
(2016) 10 GUJ CK 0034
In the Gujarat High Court
Case No : Second Appeal No. 12 of 2014

Gajaraba Bhikhubha Vadher

APPELLANT

Vs

Sumara Umar Amad

RESPONDENT

Date of Decision : 19-10-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2017) 1 GCD 244

Hon'ble Judges : Mr. Z.K. Saiyed, J.

Bench : Single Bench

Advocate : Mr. Sureshm Shah, Advocate, for the Respondent Nos. 1.1, 1.3 and 1.5; Mr. Mihir Joshi For Mr. Amar D. Mithani, Advocates, for the Appellant Nos. 1 and 8; HCLS Committee, Advocate, for the Respondent Nos. 4 and 6; Mr. PC Kavina For Mr. Ejaz M. Qureshi & Mr

Final Decision : Partly Allowed

Judgement

Z.K. Saiyed, J. (CAV) - Present Second Appeal preferred under Section 100 of the Code of Civil Procedure, by the appellants challenging the judgment and order dated 7.11.2012 and decree dated 3.12.2012 passed by the learned Additional District Judge, Jamnagar, in Regular Civil Appeal No.130 of 2005, whereby the learned Additional District Judge allowed the Appeal and set aside the judgment and decree passed by the learned Extra Assistant Judge, Jamnagar, in Special Civil Suit No.77 of 1974 dated 17.4.1982 filed by the original plaintiff.

2. It is pertinent to note that original defendant had expired during the pendency of the Special Civil Suit No.77 of 1974 and original plaintiff had died during the pendency of the Regular Civil Appeal No.130 of 2005 and their respective legal heirs and representatives were joined in the proceedings.

3. Now, in this Appeal, the appellants being the third parties and respondents are original plaintiffs and defendants.

4. The facts in brief are as under:

4.1 The appellants herein are the subsequent purchasers of the portion of land bearing Revenue Survey No.36 of Dhinchna, Ta. & Dist. Jamnagar, which was originally sold by Shri Sumara Amad Osmal (org. defendant No.1 of Special Civil Suit No.74 of 1974) on 1.2.1978 by registered sale deed to Patel Raghavji Savjibhai and others.

4.2 Original defendant No.1 ? Shri Sumara Amad Osman appears to have executed two registered sale deeds dated 29.7.1975 for 12 Acres of Survey No.36 and another dated 1.2.1978 for 11 Acres 27 Gunthas of Survey No.36. The appellants herein are the subsequent purchasers of part of the land, some plots, being carved out of the aforesaid sale transaction dated 1.2.1978. It is also the case of the appellants that the appellants were not joined as party to the Regular Civil Suit No.77 of 1974 or even in the Regular Civil Appeal No.130 of 2005 and therefore, they were not heard in the said proceedings. It is also the case of the appellants that by way of impugned judgment and order dated 7.11.2012 passed in Regular Civil Appeal No.130 of 2005, the lower Appellate Court was pleased to allow the prayers as sought for in the said Civil Suit No.77 of 1974 declaring the plaintiff to be entitled to ? share in the land bearing Revenue Survey No.36 of Dhinchana, Ta. & Dist. Jamnagar and also directed to draw the final decree to set aside the other revenue mutation entires etc. Even the lower Appellate Court also directed that the registered sale deed dated 29.7.1975 to be held as legal and valid and the mutation entries thereof are not to be affected and the impugned judgment and decree will affect the sale transaction dated 1.2.1978 and declared the plaintiff has his entire share in the land, which has been sold on 1.2.1978.

4.3 Shri Umar Ahmad Sumara, original plaintiff instituted Special Civil Suit No.77 of 1974 before the Civil Court, Jamnagar, against his father Shri Osman Sumara, original defendant, claiming ? share in the land bearing Revenue Survey No.36, admeasuring 23-27 Acres - Gunthas of village : Dhinchna, Dist. Jamnagar. The said plaint does not disclose any averment relating to said ? share in the land being orally gifted to the said plaintiff. In the said suit, Shri Amad Osman Sumara filed written submissions at Exhibit 15, denying the averments stated in the plaint. Said Shri Amad Osman Sumara expired and therefore, his heirs were brought on record by the order passed below Exhibit 39 application. Said Shri Amad Osman Sumara transferred the suit land by two registered sale deeds dated 29.7.1975 and 1.2.1978. The sale deed dated 29.7.1975 pertains to the land bearing Revenue Survey No.36 admeasuring 12 Acres, which was transferred to one Vashram Raghavji Patel and said sale deed is produced in record of Regular Civil Appeal No.130 of 2005. It appears that the registered deeds of confirmation came to be executed and produced before the lower Appellate Court vide Exhibit 52, 53 and 54 dated 28.6.2012 and 29.6.2012 respectively. By the said registered deeds of confirmation, the parties have agreed not to dispute or raise any grievance with regard to the sale transaction executed by Shri Amad Osman Sumara in favour of Shri Vashram Raghavji Patel. Said deeds of confirmation Exhibit 52 and 54 of Regular Civil Appeal No.130 of 2005 has been executed in favour of different persons viz. Champaben Ramjibhai

Patel, Ramjibhai Vashrambhai Patel, Narsinhbhai Vashrambhai Patel, Mukesh Narsinhbhai Patel, Jatubhai Bhojubhai Jadeja and Bharatkumar Jamnadas Modi. All the registered deeds of confirmation give immunity to the sale transaction dated 29.7.1975. It is pertinent to note that the deeds of confirmation being executed in the year 2011 and 2012, prior to the judgment and order dated 7.11.2012 passed in the Regular Civil Appeal No.130 of 2005 appears to have not been disclosed before the lower Appellate Court even before passing of the order. The deeds of confirmation appears to have been produced after the said judgment and order and on 3.12.2012 vide Exhibit 45, the said Champaben Ramjibhai Patel, Ramjibhai Vashrambhai Patel and Narsinhbhai Vashrambhai Patel filed application before the lower Appellate Court, pointing out that the deeds of confirmation, being executed in their favour and therefore, they prayed that in the preliminary decree, it may be declared that the judgment and order will not affect the registered sale transaction dated 29.7.1975 and also the revenue authority be restrained not to cancel mutation entries or to do anything further with regard to the sale transaction dated 29.7.1975 for 12 acres of land. It also appears that based upon such application below Exhibit 45, the decree dated 3.12.2012 in the said Appeal came to be drawn. It is also the case of the appellants that the appellants are not the party or signatory to the said registered deeds of confirmation and said deeds of confirmation executed in the year 2011 and 2012 i.e. prior to the impugned judgment and order dated 7.11.2012 appears not to have disclosed before the lower Appellate Court before passing impugned judgment and order. It is also the case of the appellants that the application Exhibit 45 filed by the third party to the proceedings, the decree dated 3.12.2012 came to be drawn without hearing the appellants. It is also the case of the appellants that the father of the plaintiff i.e. Sumara Amad Osman had sold the rest of the suit land by registered sale deed dated 1.2.1978 bearing registration No.400 for 11A. 27 G. land in favour of Patel Raghavji Savjibhia and other four persons. Said four persons have further sold 11 ? 27 Acres ? Gunthas land to one Shri Manharlal Otamchand Dadiya by registered sale deed dated 27.4.1982 for which mutation entry No.523 was certified on 3.8.1982 in the revenue record. Out of 11?27 Acres ? Gunthas land, the land admeasuring 9-13 Acres ? Gunthas was granted to Non-Agricultural Usage Permission on 27.6.1995 and mutation entry No.732 was mutated in the revenue record. It also appears that on 28.2.1994, Jamnagar Area Development Authority sanctioned the lay-out plans for the said parcel of land whereby 28 plots have been carved out land admeasuring 9 ? 13 Acres and Gunthas. The purchaser Shri Manharlal Otamchand Dadiya, who expired, had executed a registered Will on 20.9.1999 and Jayadevi Manharlal Dadiya sold the plots to different persons being carved out of the land admeasuring 9?13 Acres - Gunthas of Revenue Survey No.36 of village Dhinchna, Dist. Jamnagar. It is also the case of the appellants that the appellants have purchased some of the plots of the subject matter of land. The said two sale deeds dated 29.7.1975 and 1.2.1978, the first purchasers, who purchased by sale deed dated 1.1.1978, were joined as a party defendants in Civil Suit No.77 of 1994. It is also the case of the appellants that the original

plaintiff Umar Amad categorically stated in his deposition at Exhibit 66 that his father deceased Amadbhai had expired pending the suit. Even he has not made any application to enter his name for the suit land and for the first time, in deposition at Exhibit 66 i.e. after 7 years of filing of the suit, the plaintiff has stated that his grandfather has gifted the half portion of the suit land to him and no writing was executed for the same. Even in the notice in the form of newspaper, there was no mention about the alleged gift in favour of the plaintiff. The suit being Special Civil Suit No.77 of 1974 was dismissed by the learned Extra Assistant Judge, Jamnagar. It also appears that said judgment and order was challenged by way of First Appeal No.233 of 1983 before this Court, wherein the respondent Nos.3 to 6 filed cross-objections and later on, said First Appeal came to be transferred to District Court, Jamnagar, where it was registered as Regular Civil Appeal No.130 of 2005. In the said appeal proceedings, the application was filed for joining the purchasers as parties and the application was rejected vide order 27.8.2012 on the ground that the applicant does not fall within the scope of Order I Rule 10 of the Code of Civil Procedure as the purchasers are the subsequent purchasers to the filing of the suit. In view of the above, the appellants herein are constrained to file present Second Appeal.

5. The Coordinate Bench of this Court on 20.2.2014, admitted present appeal on the following substantial questions of law.

"1. Whether the Lower Appellate Court has not erred in overlooking the principles of Mohamedan Law while holding that the plaintiff was entitled to a half share in the ancestral property even during the lifetime of his father?

2. Whether the Lower Appellate Court has not erred in considering the evidence adduced by the plaintiff to establish that he had been gifted a half share in the suit property by this grandfather, when the same was clearly beyond the pleadings in the plaint?

3. Whether the finding of the Lower Appellate Court that there was a valid gift of half share in the suit property in his favour by this grandfather is not perverse and unsupported by any evidence whatsoever?

4. Whether the Lower Appellate Court has not erred in overlooking the fact that the two findings regarding ownership of the plaintiff of half share in the suit property by gift and by share in the ancestral property are mutually inconsistent and cannot stand together ?

5. Whether the decree drawn up by the Lower Appellate Court is in accordance with the judgment passed by the Court and in accordance with law?

6. Whether the Lower Appellate Court was justified in drawing up the decree on the basis of a compromise entered into by the plaintiff with third parties, particularly in the absence of partition of the property by metes and bounds pursuant to the judgment and in the absence of any challenge to the sale deeds executed by the original defendant no.1 pending the suit?"

6. Learned senior advocate Mr. Mihir Joshi for learned advocate Mr. Amar D. Mithani appearing for the appellants stated that the impugned decree travels beyond the impugned judgment and order passed by the Court below. He further submitted that after passing of judgment and order dated 7.11.2012, the Court below held that the original plaintiff has half share in the suit land and directed to draw decree and thereafter, the Court below took certain additional documents and then drew the decree. The said decree dated 3.12.2012 is decreed to the extent that the sale deed dated 29.7.1975 is illegal, the mutation entries with respect to sale deed dated 29.7.1975 shall not be affected by the decree and they are not be interfered with, with respect to sale deed dated 1.2.1978, all the mutation entries in the revenue records shall be cancelled and lastly held that the plaintiff is entitled to the entire land of sale deed dated 1.2.1978. He also submitted that the lower Appellate Court's record does not transpire that any hearing to the affected parties was given before adding the material in decree and therefore, it can be said that same is beyond the judgment and the decree can be said contrary to the Order 20, Rule 6 of the Code of Civil Procedure. He also submitted that the decree should be in conformity agree with the judgment as per Order 20, Rule 6 of the Code of Civil Procedure. It is further submitted that in view of the above, the decree is beyond the judgment in material terms and therefore, same is nullity. The decree drawn in final nature, whereas in the judgment, there was an order to draw a preliminary decree and the lower Appellate Court issued direction, which were even not prayed in the plaint.

7. In support of the above submissions, learned senior advocate Mr. Mihir Joshi relied upon the decision in the case of Ramnik Vallabhdas Madhvani and Ors. v. Taraben Pravinlal Madhvani reported in (2004) 1 Supreme Court Cases 497 and another decision in the case of Pothuri Thulasidas v. Potru Nageswara Rao reported in 2004(6) ALT 525. He further relied upon the case of State of Punjab v. Darshan Singh reported in (2004) 1 Supreme Court Cases 328 and submitted that as per the provisions of Section 152 of the Code of Civil Procedure, the exercise of power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate passing of effective judicial orders after the judgment and decree. He therefore, submitted that as per ratio laid down in the aforesaid cases, the present impugned decree cannot be sustained and requires to be quashed and set aside as the same is beyond the judgment and order passed by the lower Appellate Court.

8. Learned Senior counsel Mr. Mihir Joshi submitted that the procedure adopted by the lower Appellate Court is not just and proper. The said Appellate Court passed the impugned judgment and order on 7.11.2012 and then, on 3.12.2012, number of documents were taken on record from the third party and same day, they were exhibited and drew the impugned decree. He further submitted that the copies of such documents were not served to other side or even any hearing took place. It is submitted that the lower Appellate Court straightway exhibited documents and gave effect in the decree drawn on the same day. The third party produced the documents like Exhibit 45 application with a prayer that the sale

deed dated 29.7.1975 is unaffected by the judgment dated 7.11.2012, Exhibit 46 to 48, the affidavits filed by the third party namely Champaben Ramjibhia, Ramjibhai Vashrambhai Patel and Narshi Vashrambhai Patel, dated 3.12.2012 were taken on record, Exhibit 50 documentary evidence list produced by the third party on 3.12.2012, Exhibit 51, sale deed dated 29.7.1975 executed by the original defendant No.1 in favour of Vashram Raghavjibhai Patel for 12 Acres of the subject land, Exhibit 52 confirmation deed dated 28.6.2012 executed by the original plaintiff in favour of Champaben Ramjibhai Patel, with regard to sale dated 29.7.1975, Exhibit 53 confirmation deed dated 28.6.2012 executed by original plaintiff in favour of Ramjibhai Vashrambhai Patel to confirm the sale dated 29.7.1975, Exhibit 54 confirmation deed dated 28.6.2011 executed by the original plaintiff in favour of Narsinh Vashrambhai Patel to confirm the sale dated 29.7.1975. Learned senior counsel Mr. Mihir Joshi, thus, submitted that the above documents were exhibited by the Court below without following procedure as envisaged in Order 41, Rule 27 , Order 1, Rule 10 , Order 13, Rule 1 of the Code of Civil Procedure and the same procedure was not followed by the Court below in absence of any application for hearing or for documents were exhibited. Learned senior counsel Mr. Mihir Joshi submitted that after the decree dated 3.12.2012, the Court below i.e. learned Third Additional District Judge, Jamnagar addressed a letter to the Collector (Revenue Authority), Jamnagar, on 30.4.2013 for execution of decree, for cancellation of all the mutation entries with respect to the sale deed dated 1.2.1978. He further submitted that the original plaintiff has not prayed to quash the sale deeds or its relevant entries, even though by the impugned decree dated 3.12.2012 and aforesaid communication dated 30.4.2013, the said learned District Judge declared the entries to be illegal and quashed and set aside. Therefore, the relief granted is beyond the prayers and the original plaintiff though aware of the sale deeds executed pending the suit, has not amended the plaint.

9. Learned senior counsel Mr. Mihir Joshi submitted that the contentions and findings that plaintiff's title over the suit land by oral gift is absolutely illegal because the original plaintiff has not stated any case of gift in the pleadings or in the exchange of notices which were prior to the filing of the suit and even no issue in this regard was framed. He further submitted that for the first time, in the deposition of the plaintiff, at Exhibit 66, the plaintiff came out with a case of oral gift, which was recorded after six years from the institution of the suit and at that time, the defendant was no more. He further submitted that as per settled legal principle, the pleadings of the party form the foundation of their case and the party cannot given up and propound a new case in evidence and therefore, there was variance between the pleadings and proof. The plaintiff has only relied upon his signature in the mortgage deed dated 17.6.1958, which was also signed by his father, who is original defendant No.1. It is submitted that the plaintiff did not state the material facts of oral gift in the plaint but only stated about his signing the mortgage deed dated 17.06.1958, to claim the right over the suit land and to claim the right is contrary to Order 6, Rule 2 of Code of Civil

Procedure, which encast duty upon the party to state all the material facts in the pleadings. In fact in the present case, the case of gift would be the material fact particularly in the context of oral gift under Muslim Law. It is submitted that thus, not mentioning the material fact in the pleadings about such oral gift, the Appeal could not have been allowed on the said ground and the judgment and decree of the trial Court deserves to be confirmed. In support of the above submissions, learned senior counsel Mr. Joshi relied on the case of Karnataka Board of WAKF v. Government of India and Ors. reported 2004 (10) SCC 779, more particularly, Head Note ? C and also paras 8, 12 (Origin of the Title is required to be stated in the pleadings). He further relied upon the case of Union of India v. Ibrahim Uddin and Another reported in 2012 (8) SCC 148 and he emphasized on paras 77 and 78 as well as in the case of Vinod Kumar Arora v. Smt. Surjit Kaur reported in AIR 1987 SC 2179 (para 11). Besides this, he also relied upon the case of Bondar Singh and ors. v. Nihal Singh and Ors. reported in 2003 (4) SCC 161 (Head Note ? D, para 7 (in absence of pleadings, evidence cannot be looked into) as also in the case of Virender Nath Gautam v. Satpal Singh and Ors. reported in 2007 (3) SCC 617 (paras 31 to 34 (defines ? "material facts")).

10. Learned senior counsel Mr. Mihir Joshi submitted that there is huge variance in the time because in the oral evidence Exh. 66 recorded on 16.11.1981, the plaintiff stated that before 20 years, his grandfather gave an oral Gift of the suit land. Meaning thereby, such gift was made in the year 1961, whereas in the pleadings, plaintiff stated that on 17.06.1958, he signed the mortgage deed as an owner thereof along with the defendant No.1. If the gift was made in the year 1961 then prior thereto in the year 1958, the plaintiff could not have termed himself as a Co-owner. It is submitted that the trial Court considered various aspects of the matter, has minutely scrutinized the evidence on record and came to the conclusion that the case of gift is not stated in the pleadings by the plaintiff and same is therefore, by way of an afterthought and also there are number of discrepancies in the plaintiff's evidence. It is submitted that the lower Appellate Court has not dealt with the findings of the trial Court and brushed it aside on the single ground that the defendant No.1 did not enter the witness box. Therefore, as per the submissions on behalf of the appellants, the judgment and order of the lower Appellate Court is cryptic, perverse and based on assumptions which are contrary to the record and law. Therefore, the same is liable to be interfered with, in exercise of powers conferred under Section 100 of Code of Civil Procedure. Learned senior counsel Mr. Joshi submitted that the plaintiff has not challenged the sale deeds and has not amended the suit prayers. In spite thereof, lower Appellate Court, in absence of any prayer or relief, directed to quash all the revenue entries of the sale deeds dated 01.02.1978 & 19.07.1975. He also submitted that the Transfer of Property Act - Gujarat Amendment to Section 52 specifically provides for registration of the lis pendence, which was not done in the present case. Even otherwise, in light of the decision in the case of Thomson Press (India) Ltd. v. Nanak Builders and

Investors P. Ltd. and Ors. reported in AIR 2013 SC 2389 ? Head Note ? A & C, the sale transaction pending the proceedings does not get annul (automatically). Therefore, in absence of challenge to the sale-deed, the aspect of bona-fide purchasers is inconsequential. Learned senior counsel Mr. Joshi submitted that the trial Court has specifically recorded that the application for loan was made alone by the defendant No.1 (plaintiff's father). The application for loan, the Printed Instructions No.10 states that the loan papers shall be signed by the male member of major age of the applicant's family. The filled up loan application para 3 states that the land is of individual ownership of the applicant (defendant No.1). Even the Clauses 6, 7 and 15 of the Bank's Supervisors Inquiry Report states that the applicant is the exclusive owner, there is no other partner and that the mortgage deed is to be signed by the applicant along with the person of major age. In these circumstances, the mortgage deed contained the signature of the plaintiff along with the defendant No.1 for obtaining the loan and therefore, finding of ownership is perverse and based on no evidence at all. The plaintiff prayed for half of the land of Survey No.36, Totally admeasuring Acre 23.27 Gunthas, half of it would be Acre 11.18 Gunthas. The plaintiff acquiesced of the sale deed dated 29.07.1975 of 12 Acres of land and executed the confirmation deeds in favour of the subsequent transferees (Exh. 52 to 54 of Regular Civil Appeal No. 130 of 2005 before the lower Appellate Court). Thus, for more than the suit claim, the plaintiff gave the immunity to the transfer and thus, the suit claim having been satisfied could not claim further from the another sale deed dated 01.02.1978, which was for Acre 11 - 27 Gunthas. The plaintiff has no right to select the portion of his choice and more particularly when in the memo of plaint or in the oral deposition, the plaintiff has not stated any identity/boundaries of the alleged land gifted to him.

11. Learned senior counsel Mr. Mihir Joshi further relied on the following judgments relied upon by the respondents, the same are not useful in the facts of the present case.

AIR 2008 Allahabad 27 (Ved Prakash Rastogi v. Nagar Palika, Budaun):- It was the case of a simpliciter injunction suit to protect the possession and in the said circumstances Order 6, Rule 2 of Code of Civil Procedure was considered. Whereas, the facts of the present case are different and in light of the above mentioned decisions of the Hon"ble Supreme Court of India, the Appeal deserves to be allowed. Unreported decision of Lucknow Bench in the case of Gopal Singh Visharad v. Jahoor Ahmad and ors. ? Original jurisdiction, wherein, the issue considered was as to whether the minority decision should also form a part of the decree or not (para 18). In para 38 of the said decision, it has been stated that decree is to be signed by all the Judges constituting the Bench. Thus, it is not correct to state that drawing of a decree is merely a clerical work. AIR 1998 Kerala 7 (P.V. Varadaraja Iyer v. Ammukutty Amma and ors.) ? In the said case, there was an application U/s. 152 to amend the decree as per the judgment. The Court has considered the aspect of accidental errors, which is not in the present case, wherein, the Lower Appellate Court has taken on record and exhibited

number of documents, being produced by the third party and on the same day has drawn the decree, all these things happened after the judgment was delivered much earlier and whereby, in the decree, the Court below added additional directions. AIR 1966 Orissa 225 (Sagua Barik v. Bichinta Barik and another) ? The case was mere not mentioning of cost in the decree drawn and the Hon"ble Court has considered the aspect of clerical ? arithmetical errors, accidental slip or omissions and thereupon, considering Section 152 of Code of Civil Procedure, has delivered the judgment. The same is not the case in the present matter. AIR 1987 Orissa 212 (Gauri Bewa V. Ari Pradhan and Ors.) ? The same was the case as above, in relation to Section 152 of the Code of Civil Procedure, which is not in the present matter.

12. Per contra, learned senior counsel Mr. P.C. Kavina for learned advocate Mr. Harnish Darji as well as Mr.Ejas M Qureshi appearing for respondents submits that this Court in exercise of powers of Section 100 of Code of Civil Procedure may not upset the finding which is a pure question of fact. This Court in Second Appeal under Section 100 of the Code of Civil Procedure may not interfere with the findings of fact recorded by the lower Appellate Court under Section 96 of the Code of Civil Procedure. It is submitted that the scope of exercise of the Jurisdiction by the High Court in Second Appeal under Section 100 is limited to the substantial questions of law and substantial questions of law must be debatable, not previously settled by law of the land or a binding precedent and answer to the same will have a material bearing as to the rights of parties before the Court. In support of his submission, learned senior counsel Mr. Kavina submitted that said principal has been enunciated by the Hon"ble Supreme Court of India in various decisions, which are as under:

1. Damodar Lal v. Sohan Devi 2016(3) SCC 78 Para 8,9,10,12,13,14
2. Krishnan v. Backiam - 2007 (12) SCC 190 Para 10, 11
3. Narendra Gopalvidyarth v. Rajat Vidyarthi 2009(3) SCC 287 Paras 11, 12, 13, 14, 15
4. Kulwant Kaur v. Gurdial Singh Mann (Dead) By LR 2001(4) SCC 262 paras 3, 4, 6, 25, 32

13. Learned senior counsel Mr. Kavina submitted that the present Second Appeal at the behest of third party- purchaser is without any merits and requires to be dismissed as the third party has no locus standi and no reasons to challenge the impugned judgment and order or even the decree as their predecessor in title have contested suit and appeal. Therefore, appellants would be governed by the provisions of Section 52 of the Transfer of Properties Act, 1882. He further submitted that pending the suit predecessor in titles of the appellants were held not to be bona fide purchasers and hence appellants have no right title or over the suit land.

14. Learned senior counsel Mr. Kavina submitted that in 1974 the original plaintiff

filed suit against sole defendant, when no transfers have been made. Any transfers made pende lite are void as against the plaintiff and the plaintiff would be entitle to reach the property in execution, unaffected by intervening sale deed.

15. As per the submissions of the learned senior counsel Mr. Kavina, the appellants have strenuously urged that the decree drawn by the District Court is illegal and as much as it travels well beyond the judgment, gives mandates not mentioned in the judgment and seems to rely upon documents, produced after the judgment was pronounced and further the appellants' contention that this defect in the decree renders the judgment liable to be set aside. Present respondents make it clear that they have no objection to this Court exercising appellate powers and correcting the decree to bring it in conformity with the judgment. He further submitted that in fact such is the mandate of the law and Order 20, Rule 6 of the Code of Civil Procedure Code provides that " the decree shall agree with the judgment". It is therefore, apparent that judgment does not have to be set aside on the ground that it does not agree with decree. On the contrary, the decree has to be made to agree with the judgment. He therefore, submitted that in view of the submissions of the present respondents, the judgment, remaining intact, may not be interfered with while the decree as submitted above modified to the extent indicated above.

16. Learned senior counsel Mr. Kavina submitted that the contentions of the appellants, to treat judgment and decree as inseparable, is not sustainable in law. He also submitted that the judgment and decree are separate and distinct things. The decree as defined in Section 2(2) of Code of Civil Procedure. Further decree is ministerial act done by the Court Staff and not by the Judge. Further decree can be amended and corrected under the provisions of Section 151 and 152 of the Code of Civil Procedure.

17. Learned senior counsel Mr. Kavina submitted that the decree is just expression of judgment and it does not denotes any independent findings or independent decision. Hence decree can be amended or corrected at any point of time. He also submitted that merely there is mistake in preparation of decree, it does not make the entire judgment as illegal, unjust and without merits and the judgment has to be considered on it's merits as the same is based on the merits of the case, after appreciating oral as well as documentary evidence on record. Hence the judgment can not be set aside only on the ground that decree is not properly drawn. Learned senior counsel Mr. Kavina submitted that the judgment and decree are separate things and same is pronounced by so many courts of law in various judgments. He relied upon the following decisions :

1. Sagua Barik v. Bichnita Barik and another AIR 1966 Orissa 225
2. P. V. Varadaraja Iyer v. Ammukutty Amma and others AIR 1998 Kerala 7 Para 6, 7, 8, 9
3. Gouri Bewa v. Ari Pradhan and others AIR 1987 Orissa 212 Para 7, 9

4. Gopal Singh Visharad v. Jahoor Ahmad and others Civil Application No. 16(O) of 2010 Para 16 to 37 Allahabad High Court Judgment-Unreported

18. Learned senior counsel Mr. Kavina submitted that the lower Appellate Court after going through oral as well as documentary evidence and after appreciating the entire evidence, has come to conclusion and had given findings. The lower Appellate court has after going through the evidence of original plaintiff and his witnesses has come to conclusion as regards to half share of the suit land being gifted to plaintiff and defendants. The said finding of fact is based on the appreciation of oral as well as documentary evidence. He further submitted that the respondents - original plaintiffs have specifically pleaded in the plaint as regards to being the owner of the half suit land and the said fact is required to be proved by way of evidence which plaintiff has led. He also submitted that the plaintiff has led evidence to support his claim of his half share ownership by way of oral evidence of himself and other witnesses. Further as per the provisions of Order 6, Rule 2 of the Code of Civil Procedure, every pleading shall contain, and contain only, a statement of material facts. Provisions of Order 6, Rule 2 are reproduced herein below for ready reference.

Order 6 ? Pleadings Generally

Rule-2- Pleading to State Material Facts and not evidence

(1) Every pleading shall contain, and contain only, a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved.

(2) Every pleading shall, when necessary , be divided into paragraphs, numbered consecutively, each allegation being, so far as is convenient, contained in a separate paragraph.

(3) Dates, sums and numbers shall be expressed in a pleading in figures as well as in words. Similarly as per provisions of Rule 43(3) of the Civil Manual also only material facts are to be stated. Same are reproduced here in below for ready reference :

Rule 43(3)of the Civil Manual (Volume-1)

43.3) Only material facts are to be stated. The evidence by which they are to be proved is not to be stated.

19. In view of the above principle, learned senior counsel Mr. Kavina relied upon following judgments which are reproduced below:

1. Ved Prakash Rastogi v. Nagar palika Budaun AIR 2008 Allahabhad 27 ? Para 15, 20

2. Virendra Kashinath Ravat and another v. Vinayak N Joshi and others (1999) 1 S.C.C. 47- Para 16, 17

3. Rameshkumar Agarwal v. Rajmala Exports Private Limited and others (2012) 5

4. Union Bank of India v. Suresh Bhailal Mehta 1997(1) GLR 260 Para 22,23,24,25,26,27

20. After making aforesaid submissions, the learned senior counsel Mr. Kavina drew the attention to the substantial questions of law framed at the time of admitting present Second Appeal and made submissions to the questions, which are as under:

Question (1) Said question does not arise as plaintiff has never pleaded the ownership of the suit land on the basis of ancestral property and having share in the property on the basis of inheritance. Hence said question does not arise.

Question No. (2) - Plaintiff has claimed the half share in the suit property. For that he has made pleadings in his plaint. No evidence is to be stated in pleadings. In the plaint only material facts are to be stated as provided under the provisions of Code of Civil Procedure.

Question No. (3) There is ocular evidence produced by the plaintiff and same was appreciated by the lower Appellate Court. Gift or Heeba has been believed by the lower Appellate court after appreciating evidence of the witnesses. Further it is not open for this Court in exercised of powers under Section 100 of Code of Civil Procedure to re appreciate- re evaluate evidence.

Question No. (4) Plaintiff has not pleaded and not claimed half suit land on the basis of the inheritance. Hence there is no inconsistency as regards to ownership of the suit land.

Question No. (5) Decree should be changed and modified as indicated above and submitted during arguments.

Question No.(6) Decree should be in conformity with the judgment and hence necessary modification or correction can be done in the decree as stated above.

21. Herein present case, the appellants are the third parties, as they are not in the proceedings of suit as well as Appeal as well as they are subsequent purchasers of the land in question. Secondly, the suit was instituted by original plaintiff in the year 1974 and during the pendency of the suit, original defendant died and his legal heirs and other legal representatives were joined and the said suit was decided on 17.4.1982. During the pendency of the suit, the original plaintiff executed two sale deeds dated 29.7.1975 and 1.2.1978 respectively and thereafter, the suit land was purchased by the purchasers and also subsequent purchasers. It is also pertinent to note that the said suit was dismissed by the trial Court. Against the said dismissal of the suit, the original defendants preferred Regular Civil Appeal before the lower Appellate Court, wherein the Appellate Court allowed the said Appeal by quashing and setting aside the judgment and decree and held that the original plaintiff is entitled to ? share in the suit property and cancelled the revenue entries made in the record.

22. Here Section 52 of the Transfer of the property Act is to be referred which is quoted as under :

"During the (pendency) in any court having authority [within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits by [the Central Government] of (any) suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court and on such terms as it may impose. "

23. The submissions on the part of the appellants are mainly on the decree and the contentions of the appellants that the decree travels beyond the judgment and decree should be in conformity agree with the judgment. Other side contention is such that decree and judgment are separate, different and distinct. For that purpose, Section 2(2) of the Code of Civil Procedure, the definition of decree is required to be referred hereto, which reads as under :

"Decree means the formal expression of adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144 but not include -

(a) any adjudication from which an appeal lies as an appeal from an order or;

(b) any order of dismissal for default.

24. In view of the above definition of decree, the decree is merely a formal expression of an adjudication. Therefore, every Court has inherent power over its own records so long as those records are within its power and it can be set right any mistake in it. Further clarification, Section 152 of the Code of Civil Procedure made, which is required to be referred which is as under:

152. Amendment of judgments, decrees or orders - Clerical or arithmetical mistakes in judgments decrees or orders or errors arising therein from any accidental slip or omission may at any time be corrected by the Court either of its own motion or on the application of any of the parties.

25. In view of the above, this Court has referred the decisions in the case of (1) Sagua Barik v. Bichnita Barik and another (Supra) (2) P. V. Varadaraja Iyer v. Ammukutty Amma and others (Supra), (3) Gouri Bewa v. Ari Pradhan and others (Supra) (4) Gopal Singh Visharad v. Jahoor Ahmad and others (Supra) (6) Ramnik Vallabhdas Madhvani and Ors. v. Taraben Pravinlal Madhvani (Supra) (7) Pothuri Thulasidas v. Potru Nageswara Rao (supra) and (8) State of Punjab v. Darshan Singh (Supra).

26. It appears that in the appeal proceedings, the application was filed for joining

the purchasers i.e. (1) Champaben Ramjibhai Patel (2) Patel Rajmji Vashrambhai and (3) Patel Narsi Vashram as parties and the said application was rejected vide order 27.8.2012 on the ground that the applicant does not fall within the scope of Order I Rule 10 of the Code of Civil Procedure as the purchasers are the subsequent purchasers to the filing of the suit.

27. It is also required to be noted that the impugned judgment and decree passed by the lower Appellate Court, which is under challenge before this Court by way of Second Appeal under Section 100 of the Code of Civil Procedure. Therefore, under the provisions of Section 100, this Court can interfere with the impugned judgment and order passed by the lower Appellate Court, is required to be considered and can this Court in Second Appeal interfere with the judgment of the lower Appellate Court on the ground that the lower Appellate Court had not come to close grips with the reasoning of the trial Court? Section 100 of the Code of Civil Procedure impliedly declares that the lower Appellate Court is the final Court of the facts and High Court has no jurisdiction to interfere with the findings of the facts reached by the first Appellate Court. In this regard, Section 100 is required to reproduced, which is as under:

"Section 100. Second Appeal

(1) Save as otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to the High Court, if the High Court is satisfied that the case involves a substantial question of law.

(2) An appeal may lie under this section from an appellate decree passed ex parte

(3) In an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal.

(4) Where the High Court is satisfied that a substantial question of law is involved in any case, it shall formulate that question.

(5) The appeal shall be heard on the question so formulated and the respondent shall, at the hearing of the appeal, be allowed to argue that the case does not involve such question:

Provided that nothing in this sub-section shall be deemed to take away or abridge the power of the Court to hear, for reasons to be recorded, the appeal on any other substantial question of law, not formulated by it, if it is satisfied that the case involves such question.

Section 100A - No further appeal in certain cases? Notwithstanding anything contained in any Letters Patent for any High Court or in any other instrument having the force of law or in any other law for the time being in force, where any appeal from an appellate decree or order is heard and decided by a single Judge of a High Court, no further appeal shall lie from the judgment, decision or order or such single Judge in such appeal or from any decree passed in such appeal.

Section 101 - Second appeal on no other grounds ? No second appeal shall lie except on the ground mentioned in section 100.

Section 102 - No second appeal in certain suits ? No second appeal shall lie in any suit of the nature cognisable by Courts of Small Causes, when the amount or value of the subject-matter of the original suit does not exceed three thousand rupees.

Section 103 - Power of High Court to determine issues of fact? In any second appeal, the High Court may, if the evidence on the record is sufficient, determine any issue necessary for the disposal of the appeal,

(a) which has not been determined by the lower Appellate Court or both by the Court of first instance and the lower Appellate Court, or

(b) which has been wrongly determined by such Court or Courts reason of a decision on such question of law as is referred to in section 100.

Substantial question of law

The expression substantial question of law has not been defined anywhere in the code. However, observation made in the case of *Sir Chuni Lal Mehta & Sons Ltd v. Century Spg & Mfg Co Ltd* (AIR 1962 SC 1314) as follows "The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or call for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law his a substantial one and involved in the case or not, the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

28. Therefore, it is clear that the Second Appeal is based on the substantial

questions of law. The answers of such questions based on the same, this Court vide order dated 20.2.2014, admitted the Appeal, are as under: (1) So far as question No.1 is concerned, the lower Appellate Court held the plaintiff's entitlement for half share in the ancestral property as per Mohamedan Law. The question is not required to be dealt herewith because this Court has jurisdiction under Section 100 of the Code of Civil Procedure and here this Court is not required to re appreciate the evidence about half share of the plaintiff as per Mohamedan law. So far as the facts of the present case is concerned, the original plaintiff never claimed the ownership of the suit land and at the first time, said fact came to be in knowledge by way of oral evidence of the original plaintiff. Therefore, this Court is not inclined to deal with this question.

(2) With regard to question No.2, the plaintiff had been gifted a half share in the suit property by his grandfather and it is also matter of evidence and looking to the facts of this case, there is only pleadings but no evidence in that regard is produced by the plaintiff.

(3) The question No.3 pertains to the valid gift of half share in the suit property of the original plaintiff by his grandfather. It is also a matter of evidence and the same is required to be determined by the lower Appellate Court. Therefore, this question is not required to be dealt with by this Court.

(4) So far as question No.4 is concerned, the two findings regarding ownership of the plaintiff of half share in the suit property by gift and by share in the ancestral property are mutually inconsistent and cannot stand to be rejected. Further, this question is not required to be dealt with by this Court so far to exercise powers under Section 100 of the Code of Civil Procedure.

(5) This question No.5 pertains to the decree drawn up by the lower Appellate Court is in accordance with the judgment passed by this Court and in accordance with law. Here the submissions of the appellants is that decree travels beyond the judgment because on 7.11.2012, the judgment was declared by the lower Appellate Court holding that the plaintiff has half share in the suit land and directed to draw preliminary decree. In the decree dated 3.12.2012, the lower Appellate Court decreed that (1) the sale deed dated 29.7.1975 is illegal along with other directions. In this regard, Order 20, Rule 6 of the Code of Civil Procedure is required to be quoted herein:

6. Contents of decree

(1) The decree shall agree with the judgment; it shall contain the number of the suit, the [names and descriptions of the parties, their registered addresses,] and particulars of the claim, and shall specify clearly the relief granted or other determination of the suit.

(2) The decree shall also state the amount of costs incurred in the suit, and by whom or out of what properly and in what proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one party by the other shall

be set off against any sum which is admitted or found to be due from the former to the latter.

29. As per the submissions of the appellants, the order reflects to draw preliminary decree whereas there is final decree is drawn. The respondents submission so far as the decree is concerned, the same is just expression of the judgment and it does not denotes any independent findings or decision. But as per the mandate of law and Order 20, Rule 6 of the Code of Civil Procedure, the decree shall agree with the judgment. Therefore, this Court is of the view that the question is required to be dealt with so far the decree dated 3.12.2012 drawn is concerned.

30. (Sic) So far as question No.6 is concerned, the same has relevancy with the question No.5 and therefore, this question is also required to be dealt with by this Court.

31. (Sic) It is fact that the decree and judgment are different and distinct and they are separate, but as per the provisions of the law, the decree cannot be beyond the judgment and if the decree is beyond the judgment, then it can be said that same is contrary to the mandatory provisions of Order 20, Rule 6 of the Code of Civil Procedure. It is also required to note at this stage that there is provision under Section 152 of the Code of Civil Procedure, which is quoted in earlier part of this judgment. Same pertains to amendment of judgment, decrees or orders. Therefore, the lower Appellate Court is required to do correction in the decree under challenge as per the impugned judgment and order. It is also the submissions of the respondents that they have no objection to this Court exercising appellate power and correcting the decree to bring it in conformity with the judgment. Therefore, so far as modification or correction in the decree portion, which is not as per the judgment, this Court is inclined to give answers of the question Nos.5 and 6 in affirmative and to that extent, the decree is required to be modified and same is modified as per the judgment and order passed by the lower Appellate Court.

32. (Sic) In view of the above observation, this Court is not inclined to go into the merits of the case as well as in the factual aspects of the matter as there is no substantial questions of law raised to decide the appeal under Section 100 of the Code of Civil Procedure. But so far as question Nos.5 and 6 qua the decree portion is concerned, this Court consider the same. Both the learned senior counsels have argued at length the matter, but specifically argued the matter on the issue of decree and in that view of the matter, this Court is of the opinion that if the decree should be modified and same may be drawn as per the judgment, then same would meet the ends of justice.

33. (Sic) One more thing is required to be determined by this Court on the issue of locus of the appellants being third party, who prefer present Second Appeal challenging the impugned judgment and order as well as impugned decree. They are neither parties in suit nor in Appeal. It is correct that the appellants being

third party have no right to challenge the judgment and order passed by the lower Appellate Court, but they would be governed by the provisions of Section 52 of the Transfer of Properties Act and pending the suit, predecessor in titles of the appellants were held not be bona fide purchasers. Other aspect is also required to be noted here that there is no challenge of the sale deeds in question in the past and therefore, purchasers, who are even bona fide is inconsequential. This Court having power under Section 100 of the Code of Civil Procedure, cannot interfere with the findings as the scope of this Court in Second Appeal is very limited to deal with the substantial questions of law. It also appears that during pendency of the suit, the sale transactions were made by the plaintiff to the third party, but the looking to the period of filing of suit which was instituted in the year 1974 and sale deeds which were taken place on 29.7.1975 and 1.2.1978, this Court is not inclined to remand back the matter for reconsideration of the Appeal to the lower Appellate Court.

34. (Sic) In view of the above position, present Second Appeal is required to be partly allowed to the extent of impugned decree drawn by the lower Appellate Court. Hence, the present Appeal is partly allowed to the extent that impugned judgment and order dated 7.11.2012 passed by the learned Additional District Judge, Jamnagar, in Regular Civil Appeal No.130 of 2005 is hereby confirmed and the decree dated 3.12.2012 passed in the said Regular Civil Appeal No.120 of 2005 is quashed and set aside and the District Court, Jamnagar is directed to draw a fresh decree as per the impugned judgment and order dated 7.11.2012. Record and Proceedings to be sent back to the concerned trial Court forthwith. I.R. granted earlier stands vacated forthwith.

FURTHER ORDER :

Learned advocate Mr. Mithani for the appellants request to stay this order for a period of four weeks. Request is granted. This order is hereby stayed for a period of four weeks from today.