

Order below Exhibit-38

1. The present application has been filed by the defendant under the provisions of Order 11 Rule 12, 14 of C.P.C. It is contended by the defendant that vide mark 3/2 plaintiff has produced a copy of will of deceased Kamlaben Bhimabhai Nayak executed by her in presence of witnesses and registered before notary vide No. 586 of 2012 on 11th April 2012. In the present suit it is prayed by the plaintiff to declare that the said will is forged, concocted and illegal. Though the suit is placed for the evidence of plaintiffs they have not produced original will. It is further pleaded that right from the stage of written statement, it is the say of the defendant that the original will was forceably taken by the plaintiffs and the plaintiffs want to take undue advantage by not producing the original will and thereby causing loss to the defendant. Hence the defendant has prayed to order plaintiffs to produce original will, the copy of which is produced at mark 3/2.
2. Against the said application the plaintiffs have filed their objection vide Exhibit-45 wherein they have categorically denied that the original will is in their possession. It is further pleaded that the onus of proving the defence taken by the defendant is on him and the plaintiff cannot be fastened with the liability of proving the defence of the defendants.
3. Heard Learned Advocate Mr. K.S. Madiwal for the defendant and Advocate R.R. Patel for the plaintiffs. Both the advocates have submitted as per the application and the objection taken against the application. In addition to it Learned Advocate Mr. R.R. Patel has relied on the judgment of Hon'ble High Court of Gujarat in the case of Nutan Corporation through President and others versus Sunil Thakorbbhai Mehta and others reported in 2009 volume III GLR page No.2594 and has submitted that in view of the ratio laid down by Hon'ble High Court in the above judgment the application should be rejected with cost.
4. Perusing the application what the defendant has prayed in the application is to order plaintiffs to produce original will produced along with the plaint at mark 3/2. The defendant at the very first instance i.e. at the stage of their written statement has specifically denied that the original will is in his possession and the Learned Advocate for the defendant in the course of his argument has drawn attention of the court towards para 19/3 of the written statement in which it is pleaded that the plaintiff forcibly took away the alleged will when the last rites of the deceased Kamlaben were in progress. Thus according to the beneficiary of the alleged will, it is not in his possession. When the plaintiffs have come before this court seeking relief to set aside the impugned will, it is the primary duty of the plaintiff to prove the

contents of the document by either primary evidence or by way of secondary evidence showing the circumstances which allows the plaintiff to prove the documents by way of secondary evidence.. And if the plaintiffs fail in their duty to prove their case they will face whatever the outcome of the suit may be. However, that does not entitle the defendant to compel the plaintiff to produce the documentary evidence. It is upto the plaintiff to prove his suit as the burden is upon him to prove that his case falls within the four corners of law and he is entitled to the relief claimed in the suit. The judgment relied upon by the Learned Advocate of the plaintiff can be distinguished on the facts as in that judgment, the plaintiff prayed that the defendants be compelled to produce the documents that may be relied upon by them while in the present application the defendant has prayed to compel plaintiff to produce the original will which is produced by the plaintiff vide mark 3/2. Thus though the judgment cited by the Lr. Advocate for the plaintiff would be of no avail to him but on facts as the said judgment speaks about compelling the other side to produce the documents that are relied upon by them. In view of the above discussion the present application lacks merit and hence passed the following order under the application. No order as to costs.

:: Final Order :

1. The present application of defendant is hereby rejected.

pronounced and signed in open court today 1st February 2021

Date.01/02/2021

Place.Vagra

(V.P.Mehta)
Additional Civil Judge,
Vagra
UIC : GJ01538