

## **FINAL ORDER BELOW EXHIBIT 138**

### **(THIRD PARTY APPLICATION UNDER ORDER 1 RULE 10 OF CPC FOR JOINING OF DEFENDANTS)**

**RCS/17/2017**

#### **BRIEF FACTS OF THE PLAINT**

1. The suit of the sole Plaintiff Mr. Sureshbhai Dharamsinh Prajapati was filed originally in the year 2010 against 11 defendants vide RCS/6/2010 as per the cause title he seeks permanent injunction & separation and partition of the suit property. In the plaint the suit property is described as city survey number 366 admeasuring 770-13 square meter in netrang jurisdiction. In the relief part of the plaint, plaintiff is seeking permanent injunction against the defendants with respect to restrain them to transfer to third parties, further second relief sought by the plaintiff is the separation (separate possession) of share in the suit property number 366 admeasuring 770-13 square

meter in netrang from the defendants. The third relief sought by the plaintiff is the mesne profits to the tune of RS. 2000/-.

2. In the cause of action at para 3 of the plaint it is averred by the plaintiff that the defendants have threatened to sell the entire property in question and the defendants are not giving his share in the suit property. The plaintiff prior to the institution of the suit gave notice to the defendants on dated 09/10/2009. However, the defendants gave no reply to the notice and hence from that day the cause of action arose.

3. The relationship between the plaintiff and defendants is that of brothers and sisters inter se

- the defendant number 1 Bhupatbhai Dharamsing prajapati is the brother of the plaintiff
- the defendant number 2 is the step mother of the plaintiff and widow of Dharamsing Prajapati

- the defendant number 3 jagubhai dharamsing prajapati is the brother of the plaintiff
- the defendant number 4 jayantibhai dharamsing prajapati is the brother of plaintiff
- the defendant number 5 gordhanbhai dharamsing Prajapati is the brother of the plaintiff
- the defendant number 6 madhuben is the sister of the plaintiff as well as daughter of dharamsing bhanabhai Prajapati.
- the defendant number 7 dharmisthaben is the sister of the plaintiff as well as daughter of dharamsing bhanabhai Prajapati.
- the defendant number 8 to 11 are the legal representatives of govindbhai bhanabhai prajapati. (plaintiff's uncle)

4. The case of the plaintiff is that the suit property is ancestral property originally

jointly belonged to his father dharamsing bhanabhai Prajapati and plaintiff's uncle govindbhai bhanabhai Prajapati and it is averred that dharamsing bhanabhai Prajapati has expired on dated 14/03/2000. Whereas govindbhai bhanabhai Prajapati has expired on dated 10/06/2005. Further it is averred that after the death of ancestors, the name of plaintiff and defendants came to be mutated on government land records. plaintiff is claiming to have a legal share jointly with the defendants in the suit property. Despite having legal share the plaintiff has to live in a rented premises and on dated 15/01/2010 in the morning 10:00 am the defendants came at the house of the plaintiff and told the plaintiff that they will not give any share to the plaintiff in the suit property and also threatened to cause injuries to the plaintiff.

#### **BRIEF FACTS OF WRITTEN STATEMENT**

5. The process of the suit was duly served upon the defendants and defendant number 1 to 3,

5, 6 and 7 had filed written statement vide exhibit 39 and it is averred that the suit property was purchased by deceased dharamsing bhanabhai Prajapati and Govindbhai bhanabhai Prajapati vide registered sale deed dated 13/03/1972. Out of the total land of 770 square meters they on dated 07/01/1985 sold the portion of suit property 197 square meters for a consideration of Rs. 14,000/- to the defendant number 2 godavariben (widow of dharamsing) and the same was again transferred to the defendant number 5 gordhanbhai on dated 12/11/2009 vide registered sale deed and consideration of Rs. 20,000/-. Therefore, the leftover portion is 572 square meters in the suit property and the claim of the plaintiff is not maintainable due to this reason. Also the father of plaintiff himself gave advertisement public notice in the newspaper on dated 10/01/1984 that plaintiff has left the house since 10 years and

third parties should not transact with him. Also the plaintiff has expressly waived his right/share in the suit property prior to the institution of the suit and along with that other legal heirs have also waived their right over the remaining portion of suit property i.e is 572 square meters in favour of the defendant number 1 to 5 and thus defendant number 1 to 5 are the owners of the suit property.

**COUNTER AFFIDAVIT OF PLAINTIFF AT EXHIBIT 41**

6. The plaintiff has filed a counter-affidavit in this case after receiving the copy of written statement and has denied the allegations of the written statement in toto.

**TEMPORARY INJUNCTION WAS GRANTED**

7. The plaintiff filed exhibit 5 temporary injunction application and after considering the written statement of the defendants as well as counter affidavit of the plaintiff, injunction application was allowed by my

learned predecessor judge vide order dated 26/11/2010 in the favour of the plaintiff and against the defendants.

### **FINAL JUDGMENT & DECREE**

8. The entire suit was tried for 7 years and on dated 09/10/2017 my learned predecessor judge has partly allowed the suit of the plaintiff. The court observed that out of the total land of 770 square meters the original ancestors on dated 07/01/1985 sold the portion of suit property 197 square meters for a consideration of Rs. 14,000/- to the defendant number 2 godavariben (widow of dharamsing) and the same was again transferred to the defendant number 5 gordhanbhai on dated 12/11/2009 vide registered sale deed and consideration of Rs. 20,000/-. **and the leftover portion is 572 square meters in the suit property and the claim of the plaintiff was partly allowed for leftover portion only (not entire 770) the**

**same was sent to the collector for execution of separation of share of suit property.**

9. Preliminary decree was drawn in the present suit RCS/17/2017 by my learned predecessor judge in the favour of the plaintiff. The suit was kept pending for the final decree.

**FIRST APPEAL**

10. The first appeal was filed by the defendants of this case before the hon'ble district court and the defendants on the grounds of their contentions of the written statement preferred appeal vide RCA/34/2017.

11. The hon'ble appellate court granted interim protection to the appellants and the execution of the preliminary decree was stayed by the appellate court vide dated 25/10/2017.

12. Again after 7 years of appeal, on dated 07/03/2025 the judgment and preliminary decree was set aside by hon'ble appellate

court and the matter was remanded back to this court.

13. In the appeal the de facto applicant preferred the similar application vide exhibit 24 through power of attorney vipulbhai popatbhai raval and prayed before the appellate court that (1) manjuben widow of balubhai dharamsing (2) bharatbhai balubhai prajapati (3) pragnaben balubhai should be joined as respondents in appeal on the ground of necessary parties. wherein it was observed in para 18 of the judgment of the hon'ble appellate court as under

*“as per the application vide exh. 24, the applicants have stated that they have alleged to have been legal heirs of deceased balubhai dharamsinhbhai Prajapati. Along with their application, they have also produced documents vide list at exh. 34. So, now it is required to be decided that whether this third party/ necessary party are legal heirs of balubhai dharamsinhbhai Prajapati or not and whether they needs to be joined as party. the same is a matter of evidence and hence the same cannot*

*be decided without recording evidence. Further, the evidence cannot be recorded before this appellate court and the same is required to be recorded before the Ld. Trial court. hence, in my opinion it is proper to remand back the matter to the Ld. Trial court to decide the issue that whether the third party/necessary party are legal heir or not?"*

14. The applicants were given a liberty to file the same application before this court by the hon'ble appellate court.

### **BRIEF FACTS OF PRESENT APPLICATION**

#### **EXHIBIT 138**

15. Now coming to the facts of the present application, which is similar to one preferred before the hon'ble appellate court at exhibit 24. The present application exhibit 138 is filed by Vipul popatbhai rawal (who is not a party to the present proceeding) who claims to be the power of attorney of manjuben balubhai rathod and bharatbhai balubhai rathod (who both are also not a party to the present proceeding) and have produced power of

attorney in support of the present application dated 22<sup>nd</sup> July 2019 wherein it appears that both the power givers (principals) manjuben and bharatbhai are residing at surat and the power receiver (agent) vipul is also a resident of surat and the power receiver appears to be son in law (jamai) of manjuben.

16. At this juncture the court has perused the present power of attorney and the power of attorney contains thumb impression of manjuben and signatures of bharatbhai and signatures of the Vipul and the same was executed before notarised officer suresh dhodia. I have perused the entire power of attorney and read the contents of the power of attorney and prima facie the only reason for executing the power of attorney is that the de-facto power givers can't remain physically present before this court but for what reasons they can't remain physically present before this court? are they suffering from any

permanent disability? There is no answer to this question.

17. The applicant has filed the present application and invoked order 1 rule 10 of the code of civil procedure.

18. The applicant has also preferred a separate suit vide regular civil suit number 30/2020 before this court.

19. **Since this court had its own doubts regarding the genuineness of the power of attorney, on dated 22<sup>nd</sup> January 2026 vide written order this court had directed the agent Mr Vipul popatbhai rawal to ensure the physical presence of the principals before this court.**

20. **Pursuant to compliance of that order; on dated 12<sup>th</sup> february 2026 manjuben balubhai rathod (Prajapati) and bharatbhai balubhai rathod were present before this court but pragnaben balubhai was not present.**

21. Further arguments of the learned advocates on record were heard by this court on dated 12/02/2026 upon the present application and the case was posted for final orders of present application.

**ARGUMENTS OF LEARNED ADVOCATE OF**  
**DEFACTO APPLICANTS MR. KISHORE P**  
**KALSARIYA**

22. He has argued that power of attorney was executed by manjuben balubhai rathod and bharatbhai balubhai rathod in favour of the Vipul rawal for the purpose of institution of suit in the year 2019 and in the year 2020 a suit is preferred vide RCS/30/2020 before this court for the same suit property and pending before this court at the stage of plaintiff evidence. Nine issues are framed by the court and suit is pending for cross examination of 1<sup>st</sup> witness Mr. Vipul rawal.

23. Further the learned advocate has argued that in that suit the defacto applicants have claimed in the relief portion 1/4<sup>th</sup> share in the

suit property which is relief sought by the defacto applicants is the declaration and separation (separate possession) of share in the suit property number 366 admeasuring 770-13 square meter in netrang from the defendants which amounts to 192.53 square meters.

24. Further the learned advocate has argued that it is only after the receipt of reply i.e written statement of the defendants of that case the defacto applicants came to know about the pendency of the appeal before the appellate court and came to know that there is a stay order in favour of the defendants therefore the defacto applicants preferred similar application before the first appellate court.

25. The learned advocate further argued that both the parties that is the plaintiff as well as the defendants of this suit has mislead the trial court and both have suppressed the fact of existence of marital relations between

first defacto applicant and bhalubhai Prajapati (who happens to be the brother of the plaintiff).

26. The learned advocate further argued that the father of plaintiff dharamsing Prajapati had four wives and deceased balubhai Prajapati being sole son of one of the wives is entitled 1/4<sup>th</sup> share in suit property as all the wives are liable to enjoy equal share.

27. The learned advocate has further argued that since the present defacto applicants are the joint owners of the suit property, they must be joined as defendants in the present suit and argued to consider the above arguments as a part of this application and prayed to allow the present application of the defacto applicants.

**PLAINTIFF'S ARGUMENTS ON PRESENT APPLICATION**

28. Plaintiff himself has orally argued before this court that he was unaware of the legal procedure of joining all the necessary parties

due to lack of knowledge of law. He has supported the suit of the defacto applicants filed his written reply in the suit of RCS/30/2020 and wherein he supports the claim of the defacto applicants.

29. The plaintiff argues that his deceased father had four wives and he is the sole son of one of the wives is entitled 1/4<sup>th</sup> share in suit property as all the wives are liable to enjoy equal share.

30. It is pertinent to note that plaintiff has no objection to the present application.

**ARGUMENTS OF LEARNED ADVOCATE OF DEFENDANTS MR. A H PANDYA**

31. The defendants have filed written objection to the present application.

32. The learned advocate has argued that the entire application is defective as well as false averments are made in the present application. Firstly the application is silent with respect to the date of marriage of first defacto applicant and deceased balubhai

Prajapati. The defendants have confidently asserted that there were no marital relations between the first defacto applicant and balubhai Prajapati. There is no marriage registration certificate brought on record by the defacto applicants. The averments that deceased dharamsing Prajapati had four wives is totally false and misleading.

33. The learned advocate has argued that no direct claim is filed by the defacto applicants and whatever pleadings in the present suit as well as in other suit RCS/30/2020 pleadings are signed by the power of attorney who has no “personal knowledge” and no direct affidavit is preferred by the defacto applicants themselves.

34. The present application is filed because of the prior animosity between power of attorney Vipul rawal and defendants just to harass the present defendants. The defacto applicants are strangers to the suit.

35. Further he has drawn the attention of this court towards the pleadings of written statement preferred in the present suit and repeated the averments of the written statement.

36. Further the learned advocate has argued that partition cannot be as per number of wives, as per the law, partition can be done as per the number of sons and daughters. Therefore just to enhance the legal share a new concocted story of four wives is being brought up which was never brought up during the entire trial, the claim of defacto applicants as well as the plaintiff for 1/4<sup>th</sup> share each is not maintainable. Plaintiff's plaint, counter affidavit, examination in chief is silent with respect to amount of share and that itself is a ground to dismiss the whole suit.

37. Further argued that the deceased balubhai Prajapati got expired on dated 15/02/2005 and during his entire lifetime

balubhai Prajapati never claimed any partition before the defendants, and had committed suicide in the year 2005 after the expiry of 15 years in the year 2020 the defacto applicants who are strangers have preferred a suit RCS/30/2020 which is itself time barred claim and hence not maintainable. Entire application is silent for the reason why no steps were taken for the entire 15 years for claiming any right/title/interest in the suit property by the defacto applicants?

38. Further argued that the stand of plaintiff has been contradictory, and the plaintiff has tried to mislead the court, and not the defendants in the present case. In the year 2010 the plaintiff himself filed the suit without joining defacto applicants that itself is evident that even plaintiff was not aware of the marital relations between first defacto applicant and deceased balubhai Prajapati. Further the learned advocate has argued to

dismiss the present application preferred by strangers.

### **REASONS AND FINDINGS**

39. **Having heard the arguments advanced by the learned advocates on record and taking into consideration oral submissions and written application and after perusal of the documents on record in the opinion of this court and in the interest of justice and in the present facts and circumstances of this case the present application deserves to be “rejected”.**

40. It deserves to be stated that a necessary party is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a necessary party is not impleaded, the suit is itself liable to be dismissed.

41. This court no doubt is competent enough to frame the above issue as suggested by the hon'ble appellate court provided proper procedure is followed by the defacto

applicant. the first defect in the procedure is that pragnaben balubhai has not at all executed any power of attorney in this behalf therefore this court can safely conclude that the power of attorney is incomplete.

42. Second defect in the procedure is that there are no specific compelling grounds mentioned in the power of attorney for execution of power of attorney like permanent disability or non appearance on account of resident of foreign country.

Therefore in the present case defacto applicant instead of approaching directly before this court appears through the power of attorney named Vipul raval without any reasons mentioned in the power of the attorney.

43. There is no doubt as to the proposition that parties can appear through power of attorney provided that they should mention in the application that power of attorney himself have “personal knowledge” about the

transaction/facts. **The third defect is that there are no averments in the present application that the power of attorney is having any personal knowledge of the dispute in question.**

44. It deserves to be stated that there is no need for physical presence of the parties in civil matters and the parties can appear through their learned advocate provided the only stage that they need to remain present is at the stage of cross-examination or when called upon by the court. in the present case **fourth defect is that learned advocate on record has produced vakilpatra which is itself signed by power of attorney Mr. Vipul rawal and not by the defacto applicant themselves. There is no mentioning in the power of attorney that such a power of appointment of advocate is given to the present power holder. (power to appoint sub-agent is not mentioned in the power of attorney).**

45. The fifth defect is that there is no mention in the entire power of attorney that the present power of attorney is given for the purpose of joining of party in the RCS/17/2017.

46. Coming to the merits of the present application, since the contents of the application is itself hearsay and the indian evidence act is clear that all the averments/evidence should be direct and not hearsay. This court is of the firm opinion that in the facts and circumstances of this case the defacto applicant should have directly filed an application and should have directly appointed the learned advocate on their behalf and should have directly made averments and should have directly lead the documentary evidence on their behalf.

47. Therefore no proper procedure is being followed by the defacto applicant. Considering the above reasons this court is not inclined to allow the present application

and the present application deserves to be rejected at the outset.

48. In the present case whatever averments are made by the power of attorney those entire averments are hearsay as per the Indian Evidence Act.

49. The learned advocate for the defendant has rightly pointed that in the year 2010 the plaintiff himself filed the suit without joining defacto applicants that itself is evident that even plaintiff was not aware of the marital relations between first defacto applicant and Balubhai Prajapati. Also there is no marriage registration certificate brought on record as pointed out by the learned advocate of the defendant.

50. This court had asked questions under section 165 of the Evidence Act to the defacto applicant Manjuben Balubhai Rathod (Prajapati) who has appeared and she states that she wants to join in the present suit as defendant. Upon inquiry she was not at all

aware of the property number which she claims as joint owner. So called joint owner themselves not aware of the property details.

51. It is shocking that she wants to join in the present suit as a defendant and she is not aware of the property number which is the dispute in question.

52. Similarly This court had asked questions under section 165 of the evidence act to the defacto applicant bharatbhai balubhai rathod who has appeared and he states that he wants to join in the present suit as defendant. upon inquiry he was not at all aware of the property number which he claims as joint owner. So called joint owner themselves not aware of the property details.

53. It is shocking that he wants to join in the present suit as a defendant and he is not aware of the property number which is the dispute in question. Therefore this court can safely conclude that they are strangers in the present proceedings.

54. It deserves to be stated that none of the parties in the examination in chief as well as in cross examination at any point of time the factum of existence of legal heirs of deceased balubhai Prajapati was never an issue at all. Therefore the doctrine of estoppel by conduct comes into the picture and the plaintiff cannot take contradictory views. In fact objections of non-joinder of necessary parties have to be raised before the framing of issues otherwise they are deemed to have been waived as per order 1 rule 13 of code of civil procedure.

55. This court would like to point out that this court is not satisfied with the argument of the defacto applicants that partition has to be done as per number of wives, partition cannot be as per number of wives, as per the law, partition can be done as per the number of sons and daughters. Therefore the claim of defacto applicants as well as the plaintiff for  $1/4^{\text{th}}$  share in suit property is itself misleading.

56. In the interest of justice following final order is passed for the above reasons:-

**FINAL ORDER**

1. The present application filed by power of attorney Mr. Vipul Rawal is hereby rejected.
2. Since evidence is already recorded and no new issues are framed by this court, let the case be posted for final arguments.

Pronounced in the open court today on this dated 12<sup>th</sup> March 2026.

(Bharat Ramchand Lakhwani).

PCJ, Netrang.

Judge Code-GJ01711.