

--:: Order below Exhibit - 5 :: --

- 1.** The plaintiff has filed the suit for declaration and permanent injunction claiming that the plaintiff is owner and possessor of the im-moveable property situated at village: Saran of Taluka: Wagra, bearing block/survey no. 202, admeasuring 2-06-12 (hereinafter referred to as 'suit property' for the sake of brevity and convenience). Plaintiff has also sought relief that the defendants had no right to create any charge over the suit property and thus, the defendants be ordered to repay the charge created by them over the suit property and thereby free the suit property from all the encumbrances and the defendants be restrained from entering into the suit property or disturbing the plaintiff from cultivating and taking agricultural produce from the suit land.
- 2.** The plaintiff has stated that the suit property was originally owned by grand father of the plaintiff i.e. Bapusaheb Dipsang. The defendant no. 1 is the father of the plaintiff while defendant no. 2 is the uncle of the plaintiff. Plaintiff has further pleaded that the marriage of defendant no. 1 took place with Sabera Narsang Rajbha and out of the said wedlock plaintiff was born. Subsequently, defendant no. 1 took divorce with the plaintiff's mother on 10/04/1995. As the plaintiff was minor at that time she was bought up at her maternal grandfather's home. At the time when divorce took place between defendant no. 1 and plaintiff's mother, defendant no. 1 had not made any arrangements for maintenance of plaintiff.
- 3.** It is pleaded by the plaintiff that out of natural love and affection towards the plaintiff her grandfather, Bapusaheb Dipsang had executed a gift deed on 06/04/1995 as per Muslim Shariat Law on a stamp paper of Rs. 20. Since, the plaintiff was minor at relevant time, it was executed in name of plaintiff's maternal uncle, Nasir Narsang. On the same date, possession of suit property was handed over to Nasir Narsang as

plaintiff's guardian. Thus, from the very day plaintiff had become owner and possessor of the suit property.

4. Plaintiff has further pleaded that in the divorce deed between her parents was executed on a stamp paper of Rs. 10 in which the defendant no. 1 had acknowledged the fact that the suit property has been given to the plaintiff for her maintenance by original owner of the suit property. Thus, defendant no. 1 is estopped from acting against the said acknowledgment.
5. Plaintiff has also contended that though the defendants very well knew that the plaintiff has become owner and possessor of suit property, on the demise of her grandfather BabuSaheb Narsang both the defendants got entered their name in revenue record and mutated their name in the records without the knowledge of the plaintiff. Thus, they have concealed material facts and attempted to become the owner of the suit property.
6. The defendants have also created charge over the suit property by borrowing loan from Saran Co-Operative Society Ltd. According to plaintiff the cause of action to file the present suit arose when the defendants denied the ownership rights of the plaintiff over suit property and threatened plaintiff not to enter upon the suit property.
7. Along with the plaintiff the plaintiff has filed the present application under the provisions of Order 39, rule 1-2 of CPC wherein the plaintiff has re-iterated what has been stated in the plaint and sought following reliefs from the court.
 - a. Pass interim injunction against the defendants and their agents restraining them from entering upon the suit property and disturbing the plaintiff from cultivating, sowing on the suit property.
 - b. Cost of the present application.

- 8.** The summons of the present suit was duly served upon the defendants who appeared through their Advocate Mr. J. H. Kadri and filed their written statement vide exhibit-13 wherein the defendants have denied all the contention and allegations levelled by plaintiff against them. The defendants have taken primary objections about the non-maintainability of the suit on the ground of non-joinder of necessary parties, limitation, suppression of material facts, bar of section 17 of registration act, and the land being a restricted tenure land bar of section 43 of Gujarat Tenancy and Agricultural Land Act.
- 9.** The defendants have stated that on the demise of Late Bapusaheb Dipsang, the suit property was mutated in the name of his five heirs by way of mutation entry no. 3125 dated 31/08/2010 and out of the five heirs three heirs released their right from suit property in favour of defendants and entry to that effect was mutated by way of entry no. 4046. It is also pleaded that from 1995 to 2019 the original owner and after his demise the defendants have time and again obtained loan from financial institutions and bank and have repaid the borrowings. Thus, the plaintiff was never in possession of suit property and is not in possession as on today. In the lifetime of Bapusaheb Dipsang the suit property was in his possession and from 08/03/2010 the possession of suit property lies with the defendants. Thus, the plaintiff has come with a false and concocted story about the suit property being gifted to her by Bapusaheb Dipsang.
- 10.** The defendants have further denied that the gift deed bears the signature of their father. It is also pleaded that the gift deed is not signed by both the parties to it. It is also pleaded that the suit property being restricted tenure land under section 43 of Tenancy Act, it could not have been transferred without prior permission from the competent authority. Thus, transfer if any, being against the provision of law is null and void. It is also pleaded that the defendants have taken the exercise of converting the land from new tenure to old tenure. The plaintiff who stays with her maternal uncle at village Pakhajan has never come to village Saran where the suit land is situated. It is also contended that the

alleged gift deed is in contravention to provision of section 122 of Transfer of Property Act as the mandatory requirements of attestation, registration and acceptance of possession are completely lacking. The defendants have also contended that if the plaintiff is claiming her right over the suit property since the year 1995, she has shown no reason as to why she did not take any steps to enter her name in revenue record from 1995 to 2018. The plaintiff had never objected when the defendants took loan from the banks and other financial institutions and repaid the loan. But as the price of the suit land has increased many fold times the plaintiff has filed the present suit to claim right which is non-existent.

- 11.** Lr. Advocate for the plaintiff has filed his written arguments vide exhibit-16 while the Lr. Advocate for the defendants has submitted his written arguments vide exhibit-17. In the written arguments of plaintiff it is stated that it is undisputed that the suit property originally belonged to Late Bapusaheb Dipsang. It is also stated that the Muslim personal law does not distinguish between self acquired property and ancestral property. Thus, in his lifetime BapuSaheb Dipsang being the sole owner of the suit property had all the right to dispose off his land as per his choice. Gift is known as 'Hiba' under Muslim personal law and the provisions of Transfer of Property Act is not applicable to Muslim personal Law. According to Muslim Law gift means when a living person transfers his property in favour of another without consideration. Highlighting further on the aspect of gift it is stated that under Muslim Law the essential requirements of gift are (1) The property which is the subject matter of gift is in existence, (2) It should be definite, (3) The donee of the gift should be alive, (4) There should be acceptance of the gift from the donee, (5) The donor of the gift should have handed over the possession of the subject matter of the gift to the donee. Thus, if any gift is satisfying the above conditions, then it is considered as valid gift under Muslim Law. It is stated that looking to the document at mark 3/2 it is evident that the suit property is transferred in favour of plaintiff by the original owner. The plaintiff being in settled possession of the suit property has the rights against whole world to protect her possession

and therefore, the defendants should be restrained from entering upon the possession of the suit property. That all the ingredients necessary for granting injunction are in favour of the plaintiff. Hence, the present application should be allowed. The Lr. Advocate for the defendants has repeated what has been stated in the written statement in his written arguments.

12. As the plaintiff has sought interim injunction pending the final disposal of the suit it is apposite to discuss general principles of granting and non-granting of the interim injunction application. There are three basic principles for granting or refusing to grant temporary injunction i.e. prima facie case in favour of the party seeking injunction, Balance of convenience in favour of such person and lastly there must be a irreparable loss which are likely to be caused to party if injunction is not granted to such person. Thus, an injunction being an equitable remedy is always at the discretion of the court. However, such discretion must be based on sound judicial principles and guided by rules of Equity and the peculiar facts and circumstances of the case. In addition to these three basic principles for granting or refusing to grant injunction, the conduct of the person seeking injunction should also be taken in to consideration because the granting of injunction is an equitable relief and is drastic or serious order and there are two basic maxims of equity which are important to be consider at the time of deciding injunction application which are "He who seeks equity must do equity" and "He who seeks equity must come with clean hands".

13. Applying the above legal principles to the facts of the present case, what can be culled out from the case of the plaintiff is that she has claimed to be the owner of the suit property on the basis of the gift deed produced at mark 3/2 by her. So far as the argument of the Lr. Advocate for the plaintiff that the provisions of

Transfer of Property Act with respect to gift are not applicable to Muslim is concerned, this court is in complete agreement with the above argument as section 129 of Transfer of Property Act, 1882 unequivocally speaks that the provisions about gift made in it shall not affect any rule of Muhammadan Law. Thus, it is necessary to see what are the ingredients for a valid gift under muslim personal law. Hon'ble Apex Court in the case of Mahboob Sahab v/s Syed Ismail reported in AIR 1995 SC 1205 has explained the essential conditions of gift under Mohammedan Law. Relevant para of the said judgment is reproduced here.

- 5 Under sec. 147 of the Principles of Mahomedan Law by Mulla, 19th Ed. Edited by Chief Justice M. Hidayatullah, envisages that writing is not essential to the validity of a gift either of movable or of immovable property. Section 148 requires that it is essential, to the validity of a gift, that the donor should divest himself completely of all ownership and dominion over the subject of the gift. u/s. 149, three essentials to the validity of the gift should be, (i) a declaration of gift by the donor, (ii) acceptance of the gift, express or implied, by or on behalf of the donee, and (iii) delivery of possession of the subject of the gift by the donor to the donee as mentioned in sec. 150. If these conditions are complied with, the gift is complete. Section 150 specifically mentions that for a valid gift there should be delivery of possession of the subject of the gift and taking of possession of the gift by the donee, actually or constructively. Then only gift is complete. Section 152 envisages that where donor is in possession, a gift of immovable property of which the donor is in actual possession is not complete unless the donor physically departs from the premises with all his goods and chattels, and the donee formally enters into possession. It would, thus, be clear that though gift by a Mohammadan is not required to be in writing and consequently need not be registered under the Registration Act; a gift to be complete, there should be a declaration of the gift by the donor; acceptance of the gift, expressed or implied, by or on behalf of the donee, and delivery of possession of the property, the subject-matter of the gift by the donor to the donee. The donee should take delivery of the possession of that property either actually or constructively. On proof of these essential conditions, the gift becomes complete and valid. In case of immovable property in the possession of the doner, he should completely divest himself physically of the subject of the gift.

Thus, applying the above law to the facts of the present case, and closely perusing the gift deed at mark 3/2, the nomenclature of the said document is written as agreement and not gift deed. Further, it seems that there is no recital that the gift is accepted by the donee. In addition to above, I have referred Mulla's Principles of Mahomedan Law, 22nd Edition published by Lexis-Nexis publication. In chapter XVIII (Guardianship of person and property). Part C of the said chapter lays down rules regarding guardianship of the property of a minor. Section 359 is re-produced herein

359. Legal Guardians of property.

The following persons are entitled in the order mentioned below to be guardians of the property of a minor.

- (1) the father,
- (2) the executor appointed by the father's will
- (3) the father's father
- (4) the executor appointed by the will of the father's father.

The commentary appended to the said section says that 'the four guardians mentioned in the section are hereinafter called 'legal guardians'. The only relations who are legal guardians of the property of a minor are (1) the father, and (2) the father's father. No other relation is entitled to the guardianship of the property of a minor as of right, not even the mother, brother or uncle...'

In view of the above section as well as commentary appended to the said section, the guardianship of the property of the minor should be with the persons mentioned in the section and to no other person. While in the present case, the maternal uncle of minor was appointed as guardian of the minor's property which is against the principles of muslim personal law.

14. Further, when the plaintiff is claiming that she was put into possession of suit property from the day of execution of gift deed by her grandfather, then as a person of ordinary prudence, she should have taken steps to

enter her name in the revenue records of the suit property at least after she attained the age of majority but plaintiff has not taken any such steps till the suit was filed. Further, if the plaintiff claims to be in possession, she ought to have produced receipts of the land revenue paid on the suit property. She could have also produced affidavits of the persons through whom she cultivates the suit property. However, no such evidence is produced on record. Further, in document at mark 3/2 it is mentioned that it is the responsibility of the executor to repay all the loans and thereby make the suit property free from all the encumbrance. There is nothing on record that the uncle of the plaintiff or plaintiff herself on attaining majority ever made sure that the promise of the executor was fulfilled by him. In view of the above observations, the plaintiff could not take recourse to gift deed at mark 3/2 at this stage of the suit as the version of the plaintiff about execution of gift deed and handing over possession to her requires in depth evidence to be led by each party.

15. As against above the defendants have shown enough material on record to show that prima-facie they are in possession of the suit property. On the persusal of documents at mark 18/11 and 18/12 which are entries in the revenue records which shows that the defendant had re-paid the loan borrowed on the suit property. The defendants have also produced affidavit of Rasul Motaji Raj and Abdul Bhavsang Raj vide exhibit-19 and 20. The said persons are the owners and possessors of the land situated in the vicinity of the suit property who have stated on oath that the defendants are in possession of suit property since the time of their ancestors.
16. In view of the above observation, I have come to the conclusion that the present application lacks the three ingredients of granting interim injunction i.e prima facie case, balance of convenience and ir-repairable injury which cannot be compensated in terms of money. I have prima-facie come to the conclusion that it would not be just and proper to ignore the evidence placed by defendants to show that they are in possession of the suit property and if the defendants are restrained from

cultivating the suit property it would cause them ir-repairable injury. Thus, I pass following final order under the application.

:- Final Order:-

- 1 The present application is hereby rejected.
- 2 Cost of the application shall follow the cost of the suit.

Pronounced and signed in open court today on 3rd day of January, 2022.

Date:- 03/01/2022

Place:- Vagra.

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