

REGULAR CIVIL SUIT NO. 31 OF 2009**ORDER BELOW EXHS. 5 AND 92**

1. By this order I shall dispose of this application submitted by the plaintiff for obtaining temporary injunction against defendant Nos. 1 to 4. In her application, the plaintiff has stated as under:

Defendant No. 2 is the brother of the plaintiff. Defendant No. 3 is the nephew of the plaintiff. Originally, the suit-property belonged to Dharmal who happened to be the father of the plaintiff and defendant No. 2 and the grand-father of defendant No. 3. The father of defendant No. 3 i. e. the brother of the plaintiff, and the brother of the plaintiff i.e. defendant No. 2 have sold the suit-property (more specifically described in the schedule of the plaint), which is an ancestral property, to the father of defendant No. 1 and, thus, they have defeated the right of the plaintiff to the extent of 1/5th share in the suit-property. Thereafter, defendant No. 1 is in the process of selling the suit-property to some third person. Under these circumstances, the plaintiff has prayed for temporary

injunction restraining the defendants from creating any right, title or interest in favour of their persons.

2. It is to be noted that, during the pendency of this application, defendant No. 1 has sold the suit-property to defendant No. 4. Therefore, to restrain creating of further interest of other persons in the suit-property, the plaintiff has filed an application at Exh. 92 with the same relief as it is against the other defendants at Exh. 5. To this application, defendant No. 4 has filed his reply at Exh. 56.

3. In their reply at Exh 21, defendant Nos. 2 and 3 have supported the case of the plaintiff. They have clearly stated that the sale-deed of 1969 has not at all been executed either by defendant No. 2 or the father of defendant No. 3.

4. In his reply at Exh. 56, defendant No. 4 has taken the following defence:

Late Bharmal has five heirs and the plaintiff has joined only two brothers and there are other two brothers who have not been joined and, therefore, the suit is bad for non-joinder of necessary parties. The plaintiff seeks to challenge in 2009 the

document which is executed in 1969 and, therefore, the suit is completely barred by limitation. Defendant No. 1 enjoyed the possession of the suit-property for more than 42 years and he transferred it to defendant No. 4. Thus, as defendant No. 1 became the owner of the suit-property by way of adverse possession, the title of the suit-property is perfect in favour of defendant No. 4. The plaintiff and defendant Nos. 2 and 3 have colluded to defeat the rights of defendant No. 4. The suit-property is not an ancestral property as claimed by the plaintiff.

5. Perused the application and the replies. Heard learned Advocate Mr. Chinaran for the plaintiff and learned Advocate Mr. A R Limbani for defendant Nos. 4 and 1. None argued for defendants Nos. 2 and 3.

6. On going through the averments in the application, it is very clear that the plaintiff seeks to challenge in 2009 the document which is executed in 1969. Under these circumstances, the plaintiff, first of all, ought to have pleaded the circumstances which prevented her from gaining knowledge to such transaction which gave rise to the document executed in 1969. In this regard, the plaintiff has totally failed. Further, the plaintiff has claimed the relief of

possession against defendant Nos. 1 and 4 which means that the possession has been enjoyed by defendant No. 1 continuously for the last more than 40 years. At this stage, it is to be noted that defendant Nos. 2 and 3 have also admitted the possession of defendant No. 1. It being so, it is pertinent to also note that defendant Nos. 2 and 3 have not challenged the registered sale-deed till date. Therefore, it becomes a reason to believe that the sale-deed in favour of defendant No. 1 was *prima facie* valid. This *prima facie* gives credence to the fact that the document in question was executed by the brothers of the plaintiff in favour of defendant No. 1. Under such circumstances, the defence of defendant Nos. 2 and 3 about fraudulent execution of the sale-deed does not become believable.

7. It is also noticeable that the plaintiff claims the relief of partition of the suit-property but she has not joined all the heirs having interest in the suit-property like all the heirs of her deceased sister and all the heirs of her deceased brother. Therefore, this suit is *prima facie* barred by non-joinder of necessary party as rightly submitted by learned Advocate Mr. Limbani for defendant No. 4.

8. Further, as noted above, the plaintiff has claimed the relief of partition. In the case of *Dilipsinh Devubha Zala V. Kishorbhai Ranchhodbhai Thummar And Ors, 2013 (1) GLR 320*, the Hon'ble High Court of Gujarat has referred to its own decision in the case of *Chamar Jivabhai Bechardas Vs Chamar Harijan Kesharbai, 1968 GLR 727*. In the case of *Chamar Jivabhai (supra)*, it was held that a suit for partition had to be valued on the basis of the valuation of the subject-matter and not on the valuation for the purpose of Court-fees. On going through the averments made in the plaint, it clearly transpires that the plaintiff has neither stated the valuation of the subject-matter of the suit-property nor the valuation for the purpose of Court Fees. On this ground, also, it does not appear that the plaintiff has a *prima facie* case.

9. In view of the aforesaid discussion, I find that the plaintiff does not have any *prima facie* case. It is settled principle of law that when the plaintiff fails to establish a *prima facie* case, the injunction cannot be granted even if he succeeds in establishing the case of balance of convenience and the irreparable loss and injury in his favour. Therefore, there is no question of going into the determination of other two factors.

10. For the foregoing reasons, both the applications are liable to be rejected and, therefore, they are rejected accordingly.

Pronounced in the open Court today i.e. 23rd August, 2016.

Place : NAKHATRANA (PRIYADARSHINI PINAKINBHAI MOKASHI)

Principal Civil Judge,
And, Judicial Magistrate, First Class.

Date : 23-08-2016

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