

IN THE COURT OF PRINCIPAL SENIOR CIVIL JUDGE [HON'BLE SHRI R P DAVENDRA] TAPI @ VYARA.

**REGULAR CIVIL SUIT NO.: 17 OF 2021.**

**Plaintiffs:** 1. Ms. Bhartiben D/o.: Kantilal Bhavsar & 02 Others.

VERSUS

**Defendants:** 1. **Shri Kaushikbhai Kantilal Bhavsar and others.**

**Subject:** Suit of cancellation of WILL and for partition as well as for consequential relief for injunction.

APPEARANCES:

**Shri P P Mehta,** Ld. Counsel for the Plaintiffs.

**Shri M P Joshi,** Ld. Counsel for Defendant No.:1.

Defendant Nos.:2/1 to 2/4 **SERVED**

ORDER BELOW APPLICATION - EXH.: 5 - FOR INTERIM RELIEF UNDER ORDER 39 RULES 1 AND 2 OF THE CODE OF CIVIL PROCEDURE, 1908.

**-:~::~ JUDGEMENT ~::~:-**

1. The dispute involved in this suit is in respect of following landed properties:-

Sr. No.	Village/Taluka	Survey/Block City Survey Number	Area [In Sq. Meters]	Remarks
01	Dadakvan/Vyara	176	1006	Agri. Land
02	Dadakvan/Vyara	177	3589	Agri. Land
03	Dadakvan/Vyara	185	3342	Agri. Land
04	Dadakvan/Vyara	186	3173	Agri. Land
05	Dadakvan/Vyara	187	2690	Agri. Land
06	Dadakvan/Vyara	205	2465	Agri. Land
07	Dadakvan/Vyara	206	2401	Agri. Land
08	Dadakvan/Vyara	179	9466	Agri. Land
09	Dadakvan/Vyara	183	1803	Agri. Land
10	Dadakvan/Vyara	184	1459	Agri. Land
11	Dadakvan/Vyara	189	15729	Agri. Land
12	Dadakvan/Vyara	204	3487	Agri. Land
13	Vyara/Vyara	1606	76.5	
14	Vyara/Vyara	1696	202.34	
15	Vyara/Vyara	1407	127.23	

2. The aforesaid properties, will herein after be referred to as '**SUIT LAND or SUIT PROPERTIES**', for the sake of convenience and brevity.

The Plaintiffs are sisters of present original defendants, and all of them happen to be legal heirs of late Shri Kantilal Pranjivandas Bhavsar who has passed on for heavenly abode on 06.12.2005. Shri Kantilal Bhavsar has passed away intestate, survived by 03 daughters - present Plaintiffs, 02 sons - original defendants and his wife - Ms. Manjulaben @ Bhanuben. Ms. Manjulaben @ Bhanuben has also passed away for heavenly abode on 23.07.2017 [**Mark-17/21**].

3. The Plaintiffs claim that, on sad demise of their father on 06.12.2005 names of all his legal heirs viz. 03 daughters, 02 sons and widow was mutated in revenue records of the suit land/properties. They further claim that, their grand father and grand mother viz. Shri Pranjivandas Ichharam Bhavsar and Ms. Maniben Pranjivandas Bhavsar have also passed away for heavenly, intestate, on 09.03.1981 and 18.11.1968 respectively and names of his legal heirs came to be mutated in revenue records. Out of his legal heirs one Shri Natwarlal Pranjivandas expired on 30.03.1998. Out of suit properties, properties bearing City Survey Nos.: 1606 and 1603 which stood in the names of their father - Shri Kantilal, Shri Natwarbhai [Uncle] and Ms. Kanchanben and Ms. Dhanuben [Aunties], however, on the strength of statement/reply of Shri Natwarbhai and his legal heirs as well as Ms. Kanchanben and Ms. Dhanuben their names came to be removed from city survey records as such their father became sole owner of aforesaid properties. The Plaintiffs claim that, as their father Shri Kantilal and mother Ms. Manjulaben @ Bhanuben have passed away for heavenly abode, each of them have equal right and share in the suit properties.

4. The Plaintiffs claim that, their father and 02 uncles were carrying on business as grain merchants and from the joint income of the family all of them started restaurant in the name and style of '**Bhavsar Restaurant**' thereafter in 1979-80 two brothers viz. Natwarbhai and Mohanbhai withdraw themselves from restaurant business therefore their father continued restaurant business in the name and style of '**Om Bhavsar Restaurant**'. From the joint income of the family, their father has managed to marry his 02 sons and 03 daughters. Property bearing City Survey No.: 1696 which was

purchased long back in the names of M/s. Natwarlal and Kantilal came in the share of their father as a part of partition process and said property was used as warehouse for storing Cupboards and said property is joint property of family.

5. They further claim that, on sad demise of their father on 06.12.2005, intestate, names of all his legal heirs viz. 01 widow, 02 sons and 03 daughters came to be mutated in revenue records vide mutation entry number 807 on 06.09.2012 and certified on 18.01.2013. They further claim that, after death of their mother, both parties have right share and interest even from the share of their mother.
6. The Plaintiffs further claim that suit property is joint property of the family and partition or division of same has not taken place hence each of them have right share and interest to the extent of  $3/5^{\text{th}}$  share in suit properties, as per provisions contained in Hindu Succession Act, 1956 as amended in 2005. They further claim that, as partition has not taken place, inter se amongst legal heirs of late Shri Kantilal Bhavsar, present Plaintiffs have more than once requested present Defendants to partition suit properties and hand over physical possession to each of them, however, Defendants have refused to do so and informed them that, now as they have no family relation with each other, they will sell suit properties, after death of present Plaintiffs and are killing time under one or other guise; therefore, as per legal advise received by them, they obtained copies of revenue records of suit land and on obtaining such copies they came to know that, in order to avoid giving share to the Plaintiffs, present Defendants have got mutation entry number 795 for expunging name of their father from revenue records; however said entry was not certified. They further learnt that, Defendants have also challenged mutation entry number 807 dated: 06.09.2012 before Dy. Collector, Vyara by filing RTS Appeal, which appeal came to be rejected hence, said order was carried on further by filing RTS Revision No.: 83.2019 before Collector, Vyara, wherein orders of Mamlatdar as well Dy. Collector came to be rejected and mutation entry on the strength of WILL was ordered to be made in revenue records. As such present Plaintiffs came to know that, Defendants have fabricated bogus WILL of their father in respect of suit land.

7. The Plaintiff claim that, due to illness their father was unable to understand and in order to avoid giving any share from suit land, present Defendants have got executed bogus WILL of their father on stamp paper of Rs.10=00, which WILL prima facie appears to be fraudulent, as no stamp is required for executing WILL as per provisions contained in Stamp Act. Age of the executor of WILL is shown as 65 Years. WILL does not bear signature of executor on each page and signature is found only on last page, which signature is also bogus, as signature on WILL does not match with natural signature of their father. WILL does not contain thumb impression of the executor as well as attesting witnesses and per provisions contained in Registration Act, photo and id proof of executor as well as witnesses is must however no such photo or id-proof is found on the WILL. WILL is made on stamp paper purchased on 27.01.2001 and made on 28.01.2001 whereas it is registered on 05.09.2001 therefore execution of WILL is doubtful. Shri Kantilal Bhavsar was suffering from serious ailment of intestine as well as diabetes on the date on which WILL is executed and was under treatment at Surat, Baroda as well as in Orthopedic hospitals as such he was mentally not sound.
8. As Defendants are depriving them of their right share and undivided 3/5<sup>th</sup> share in the suit land, hence, present suit for partition as well as for declaration of WILL being bogus and for ancillary relief of injunction.
9. By way of present application, Plaintiffs are seeking interim relief pending hearing and final disposal of suit, restraining Defendants from dealing with or alienating suit properties in any way or any form and/or changing identity of the suit properties till final disposal of the suit, on the principle of **PREVENTION IS BETTER THAN CURE.**
10. The Defendant No.:1 is duly served with summons of the suit as well as present application; whereas process issued on Defendant No.:2 is returned unserved as Defendant No.:2 has passed away for heavenly abode on 26.04.2021. The Plaintiffs have filed necessary application for bringing their legal heirs on record, which is allowed by this court on 18.11.2022. The legal heirs of Defendant No.: 2 have preferred to remain silent; as such they have not filed any written statement, either opposing the suit or supporting the Plaintiffs in their cause.

11. Per contra, Defendant No.:1 has contested the suit, tooth and nail by filing common written statement at **Exh.: 10**, wherein he has inter alia denied entire pleadings put forth by the Plaintiffs. They have inter alia contended that, suit is barred by limitation as present name of Defendant No.:1 were mutated in records of City Survey in respect of properties bearing S. Nos.: 1407 and 1696 on the strength of WILL and prior thereto notice were issued and served on present Plaintiffs wherein they no taken any objection accordingly entry number 728 was made on 03.03.2007. Similarly name of original Defendant No.: 2 were mutated in respect of property bearing city survey number 1606 by same entry and it was duly certified on 08.08.2007. This fact itself goes to indicate that, present Plaintiffs were aware about existence of WILL since then i.e. 2007, therefore, challenge to WILL is required to be filed within 03 years, and hence, suit is barred by law of limitation. He has further contended that, present suit filed by suppressing material facts and Plaintiffs have come with clean hands therefore also suit is required to be dismissed. He has further contended that, some of the lands situated at Village: Dadakvan, as enumerated in Para 8 of written statement, were not purchased by his father alone but was jointly purchased by him as well as his father from one Shri Bipinbhai Natwarlal Bhakt vide registered sale deed dated: 11.08.1997 and mutation entry thereof was made on 16.09.1997 being entry number 631. As such said parcels of land are his self acquired properties. Whereas other parcels of land were jointly purchased by him as well as his father from one Shri Natwarlal Vallabhbai Bhakt by sale deed dated: 11.08.2007 and mutation entry number 630 was made on 16.09.1997, as such said parcels of land are his self acquired properties. He has further contended in order to avoid conflict amongst family members in respect of suit properties, his father, during his life time has executed registered WILL on 05.09.2001 in favour of his sons - present original Defendants. As such he is in possession of landed properties and he is cultivating it and taking yield there from. He has further contended that, as such present Plaintiffs have nothing to do with suit land/properties hence suit is required to be dismissed with exemplary cost of Rs.50,000=00.

12. I have heard Ld. Counsel for the Plaintiffs. Perused records and documents relied upon by the parties in support of their pleadings as well as written argument at **Exh.: 30** on behalf of Plaintiffs and at **Exh.: 32** on behalf of Defendant No.:1.

13. I have given my thoughtful considering to the pleadings put forth by the contesting parties. It is now no more res ges tate that, party claiming interim relief, pending hearing and final disposal of the suit, have to prove three factors - existence of prima facie case in his/her favour, balance of convenience in his/her favour and irreparable loss. It is also now almost settled position of law that, all 03 factors must be in favour of party claiming interim relief and lack of even one factor would disentitle him/her of interim relief. It is also now settled position of law that, grant of interim relief is discretionary power of court and it is governed by law of equity, as such parties claiming interim relief must come with clean hand and with correct fact and not any material fact from court of law, since, court does not know fact but knows only law, which is required to be applied to the facts put forth by the parties, hence, for coming to correct and just conclusion/decision it is incumbent upon parties to place on record not only correct fact but also full fact.
14. In the light of above settled position of law, now let me examine pleadings put forth by the Plaintiffs in the light of documents placed on record and relied upon by them. From the documents at **Mark-3/1 to 3/12** it is seen that, names of present parties to the suit is found so far as agricultural lands are concerned and from document at **Mark-3/15 and 3/16** it clearly transpires that, their names are mutated being legal heirs of late Shri Kantilal Bhavsar. Moreover from document at **Mark-3/14** it transpires that, out of 02 names viz. M/s. Kaushikbhai Bhavsar and Kantilal Bhavsar, name of Shri Kantilal Bhavsar was sought to be expunged as he has passed away for heavenly abode vide entry number 795 however said entry was not certified on 09.04.2012 by competent authority, by observing that, legal heirs are required to be brought on record as such this entry was rejected.
15. So far as properties other than agricultural land are concerned from the document at **Mark-3/25** it is seen that Defendant No.:1 had applied to City Survey Superintendent, Vyara to mutate his name in records on the strength of WILL as well as death certificate and same was accepted by said authority as no objections were received after service of notice issued under section 135-D as such entry number 728 in respect of property bearing city survey number 1407 was certified on 08.08.2007 subject to penalty of Rs.5=00. This

very document is placed on record by Defendant No.:1 at **Mark-11/48**. From documents produced along with document at Mark-11/48 it transpires that, notices are issued by City Survey Superintendent, Vyara and served on present Plaintiffs by '**Under Postal Certificate**' in respect of all the 02 properties viz. properties bearing City Survey Nos.: 1696 and 1407; as such from documents on record it is clear that, Defendant No.1 applied on 18.04.2006 for mutating his name in the records of City Survey on the strength of WILL and after following due process, as per land revenue record, his name is mutated in record, therefore, it can safely be inferred that, present Plaintiffs were aware about existence of WILL executed by their father, in 2007 itself and they have not taken recourse to law, as such present suit prima facie appears to be barred by law. As such their pleadings to the effect that, their father has died intestate appear to be far away from truth. Moreover, as they were aware about existence of WILL executed by their father, in favour of their brothers, even if same is assumed to be bogus or got up one, as pleaded by them it was incumbent upon them to file appropriate civil proceedings in civil court for cancellation thereof within 03 years of knowledge however they have failed to do so till 2020 by filing present suit. Moreover, they have safely and conveniently produced only application dated: 18.04.2006 [**Mark-3/25**] and order passed thereon but have not placed on record other documents and they have also suppressed material fact about service of notice to them by City Survey Superintendent, Vyara before mutating name of Defendant No.: 1 in two properties, therefore, on this count alone viz. suppressing material fact, present Plaintiffs are not entitled to equitable relief of injunction.

16. So far as other properties are concerned viz. agricultural lands, prima facie from the documents at placed on record it transpires that, their names along with names of original Defendants are found in revenue records of suit land being legal heirs of late Shri Kantilal Bhavsar; however, from document at **Mark-11/27** placed and relied upon by Defendant No.:1 it clearly transpires that, land bearing S. Nos.: 121, 126, 127, 128, 142 and 143 are purchased by present Defendant No.:1 as well as Shri Kantilal Bhavsar by virtue of registered sale deed; as such pleadings of the Plaintiffs to the effect that, landed properties are self acquired properties and/or co-parcenary properties does not get support as such pleading and proof

of Plaintiff does not go together and are found to be distinct neighbours. Moreover it appears that, being aware of this fact, Plaintiffs have not placed on record this valuable and crucial document and have tried to suppress material document. Similarly from document at **Mark-11/28** placed and relied upon by Defendant No.:1 it clearly transpires that, land bearing S. Nos.: 122/2, 125/1,125/2, 129, and 141 are purchased by present Defendant No.:1 as well as Shri Kantilal Bhavsar by virtue of registered sale deed; as such pleadings of the Plaintiffs to the effect that, landed properties are self acquired properties and/or co-parcenary properties does not get support as such pleading and proof of Plaintiff does not go together and are found to be distinct neighbours. Moreover it appears that, being aware of this fact, Plaintiffs have not placed on record this valuable and crucial document and have tried to suppress material document. Therefore, if both these documents are read and considered together then, at the most present Plaintiffs can claims right share and interest only in  $\frac{1}{2}$  of the aforesaid lands. As such present defendant No.:1 is absolute owner so far as  $\frac{1}{2}$  of the land and other parties including Defendant No.: 1 can claim  $\frac{1}{5}$  share only on rest of the  $\frac{1}{2}$  of the lands, as such, pleading of the Plaintiff to the effect that, they have  $\frac{1}{5}$ th share in entire suit land appears to be farce.

17. Now let me prima facie examine genuineness of the WILL executed by late Shri Kantilal Bhavsar in the light of the doubt raised by Plaintiffs. A copy of the WILL is placed on record at **Mark-3/24**. On going through WILL it transpires that, WILL is registered in the office of Sub-Registrar, Vyara, on 05.04.2001 and same is on stamp paper of Rs.10=00. It is true that no stamp or stamp paper is required for executing WILL. In other words it can be executed on plain paper also; however, it is equally true that, only because it is executed on stamp papers do not make WILL illegal. It is seen that, stamp paper is purchased on 27.07.2001 and WILL is executed on 28.08.2001 and same is registered on 05.09.2001 as such stamp papers is consumed or used within over all time limit of 06 months of its purchase, moreover, competent authority has accepted it and has registered it, as such, in absence of any adverse material on record, genuineness or correctness of same cannot be doubted and there is nothing on record to show that, on the date of execution and/or registration, executor of the WILL was incompetent in any way. Moreover, in absence of any adverse material on record, as per

provision contained in section 114 of Indian Evidence Act, 1872, this court is duty bound to presume that official duty is duly performed by sub-registrar, Vyara.

18. For the reasons assigned herein, it thus appears that, suit is time barred; Plaintiffs have failed to show or establish any prima facie case in their favour. Moreover they have suppressed material facts hence; they are not entitled to any interim relief. They have also failed to show existence of balance of convenience in their favour and they are not likely to suffer any irreparable loss since if ultimately they can establish their right and share in '**agricultural lands**', then they can be compensated in terms of money. I am intentionally used word '**agricultural land**' as name of Defendant No.: 1 is already mutated in city survey records, after undergoing due process, as such Defendant No.:1 is absolute owner of 02 such properties. There is no iota of evidence to even remotely indicate that, Defendants are trying to dispose of agricultural land, hence, following order:

**-:~::~ ORDER ~::~:-**

Application is rejected with no orders as to costs.

**PRONOUNCED IN OPEN COURT ON THIS 17<sup>TH</sup> DAY OF OCTOBER,  
2023 AT TAPI @ VYARA.**

**[RAVICHANDRAN PERIYASWAMY DAVENDRA]**  
PRINCIPAL SENIOR CIVIL JUDGE,  
TAPI @ VYARA  
**[GJ-00459]**