

HIGH COURT OF GUJARAT

JAYANTIBHAI S/O VALLABHBHAI NANJIBHAI AND ANR

Versus

MANAGER AND ORS

Date of Decision: 26 November 2010

Citation: 2010 LawSuit(Guj) 1206

Hon'ble Judges: [Rajesh H Shukla](#)

Case Type: Second Appeal

Case No: 120 of 2010

Subject: Civil, Property

Acts Referred:

[Code Of Civil Procedure, 1908 Or 8R 5, Sec 100](#)

Final Decision: Appeal dismissed

Advocates: [Devang Nanavati](#), [R C Jani](#), [Vivek N Mapara](#)

Cases Referred in (+): 1

Rajesh H. Shukla, J.

[1] The present Second Appeal has been filed under Section 100 of the Code of Civil Procedure with following substantial questions of law:

1. Whether the Lower Courts committed an error of law in not holding that the Plaintiffs had not acquired any title either as tenants or persons in legal possession (Possessory Title), and that the documents were the documents of license. Unless this question is answered legally and rightly the inferences that would be drawn by the courts would be illegal and unjust.

[2] The Lower Appellate Court overlooked the legal position created by virtue of the provisions of Order 8 Rule 5 of the Code of Civil Procedure Code, which ordains the Court to pass a decree in favour of the Plaintiffs. Rule 5(2) of the Code of Civil Procedure reads as follows:

Where the Defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint....

[3] The Lower Appellate Court appreciated that evidence on record in the form of rent note exh.95 executed by Revenue Secretary on behalf of the erstwhile Jamnagar State, in respect of agricultural lands bearing Survey No. 1337 and 1355, for which yearly rent (Udhad) was fixed at Rs. 2.08 Ps. by the Rural of Navagam, the increase of the Udhad to Rs. 200 per year about which 32 receipts (Collectively exh.96) issued by the Trust and the statutory Form filled by the Plaintiffs in U.L.C. Case No. 1328 of 1976 under Urban Land Ceiling Act, and came to a conclusion that the Plaintiff suit was based on possessory title and not on mere possession. After arriving at this conclusion the Lower Appellate Court should have come to a logical conclusion that the Plaintiff suit was required to be decreed.

2. However, the facts in nutshell, which have been referred by both the Courts below clearly suggest that the Plaintiffs filed Suit being Regular Civil Suit No. 14 of 1999 for claiming the possession and possessory title of the suit land belonging to the Defendant No. 3-Trust. The Suit came to be dismissed by the Learned Senior Civil Judge, Jamnagar on the basis of the evidence vide judgment and Order dated 31.10.2009. Against the said judgment and Order, appeal being Regular Civil Appeal No. 182 of 2009 came to be preferred before the Court of the Learned Principal District Judge, Jamnagar, which also came to be dismissed vide judgment and Order dated 30.01.2010, which gave rise to filing of the present Second Appeal raising the aforesaid substantial questions of law. Though the substantial question of law have been raised, it only refers to appreciation of evidence.

3. However, learned Counsel, Mr. R.C. Jani for the Appellants submitted that both the Courts below have failed to appreciate the evidence regarding the possessory title and have also overlooked the provisions of Order 8, Rule 5 of the Code of Civil Procedure Code. He emphasized and submitted referring to the provisions of Order 8, Rule 5 that both the Courts below have failed to appreciate this aspect. He referred to the material and evidence and submitted that both the Courts below have failed to appreciate that the possession was with the Plaintiffs, which was taken away forcibly and, therefore, the impugned judgment and Order of the Learned Civil Judge, Jamnagar, which has been confirmed by the Learned Principal Judge, Jamnagar is erroneous and the present appeal may be allowed. He has also submitted that the Plaintiffs were having possession as a licensee and, therefore also, the possession should have been restored, which has not been appreciated.

[4] Learned Counsel, Mr. Devang Nanavati appearing with learned Counsel, Mr. Vivek Mapara for the Respondents submitted that there are two concurrent findings of fact

with regard to the possession of the Plaintiffs, which has not been believed or accepted. Learned Counsel, Mr. Nanavati also referred to the material and evidence and submitted that the Plaintiff was in possession, which has been discussed by both the Courts below, for which, he has also referred to the findings recorded in Para No. 12 of the judgment and Order of the Learned Civil Judge, Jamnagar. Referring to the Kabulatnama, Exh.127, he submitted that as can be seen from the said Kabulatnama, the possession has been handed over after receiving the payment of money by cheque and it has been notarized also, which has been discussed by the Courts below while delivering the judgment. He, therefore, submitted that the boggy raised with regard to forcible dispossession is without any basis, which has not rightly been believed and accepted. Learned Counsel, Mr. Nanavati, therefore, submitted that there is no substantial question of law involved and the Plaintiffs had failed to establish on the basis of the evidence the possession and, therefore, there is no question of passing any order under Order 8, Rule 5 of the Code of Civil Procedure Code. He further submitted that the provisions of Order 8, Rule 5 of the Code of Civil Procedure is enabling the provision and is not mandatory provisions that when the written statement is not filed, the Court must pass decree as contended. In support of this submission, he has referred to and relied upon the observations made in the judgment , in case of [Modula India v. Kamakshya Singh Deo more particularly](#), 1989 AIR(SC) 162 Para No. 12 (Page No. 176), which reads as under:

It will be seen that these rules are only permissive in nature. They enable the Court in any appropriate case to pronounce a decree straightway on the basis of the plaint and the avermetns contained therein. Though the present language of Rule 10 says that the Court "shall" pronounce judgment against him, it is obvious from the language of the rule that there is still an option with the Court either to pronounce judgment on the basis of the plaint against the Defendant or to make such other appropriate order as the Court may think fit. Therefore, there is nothing in these rules, which makes it mandatory for the Court to pass a decree in favour of the Plaintiff straightway because a written statement has not been filed.

[5] Learnedcounsel, Mr. Nanavati, therefore, submitted that the present Second Appeal may not be entertained.

[6] In view of the rival submissions, it is required to be considered whether the present Second Appeal can be considered or not.

[7] As it appears from the facts that the Plaintiffs have claimed possession or possessory title, however, there are concurrent findings of two Courts below not believing or accepting on this count. Further, though the submissions have been made with regard to forcible dispossession, in fact it has been discussed by both the Courts

below. It has been observed and dealt with in Para No. 12 of the judgment of the Learned Principal District Judge, Jamnagar, Kabulatnama, Exh.126 was executed, which has also been notarized and amount was also accepted by the Plaintiffs for handing over the possession. This aspect has been discussed and it has been clearly observed in the judgment that the possession has been handed back to the Trust for Rs. 1.00 lacs and for the fencing and their remuneration by cheque dated 04.01.1999 received from the Trust.

Further, it is made clear that the Trust is the owner and in possession of the land and the Plaintiffs have signed this writing, which has been identified by the Advocate and it has also been notarized. Therefore, in light of this evidence regarding the appreciation of evidence on factual aspect, there is no substantial questions of law, which can be said to have been involved.

[8] Another facet of arguments, which have been canvassed by the learned Counsel, Mr. R.C. Jani for the Appellants referring to the Order 8, Rule 5 of the Code of Civil Procedure also has to be considered in background of a given set of facts and circumstances. His submission that without even leading of the proper pleadings, the Court has passed the order and has failed to pronounce the judgment as required is misconceived. Reliance placed by the learned Counsel, Mr. Nanavati upon the judgment reported in , AIR 1989 SC 162 (Page No. 176) is complete answer to the same as it is enabling the provisions in a given set of circumstances, but it cannot be held to be mandatory in every case. It gives an option to enable to pass an appropriate order/decreed in a given set of circumstances.

[9] Learned Counsel, Mr. Jani has also given some papers and in fact, the Competent Authority and ULC have passed Resolution in 1980, which also refers to this aspect about the possession and title making it clear that the Plaintiffs are not having any such possession and title.

[10] Under the circumstances, considering the settled legal position with regard to the scope of exercise of the jurisdiction under Section 100 of the Code of Civil Procedure while entertaining the Second Appeal, there has to be substantial questions of law involved as observed in the judgment reported in , AIR 1989 SC 162 . Therefore, as there is no substantial questions of law, which are said to have involved, the present Second Appeal cannot be entertained and deserves to be dismissed.

[11] Accordingly, the present Second Appeal stands dismissed. Notice is discharged.

[12] In view of the dismissal of Second Appeal, the Civil Application filed for stay does not survive and stands disposed of accordingly. Notice is discharged.