72-15 hq.sq.mtrs,
- 5) Account No.78, Block/Survey No.485/7 Paiki admeasuring 1-90-20 hq.sq.mtrs and
- 6) Account No.645, Block/Survey No.342, admeasuring 0-64-75 hq.sq.mtrs.

[hereinafter all the above mentioned properties be referred as **‘suit properties’** for the sake of convenience]

- (b) It is further contended that plaintiffs’ grand-mother deceased Khaniben was having 4 daughters wherein 1. Veeruben Meethabhai, 2. Motiben Meethabhai, 3. Naniben and 4. Kankuben Meethabhai. Deceased Khaniben had executed one registered Will when she was alive on dated 05.02.1962 and it is declared that the right of Khaniben’s daughters in the above mentioned suit properties. Khaniben had died on dated 15.01.1973 and in pursuant to Will, revenue Entry No.3585 has been mutated and name of four daughters of deceased

Khaniben were inserted in the suit properties by way of succession right after submitting the application on dated 23.02.1973 and the revenue entry has been certified on dated 04.05.1973. Thus, suit properties are the joint family ownership property without partition amongst four daughters.

- (c) It is further contended that the marriage of elder daughter Veeruben was solemnized with Trikambhai at village-Lagdana and defendant No.14 to 17 are the legal heirs of deceased Veeruben and in the suit properties, defendant No.14 to 17 are also owner and no succession entry has been mutated as to same. The second daughter of deceased Khaniben namely Motiben Meethabhai marriage was solemnized at Rupal village and her marriage was divorced/dissolved therefore, she was staying alongwith her mother Khaniben at Sindhrej village and she was died without any legal heirs(issueless) on dated 22.01.1984. In pursuant to that in the share of deceased Motiben, false statement in the false manner and in collusion with Talati-cum-Mantri submitted the false Will and Pedigree, thereafter, Babhaibhai had inserted his name in the Revenue record and in the suit properties in question, there was no legal right despite, he became the co-owner in the suit properties.
- (d) It is further contended that Babhaibhai had died on dated 13.11.1997 and records of right entry No.4582, name of defendants No.1 to 8 were added as the co-owner in the suit properties but defendants No.1 to 8 have no right over the suit

properties. Record of rights revenue Entry No.4492 as an occupier name of Pitambar Narshibhai entry has been mutated as to revenue Survey/Block No.485/7 Paiki 5 for taking the care. It is further contended that third daughter of deceased Khaniben, namely Naniben's legal heirs are plaintiffs No.1 to 6 and Naniben died on dated 29.10.2004 at Rupal village and in the suit properties in question according to the succession entry, their names were entered as a co-owner in the records of right vide entry No.5472.

- (e) It is further contended that fourth daughter of deceased Khaniben's namely Kankuben's marriage was solemnized with Talisbhai Lakum at Rajoda village and after the death of Kankuben, their legal heirs are plaintiffs No.7 to 10 were joined as a plaintiffs and succession entry in the revenue record has not been mutated as a legal heirs of Kankuben and at present name of Kankuben is present as a record of rights entry, thus as a legal heirs of Khaniben, mere plaintiffs No.1 to 10 and defendants No.14 to 17 are joint co-owner of the suit properties despite, there is no right in the suit properties in question but defendants No.1 to 13 have created false rights and without partitioned the suit properties, created their right and without informing plaintiffs and without the permission of Panchayat, the house was build up in revenue Survey No.47 and on the land bearing No.485/7 Paiki 5, defendants No.8 to 13 had attempted to manufacture the bricks without the prior permission of Mamlatdar or Deputy Collector and if

they are not prevented to carry out manufacturing in the land, it is high probability that land will become unused.

(f) It is further contended that the defendants are high headed persons and plaintiffs have cultivated the land in question and if defendants success to prevent the plaintiffs to carry out the agricultural work and if defendants commit any tortuous act, in the circumstances, it is likelihood to cause loss and damages which would not be compensated in money. Defendants have no right, title and interest in the property in question therefore, cause of action has arisen to institute the suit and plaintiffs have sought the declaratory decree and perpetual injunction relief.

6. The summons and notices were duly served to the defendants and defendant Nos.1/2 to 1/4, defendants No.2, 3, 4, 5, 6, 8, 9, 10, 11, 12 & 13 were appeared before the Ld. trial Court through their Ld. advocates and defendant No.13/1 to 17 were not appeared before the Ld. trial Court. Defendant No.2 to 6 and defendants No.8 to 13 have submitted the written statement vide Exh.87 against the plaintiffs' suit/plaint and by & large, the facts of the plaint were refused to accept and it is contended that plaintiffs' suit is barred by mis-joinder and non-joinder of the parties as well as barred by Law of limitation. It is further stated that defendant No.7 died before 8 to 9 years to institute the suit. Plaintiffs have wrongly described the

incident of threatening and deceased defendant No.7 was present has been shown and false suit has been instituted. In the revenue Survey/Block No.47 since long back, the house of defendants No.1 to 4 are existing in the Panchayat record and possession of the land in questions are having defendant Nos.1 to 4 and plaintiffs are not in the occupation and possession. It is further stated that the land bearing Survey No.485/7 paiki 5 land was sold by Motiben Meethabhai on dated 04.05.1983 to Pitambarbhai Narsinhbhai and consideration amount has been obtained and writing made on the stamp paper. The possession of the disputed properties are not having of the plaintiffs and husband of defendant No.9 and defendant No.10 to 13 are in the occupation and possession of the suit properties. It is further submitted that in the land bearing revenue Survey No.110, defendants No.2 & 3 had executed one contract for manufacturing the bricks and said contract has been executed with Mahammad Ahemadbhai on dated 01.02.2008 and the said suit property is in the occupation and possession of the 3rd party and plaintiffs have not joined as a parties to the suit. It is further stated that plaintiffs have submitted the false and fabricated Will and false suit instituted against the defendants. Plaintiffs and their predecessor Motiben Meethabhai had executed one Will in

favour of the predecessor of defendants No.1 to 8 namely Babhaibhai on dated 15.01.1983 and Motiben has submitted the statement before the Talati at the relevant point of time and in pursuant to that defendants' predecessor Babhaibhai name was mutated and inserted in the revenue record and plaintiffs have taken misadvantage under the guise of the name inserted in the revenue record. It is further submitted that in the Will dated 05.02.1962, executor of Will had expressed intention that her daughter Motiben would administrate all the properties of deceased Khaniben and rest of other daughters would be followed as per the instruction of Motiben and Motiben had executed one Will in favour of Babhaibhai on dated 15.01.83 and in pursuant to the said Will, in the revenue record Entry No.3940 dated 25.06.84 and Motiben had died on dated 22.03.1984, the sisters of Motiben namely Veeruben, Naniben and Kankuben were appeared before the Talati and submitted their statement in favour of Babhaibhai before the Talati and in pursuant to that name of defendants were mutated in the revenue record. It is further stated that plaintiffs are illegally and falsely added their name in the revenue record and with mala-faide intention, plaintiffs have instituted the suit.

7. Ld. advocate for the appellants has filed written submissions and vehemently argued that the order and decree passed by the Ld. trial Court in RCS No.80/2008 are illegal, un-just, mis-interpretation of law and not evaluated the evidence on record and Ld. trial Court has unnecessary given the weithage to the evidences adduced by the plaintiffs/respondents therefore, the judgments and order are erroneous, therefore, the judgement is required to be reversed.
8. The summons and notices have been duly served to the respondents and the respondents No.1 and respondents No.2/2 to 2/4 and respondents No.3 to 6 have appeared through their Ld. advocate before the Court and filed the written submissions against the appeal vide Exh.17, by & large, respondents/plaintiffs have declined to accept the grounds of appeal memo and further submitted that the judgment and decree passed by the Ld. trial Court is correct, legal and accordingly to natural justice and the Ld. trial Court has rightly observed the evidences produced by them and lastly prayed to dismiss the appeal.

9. Having regards to the contentions raised by the parties, it is pertinent to note that, considering the pleadings of the parties to the suit for final adjudication, following points have been arisen for the determination of this appeal.

Points for determination

- 1) Whether the plaintiffs prove that they and defendant Nos.14 to 17 are the joint owners and occupants of the suit properties ?
- 2) Whether the plaintiffs prove that they and defendant Nos.14 to 17 are in actual possession of the suit properties?
- 3) Whether the plaintiff proves that the defendant Nos.1 to 13 have no right, title or interest in the suit properties?
- 4) Whether the defendant Nos.1 to 13 proves that they are in actual possession of the suit properties?
- 5) Whether the plaintiffs are entitled to get relief as prayed for?
- 6) Whether the defendants/appellants herein prove that the judgment and decree passed in Reg. Civil Suit No.80/2008 below Exh.232 on dated 06.05.2023 is perverse, erroneous, arbitrary and against the provision of Law and is required to be set aside?
- 7) What order and decree ?

10. Reply of the above points for the reasons recorded herein are as under:

- 1) In affirmative.
- 2) In affirmative.
- 3) In affirmative.
- 4) In Negative.
- 5) Partly affirmative.
- 6) In Negative.
- 7) As per final order.

:- REASONS :-

Points Nos.1 to 6:-

11. All the above mentioned points are connected one another, therefore, for the sake of brevity, all the points are discussed hereinafter all together.

12. The ratio laid down by the **Hon'ble Apex Court in Civil Appeal No.670-671 of 2011 in case of C. Venkata Swamy vs. H. N. Shivanna (D)** are required to be considered and it is held that:-

"11. It is a settled principle of law that a right to file first appeal against the decree under Section 96 of the Code is a valuable legal right of the litigant. The jurisdiction of the first Appellate Court while hearing the first appeal is very wide like that of the Trial Court and it is open to the appellant to attack all findings of fact or/and of law in first appeal. It is the duty of the first Appellate Court to appreciate the entire evidence and arrive at its own

independent conclusion, for reasons assigned, either of affirmance or difference.

12. Similarly, the powers of the first Appellate Court while deciding the first appeal are indeed well defined by various judicial pronouncements of this Court and are, therefore, no more res integra. It is apposite to take note of the law on this issue.

13. As far back in 1969, the learned Judge – V.R. Krishna Iyer, J (as His Lordship then was the judge of Kerala High Court) while deciding the first appeal under Section 96 of the Code in Kurian Chacko vs. Varkey Ouseph, AIR 1969 Kerala 316, reminded the first Appellate Court of its duty to decide the first appeal. In his distinctive style of writing with subtle power of expression, the learned judge held as under:

“1. The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal, the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.

2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court.

3. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation.....” (Emphasis supplied)

14. This Court also in various cases reiterated the aforesaid principle and laid down the powers of the Appellate Court under Section 96 of the Code while deciding the first appeal. We consider it apposite to refer to some of the decisions.

15. In Santosh Hazari vs. Purushottam Tiwari (Deceased) by L.Rs. (2001) 3 SCC 179, this Court held (at pages 188-189) as under:

“15.....the appellate court has jurisdiction to reverse or affirm the findings of the trial court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the

parties for decision of the appellate court.....while reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate court had discharged the duty expected of it.....”

16. The above view was followed by a three-Judge Bench decision of this Court in **Madhukar & Ors. v. Sangram & Ors.**, (2001) 4 SCC 756, wherein it was reiterated that sitting as a Court of first appeal, it is the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings.

17. In **H.K.N. Swami v. Irshad Basith**, (2005) 10 SCC 243, this Court (at p. 244) stated as under: (SCC para 3)

“3. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard both on questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. Unfortunately, the High Court, in the present case has not recorded any finding either on facts or on law. Sitting as the first appellate court it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording the finding regarding title.”

18. Again in **Jagannath v. Arulappa & Anr.**, (2005) 12 SCC 303, while considering the scope of Section 96 of the Code, this Court (at pp. 303-04) observed as follows:

“2. A court of first appeal can reappreciate the entire evidence and come to a different conclusion.....

19. Again in **B.V Nagesh & Anr. vs. H.V. Sreenivasa Murthy**, (2010) 13 SCC 530, this Court taking note of all the earlier judgments of this Court reiterated the aforementioned principle with these words:

“3. How the regular first appeal is to be disposed of by the appellate court/High Court has been considered by this Court in various decisions. Order 41 CPC deals with appeals from original decrees. Among the various rules, Rule 31 mandates that the judgment of the appellate court shall state:

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled.

4. *The appellate court has jurisdiction to reverse or affirm the findings of the trial court. The first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate court must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. Sitting as a court of first appeal, it was the duty of the High Court to deal with all the issues and the evidence led by the parties before recording its findings. The first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings. (Vide Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179 at p. 188, para 15 and Madhukar v. Sangram, (2001) 4 SCC 756 at p. 758, para 5.)*

5. *In view of the above salutary principles, on going through the impugned judgment, we feel that the High Court has failed to discharge the obligation placed on it as a first appellate court. In our view, the judgment under appeal is cryptic and none of the relevant aspects have even been noticed. The appeal has been decided in an unsatisfactory manner. Our careful perusal of the judgment in the regular first appeal shows that it falls short of considerations which are expected from the court of first appeal. Accordingly, without going into the merits of the claim of both parties, we set aside the impugned judgment and decree of the High Court and remand the regular first appeal to the High Court for its fresh disposal in accordance with law.”*

13. Whereas, before determining the controversial question between the parties to the suit, it is the duty of the appellate Court to consider the cause of action, relief sought by the plaintiff as well as contention raised by plaintiff in the pleadings of the suit. The Civil Appeal is the continuation of civil suit therefore, Court has to look into the

grass root or genesis of dispute between the parties to the suit. The plaint are very important material.

14. First of all, plaintiffs have sought the relief of declaratory decree and also sought the relief of perpetual injunction with regards to the suit properties.
15. At the time of appreciation of evidence in civil case, principle of preponderance of probability only be taken into consideration. When any civil suit, any admission made by any parties to the suit while he/she is stepping into the witness box are become very valuable oral evidence but it is the duty of the civil Court to consider admissions which are relevant to the facts of the case. Irrelevant admission or any exaggeration of admission which are not connected to the facts of the case would not get the much more weightage but any admission has been made by any party which are relevant to the facts as well as documentary evidences to the case are material admissions.
16. In the Civil Cases, principle of preponderance of probability are very much important and without considering the principle of preponderance of probability, Court cannot be determined the

controversial questions between the parties to the suit and admissions made by any parties to the suit are also taken into consideration. Defendants No.14 to 17 have not challenged the plaintiffs' suit/case original owner of the suit properties was being an agricultural tenant Mrs. Khaniben Meethabhai and after death of Khaniben Meethabhai, her daughters namely Motiben, Veeruben, Naniben and Kankuben names were mutated in the record of rights revenue Entry No.3585 as succession right on dated 23.02.1973. Motiben got divorced from her husband and she was residing alongwith her mother Khaniben at Sindhrej village and other sisters were staying at their respective matrimonial home. Looking to the documentary evidences as well as oral evidences, no partition took place amongst Mrs. Khaniben's legal heirs/daughters thus, all the suit properties vide record of rights revenue Entry No.3585 is the co-ownership and joint property of the daughters of Mrs. Khaniben Meethabhai as per revenue Entry dated 23.02.1973. It is the duty of the defendants to submit the challenging facts against the non-partition and against the ownership property but defendants are failed to adduce any trustworthy/satisfactory evidence against the facts of the plaintiffs averments. Whether one co-owner Motiben was entitled to transfer the inherited property without written

consent and in pursuant to that Will was executed or not? such type of rights can be decided according to the provision of Indian Succession Act and when any female died without legal heirs, therefore, Indian Succession Act provision comes into operation. Deceased Khaniben Meethabhai has executed one Will in favour of her four daughters on dated 05.02.1962 but original copy of the Will has not been adduced and according to the provision U/s 61 of the Indian Evidence Act, any documents may be proved by primary or secondary evidence. The original copy of the Will executed by deceased Motiben in favour of Babhaibhai are not produced. It is obvious that after the death of Khaniben, her existing legal heirs were only four daughters and according to Hindu Succession Act, 15 & 16, all the properties of deceased Khaniben are handed over to her daughters as of heirs. According to the succession right, the suit properties are the co-ownership properties of Mrs. Khaniben. Four daughters names entered hereinabove. When plaintiff No.1 & defendant No.14 to 17, mother is the co-owner of the suit properties in question, therefore, after the death of mother of plaintiffs and defendant No.14 to 17, since daughters and husbands are the legal heirs and defendants No.14 to 17 are not come within the purview of the legal heirs so, occupation and possession of the property in

question are not having defendants by legal way and plaintiffs and defendants No.14 to 17 are the joint owner and occupancy as to properties in questions.

17. The Ld. trial Court has squarely relied upon the ratio laid down by the Hon'ble Apex Court in case of **Anathula Sudhakar Vs. Buchi Reddy (Dead) by L.R.s & Ors. 2008(2) 660.**
18. Considering the above ratio and guidelines given by the Hon'ble Apex Court with regards to the possession, it is the duty of the claimant as to continue in possession of another property, it is the duty and obligation on the claimants that he has to plead which specifically about who was the owner on what date did he enter into possession and in what capacity and in what manner did he conduct his relationship with owner over the years till the date of suit and claimant must give details on what basis claiming a right to continue in possession. Until the pleading raised a sufficient case, they will not constitute sufficient claim of defence. Having regards to the deposition of 3rd parties in favour of defendants to show the position and considering the evidences adduced on records, all those witnesses would not know the dispute and controversial questions as well as position. The defendants' houses are existing in land bearing

revenue Survey No.47 and bricks manufacturing unit is existing in the revenue Survey No.110. In pursuant to that according to the documentary evidences vide Exh.210 to Exh.217 and Exh.226, defendants are not occupation and possession of the suit property and it is also not proved by the defendants that the said facts was well within the knowledge of original owner. Possession was without the consent and said possession was within the knowledge of the plaintiffs. It is the settled principle of adverse possession are “permissive possession is not adverse and adverse possession is not permissive” and the theory of adverse possession since long back has not been proved by the defendants on vague pleadings are not sufficient. Who are in possession/occupation or otherwise living with him, in what capacity as family members, friend or servants etc. are possession are very material basis of claimant that not to deliver possession but continue in possession are very important factor.

19. Ld. trial Court has pointed out the following provisions of Section 5 & Section 54 of the Transfer of Property Act, 1882 which are as under:

Section 5, “Transfer of property” defined.—*In the following sections “transfer of property” means an act by which a living person*

conveys property, in present or in future, to one or more other living persons, or to himself, or to himself and one or more other living persons; and “to transfer property” is to perform such act. In this section “living person” includes a company or association or body of individuals, whether incorporated or not, but nothing herein contained shall affect any law for the time being in force relating to transfer of property to or by companies, associations or bodies of individuals.

Section 54, “Sale” defined.—*“Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised. Sale how made.—*

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument. In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property. Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property. Contract for sale.—A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.”

20. In view of the above provisions, sale is an exchange of ownership.

No transfer has been came into the operation in favour of deceased Babhaibhai and Pitambarbhai Narsinhbhai and no transfer has been taken place, therefore, the ownership of the property are not in favour of defendants except defendants No.14 to 17. In so far as the ownership of defendants No.14 to 17 are concerned, rest of other defendants have no right as a ownership according to the provision

U/s 44 of the Transfer of Property Act and according to the Section 44 of the T.P. Act, co sharer/co-owner of immovable property legally competent in that behalf transfer his share of such property or any interest therein, the transferee acquires as to such shares or interests and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment.

21. Looking to the above provision, considering the pleadings, proof and prove, whether co-owner Motiben was competent to transfer the suit property in favour of anybody by Will or any other mode or not? No iota of evidence with regards to it has been adduced by the defendants and Babhaibhai is not the legal heirs of deceased Motiben U/s 15 of the Hindu Succession Act, 1956 and defendants have no right over the suit properties and as per section 44 of the T.P. Act, co-sharer/co-owner would transfer the joint property but it is established in the provision that co-owner/co-sharer can be transferred its respective share when share are equal. Deceased Babhaibhai is not the legal heirs of deceased Motiben at all, if any transfer has been executed by Will and original Will has not adduced and Will is not proved, therefore, it is the settled position of Law

that any transfer/exchange of ownership must be executed as per registered sale-deed and defendants are not the legal and competent owner of the property.

22. Plaintiffs have successfully proved that suit properties are joint properties and they are in the occupation and possession. Defendants are not in the occupation and possession as discussed hereinabove in the suit properties legal heirs daughters of deceased Khaniben have co-owner/co-sharer right as a succession right. In suit to prove their right, title and interest in the property in question. The possession are also not proved by defendants No.1 to 13. The provision of u/s 34 of the Specific Relief Act which are

Section 34. Discretion of court as to declaration of status or right.—Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief: Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Section 36. Preventive relief how granted.—Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

Section 38. Perpetual injunction when granted.—

- (1) Subject to the other provisions contained in or referred to by this Chapter, a perpetual injunction may be granted to the plaintiff to prevent the breach of an obligation existing in his favour, whether expressly or by implication.
- (2) When any such obligation arises from contract, the court shall be guided by the rules and provisions contained in Chapter II.
- (3) When the defendant invades or threatens to invade the plaintiff's right to, or enjoyment of, property, the court may grant a perpetual injunction in the following cases, namely:—
 - (a) where the defendant is trustee of the property for the plaintiff;
 - (b) where there exists no standard for ascertaining the actual damage caused, or likely to be caused, by the invasion;
 - (c) where the invasion is such that compensation in money would not afford adequate relief;
 - (d) where the injunction is necessary to prevent a multiplicity of judicial proceedings.

23. Considering the above provisions, plaintiffs are entitled to get the relief of perpetual injunction as well as declaratory decree also.

24. Defendants have raised the dispute that plaintiffs' suit is barred by Law of limitation. Dispute of limitation is the mixed question of Law and facts and looking to the cause of action denoted in the plaint, defendants have forcefully attempted to snatch the possession and also tried to encroach in the legal possession of the plaintiffs and absolutely the act of defendants are to breach the legal rights of the plaintiffs and invasion over the legal rights of plaintiffs also and thereafter, cause of action has been arisen. The limitation period for

seeking declaratory decree and perpetual injunction are 3 years as per Article 58 of the Limitation Act. Deceased Motiben had made transaction in favour of Babhaibhai as per the revenue entry of records of rights but they are not parties to the records of right revenue of Entry no.4492 and when plaintiffs came before the Court after cause of action has been arisen and to institute the suit before the Civil Court within 3 years limitation period, therefore, the plaintiffs' suit is not barred by Law of limitation and suit instituted by the plaintiffs within the limitation period. The ratio laid down by the Hon'be Apex Court in the case of **Becharbhai Zaverbhai Patel Vs. Jashbhai Shivabhai Patel**, GLR 51(1) 398 and **Krishnamurthy S. Setular Vs. O.V. Narsimha Shetty**, 2019(SC) 47.

25. The above both the dicumts are not supporting the arguments advanced by the Ld. advocate for the defendants and possession of the plaintiffs' predecessor was as a co-sharer/co-owner and after the death of the predecessor of the plaintiffs, being a successor, plaintiffs have every legal right, title and interest over the suit properties in question and plaintiffs are entitled to get the equitable relief as prayed for.

26. I have carefully considered the submissions made by the learned Advocate for the appellants/defendants and gone through the record & proceedings of the Ld. trial Court. Looking to the impugned judgment and decree passed by the Ld. trial Court, the Ld. trial Court has elaborately discussed in the judgment about oral evidence produced by the plaintiffs side and defence raised by the defendants side also.
27. I have considered the rival submissions and having heard both the parties it clearly emerges that the submission of appellants/defendants in the present appeal are not plausible, just and proper. The same have, in my opinion, no need to interference in the decree and order and reasons recorded by the Ld. trial Court because findings are just and proper. Appellants/defendants are failed to make out the valid and sustainable case for appeal and I do not find any material which is pointed out to me from the record which make me to come to the conclusion that the decree and order passed by the Ld. trial Court is against the plaintiffs/respondents. The Ld. trial Court has not erred in passing the decree. The Ld. trial Court has passed the impugned judgment and decree in favour of

plaintiffs/respondents and it cannot be said to be erroneous capricious and perverse.

28. The Ld. Trial Court i.e. Ld. Court of Additional Senior Civil Judge, Dholka has partly allowed the suit of the plaintiffs and passed the order and decree below Exh.232 vide order dated 06.05.2023 are just and proper. The reasons recorded, observations made, findings given by Ld. Trial Court in its Judgment and Order are not erroneous, not arbitrary and not perverse, therefore, no need to interfere to the Judgment and Order of the Ld. trial Court and looking to the findings given by Ld. trial Court, it is not against the provision of law. However, of course, being a Appellate Court, it is the duty to add some findings and reasons for the adjudication of present appeal, that is why, this Appellate Court has categorically discussed in details hereinabove but this Appellate Court has included some findings additional to the observations made by the Ld. trial Court. So, considering the merits of the case, Judgment and Decree passed by the Ld. Trial Court are required to be affirmed and also deserves to be affirmed. Hence, Points No.1 to 6 are decided accordingly and the following Order is passed for Point No.7 in the interest of justice.

Point No.7:

29. In view of the above deep discussion, findings arrived, reasons recorded and observation made in the present appeal is required to be dismissed and deserves to be dismissed. Hence, in the interest of justice, I pass the following order:-

∴-ORDER-∴

- Regular Civil Appeal No.11/2023 is hereby **dismissed**.
- The Judgment and decree passed by the Ld. Court of Additional Senior Civil Judge, Dholka in **Regular Civil Suit No.80/2008** on dated 06.05.2023 is hereby confirmed.
- The findings and observations made by Ld. trial Judge with regards to the points are hereby confirmed.
- Looking to the facts and circumstances of the case, no order as to costs.
- Decree be drawn accordingly.
- Copy of this judgment along with the Records & Proceedings be sent to the Ld. trial Court.

Signed & Pronounced in the open Court on this 31st day of May, 2025.

[Naresh Girikant Dave]
Additional District & Sessions Judge,
Ahmedabad (Rural) at Dholka.
(UIC No.GJ00467.)

Date :31/05/2025.
Place:Ahmedabad.
P.D.Mishra