

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO.1062 OF 2015
WITH
CAA/1305/2015**

Shri Shantilal Dayabhai Patel & Ors.

... Appellants

Vs.

Shri Dilip Ukaria & anr.

... Respondents

Mr.Ralston Fernandes for the Appellants
Mr.Jayesh Bhatt for Respondents

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 14th JANUARY, 2016

P.C.:

1. This Appeal from order is directed against the order dated 9.7.2015 passed by the learned Civil Judge, Senior Division, Daman while rejecting the application at exhibit 5 in SPCS No.35 of 2014. The plaintiffs, who are the appellants before this Court, have filed suit for declaration and injunction. In that, they moved an application for interim injunction under Order 39 Rule 2 of the Civil Procedure Code that defendant No.1 and his representatives, agents be restrained from recording his name pursuant to the will in the revenue records and be restrained also from wasting, damaging, alienating or creating any encumbrance or third party right in respect of the suit property or any part thereof. The said prayer is rejected. The plaintiffs are the brothers of one Narayanbhai who died on

20.11.2013 who had executed a will on 19.6.2013. Defendant No.2 is the wife of Narayanbhai and defendant No.1 is the son of the brother of defendant No.2 i.e., the nephew of late Narayanbhai and defendant No.2. The suit property is bequeathed by will by Narayanbhai in favour of defendant No.1. The plaintiffs challenged the execution of the said will as it is null and void ab initio and not enforceable in law and not binding on them. So also, they sought injunction in respect of the suit property. The said application was rejected. Hence, this appeal.

2. The learned Counsel for the appellants has submitted that the order passed by the trial Judge is erroneous. The trial Judge has not considered the entire suit property which is described in the plaint. The learned trial Judge has only considered a part of the suit property with Survey No.424 admeasuring 5400 sq.mtrs. agricultural land. But there is also other suit property, i.e., plot No.P.T.S. 34/172 admeasuring 85 sq.mtrs. and Plot No.PTS-34/1891 admeasuring 85 sq.mtrs. separately with construction there on DMC No.13-181 and 196 situated at Nani Daman. He submitted that the learned Judge has not passed any order in respect of the entire suit property. He further submitted that the plaintiffs are the real brothers of the late Narayanbhai and they have all undivided shares in the suit property i.e., 1/4th equal shares in the entire suit property. It is argued that the will which is executed is illegal and void on two reasons. They are

mainly that Narayanbhai cannot be the sole owner of the entire suit property as all the brothers i.e., the plaintiffs have undivided share in the suit property and secondly, the property cannot be bequeathed by Narayanbhai in favour of any relative from his wife's side in view of the settled legal position and the restrictions under the Portuguese law. The learned Counsel further submitted that in the written statement also, the learned Judge ought to have considered that in paragraphs 1 and 2, the averments in respect of the suit property are admitted by the defendants and so also the defendants have stated that the suit property Survey No.424 is legally undivided and it was claimed that practically it is divided since long. The learned Counsel read over the relevant portions in paragraphs 8, 11 and 13 of the written statement and considered that there are such admissions given by the defendants in respect of the applicability of the Portuguese succession law.

3. Per contra, Mr.Bhatt, supported the order passed by the learned trial Judge. He submitted that the late Narayanbhai was the owner of the suit property and the said property had fallen to his share long back and he alongwith his wife was enjoying the said property. It is further submitted that though legally, there was no partition as such, still, the property was practically divided since long and each co-owner is enjoying the respective portion. He submitted that the plaintiffs are in possession of their

respective shares and enjoy their respective properties and therefore they have no right to challenge the bequeath made by Narayanbhai in favour of defendant No.1. He further submitted that there are no specific averments in respect of fraud but it is a registered will which was executed before the proper authority i.e, Civil Registrar cum Ex-Officio Notary of Daman and therefore, it cannot be doubted at this stage. He further submitted that the defendants are in possession of the suit property. Defendant No.1 is taking care of his paternal aunt i.e., defendant No.2 and therefore the late Narayanbhai has executed the will and bequeathed the property in favour of defendant No.1.

4. Read the plaint, application at exhibit 5 and the written statement so also the impugned order. The submissions are made in respect of bar under the law on bequeath and disposing of the inherited property by will by a male member under the Portuguese law. These submissions can be dealt with by the learned trial Judge at the time of deciding the suit. At this stage, I do not think is appropriate to deal with the said issue. On perusal of the impugned order, I found that learned trial Judge has considered only a part of the suit property i.e., Survey No.424 and has not considered the other portion of the property. It appears from the pleadings of both the sides that the property of the father of the plaintiffs and Narayanbhai was not partitioned legally but the parties are enjoying separately some portion

of the property. As per the submissions of the learned Counsel for the respondents whether such mutual partition and enjoyment of the properties for a long period is a valid partition or not can be the issue before the trial Court and that can be decided at the stage of hearing after considering the law and evidence of both the parties. At this stage, the will is produced before the trial Court and defendant No.1 claims his right through the will which is registered and therefore, I am of the view that the order passed by the trial Court needs to be modified to a certain extent as follows:

- i) The acts done or action taken by defendant No.1 in respect of the change in the revenue records of the suit properties will be subject to the outcome of the suit.
- ii) Defendant Nos.1 and 2 themselves or through their servants, agents or representatives or power of attorney holder are restrained from creating any third party right or any encumbrance or alienating the property in any manner without the permission of the Court and without giving prior intimation to the plaintiffs.

5. With these directions, I allow the appeal partly. All contentions of the parties are kept open.

6. Appeal from order and the Civil Application stand disposed of accordingly.

(MRIDULA BHATKAR, J.)