

GJRJ020016692016 Received on : 28/01/2016
 Registered on : 28/01/2016
Decided on : 14/08/2025
Duration : YY/MM/DD
: 09/07/16

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IN THE COURT OF 7TH ADDITIONAL SENIOR CIVIL JUDGE
(MR. R. R. MISTRY SAHEB), RAJKOT

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Sp. C. Suit No.12 of 2016.

Exh. 30

Plaintiff :

Harshadbhai Chakubhai Kavaiya,

Hindu, Adult,

Address :

9- Wyvern Avenue, Leicester,, LE4 7HG

Through His Power of Attorney Holder

Navneet Singh

Hindu, Adult

Address:

1393 Sector 33 C, Chandigarh

Versus

Defendants :

1. Khayati Dhiraj Kavaiya,

Hindu, Adult

2. Umeed Dhiraj Kavaiya,

Hindu, Adult

3. Bhavna Dhiraj Kavaiya

Hindu, Adult

All of the above residing at

Kanta Vikas Road, Harshad Niwas, Rajkot.

Subject: Declaration, Permanent Injunction and Directional Suit and Possession Suit.

Appearances:-

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- Mr. P.D.Pithadiya : Ld. Advocate for the plaintiff.
 - Suit proceed ex-parte against the defendants.
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:~: J U D G M E N T :~:

1. The plaintiff has filed the present suit for declaration and permanent injunction and directional suit and possession suit against the defendants.

2. The brief facts of the plaint application are as under :-

2.1 It is stated by the plaintiff that the deceased Chakubhai Kalyanji Kavaiya has purchased a house property by registered sale deed No. 1284 on 10/07/1957 situated at 26, Milpara Corner, Kanta Stri Vikas Gruh, Rajkot. Chakubhai Kalyanji Kavaiya during his lifetime in a sound and disposing mind made a WILL dtd. 06/11/1984 vide Regd. No. 6688. According to the Will of Late Chakubhai Kalyanji Kavaiya, the suit property was bequeathed to the plaintiff. That Chakubhai Kalyanji Kavaiya, the plaintiff became the owner and was in possession of the suit property in question. Further more, it is stated by the plaintiff that he has been residing in England and due to his health issues could not travel very often to India in the recent past. That the father of the defendant No.

1 and 2 being the real brother and defendants being closest surviving family in Rajkot, requested them to look after the suit property and take proper care of it. In August-2014 plaintiff came to India and requested the defendants to hand over the key of the suit property as he wished to get some renovations done in order to make it livable for him and he could live in the property. That the defendants to the utter dismay and shock of the plaintiff not only rescinded his request to hand over the keys of the suit property but also threatened plaintiff of life endangering consequences if he tried to claim any right over the property. Plaintiff is an N.R.I. and is permanently residing in United Kingdom, the defendants took undue advantage of this fact. Plaintiff came to know about the malafide and fraud intention of Dhirajbhai and after he died, the conduct of his legal heirs regarding suit property. Therefore, the plaintiff has no other alternative, except to move before this Court to get his property vacated and restraint the defendants from interfering in his peaceful possession.

2.2 That the valuation of the suit for the purpose of the jurisdiction for declaration and Possession is Rs. 45,00,000/-. Hence, a proper court fee is paid.

2.3 The property in dispute is situated in Rajkot which is within local limits of the ordinary, original civil jurisdiction of this Honorable court. Hence, this Honorable court has got the jurisdiction to entertain try and decide the present suit.

2.4 There is no other litigation is pending in between the parties to the suit or between the Parties under whom they or any of them claim litigating on the same ground, nor has any such suit has been previously instituted on the same grounds or finally decided by any court of competent jurisdiction and then the plaintiff also prayed in Paragraph-14 as under.

1. A decree for Declaration be made in favour of the plaintiff to the effect that the plaintiff is the sole and lawful owner and in possession of the Suit property mentioned in Para-3 of the Plaint;
 2. A decree of Declaration to the effect that Defendants has no title, rights over the suit property;
 3. Decree of Possession in favor of the Plaintiff;
 4. A decree of Permanent Injunction be passed in favour of the plaintiff and against the defendants by restraining them, their agents, attorneys, representatives, assignees, succession heirs and servants herein from selling, transferring, alienating, creating third party rights or parting with possession of the suit property;
 5. The costs of this suit be awarded to plaintiff.
 6. Any other relief which the Hon'ble Court may deem fit to grant on the basis of the facts mentioned above may kindly be awarded to the plaintiff.
- 3.** The Exh-5 application decided by my Predecessor Learned Judge and it is rejected on dtd. 06/04/2017.

4. To determine the suit the following issues are framed vide Exh.8 on 26/06/2023.

::: ISSUES :::

- 1] Whether the plaintiff proves that he is the sole and lawful owner of the suit property?
 - 2] Whether the plaintiff is entitled to get relief as mentioned in his plaint ?
 - 3] What order and decree ?
5. My findings on the above issues are as under.
- 1] In the Negative.
 - 2] In the Negative.
 - 3] As per final order.
6. The plaintiff has produced following oral as well as documentary evidence for proving its case.

:: ORAL EVIDENCE ::

Sr. No.	Particulars	Exh.
1	Affidavit of examination in chief on behalf of the plaintiff Harsadbhai Chakubhai Kavaiya under Order 18 Rule 4 of Code of Civil Procedure, 1908.	14

:: Documentary Evidences ::

Sr. No.	Particulars	Exh.
1	Power of attorney in the name of Navneet singh	21

2	Death certificate of Chakubhai K. Kavia	22
3	Registered sale deed vides No. 2284	23 & 27
4	Property card on name of deceased Luhar Chakubhai Kalyanji	24
5	Sanad of property	25
6	Chakubhai Kalyanji Kavaiya Reg. Will Vide No-6682	26 & 28

The plaintiff has filed closing pursish vide Exh. 29.

7. Defendants Evidences

In this matter, proceedings against the defendant no. 1 to 3 remained absent even though duly serving of summons, therefore the present suit is proceed ex-party against the defendant no. 1 to 3.

8. Final Arguments.

Ld. Advocate for the plaintiff Mr. P. D. Pithadiya has argued that in the present suit, defendants have not appeared and not challenged the documents lead by the plaintiff. Hence, he argued out that the version of the plaintiff is believable and the plaintiff is entitled to get reliefs as prayed for.

-: Reasons :-

9. Issue Nos.1 & 2 : -

As all the issues are interconnected my reasons for the above mentioned issues, all the issues are required to be decide on the same set of evidence.

9.1 Before appreciating evidence in the suit, it is required to be

noted that defendants have not participated in the suit hence, evidence are left unchallenged. It can be said that when defendants did not appear and participated in the Court proceedings, judgment and decree in favour of the plaintiff is not an automatic process. To put it in other words, it can be said that mere none appearance of the defendants does not entitles plaintiff to have judgment and decree in his favor. Even though, defendant did not appear before this Court, then also plaintiff is always requires to prove his case on his own strength and pleadings as well as documents. This Court would like to make a reference to the judgment of Hon'ble Supreme Court delivered in the case of **Smt. Sudha Devi Vs. MP Narayanan, reported in AIR 1988 SC 1981**, relevant observations runs thus in para 6 of this judgment :-

“6.On the failure of the defendants to appear in the suit, the learned trial Judge decided to proceed with the case ex parte. Even in absence of a defence the Court cannot pass an ex parte decree without reliable relevant evidence. The fact that the plaintiff chose to examine some evidence in the case cannot by itself entitle her to a decree. The High Court (in appeal) was, therefore, perfectly justified in scrutinizing the evidence from this angle. The suit was filed and the relief was claimed on the basis that the third defendant was inducted in the flat in question by the other two defendants after they had already suffered a decree and there is not an iota of evidence led by the

plaintiff to prove this story. On the other hand, the evidence of the sole witness disproves this part of the case. Having regard to the allegations in the plaint, the facts emerging from the documents and the oral evidence, it is clear that several other questions may arise for consideration if the defendant No. 3 is assumed to be in possession from before the earlier decree. We, therefore, agree with Mr. Bobde that the plaintiff cannot be allowed a decree on the evidence led by her in the suit founded on the plaint as it is.”

9.2 Thus, it is clear from the observation of the Hon'ble Supreme Court made in the above judgment that even in case wherein defendants have not appeared, plaintiff is always support to prove his case as per his pleadings.

10. Having heed to the above mentioned ratio laid down by Hon'ble Supreme Court this Court would now like to appreciate evidence produced by the plaintiff in the suit along with her claim made in the plaint itself. The suit is filed by the plaintiff and it is also required to be noted that the present plaintiff has filed a suit against the defendant for declaration of the ownership of the suit property in respect of Will which is produced vide Exh. 28 but looking to the documentary evidence produced by the plaintiff that no revenue record produced by the plaintiff regarding the name of the plaintiff is mentioned in revenue records as a possesioneer and further plaintiff neither examined any independent witness regarding the possession of the suit property nor produced any

documentary evidence regarding the suit property. Further, the plaintiff relied in support of his plaint, that the deceased Chakubhai Kalyanji Kavaiya made a WILL vide Regd. No.6688, dtd.6/11/'1984 and according to the WILL of late Chakubhai Kalyanji Kavaiya, the suit property was bequeathed to the plaintiff and after the death of deceased Chakubhai Kalyanji Kavaiya, the plaintiff became the owner and was in possession of the suit property and the defendants have no right or interest in the said property, though, the plaintiff are in occupation and possession of the said property after the death of deceased Chakubhai Kalyanji Kavaiya. In this regard, the plaintiff has produced xerox copy of death certificate of deceased Chakubhai Kalyanji Kavaiya vide Exh. 22 and, xerox copy of a registered sale deed No. 2284/1957 vide Exh. 23 & 27, xerox copy of property card in the name of deceased Chakubhai vide Exh. 24, xerox copy of Sanad of property vide Exh. 25, xerox copy of deceased Chakubhai Kalyanjibhai Kavaiya's Regd. WILL vide No.6682, dtd. 6/11/1984 vide Exh. 26 & 28.

11. Looking to said copy of the Regd. WILL, which is executed on 6.11.1984 since from than why plaintiff has not use his right. Further more it appears that plaintiff has not filed affidavit of the executing witnesses of the WILL. In this circumstances the will must be prove by the plaintiff to examine at least one attesting witness of the will and in this regard I have referred a provision of Section 63 of Indian Succession Act, 1925 read with Section 68, 69 of Indian Evidence Act, 1872 as under:

Section 63 in The Indian Succession Act, 1925

63. Execution of unprivileged Wills.—

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his Will according to the following rules:

- (a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.
- (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
- (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Section 68 in The Indian Evidence Act, 1872

68. Proof of execution of document required by law to

be attested.

If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.] *[Inserted by Act 31 of 1926, Section 2.]*

Section 69 in The Indian Evidence Act, 1872

69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

As per above referred provisions, the plaintiff must be prove the executing registered Will to examine at least one attested witness in the suit proceeding but here the plaintiff neither examine the attested witness of the will nor submitted any oral or documentary evidence to prove the will was executed by deceased Chakubhai Kalyanjibhai Kavaiya.

12. Hence, this Court firmly believes that, despite of defendants have not contested the suit by participating in the suit proceedings as well as taken into consideration arguments advanced by the Ld. Advocate of the plaintiff in the present suit, therefore, the plaintiff has failed to prove his case by leading oral as well as documentary evidence which is not satisfy this Court with regard to alleged ownership of suit property by way of Will.
13. Hence, answering issue no. 1 & 2 in negative, with respect to issue No. 3 following final order is passed in better interest of justice.

-:: F I N A L O R D E R ::-

- (a) The present suit is hereby dismissed.
- (b) Plaintiff to bear their cost of suit throughout.
- (c) Decree to be drawn accordingly.

Signed and pronounced in the open Court today on 14th August, 2025 at Rajkot.

Place: Rajkot.
Date : 14/08/2025.

Sd/-
Rajeshkumar Ramanlal Mistry
7th Addl. Sr. Civil Judge,
Rajkot
Code No.GJ-01169.