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सत्यमेव जयते

**IN THE COURT OF THE PRINCIPAL DISTRICT JUDGE
AT DAHOD**

**Regular Civil Appeal No.35/2019
Exh.10**

APPELLANT :- Savitaben Gangjibhai Bhabhor
Through Her Power of Attorney Holder :-
Bhabhor Gangjibhai Chatrabhai,
Aged 60 Years, Occupation : Retired,
Resident of Dahod, Tal. & Dist. Dahod.

VERSUS

RESPONDENT :- Pargi Parvatiben Rupsingbhai,
Aged 62 Years, Occupation : Household
Work, Resident of Hajariya Faliyu,
Dahod, Tal. Dist.Dahod.

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LEARNED ADVOCATES FOR THE PARTIES

Mr. A. R. Chauhan : Ld. Adv. For Appellant
Mr. D. B. Trivedi : Ld. Adv. For Respondent

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APPEAL U/SEC.96 OF THE CIVIL PROCEDURE CODE**-: J U D G M E N T :-**

(1) Appellant - Savitaben Gangjibhai Bhabhor through her power of attorney holder has preferred present regular civil appeal under Section 96 of the Civil Procedure Code (herein referred to as 'the C. P. C.' in short) against respondent Parvatiben Rupsingbhai Pargi being aggrieved and dissatisfied with the judgment and decree dated 29.09.2017 passed by the learned 3rd Additional Senior Civil Judge, Dahod in Regular Civil Suit ('R. C. S.' in short) No.209/2010 whereby the suit filed by the plaintiff (appellant herein) came to be rejected.

(1.1) The appellant is original plaintiff and the respondent is original defendant No.1 in the suit before the learned trial Court. Therefore, for the sake of convenience and brevity, they are referred to as per their original character as plaintiff and defendant No.1 in this judgment.

(2) The case of respective parties before the learned trial Court can be summarized as under :

(2.1) The plaintiff filed a civil suit bearing R. C. S. No.209/2010 before the learned trial Court with the case that a land bearing Revenue Survey No.158, admeasuring Hectare 0-32-38 Sqr. Mtr., situated at village Dahod Kasba which is jointly owned by the plaintiff and the defendant No.1, who are real sisters. It is a new tenure land restricted by Section 73AA of the Land Revenue

Code. It was purchased in Year 1986 and was confiscated to the Government due to breach of conditions. Afterwards, it is repurchased by the plaintiff in auction after payment of premium. Houses of the plaintiff and defendant No.1 are situated in the said land and other portion of the land is open and in possession of the plaintiff and there is no demarcation of the open land.

(2.2) It is the case of the plaintiff that the defendant No.1 is conspiring to alter the actual position of the suit land and as her relative is working as Shirestedar in Revenue Court, order partitioning the suit land in to two is passed and on the basis of the order and with the help of defendant No.2 Talati, she is trying to take over the possession of the land for the purpose of making partition and separating the revenue record of the land though no partition is effected nor separate maps of the land exists. Against the order passed by Dy. Collector, the plaintiff filed an appeal before the Revenue Court but since she holds the possession of the land, civil court has jurisdiction over the land so to prevent the defendant No.1 from partitioning the land on the basis of order passed by Dy. Collector and to maintain the status-quo of the suit land, she has filed the instant civil suit against the defendants in the Civil Court.

(2.3) The case of the plaintiff is that since she deposited premium amount and filed other litigation, her name came to be entered in revenue record and while passing the order, condition No.2 was imposed by the Deputy Collector that the land in question shall not be sold, mortgaged, gifted or transferred in any

manner to any one or shall not be partitioned without prior permission of the Collector. The Defendant No.1 has with a view that the land may be confiscated to the government due to breach of condition by way of partition and she may repurchase the land in auction and thereby, become sole owner of the entire land. Against this act, the plaintiff issued a notice upon the defendant No.1 and filed this suit with the prayer not to partition the land.

(2.4) The defendant No.1 appeared before the learned trial Court and raised various contentions by filing written statement vide Exh.23. It is the say of the defendant No.1 that partition is made in the suit land on the basis of order passed by the Competent Authority and the land came to be partitioned, therefore, there is no case of breach of condition or confiscation to the government. It is contended that the suit is barred by the principle of suppression of material facts and the plaintiff has come before the Court by hiding true facts. Further, the suit is barred by Section 11 of the Revenue Jurisdiction Act as the plaintiff has not exhausted all remedies available to her before the Revenue Authority. The appeal filed before the Collector is pending. The plaintiff cannot seek one and same relief before two different Competent Authorities at the same time. Further, the suit is barred by mis-joinder of parties and non-joinder of necessary parties. It is accordingly urged to reject the suit filed by the plaintiff with costs.

(2.5) Defendant No.2 Talati Cum Mantri, Dahod filed written statement vide Exh.21. It is contended that whatever the works

done by the defendant No.1 are the works in the capacity of Talati under the order of his Superior Officer and in the official capacity, therefore, without joining the Government as party in proceedings under Sec.79 of the C. P. C., the suit is barred by non-joinder of necessary party. It is submitted that the plaintiff is in dispute with the defendant No.1 being his sister has mis-joined him as party in proceedings. The defendant No.2 has only to carry out Panchnama but other works are not performed by him. Whatever partition has been made, is the result of order of the Deputy Collector and Mamlatdar has certified the said entry. Moreover, the Civil Court has no jurisdiction to hear this suit. Lastly it was requested to dismiss the civil suit filed by the plaintiff.

(3) On the basis of averments of the parties, the learned trial Court framed Issue Nos.1 to 8 vide Exh.27 and recorded oral as well as documentary evidence adduced by both the parties which have been referred in the impugned judgment. After recording the evidence of parties and hearing the arguments on behalf of both parties, the learned trial Court has passed the impugned judgment & decree on 29.09.2017 and disallowed the suit filed by the plaintiff. The said judgment and decree are challenged by the appellant i.e. original plaintiff by way of filing this regular civil appeal.

(4) It is pertinent to note that initially, the only respondent - defendant herein appeared before the Appellate Court through her learned Advocate and the matter was adjourned on her

request to file objections but though sufficient time was granted, the respondent did not file objection to this appeal and thereby, the respondent remained gross negligent in filing objection, therefore, right of respondent to file cross-objection has been closed by the then Additional District Judge, Dahod vide order dtd.08.09.2021. The plaintiffs to prove the case before the Trial Court has adduced following documentary evidence.

Sr. No.	Description of Document	Exh.	Date
1.	Certified copy of form NO.8/A of R.S. No.69/2	53	10.12.2014
2.	Certified copy of village Form No.7/12 of R.S/ No.69/2	54	10.012.2014
3.	Certified copy of Village Form No.6 of R.S. No.69/2	55	10.12.2014
4.	Certified copy of village form No.6 of R.S. No.69/2	56	01.04.1983

(5) The defendants have produced the following documentary evidence:

Sr. No.	Description of Document	Exh.	Date
1.	Certified copy of form NO.8/A of R.S. No.69/2	70	16.12.2010
2.	Certified copy of village Form No.7/12 of R.S/ No.69/2	71	26.07.2012
3.	Certified copy of Village Form No.7/12 of R.S. No.69/2	72	16.12.2010
4.	Compromise Deed between plaintiff and defendant	73	17.10.2011

(6) The learned Trial Judge framed the following issues vide Exh.27 on 23.06.2011:

૧. શું વાદી પુરવાર કરે છે કે મોજે દાહોદ કસબા રે. સ. નં.૧૫૮ હે. આર. ૦-૩૨-૩૮ વાળી જમીન મહેસુલ નિયંત્રિત સત્તા પ્રકારની ૭૩એએ વાળી અને પ્રતિવાદીઓની નં.૧ની સંયુક્ત માલિકી કબજા ભોગવટામાં આવેલી છે ?
૨. શું વાદી પુરવાર કરે છે કે દાવાવાળી મિલકતમાં વાદી અને પ્રતિવાદી નં.૧ના રહેવાના મકાન છે અને બાકીની ખેતીની ખુદ્દી જમીનમાં વાદીનો કબજો ભોગવટો છે અને તેનો ઉપયોગ કરે છે ?
૩. શું વાદી પુરવાર કરે છે કે સદર તકરારી મિલકતના હિસ્સા કે નકશા અલગ નહીં હોવા છતાં પ્રતિવાદી સદર જમીનમાં હિસ્સા પડાવવાનો પ્રયત્ન કરી પ્રતિવાદી નં.૨ જોડે મળી ભળી જઈ કબજો છીનવવાનો પ્રયત્ન કરી રહેલ છે ?
૪. શું વાદી પુરવાર કરે છે કે તા.૨૨/૪/૮૭ના રોજ નાયબ ડેપ્યુટી કલેક્ટરશ્રીએ કરેલ હુકમમાં શરત નં.૨ મુજબ તકરારી મિલકતમાં કલેક્ટરશ્રીની પરવાનગી મેળવવા સિવાય વેચાણ, ગીરો, બક્ષીસ કે ભાગલા પાડી શકાશે નહીં ?
૫. શું પ્રતિવાદી પુરવાર કરે છે કે સદર દાવાને જરૂરી પક્ષકારોની ખામીનો બાધ નડે છે ?
૬. શું પ્રતિવાદી પુરવાર કરે છે કે સદર દાવાને હકૂમતનો બાધ નડે છે ?
૭. શું વાદી માંગ્યા મુજબની દાદ મેળવવા હકદાર છે ?
૮. શું હુકમ અને હુકમનામું ?

(7) The learned Trial Judge has replied the above issues as under :

1. Partly affirmative and partly negative
2. Affirmative.

3. Negative
4. Affirmative.
5. Affirmative.
6. Affirmative.
7. Negative.
8. As per final order.

(8) After considering the above stated all materials, which are on record the Ld. Additional Civil Judge, Dahod dismissed the suit bearing R. C. S. No.94/2012 by judgment dated 03.07.2019 and the original plaintiff being aggrieved by said judgment and decree, have filed the present appeal.

As to Maintainability of Appeal :-

(9) General provision as to filing of first appeal has been provided in sec.96 of the code of Civil Procedure 1908. Sec. 96 says that save where otherwise expressly provided, in the body of this code or by any other law for the time being in force, an appeal shall lie from every decree, passed by any court, exercising original jurisdiction, to the court authorized to hear appeals from the decisions of such court.

THE POWER OF APPELLANT COURT AS PROVIDED UNDER THE ORDER 41 RULE 33 OF THE CODE OF CIVIL PROCEDURE, 1908 :-

(10) Under O-41 Rule-33 of the Code of Civil Procedure, 1908, the power of court of appeal has been provided and it is reproduced herein as under :-

"O41 R. 33: Power of Court of Appeal - The Appellate Court shall have power to pass any decree and make any other order which ought to have been passed or made and to pass or-make such further or other decree or the order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favor of all or any of the respondents or parties, although such respondents or parties, may not have filed any appeal or objection 1.1. Ins. by Act 104 of 1976, Sec. 87 (w.e.f. 1st February, 1977). [and may, where there have been decrees in cross-suits or where two or more decrees are passed in one suit, be exercised in respect of all or any of the decrees, although an appeal may not have been filed against such decrees] : "

(11) Therefore, by reading said provision it is quite clear that the court of appeal can pass any order or decree which ought to have been passed and such power can be exercised against any party to the proceedings and appeal court is empowered to re-appreciate evidence and record its own findings.

(12) The powers of the first appellate court while deciding the first appeal under Section 96 read with Order 41 Rule 31 of the Code of Civil Procedure, 1908 are indeed well defined by various judicial pronouncements of Hon'ble Superior Court and are, therefore, no more res-integra. Some of the Judgments are discussed herein below to better understand the scope of Appellate court.

(13) As far back in 1969, Hon'ble Justice Mr. 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 C. P. C. in Kurian Chacko vs. Varkey Ouseph, AIR 1969 Kerala 316, reminded the first appellate court of its duty as to how the first appeal under Section 96 should be decided. In his distinctive style of writing and subtle power of expression, the Hon'ble Justice 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. 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)

Standard of Proof :-

(14) The Evidence Act, 1872 provides as regards how evidence becomes admissible, impact of evidence and how and when any fact can be said to be proved. In interpretation clause of The Evidence Act, 1872, the interpretation of proved has been given as under :

“proved” .- “A fact is said to be proved when, after considering the matter before it, the Court either believes it to exist, or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists.”

(15) Second part of said clause says as to standard of prudent man and it is settled proposition of civil jurisprudence that standard of proof in civil matter is preponderance of probability. It means such degree of probability as would satisfy the mind of a reasonable man as to the existence of a fact. Thus herein also court has to keep said standard in mind while evaluating the evidence.

(16) This Court has heard the arguments of learned Advocate Mr. A. R. Chauhan on behalf of the plaintiff-appellant and learned Advocate Mr. D. B. Trivedi on behalf of the defendant-respondent.

(17) Learned Advocate Mr. A. R. Chauhan on behalf of the appellant has submitted in his arguments that the plaintiff was not informed regarding the pronouncement of impugned judgment

and decree and she came to know regarding impugned judgment & decree when she was served notice of Caveat Application on 25.12.2017. It is submitted that the judgment & decree passed by the learned Civil Court are illegal, erroneous, against the oral and documentary evidence produced on record and without proper appreciation of the evidence led before the Court. It is submitted that the impugned judgment will cause damage to the possession of the plaintiff upon the suit land as such the defendant is of the intention to take over the possession of suit land. In-fact, the learned Civil Court though appreciating the evidence before the Court, has overlooked the attempt of the defendant to cause damage to the civil right of the plaintiff and to take over the possession of suit land without following due process of law. The impugned judgment is against the evidence on record as the defendant has admitted in cross-examination that she has filed application to make equal partition of land and the plaintiff has more land on the spot. It is contended that though the learned Civil Court has accepted the possession of the plaintiff over the open land and has held that the suit land cannot be sold, mortgaged, gifted or partitioned without prior permission of the Collector, the suit filed by the plaintiff has been rejected, which is against the evidence on record. It is accordingly urged to allow this appeal by quashing and setting aside the judgment and decree passed by the learned Civil Court and also to allow the prayer made by the plaintiff in the suit.

(18) As against this, learned Advocate Mr. D. B. Trivedi on behalf of the respondent has submitted in his arguments that the

civil suit filed by the plaintiff is rightly rejected by the learned trial Court and the judgment & decree passed by the learned trial Court are just and on the line of evidence on record and no error is committed by the learned Civil Court by disallowing the suit filed by the plaintiff. It is submitted that during the course of proceedings of civil suit, Issues were framed by the learned Civil Court wherein Issue No.5 and 6 are important and relevant to decide the controversy between the parties, for which the learned Civil Court has discussed in Para (10) & (11) of the judgment. The learned Civil Court has held that the plaintiff has not explained as to non-joinder of necessary party i.e. Government as such the Government is necessary party under Section 79 of the C. P. C. and without joining the Government as a party in proceedings, the suit is barred by the principle of non-joinder of necessary party. Further, the learned Civil Court has taken into consideration Section 11 of the Revenue Jurisdiction Act and held that the suit filed by the plaintiff is premature as such the plaintiff has not exhausted all the remedies provided under the Land Revenue Code. It is further submitted that the orders passed by the Competent Authority and produced vide Exh.77, Exh.78 and Exh.79 before the learned Civil Court are in favour of the defendant. So, the judgment and decree passed by the learned trial Court is according to the evidence on record and no interference is required by this Court in this appeal. Accordingly, the appeal requires to be dismissed with costs.

(19) I have perused the entire record of the court below, heard arguments of L.A.s of the parties and considering the matter

following points under order 41 rule 31 of the C. P. C. arose for my consideration in the present appeal.

ISSUES

1. Whether the appellant / plaintiff proves that the suit land was allotted to her and is of her exclusive ownership and in her exclusive possession ?
2. Whether the appellant / plaintiff proves that the suit land is not partitioned between the two sisters ?
3. Whether the appellant / plaintiff proves that the impugned judgment and decree dtd. 29.09.2017 passed by the learned 3rd Additional Senior Civil Judge, Dahod in Regular Civil Suit No.209/2010 are erroneous, capricious, perverse and arbitrary in nature and liable to be set-aside ?
4. What order and decree?

(20) My reply to the above point of determination is as under:

1. Negative.
2. Negative.
3. Negative.
4. As per final order.

:- REASONS :-

(21) All the points for determination are interconnected so for the sake of brevity and to avoid repetition, I am discussing all of them together. The case of plaintiff as reflected from the plaint and affidavit on oath is that land bearing Revenue Survey

No.158, ad measuring Hectare 0-32-38 Sqr. Mtr., situated at village Dahod Kasba which is jointly owned by the plaintiff and the defendant No.1, who are real sisters. It is a new tenure land restricted by Section 73AA of the Land Revenue Code. It was purchased in Year 1986 and was confiscated to the Government due to breach of conditions. Afterwards, it is repurchased by the plaintiff in auction after payment of premium. Houses of the plaintiff and defendant No.1 are situated in the said land and other portion of the land is open and in possession of the plaintiff and there is no demarcation of the open land. It is further the case of the plaintiff that the defendant No.1 is conspiring to alter the actual position of the suit land and as her relative is working as Shirestedar in Revenue Court, order partitioning the suit land in to two is passed and on the basis of the order and with the help of defendant No.2 Talati, she is trying to take over the possession of the land for the purpose of making partition and separating the revenue record of the land though no partition is effected nor separate maps of the land exists. Against the order passed by Dy. Collector, the plaintiff filed an appeal before the Revenue Court but since she holds the possession of the land, civil court has jurisdiction over the land so to prevent the defendant No.1 from partitioning the land on the basis of order passed by Dy. Collector and to maintain the status-quo of the suit land, she has filed the instant civil suit against the defendants in the Civil Court. The case of the plaintiff is further that since she deposited premium amount and filed other litigation, her name came to be entered in revenue record and while passing the order, condition No.2 was imposed by the Deputy Collector that the land in question shall

not be sold, mortgaged, gifted or transferred in any manner to any one or shall not be partitioned without prior permission of the Collector. The Defendant No.1 has with a view that the land may be confiscated to the government due to breach of condition by way of partition and she may repurchase the land in auction and thereby, become sole owner of the entire land.

(22) To prove her case plaintiff has tendered affidavit on oath, under O18R4 of C. P. C., vide Ex-31, wherein she has reiterated the facts which I have reproduced herein above so to avoid repetition I am not reproducing the same again.

(23) During the cross examination conducted by the defendant No.1 Advocate, plaintiff has admitted that collector, Dahod has passed an order to partition the suit land between the two sister but pleads ignorance about entry No 26170 pertains to the order passed by the collector but admits that entry No 26170 is certified by the competent Authority. She has further admitted that prior to the date, collector passed the order, both the parties were tilling their respective share of land and that before the present suit was filed, on the basis of collector's order, the suit land was partitioned in to two but the said fact was not disclosed in the plaint.

(24) Thus plaintiff herself has admitted that prior to the order passed by the collector both the sisters were tilling their respective share of the land and that the suit land was partitioned on the basis of the order passed by collector which fact has not

been disclosed in the plaint. Thus plaintiff is guilty of material suppression of facts and though the suit land was partitioned prior to the filing of the suit this fact was not divulged in the plaint and a sham cause of action was created and suit was instituted way back in 2019 and the same is till pending thus valuable time of the court is wasted in trying a suit without any cause of action.

(25) Similarly the say of the plaintiff that upon repurchase of the suit land after the same was forfeited by the government she paid the price fixed by the competent authority so the land was allotted to her is contrary to the document produced by the plaintiff. The allotment order is on record vide Ex-50. A bare perusal of the document on record vide Ex-50 makes it amply clear that suit land was allotted in the joint names of plaintiff and defendant. The challan by which Rs.150/- was paid is on record vide Ex-51 and it is admitted by the defendant that amount of Rs.150/- was paid by the plaintiff. Thus the amount of Rs.150/- was paid by the plaintiff but the land allotment order of Mamlatdar dated 22/4/1997 is in the joint names of plaintiff and defendant.

(26) The plaintiff has produced revenue record vide Ex-48 & 49 which are extract of village form 8-A & 7/12 which shows the joint names of plaintiff and defendant as owner /occupant and the area mentioned therein is 0-32-37. Whereas the defendant has produced village form No 8-A,7/12 & 6 which shows individual name of defendant and the area shown is 0-16-18 which is half

of the total area of suit land reflected in document on record vide Ex 49. The defendant has also produced form 6 showing entry no 26170 dated 7/9/10 by which the suit land was partitioned between the plaintiff and defendant on the basis of order passed by the collector dated 6/9/2010 and the objection raised by the plaintiff was rejected and the entry came to be certified.

(27) In view of discussion made herein above the argument made by the Ld. advocate for the plaintiff that partition is in breach of condition No 2 imposed in the land allotment order vide Ex-50 also does not find favour with this court as there is no breach as the partition is effected on the basis of order passed by Dy. Collector so condition No 2 is not breached as the partition was effected after obtaining the necessary permission of the Collector.

(28) Thus considering the documentary evidence referred herein above coupled with the admission made by the plaintiff that that collector, Dahod has passed an order to partition the suit land between the two sister but pleads ignorance about entry No. 26170 pertains to the order passed by the collector but admits that entry No 26170 is certified by the competent Authority. She has further admitted that prior to the date, collector passed the order, both the parties were tilling their respective share of land and that before the present suit was filed, on the basis of collector's order, the suit land was partitioned in to two but the said fact was not disclosed in the plaint, the plaintiff has failed to

prove point of determination no 1,2 & 3 and therefor not entitle to get the relief sought for in the plaint.

(29) Under the above circumstances and in view of the above stated reasons, the impugned Judgment and consequent Decree passed by the learned Trial Judge in Regular Civil Suit No.209/2010, on 29/09/2017 does not appear to be illegal, unjust, perverse, erroneous, incorrect and improper in any manner and the impugned Judgment and Decree are, in my mind, not required to be quashed and set aside, and no interference of this Court is called for.

(30) For the foregoing reasons and upon re-appreciation of evidence my reply to point of determination No.1, 2 & 3 is in negative and I pass the following order below point for determination No.4.

:- ORDER :-

1. The present Regular Civil Appeal is hereby dismissed.
2. The judgment and decree passed by the Ld. Civil Judge Dahod in Regular Civil Suit No.209/2010 on 29-09-2017 is hereby confirmed.
3. Considering the circumstances of present case, the entire costs of this appeal shall be borne by the appellants only.
4. Under the Order 41 Rule 37 of the C. P. C., 1908, the certified copy of the judgment of this appeal shall be sent

to the court below for necessary procedure as contemplated in the Order 41 Rule 37 of the C. P. C., 1908.

5. The interim order, if any shall merge with final order.
6. Original record shall be sent back to the court below forthwith.
7. Decree be drawn accordingly.

Pronounced in open court to day on 30th day of June, 2026.

Dt.30.06.2026
Place : Dahod

[Harishchandrasinh Gulabsinh Vaghela]
Principal District Judge,
Dahod.
Unique ID Code No.GJ00590