

(2022) 06 GUJ CK 0189
In the Gujarat High Court

Case No : R/First Appeal No. 1737 Of 1982, R/Cross Objection No. 55 Of 2017

Babulal Hathiram Raval -Heirs Amd Legal Representatives Of APPELLANT
Deceased & 1 Other(S)

Vs

Deceased Barot Girdharlal Jethalal Through Heir RESPONDENT

Date of Decision : 30-06-2022

Acts Referred:

Code Of Civil Procedure, 1908 — Order 3 Rule 1, Order 3 Rule 2

Citation : (2022) 06 GUJ CK 0189

Hon'ble Judges : Dr. A. P. Thaker, J

Bench : Single Bench

Advocate : VH Patel, Darshan Dave, HL Patel, RD Dave

Final Decision : Allowed

Judgement

Dr. A. P. Thaker, J

1. This First Appeal and Cross-Objection are arising from judgment and decree passed by learned Civil Judge, S.D., Himmatnagar dated 30.1.1982 in Special Civil Suit No.17 of 1975. The First Appeal has been preferred by the original defendant, whereas cross-objection has been preferred by the original plaintiff.

2. By judgment and decree dated 30.1.1982, trial Court has partly allowed the suit of the plaintiff and restrained defendants and his agents and servants by way of permanent injunction from making any construction upon the land admeasuring 26 ft. (N-E) X 33 ft. (E-W) situated at Khedbrahma and bounded as shown in para 5 of the plaint. At the same time, the defendants were restrained from disturbing the plaintiff from his use and occupation of the suit land except the land admeasuring about 83 ft. (E-W) X 9 ft. (N-S) as indicated by letter "A" mentioned in paragraph 51 as well as land admeasuring about 15 ft. (E-W) X 18 ft. (N-S) as indicated by letter "B" in paragraph 13 of his written statement, which are in actual possession of the defendant.

3. The defendant by way of First Appeal has submitted that the trial Court has

committed an error of facts and law in passing permanent injunction in respect of the land, which is in actual possession of the defendant. The defendant has also submitted that the trial Court has committed error in believing the title of the plaintiff in respect of the suit land admeasuring 76 ft. X 33 ft. According to him, he has proved his title by various documents, which includes sale deed Exh.159 dated 8.4.1949, Sanad Exh.160 dated 15.12.1953 as well as Sanad Exh.161 dated 10.4.1973 and actual possession of the suit land. It is also contended that the defendant is in actual possession of the suit land since 1949 and the plaintiff has never objected to the same. It is also contended that the plaintiff has relied upon Sanad no.122 dated 12.3.1932, exh.123 dated 4.10.193 and exh.124 dated 21.2.1934, however, the plaintiff does not aver that what he did for all these 50 years in respect of the suit land and plaintiff has slept over his right for more than 40 years.

3.1 It is also contended that the plaintiff has filed suit for permanent injunction only and thereby wanted and tried to take away possession from the defendant. It is also contended that the plaintiff himself has not deposed before the trial Court and his Power of Attorney Holder has been examined, who has admittedly no personal knowledge about the facts of the case.

3.2 It is also contended that trial Court has committed error of facts and law though it has believed the possession of the defendants in respect of the suit land and yet he has been restrained from utilizing the same. It is also contended that the plaintiff has failed to establish his title over the property in question and since he was not in possession, the suit filed for permanent injunction simplicitor is not maintainable. It is also submitted that the defendant is in possession of the suit land since many years and even if it is the case of the plaintiff that by way of Sanad of 1932, he has title over the land, even in that case, the possession of the defendant has become adverse and this issue of adverse possession ought to have been decided in favour of the defendant. It is contended that observation of the trial Judge that issue of adverse possession is redundant is not proper. The defendant has also contended that trial Court has failed to appreciate oral and documentary evidence of the defendant in proper perspective and has failed to draw proper and legal inference. According to the defendant, suit of the plaintiff ought to have been dismissed and relief sought by him in counter-claim ought to have been granted in favour of the defendant.

3.3 On all these averments, the defendant has prayed to set aside the judgment and decree passed in Special Civil Suit No.17 of 1975 dated 30.1.1982 passed by Civil Judge, S.D., at Himmatnagar, and to dismiss the suit of the plaintiff with cost.

4. In the cross-objections, heirs of original plaintiffs have submitted that deceased Barot Girdharlal Jethalal, predecessors of the plaintiff filed aforesaid Special Civil Suit No.72 of 1975, wherein the trial Court has erroneously held that the appellants are though held as owners of the land, the possession has not been believed. It is contended that the witnesses of the defendant have also

admitted that possession is with the plaintiff and yet the trial Court has not considered this aspect. It is contended that the judgment and order as regards possession of the disputed land is erroneous and based on conjectures and surmises. It is contended that the defendants have failed to establish their possession on the disputed land. It is admittedly of the ownership of plaintiff and, therefore, the suit of the plaintiff ought to have been allowed in toto instead of depriving the plaintiff from the possession thereof. It is contended that the trial Court ought to have appreciated that way back in 1932, the disputed land was purchased by the predecessor of the plaintiff, Muljibhai Dayabhai from M/s.Navrojji Pestonji and Company and on that basis though the trial Court has believed the ownership of the plaintiff has erroneously decided the issue of possession against the plaintiff.

4.1 It is also contended that Sale Deed in favour of the defendants by one M/s.Vakilwala and Company is held to be illegal by the trial Court. It is also contended that the trial Court has also held that defendant was in unauthorized use and occupation of the land in dispute by virtue of Sanad dated 15.12.1952, Exh.161. According to the plaintiffs, this observation is clearly contrary to the actual physical facts about possession of the plaintiff. It is clear from the Panchnama and other documents, that on the date of filing of the suit, plaintiff was in possession of the disputed land.

4.2 It is also contended that the trial Court has erred in holding that there were four Gallas, which were leased to different persons by the defendants, however, in fact, as per Panchnama, there were no Gallas found and only some material like pieces of bricks, stones, woods etc. were lying on the disputed land, which cannot be termed as Gallas was in occupation and possession of various persons. It is also contended that the defendant has not examined so-called tenants Raval Bhikhabhai, Darji Govindbhai and Nai Shyamjibhai as witnesses, who claimed to have installed gallas in the premises and, therefore, there is no evidence produced by the defendant of any kind that disputed premises was given on rent to somebodyelse. It is also contended that the trial Court has not appreciated properly the panchnama of the Commissioner and has wrongly not believed that the plaintiff was in possession of the suit land, even at the time of the suit when fencing was there.

4.3 It is also contended that learned trial Court has committed serious error in deciding the issue of possession against the plaintiff, merely because the plaintiff himself has not stepped into witness box, to depose and his Power of Attorney holder Amrutlal, who happens to be close relative of the plaintiff, has been examined. According to the plaintiff, trial Court has examined the witnesses of the plaintiff along with Panchnama, which is clear indication that the plaintiff has been in possession of the suit property. It is also contended that the trial Court has mis-interpreted the deposition of the plaintiff's witness no.1, Mr.A.S.Barot, Exh.120 and has also committed serious error of facts and law in passing the impugned order. It is prayed by the plaintiff that entire suit of the plaintiff to be

decreed and to declare that the disputed land is in possession of the plaintiff and the defendants may be restrained from interfering with the possession of the plaintiff of the disputed land.

5. Heard learned Senior Counsel, Mr.V.H.Patel assisted by Mr.Darshan Dave for the appellant and learned advocate Mr.R.D.Dave for the respondent-original plaintiff.

6. The plaintiff has filed Special Civil Suit No.17 of 1975 for declaration and permanent injunction contending that the property in question was of one Mr.Dayalji Abji and he had two sons viz. Mulji and Tribhovan Dayalji. It is alleged that the property of deceased Tribhovan Dayalji came in the share of plaintiff's father-Jethalal Tribhovan and he was acting as Karta of HUF of Mr.Jethalal Tribhovan. According to the plaintiff, he is the owner and occupant of open piece of land admeasuring 76 ft. (N-S) X 33 ft. (E-W) since last more than 50 years and since time of his ancestors. It is further alleged that Ex-Maharaj of Idar had given said house-side piece of land to his ancestor Muljibhai Dayalji in the year 1931 and Maharaja issued two Parvanas one dated 12.3.1932 and another dated 4.10.1932 in favour of Mulji Dayalji. It is further the case of the plaintiff that said open piece of land forms part of village side land belonging to Khedbrahma Gram Panchayat and that boundary of the said land is detailed in paragraph 5 of the plaintiff and defendant has no right, title or interest upon the said open land of the plaintiff.

6.1 It is averred by the plaintiff that on the West side of his land, there is room belonging to the Custom Department and same is being used as Chora. That the defendants open house-side piece of land is 31 ft. (E-W) X 27 ft. (N-S) touching to the said room of Custom Department. It is averred that towards southern side of the defendants above-said piece of land is situated a naveli (strip of land) and touching said strip of land, there are houses belonging to Shikh Mansing. It is further alleged that north side of the defendant's land, public road is situated and on the eastern side of the defendant's aforesaid land, plaintiff's open land is situated, after leaving an area of about 3 ft. - 6 inch of the strip of land i.e. naveli.

6.2 It is alleged by the plaintiff that the defendants knew very well that site of hosue-side open piece of land and boundaries thereof belongs to plaintiff and inspite of this knowledge, he submitted the application for constructing a property on the defendants' said land. It is alleged that the defendant has included in the said map and plan some part of plaintiff's open land and started putting up construction in the northern part of plaintiff's said land, two days prior to the date of the suit. Hence, according to the plaintiff, he has been compelled to file the suit for declaration and permanent injunction. Pending hearing and final disposal of the suit, the plaintiff has also applied for interim injunction, which was granted by the trial Court.

7. The defendants have resisted the suit by filing written statement, inter alia

contending that the defendant as well as one Umiyashankar of Vasna have started business in the partnership in the year 1947 upon the open land, which is towards the east of the room belonging to Custom Department. It is contended by the defendant that the said open piece of land admeasuring 17 ft. (N-S) X 32 ft. (E-W) is situated at a distance of about 35 ft. from east-north corner of the said room of the Custom Department. According to the defendant, on the said open piece of land, there was one hut (chhaparu), which was in the most dilapidated condition and the walls thereof were made of sand and roof of said structure was also in dilapidated condition and merely two walls had remained on the said open piece of land. It is further contended by the defendant that as they desired to start Hotel on the said open piece of land, they made inquiry regarding ownership of said open piece of land and structure thereof. It is contended that they came to know that one Mulji Dayalji Barot was the owner of the said land and structure and also came to know that Mulji Dayalji has died long back without leaving any heirs and due to that Ruler of Idar State has confiscated the land.

7.1 It is further contention of the defendant that he and Umiyashankar have put up new roof on the walls of said old structure and started their hotel therein. According to the defendants, toward east of the room belonging to Custom Department, after leaving margin of 6 ft. 10 inch, there was another open piece of land admeasuring 40 ft. (E-W) X 18 ft. (N-S), which was belonging to one M/s.Navrojji Pastonji Vakil and Company. That the said Vakil and Company had Parvana No.1008 of the year 1911-12 issued by Idar State with respect to said open piece of land. According to the defendant, there was also structure near the hotel of the defendant. That he had purchased said open land by registered Sale Deed dated 8.4.1949 from M/s.Vakilwala and Company. According to the defendant, after few months of their purchase of the said property from M/s. Vakilwala and Company, his partner Umiyashankar retired from the business and, thereafter, the defendant shifted his hotel, which was in the old structure into new structure, which he had purchased from M/s.Vakilwala and Company. It is further contention of the defendant that he used old structure for storing the grass and tethering his cattles therein.

7.2 It is also the contention of the defendant that there is another strip of land which is admeasuring 20 ft. 4 inches (E- W) X 9 inches (N-S) towards north of the property, which belonged to M/s.Vakilwala and Company and from whom they had purchased it, as referred to herein above. According to the defendant, in the year 1963, by way of Sanad dated 15.12.1963, he had purchased the aforesaid strip of open land. According to him, as the roof of the old structure had become dilapidated, he removed old structure along with roof and kept his Galla on the said land and has leased the remaining portion to other persons, whose names are referred in written statement. He has also contended that on the remaining area of the said land, he was keeping the cattle and was in use and occupation fo the said open piece of land continuously and to the knowledge of the plaintiff. It is alleged that he has become owner of the said open piece of

land over which the plaintiff claims his ownership by virtue of adverse possession thereof since 1949 till date of the suit. He has contended that the plaintiff has no right to file present suit and his alleged right of obtaining possession has been extinguished by lapse of time.

7.3 In the alternative, the defendant has also contended that as he is/was in use of the disputed land, the Collector, Sabarkantha, issued Parvana dated 4.4.1973 and on that basis also he has become occupier and owner of the land in question. It is also alleged by the defendant that Ramdas Tribhovandas and Mulji Tribhovandas, who are sons of deceased Tribhovandas Dayalji are alive. He has also alleged that except Girdharbhai Jethabhai, rest of heirs and legal representatives of deceased Jethabhai are residing in Village-Gundel. The defendant has denied that the plaintiff or his ancestors were in use and occupation of the land in question for last about 50 years. The defendant has also described the boundaries of his land and prayed to dismiss the suit of the plaintiff.

7.4 The defendant has also contended that prior to two months of filing of the suit, he has decided to construct new house in place of dilapidated condition of the house, which he has purchased from M/s.Navrojji Vakil, as his Village-Champalpur submerged in Dharoi Dam. He has submitted that debris of old house were kept there and he has also got vacant portion of the land, which he has given to one Raval Bhikhalal, Darji Govind and Nai Shamji, who have put up their Gallas and on that open land, he has decided to make construction of his new house. It is alleged that on 5.9.1975 at about 5 O' clock, he received copy of injunction order and on the next day, i.e. on Sunday at about 7 to 7.30 a.m., plaintiff allong with his relatives and about 50 labourers came there and assaulted him and, thereafter, on the basis of injunction order, it has put up fencing by utilizing the old debris lying there. He has submitted that the plaintiff has no right to do so over the land, which was in occupation and possession of the defendant and, therefore, he has sought for declaration against the plaintiff that the plaintiff has no such right.

8. On the basis of pleadings of the parties, the trial Court has framed following issues at Exh.86.

"1. Whether the plaintiff proves that his ancestes was Deyalji Abji and Dayalji Abji had two sons (i) Mulji Dayalji and (ii) Tribhovan Dayalji as alleged?

2. Whether the plaintiff proves that the property of Tribhoval Dayalji was inherited by the father of plaintiff i.e. Jethalal Tribhovan, and that it was in possession and enjoyment, and in Vahivat of Jethalal Tribhovan as alleged?

3. Whether the plaintiff proves that he was doing Vahivat of the undivided joint Hindu Family of Jethalal Tribhovandas as alleged?

4. Whether the plaintiff proves that the open land situated in the station area at Khedbrahma admeasuring North-South 76 feet and East-West 33 feet was and in

the possession and enjoy of plaintiff since the time of ancestors as owners and since last more than 50 years as alleged?

5. Whether the plaintiff proves that his ancestors Barot Mulji Dayalji had received Parwanas of the disputed suit land in the year 1924 from Idar Maharaja, and that the present plaintiff has also received two parwanas dated 12-3-1932 and 4.10.1932 as alleged ?

6. Whether the defendant proves that as all the legal heirs of deceased Tribhovan Dayalji have not brought the suit, the plaintiff's suit in its present form is not maintainable at law as alleged ?

7. Whether the defendant proves that in the year 1947 he has started his hotel business to the East of Custom ordi in the station area at Khedbrahma and other averments made in para 6 of his W.S. Ex.51 as alleged ?

8. Whether the defendant proves that he has become the owner of the disputed land by virtue of his alleged adverse possession over the suit land as alleged ?

9. Whether the defendant proves that he is in possession of the suit land by virtue of the order of the District Collector dated 17-6-1972 and 10/4/1973 as alleged ?

10. Whether the defendant proves that he had purchased the open land to the East of Custom ordi after leaving a "Naveli" of 6'-10' East 40 feet North-South 18' land along with the building by a registered deed dated 8/4/1949 as alleged?

11. Whether the plaintiff is entitled to get declaration and permanent injunction as prayed for?

12. What decree?

13. What order?

9. It appears that from the oral and documentary evidence on record, the trial Court has decided these issues as under:-

1. Affirmative.

2. Affirmative, but so far the question of possession is concerned it would be as per the final order.

3. Affirmative.

4. Affirmative, however, so far the question of possession is concerned it would be as per the final order.

5. Affirmative.

6. Negative.

7. Partly in affirmative, and also subject to the observations made in the judgment.

8. Redundant.

9. Partly in affirmative and subject to the observations in the judgment.

10. Affirmative.

11. Partly in the affirmative.

12. As per the final order.

13. As per the final order.

10. Considering the submissions made on behalf of both the sides and on perusal of record and proceedings of trial Court, including judgment and decree, the following points arise for determination of present appeal.

(i) In the facts and circumstances of the case, whether the trial Court has committed error of facts and law in holding that the plaintiff is in occupation of the land in question?

(ii) In the facts and circumstances of the case, whether the trial Court has committed error of facts and law in deciding the issue of adverse possession, as being redundant ?

(iii) In the facts and circumstances of the case, whether trial Court has committed any error of facts and law in passing the impugned judgment and decree in favour of the plaintiff?

(iv) What order?

11. For the reasons recorded hereinafter, my findings on the above points, is as under:-

(i) In affirmative.

(ii) In affirmative.

(iii) In affirmative.

(iv) As per final order.

REASONS:-

12. Learned Senior Counsel Mr.Patel for the appellant has submitted the same facts, which are narrated in the memo of appeal and has submitted that oral evidence rendered by power of attorney holder of the plaintiff cannot be looked into as the plaintiff himself has not deposed anything. According to him, the power of attorney holder has no knowledge and whatever he has stated is on the basis of hearsay evidence and, therefore, his evidence regarding possession of the land in question cannot be believed. He has also submitted that as per oral and documentary evidence, it clearly transpires that though predecessor of plaintiff got ownership of the land by so-called documentary evidence but actually there was no possession of the plaintiff. He has also submitted that as

per oral and documentary evidence produced in the matter, the possession was with defendant and as per panchnama prepared by the Court Commissioner, there is specific averment in panchnama that there was space for Gallas and the fencing put up on the disputed land is new fencing wherein debris material is used, which belongs to the defendant. He has submitted that after getting ex-parte injunction, the plaintiff has put up said fencing. He has submitted that version of the defendant that he was in occupation of the land and has put up Gallas is duly corroborated from the factum of signs of galls found in panchnama.

12.1 Learned counsel Mr.Patel has also referred to entire oral and documentary evidence and has also read the judgment of the trial Court and has submitted that the trial Court has committed serious error of facts and law in believing the version of the plaintiff that he was in possession of the suit land. He has submitted that evidence led by the defendant showing that since more than 50 years, he is in occupation of the land and has also got necessary license from Collector and he is possession of the land is not controverted by the plaintiff himself by entering into witness box. He has submitted that the trial Court has not properly appreciated the fact that though there was documentary evidence showing ownership of forefather of the plaintiff, after death of forefathers, nobody was utilizing and occupying the land in question and defendant was utilizing it for his hotel with another person and, thereafter, he was tithing his animals there. He has also submitted that, therefore, by reappreciating the entire evidence on record, this Court should set aside the judgment and decree of the trial Court and suit of the plaintiff be dismissed and injunction granted against the defendant be lifted and prayer of defendant for declaration to the effect that plaintiff has no right or title over the property be passed in favour of the defendant.

12.2 Mr.Patel has also submitted that the plaintiff was not the sole owner of the land, as admittedly it was ancestral property and other heirs are not joined as party to the proceedings. He has also submitted that the plaintiff has failed to prove his ownership and possession, whereas legal ownership is vested in the defendant by adverse possession. He has submitted that considering even adverse possession of the defendant, decree ought to have been passed in favour of the defendant. He has submitted that the trial Court has rightly not believed possession of the plaintiff but has failed to consider the fact that when possession was with defendant, he ought not to have been restrained from utilizing the land.

12.3 He has prayed to allow present appeal by relying upon following decisions:-

(i) Janki Vashdeo Bhojwani and Another v. Indusind Bank Limited and Others reported in (2005) 2 SCC 217.

(ii) Nagben D/o Vithalbhai Motibhai v. Bhikhabhai Ranchhodbhai reported in 2020 JX (Guj) 309.

(iii) Vineeta Sharma v. Rakesh Sharma and Others reported in 2020 (9) SCC 1.

13. Per contra, learned advocate Mr.R.D.Dave for the respondent-original plaintiff has submitted that in a given case, power of attorney holder can depose on behalf of the owner of the property and it is not legal necessity that only the person, who has given power must enter witness box. He submitted that in the present case, power of attorney holder was examined in dual capacity i.e. as relative of the plaintiff and as power of attorney holder of the plaintiff and he has factual knowledge of the matter. He has submitted that therefore version of the power of attorney holder cannot be discarded totally. While referring to oral and documentary evidence, Mr.Dave for the original plaintiff has submitted that as per written statement itself, when the defendant used the land in question nobody has opposed and, therefore, there cannot be any question of adverse possession. He has submitted that mere possession is not adverse possession. According to him, adverse possession means when it is objected by the original owner or anybody claiming through him. He has submitted that in view of the averments made in written statement and the oral evidence there was only possession by the defendant and it was not known to original owner, therefore, non-resistance by original owner or person claiming through him cannot be said to have knowledge of possession adverse to his right. He has also submitted that in the present case, defendant has claimed two contrary pleas, i.e. one regarding ownership on the basis of Sale Deed and second by adverse possession. He has submitted that this are two contrary pleas and the defendant has to choose anyone.

13.1 Mr.Dave has also submitted that in the present case, plea of adverse possession has failed and, therefore, the trial Court has rightly decided the point that question of adverse possession has become redundant. He has also submitted that the trial Court has rightly passed decree partly in favour of the plaintiff but has committed an error of facts and law in holding that possession of the land is with the defendant. He has submitted that, therefore, the plaintiff has filed cross-objection. He has submitted that version of the defendant that he was utilizing the land for hotel and he has given some portion to four persons for putting up Gallas is not proved. He has submitted that the persons to whom the land was rented are not examined by the defendant and, therefore, that version cannot be believed.

13.2 Mr.Dave has also submitted that the property even if held to be joint property, any co-sharer can file a suit against third party for protection of co-parcenary right and there is no need of joining all co-parceners as plaintiffs.

13.3 Regarding Court Commissioner's panchnama, he has submitted that debris found during panchnama may be of 1949 as the defendant himself has stated in his written statement that house was in dilapidated condition and merely presence of debris at the time of panchnama cannot decide the fact that the defendant is in possession of the land in question. He has submitted that the trial Court has committed error of facts and law in granting relief in favour of the defendant. He has submitted that entire suit should have been decreed in favour

of the plaintiff. He, therefore, prayed to dismiss present appeal and prayed to grant relief, as prayed for in cross-objection. He has submitted that the decisions relied upon by other side do not have any application to the facts of the present case.

13.4 He has relied upon following decisions:-

(i) A.C.Naranayan v. State of Maharashtra reported in (2014) 11 SCC 809.

(ii) P.G.V.C.L. City Division v. Alimamad Karim through Hasam Haji Abu Ravalia and Others reported in 2017 (2) GLR 934.

(iii) S.M.Karim v. Mst.Bibi Sakina reported in AIR 1964 SC 1254.

(iv) L.N.Aswatham and Another v. P. Prakash reported in (2009) 13 SCC 229.

14. In rejoinder, learned counsel Mr.Patel for the appellant has submitted that as per para 7 of deposition of power of attorney holder, he has no personal knowledge and in view of observations made by the Supreme Court in the judgment reported in (2014) 11 SCC 790, his deposition cannot be taken into consideration. He has also submitted that as per the plaintiff's own witness, Kalaji Mulji Dayalji had no heirs. According to him, when Mulji Dayalji has died, he had no issues then how Jethabhai has become his heir. He has submitted that in this case, there is no document regarding oral partition between the parties. He has submitted that the defendant was only required to prove continuous possession without interruption by owner for the purpose of proving adverse possession. He has submitted that in this case, there is ample evidence to show that defendant was in possession since 1949 and his possession continued till the date of filing of the suit. Therefore, even by plea of adverse possession, the defendant has become owner of the land. He has submitted that other documentary evidence regarding purchase of the land pertaining to adjacent land and, therefore, there is no question of any contrary plea being raised by the defendant. He has submitted that the decisions relied upon by other side do not have any application to the facts of the present case.

15. Order 3, Rules 1 and 2 of CPC empowers the holder of power of attorney to "act" on behalf of the principal. In this regard, in the case of Janki Vashdeo Bhojwani and Another (supra), the Apex Court has held as under:-

"Order III, Rules 1 and 2 CPC, empowers the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order III, Rules 1 and 2 CPC, confines only in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has rendered some "acts" in pursuance to power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter which only the principal can have a personal knowledge and in respect of which the principal

is entitled to be cross-examined."

15.1 In para 15, the Apex Court has also observed as under:-

"Apart from what has been stated, this Court in the case of Vidhyadhar vs. Manikrao and Another, (1999) 3 SCC 573 observed at page 583 SCC that:

"17. where a party to the suit does not appear in the witness-box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that the case set up by him is not correct".

16. Learned advocate Mr.R.D.Dave for the respondent has relied upon the decision of A.C.Naranayan (supra) for his submission that power of attorney holder can depose on behalf of principal and, accordingly in this case, though the original plaintiff has not entered the witness box, his general power of attorney holder has specifically stated the facts regarding possession of the plaintiff over the suit plot and the power of attorney holder is near relative of the plaintiff and, therefore, the version of the power of attorney holder regarding possession of the plot in question of the plaintiff has been rightly believed by the trial Court. He has also submitted that question regarding entitlement of the power of attorney holder to depose on behalf of the principal is referred to the Larger Bench by the Apex Court in this case and, therefore, the decision relied upon by learned advocate for the other side, which is referred to herein above, cannot be made applicable. In this decision, decision in the case of Janki Vashdeo Bhojwani (supra) has also been referred to and after referring this judgment, the Apex Court has opined that the matter should be considered by the Larger Bench. Now, so far as decision relied upon by learned advocate Mr.Dave is concerned, considering the facts therein, it appears that the matter was pertaining to the complaint filed under the provisions of the Negotiable Instruments Act and complainant himself has not filed the complaint, his power of attorney holder had approached the Court. Under those facts, while referring to various decisions of the Apex Court has referred the issue to the Larger Bench.

17. It is pertinent to note that decision relied upon by learned advocate Mr.Dave is pertaining to Negotiable Instruments Act, whereas in the case of Janki Vasudev Bhojwani (supra), it was pertaining to interpretation of Order 3, Rule 1 and 2 and other relevant provisions of CPC regarding power of Power of Attorney Holder to depose on behalf of the Principal, wherein as referred to herein above, the Apex court has clearly held that under Order 3, Rule 1 and 2 of CPC, the power of attorney can only act as per the power given to him and he cannot depose on behalf of the principal on the facts, which are in the personal knowledge of the principal. Now, admittedly in this case, plaintiff himself has not stepped into the witness box in relation to his averment that he is in possession of the suit land from the years together. The power of attorney holder, though is a near relative has no personal knowledge regarding actual possession of the plaintiff. Therefore, oral evidence rendered by the power of attorney in place of the

plaintiff himself loses its authenticity. Since the plaintiff did not step into witness box himself, the valuable right to cross-examine him on the aspects of actual possession of the land has been defeated. Therefore, in this case, in absence of examination of the plaintiff by himself on oath in respect of the actual possession of the suit land, the plaintiff has produced the documentary evidence showing that the suit plot was purchased by the deceased in the year 1932. Various documents reveal that the deceased has purchased the land, but there is also oral evidence produced by both the plaintiffs to show that when the defendant inquired regarding ownership of the land in question, he came to know about name of the deceased. However, since nobody occupied the same, he has occupied it and made hotel with another partner. It also reveals from the evidence on record that thereafter, he has also made some construction and given it on rent to other persons. It also appears that another strip of the land has also been purchased by the defendant. Thereafter, even government has granted Sanad to him.

18. It also appears from panchnama prepared by the Court Commissioner at Exh.168 that when it was prepared the sign of Otas was found on the place, which supports the version of the defendant that he was in possession of the land in question and he has constructed those otas. This very fact suggests that at the relevant point of time, the plaintiff was not in possession of the land in question.

19. At this juncture, it is pertinent to note that there is also a question regarding possession being adverse or not. In this regard, learned advocate Mr.Dave for the original plaintiff has relied upon decision in the case of P.G.V.C.L. City Division v. Alimamad Karim through Hasam Haji Abu Ravalia and Others reported in 2017 (2) GLR 934, especially para 57, which reads as under:-

"57. As against this, learned senior counsel Mr. Kavina forcefully relied upon the decision in the case of S.M. Karim V. Bibi Sakina, reported in AIR 1964 SC 1254 and submitted that long possession is not necessarily adverse possession and there is no evidence here when possession became adverse. Therefore, the question No.3 is not required to be dealt with. Even the trial Court has framed issue No.4 and answered to the same in negative. Learned senior counsel further submitted that a person pleading adverse possession has no equities in his favour and since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession. It is also submitted that neither has the appellant anywhere pleaded the exact date on which its possession became adverse, nor did the appellant ever possess the requisite animus possidendi. Same ratio is absolutely applicable in the present case."

20. Against this learned Senior Advocate Mr.Patel for the appellant has relied upon the decision in the case of Nagben D/o Vithalbhai Motibhai v. Bhikhabhai Ranchhodbhai reported in 2021 JX (Guj) 309, wherein this Court has observed as under:-

"15. Now, it is well settled that "Possession" implies dominion and control and the consciousness in the mind of the person having dominion over an object that he has it and can exercise it, whereas the "Occupation" implies only bare use of the land/immovable property without any right to retain it. The concept of "adverse possession contemplates a hostile possession, i.e. a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's right's but denies them. The principal of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor.

15.1. Now, it is well settled that, adverse possession means, possession by a person holding the immovable property on his own behalf and on behalf of the some person other than the true owner having a right to immediate possession, provided the true owner is not under a disability or incapable of suing. Adverse possession is a possession that is hostile, under a claim or colour of title, actual, open, notorious, exclusive, and continuous, continued for the required period of time thereby giving an indefeasible right of possession or ownership to the possessor by operation of the limitation of action. It is a settled law that if someone wants to take a plea of adverse possession, it implies that initial entry was not under any right to possess the property but it must be commenced in wrong and is maintained against the right of the other. The basic ingredient of adverse possession theory is that the possession must be in hostile without any right of first entry thereof. Adverse possession in once sense is based on the theory of presumption that owner has abandoned the property to the adverse possessor on the acquiescences of the owner thereof to hostile acts and claims of the person in possession. At the same time, mere possession even of a trespasser will not constitute adverse possession unless accompanied by open assertion of hostile rider.

15.2. Further, adverse possession is a method of acquisition of title to the property by possessing for a statutory period under certain conditions. It depends on intention of the occupant to claim and hold the land/property in opposition to the whole world, and also embodies the idea that the owner or person interested in the property have knowledge of the assertion of ownership by the occupant. It consist of actual possession with intent to hold solely by the possessor to the exclusion at all others and is denoted by the exercise of the act of dominion over the property including making of ordinary use and taking of ordinary usufructs of which the land/property is stumple in its present state. It is unilateral act and there is no question of any contract or agreement giving rise to adverse possession.

15.3. It is well-known that when the parties are co-owners to acquire

prescriptive title there should be ouster, and limitation would start to run only from the date of ouster. If ouster is to be pleaded, the title has to be acknowledged. It is also well settled the mere entry of name in the mutation register, is not an indication of adverse possession. As it is well settled that one co-owner, in exclusive possession cannot render his possession adverse to other co-owners, not in possession, merely on the basis of a secret or hostile animus on his part. It is also needs to be observed that adverse possession cannot be established on the basis of mutation of name in revenue records without issuing notice to co-tenure holder. Further, merely paying property tax could not established that possession had become adverse to the co -owners. It is also settled that fundamental rule is that the entry and possession of property under the common title of co- owner will not be presumed to adverse to the others was ordinarily be held to be for the benefit of all.

15.4. The principles bearing on the nature of possession of one co-owner vis-a-vis the other co-owners and when the possession of one co -owner becomes adverse to the other coowner were clearly enunciated by the Honourable Supreme Court in the case of P.Lakshmi Reddy v. L. Lakshmi Reddy reported in A.I.R. 1957 SC

314. It was held in that case that it is well settled that in order to establish adverse possession of one co-heir as against another it is not enough to show that one out of them is in sole possession and enjoyment of the profits of the properties, and that ouster of the nonpossessing co-heir by the co-heir in possession who claims his possession to be adverse, should be made out. The Supreme Court emphasized further that "the possession of one co-heir is considered in law, as possession of all the co-heirs" and that" when one co-heir is found to be in possession of the properties it is presumed to be on the basis of joint title." it was further observed that "the co-heir-in-possession cannot render his possession adverse to the other co-heir, not in possession, merely by any secret hostile animus on his own part in derogation of the other co-heirs title".

21. In view of the observations of this Court, now it is settled that a person, who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. It is also necessary that if someone wants to take a plea of possession, it implies that initial entry was not under any right to possess the property but it must be commenced in wrong and is maintained against the right of the other. The basic ingredient of adverse possession theory is that the possession must be in hostile without any right of first entry thereof. At the same time, mere possession even of a trespasser will not constitute adverse possession unless accompanied by open assertion of hostile rider. Now, admittedly in the present case, the initial entry by the defendant on the land in question was not legal one, as per pleading. Before entering upon the land, he has inquired regarding true owner of the land and, thus, his possession was at the relevant time not legal one, but, at the same

time, it appears that when he claims ownership of the land in question on the basis of his long possession. It is for him to prove that the possession of the land in question by him was within the knowledge of the original owner and he has not objected to it. Now, admittedly as averred by the defendant himself, the deceased in whose name the land in question was standing has already died and the defendant had no knowledge regarding his heirs. At the same time, the claim of possession of suit land by the plaintiff himself is not established and it is revealed from evidence that the defendant is in possession since 1949. Thus, the possession of the defendant, in absence of any resistance or claim by the plaintiff for long time i.e. upto filing of suit in 1975, would take colour of adverse possession of the defendant, defeating the right of the plaintiff. This facts and legal aspect is lost sight by the learned trial Court and it has wrongly observed that the issue of adverse possession has become redundant. Further, when admittedly on the date of filing of the suit, the plaintiff was not in possession of the suit land, the suit for declaration and permanent injunction without any prayer for recovery of possession is not liable to be successful.

22. Now, so far as the point of non-joinder of other heirs is concerned, it is well settled that if the property belongs to HUF/ Joint property, then, any one member/ co-parcener can file suit, against any third party for protection of rights pertaining to such property and there is no need to join all the family members thereof in such suit filed against third party.

23. Now admittedly in this case, the plaintiff has filed the suit on the basis of old documents showing that his forefather was the owner of the land and it has come to his father's share. However, on perusal of the entire evidence on record, it clearly transpires that there is no evidence of devolvement of the suit land in favour of the plaintiff. The person, who has been examined by the plaintiff is Power of Attorney Holder and he has no knowledge thereof. It also reveals that for the said land, the revenue authority has issued Sanad to the defendant. This shows that the land has been vested to the government. Otherwise, the revenue authority could not have issued Sanad in favour of the defendant. This fact suggests that after death of person, in whose name the land was standing, nobody has put up claim before the authority. Therefore, the version of the plaintiff regarding having rights in the suit property, part of the property came in his hand on oral partition of the family property has no sufficient evidence on record. In absence of such evidence on record, version of the Power of Attorney Holder of the plaintiff cannot be believed. Had the plaintiff himself entered into the witness box and has examined himself, in that case, all these questions might have been properly answered by the plaintiff. Be that as it may, the plaintiff did not chose to enter the witness box, for the reasons best known to him. Moreover, when the plaintiff was not in possession of the land in question, he ought to have sought a relief for possession of the land in question, rather than seeking only declaration and injunction, based on mere averment that he is in possession of the suit land. Thus, when the plaintiff has not filed suit for possession of the land, and has filed suit only for injunction and declaration, the

plaintiff is not entitled to get said decree for declaration and injunction. On perusal of the impugned judgment and decree of the trial Court, it appears that the question of adverse possession has not been properly dealt with by the trial Court and has also lost sight of the fact that the plaintiff did not prove his basic requirement that on the date of filing of the suit, he was in possession of the land in question. Under the circumstances, admittedly from evidence, it is clearly established that on the date of filing of suit, the defendant was in possession of the suit land. On the basis of the material placed on record, especially government Sanad and the version of preparation of ota and ancillary evidence, the partial decree ought not to have been granted in favour of the plaintiff and against the defendant.

24. Considering the facts and circumstances of the case, the suit of the plaintiff is liable to be dismissed and the trial Court ought to have dismissed the suit accordingly. However, the trial Court has passed partial decree in favour of the plaintiff restraining the defendant. This partial decree of the trial Court is not sustainable in the eyes of law.

25. In view of above discussion and considering the facts and circumstances of the case, I have decide the points raised in this appeal in affirmative. The following final order is passed in the interest of justice.

ORDER

26. The present appeal is allowed. Cross-objection is dismissed. Impugned judgment and decree passed by learned Civil Judge, S.D., Himmatnagar dated 30.1.1982 in Special Civil Suit No.17 of 1975 are quashed and set aside. The suit of the plaintiff stands dismissed accordingly.

27. Considering the facts and circumstances of the case, parties are directed to bear their respective costs of appeal and Cross-objections.

28. Decree to be drawn in present appeal accordingly in the present appeal. Along with copy of present judgment and decree, Record and Proceedings be sent back to the concerned trial Court.