
(1995) 11 GUJ CK 0035
In the Gujarat High Court

State of Gujarat

APPELLANT

Vs

Mali Ranchhod Kheta and Others

RESPONDENT

Date of Decision : 11-11-1995

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Section 100
Evidence Act, 1872 — Section 101, 101, 102

Citation : (1996) 2 GLR 501

Hon'ble Judges : S.D. Shah, J

Bench : Single Bench

Judgement

S.D. Shah, J.—This Second Appeal is filed by the State of Gujarat u/s 100 of the CPC against the judgment and decree passed by the Assistant District Judge, Banaskantha in Regular Civil Appeal No. 22 of 1975 dated 7th of April, 1977, whereby he dismissed the Appeal of the State and confirmed the judgment and decree of Civil Judge (S.D.), Palanpur, declaring that the respondent Nos. 1 to 7 - plaintiffs are the owners of parcel of land bearing Survey No. 295 and are in possession thereof, situated at village Bhabhar Navavas, which is declared to be admeasuring 2 acres 9 gunthas 88 cents. The trial Court while granting aforesaid declaration also granted permanent injunction against the defendant No. 1 - State of Gujarat (appellant herein) and against Bhabhar Navavas Gram Panchayat, respondent No. 8 (defendant No. 2) whereby the defendants, their servants, and agents are permanently restrained from interfering with the plaintiffs' possession of the suit land.

The learned single Judge of this Court (His Lordship Justice P.D. Desai, as he then was) admitted the Appeal and framed following substantial questions of law as required by Amended Section 100 of the Code of Civil Procedure, 1976:

(1) Whether on the facts and in the circumstances of the case, the Court below were right in law in holding that the respondents - plaintiffs proved their title to the suit property?

(2) Whether the suit is barred by law of limitation?

2. In order to answer the aforesaid questions of law framed by the learned single Judge of this Court, a few relevant facts, pleadings of the parties, are required to be stated hereunder:

(1) Gist of Pleadings: The plaintiffs in the plaint of Regular Civil Suit No. 7 of 1969 instituted in the Court of Civil Judge (S.D.) at Palanpur prayed for the relief of declaration that Mali Ranchhodji Khetaji (plaintiff No. 1 and 6 other plaintiffs) are the owners of Survey No. 295 situated at village Bhabhar Navavas. They specifically pleaded that the village was a Jagir village and Survey No. 295 was of the ownership of Jagirdar Thakor Balvantsingh Kaluji. In the plaint they set out the boundaries of Survey No. 295. Their case was that under the Bombay Land Revenue Code, the lands of the village were not surveyed and the field in question was admeasuring 3 acres 32 gunthas 88 cents, but in the revenue record, however, the area was approximately shown to be 1 acre and 28 gunthas. They further pleaded that after the survey of the land was undertaken by the State Survey Department, the correct measurement of the field was written and that was 1 acre and 28 gunthas. Admittedly, the survey took place in the year 1954 and their case is that plaintiff No. 1 Mali Ranchhodji Khetaji and one deceased Parshottam Chunnilal were in possession of land admeasuring 2 acres and 24 gunthas. It is their case that eastern and northern portion of the said land was uneven and was not cultivable which they had improved and made cultivable. It is their further case that while surveying the land, wrong measurement of Survey No. 295 is stated which mistake has crept in even in the revenue record and though revenue record shows the measurement of the field bearing Survey No. 295 to be 1 acre and 25 gunthas, actual measurement thereof is 3 acres and 32 gunthas. They further contended that the Jagirdar Thakor Balvantsingh Kaluji had mortgaged the said parcel of land with possession in favour of the plaintiff No. 1 and deceased Parshottam Chunnilal by a registered sale deed dated 22nd July, 1954 for an amount of Rs. 500/-. The mortgage was for a period of 10 years within which the amount borrowed was to be returned and the mortgage was to be redeemed. It is their further case that subsequently they have purchased this very parcel of land from Jagirdar - Thakor Balvantsingh Kaluji by registered sale deed and they have thus become the owner of the said land and defendants have no right to interfere with their possession of the said parcel of land.

In the written statement filed by State of Gujarat at Exhibit 23, the allegations made in the plaint were denied. It was contended that the correct measurement of Survey No. 295 was 1 acre and 23 gunthas and the additional area was part and parcel of Survey No. 294. It is their further case that after coming into force of the Bombay Merged Territories and Area (Jagirs Abolition) Act, 1954, the Jagir of said village was abolished and since Thakor Balvantsingh Kaluji was the Jagirdar, his Jagirdari right over Survey No. 295 came to be abolished under the provisions of the said Act and there was statutory vesting of the said land in the State Government whereby the State Government has become owner thereof. It is their further case that the plaintiffs have illegally encroached upon parcel of

land bearing Survey No. 294 and have then tried to contend that measurement of Survey No. 295 was not correctly shown in the revenue record and that they were in lawful possession of the entire area as owners of the land. They reiterated that there was no mistake in mentioning the area of land as admeasuring 1 acre and 23 gunthas and since Bhabhar Gram Panchayat was directed to recover the land revenue with penalty from plaintiffs, the plaintiffs have instituted the suit.

(II) Relevant issues and findings of two Courts: On the aforesaid pleadings, the trial Court framed 12 issues at Exhibit 24 and only following issues being material, they are reproduced along with their findings thereon:

1. Whether the plaintiffs prove ownership and possession of the suit land? : YES
1A Whether the plaintiffs prove that they were cultivating the suit land from seven years prior to 22nd July 1954 as alleged in para 5 of the plaint? : YES
2. Whether the suit is within limitation? : YES
3. Whether the suit land belongs to the State and vested in the Gram Panchayat of Bhabhar? : NO
4. Whether the State proves that the actual measurement of S. No. 295 of Village Bhabhar was 1 acre and 23 gunthas at the time of abolition of Jagir of Bhabhar? : NO

The lower appellate Court framed the points for determination as to whether plaintiffs proved that they were the owners of the suit land and were in actual possession of the suit land? The said points were answered in affirmative. As regards suit of the plaintiffs being barred by limitation, it held that it was not barred by limitation and it further held that entries made in the revenue record were not as per the actual survey made before the abolition of Jagir.

(III) Nature of Oral and Documentary Evidence: In order to establish their title over Survey No. 295 and its measurement, the plaintiffs have examined Mali Ranchhodji Khetaji at Exhibit 46. They have also produced documentary evidence along with list at Exhibit 4/1 along with which they have produced the original registered mortgage deed dated 22nd July, 1954 executed by Jagirdar Thakor Balvantsingh Kaluji in favour of the plaintiff No. 1 and one deceased Parshottam Chunnilal. Whether this mortgage deed is lawfully proved and could have been exhibited and admitted into evidence is a question which is raised before this Court and shall be answered hereafter. The plaintiffs also relied upon the map produced by them along with the said list which is exhibited at Exhibit 65, the admissibility in evidence of which is also challenged before this Court. The defendants objected to exhibiting and admitting the aforesaid two documents in evidence and yet the trial Court has exhibited the same and admitted the same in evidence and, therefore, at the appropriate stage, this Court shall deal with the question of proof and admissibility of the said two documents. It must be stated at this stage that though in the plaint it is averred that Thakor Balvantsingh has subsequently taken further amount of Rs. 500/- and had sold Survey No. 295 to the plaintiffs by registered sale deed, the said registered sale deed is admittedly not produced by the plaintiffs and in the deposition the case of plaintiff No. 1 is that such sale deed was given by him to their Advocate for

production in the Court. The fact remains that such registered sale deed allegedly executed by Thakor Balvantsingh Kaluji in favour of the plaintiffs is not produced and proved before the Court.

The appellant-defendant State of Gujarat claimed ownership of the suit land bearing Survey No. 295 admeasuring 1 acre and 23 gunthas by contending that on coming into force of the aforesaid Jagirs Abolition Act, 1953, by virtue of Section 3 all Jagirs shall be deemed to have been abolished and all rights of any person legally subsisting on the date on which the Act came into force, shall be deemed to have been extinguished.

xxx xxx xxx Based on the aforesaid statutory provisions, the appellant-defendant claims ownership over the suit land by statutory vesting of the suit land in the State Government.

It may be stated that the defendant State denied execution of any registered mortgage deed or registered sale deed by Jagirdar Thakor Balvantsingh Kaluji in favour of the plaintiff No. 1. The State Government also relied upon the survey settlement and the revenue record starting from the year 1954 which consistently showed the area and measurement of Survey No. 295 to be 1 acre and 23 gunthas.

xxx xxx xxx (IV) Is title over suit land claimed by plaintiffs proved? How can title over immovable property be proved? On whom lies the burden to prove the title?

The trial Court while answering issues No. 1 to 4 referred to hereinabove, has mainly relied upon the fact that no regular survey of the land was made and that the measurement shown after survey of the land was incorrect. In my opinion, the entire exercise undertaken by the trial Court as well as by the First Appellate Court in this regard is misconceived in law because measurement recorded at the survey settlement cannot be the proof of title over the land.

In order to establish title over the immovable property, the burden of proof initially lies on the person claiming ownership of the immovable property. Section 101 of the Evidence Act provides that whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of the facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Section 102 of the Evidence Act provides that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

3. In a civil suit for declaration of title over immovable property and permanent injunction on certain facts or propositions asserted by the plaintiff/plaintiffs, when they are denied or at least not admitted by the defendants, the question on the burden of proof arises. In the present case, all plaintiffs No. 1 to 7 came to the Court for declaration that they are the owners of Survey No. 295 of village Bhabhar Navavas, which according to them was admeasuring 3 acres 32 gunthas

and 88 cents. They positively averred in the plaint that after survey settlement in the revenue record since 1954, the area of the said land was shown as 1 acre and 23 gunthas, but their assertion was that such area was simply approximately written. They have claimed ownership over the suit land by averring that Jagirdar Thakor Balvantsingh Kaluji had mortgaged the said Survey No. 295 with possession by registered deed for Rs. 500/- for a period of 10 years to plaintiff No. 1 and deceased Parshottam Chunnilal, who is represented by plaintiffs No. 2 to 7, being his heirs and legal representatives. It is their case that since execution of the said mortgage deed dated 22nd July, 1954, they are in possession of Survey No. 295. The said registered mortgage deed dated 22nd July, 1954 executed by Thakor Balvantsingh Kaluji is produced along with the list of documents at Exhibit 4/1 and the same is exhibited at Exhibit 47.

4. At this stage, it would be necessary for this Court to deal with the contention of the State Government that the said document is not duly proved and could not have been admitted into evidence. Admittedly, the defendants have not admitted or agreed to exhibition of such document. The plaintiff No. 1 is examined at Exhibit 46. In his deposition, plaintiff No. 1 stated that said land was mortgaged to him by mortgage deed dated 22nd July, 1954 and that deed was written at Tharad by Bhogilal Amratlal Vakil. He further deposed in his examination-in-chief that Thakor Balvantsingh Kaluji had put his thumb impression on the registered mortgage deed in his presence and the said Thakor is now dead. The trial Court has thereupon exhibited the said mortgage deed at Exhibit 47. However, the trial Court has failed to run to the cross-examination of the very witness, who has stated in his cross-examination that the witness himself has not gone for execution of the mortgage deed, but, his father and deceased Parshottam Soni had gone for execution of the mortgage deed. He also admitted that Advocate Bhogilal Amratlal who had written the mortgage deed was alive on the date of his deposition and he was practising at Deodar. He also admitted that the measurement of the land Survey No. 295 shown in the mortgage deed was correct. From the aforesaid cross-examination, it becomes clear that when the document was registered in the office of the Sub-Registrar and when thumb mark on the mortgage deed was put by Jagirdar Thakor Balvantsingh Kaluji, the witness was not present. He could not have, therefore, seen Thakor Balvantsingh putting his thumb impression on the mortgage deed. He has not stated that he has seen the thumb impression of Thakor Balvantsingh Kaluji on number of other occasions or that he was in a position to identify thumb impression as that of Thakor Balvantsingh because of his acquaintance with him.

5. u/s 61 of the Indian Evidence Act, 1872, the contents of documents may be proved either by primary or by secondary evidence. Section 62 of the said Act provides that primary evidence means the documents itself produced for the inspection of the document. Since the registered mortgage deed itself is produced in the trial Court, the execution of such document must be proved by primary evidence. u/s 67 of the said Act if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the

handwriting or so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting. In view of the aforesaid provisions, the mortgage deed in question which is allegedly executed by Thakor Balvantsingh Kaluji was required to be proved by identifying his thumb impression. The plaintiff No. 1 admittedly had not gone to the office of Sub-Registrar when the document was executed. His assertion in cross-examination-in-chief, therefore, that in his presence thumb mark was placed by Thakor Balvantsingh Kaluji cannot be accepted in view of his admission in cross-examination that he has never gone with Thakor Balvantsingh Kaluji for execution of document but his father has gone. The witness also has nowhere stated that he was otherwise acquainted with the thumb impression or Thakor Balvantsingh Kaluji and was, therefore, in a position to identify the thumb impression. It cannot be said that the execution of the document is proved. There was yet another mode to prove the document available to the plaintiffs and that was by examining Advocate Bhogilal Amratlal, who had written the mortgage deed. The plaintiff No. 1 has in his deposition admitted that on the date of his deposition, the said Advocate was alive and was practising at Deodar and, therefore, by examining him, the handwriting of the document could have been proved and even execution of the document could have been proved. Thus, the execution of the mortgage deed is not duly proved because the thumb mark of the executant could not have been identified by plaintiff No. 1 and secondly there is no other evidence to the effect that he has other occasion of seeing the thumb mark of Thakor Balvantsingh Kaluji and the thumb mark in the disputed document was that of Thakor Balvantsingh Kaluji. There is, therefore, substance in the submission of the learned Assistant Government Pleader that mortgage deed at Exhibit 47 ought not to have been exhibited and admitted in evidence as it was not duly proved.

6. Another document on which the plaintiffs have placed reliance and on which both the Courts below had acted for recording the finding that the plaintiffs have established their title over Survey No. 295 is the map which was produced along with the plaint and which is exhibited at Exhibit 65. As per the deposition of plaintiff No. 1 at Exhibit 46, such map was prepared by one I.A. Momin on 6th August, 1968. Said person I.A. Momin has not been examined as a witness nor it is proved by reliable evidence that such map faithfully and correctly reproduces the measurement of Survey No. 295 and boundaries of Survey No. 295. Firstly, it may be noted that a map of immovable property showing its boundaries which is prepared by a private party, can never provide evidence of title nor can a Court of Law based on such map, hold that the persons at whose instance the map was got prepared, were the owners of the property in dispute. No explanation is given by the plaintiffs as to why said I.A. Momin, was not examined though witness summons were got issued on him. The trial Court as well as the lower appellate Court have held that for non-examination of person who prepared the map, no adverse inference can be drawn against the plaintiffs. Both the Courts below have also found that measurement of Survey No. 295 as shown in the mortgage

deed at Exhibit 46 as well as boundaries thereof tallied with the boundaries mentioned in the map at Exhibit 65. Even when such map was sought to be exhibited and admitted into evidence by the trial Court during evidence of plaintiff No. 1 at Exhibit 46, defendant No. 2 Bhabhar Gram Panchayat objected to exhibition of the said map as it was not duly proved. The trial Court has not assigned any reason as to why it was exhibiting and admitting the said map into evidence and yet it has exhibited the same at Exhibit 65. As stated hereinabove, the map of immovable property got prepared by private party or through surveyor, even if duly proved and admitted into evidence, can at the most prove the boundaries of the property but it can never prove the ownership of the persons at whose instance the map is prepared. The lower appellate Court having noticed objection to exhibition of Exh. 65 did not give much importance to the contentions of the defendants by stating that neither State of Gujarat-defendant No. 1 nor Bhabhar Gram Panchayat - defendant No. 2 has challenged the ownership of Thakor Balvantsingh Kaluji over the land bearing Survey No. 295. In fact, in the written statement of defendant No. 1 it is clearly stated that Thakor Balvantsingh Kaluji was Jagirdar of Survey No. 295 admeasuring 1 acre and 23 gunthas. However, the case of the State Government was that on coming into force of the Bombay Merged Territories and Areas (Jagirs Abolition) Act, 1953, all Jagirs were abolished and rights of Jagirdar were extinguished and that the land were made liable to payment of land revenue. This plea is thoroughly missed by both the Courts below. They have also failed to notice the fact that the land in question has vested in the State Government by virtue of Section 8 of the said Act of 1953.

7. However, this Court would not place much reliance upon such defect in evidence once it is admitted in evidence in presence of the Advocate of the defendants. The Advocates of the defendants could have very well objected to exhibition of the documents on the ground that it was not duly proved.

8. It is thus clear that neither the mortgage deed dated 22nd July, 1954 at Exhibit 47 nor the map at Exhibit 65 was sufficient to prove title or ownership of the plaintiffs over Survey No. 295. At the most even if it is assumed and considered that registered mortgage deed was legally exhibited and admitted into evidence, it can only prove that the plaintiffs were the mortgagee in possession of Survey No. 295.

9. Secondly when reference is made to the registered mortgage deed, which is illegally exhibited and admitted into evidence, one glaring fact is required to be noticed and the said fact is that even in such registered mortgage deed, the measurement of Survey No. 295 is shown to be 1 acre and 23 gunthas. Firstly, if no survey settlement has taken place, no survey number of the land in question could have been stated in the registered mortgage deed. In the examination-in-chief, he stated that no survey settlement took place when the said deed was executed and he, therefore, did not know as to how the measurements were written in the mortgage deed. However, in cross-examination, he has clearly

admitted that the measurement of the field Survey No. 295 stated in the mortgage deed at Exhibit 47 was correct. The said measurement is 1 acre and 23 gunthas only. The attempt of the plaintiff thereafter at the trial to state that no survey settlement was made when the registered mortgage deed was executed or that the measurement of Survey No. 295 was bigger than 1 acre and 23 gunthas is nothing but an afterthought and such attempt is also falsified if reference is made to revenue record at Exh. 48 to 51 and at Exh. 88 to 98. In such revenue records measurement of suit field is shown to be 1 acre and 23 gunthas.

10. As discussed hereinabove, neither of the two documents - Exhibit 47 and Exhibit 65, even if assumed to have been legally admitted into evidence, can prove ownership of the plaintiffs over Survey No. 295.

11. The plaintiffs have specifically averred in the plaint that subsequently Thakor Balvantsingh Kaluji had sold Survey No. 295 to them by sale deed on payment of further amount of Rs. 500/-. Such fact which is asserted in the plaint is required to be proved by the plaintiffs. The plaintiffs are thus claiming their title of ownership over Survey No. 295 on the basis of the sale deed alleged to have been executed by Jagirdar subsequently. The plaintiff No. 1 in his deposition at Exhibit 46 has stated that plaintiffs have given such sale deed to their Advocate. However, such sale deed alleged to have been executed by Thakor Balvantsingh Kaluji is not produced. The date and the year in which sale deed is allegedly executed is also not stated. No explanation is forthcoming from the plaintiff or their Advocate as to why such sale deed allegedly executed by Jagirdar is not produced. The factum of execution of such sale deed is denied by the defendants. In absence of the production of the sale deed, therefore, it could not be said that plaintiffs have become the owners of Survey No. 295. In fact, it was further admitted before the two Courts below that adverse inference should be drawn against the plaintiffs for not producing the sale deed, if any, allegedly executed by Thakor Balvantsingh Kaluji and unfortunately the trial Court as well as the lower appellate Court brushed aside the said valid objection by stating that non-production of the sale deed in no way affect the suit of the plaintiffs as State of Gujarat has admitted that plaintiffs were in possession of the suit land.

12. In my opinion, the grave error of law, which is committed by both the Courts below is that of failure to appreciate the distinction between a suit based on title/ownership of immovable property and a suit based on possessory title. Section 6 of the Specific Relief Act, 1963 deals with suit based on possessory title. Section 110 of the Evidence Act deals with burden of proof as to ownership when the question is whether a person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. In the present case, admittedly, the plaintiffs have not claimed ownership over Survey No. 295 on the basis of their possession. They have claimed the same on the basis of the mortgage deed at Exhibit 47 and theory of registered sale deed alleged to have been executed by

Thakor Balvantsingh Kaluji subsequently on payment of further amount of Rs. 500/-. It is no doubt true that possession is the visible badge of ownership and therefore, one who sues on possessory title and is found to be in the possession over property is presumed to be the owner. One who wants to assert that possessor is not owner, has to prove that he is not the owner. A distinction must be made between the rule of the evidence embodied u/s 110 and the principle on which the concept of possessory title is based. The principle is that possession constitutes by itself a limited title over the property, a title which is good against all except the rightful owner. This title, usually described as possessory title has all the features of an estate in land. Possession has a two-fold value; it is evidence of ownership and is itself the foundation of a right to possession. However, when the suit is against the rightful owner, i.e., the State of Gujarat in whom the statutory vesting of the property has taken place and when the suit is based solely on title acquired by mortgage deed as well as by subsequent deed of sale, plaintiff cannot succeed on the basis of possession and unfortunately, the lower Courts grossly erred in missing this distinction. The genesis of the rule of possessory title lies in the Latin maxim "In aequali jure melior est conditio possidentis" which means that when the right is equal, the claim of the party in active possession shall prevail. The doctrine is explained by Broom's Legal Maxims by stating that the general rule is that possession constitutes a sufficient title against every person not having a better title till some act is done by the rightful owner to divest this possession and assert his title, such actual possession is prima facie evidence of legal title in the possessor. However, such possessory right constitutes perfectly good title against all the world but the rightful owner. In the present case, the rightful owner of Survey No. 295 being the State of Gujarat on statutory vesting of the land in the State of Gujarat by virtue of Sections 3 and 8 of aforesaid Jagir Abolition Act, the plaintiffs cannot succeed on the basis of possession and in fact the plaintiffs have never sued on the basis of possession. The possession of the plaintiffs over the suit land was only as a mortgagee in possession. It is well settled that the right of mortgagee in possession is a limited right and the same is subject to remedy of redemption of mortgage available to the mortgagor. A person with limited right in the property as mortgagee cannot acquire the right of full ownership and even otherwise when the right is claimed on the basis of sale deed allegedly subsequently executed, plaintiffs having failed to establish their right, they must fail. Two Courts below were therefore, in my opinion, had erred in holding that the plaintiffs have established their ownership right over suit property survey No; 295.

13. This Court must at once clarify that the question of burden of proof or onus probandi is certainly important in the early stage of a case. It may also assume importance where no evidence at all is led on the question in dispute by either side. In such a contingency, the party on whom the onus lies to prove certain facts must fail if facts are not proved. In the present case, when ownership over Survey No. 295 was asserted by the plaintiffs and when specific issues to that

effect were framed, and when plaintiffs have never claimed title on the basis of their possessory title, they having failed in discharging their burden of proving their title, they must fail. It is true that in cases where evidence has been led by the contesting parties on the question in issue, abstract considerations of onus are out of place and truth or otherwise of the case must always be adjudged on the evidence led by the parties. Vide *Kalwa Devadattam and Others Vs. The Union of India (UOI) and Others*, .

14. The learned Assistant Government Pleader has in this connection invited attention of this Court to the decision of Madhya Pradesh High Court in the case of *Smt. Lalita James and Others Vs. Ajit Kumar and Others*, . The suit was filed by purchasers of the property for possession. The property was admittedly in possession of the defendants. It was for the plaintiffs to prove that their vendor had necessary title. In this connection, the Court held that the plaintiff can only succeed on the strength of his own title and not by any weakness in the case of defendants. For such proposition, reliance was placed by the learned single Judge of M.P. High Court on the principle that it is a well settled rule of law that burden of proving his case to obtain a decree from the Court being on the plaintiff, he must adduce reliable and admissible evidence for the same purpose. As a necessary corollary to the aforesaid rule is the rule that the plaintiff must succeed on the strength of his own title and not by any weakness in the case of the defendant. The well settled principle was stated by Privy Council in the case of *Jagmalprasad v. Sayed Abdulla* reported in AIR 1918 PC 35 by observing that the defects in evidence of the party on whom the burden of proof lies cannot be cured by criticism of other party. In claims based on title, the plaintiff who makes such a claim, has to prove his subsisting title. In *M.M.B. Catholics v. T. Paulo Avira* reported in AIR 1959 SC 31 it was emphasised that when the plaintiff sues on the strength of his title, it is proof of his title that matters and not the absence of title in the defendants. The position of law is thus well established. In view thereof it must be held that two Courts below grossly erred in holding that the plaintiffs have succeeded in establishing their title over Survey No. 295.

15. One of the main substantial questions of law having thus been found against the respondent-plaintiffs, it is not necessary to go into the other question of bar of limitation to the suit of the plaintiffs.

16. In view of the aforesaid discussion, the judgment and decree passed by Civil Judge (S.D.), Palanpur dated 13th January, 1975 declaring the plaintiffs to be the owners of the Survey No. 295 admeasuring 2 acres 9 gunthas and 88 cents of village Bhabhar Navavas as well as the confirming decree passed by the Assistant District Judge in Regular Civil Appeal No. 22 of 1975 are required to be quashed and set aside and the suit of the plaintiffs for declaration is required to be dismissed and is hereby dismissed.

17. In fact, on the vesting of their land in question in the State Government, action was taken by the State of Gujarat immediately through Bhabhar Gram Panchayat to recover possession of the suit property and in fact, plaintiffs have

admitted that Bhabhar Gram Panchayat gave notice to the plaintiffs on 26th February, 1987 at Exhibit 66 and that the action taken pursuant thereto was not challenged by the plaintiffs. It would, therefore, be open to the respondents to take appropriate action as permissible in law for recovering possession and since plaintiffs have failed to establish title over the suit land, permanent injunction as prayed for could not be granted and the decree of the trial Court on that is also required to be quashed and set aside.

18. In the result, the appeal succeeds. The judgment and decree of the trial Court as confirmed in appeal is quashed and set aside and the suit of the plaintiffs is dismissed. There shall be no order as to costs.