

(2011) 06 GUJ CK 0027
In the Gujarat High Court
Case No : Second Appeal No. 105 of 1982

Mansuri Yusuf Abdul Rahaman Ismail and Another	APPELLANT
Vs	
Ramaben Gandhi and Others	RESPONDENT

Date of Decision : 23-06-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Citation : (2011) 06 GUJ CK 0027

Hon'ble Judges : K.S. Jhaveri, J

Bench : Single Bench

Advocate : D.F. Amin, for the Appellant; Y.M. Thakkar, for Defendants 1.2.1, 1.3.1, 1.3.2, 1.3.3, 1.3.4 and 4, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J.—The present appeal is a Second Appeal u/s 100 of Code of Civil Procedure, filed by the original Defendant, whereas the Respondent is the original Plaintiff.

2. Before proceeding on the merits of the matter, it is necessary to examine the scope and ambit of the present appeal.

3. The scope of Section 100 of CPC and the powers of the High Court while exercising jurisdiction as a second appellate court are by now well defined and require no detailed discussion. The Supreme Court has, in the case of Ramaswamy Kalingaryar v. Mathayan Padayachi AIR 1992 Supp (1) SCC 712 , and in the case of Parsini (dead) thorough LRs. Vs. Atma Ram and others, clearly reiterated the principle that the High Court cannot, while functioning as a second appellate court u/s 100 of Code of Civil Procedure, upset the findings of fact recorded by the lower appellate court by reassessing the evidence, or reassess the qualitative value of such evidence on record, and thus cannot reverse such findings of fact. In fact, the High Court cannot interfere with such findings of fact even by examining or reappreciating the evidence from the aspect of "sufficiency

of proof ".

4. The Respondent-Plaintiff had filed suit being Regular Civil Suit No. 337 of 1975 before the learned 2nd Joint Civil Judge (J.D.), Godhra for permanent injunction against the Defendants for not fitting a flour mill and for removal of encroachment made by the Defendants on the suit premises. The learned trial Judge vide judgment and decree dated 29.09.1978 decreed the suit so far as encroachment was concerned.

4.1 Being aggrieved by the order of the trial Court, the Defendant preferred appeal being Regular Civil Appeal No. 75 of 1979 before the District Judge, Panchmahals at Godhra wherein the appeal was dismissed vide judgment and order dated 31.07.1981 by confirming the judgment and decree of the learned trial Court. Hence, this Second Appeal.

5. At the time of admitting the matter, following substantial questions of law have arisen which are as under:

1. When the evidence of Gani Ismail Exh. 66 shows that the disputed land was in his possession as a tenant up to 1949 and after he vacated the said premises Abdul Gani Sattar occupied the said premises whether the trial Court and the Appellate Court erred in holding that the Defendants have made encroachment upon the suit land?

2. In view of the evidence on record, whether the Appellate Court and the Trial Court erred in not holding that Defendants are tenants of the suit land?

3. Whether the trial Court and the Appellate Court erred in construing the pleadings of the parties?

4. In view of the fact that the plaint does not disclose the cause of action for relief as to removal of encroachment, whether the trial Court and the Appellate Court erred in holding that the suit cannot be dismissed on that count

5. In view of the fact that the Plaintiff has not specifically stated in the plaint that when the Defendant encroached upon the suit land, whether the Trial Court and the appellate Court erred in holding that the Defendant encroached upon the suit land in the year 1975 and therefore, the question of limitation does not arise?

6. In view of the fact that the Defendants have taken the contention as to limitation, whether the Trial Court erred in not framing issue as to limitation and whether the appellate Court erred in holding that the question of limitation does not arise.

6. Learned advocate appearing on behalf of the Appellant contended that the trial Court has committed error in not framing the issue regarding the encroachment which was made prior to 1954.

7. Learned advocate appearing for the Appellant further submitted that the lower Appellate Court has committed error in disbelieving the deposition of witnesses,

viz., Abdul Gani Ismail at Exh. 66 who is close relative of the Appellant and Champaklal Bhurabhai at Exh. 60 who was the tenant of one part of the northern side of the suit premises. He submitted that both these witnesses have stated that the suit land was in possession of the Defendants from the very beginning and the shed of iron sheet on the suit land was in existence for last many years. He submitted that the learned Judge has erred in discarding the evidence of the said two witnesses and misread the evidence of the said witnesses.

8. Learned advocate appearing for the Respondents supported the orders of the trial Court as well as appellate Court. He submitted that the appeal may be dismissed.

9. Heard learned advocates for the respective parties. Few facts which emerge from the record are that suit premises was let out to the Defendant but the additional portion which was encroached was never rented out. On the basis of the evidence, the lower Appellate Court concluded that the encroachment was made recently. From the record it seems that the Defendants could not be in possession of the land between the shop and the partition of the iron sheets, when they were not tenants in the year 1947. The Defendants came in the suit premises in the year 1954 and thereafter the encroachment on the suit land was made.

10. With regard to the issue of limitation it is observed by the lower appellate Court that it is true that the Plaintiff has not mentioned the exact date on which the encroachment was made by the Defendants but in para 3 of the plaint, the Plaintiff has mentioned that since sometime prior to the suit, the Defendants have made encroachment on the suit land. The suit was filed on 22.08.1975 and, therefore, the Plaintiff's allegation would amount to the encroachment having been made in the year 1975 or thereabout. As against this, the say of the Defendants in the written statement that he is in possession of the suit land since 1947 and the say of the Defendants is not acceptable. The specific plea of the Defendants that they are in possession of the suit premises since 1947 and the question that suit is barred by limitation or not is to be decided on the basis of their plea and when they have failed to prove that they are in possession of the suit premises since 1947, the plea of limitation will not survive.

11. The Defendants have also failed to prove by giving evidence as to how they came into possession of the suit land. As against this, the Plaintiff has examined Champaklal Bhurabhai at Exh.60. He was the tenant of one part of the Northern side of the suit premises and he has stated that since Samvat 2006 and 2007, the Defendants were not rented any portion in front of the suit shop and only the suit shop and shop was in possession of the Defendants. It is true that this witness was serving with the Plaintiff. It is also observed in the judgment of the trial Court that this witness was remaining present whenever the Plaintiff remained present in the Court. Therefore, it can be said that he is an interested witness but from the cross-examination of the said witness, it does not appear that he is stating falsehood. Even if the evidence of this witness is not taken into

consideration then also the fact remains that the Defendants have failed to prove as to how they came into possession of the suit land after the suit shop was rented to them. The Defendants have also examined Surendrakuma Radhakrishna at Exh. 63. He is residing near the suit premises. According to him, he is there since the last 40 years. He further submitted that he did not know whether Champaklal was there as a tenant of the suit premise or not. This Champaklal who was a Plaintiff's witness was examined at Exh. 60 and he has stated that he resided near the suit premises. This witness also stated that he had seen katcha roof of Defendants shop. He deposed that he has been seeing that roof since long. There is no change in width and length of this roof. According to him, the roof is in the same position from his knowledge. He has admitted that he did not know who built the roof and when it was built up. He appears to be a chance witness and has no knowledge about the time since which the construction were made on the suit land. In view of these circumstances, I am of the view that no case is made out by the Appellant to cause interference in this appeal.

12. In the premises aforesaid, no substantial question of law arises in the present appeal, which would justify interference by this Court u/s 100 of Code of Civil Procedure. This appeal is therefore, dismissed.