

HIGH COURT OF GUJARAT

KALIDAS KANABHAI (SON) AND ORS

Versus

PURIBEN WD/O NANJIBHAI AND ORS

Date of Decision: 22 June 2012

Citation: 2012 LawSuit(Guj) 387

Hon'ble Judges: [M R Shah](#)

Case Type: Second Appeal

Case No: 10 of 1986

Subject: Civil

Acts Referred:

[Code Of Civil Procedure, 1908 Sec 100](#)

Final Decision: Appeal dismissed

Advocates: [Hemang Parikh](#), [Jairaj Chauhan](#), [Jayesh M Patel](#), [R C Jani](#)

M. R. Shah, J.

[1] The present second appeal u/s.100 of the Code of Civil Procedure has been preferred by the appellants herein original defendants to quash and set aside the impugned judgment and order dated 30/10/1985 passed by learned Appellate Court i.e. learned Extra Assistant Judge, Mehsana in Regular Civil Appeal No.53 of 1982, by which, learned Appellate Court has allowed the said appeal preferred by the respondents herein- original plaintiffs and has quashed and set aside the judgement and decree passed by learned Trial Court decreeing the suit and consequently dismissing the Civil Suit No.195 of 1978 and granting perpetual injunction in favour of the original plaintiff restraining the defendants from interfering with the possession of the plaintiff in the suit land. By the aforesaid order, appellants herein original defendants are restrained from removing the cactus hedge surrounding the suit land.

[2] Facts leading to the present second appeal, in nutshell, are as under:

The defendant herein original plaintiff instituted Regular Civil Suit No.195 of 1978 against the appellants herein original defendants in the court of learned Civil Judge

(J.D.), Vijapur for perpetual injunction only restraining the defendants from interfering with the possession of the plaintiff in the suit land. It appears that the Suit was resisted by the defendants submitting that as such defendants are owner of the suit land in question. On appreciation of evidence, learned Trial Court dismissed the Suit by holding that the plaintiff has failed to prove that he is in exclusive possession of the suit land and he has become owner by adverse possession.

Being aggrieved by and dissatisfied with the judgement and decree passed by learned Trial Court in dismissing the suit, the respondent herein original plaintiff preferred Regular Civil Appeal No.53 of 1982 before learned Extra Assistant Judge, Mahesana, who by impugned judgement and order has allowed the said Regular Civil Appeal No.53 of 1982 by quashing and setting aside the judgement and decree passed in Regular Civil Suit No.195 of 1978 and consequently decreeing the suit and granting perpetual injunction against the defendants restraining the defendants from interfering with the possession of the plaintiff in the suit land and also further restraining the defendants from removing the cactus hedge surrounding the suit land.

Being aggrieved by and dissatisfied with the judgement and order passed by learned Extra Assistant Judge, Mahesana in Regular Civil Appeal No.53 of 1982, the appellants herein original defendants have preferred the present second appeal u/s.100 of the Code of Civil Procedure.

[3] Mr.Hemang Parikh, leaned advocate appearing for Mr.R.C.Jani, learned advocate appearing on behalf of the appellants herein original defendants has vehemently submitted that learned Appellate Court has materially erred in decreeing the suit and learned Appellate Court ought to have dismissed the appeal on the ground of non-joinder of proper party i.e. Panchayat in the suit. It is submitted that as such Panchayat is owner of the disputed land and, therefore, while considering the case of the plaintiff that he has become owner by adverse possession, Panchayat was required to be heard. It is submitted that Panchayat is owner of the disputed land in question and all the village people have right to pass through the suit land and as such learned Trial Court rightly dismissed the suit, by holding that the plaintiff has failed to prove that he is in exclusive possession of the suit property. By making above submissions, it is requested to allow the present second appeal.

[4] The present second appeal is opposed by Mr.Jairaj Chauhan, learned advocate appearing for Mr.Jayesh Patel, learned advocate appearing on behalf of the defendants herein - original plaintiffs. It is submitted that as such it was the specific case on behalf of the defendants that they are owners of the suit land and as they failed to prove that

they are owners of the suit land and when it was found by learned Appellate Court that the plaintiff was in possession of the suit property, no illegality has been committed by learned Appellate Court in allowing the appeal and granting perpetual injunction against the defendants as they were trying to disturb the possession of the plaintiff. As such the suit is not required to be dismissed on the ground of non-joinder of proper party as the suit was not for declaration that the plaintiff has become owner by adverse possession and as such the suit was filed by the plaintiff for perpetual injunction only as they were trying to disturb the possession of the plaintiff. Therefore, contention on behalf of the appellants herein original defendants that the suit is required to be dismissed on the ground of non-joinder of proper party, may not be accepted. It is further submitted that even no declaration has been granted by learned Appellate Court that the plaintiff has become the owner by adverse possession. It is submitted that he has no objection if it is suitably observed that the impugned judgement and order passed by learned Appellate Court decreeing the suit would be binding to the parties to the suit only and not binding to the Panchayat and if the Panchayat is of the opinion that Panchayat is the owner of the suit property, it will be open for the Panchayat to evict the plaintiffs after following due procedure. By making above submissions, it is requested to dismiss the present second appeal.

[5] Heard learned advocates appearing on behalf of the respective parties at length and considered the impugned judgement and orders passed by both the Courts below.

[6] At the outset, it is required to be noted that original plaintiff instituted suit only for perpetual injunction restraining the defendants from disturbing the possession of the suit land alleging inter alia that they are trying to disturb the possession of the suit land. It is true that learned Trial Court framed issue whether the plaintiff has proved that he has become owner by adverse possession and the same came to be negated. In the suit, the plaintiff never claimed for declaration that he has become owner by adverse possession and, therefore, such a question was not required to be considered by Courts below. Even Mr. Chauhan, learned advocate appearing on behalf of the defendant herein original plaintiff has also submitted and stated at the bar that the Suit was not filed for declaration that the plaintiff has become the owner by adverse possession and the suit was filed only for perpetual injunction against the defendants only. Under the circumstances when there was no prayer that the plaintiff has become the owner of the suit land by adverse possession, it cannot be said that the suit is required to be dismissed on the ground of non-joinder of proper party. It is required to be noted that as such it was the specific case pleaded by defendants that they are owner of the suit land, which they failed to prove. It is the case on behalf of the original defendants that from deposition of the Sarpanch, it is clear that the Panchayat is the owner of the suit land, which is just contrary to the stand taken by the

appellants in the courts below. In any case, Mr.Chauhan, learned advocate appearing on behalf of the defendants herein original plaintiffs has stated at the bar that he has no objection if it is clarified that judgement and decree shall be binding to the parties to the Suit only and shall not bind the Panchayat and it will be open for the Panchayat to evict original plaintiffs after following due procedure as required under the law.

[7] Now so far as the impugned judgement and decree passed by learned Appellate Court allowing the appeal and consequently decreeing the suit and granting perpetual injunction is concerned, the learned Appellate Court on appreciation of evidence has found the plaintiffs in possession of the suit land and, therefore, no illegality has been committed by learned Appellate Court in granting perpetual injunction against the defendants only.

[8] In view of the above and for the reasons stated hereinabove, the present Second Appeal fails and the same deserves to be dismissed and is accordingly dismissed. However, it is clarified that the impugned judgement and order passed by learned Appellate Court and consequently decreeing the suit and granting perpetual injunction against the appellants herein original defendants would be binding to the parties to the suit only i.e. plaintiff and defendants only and shall not bind the Panchayat and any other persons. It is also clarified that (and even not objected by Mr.Chauhan, learned advocate appearing on behalf of the respondents herein- original plaintiffs) it would be open for the Panchayat to initiate appropriate proceedings for eviction against the original plaintiffs in accordance with law and on merits, after following due procedure as required and the impugned judgement and decree shall not come in the way of the Panchayat in initiating the appropriate proceedings for eviction.

With these clarifications, the present second appeal is dismissed. No costs.