

RCS NO - 96 /2015
SUIT FOR DECLARATION, POSSESSION,
PARTITION , AND PERMANENT INJUNCTION
ORDER BELOW EXH. NO – 5

The plaintiff has instituted the suit against the defendants for the declaration ,partition ,possession and permanent injunction with respect to the suit property .In this suit the plaintiff has files a n application to seek relief of the temporary injunction against the defendant to restrain defendant to alienate the suit property without the written permission of the plaintiff.

Heard both the parties, read the application of plaintiff filed under section 94 (c) r/w order 39 rule 1 and 2 r/w section 151 Civil Procedure Code 1908 and all other relevant documents produced by both the parties.

The brevity of factual matrix between the parties, as per the plaint, is that plaintiff has instituted the suit and pleaded that the plaintiff and defendants are the brother and sisters and during life time the mother of the plaintiff and defendants name Mrs Damyantiben KrishanKant Shah, has purchased a house bearing number at bardoli Nagarpalika survey no.464 and city Survey no 5064 situates as house no 19Ain Baladevi society, Anandnagar,Bardoli, and after the death of the mother on dated 16/12/1998 and result of the relinquishment of right of the defendant no 1 and 2 the property has devolved in name of the present plaintiff and the father name Mr. Kishana kant Shah on dated 4/6/1999 vide heirship entry no 159 before the city survey Superintendent, Bardoli.

The father of the plaintiff and defendant no 1 has been living with the defendant no 1 as she is widow and the plaintiff has been living at Surat as doing the government job and visited Bardoli regularly to take care of the father .

The defendant no 1 has created a false forged and fabricated will w.r.t. the suit property of father Mr Krishankant in his favour. This will is not genuine as the father has no love affection and attachment to the defendant no 1 as she married in other cast and moreover the father had no right to execute this will as this

property is not the self acquired and separate property of the father and as the plaintiff is coparcenary with the father in this property as devolved by inheritance after death of the mother of plaintiff and defendant and, moreover even if the 'will' is presumed to be genuine even then the plaintiff has half of the share in the suit property.

Therefore if the defendant has alienated this property then it would cause irreparable loss to the plaintiff which cannot be compensated in monetary terms. The plaintiff has produced two documents vide marks 3/1 and 3/2 in support of his suit as follows:

1. Application of CTS NO 216/ 2011
2. Photocopy of revenue record of the suit property bearing no 5064, as when the mother has become owner of this property dated 25/04/1985 and plaintiff and father have become the co-owners of the suit property on 04/06/1999

After service of summons, the defendant no 2 has not appeared even after the service of summons thereafter the suit has been ordered to proceed as ex parte with respect to the defendant no 2 vide order below Exhibit no 1 dated 5/03/2014

The defendant no 1 has appeared through the Ld counsel and filed the written statement vide Exh 21 and denied the pleading of plaintiff and the suit is barred by law of limitation and liable to be dismissed on ground of the misjoinder and non-joinder of the parties. The plaintiff has suppressed the material true facts. The defendant no 1 has contended that as the plaintiff has pleaded that there was no love and affection and attachment of the father to the defendant no 1, is not true actually the father was living with defendant no 1 and the defendant no 1 has been taking the proper care of her father and bore the expenses of the medicine. The facts pleaded by plaintiff that she regularly visited the Bardoli and taking care of the father of parties, is not true as the plaintiff had come to the Bardoli after the father of parties to suit died. The plaintiff has never discharged their responsibilities towards the father and not visited regularly to take care of the father.

The defendant has contended that the pleading of execution of the false forged and fabricated will of father is not true but the father of parties to suit has executed the will and then registered vide entry no 549/2011 dated 04/03/2011 during life

time of the father which consists many properties including the suit property situated at H NO 19A consisting of two floors, Ward no 6 situated at Baladevi society, Anandnagar, Bardoli bearing Nagarpalika no 464/687 and house no 5064 and shop no 6, Mayank xerox Mozambique Shopping Complex, Station Road and the all equipment, tools machinery and other affixes property of this shop , the bank balance of the account no 10291754063 in SBI Bank, all the share certificates and all other movable and immovable property wherever exists.

After death of the father of parties to suit the defendant no 1 has applied for the mutation entry on the basis of will but that application was rejected and stated that the probate is necessary and thereafter the appeal has also files against this order on one of the ground that probate .The plaintiff has personal knowledge of the will and unlawfully instituted this suit

The father of the parties to the suit has died on 06/04/2011. The defendant no 1 has contended that the mother of the parties to the suit was merely the possessor of the suit property for the purpose of the family management and administration and actually the suit property has purchased by the independent income of the father and the property has purchased by the father of the parties as the mother had no independent income of herself as neither involved in any economic activities and nor had any source of income.

The defendant further contended that the defendant no 1 has never relinquish the right from the property and never entered into any compromise deed and not signed any relinquishment deed or compromise deed but the plaintiff has after conspire with the City Survey superintendent Bardoli, has got the name deleted illegally and unlawfully from the suit property without the permission or consent of the defendant no 1. There is no dispute with respect to the entry of name of father in the entry no. 159 in 1999. The defendant further contended that the plaintiff has mala-fide intention to grasp the suit property due to giant inflation in the property rates. Moreover the relinquishment deed is inadmissible on want of registration and insufficiently stamp.

The defendant contended that she is residing in the suit property since long time and depositing the house tax an electricity bill etc

Moreover the partition with respect to property has already occurred during the life time of the father. The father of plaintiff and defendant has , out of his separate and independent income got the construction work completed of the house situated at ward no 2, vide entry no 1602, Javish Apartment, Surat admeasures as 130.43.62 square meter and given to plaintiff in which the plaintiff with his family has now residing, this house is registered on the name of the plaintiff and his wife. Till today the plaintiff has not raised any objection now the due to the greed as the inflation in the properties, the plaintiff has instituted this suit.

The plea raised by the plaintiff as he has half share in suit property is not true as after partitioned the property, the suit property became separate property of the father and become the independent and exclusive owner of the property and thereafter the suit property has alienated by the father through 'registered will'. The defendant no 1 being widow has no other residence to live and the suit property is the only property of the defendant no 1 .The defendant no 1 has contended that suit property is in the possession of the defendant no 1 and defendant no 1 has never inquired to sell it. Therefore the plaintiff has no prima face in this case and the if the injunction has granted then the irreparable loss would caused to the defendant no 1 which cannot be compensated in monetary terms and the balance of convenience is in favour of the defendant as if the injunction will be granted the it cause great inconvenience of the defendant no 1 as the property is in the possession of the defendant no1 and she has no other property to resides .Therefore prayed to reject the injunction application . The defendant has produced the document vide Exh 22 along with Mark 22/1 to 22/34 in support of his litigating interest .

Which shows that father of the parties is in the possession of suit property and the electricity bill has generated on name of mother and father of parties to suit of the suit property and Shop at Mozambic Shopping centre. Three bills of goods related to construction work on name of defendant no 1. Death certificate of father and mother of parties to suit and 'will' of father of parties Mr. Krushankant Shah vide registration no 549/2011.the fact that defendant no 1 is in the possession of the suit property has also admitted by the plaintiff.

The plaintiff has not filed any rejoinder in this case.

After considering the factual matrix between the parties and the relief claimed this court is going to discuss the following issues for the adjudication of the application of plaintiff

ISSUES FOR CONSIDERATION

1. Whether the plaintiff shows his prima facie case in his favour ?
2. Whether the plaintiff shows the balance of convenience in his favour ?
3. Whether the plaintiff shows that irreparable loss will be caused, if the relief of temporary injunction is not granted ?
4. What order ?

ANSWER

1. The answer of issue no 1 is in POSITIVE.
2. The answer of issue no 1 is in POSITIVE.
3. The answer of issue no 1 is in POSITIVE.
4. As per final order.

ARGUMENTS.

The Ld counsel on behalf of the plaintiff has argued and reiterated almost similar facts as stated in the plaint therefore this court is not repeated it again.

The defendant no 1 has argued and relied upon the judgments pronounced by the Hon'ble High court of Chhattisgarh and Gujarat reported as 2014(1)CLJ406,2006(0)GLHELHC 217150, on the issues of the will as how the will can be proved and whether the probate is necessary for proof of the will in state of Gujarat, and the inadmissibility of unregistered and improperly relinquishment deed.

ISSUE NO 1 TO 3

For the convenience and avoidance of reiteration I hereby discussing all issues simultaneously. After considering the fact and circumstances, arguments and

document on the record this court and, without going into the merits, hereby observed that the plaintiff has prima facie show that the suit property was recorded in revenue record on the name of the plaintiff and father of parties to the suit and also admitted that defendant no 1 is in the possession of the suit property and asked for the injunction to restrain the defendant no 1 to alienate the suit property without the written permission of the plaintiff .Thereafter all other issues as per the pleading of the plaint that the defendants has relinquished the right in suit property and the forged and fabricated will of father created by the defendant no 1 and contention of the defendant no 1 as it partitioned has occurred and will has executed in favour of the defendant by the father and defense as the suit property was on the name of the mother of parties for the administrative purpose and purchased by the father out of his own independent and separate income ,partition occurred and forged relinquishment deed and all other facts required to be proved after adducing the substantial evidences and cannot be decided at this infant stage of the suit .However it is settled principal of law the revenue entries are not the substantial proof of the ownership but merely for the fiscal purpose it is considered. But the plaintiff has prima facie shows that in the suit property the plaintiff has some right interest and this court is in the view of that if it had alienated without the permission it would caused irreparable loss to plaintiff as it is prima facie shown as the suit property has devolve from the mother of parties and it is immovable property and not able to compensated in the monetary terms if it will be alienated it might create multiplicity of the proceedings . On the other hand the defendant no 1 will not suffered any irreparable loss as she is in the possession of the suit property and also admitted that she is not intended to sell this property and moreover the fact, that plaintiff is interested to disturb the possession of defendant, has not shown in the suit by any of the party.

However the judgments produce by the defendant is relevant to decide the final fact in issue of this case but at this juncture this court is not seems necessary to relied on it as this court is not going to decided the fact in issue vide this ad-interim injunction application as court is not going to decided as whether the probate is necessary or execution of relinquishment deed or execution and proof of will through this ad interim injunction application. All these facts are required to be decided after taking the evidences. After considering all facets of this litigating interest this court is hereby observes as parties to the suit has some right and

interest in the suit property but these rights cannot be decided categorically , at this juncture without taking and considering the substantial ,admissible and reliable evidences

Therefore this court is hereby pass the order as ex- debito - justitiae

ORDER

- 1 . The application of the plaintiff of ad interim injunction is hereby ALLOW.
2. The defendant no 1 is hereby restraint to alienate and to deliver the possession of the suit property bearing House No 19A, entered in city survey vide entry no 5064 admeasures as 46.38 sq.m., situated at Baladevi Society ,Anadnagar,Bardoli, by any way to any one without written permission of the plaintiff and maintain the status quo with respect to alienation of the suit property
3. No Order as to cost.

PRONOUNCE IN OPEN COURT TODAY ON 30/04//2018.

MS SUDESH
(GJ 001400)
2nd Additional Civil Judge
Bardoli.Surat.