

THE HON'BLE 3RD ADDITIONAL SENIOR CIVIL COURT, KADI

ORDER BELOW EXHIBIT - 5

IN REGULAR CIVIL SUIT NO.116/2023

1. The plaintiff has filed present suit to get declaration of cancellation of registered Will registered at Sr. No.5882, dated 16/11/2017 and plaintiff is the lawful owner and occupier of the lands bearing ledger No.1479, block/survey No.20, ad measuring area in Hector-ARE-Sq.mt. 0-04-03, block/survey No.570, ad measuring area in Hector-ARE-Sq.mt. 0-08-95, block/survey No.640, ad measuring area in Hector-ARE-Sq.mt. 0-07-51, block/survey No.645, ad measuring area in Hector-ARE-Sq.mt. 0-28-15, block/survey No.1392, ad measuring area in Hector-ARE-Sq.mt. 0-30-79, block/survey No.1535, ad measuring area in Hector-ARE-Sq.mt. 0-30-83, block/survey No.1856, ad measuring area in Hector-ARE-Sq.mt. 0-19-01, block/survey No.587, ad measuring area in Hector-ARE-Sq.mt. 0-32-27 and ledger No.1346, block/survey No.32, ad measuring area in Hector-ARE-Sq.mt. 0-26-14, block/survey No.361, ad measuring area in Hector-ARE-Sq.mt. 0-40-15,

block/survey No.1151, ad measuring area in Hector-ARE-Sq.mt.0-28-65 and ledger No.1626, block/survey No.407, ad measuring area in Hector-ARE-Sq.mt. 0-33-23 and ledger No.1755, block/survey No.783/001, ad measuring area in Hector-ARE-Sq.mt. 0-47-56, block/survey No.783/002, ad measuring area in Hector-ARE-Sq.mt.0-23-78, block/survey No.783/003, ad measuring area in Hector-ARE-Sq.mt.0-29-75, and block/survey No.783/002, ad measuring area in Hector-ARE-Sq.mt.0-23-78 situated in the simoje Zaloda, Taluka Kadi, District Mahesana **(hereinafter referred to 'suit properties')** which were running in the name of ancestor of plaintiff namely Mathurji Madhaji through the ancestral heirship right, thenafter undivided suit properties continued in the names of Thakor Somiben Wd/o Babuji Mathurji and other co-owners on the right of ancestral heirship which are of plaintiff's independent owned and occupied ancestral suit properties. After the death of Babuji Mathurji on 15/11/2010, defendant Somiben who niece to widow of Babuji Mathurji, who had Bharatji Babuji Thakor and daughter Hansaben Babuji both unmarried and as such defendant has created

illegal, false and fabricated 'Will' i.e. 'Testament' and in the said 'Will' false facts stated about Bhartatji Babuji and Hansaben Babuji as unmarried and defendant had created forged and illegal 'Will' with a view to usurp the undivided suit properties and thereafter mutated entry of Will in the revenue record, but before mutate the entry no notice under Sec.135 issued by her and her heirs nor produced pedigree in that regard and due to such reason entry of defendant was cancelled, one plaintiff namely Amaratben Ramaji challenged the entry NO.1660 by filing of appeal which was partly allowed, inter alia passed an order for remand to verify the proper straight lineage/heirs of the deceased Thakor Mathurji Madhaji and ordered to pass fresh order and in regard to that order mutated entry No.4478 in respect of heirship against which present defendant raised objection for which created Dispute Case No.92/2020 and thereby plaintiff came to know about the fraudulent, illegal and false Will which is made by the defendant to usurp the undivided suit property of the plaintiff, hence filed the suit to cancel it and requested to declare for restitution of right

of the plaintiff in the undivided suit properties. The plaintiff has also filed present application Exh.5 to get temporary injunction under Sec.151, Rule-XXXIX, Rule-1 & 2 of C.P.C, 1908 against defendants as it will take time to decide entire suit. The contents of Exh.5 are not repeated here again to avoid repeatation.

2. The plaintiff has produced documents vide D/list at Exh.3 & D/list at Exh.27.

3. Upon receiving summons/notices, defendants No.1 to 29 remained present through their Ld. Advocate. Ld. Advocate for defendant No.1 has filed written statement at **Exh.20**, in which he has denied the facts and averments of the suit as well as injunction application in *toto*. It is contended that the suit as well as injunction application of the plaintiff barred by the law of limitation. Also, suit as well as injunction application of the plaintiff are barred by the principles of delay, latches, estoppel and acquiescence. He has narrated the true facts that land bearing block/survey

Nos.20, 32, 361, 407, 570, 587, 640, 645, 783, 1151, 1392, 1535, 1856 situated moje village Zaloda, Taluka Kadi, District Mahesana which were of original owner Mathurji Madhaji and upon his death, names of his heirs namely 1) Reshamben Widow of Mathurji (died on 21/05/1988), 2) Kanaji Mathurji, 3) Babuji Mathurji, 4) Amaratben Mathurji were mutaed in the revenue record, thenafter the death of Babuji Mathurji on 15/11/2010, his heirship was done in which 1) Somiben Widow of Babuji Mathurji 2) Bharatji Babuji, died on 14/08/2006 and his wife namely Hiraben Bharatji widow has remarried, who has one daughter namely Hansaben Babuji who died on 24/04/2014, hence her name was cancelled from the record. As such, deceased Somiben Widow of Babuji Mathurji had right over the undivided suit properties. It is further submitted that no one take care of Somiben (aged 70 years), defendant taken care and upon taking care and servicing to Somiben, she had executed lawful registered Will No.5882, dated 16/11/2017 before Sub-Registrar, Kadi and in presence of two in favour of defendant namely Thakor Kishanji Kalaji and thenafter as per Will, it's effect will

come into force after death of Somiben Babuji Mathurji and death of Somiben Wd/o Babuji Mathurji died on 27/11/2017 and her all the final rituals made at his place Garodiya, Taluka Sanand, District Ahmedabad and on the basis of 'Will' defendant has mutated entry No.4212, dated 20/09/2008 in the revenue record, but that entry was cancelled and against the order of Circle - Prant Officer, filed Revision Application No.43/2023 before Ld. Collector, Mahesana which is pending. It is further submitted that the land devolved to Somiben through the right of heirship and her son was married, but died without offspring and his wife remarried, hence she had no right, share or interest in the said land, as such Somiben has the sole right over the land, and plaintiff has knowledge about the execution of 'Will' made by Somiben in favour of defendant, hence after the death of Somiben with a view that lands not to meet to defendant, before Talati show that Bharat had a daughter and made pedigree as well as panchnama and mutated heirship entry No.4478, dated 19/08/2020 and thereby name of defendant No.3 mutated in the village form No.7/12, in fact land was devolved to Somiben and

before execution of 'Will' said defendant No.3 nor her guardian Thakor Amartben is mentioned nor defendant No.3 was brought on revenue record, as such Somiben Babuji had execution of 'Will' to defendant. It is further submitted that after the death of Babuji Mathurji on 15/11/2010 his two heirs were survived, one Somiben Babuji and Bharat Babuji, but on 14/08/2006 Bharat Babuji died and his wife Hiraben Bharatji re-married and as per provision of Hindu Succession Act, when Hindu woman re-married, then she has no right, share or interest in the property of former husband, but in collusion rest of the defendants have shown Mayaben as daughter of Bharatji and created false pedigree and panchnama before the Talat-cum-Mantri and mutated heirship entry in the name of Mayaben Bharatji in the revenue record of 7/12 abstract and shown Amaratben as guardian to minor and created illegal deed. It is furthermore submitted that in the entry No.3113, dated 16/11/2017 death of Babuji Mathurji shown on 15/11/2010, whereas Bharat Babuji death dated 14/08/2006 and Bharat Babuji shown as unmarried and such entry certified on 23/01/2018, under the circumstance deed executed in the name

of Mayaben Bharatji create doubts that if Bharat Babuji Mathurji died unmarried then there is no question in respect of having daughter to him, under the circumstance, suit as well as injunction application of the plaintiff be dismissed with cost and compensatory cost be awarded from plaintiff to defendant No.1.

3.1 In support of the defense defendant No.1 has produced documentary evidence vide D-List Exh.21.

At this stage court also consider the document at Exi.28 and 29 respectively filed by the rival side in which on behalf of plaintiff submitted about the affidavit of the attesting witness of the will in question whose testator late Somi ben Babuji Thakore and submission from the plaintiff side in these affidavit they not support the contention of the will and also other side attesting witnesses filed their affidavit in respect to the will in question, more over court also consider the document along with the written argument at Exi. 27/A, along with mark 27/1 to 27/5 which is the revenue proceedings of the entry

no 4212 which is confirm by the COLLECTOR
MAHESANA,

4. Ld. Advocate for the plaintiff and Ld. Advocate for the defendants have made oral arguments, along with written arguments , which I have read, heard considered.
5. Considering the pleadings of parties and averments of defendants, the following issues are raised to decide the present Exh.5 application.

~ I S S U E S ~

- [1] Whether the plaintiff is entitled to get relief as prayed for?
- [2] What order & decree?
- [6] My answers of above issues are as under;
 - [1] In the affirmative
 - [2] As per final order.

REASONS

7. Issues NO.1 to 2 :

All these issues are inter-connected with each other
and in order to avoid repetition of the facts, all these issues are

dealt and discussed together.

First of all I , reproduce the provision of the injunction herein below for- order 39 Rule 1-- **"Cases in which temporary injunction may be granted"**--Where in any suit it is proved by affidavit or otherwise-(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree,-or, (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defrauding-his-creditors, (c) that the defendant threatens to dispossess, the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court may be order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or dispossession of the property or dispossession of the plaintiff, or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit] as the Court thinks fit, until tile disposal of the suit or until further orders.

Rule 2 Order XXXIX of Code of Civil Procedure 1908

"Injunction to restrain repetition or continuance of breach"

- (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgement, apply to the Court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained, of, or any breach of contract, or injury of a like kind arising out of the same contract or relating to the same property or right.
- (2) The Court may be order grant such injunction, on such terms as to the of the durations injunction, keeping an account, giving security, or otherwise, as the Court thinks fit.

Now considering above provision with fact of the case , on hand , As per the submission of the plaintiff regarding the disputed property , the executor of the will, was the mother of deceased Bharatbhai babuji thakore who is the father of the plaintiff lady , and thus, as per the case of the plaintiff lady , she has a relation of grand daughter and grand mother with the late somiben babuji Thakore who is the testator of the will in question at Mark-3/41

.As per say of the plaintiff that testator of the will deceased somiben babuji Thakore who died on Dt. 27-11-2017, had children namely Shree Deceased Bharatbhai and Ashaben . Those both children had

expired before the death of the executor of the will i.e her mother , Even though the executor the will had a son name Bharat , he had executed the regi. Will on Dt. 09-11-2017 vide No. 5882-2017, in favour of grandson of her brother i.e. in the name of defendant no.1 . and regarding the legality of the will , the disputed is raised by the plaintiff lady that even though the testator of the will had a son and daughter , in PAGE-2, of the will ,”he had mention , she had no any , children as her natural hair “ against this submission ,plaintiff has submitted that , he is the grand daughter of the executor of the will i.e the daughter of deceased Bharatbhai .

In this regard he has produced record of right, birth certificate, and the family tree (pedigree). Which is present at mark-3/36,3/39,3/34, 25/1, 25/2 indicate about the relation of plaintiff to testator of the will as well as her natural father ,

Looking to the document of relation between plaintiff and testator of the will, there is contradiction in the history of the will from the record of the case,. The plaintiff had submitted that the condition of testator of the will not good at the time of executing the will.

As per the family tree_ produced by the plaintiff lady at Mark – 25/2 . Which is supported her submission that she is the daughter of deceased Bharatbhai and as against this , other side defendant submitted the

document vide Mark.27/1, to Mark 27/5 in which, entry no. 3635 known as succession entry there after other document produced vide Mrk 27/4 entry which is disallowed by the Mamltadar Kadi vide order below entry no. 4478 along with family- tree. Of late Babuji Mathurji Thakore in which there is no specification about the legal heir of the his son bharabhai And in addition on behalf defendant side submitted order of RTS Revision -43-2013 vide mark 27/1/1 and in which confirm the entry no. 4212 subject to civil court order . along with also consider the further SACHIV order vide mark 29/1 in which they confirm the order of trial authority in respect to revenue entry no. 4212- Looking to the reasoning of the revenue proceedings the will in question present at mark 3/41 Dt. 09-11-2017 given weightage of said document.

With the aforesaid observation, this court noted that , the testator of the will, dece. Somi ben has executed the will, in respect to her undivided share ,in the , property which is the subject matter of this suit,. And as per the dispute of the suit , the executor of the will has given the property to third party relative instead of her direct heir , at this stage this court clarifies the family history , of the executor of the will, that as per the case plaintiff lady amongst the three son of late original owner Shree Majurji , the wife of Late Babubhai deceased Somi ben was the executor of the present will, regarding the injunction application filed by the

plaintiff lady .

Court also consider the rival side submission along with the document which is produced at Exi-21 along with the written statement of the defendant vide Exi-20, among them consider the entry no. 4212, 4478, in respect to name of the plaintiff muted in record of right, and there after copies of revenue proceedings of RTS, AND COLLECTOR, in which revenue side the entry in view of the will of Late Somiben babuji Thakore in favour of the defendant no.1 is allow subject to civil proceeding,

Looking to the both side sub mission , it is to be noted at primary stage of civil proceedings that, plaintiff lady produced the family history of the- testator of the will in question i.e late Somiben babuji Thakore , and first instance name of the plaintiff lady as daughter of the late bharatbhai Thakore whose mother late Somibne babuji Thakore is justified , then contention of the will about the family of the testator late son bharatbhai Thakore that he was child - less, how justified ? and suspicion about the state of mind and recital of will,.

Considering the aforesaid all, observation when the plaintiff lady , has raised the doubt regarding the history mention in the will executed

by the executor , of the will , and thus when she has clarified prima facie her right , regarding the property , on the bases of , the revenue record of the property family tree- , birth certificate and also there is a litigation between the parties of the suit in revenue side, in respect to record of right on the base of will in question at mark 3/34 .

More over it is also to be noted that ,plaintiff filed the document at Mark. 27/01 in which, hon Session court also pass order in respect to the plaintiff lady for her guardian- ship and appointed Hiraben Wd of Late Bharatji as mother of the plaintiff mayaben , so in view of the aforesaid observation prima facie relation of the plaintiff with testator is not create doubt .

In such circumstances this court believe, in prima facie comparison of the recital of the will of late somiben babuji Thakore base of her bequeaths and other side litigation from very beginning between plaintiff side and other side, will in question is create uncertainty and deserve to resolve on evidence . So, It seems necessary to prevent further transfer of the property , by disputed will of late Somiben Babuji Thalre Dt.09-11-2017,, produced at Mark – 3/41 and it is necessary , to protect the right and interest of the parties which are in the disputed property until the matter is finally adjudicated by the evidence , so therefore this court believe that the plaintiff lady has a prima facie case and hence , the

following order is passed .

ORDER

The injunction application is filed by the plaintiff is allowed and the defendants are restrained from , transferring , selling , assigning the undivided share of Deceased Somiben babuji Thakore in the suit property to any one in any manner till final disposal of the suit .

Signed and pronounced in the open court on 4 th day of April, 2024
at Kadi.

Date:04/04/2024

(Aniket Mahendra Kumar Shukla)

Place: Kadi.

[Code No.-GJ01139]

3rdAdditional Senior Civil

Judge, Kadi.

