

FARAD CONTINUATION SHEET NO.
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD.

Office Memoranda of appearance, Court's orders or directions and Registrar's orders.	Notes, of Court's orders or Registrar's orders.	Office Coram,	Court's or Judge's orders.
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APPEAL FROM ORDER NO. 8 OF 2013

WITH CA/625/2013 IN AO/8/2013
WITH CA/16000/2013 IN AO/8/2013

DINYAR FARDOONJI BHAGAT AND ORS
VERSUS
DURGABAI ONKARDAS AGRAWAL AND ORS

Advocate for Petitioners : Mr. Ajit D. Kasliwal.
Advocate for Respondent Nos.1, 4 & 6 : Mr. A. S. Bajaj.
Advocate for Respondent Nos.5A to 5D: Mr. R. S. Tawarwala.
Advocate for Respondent No.9: Mr. S. V. Natu.

CORAM : T. V. NALAWADE, J.
DATED : 5th JANUARY, 2016.

PER COURT:

1. The appeal is filed to challenge the order made on Exhibit-5 in Special Civil Suit No.57 of 2012 which is pending in the Court of Civil Judge, Senior Division, Jalna. In a suit filed by present Appellants, application was moved for relief of temporary injunction and this application is rejected by the trial Court. Both the sides are heard.

2. Meherwanji was the owner of suit property. He left behind a son, Minocher and two daughters viz. Homai and Banu. Banu died issueless. Present Appellants, plaintiffs are successors of Homai. Defendant No.9 Khusrav Taraporewalla is a son of sister of Smt. Alloo. Smt. Alloo was the wife of Minocher, son of Meherwanji. In the year 1949 Meherwanji executed a will in favour of his son and two daughters. These facts are not disputed.

3. It is the case of plaintiffs that Meherwanji was the owner of 20% portion of Survey No. 272 (Part-I), this portion is given CTS No.4700 in the record of City Survey Office and the area of this number is shown as 52252.09 Sq.Mtrs. The property CTS No.4700 is situated at Kasbe Jalna, Mantha Road, Jalna. On this property there are structures of bungalows. It is the case of plaintiffs that as successors of Meherwanji his three issues had acquired share in the three properties. They have contended that they are entitled to succeed to the shares of Smt. Homai and Banu, daughters of Meherwanji and so they are entitled to get 50% share in the aforesaid share of Meherwanji.

4. Relief of declaration of ownership in respect of the

aforesaid share is claimed by plaintiffs in the suit. They have claimed relief of declaration that the sale deed dated 20th June, 2012 executed by Defendant No.9 in favour of Defendant Nos.1 to 6 in respect of CTS No.4700 is null and void. In the suit, they have prayed for relief of injunction to restrain the purchasers, defendant Nos.1 to 6 from claiming exclusive possession over CTS No.4700 and to prevent them from pulling down the constructions which are present on CTS No.4700. Relief of injunction to prevent these defendants from alienating the property is also claimed. It is contended that the aforesaid sale deed executed by Defendant No.9 is not binding on them to the extent of aforesaid share.

5. Defendant Nos.1 to 6 and 8 filed joint written statement. They denied that the plaintiffs are entitled to 50% share in the property owned by Meherwanji in CTS No.4700. They have contended that defendant No.9 was the owner of the property on the date of the sale deed as under a will executed by Smt. Alloo Minocher the property was bequeathed to him and he was in possession of the property. It is contended that the name of Defendant No.9

was recorded in City Survey Record also.

6. It is the case of defendants that the property was owned by Minocher and after his death in the year 1982 his widow Alloo became owner of the suit property as will was executed in her favour by Minocher. This will was dated 8th August, 1969. It is contended that sister of Minocher had no right or interest in the suit property. They have contended that in Probate Proceeding No.56 of 2005 probate was issued in favour of Defendant No.9 of the will executed by Smt. Alloo and after verifying this record these defendants had purchased the property. They contended that they have become owner of the suit property and they have purchased the remaining portion of CTS No.4700 also from the other owners and so they cannot be prevented from using and developing the suit property. They have given particulars of various sale deeds under which different portions of CTS No.4700 were purchased by them. It is contended that they have purchased the portion of 26191 Sq.Mtrs.

7. Defendant No.9 has filed written statement and his contentions are similar to the contentions made by

defendant Nos.1 to 6. It is his case that he has executed the sale deed in respect of 20% portion, area of 9492 Sq.Mtrs. in favour of defendant Nos.1 to 6 as he was owner of the property. He has contended that some portion of CTS No.4700 was already acquired by Jalna Municipal Council for Mantha road widening purpose. It is the case of defendant No.9 that he was in exclusive possession of the property of Smt. Alloo and he has handed over the possession to defendant Nos.1 to 6 under sale deed dated 20th June, 2012.

8. The application at Exhibit-5 filed for relief of temporary injunction is rejected by the trial Court by holding that there is no prima facie case in favour of the present Appellants, plaintiffs and the law of limitation is also a hurdle for giving the relief to them.

9. Both the sides are claiming through Meherwanji. The execution of will by Meherwanji in favour of Minocher and two daughters like Homai and Banu is not disputed. In view of this circumstance, the contents of the will made by Meherwanji need to be seen for the present purpose also. The rival cases and the contents of the will show that

Meherwanji was a partner of a firm and he was having other properties like residential bungalow. In para 1 and 2 of the will, Meherwanji made distribution of the property of the firm like share in the firm. The proportion is given in para No.1. The 10 Annas share was given to Minocher and remaining 6 Annas share was equally distributed between two daughters like Homai and Banu. In para No.4 of the will he made a specific mention of residential bungalow, of which he was in possession. This para reads as under:

“Para 4. In that part of the residential bungalow which I possess my son, daughter-in-law and my wife shall live and they shall be entitled to the same. Nobody (else) shall have any right to interfere with the same.”

It is not disputed that the aforesaid bungalow is situated in CTS No.4700.

10. The submissions made and the record show that 5 families were having equal shares in CTS No.4700. Thus, Meherwanji had 20% share in this property. When the record was prepared by City Survey Office first time, in the year 1975, the name of Minocher only was entered as

successor of Meherwanji. Minocher executed will on 8th August, 1969 in favour of his wife Smt. Alloo. In para 2 of the will left behind by Minocher there is a mention of the will of 1949 made by Meherwanji. This para reads as under:

"2. I am the owner and possessor of the property described hereinafter. My late father Meherwanji S/o. Fardunji had bequeathed property to me and to my sisters mentioned above through a will dated 23rd December, 1949 A.D. The original will deed has been lost and I had a copy of the said will deed. I become owner and the possessor of the property as well as my sisters also acquired the title and right over the property mentioned in the will deed dated 23rd December, 1949."

Then, in para No. 3 (d) there is specific mention about the residential house and it is as under:

"3. (d) I am the owner and possessor of a residential - house bearing Municipal No.4914 old/ 4515 new, situated at Kadrabad Jalna bounded as follows:

East: Bungalow of Rustumji.

West: House of Dinshaw Pestonji.

South: Road and Municipal play ground.

North: Mantha road"

This house is the first floor of the house bearing No.4194 old/ 4515 new, situated at Kadrabad Jalna. There are - four rooms having two verandas. The entire house described above is exclusively owned and possessed by me. This said house has been bequeathed to me by my father through the will deed referred above."

11. It is the case of defendant No.9 that Municipal House No.4914 is the number which was given to the constructions mentioned in will of 1949. At present there is nothing to dispute this contention. Thus, in the year 1969 Minocher executed a will in favour of Smt. Alloo in respect of the suit property. Minocher died in the year 1982. Smt. Alloo executed the will on 6th April, 1998 and the relevant portion of the will is in para No.3, which is as under:

"3. I give, devise and bequeath all estate moveable/ immoveable of whatsoever nature and kind and wherever situate now or hereafter belonging to me or over which I may have right of disposition to my nephew Mr. KHUSRAV SAROSH TARAPOREWALA as my heir and sole successor in title, more particularly described hereinbelow or

inheritable to me not indicated in this my WILL or to which I may be entitled by right of inheritance or share in the properties of my husband late Mr. Minochar Meherwanji Jalnawalla.

a) Residential flat, fully furnished including all the furniture, fixtures and accessories, the garage, adjoining store and garden in the bungalow known as Jalnawalla Bungalow, situated opposite Civil Club, Nezonji Road, Jalna.

b) 10/16 of 1/5 share in the following firms and their subsidiaries, if any:

- i) M/s. Pestonji Meherwanji, Jalna.*
- ii) M/s. Dinshaw Pestonji, Bombay.*
- iii) M/s. Dinshaw Pestonji Ginning and Pressing Factory, Dhamangaon.*
- iv) M/s. R. Bazonji Ginning and Pressing Factories at Aurangabad and Satana.*
- v) Jalna Ginning & Pressing Factory at Jalna.*
- vi) Agricultural lands, house properties and reserve fund account in the firm of M/s. Pastonji Meherwanji, Jalna, their partners or their predecessors.*

c) 1932 out of 16/28 share in the firm of M/s. Padamji Pestonji Ginning and Pressing Factory at Davalgaon Raja (District Buldhana).

d) Credit cash balance in my personal account

in the firm of M/s. Pestonji Meherwanji Jalna and its subsidiaries referred to above whoever I hold my share therein.

e) Motor Car, make premier bearing Motor Vehicle Registration No. MTN-9109.

*f) All or any other asset or property, moveable/ immoveable **held by me or inheritable to me not no** not indicated heretofore in this my WILL **or to which I may be entitled by right of inheritance or share in the assets and properties of my husband late Mr. Minocher Meherwanji Jalnawalla.**"*

12. She gave not only the suit property but also other properties to defendant No.9 under the will. Thus, on one hand in all the three wills there is specific mention of the suit property and the property first came to Minocher, then to Smt. Alloo and then to defendant No.9 and on the other hand in the wills executed by Smt. Homaibai, a sister of Minocher dated 13th February, 1984 there is no mention of this residential premises. She bequeathed her share in the property of firm to her son. If she believed that she was given share by her father in the suit property also, she would have mentioned about it in her will. Absence of said

mention needs to be considered for the present purpose also. In the will left behind by Smt. Banu, there is a mention about one cottage in para 2 and it is as under:

"2. I have constructed out of my own moneys in 1975 a cottage in the compound of Jalnawall's Bungalow, Bezonji Road, Jalna. The said cottage shall be available for use to my nephew Dinyar Fardoonji Bhagat and Cyrus Fardoonji Bhagat and my niece Dhum Cawas Billimoria and their families. The said cottage shall not form part of my residuary estate hereinafter bequeathed because in accordance with the arrangements I have made with the owners of Jalnawalla's Bungalow, I cannot sell or otherwise dispose of the said cottage."

13. The aforesaid mention in will of Smt. Banu shows that this lady was not claiming any title in the suit property and she had made some construction only because the owners had allowed her to do so. This contention also needs to be considered for the present purpose.

14. The learned counsel for the Appellants produced some record like returns of income tax of Smt. Alloo, Shri Persis Danish Irani, Smt. Homaibai and Shri Cyrus. The

record shows that on 28th January, 1999, 5 Hectare 37 Are of Survey No. 272/1 was sold and Smt. Alloo had filed return to the effect that she had got 12.5% of 1/5 share. The returns show that Persis had received 1.875% share, Cyrus had got share of 1.875% and Smt. Homaibai had received Rs. 4,92,750/- as against the amount of Rs.94,24,350/- received by Smt. Alloo in that transaction. The learned counsel for Appellants, plaintiffs submitted that if the successors of two daughters of Meherwanji were given share in the sale proceeds of part of Survey No.272/1 in the year 1999, it needs to be presumed that under the will the suit property was not given to Minocher. On this point, the learned counsel for Purchasers and defendant No.9 submitted that CTS No.4700 was already separated and it was described as residential premises when the remaining portion of Survey No.272 was with the firm of five families. He submitted that the portion on which the construction was done and which was used for residential purpose was converted to non-agricultural use long back, in the year 1889 (it was part of Cantonment Area of British at Jalna) and so this property was dealt with separately by Meherwanji. In view of the

contents of will, the shares in sale proceeds and record of N.A. conversion, this Court holds that there is force in the submissions made for purchasers.

15. On the basis of the will executed by Meherwanji, entry was made in favour of Minocher in revenue record of suit property and then his widow Smt. Alloo used the property as the owner. Thus, for many years, Minocher was dealing with the property as the owner and his name was also entered as owner in the revenue record but this entry was not challenged and no grievance was raised. On the contrary, the wills of aforesaid nature were executed by two sisters of Minocher. This record creates probability as contended by defendant No.9 for the present purpose. In view of these circumstances, the trial Court has held that there is no prima facie case with the plaintiffs. The trial Court has referred the provisions of Limitation Act also as it will have to be decided in the suit as to whether the suit property was bequeathed to Minocher by Meherwanji.

16. Meherwanji was having only 20% share in CTS No.4700. Defendant Nos.1 to 6 have purchased not only this portion but portions from other co-owners also. The

record about possession is not in favour of plaintiffs. In view of these circumstances, this Court holds that the trial Court has not committed error in refusing the relief of temporary injunction.

17. In the result, Appeal stands dismissed.

18. In view of final disposal of the Appeal itself, the civil applications also stand disposed of.

19. Learned counsel for the Appellant requested for extension of interim order. The request is turned down.

(T. V. NALAWADE, J.)

Dt.05/01/2016.
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