

IN THE CITY CIVIL COURT AT AHMEDABAD**13****CIVIL SUIT (CCC) NO. 2339 OF 2011.**

Appearance:**B.M.SHAH For Plaintiff 1, 2****S.M.SHAH For Plaintiff 1, 2****S.M.AHUJA For Defendant 1****A.C.THAKER For Defendant 2**

ORDER BELOW CHAMBER SUMMONS EXH.38/39:-

1. By way of filing the present chamber summons under the provisions of Order 7 Rule 11(a) of the Code of Civil Procedure, the applicants-defendants have sought to reject the plaint of the plaintiff, as the same does not disclose the cause of action.

2. The applicants in support of their contentions, have produced the documents at Exh.41, being a copy of the gift deed executed by grand-father in favour of the father of the applicants, a copy of the gift deed (Hiba) executed in favour of the applicants, a copy of the death certificate of the father of the applicants, a copy of the municipal tax pertains to the suit property.

3. The learned advocate for the applicants in support of their contentions, have raised the contentions, that since the cause of action said to have arisen in favour of the plaintiff, is only on the ground of the gift deed being executed in favour of the applicants have been obtained by way of inducing the father of the parties to the suit since

deceased, and therefore, the inducement and the so called contentions as to cheating can be proved in presence of the person who in fact has been induced and cheated so, which is not possible for the plaintiffs to prove in absence of person so induced, and therefore also, no cause of action survives in favour of the plaintiff. Though the learned advocate for the applicants in support of her contentions has placed reliance in the case of Becharbhai Zaverbhai Patel & Another Vs. Jashbhai Shivabhai Patel & Others, 2013(1) GLR 398 and Kanjibhai Bhagwanjibhai Patel Vs. Nanduben Shamjibhai Sorathiya through P.O.A. Dharmesh P. Trivedi & Others, 2013(1) GLR 51 and has submitted that since the suit is barred by law of limitation, and therefore also, the plaint is required to be rejected.

4. It is pertinent to note here that earlier, the present applicants have also taken out the chamber summons at Exh.19/20 under the provisions of Order 7 Rule 11(b) on the ground that the relief claimed by the plaintiff is undervalued and sought necessary directions against the plaintiffs for rejection of plaint. Accordingly, the said chamber summons came to have been disposed of, as the plaintiffs (opponents) have deposited the deficit court fees stamp. However, no such contentions falls within the ambit of Order 7 Rule 11(a) and (d) of the Code of Civil Procedure and other contentions as averred herein have been raised by the applicants and by filing the present chamber summons, the applicants have sought the relief as discussed hereinabove.

5. On being served with the process of the present chamber summons, the learned advocate for the plaintiffs though have not filed any reply, but has submitted that earlier, the present applicants have also taken out the chamber summons under the provisions of Order 7 Rule 11 of the Code of Civil Procedure and no such contentions as averred in the present chamber summons have been taken and submitted that since the plaintiffs have sought a relief to quash and set aside the gift deed being null and void said to have been registered at serial No.735 on 1.3.2007 as the same has been executed without the knowledge of the present plaintiff and by way of inducement and the very fact came into the knowledge of the plaintiff when the defendants after the demise of their father tried to take the forcible possession from the plaintiffs on the ground of the said gift deed. It is also submitted that since the parties to the suit are in joint possession of the property, and therefore, the plaintiffs cannot be evicted, rather driven out from the suit property without following the due process of law and particularly when the deed is a subject to challenge by way of filing the present suit.

In support of his contentions, the learned advocate for the plaintiffs have placed reliance in the case of Abdur Rehman & Others Vs. Smt. Athifa Begum & Others, reported in AIR 1998 Karnataka 39 and submitted that possession of gifted property not made over to the applicants nor the applicants are in possession. However, considering the provisions of

section 150 of the Mohammedan Law, it is clear that delivery of possession of a gift may be actual and constructive and also considering the fact that parties to the suit are in possession of property in question, however under what head and right, they claim possession is a matter of proof, and therefore, at no stretch of imagination, the ratio laid down in the aforesaid case is helpful to the plaintiffs-opponents at this stage.

6. Having heard the learned advocates appearing for the respective parties and considering the material placed by the parties concerned in support of their respective contentions and also gone through the ratio laid down in the aforesaid decided cases and particularly the reliance placed by the learned advocate for the applicant by referring sections 142, 147 and 149 etc. of the Mohammedan Law it appears that the aforesaid provisions, the essential ingredients to the validity of the gift are (1) the declaration of gift by the donor, (2) acceptance of the gift express or implied, by or on behalf of the donee, (3) delivery of the possession of the subject of the gift by the donor to the donee as mentioned in section 150 and if all these conditions are complied with, the gift deed said to be completed. While relying on the aforesaid provisions, the learned advocate for the applicants has submitted that since the possession of the property in question has been handed over to the applicants and the necessary entries on the basis of the gift deed has been mutated in the revenue records with the office of the

concerned authorities whatsoever to claim any right against the present applicants.

Though during the course of the hearing, the learned advocates for the respective parties appearing have conceded that the parties to the suit are in possession of the property, but the learned advocate for the applicant has further submitted that since the portion of the possession of the suit property have been forcibly taken out by the plaintiffs on the demise of their father and during the life time of the father, they have not raised any objections and moreso they have been residing separately. Though the learned advocate for the applicants in support of her submission has not produced any documents to show that any such fact as to the fact of the plaintiffs being residing separately, except the affidavit of stranger which again is subject to confrontation and proof and the fact of gift deed was within the knowledge of the plaintiff is also subject matter of proof. Moreover, the contentions raised by the plaintiff with regard to the execution of the gift deed by way of inducement and the factum as to the execution of the gift deed came into their knowledge as averred in the plaint and the fact that the plaintiffs have been residing separately and particularly the fact that by which mode the plaintiffs are in possession of the suit property are all the issues require to be proved by leading substantial evidence.

So far as the reliance placed by the learned

advocate for the applicant in case of Becharbhai Zaverbhai Patel & Another (Supra) and Kanjibhai Bhagwanjibhai Patel (Supra), the ratio laid down in the aforesaid decided cases are not applicable to the facts of the present case, as the present applicants have taken out the present chamber summons only on the ground which falls under the provisions of Order 7 Rule 11(a) of the Code of Civil Procedure and no other contentions have been raised by the applicants as to the ground of limitation, and therefore, though I humbly agree with the ratio laid down in the aforesaid decided cases, but the same is not applicable to the facts of the present case as stated hereinabove.

7. Thus, in view of the aforesaid facts and particularly, the contentions and the reference made by the learned advocate appearing for the applicants while inviting attention of this court towards the affidavit filed by the third party cannot be considered because while exercising the powers under Order 7 Rule 11, the Court has to consider only the pleadings and supporting evidence produced by the plaintiff and the defence cannot be considered.

8. Recently, the decision of the Hon'ble Apex Court in the case of The Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman Vs. Ponniamma Education Trust represented by its Chairman, reported in AIR 2012 SC 3912, removed all the clouds and doubts by holding accordingly. Therefore, considering the aforesaid facts, the

decision of the Hon'ble Apex Court, the contentions raised by the applicants do not fall within the ambit of Order 7 Rule 11(a) of the Code of Civil Procedure, as the same are required to be proved by leading substantial evidence. Hence, I do not find any substance in the present application and the same deserves to be dismissed and accordingly, I pass the following order:-

O R D E R

The present chamber summons is hereby dismissed.

Pronounced in the open court on this 15th day of April, 2013.

Ahmedabad.

**(R.T. VACHHANI)
JUDGE,
COURT No.13,
CITY CIVIL AND SESSIONS COURT**

Safir*