

GJKT010032642019



Presented on : 26-07-2019
Registered on : 26-07-2019
Decided on : 29-08-2023
Duration : 4 years, 1 months, 3 days

**IN THE COURT OF
8th ADDL DISTRICT JUDGE AT BHUJ,KACHCHH
Presided Over by S.M.KANABAR**

RCA/93/2019

Exhibit No.: 30

Appellant:

MOHANBHAI MAVJIBHAI BHANUSHALI

Age: 47 Occupation :

Address: HAMLA, TA.MANDVI KACHCHH

**DIED DURING THE PENDENCY OF THE SUIT HENCE HIS
HEIRS**

1/1 MINABEN WD/O MOHANBHAI

1/2 PUJABEN D/O. MOHANBHAI W/O MEHUL MOHANBHAI

1/3 ANAND S/O. MOHANBHAI

1/4 SHITAL D/O. MOHANBHAI

ALL RESIDING AT VILLAGE HAMALA (MANJAL)

SUB-DISTRICT - MANDVI - KUTCH

VERSUS

Respondent:

HARSHAD SHIVJI SANGHAR

Age: 62 Occupation :

Address: HAMLA, TA.MANDVI KACHCHH

2:NAVINCHANDRA BHOJRAJ SHAH

Age: 35 Occupation :

AT. PLOT NO.4 INDRAPURI SOCIETY THANE MUMBAI

3:The Collector

**Age: 0 Occupation :
BHUI KACHCHH**

4:The Mamlatdar

**Age: 0 Occupation :
BHUI KACHCHH**

**SUBJECT - FIRST APPEAL U/S. 96 AND
ORDER 41 OF THE CODE OF
CIVIL PROCEDURE.**

Advocate for Appellant: A.H.LODHIA

Advocate for Respondent: S.T.PATEL

**JUDGMENT
(Delivered on 28/8/2023)**

Part 1 – Fact of original Case of plaintiff

(1) While preferring the appeal, appellant / original plaintiff filed the appeal under Section 96 of the Code of Civil Procedure against the decree and judgment passed in Regular Civil Suit No.17/2018 on Dtd.18/7/2019 by the learned Principal Senior Civil Judge, Mundra. The learned trial judge has rejected the suit of original plaintiff hence, plaintiff is the appellant and original defendant is the respondent before present court.

(2) The original suit filed by the plaintiff/appellant stating that land R.S. No.119 of the village Hamla of Sub-District - Mandvi was the ancestral property of plaintiff and plaintiff was doing administration of the land on behalf of his other six brother and sisters. He stated that Hirji Kunvarji Bhanushali was the original owner of the suit land but he was having poor condition, he placed the land R.S. No.119 under mortgage with possession (i.e. VATANTAR) before Shri Kunvarji Radha against

the amount of Rs.1700/- as per revenue entry No. 6 and 222. It was further stated that plaintiffs were agriculturist and possessor of agricultural land from the time of their ancestors. It was further stated that parties were on dispute of possession rights and tenancy rights but the father of plaintiff i.e. Mavji Hirji Bhanushali died on Dtd.8/1/2007 and plaintiff was not aware of the registered document. Plaintiff stated that defendant started to sell the suit land, hence, he published the objection in Kutch-Mitra of Dtd.19/1/2012, but they did not bother and entered revenue entry No. 1101 in collusion of each other. Plaintiff stated his absolute ownership and possession on suit land and denied any ownership right of defendant No.1 and alleged registered sale deed No.141 of Dtd.9/1/2012 as illegal and also alleged the possession of defendant No.2 as only on paper, resultant, filling of suit declaration of their ownership with the declaration that suit land was under mortgage before defendants with the relief of declaration of his right of redemption as well as relief of execution of re-convention deed with the declaration of his actual possession on suit land with injunction of further transfer of suit land.

Part 2 – Brief Statement of written statement filed in the suit.

(3) Original defendants/respondents filed written statement in original suit vide Ex.22. They raised the issue of limitation, cause of action, bare of section 11 of land revenue code, non joinder of necessary party filling of suit without cause of action. They further stated that original owner of suit land was Nanubha Meghrajji and Satubha Gagubha Jadeja and they placed the land under mortgage against 177 cories before Kunvarji Radha and the land was allotted to Hirji Mavji for the cultivation. He further stated that special Mamlatdar declared the Kuvarji Radha Shah as possessor through revenue entry No.6, 76, 181 and he

became absolutely owner of suit property. He further stated that suit land was succeeded by the heirs of Kunvarji Radha named as (1) Navinchandra Bhijraj Shah (2) Kasturben Bhojraj (3) Prabhaven Bhojraj through the revenue entry No. 1079. It is further stated that heirs Kasturben and Prabhavati relinquished their rights in favour of Navinchandra vide revenue entry No.1084. It was further stated that Navinchandra was absolute owner and possessor of suit land and he sold the land through the registered sale deed of Dtd.9/1/2012 to Harshad Shivji Sandhar and he became the absolute owner and possessor. He further stated Nanubha Meghrajji and Satubha Gagubha Jadeja relinquished their right to redeem the mortgage during their life time but that deed was not traceable, hence, to avoid the dispute their heirs Bachubha Nanubha Jadeja and Bhikhubha Nanubha Jadeja executed relinquishment of their right in favour of Harshad Shivji Sandhar. They further stated that Bhanushali Hirji Mavji stopped to cultivate land and he also executed for relinquishment of his cultivation right on suit land in favour of Navinchandra and Bhanushali Hirji Mavji and Mavji Hirji are two separate persons and plaintiff had no relation with Bhanushali Hirji Mavji and filed false suit. He also raised the issue of limitation and revenue entry of the year 1958 and 1966 are challenged in the year 2012 and also raised the issue of service of the notice of section 80 and asked rejection of the suit.

Part 3 – Reasons for the appeal with grounds of appeal.

- (4) After recording of the evidence and hearing both the parties, learned trial judge rejected the suit on Dtd.18/7/2019, resultant, filling of this appeal by the original plaintiffs.
- (5) Appellant/Original plaintiff filed the appeal and raised following

grounds for challenge the decree of trial court.

- A. The order of the trial court is wrong and illegal and contrary to the principle law.
- B. The trial court has made error in interpretation as well as in the in settlement of issues framed under original suit.
- C. The trial court has passed the order under presumption and assumption.

Part 4 – Reply of Respondent.

(6) After service of notice, respondents appeared through the advocate S T Patel but did not file any written objection against the appeal.

Part 5 - Argument

A. Arguments of appellant side :-

(7-i) Learned advocate of appellant filed written argument vide Ex.12. He narrated the fact of suit, evidence filed before the trial court. He stated that evidence of Ex.30, 102, 103 are in favour of plaintiff's suit. He further argued that documents of Ex.46 to 91 are in favour of plaintiff. He further stated that plaintiffs are cultivating the suit land and are earning the income. He further argued that name of plaintiff and his father was running even after execution of sale deed. He further argued that neighbors were tried to encroach the land during the pendency of the suit, hence, he filed RCS No. 47/2016 and in the report of court commissioner the possession of plaintiff was registered. He stated that as per document of Ex.46 to 91, the name of plaintiff was mentioned as the owner and possessor of suit land. He further argued that name of the father of plaintiff was running in all the documents and stated that

document No.141 of Dtd.9/1/2012 was executed merely relying on false revenue entry No.1101. He further relied on the cross-examination recorded under Ex.43 i.e. defendant and stated the admission of possession of suit land before plaintiff. he further argued on breach of provision of section 79 of the Land Revenue Code and asked the relief as prayed for in original suit by allowing appeal.

(7-ii) Learned advocate argued orally and length and narrated all the facts as stated in written argument in written argument. he stated the ownership and possession of plaintiff relying on revenue entry and revenue village forms. He further stated that as per panchmana drawn in RCS No.47/2016, the possession of plaintiff was established. He further argued that an unknown person executed registered sale deed and he repeatedly argued that he applied to give exhibit to one document in appeal and this court rejected the application and filling or appropriate proceedings on it. He further argued that defendant No.1 was residing in Mumbai and denied his possession and raised the issue of snatching away the possession without due course of law. He further argued that the title does not pass merely by execution of registered sale deed but he has to produced all consequential and relevant documents of ownership from the starting. He denied the production of such kind of documents. He further raised the issue of non serving of the notice u/s. 135D of Land Revenue Code and denied the legality of deletion of his name from revenue records. He further argued that the order of denial of exhibiting the documents Mark 3/3 by this court with awarding the payment of costs is the punishment to a widow who is fighting for his right and she will not give blessing to this court but will give curse to this court and argued to allow the appeal.

B. Arguments of respondents :-

(8) Learned advocate of respondent No.1 and No.2 filed written argument vide Ex.24. He denied any error of trial court in giving finding on issues and also stated the case of plaintiff with the defence and issues framed by the trial court. He further argued that plaintiff is failed to prove possession, ownership and he also argued on non joinder of other heirs of Mavji Hirji. He further argued that mortgage deed (Vatantar deed) was not produced before trial court. He also raised the issue of mentioning of the Mavji Hirji as agriculturist not the mortgagor and denied their ownership. He further raised the issue that if the person was owner then there was no question of tenant and denied any right of plaintiff on suit land. He denied the support of entry No.222 to the case of plaintiff. He further argued that plaintiff admitted some shocking facts in his cross-examination recorded under Ex.33. He also denied the revenue entry as the proof of ownership. He further argued that documents filed by the plaintiff is contrary to his claim and also stated the failure of the plaintiff to prove the suit. He further argued that plaintiff relied on the pleading of RCS No.47/2016 but present defendants were not the parties in that suit. He denied applicability of that suit to present case and also stated that when present defendants applied to join them as the party in that suit, then suit was withdrawn unconditionally. He stated the application of res-judicata for that pleadings and raised the issue of filling of that suit without disclosure of fact of present suit and without getting permission and asked rejection of appeal.

Part 6 – Point of determination.

(9) Recently Hon'ble Gujarat High Court declared in SECOND

APPEAL NO.216/2021 decided on DTD.7/9/2022 that First Appellate Court has to frame issues i.e. point of determination and remanded many old appeals for fresh decisions. It was the practice to frame point of determination at the time writing appeal, but considering the decision of Hon'ble Gujarat High Court, it is the opinion of this court that in future, the party who lost the case, may raise grievance that he was not heard on the point of determination framed in appeal by first appellate court, thus, to prevent any kind of injustice, this court has framed following points of determination under Ex.27 and has putted it into knowledge of both the parties before proceedings of hearing.

1. Whether appellant is able to show that trial court has made error in evaluation of evidence filed before trial court?
2. Whether appellant is able to show that trial court has made error in the application of law relating to subject matter?
3. Whether appellant is able to show that the order and decree passed in RCS No.17/2018 on Dtd.18/7/2019 is wrong, illegal and perverse in the eyes of law?
4. Whether the suit of original plaintiffs was barred by any law?
5. What is order?

Part 7 – Decisions on point of determination.

(10) **Followings** are the decisions of this court on the point of determination.

Point No.	Decision there on
1	In negative.

2	In negative.
3	In negative.
4	In affirmative.
5	As per final order

Part 8 – Reasoning

Point No. 1 :-

- Whether appellant is able to show that trial court has made error in evaluation of evidence filed before trial court?**

(11) Original plaintiff filed following evidence before learned trial court.

Sr. No.	Ex.	Description
1	33	Deposition of Mohan Mavji Hirji
2	46	Form No. 6 Entry No.6
3	47	Form No. 6 Entry No. 181
4	48 to 51	Form No. 7-12 from
5	52	Revenue Receipt
6	53	Receipt of Education Tax
7	54	House Tax Receipt
8	56	Receipt of Education Tax
9	57	Receipt of Education Tax
10	58 to 61	Land Revenue Receipt
11	62-63	Receipt of Education Tax
12	64-65	Land Revenue Receipt
13	66	Receipt of Education Tax
14	67-69	Land Revenue Receipt
15	70, 71	House Tax Receipt
16	72-74	Receipt of Education Tax

17	75	Land Revenue Receipt
18	76	Receipt of allotment of house number
19	77	Receipt of Education Tax
20	78	Land Revenue Receipt
21	79	Receipt of Education Tax
22	80-81	Land Revenue Receipt
23	82-86	House Tax Receipt
24	87	Notice on the name of Bhanushali Harji Khimji
25	88	Receipt of Education Tax
26	89	Land Revenue Receipt
27	90	House Tax Receipt
28	91	Notice of Special Mamlatdar for case No.917/62
29	102	Deposition of Mohan Shivji Bhanushali
30	103	Deposition of Jethalal Manji Bhanushali

(12) Learned advocate of appellant raised first issue of deficit evaluation of evidence filed before trial court.

(13) Learned Trial Court narrated the law for the burden of proof in para No.7 and No. 8 of its judgment Ex.136. Learned trial court gave the finding for issue No.1, 2, 4 and No.5 in para No.9 to 21 in its judgment. Learned trial court narrated the evidence of Ex.33 and Ex.46 to 48 to 91 in its judgment in para No.10 and learned trial court recorded the admission given by the plaintiff under his cross-examination. It is necessary to note here that learned advocate of plaintiff raised the issue of deposition of defendant and alleged admission which was the reading of any document showed to him stating the admission of facts under his argument but he was silent on the admission given by the plaintiff under his cross-examination. It is cleared from the judgment of the learned trial court as well as from the original records of the learned trial court that first issue framed by the learned trial court was for the absolute

ownership of plaintiffs on suit property. On bare reading of deposition of plaintiff filed at Ex.33, it is cleared that plaintiff showed the suit land as of the ownership of his ancestor Hirji Bhanushali and stated the mortgage with possession before Kuvarji Radha against the Rs.1700/- as per revenue entry No. 6. Revenue entry No. 6 filed at Ex.46. It is mentioned in it that "શા. કુવરજી રાધા મંજબના તા.૩૦/૧૨/૫૮ ના રોજ ૨૦ વરસથી ઉપરાંત વટાંતર જમીન ધારણ કરતા હોઈ ઈનામદાર મોજે નાબુલા મેઘરાજજી તથા જાડેજા સતુભા ગજુભાને ઈનામ નાબુદી ધારાની કલમ ૭ (૩) હેઠળ આકારની ત્રણ ગણી રકમ ભરવાની શરતે કબજા હકક પ્રાપ્ત થાય છે. કબજા હકકની રકમ ભરેલ ન હોય લીટી નીચેના કબજેદાર બને છે. વટાંતર ખેડુત ભા. હીરજી માવજી. ખે.વ.ઈ.કોરી ૧૭૦૦ રૂ.૫૬૬-૬૭". The other documents of Ex.47 is the revenue entry No.181 which is of the year 1968 and the particulars are mentioned in it that "શ્રી સ્પે.મામલતદાર સા.ના કેસ નં.૯૧૭/૬૨ તા.વાળાથી ચુકાદો આવેલ છે કે સ.નં.૧૧૯ વાળું ઠામ શ્રી શા.કુવરજી રાધા પાસે વિટાંતર છે. તેમનો ખેડૂત હીરજી માવજી છે. ઉપરોક્ત ઠામ વિટાંતર હોય કબજા હકક નામંજૂર કરવામાં આવેલ છે. ખેડ હકક ચાલુ રાખવામાં આવેલ છે. જેની નોંધ લેવામાં આવી. " Thus, it was cleared that Hirji Mavji was not the owner of suit land and also not having right of possession but he had only right for cultivation of land from 1968. The document of Ex.48 shows that cultivator was Mavji Hirji from 1961/62 to 71/70 and possessor was Shah Kuvarji Radh and name of agriculturist is mentioned as self in the year 1970/71. Ex.49 says that possessor was Shah Kuvarji Radh and name of agriculturist was mentioned as Bha. Mavji Hirji from 1971/72 to 80/81 and the colons of crop is mentioned as "પડતર" the same situation is stated by the Ex.50 and the name of crop was mentioned in the year 1981/82 to 1986/87 but the name of crop mentioned as "પડતર" in the

year 1986/87. Ex.51 says the situation of agriculturist for year 1992/93. There is no situation afterwards on record and suit has been filed in the year 2012 i.e. after 20 years. Appellant / original plaintiff filed document of payment of taxes in form of revenue receipts but merely the payment of taxes does not confirm the ownership right of possession right which was denied in the year 1968. It is also admitted by the plaintiff under his cross-examination that in the year 1968, the effect of revenue entry No.118 and order of Special Mamlatdar was not challenged and till the date of filling of suit it was not challenged.

(14) Original plaintiff relied on revenue entry No.222 and document was filed or record before learned trial court but did not adduced as evidence before learned trial court.

(15) It is also shocking for this court that plaintiff side applied for reopening of his right to file further evidence after competition of evidence of defendant and demanded the exhibit to his documents but there was no chance to defendant side to refer those documents in the cross-examination of original plaintiff. It is quite shocking that till the closure of the evidence of defendant side, plaintiff side was not aware of the documentary evidence on which he wanted to rely. On each and every stage of the trial court, plaintiff side has produced the documents by opening the rights and even in the stage of appeal he filed the application for adducement of further evidence.

(16) Probably, plaintiff side was not aware of the law established by the Apex Court that merely the exhibiting the documents does not prove it. It is also law that both the parties have to get equal opportunity to challenge the evidence of each other. In case on hand the

(17) Plaintiff side demanding their absolute ownership right on one hand and on other hand they say the mortgage with possession before

Kunvarji Shah. If plaintiff's ancestor placed the land under possessory mortgage before Kunvarji Shah, neither plaintiff nor their ancestral was under the possession of suit land. Thus, both the plea is contrary to each other.

(18) Learned trial court has discussed all the issues in its order at length. Plaintiffs are failed to produce registered mortgage deed. It is also believed by the learned trial court that plaintiff was failed to prove the factum of mortgage placed by their ancestor before Shah Kunvarji. Thus, learned trial court has evaluated the evidence properly.

(19) The learned advocate of appellants relied on some portion of the cross-examination of defendant and stated that he admitted the possession of plaintiff but it is not the law, that plaintiff may insist the reading of any document to any witness which is in witness box saying that this is written in the document and then after produced and relied it as the admission of that person.

(20) The law of possession is also cleared from the following dictum that court commissioner can not decide the possession of property and when the court commission made in the absence of disputed party or in other suits where the disputed parties were not the party, those contentions are also not applicable to the absence party. Some decision on the powers of commissioner is also mentioned in following dictum.

* Hon'ble Gujarat High Court in case of Jayantibhai Joitaram Patel vs District Collector & on 28 March, 2013 held that "(10) It appears that a civil suit being Special Civil Suit No.168 of 2006 came to be instituted by one Arvindbhai Vadilal Patel against the petitioners and their brothers claiming 1/7th share in the properties of his grandfather, wherein he had also filed an application for interim injunction

(exhibit-5). By an order dated 22nd April, 2010 passed on the said application, the court directed the parties, namely, the plaintiff and the defendants therein to maintain status-quo qua the suit properties till the final disposal of the suit. In the said suit, the plaintiff also sought for a commission to ascertain the status of the subject land. Accordingly, the Commissioner appointed by the court submitted a report (page 123B of the petition). On behalf of the petitioners, it has been contended that the said report reveals that the petitioners are in possession of the said land. The facts reveal that in the suit was between the petitioners and the said Arvindbhai, the respondents No.3 to 5 herein were not parties and as such any report of the Court Commissioner made in the said proceedings would not be applicable insofar as the dispute between the petitioners and the respondents No.3 to 5 are concerned. Moreover, a perusal of the provisions of Order XXVI of the Code of Civil Procedure which makes provision for Commissions shows that the same makes provision for appointment of Court Commissioner for making inquiries of the nature specified therein. **However, there is no provision for appointment of a Court Commissioner for ascertaining as to who is in possession of the disputed lands. Any report made by a Court Commissioner in any such proceeding, therefore, cannot be relied upon for examining as to who is in possession of such land.** Under the circumstances, reliance placed upon the said report for contending that the petitioners are in possession of the suit land is misconceived."

* It is further held in K.M.A.Wahab & others vs. Eswaran

& another, reported in 2008 (3) CTC 597, it was held that appointment of Commissioner for making enquiry about the factum of possession of the property in dispute is improper since the same has to be adjudicated upon framing issues and on appreciation of evidence.

* In *M/s. Benz Automobiles Private Limited vs. Mohanasundaram*, reported in 2003 (3) MLJ 391, it was held that Commissioner cannot be appointed to find out the factum, as to who is in possession of the property. Even if a Commissioner is appointed and his report is filed, it can be questioned by the other side by filing objections, as the dispute in the suit could be resolved only on the basis of oral and documentary evidence let in by the parties.

* [In Chandrasekaran vs. Doss Naidu](#), reported in 2005 (3) MLJ 473, it was held that though appointment of Commissioner was sought for under the pretext of noting down the physical features, indirectly it was only to find out the factum of possession. As the material issue involved in the suit relating to the nature of possession and lawful right of the parties, it was held that the material issue of determining the possession cannot be left to a Commissioner.

* [In Kuttiyappan, D. vs. Meenakshiammal Polytechnic Unit of M/s. Meenakshiammal Trust](#), reported in 2005 (4) CTC 676, it was held that the defendants therein were not entitled to seek for appointment of Commissioner to note their possession, as it is well settled that Commissioner cannot be appointed for noting down the factum of possession or the enjoyment of property.

* [In Krishnamurthy, T.K vs. Tamil Nadu Water and](#)

[Drainage Board](#), reported in 2006 (5) CTC 178, it was held that Advocate-Commissioner should not be appointed to gather evidence to prove the case of parties, since the parties should prove their case by letting in legally acceptable evidence and the report of the Commissioner can only aid the Court in evaluating the evidence to come to just conclusion.

* [In Devadoss vs. A.Duraisingh](#), reported in 2002 (3) CTC 748, it was held that Commissioner cannot be used for fact finding purposes and as such, the order passed by the Court below is not sustainable under law.

* [In Rajendran vs. Lilly Ammal](#) alias Nelli Ammal, reported in 1998 (II) CTC 163, it was held that Commissioner cannot be appointed to find out the fact as to who is in possession of suit property in a case.

* [In Minor Amid Stanly & another vs. Lakshmiammal & others](#), reported in CDJ 2009 MHC 324, it was held that the factum of possession cannot be ascertained by Commissioner, as the same could be proved by letting in oral and documentary evidence by the parties before the Court.

* Supreme Court in the decision of [Rahul S Shah vs Jinendrakumar Gandhi](#) (2021 SCC OnLine SC 341) held that In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the Court, the Court may appoint Commissioner to assess the accurate description and status of the property.

(21) Thus, the decision given by the learned trial court on issue of ownership of plaintiff as well as placing of property under possessory mortgage by the ancestor of plaintiff and ownership of suit land before

Nanubha and Satubha and status of Hirji Mavji as agriculturist at the time of mortgage is properly based on the evidence filed and evidence was properly evaluated by the learned trial court.

(22) The issue of execution of registered sale deed and its consequential documentary supported is also discussed by the learned trial court in the shadow of document of Ex.127, 125, 124 and denied any illegality in the registered document executed in favour of defendant No.2.

(23) Learned trial court has discussed the document of Ex.128, 52 to 90 and its effect. It is stated in the order that document of Ex.54, 55, 70, 71, 82 to 86 are the documents of payment of house tax which does not establish the possession of agricultural land. It is further stated that document of Ex.52, 53, 56 to 69, 72 to 81 and 87 to 90 revealed that Bhanu Mavji Hirji was under cultivation of land till 1998-99 and if he was under cultivation afterwards, he must able to file the other revenue receipt before the trial court. It is also noted that there was no proof of possession of Mvji hirji on suit land after 1998-99. Thus, document executed in favourt of defendant No.2 was legal and denied any defect and rejected the contention of issue No.3 framed in original suit.

(24) Considering the whole discussion on the issues, there was no defect found in the evaluation of the evidence oral or documentary and decision on point No.1 is given in negative.

Point No.2 :-

- 2. Whether appellant is able to show that trial court has made error in the application of law relating to subject matter?**

(25) The learned trial court relied on the provision of the Section 59 of Transfer of Property Act for the issue of mortgage. It is the law that mortgage must be executed through the registered deed. It was the finding of learned trial court that if the mortgage was made by the ancestor of the plaintiff, the deed must be in his possession and plaintiff was able to produce it. The decision of learned trial court was properly based on law and learned advocate of appellant/ original plaintiff side is failed to show that what law was applicable and what law was not applicable even though the learned trial court made the error in the application of those law.

(26) On reading of whole appeal as well as whole argument learned advocate of appellant has not cited even a single provision of law which was wrongly applied by the learned trial court or which was not applied by the learned trial court.

(27) It is the established law, that plaintiff has to prove his case on his own foot and he does not take benefit of the weakness of other side. This court has not find any application of wrong law of defect of non application of any relating law, thus, decision on point No. 2 is given in negative.

Point No.3 :-

3. Whether appellant is able to show that the order and decree passed in RCS No.17/2018 on Dtd.18/7/2019 is wrong, illegal and perverse in the eyes of law?

(28) As the discussion made in above paragraphs, the order or learned trial court is perfect on the law point as well as proper evaluation of evidence is made properly. There is no defect of the learned trial court in

any corner, thus, decision on point No. 3 is given in negative.

Point No. 4 :-

4. Whether the suit of original plaintiffs was barred by any law?

(29) Respondent side did not raise any issue that suit was barred by any law but as this court found the situation on bare reading of the record of learned trial court that suit was barred by the law of limitation because the status of Hirji Mavji was declared as agriculturist only in the year 1968 by the Special Mamlatdar and his right of possession was also denied and only right for the cultivation was given, even though, he did not file any proceedings for right under Civil Remedy and filed suit after 44 years under the veil of execution of registered deed by defendant No.1. He lost his right in the year 1968, even though, did not appear before the court. He lost his status as agriculturist from revenue record from the year 1998-99 and he has not paid even a single amount of money as revenue tax. It was the argument of learned advocate of appellant that he was not aware but as he filed each and every revenue receipt before the year 1998-99, it is hardly to believe that change made in revenue record was without his knowledge. If the person was aware of the payment of revenue tax since the years and in case of not having any tax notice for subsequent 20 years, he did not move for the inquiry, is quite unbelievable fact. Thus, the original suit for the declaration of his absolute ownership and possession on that status as well as declaration of his mortgage was barred by law of limitation as his status as cultivator was declared in the year 1968 and his possession was also denied, hence, there was no question of his status as mortgagor. Thus, original suit of plaintiff was barred by law of limitation as the suit was filed for these

three relief after 44 years. Thus, decision on point No.4 is given in affirmative.

Part 9 - FINAL CONCLUSION

Point No. 5 :-

(30) It is well settled law that burden to prove the case is on the person who alleged it. The provision of section 101 to Section 103 of The Evidence Act is cleared.

A. Section 101. Burden of proof. - Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

B. Section 102. On whom burden of proof lies. - The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

C. Section 103. Burden of proof as to any particular fact. - The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

(31) Some decision on the issue are as under

Burden of proof

Supreme Court of India Rangammal vs Kuppuswami & Anr. on 13 May, 2011 reported in (2011) 12 SCC 220 held in Para 14. Section 101 of the Indian Evidence Act, 1872 defines "**burden of proof**" which clearly lays down that whosoever

desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine as to whether the person upon whom burden lies has been able to discharge his burden. Until he arrives at such conclusion, he cannot proceed on the basis of weakness of the other party.

It has been further held by the Supreme Court in the case of State of J & K vs. Hindustan Forest Company, 2006 (12) SCC 198, wherein it was held that the **onus** is on the plaintiff to positively establish its case on the basis of material available and it cannot rely on the weakness or absence of defence to discharge onus.

Supreme Court's Judgment in [Parimal v. Veena @ Bharti](#) (2011) 3 SCC 545 which held inter-alia: "15.The provisions of [Section 101](#) of the Evidence Act provide that the burden of proof of the facts rests on the party who substantially asserts it and not on the party who denies it. In fact, burden of proof means that a party has to prove an allegation before he is entitled to a judgment in his favour. [Section 103](#) provides that burden of proof as to any particular fact lies on

that person who wishes the court to believe in its existence, unless it is provided by any special law that the proof of that fact shall lie on any particular person. The provision of [Section 103](#) amplifies the general rule of [Section 101](#) that the burden of proof lies on the person, who asserts the affirmative of the facts in issue."

In Anil Rishi vs. Gurbaksh Singh reported in (2006) 5 SCC 558, it has been held: "19. There is another aspect of the matter which should be borne in mind. A distinction exists between a burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is which party is to begin. Burden of proof is used in three ways : (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule is [Section 101](#) is inflexible. In terms of [Section 102](#) the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.

Supreme Court of India in case of Addagada Raghavamma And Anr vs Addagada Chenchamma And Anr on 9 April,

1963 reported in 1964 AIR 136, 1964 SCR (2) 933 held that " there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence."

[In Mayawanti v. Kaushalya Devi](#) reported as **1990 SCR (2) 350, 1990 SCC (3) 1** and [Mirahul Enterprises and Ors. v. Mrs. Vijaya Sirivastava](#) reported as AIR 2003 Delhi 15, it was held that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. Where a valid and enforceable contract has not been made, the court will not make a contract for the parties.

The decision of the Supreme Court in [Ganesh Shet v. Dr. C.S.G.K. Setty and Ors.](#) Decided on **on 15 May, 1998** reported as 1998 (2) Civil Court Cases 711 (SC) wherein it is laid down that ""greater amount or degree of certainty is required in the terms of an agreement, which is to be specifically executed in equity, than is necessary in contract; which is to be the basis of an action at law for damages. An action at law is founded upon the mere non-performance by the defendant, and this negative conclusion can often be established without determining all the terms of the agreement with exactness. The suit in equity is wholly an affirmative proceeding. The mere fact of non-

performance is not enough; its object is to procure a performance by the defendant and this demands a clear, definite and precise understanding of all the terms; they must be exactly ascertained before their performance can be enforced...."

In [Jagdish Patel vs. Shivnath and Others](#) reported in (2019) 6 SCC 82, where the apex court has observed in the following manner: 44. In the suit for declaration for title and possession, the plaintiffs-respondents could succeed only on the strength of their own title and not on the weakness of the case of the defendants- appellants.

Honb'le Gujarat High Court in *State Of Gujarat vs Mali Ranchhod Kheta And Ors.* on 11 November, 1995 reported in (1996) 2 GLR 501 held that "Section 101 of the Evidence Act provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of the facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Section 102 of the Evidence Act provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

In AIR 2019 Supreme Court 4374, in the case of [Raja Ram v. Jai Prakash and others](#), wherein the lordships have held as

under:- " [\(A\) Evidence Act](#) (1 of 1872), [S. 101](#) - [Contract Act](#) (9 of 1872), Ss.14, 16 - Burden of proof - Execution of sale deed - Challenge as to, on ground of physical condition and mental capacity of deceased, executant - No evidence regarding mental impairment of deceased except bald statement in plaint - No credible evidence that deceased was bed-ridden - Hardness of hearing by old age cannot be equated with deafness - Sale deed cannot be faulted."

(32) It is well-established principle of the law, that burden of proof is always lies on the plaintiff and in failure of it, he can not take benefit of weakness of other side. Here in case on hand, plaintiff appeared with the plea of having absolute ownership and possession on the bases of absolute ownership but he failed to prove it

(33) More over it, it was absolute shocking for this court that learned advocate of appellant argued before this court that as this court has rejected the application filed under order 41 rule 27 of the CPC with awarding of payment of costs in DLSA, the applicant/ original plaintiff who is the widow will not give blessing to this court but will give curse to this court. Such kind of situation and wordings of learned advocate of appellant is disgusting. It is one kind of threat to judicial officer who does not allow the lingering of the matters and does pass strict order. According to this court, such kind of incidences covered under one offence enumerated under one provision of IPC. But this court is not here to enlarge or to adduce the litigation but the wordings of learned advocate was an alarm for the situation going to be immersed in the court and for the presiding officer, which ever of their designation, in near future.

(34) As the judgment of learned trial court does not possess any illegality or perverseness and it is purely based on the pleadings and documents filed by the original plaintiff/appellant and the proper law was applied by the learned trial court in determination of all the issues. Thus, there is no question of interference in the order passed by learned trial court and following final order is required to pass.

Final Order

1. The appeal filed by appellant/original plaintiff is rejected with costs.
2. The order passed in Regular Civil Suit No.17/2018 on Dtd.18/7/2019 by the learned Principal Senior Civil Judge, Mundra is hereby confirmed as it is.
3. Decree/Memo of costs to be drawn accordingly.
4. Registry of this court is hereby directed to send the certified copy of this order with original Record and Proceedings back to trial court.

Singed & Pronounce in open Court Today 29th, August, 2023

Dt.29/08/2023

Place - Bhuj-Kutch

(Shilpa M. Kanabar)
8th Additional District Judge, Kutch-Bhuj
Code: GJ00814

PROCEEDINGS

Joint proceedings of 24/8/2023 to 29/8/2023	Matter is listed on board on 24/8/2023 but as my one regular clerk was on leave from Dtd.21/8/2023 and ADM had denied to give me substitute person who may type deposition in sessions and ACB cases and on each and every day from 21/8/2023, there were more than 4-5 appeals other bail applications were pending for writing of judgment and inspite of attending the office from 9-45 to 7 or 7-30 on each day and I was not free from work of writing of proceedings and doing other ministerial work, I was not able to write judgments in cases. The answer was quite shocking that ADM Bhuj has no clerk for the Additional District Court to run the day to day work of court when the original posted clerks are on leave. But I have no option for it. Thus, it was not possible for me to declare the judgment on due date as my ADM was not supporting me in allowing only one clerk as substitution of my regular clerk who was on leave.
30	Judgment prepared and declared on today 29/8/2023
	Matter is disposed of accordingly.

(Shilpa M. Kanabar)

8th Additional District Judge, Kutch-Bhuj

Code: GJ00814