

HIGH COURT OF GUJARAT**NEW GUJARAT KABADI MARKET CORPTHRO SECRETARY SIDDHIQUI HAJI
MOHAMMED ALI KURESI & 7 OTHER(S)***Versus***DOODHWALA JAMAD TRUST, THR PRESIDENT YUSUFMIYA NOORMIYA HAKIM
& 1 OTHER(S)****Date of Decision:** 19 April 2022**Citation:** 2022 LawSuit(Guj) 3671**Hon'ble Judges:** [Dr A P Thaker](#)**Case Type:** First Appeal**Case No:** 105 of 1985**Subject:** Civil**Acts Referred:**[Code Of Civil Procedure, 1908 Sec 96, Or 20R 12\(1\)\(c\), Or 7R 2](#)**Final Decision:** Appeal dismissed**Advocates:** [M B Gandhi](#), [Chinmay M Gandhi](#), [R C Jani](#), [Hriday Buch](#), [Fouzan N Soniwala](#), [P V Patadiya](#)**Cases Referred in (+):** 1**Dr. A. P. Thaker, J.**

[1] Being aggrieved and feeling dissatisfied with the judgment and decree of the learned City Civil Judge, Court No.5, Ahmedabad in Civil Suit No. 4342 of 1978 , directing the appellants - defendants to hand over the possession of 3000 sq. yds of land adjoining the sub-plot of 6175 sq. yds of land in their possession, the original defendants have preferred the present Appeal under Section 96 of the Code of Civil Procedure.

[2] The contentions of the defendants are that the trial Court has not given opportunity to the defendant to lead their evidence and has committed error of facts and law in decreeing the Suit even though the plaintiff did not specify the exact portion of encroachment either in the original plaint or in the amended Plaint. It is also

contended that the trial Court has erred in holding that the defendants encroached upon the land of 3000 sq. yds. It is also contended that the trial Court has failed to consider and give due weightage to the admission made by the plaintiff and their witnesses in their evidence. According to the defendant, the trial Court has erred in holding that a mere wrong description of the property in the newly added para-8A would not affect the plaintiff's case and such wrong description has to be ignored. The defendants have also contended that the trial Court has wrongly relied upon the agreement of lease executed by "Jammat" in favour of proposed Janashakti Cooperative Housing Society. That the trial Court has erred in holding that the plot of 3200 sq. Yds. leased to the proposed Society is between the plots of 3000 sq. Yds and 6175 sq. Yds of land lawfully held by the defendants. According to the defendants, the error has been committed by the trial court holding that the defendants have encroached upon the area of 3000 sq. Yds and land of Final Plot No. 64, which is to the north of sub-plot admeasuring 6175 sq. Yds, which was originally let to Shantilal Ambalal Shah on 26.3.1975. It is contended that the trial Court erred in holding that the plaintiff had authority to file the Suit. It is also contended that the impugned judgment and order of the trial Court is against law and against the evidence on record and the deserves to be quashed and set-aside. On all these grounds, he has prayed to set aside the impugned judgment and decree passed by the trial Court. The appellants are the original defendants and the respondent is the original plaintiff.

[3] The plaintiff has filed a Suit for recovery of vacant possession of the property alleged to be encroached upon by the defendant forming part of Survey Nos. 62, 63 and 64 admeasuring 3000 sq. Yds situated at Jamalpur Town Planning Scheme, known as Panch Pir Kabrastan land.

3.1 The contention of the plaintiff is that he was appointed as Receiver in Civil Suit No. 1382/75 on 22.7.1975 and he took charge of the Management of the property of the Jamat known as Sabliya alias Dudhwala Jamat. That he had obtained permission of the City Civil Court, Ahmedabad by an order dated 10.8.1977 to file suit against the defendants who are trespassers in the property know as Panch Pir Kabrastan Trust property. According to him, the Court has granted permission to the plaintiff to file Suit to recover possession of the property from the trespassers.

3.2 According to the averment in the plaint, the property of Panch Pir Kabrastan Trust admeasuring thousands of square yards and the total property is described in the plaint and as there was allegation of mismanagement and misappropriation and there were ground of adverse interest claimed by the Secretary of the Trust, Receiver was appointed for the beneficial management of the Trust property. It is contended that a particular portion of the land of the Trust was leased on permanent basis to one Shantilal Ambalal Shah by two lease deeds executed in the

year 1965 and Mr. Shantilal Shah sold his leasehold rights to defendant No.1, the New Gujarat Kabadi Market Corporation. It is contended that according to the information received by the plaintiff, the defendant No.1 gave away that plot of land by dividing into various units to its 125 members. According to the plaintiff, the Members of the defendant No.1 have illegally and unauthorisedly occupied the land over which they have no right or claim. It is also contended that not only they have occupied the land which forms part of the lease in the year 1965, but they have also encroached upon the land belonging to the Trust property, which was never leased to Shantilal in the year 1965. It is contended that the said property on which the defendant has encroached is a Kabrastan land used for the purpose of Kabrastan and the defendants and their Members have illegally occupied and trespassed upon it, which cannot be used for any other purpose other than that of Kabrastan.

3.3 It is also contended that the defendant in collusion with the past Secretary Nabibhai have connived and acquiesce in such encroachment and have illegally come in possession of the encroached lands.

3.4 It is further the case of the plaintiff that the Managing Committee of the 'Jamat' have leased out the Plot of land admeasuring 6175 sq. Yds at an annual rent of 31 paise per square yard and a plot of land admeasuring 9551 sq. Yards at the rent of Rs. 0.50 Ps per square yard to Shantilal Ambalal under two lease deeds. It is further contended that the said land were open and thereafter, the Plaintiff No.1 have put up 125 constructions on the aid open land of the Kabrastan extending 3000 sq. Years. According to the plaintiff, this encroached land was formerly a pit which was filled by brick-bate and other materials and levelled and the defendants have put a wall around the area which is not actually let out to them. It is contended that this encroachment was made at the time when the property was under the Management of the then Managing Committee and the Secretary was in league with the Members of the defendant Association and, therefore, did not take any action against the encroachment.

3.5 By way of amendment in Plaint Para-8A, the plaintiff has also contended that on the encroached land, the defendant has constructed 125 shops of various measurements mentioned therein. It has relied upon the Map prepared and produced by the Court Commissioner. It is also contended that the boundaries of the property which is encroached is described in the said paragraph. It is contended that the defendant No. 1 Association is liable to pay damages for the use and occupation of the encroached land at teh rate of Rs.3,000/- per month with effect from the date of the Suit.

[4] It appears from the record that defendant Nos. 1 to 3 and 5 to 8 have filed their written statement at Exh-18 and thereafter filed further written statement at Exh-50 to the amended plaint. It appears that defendant No.4 though duly served did not appear. It is the contention of the defendants that the Suit is not maintainable and it has not been filed on proper Court fees. They have admitted that the Panch Pir Kabrastan Trust has a large property at Behrampura. However, they have stated that the property has not been properly described in the Plaint Para 8. They have denied that some of the properties of the Trust were leased to Shantilal Ambalal Shah and others under two lease deeds executed in 1965. They have contended that Sabliya/ Dudhwala Jamat had executed two registered deeds dated 26.3.1965 by which Jayantilal Hargovandas Mehta and Shantilal Ambalal Shah and others were granted lease of the Suit land for a period of 98 years. According to the defendants, the defendant No.1 Corporation had purchased the leasehold rights from Jayantilal Hargovandas Mehta and others under two registered deeds dated 4.11.1965 and thereafter the lands have been in possession of the defendant No.1 and its members. It is also contended by them that defendant No.1 had divided the lease land into various plots and given to its 125 members. They have denied that defendant No.1 has encroached upon any portion of land as alleged by the plaintiff and has also denied that any portion of Kabrastan land has been encroached upon by the defendants. They have specifically denied that the defendants have encroached upon 3000 sq. Yds of land. They have denied that the defendants have occupied any land which has not been leased to the defendants Corporation. According to the defendants, they have made construction on the land which has been lawfully leased to the defendant No.1 and description of the boundaries of the alleged encroached land which is given in Para-8A of the amended plaint is incorrect. They have denied the liability to pay mesne profits at the rate of Rs.3,000/- per month from the date of the suit as claimed. They have stated that they are not in possession of any land other than the land leased to them. They have prayed to dismiss the suit.

[5] On the basis of the pleadings of the parties, the learned trial Court has framed issues at Exh-52 to the following effect:

1. Is the suit not presented on proper court-fee as contended by the defendant?
 - 1A. Is the suit not maintainable as contended by the defendants in their written statement?
2. Does the plaintiff proved that the defendants have encroached upon the disputed property and have illegally constructed 125 shops as contended in paras 5, 8, 8A and 9 of the Plaint?

3. Does the plaintiff proved that he is entitled to recover possession of the suit property from the defendants after removal of the encroachment as claimed?

4. Does the defendants prove that they are in lawful possession of the disputed property as contended in paras 7, 8 and 9 of the written statement exh.18 and in para 2 of the further written statement exh.50?

5. What should be the final order and decree?

[6] On the basis of the evidence led by both the sides and after hearing the submissions made on behalf of both the sides, the learned trial Court has answered Issue NO.1, 1A, and 4 in the negative whereas Issue Nos. 2 and 3 are answered in affirmative only as regard to the portion of 3000 sq. Yds and ultimately passed the decree in favour of the plaintiff.

[7] Heard Mr. M.B.Gandhi, learned Senior Counsel with Mr. Chinmay Gandhi, learned counsel for the appellants-defendants and Mr. Hriday Buch, learned Counsel assisted by Fouzan Soniwala for the respondent Nos. 1 and 2 at length. Peruse the impugned judgment of the trial Court along with R&P of the trial Court.

[8] The following points arise for determination of the present Appeal:

1. In the facts and circumstances of the case, whether the trial Court has committed any error of facts and law in holding that the Suit is maintainable and it is on proper Court-fees?

2. In the facts and circumstances of the case, whether the trial Court has committed any error of facts and law in arriving at the conclusion that the defendants have encroached upon the portion of land of 3000 sq. Yds?

3. In the facts and circumstances of the case, whether the trial Court has committed any error of facts and law in holding that the plaintiff is entitled to recover the possession of portion of 3000 sq. Yds from the defendants?

4. In the facts and circumstances of the case, whether the trial Court has committed any error of facts and law in passing the judgment and decree and the same is liable to be set aside?

5. What order and decree?

[9] My findings of the above points, for the reasons assigned below, are as under:

1. In the negative

2. In the negative.

3. In the negative.

4. In the negative.

5. As per final order.

[10] Mr. Gandhi, learned Senior Counsel for the appellant-defendants has vehemently referred to the plaint as well as written statement and the documentary evidence of the Suit and has submitted that there is no proper description of the suit property made in the plaint as per Order 7 Rule 2 of CPC. He has also submitted that the Suit is filed on Stamp of Rs. 5 is also bad in law as the plaintiff has sought for eviction and for damages. According to him, proper Court fees ought to have been paid by the Trust and Trust has no exemption in paying the Court fees. Mr. Gandhi, learned Senior Counsel has also submitted that the suit was filed by the plaintiff i.e. Receiver for eviction of defendants on the ground that the defendants have encroached upon the land of the Trust. According to Mr. Gandhi, initially the portion of the Trust property was leased to one Mr. Shantilal Ambalal Shah who has sold his leasehold right to defendant No.1 and thus there was assignment of tenancy right. According to him, this has happened in 1965. He has submitted that initially the entire land was in Pit condition. He has submitted that now there are 125 shops constructed on the land.

10.1. Mr. Gandhi, learned Senior Counsel, by referring to the Map, has submitted that there is no space available near Nala. He has also submitted that as per the Map, Plot No.3 admeasuring 9551 sq. Yds was in possession of Shantilal Shah and others. He has also referred to the paper-book (page-24) which is assignment of tenancy right to which defendant No.1 and Shantilal Shah and other wherein within Plot No. 64, Plot No.1 was having 6175 sq. Yds alleged to be assigned to defendant No.1. While referring to the another assignment of the lease right, pertaining to Plot No.2 of Final Plot No. 64 (page-31 of Paper book) he has submitted that the area thereof is 9551 sq. Yds. Mr. Gandhi has also referred to Map at Page-96 and has submitted that there is no question of any encroachment on the land of the Trust as alleged by the plaintiff. Mr. Gandhi has also vehemently submitted that as per the two lease deeds, the plaintiff has also paid rent to Plaintiff Trust as per Exh-59 to 62.

10.2 Mr. Gandhi has submitted that oral evidence of both the sides and submitted that as per the version of the plaintiff witness Ghulam Nabi Alibhai Shaikh (Exh-77) alleged encroachment is shown to be land towards the Plot No.62 and not in 64. He has also submitted that found as per Exh-75 and 76, the lands were in a pit condition. He has submitted that the plaintiff has relied upon the Map prepared by

one Yassuddin Malik in the year 1984, which was not prepared in presence of defendant and it cannot be taken into consideration. He has submitted that lease dated Exh-75 and 76 clearly depicts that those lands were leased to the respondent No.1 Association and there is encroachment as alleged by the plaintiff. He has also submitted that there is no space for encroachment on the eastern side of Nala.

10.3 Mr. Gandhi, learned Senior Counsel, while referring to the oral evidence has submitted that four plots were let out to defendant No.1 and on that plots, 125 shops are already located. He has also submitted that there is a screening factory situated in sub-plot No. 5 he has submitted that the plaintiff is unable to locate encroachment on 3000 sq. Yds land by the defendants. He has submitted that learned trial Court has not appreciated its oral and documentary evidence and has committed error of facts and law in passing the decree in favour of the plaintiff-Trust and against the defendants.

10.4 He has also submitted that to substantiate the stand of the defendant that they have not encroached upon the land of the plaintiff-trust, during the pendency of the appeal, they have got measured the area of the shops and have obtained the Certificate which is produced in Civil Application filed in this Appeal wherein it is specifically mentioned that the area in possession of the defendant is as per the lease agreement and there is no encroachment of 3000 sq. Yds as alleged by the plaintiff and decree passed by the trial Court and has prayed to allow the appeal.

[11] Per contra, Mr. Hriday Buch, learned Counsel for the plaintiff Trust has vehemently submitted that the trial Court has not committed any error of facts and law in holding that the suit is maintainable and the Court-fee paid is proper one. He has submitted that the encroachment has been made by the defendant on the upper portion of the land admeasuring 6175 sq. Yds which is shown in Map (page-96). He has submitted that there are only two lease deed in favour of the defendants regarding two parcels of land i.e. 9551 and 6175 sq. Yds. He has submitted that it is alleged by the defendants that 4000 sq. Yds was leased to one Ramjuji in 1960 however, there is no documentary evidence produced by the defendant in support of the say that 4000 sq. Yds was leased to such person and it was also leased to defendants by the plaintiff. He has submitted that existence of the land is already certified by witness at Exh-93 and at the time of preparation of Map, the measurement of the occupation of the land by the defendants comes to 29500 sq. Mtrs. While referring to the evidence of Mangabhai at Exh-89 as well as agreement to sell at Exh-92 and cross-examination of this witness, Mr. Buch has submitted that as per this evidence the open land was to be proposed to be sold to the Society in the year 1968 and this was a vacant land. He has submitted that defendant's existence is since 1965 and has further submitted that as per evidence at Exh-68, there were no shops on the land in 1969 which has been

borne out from the cross-examination of the witness Gulab Tajmahmad. He has submitted that after riots of 1969, the defendant Association has encroached upon the land in 1971. He has vehemently submitted that from the entire oral evidence of witness Gulamnabi, the factum of encroachment of land by the defendants in the year 1970 is borne out. He has submitted that the trial Court has properly considered the oral and documentary evidence and has passed proper decree. He has submitted that the present Appeal is devoid even of merits and needs to be rejected.

11.1 Regarding the so called Certificate of 2016 produced by the appellant in this Appeal by filing Civil Application, Mr. Buch has submitted that it is a vague certificate and it only measures certain shops that too inner parts of the shops and does not include lands abutting to each shop. He has also submitted that even without prior permission, no certificate ought to have been produced in the matter and the respondent has no occasion to cross-examine the said author who is alive. He has also submitted that in the present matter as earlier, the appeal was disposed of way back in 2016 and the same came to be challenged before the Apex Court and the Apex Court has set aside the said judgment and has remanded the matter for fresh hearing, the order with CA needs to be treated as cancelled one and, therefore, reliance upon such certificate may not be made. He has submitted that even if it is believed to be true and accepted, in that case also, it does not reflect the entire area in occupation of the defendant and it only reflects to the measurement of the certain shops that too all inner parts. He has submitted that the location of the land has already established.

[12] In rejoinder, Mr. Gandhi learned Senior Counsel has submitted that there is no evidence produced by the plaintiff that the defendant has encroached upon Plot No.4. He has submitted that Map submitted by witness Mangabhai pertains to another land and there is no such description. He has also submitted that there is no case made out by the plaintiff regarding the encroachment of the land and, therefore, should ought to have been dismissed by the trial Court. He has submitted that the trial Court has committed serious error of facts and law in passing impugned judgment and decree by reappreciating the evidence, this Court as a first Appellate Court, may set aside the decree of the trial Court by allowing the present appeal. He has prayed to allow the appeal and dismiss the suit of the plaintiff with costs. He has relied upon the decision in case of [Nahar Singh v. Harnak Singh and Others](#), 1996 6 SCC 699.

[13] Point NO.1: It appears from the record that the plaintiff Jalaluddin K. Shaikh, who was a practicing advocate, was appointed as Receiver in Civil Suit No. 1382 of 1975. It is not disputed that he continued to be a Receiver in respect of the properties in Jamat. He has deposed at Exh-54 that he was appointed as Receiver in August, 1977. It appears from the Certified Copy of the judgment and order passed in Civil Suit

No. 1382 of 1975 at Exh-74 that the Plaintiff was ordered to be Receiver for Managing the property of the Jamat till the new working Committee was elected. From the application and the Order passed below it, certified copy of which has been produced at Exh-76, it is clear that on 27.7.1978 the Plaintiff was authorised to file a Suit against defendant No.1 New Gujarat Kabadi Market Corporation, as prayed for in Para-3 of the application. Thus, the plaintiff was authorised to file a Suit by order of competent Court passed on 27.7.1978 in Civil Suit No. 1382 of 1975 and, therefore the observation of the trial Court regarding maintainability of the Suit is proper.

13.1 So far as the question of Court Fee is concerned, it appears that the Plaintiff in deposition at Exh-54 in Para-4 has stated that the land was of Kabrastan land, could not be sold and, therefore, its market value could not be assessed. He has also stated that Kabrastan was vested in his Almighty and, therefore, its value could not be assessed and hence Court Fee which is affixed is proper. It appears from the decision of the Trial Court that this proposition was not at all disputed by the other side. On that basis, the trial Court has properly held that the Suit cannot be sadi to have been brought on insufficient Court Fee.

13.2 In view of the aforesaid facts and circumstances emerging from the record and the observation of the trial Court, this Court is of the considered opinion that the trial Court has not committed serious error of facts and law in deciding the Court Fee and maintainability of the Suit, and this Court has answered accordingly.

[14] Point Nos. 2, 3 and 4: As the pleadings and the evidence pertaining to all these Points are interconnected, to avoid repetition of the same, all three points are discussed together herein.

14.1 It appears from the record that so far as the oral evidence adduced by both the parties is concerned, it consists of following:

PLAINTIFF'S SIDE

Sr. No	Particulars	Exhibit No.(s)
1.	Jalaluddin Karimuddin Shaikh	Exh-54
2.	Gulab Tajmahmad	Exh-58
3.	Gulamnabi Alibhai Shaikh	Exh-77
4.	Mangabhai Manorbhai Parmar	Exh89
5.	Yasuddin Badruddin Malik	Exh-93

DEFENDANT'S SIDE

Sr. No	Particulars	Exhibit No. (s)
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1.	Sirajbhai Hanifbhai (Secretary of Defendant No.1)	Exh-105
2.	Husseinbhai Fidahussain Sabuwala (Defendant No. 3)	Exh-111

14.2 The documentary evidence of both the sides as as under:

DOCUMENTARY EVIDENCE OF BOTH THE SIDES

Sr.No	Particulars	Exhibit No.(s)
1.	Rent receipt in respect of the land leased to defendant No.1	Exh-59 to 62
2.	Commission's Report showing 125 shops along with Map (Sketch)	Exh-55
3.	Certified Copy of the application made by Receiver in Civil Suit No. 1382 of 1975	Exh-72 & 73 (Photocopy at Exh- 78 and 79)
4.	Certified copy of the judgment and order dated 31.13.1982 passed in Civil Suit No. 1382 of 1975 in respect of the application of plaintiff as Receiver of Jamat	Exh- 74 (Photocopy at Exh- 80)
5.	Certified Copy of lease deed dated 26.3.1965, executed by Sabliya @Dudhwala Jamat in favour of Shantilal Ambalal Shah, Amrutlal Ambalal Shah, Babubhai Ambalal Shah, Kantilal Ambalal Shah, Alibhai Chhabubhai in respect of land admeasuring 9551 sq . Yds forming part of FP No. 64.	Exh-75
6.	Simarily, lease deed executed by the Jamat in favour of Jayantilal Hargovandas Mehta and 9 others, including Shantilal Ambalal Shah in respect of the land admeasuring 3175 sq. yds constituting part of Final Plot No. 64 on 26.3.1965	Exh-76
7.	Layout plan showing of Division of Final Plot No. 64	Exh-82
8.	Agreement to sell dated 24.9.1968 executed on behalf of Jamat in favour of the Promoters of the New Janshakti Cooperative Housing Society (proposed) showing that the portion of market in the Plaint annexed to that agreement and admeasuring 3200 sq. yds constituting part of Final Plot No. 64.	Exh-92

9.	Notice issued by the Plaintiff's Advocate to the Defendant's advocate calling upon the defendant to produce lease deed executed in their favour by Shantilal Ambalal Shah and others in respect of two Plots measuring 9551 sq. yds and 6175 sq. yds along with the Map attached to those lease deeds with endorsement made by the learned advocate for the defendants where these documents were not traceable	Exh-94
10.	Certified Copy of the lay-out plan obtained from the Registrar's Office, which were attached to the registered lease deeds in respect of the said two Plots and 9551 sq. yds and 6175 sq. yds	95 and 96

14.3 It is the contention of the defendant that there is a mistake in description in the Plaintiff as well as Plaintiff Para-8A. This point was also raised before the trial Court. The trial Court has clearly observed in Para-12 as under:

"12. From the contents of paras 8 to 12 of the plaintiff it is clear that the case of the plaintiff has all along been that the defendant no.1 has encroached upon a portion of about 3000 square yards of land being part of the Kabrastan land belonging to the Jamat and forming part of final plot No. 64. The plaintiff came out with a definite case in the plaintiff that the defendants had encroached upon 3000 square yards of land of final plot no. 64 being an area which was not actually let out to them. Therefore, a mere wrong description in the newly added para 8A of the encroached land would not nullify the definite case of the plaintiff that the defendants had encroached upon 3000 square yards of Kabrastan land of final plot no. 64 which was not let out to them. Para 8A of the plaintiff admittedly includes the entire land in the occupation of the defendant no.1 because it refers to 125 shops which admittedly are constructed on the entire land in occupation of the defendant no.1 including the land of the aforesaid four plots which are in lawful possession of the defendant no.1 in view of the two lease deeds and other admitted leases of 3000 square yards in 1962 and about 400 square yards in 1973 and in respect of which receipts were being issued for the rents realised by the Jamat through the Receiver. An obviously wrong description in para 8A of the plaintiff showing as if the entire land in the occupation of the defendant no.1 is an encroached land has, therefore, to be ignored and the plaintiff's definite case made out in the plaintiff that 3000 square yards of land from plot no. 64 which was not let out to the defendants was encroached upon by them can never be clouded by the fact that in some portion of the plaintiff there is a wrong description of the encroached land."

This observation of the trial Court is factually and legally correct. Mere wrong description in the amended Plaintiff cannot be ground to reject the Plaintiff as a whole.

When the case of the Plaintiff is based on the ground that the defendant No.1 has encroached upon the land of the Jamat which were not leased out, then mere some mistake in making averment in amended plaintiff regarding all the lands, which include lease lands and the other portion of the land, there cannot be any cloud over the prayer of the plaintiff. Further, it is admitted fact that the plaintiff who was appointed as Receiver, was a practising Advocate, may not have any personal knowledge regarding the entire description of the property and, therefore, he may not be in a position to describe the property minutely. That fact does not affect the right of Jamat in relation to the propriety right of the suit land which is alleged to be encroached upon by the defendant No.1.

14.4 On perusal and re-appreciation of the oral as well as documentary evidence on record, it transpires that the witness Gulab Taj Mohammed in his deposition at Exh-58 has specifically stated that he has served as Watchman for 16 years and his father was also working as Watchman. According to this witness, Kabrastan land was huge estate admeasuring about 1 lakh sq. yds and some portion of the land was leased to defendant No.1. He has specifically stated that defendants have encroached upon 2500 to 3000 sq. yds of the land. He has also deposed that there was a pit in the land which came to be encroached upon by the defendants and they have levelled it up and constructed shops and they have also put up a gate on the side of the encroached land. According to this witness, the defendants have encroached upon the said lands in or about 1969-70. It appears from his cross-examination that the shops were constructed in or around the year 1970-71. During his cross-examination, suggestion was made to the effect that in all 4 Plots were leased to the defendant No.1 and to the North of the Kabadi Market, there is Kabrastan land, which has been admitted by him. He has also stated that even to the West there is other Kabrastan land. According to this witness, the encroached portion of the land is to the South of the part of the land which has been let-out to defendant No.1.

14.5 At this stage, on perusal of the lay-out plan at Exh-82 as well as Maps, which are at Exh-95 and 96 and the other evidences on record, it emerge that the Plot admeasuring 12261 sq. yds described as Plot No.5 in Exh-82 is to the North of the other portion of the land of Final Plot No. 64 and this part of 12261 also forms part of the Final Plot No. 64. It can be seen from the evidence on record, that to the North of the Plot admeasuring 6175 sq. yds, is the portion of the land said to be encroached upon which in Plan at Exh-82 is shown as sub-plot No.4 admeasuring 2018 sq. yds and to the further North is sub-plot admeasuring 12261 sq. yds which is a portion said to have been encroached making a total of 3000 sq. yds of

encroached land and to the further North of that, alleged encroached land is a portion of about 3000 sq. yds, which was leased to the defendant in the year 1962.

[15] On perusal of the deposition of Ghulamnabi Alibhai Shaikh (Exh-77), he has stated that before the two plots, land admeasuring 9551 sq. yds and 6175 sq. yds were leased under the lease deeds at Exh-75 and 76 to Shantilal Ambalal Shah and others, a portion of 3000 sq. yds was leased to defendant No.1 by Jamat. According to him, even after two lease-deeds, a portion of about 4000 sq. yds was leased to the defendant No.1. He has deposed that the lease of two Plots admeasuring 9551 sq. yds and 6175 sq. yds , no sooner, documents at Exh-76 and 77 were executed that sold away their lease-hold right to the defendant No.1 Corporation. According to him, on 24.9.1968, a agreement of lease was executed by the Jamat in favour of the promoters of the proposed new Janshakti Cooperative Housing Society for long term lease of 3200 sq. mtrs of Final Plot No. 64. He has specifically stated that out of the said area of 3200 sq. yds of the land which was to be leased to the said proposed Society, a area of about 3000 sq. yds has been encroached by defendant No.1. He has also stated that there was a Pit falls on the side of the Nala, which is to the east of Final Plot No. 64 and to the West of the said encroached land is the Plot admeasuring 9551 sq. ys. Further he has deposed that a portion of about 3000 sq. Yds which is to the north of the encroached land, was the plot which was earlier let-out to defendant No.1 for a monthly rent of Rs.260/-. According to him, to the South of the said encroached land, is the Plot admeasuring 6175 sq. yds, which was leased to the defendant No.1. He has also stated that the lay-out plan No. 82 was got prepared by the Jamat through an Engineer. According to him, in sub-plot 2018 sq. yds shown in the said lay-out plan, there was a pit and even to its North there was a pit. He has specifically satated that the land which has been encroached upon by defendant No.1 is the land which forms part of the said sub-plot admeasuring 2018 and a portion of its north, in all admeasuring 3000 sq. yds. Further, he has stated that about 4000 to 5000/- sq. yds of the land of Jamat was let to screen -printers.

15.1 Further, it also reveals from his evidence that he has stated that even in Final Plot No. 63, which is to the north of the Final Plot No. 64, there were screen printing factories. He has stated that lands of the Plots admeasuring 9551 sq. yds and 6175 sq. yds were adjoining to each other. He has further deposed that adjoining land of 6175 sq. yds is encroached Plot of 2018 sq. yds and further encroached Plot of 800 to 900 sq. yds and thereafter there is a plot of 3000 sq., Yds, which was earlier let-out to defendant No.1. He has admitted this suggestion of the defendant that the portion of 3000 sq.yds, which was earlier leased to defendant No.1, was in possession of the defendant No.1. Further, he has specifically stated that when the lease deeds Exh-75 and 76 were executed by

Jamat in favour of Shantilal Ambalal Shah and others, the sub-plot admeasuring 2018 sq. yds was lying vacant. Of course, it appears that he has committed some error when he has stated that sub-plot admeasuring 2018 sq. yds is to the South of sub-plot admeasuring 6175 sq.yds. Thus, on this evidence as well as Plan Exh-82, 95 and 96 it clearly appears that land which is encroached upon by the defendant is adjacent to 6175 sq. Yds leased to the defendant No.1 and which is situated sub-plot No.4 admeasuring 2018 sq. yds + portion of about 800 to 900 sq. yds to the land adjoining that land which would be to the North of sub-plot No. 4 admeasuring 2018 sq. yds.

[16] It reveals from the evidence of Mangabhai Parmar at Exh-89 that the agreement to lease dated 24.9.1968 which is at Exh-92, was executed in favour of the proposed new Janshakti Cooperative Housing Society by the Jamat. It reveals from the Map that the portion of 3200 sq. yds of land falling on the Nala road, which is to the east of Final Plot No. 64, was proposed to be leased to the said proposed Society for a period of 98 years. In the description of the boundaries of the said Plot proposed to be leased, it emerges that to its east is the Nala road and to its west is part of Final Plot No. 64 which was let out to the New Kabadi Market Corporation i.e. defendant No.1, to its North is part of Final Plot No.64, which was let out to defendant No.1 and to its South was a part of Final Plot No. 64, let out to defendant No.1.

[17] On conjoint reading of the evidence of Gulamnabi at Exh-74 and Mangabhai Parmar at Exh-89 along with Map at Exh-92 and other materials, it could be noticed that the land which was earlier let out to the defendant No.1 in the year 1962, is to the North of the proposed Plot of 3200 sq. yds, which was to be leased to proposed Society. In other words, this 3200 sq. yds of land was in the Plots of 3000 sq. yds and 6175 sq. yds of land lawfully held by the defendants. The lease agreement executed in favour of the proposed Society along with Maps annexed thereto clearly show that this portion of 3200 sq. yds of land, which falls on the Nala road, was never leased to defendant No.1 Corporation. For, had it been so, there would have been no occasion to lease it to the proposed Society. This lease agreement clearly supports the version of the plaintiff-witness Gulamnabi that the encroached land was part of 3200 sq. yds and land, which was to be let-out to the said proposed Society. It is crystal clear that the area of 2018 sq. yds sub-plot No.4 has also some more land, in all making it total 3200 sq. yds were proposed to be leased to the said Society and from that land about 3000 sq. yds of land has been encroached upon by the defendant No.1 because that portion of land was never leased to defendant No.1 and is not the part of 4 Plots lawfully held by defendant No.1.

[18] According to deposition of Sirajbhai Exh-105, who is Secretary of Defendant No.1, initially in the year 1962, about 4000 sq. yds of land was leased by the Jamat to

the defendant No.1 Corporation. He has further deposed that the two plots of 6175 sq. yds and 9551 sq. yds sq. yds, which were leased to Shantilal Ambalal Shah and others were taken over by the defendant No.1, who purchased his lease-hold right fo the original lessee. According to this witness, thereafter Ramjuji's factory admeasuring about 5000 sq. yds was purchased by defendant No.1 and this is how 4 plots were in lawfully possession of the defendand No.1 and the land receipts whereof are produced at Exh-59 to 62. He has further deposed that the defendant No.1 is not in possession of any land except the land in respect of which rent was being paid i.e. said 4 Plots which constitute part of Final Plot No. 64. During his cross-examination, he has stated that in the year 1962, the land admeasuring about 4000 sq. yds was leased under a writing, but, that writing has not been produced. He has further stated that in his cross-examination that the receipt of Rs.35 is in respect of Plot taken by defendant No.1 from Ramjuji. He has also stated that to the norht of Plot admeasuring 6175 sq. yds, is the land belonging to defendant No.1. According to him, Plot of about 4000 sq. yds which was earlier leased to defendant No.1 was to the North of the Plot admeasuring 6175 sq. yds and was adjoining that Plot. He has denied the fact that sub-plot No.4 admeasuring 2018 sq. yds was to the North of the said Plot admeasuring 6175 sq. yds which was leased to defendant No.1 by virtue ot their purchasing the leasehold right from Shantilal Ambalal Shah, who was originally holding leasehold right under the lease-deed at Exh-76.

[19] It reveals from the evidence of Mr. Husseinbhai at Exh-111 that he has admitted that there was no other land which was leased to the defendant except the 4 plots viz. Plot leased in the year 1962, 2 plots which were originally leased to Shantilal Ambalal Shah and others and the Plot taken from Ramjuji by defendant No.1.

[20] Thus, on appreciation of the entire oral and documentary evidence, it emerges that in all only 4 plots were leased to the defendant No.1, which included 2 Plots admeasuring 9551 sq. yds and 6175 sq. yds, which were originally leased to Shantilal Ambalal Shah and others under the lease deeds at Exh-75 and 76 and the Plans attached thereto at Exhs-95 and 96, two other Plots which came to the lawful possession of the defendants consist of one Plot of 3000 sq. yds, which was leased to defendant No.1 in the year 1962, which was from the land which is to the north of Final Plot No. 64 and beyond the land shown as sub-plot No.4 admeasuring 2018 sq. yds as shown in the layout plan at Exh-82, Exh-95 and Exh-96 and the 4th Plot which, according to plaintiff- defendant No.1, was originally leased by the Jamat to Ramjuji and later on taken by defendant No.1 from Ramjuji under Resolution No. 109 passed on 9.4.1973. It also reveals from the evidence that the portion of about 3000 sq. yds of land which is adjoining to the Plot of admeasuring 6175 sq. yds and which admeasures 2018 sq. yds has been encroached upon by the defendant No.1 and land

of about 900 sq. yds adjacent to that land was also encroached upon. On perusal of the Plan Exh-95 and 96, it is crystal clear that to the North of sub-plot admeasuring 6175 sq. yds, there is 50 feet ring road, meaning thereby that the Southern boundary of Final Plot No. 64 abuts with this road and there is no land of Final Plot No. 64 beyond the Southern boundary of sub-plot admeasuring 6175 sq. yds which was admittedly leased to the defendant No.1. It also emerges from the Map that to the West of the said sub-plot admeasuring 6175 sq. yds, the other leased Plot admeasuring 9551 sq. yds, which also forms part of the Final Plot No. 64. Further West, beyond the Plot admeasuring 9551 sq. yds, is the Plot of 8673 sq. yds, which was admittedly let-out to Dr. Suresh. From the evidence on record, it is crystal clear that in the year 1962, a portion of 3000 sq. yds was leased to the defendant No.1 from its Northern side, which would be out of the area 12,261 sq. yds. It is also clear that the land to the North of the sub-plot admeasuring 6175 sq. yds, which is described as subplot No.4 admeasuring 2018 sq. yds in the lay-out plan at Exh-82, was never leased to defendant No.1 Corporation. Further, it also emerges from the lease deed Exh-75 in respect of 9551 sq. yds which was executed by the Jamat on 26.3.1965 in favour of Shantilal Ambalal Shah and others, from the description thereof, it appears that the land to the east of the said Plot was of Final Plot No. 64 and so was the land to the North of this Plot. The land which is to the West of this plot is described as the land of Final Plot No. 64 leased to Dr. Suresh. If the land to the east of this Plot admeasuring 9551 wherein lawful possession of defendant No.1 as lessee, the description of the easter side of this Plot would have show that fact. It also reveals even from the lease at Exh-76, which was executed by the Jamat in favour of Shantilal Ambalal Shah and others, the description of the Plot admeasuring 6175 sq. yds under this deed, shows that to the North of this plot is the land of FP No. 64/ Part. It also revelas that while describing it, the eastern boundary there is reference to the land lease to Shantilal Ambalal Shah and others, whihc is Plot admeasuring 9551 sq. yds. Had there been defendant No.1 in lawful possession of any land constituting part of Final Plot No. 64 to the North of the Plot admeasuring 6175 sq. yds, leased under deed 1976, that fact would have been mentioned in this deed. Thus, it clearly transpires that prior to the execution of these two deeds, the land adjacent to Plot admeasuring 6175 sq. yds to its North had not leased to Kabadi Market Corporation and 3000 sq. yds of land, which were admittedly leased in 1962 by the adjacent to the said Plot admeasuring 6175 sq. Yds: otherwise it would have been so described in the lease deed Exh-76 while mentioning the Northern boundary of Plot admeasuring 6175 sq. Yds. It also emerges from the Plan Exh-95 that there is description regarding the boundaries of Plot admeasuring 9551 sq. Yds, which also tallies with the layout plan at Exh-82. It also reveals from Exh-96 that it was part of the lease deed in respect of Plot admeasuring 6175 sq. Yds at Ehx-76. It also tallies with the layout plan at Exh-82 wherein the boundaries of other sub-plots including sub- plot No.4 admeasuring 2018

sq. Yds, which is to the North of sub-plot admeasuring 6175 sq. Yds also tallies. It is pertinent to note that the Exh-95, 96 certified copy obtained from the Registrar's Office and which constitute part of the lease deed in respect of the land admeasuring 9551 sq. Yds and 6175 sq. Yds, which were admittedly leased to the defendant No.1. It is also pertinent to note that though both these documents were called upon, both these documents pertain to defendant No.1, it was not produced by defendant No.1, as according to defendant No.1, the original documents were destroyed in the riots of 1969.

[21] It is pertinent to note that during the pendency of this Appeal, the defendant has produced one Certificate dated 27.6.2016 issued by one Ashish C. Mehta, Chartered Engineer, to substantiate their stand that the possession of the defendant No.1 is as per the Plan i.e. only upto 19526 sq. Yds and there is no other land occupied by defendant No.1. Thus, this document has been obtained during the pendency of the Appeal. Such Certificate was never produced before the trial Court, obviously because this is of the year 2016. Defendant No.1 could have taken out such exercise during the pendency of the proceedings before the trial Court itself. However, assuming that the contents of this Certificate be read for deciding the controversy, it reveals that the signatory of the Certificate has visited the site on 25.6.2016 and he took the measurement on **random basis** of various shops and has inspected certain number of shops and took measurement of certain shops out of 125 shops. It also reveals that according to this Certificate, Mr. Mehta has issued this Certificate stating that all the shops are as per the Plan, but, there is no exact measurement of entire Plots in occupation of defendant No.1 nor the vacate land abutting all the Shops. Even there is no measurement of all the shops of the entire area in occupation of the defendant No.1 and, therefore, this Certificate has no value in the eyes of law and it cannot be considered at this belated stage.

[22] Thus, on overall re-appreciation of the entire oral and documentary evidence, it clearly transpires that plaintiff has proved the fact that the defendants have encroached upon 3000 sq. Yds of land. The defendants have failed to prove that they are in lawful possession of the disputed land. On perusal of the impugned judgment and decree of the trial Court it clearly transpires that the learned trial Court has properly appreciated the entire evidence on record in threadbare manner and has not committed any error of facts and law. The ultimate conclusion reached by the trial court holding that the defendants have encroached upon the land of 3000 sq. Yds of the plaintiff and also directing the defendants to hand over vacant and peaceful possession to the plaintiff, are sustainable in the eyes of law. At the same time, it also reveals that there is no iota of evidence regarding the amount of mesne-profit and,

therefore, discretion exercised by the trial Court, directing an inquiry under Order 20 Rule 12(1)(c) is just and proper.

[23] In view of the aforesaid facts and circumstances, this Court has decided the Point Nos. 2, 3 and 4 accordingly.

[24] Point NO.5: In view of the above discussion, I pass the following final order in the interest of justice:

ORDER

The present First Appeal No. 105 of 1985 is hereby dismissed with costs. The impugned judgment and decree passed in Civil Suit No. 4342 of 1978 by learned City Civil Judge, Court No.5, Ahmedabad are hereby confirmed. Defendants are hereby directed to hand over vacant and peaceful possession of the land admeasuring 3000 sq. Yds as directed by the trial Court, within 3 months from today. Necessary inquiry regarding mesne profit be initiated as directed by the trial Court. The appellant-defendant No.1 is hereby directed to bear the cost of the plaintiff and bear its own cost of this Appeal.

Decree to be drawn accordingly in this Appeal.

Along with the copy of this judgment and decree, R&P to be sent back to the trial Court.