

(2019) 11 GUJ CK 0038

Gujarat High Court

Case No: R/Appeal From Order No. 270 Of 2019, Civil Application (For Stay) No. 1 Of 2019 In
R/Appeal From Order No. 270 Of 2019

L/H Of Deceased
Abdulhak Abdulmajid
Munshi

APPELLANT

Vs

Habibunisa D/O
Abdilmajid
Abdulrahman Munshi
And W/O Sirajudin
Gulammurj Munshi

RESPONDENT

Date of Decision: Nov. 29, 2019

Acts Referred:

- Registration Act, 1908 - Section 17(1)(b), 49

Hon'ble Judges: A.Y. Kogje, J

Bench: Single Bench

Advocate: Percy Kavina, Sp Majmudar, Ullash N Gohil, Rr Marshall, Dhruvik K Patel

Final Decision: Disposed Of

Judgement

A. P. Thaker, J

1. Being aggrieved and dissatisfied with the order dated 17.09.2019 passed by the learned Judge, Court No.10, City Civil Court, Ahmedabad

(hereinafter be referred to "the Trial Court") below application Exhibit 7 in Civil Suit No.1897 of 2017, the appellant has preferred the present Appeal

from Order.

2. Brief facts of the present case are as under:-

2.1 It is alleged that the plaintiff - respondent herein has filed the suit against the defendants for declaration and permanent injunction with respect to

the suit property on the ground that she has 1/5th share as per Muslim law. It is alleged that the Muslim Cooperative Society Limited is registered

under the Gujarat Cooperative Housing Societies Act, situated at Navrangpura, Ahmedabad and there are different plots and out of those plots, plot

No.17 admeasuring 1131 square meters of the land is the disputed property. It is further alleged that the owner and occupant of the suit property was

one Abdul Majid Abdul Rehman who died on 15.06.1945 without making any Will and without division of the said property and, therefore, both the

parties became owner and occupant of the suit property. It is alleged by the plaintiff that she has 1/5th share in the suit property and she has never

executed any release deed in favour of anybody and she has not made any signature on any of the documents. It is further alleged by the plaintiff that

the suit property is undivided property and defendants are trying to sell the suit property to third party without consent of the plaintiff. On that ground,

the plaintiff has filed the suit and has also filed Notice of Motion at Exhibit 7 restraining the defendants from selling, transferring, alienating, mortgaging

the suit property in any manner and restraining from handing over the possession of the suit property to any third party till the final disposal of the suit.

In the suit, by impugned order, the Trial Court has allowed the Notice of Motion against the defendants.

2.2 This order has been challenged by the defendants on the ground that the Trial Court has not considered the fact that the plaintiff had approached

the concerned Court after gross delay and on such conduct, she is not entitled for any injunction. It is alleged that the Trial Court has not considered

the provisions of the Muslim law under which the plaintiff has not entitled for any part of the suit property and has also committed mistake in

appreciating the facts that the third party interest has already been created. According to them, the plaintiff had voluntarily executed release deed in

favour of the defendants and plaintiff is also residing in the same vicinity and, therefore, she has aware of the fact that even in record of the society,

name of the plaintiff was removed before two decades. It is further alleged that the construction of the suit property was almost completed and the

documents executed in favour of the third parties have not been challenged by the plaintiff. It is alleged that the plaintiff's suit is barred by provisions

of the Gujarat Cooperative Housing Societies Act and she has not joined the necessary parties in the suit. It is further alleged that the document of

handwriting expert produced by the plaintiff is doubtful and it is required to be proved. On all these grounds, it is submitted that the Trial Court has

committed serious error of law and the impugned order of the Trial Court is perverse one and the same is required to be quashed and set aside.

3. Heard Mr.Percy Kavina, learned senior advocate with Mr.S. P. Majmudar, learned advocate for the appellants and Mr.R. R. Marshall, learned

senior advocate with Mr.Dhruvik Patel, learned advocate for the respondent at length. Perused the materials placed on record and the decisions cited

at the Bar.

4. Mr.Percy Kavina, learned senior advocate with Mr.S. P. Majmudar, learned advocate for the appellants has submitted the same facts which are

narrated in the memo of appeal and has submitted that the parties are the Muslim community and, C/AO/270/2019 JUDGMENT therefore, the

plaintiff's claim of 1/5th share in the suit property is not proper. It is submitted that the share of the plaintiff would be 44/400 i.e 11% only. While

referring to the relevant clause of the plaint, learned senior advocate for the appellants has submitted that the demand of 1/5th share by the respondent

is not in consonance with the Muslim law. While referring to the various documentary evidence and the paper book, learned senior advocate for the

appellants has submitted that the plaintiff has relinquished her right in the suit property in the year 1995 and the same has been resolved in the meeting

dated 16.07.2017 which is produced at page No. 107 of the paper book. According to him, earlier the plaintiff has released her share in favour of her

relatives and now, she is claiming her rights in the suit property. Regarding handwriting expert report, learned senior advocate for the appellants has

submitted that it is based on photo copy of the undertaking and not on the basis of the original signature and, therefore, the handwriting expert report

may not be taken into consideration at this stage. He has stated that the Corporation has already granted commencement letter (Rajachitthi) for

construction on the suit land as per page No.80 of the paper book and accordingly, the appellants has constructed 21 residential flats. According to

him, the share of the plaintiff is only 11% then for that portion of land, the right of entire suit property cannot be stayed and the defendants cannot be

restrained from dealing with the property. He has submitted that initially, there was no order of status-quo and by way of the present order passed

below the Notice of Motion, the injunction order has been passed and the same has been stayed by the Trial Court itself which has also been stayed

as per the order passed in this case. While assailing the impugned order, learned senior advocate for the appellants has submitted that the Trial Court

has committed serious error of facts and law. He has submitted that the plaintiff is residing nearby and she knows everything from the very beginning

and yet she has not approached C/AO/270/2019 JUDGMENT the Court diligently. He has submitted that even if the plaintiff is entitled to get 11% of

the property then for such portion of the entire property cannot be subject matter of injunction. According to him, the Trial Court has failed to consider

this aspect and also the order of the Trial Court is perverse one and it is required to be interfered with by this Court. He has prayed to quash and set

aside the impugned order of the Trial Court.

5. Mr.R. R. Marshall, learned senior advocate with Mr.Dhruvik Patel, learned advocate for the respondent - plaintiff has submitted that the order

passed by this Court on 15.10.2019 was concessional order. It is submitted that the Trial Court ought not to have stayed its own order. He has

submitted that even if it is believed that the plaintiff has 10% to 11% share in the suit property instead of 20% then in that case also, it is admitted

position that the plaintiff has right in the suit property and, therefore, the status-quo of the suit property could be passed. Regarding the documents of

relinquishment of right or passing of the resolution of the society. Learned senior counsel for the respondent has submitted that at the relevant time,

the plaintiff was residing at Delhi and on coming to know that defendants are going to transfer the suit property, has immediately filed the suit before

the Trial Court. While referring to the passport and other documents, learned senior advocate for the respondent has submitted that the signatures on

the so-called release deed and the other documents are not of the plaintiff and that signatures have been fabricated by someone else. He has also

relied on the report of the handwriting expert and has submitted that the handwriting expert has clearly opined that there is no signature of the plaintiff

on the so-called release deed and the handwriting expert would come before the Court for giving evidence. While referring to the written statement of

the defendants in the earlier suit being Civil Suit No.1897 of 2017 at Exhibit 33 (pages No.75 - 76 of the paper book), he has submitted that the

C/AO/270/2019 JUDGMENT defendants have admitted in saying that they have 08 flats which are being constructed in the suit plot. He has

submitted that there is undivided share of the plaintiff in the suit property and the construction of the flat was made during the pendency of the suit. He

has submitted that the document produced by the defendants is doubtful as there was no relinquishment right by the plaintiff. He has submitted that the

share of the property has not been received by the plaintiff. While relying upon the following decisions, Mr. Marshall, learned senior advocate for the

respondent has urged to dismiss the present Appeal from Order.

5.1 In the case of Laxmipriya Paikaray Vs. Bichitra Nanda Das, rendered by the Orissa High Court in F.A.O. No.438 of 2012 dated 12.03.2014 in

Manupatra, especially para-7 thereof which reads as under:-

7. It is not in dispute that late Banamali Das left behind two sons and three daughters and Appellant is one of the daughters. It is also not specifically

denied that while seeking for conversion of the status of the suit land in OLR Case No.321 of 2010 and seeking mutation in their names vide M.C.

No.418 of 2010, Respondent Nos.1 and 2 suppressed the fact that late Banamali Das had three daughters. They obtained the order of conversion as

well as mutation behind the back of the Appellant. It is also not in dispute that while executing the sale deed in favour of Respondent Nos.3 and 4,

Respondent Nos.1 and 2 have suppressed the fact that there are also other co-shares in respect of the suit property. The purchasers also do not

appear to have taken due care to find out whether late Banamali Das had left C/AO/270/2019 JUDGMENT behind any other heirs. In this

background, the plea taken by the Appellant that her brothers fraudulently obtained a deed of relinquishment from her cannot be outrightly rejected at

this stage to further proceed to say that she, having executed the deed of relinquishment, is etopped to challenge the same. No doubt, she has put

signature on the deed of relinquishment but mere putting one's signature is not an indication that he or she is literate. She has taken the stand that she

is an old illiterate lady and one deed of relinquishment has been obtained from her by way of misrepresentation and fraud. Under such circumstances,

it cannot be said that the petitioner has not raised a substantial question which needs investigation and decision on merits. Therefore, she has got a

prima facie case in her favour. The Respondents assert that they are proceeding with construction of residential complex for commercial purpose.

The Appellant has filed the suit for partition. In the event she ultimately succeeds in the suit, she will definitely suffer a great deal of inconvenience as

well as irreparable injury, if construction work for commercial purpose is allowed to proceed. Therefore, it is considered necessary to restrain the

opposite parties from making further construction or creating any third party interest by making further alienation till disposal of the suit.

5.2 Learned senior advocate for the respondent has also relied upon the decision in the case of Yellapu Uma Maheswari and others Vs. Buddha

Jagadheeswararao and others, reported in 2015 (13) Scale 615. for his preposition that the relinquishment deed cannot be looked into as alleged and it

it is not registered in terms of Section 17(1)(b) and Section 49 of the Registration Act, 1908. In paras-15 and 18, the Apex Court has held and

observed in the said decision as under:-

15. Section 17(1)(b) of the Registration Act mandates that any document which has the effect of creating and taking away the rights in respect of an

immovable property must be registered and Section 49 of the Act imposes bar on the admissibility of an unregistered document and deals with the

documents that are required to be registered under Section of the Act.

18. Then the next question that falls for consideration is whether these can be used for any collateral purpose. The larger Bench of Andhra Pradesh

High Court in Chinnappa Reddy Gari Muthyala Reddy v. Chinnappa Reddy Gari Vankat Reddy MANU/AP/0141/1969 : AIR 1969 A.P. (242) has

held that the whole process of partition contemplates three phases i.e. severancy of status, division of joint property by metes and bounds and nature

of possession of various shares. In a suit for partition, an unregistered document can be relied upon for collateral purpose i.e. severancy of title, nature

of possession of various shares but not for the primary purpose i.e. division of joint properties by metes and bounds. An unstamped C/AO/270/2019

JUDGMENT instrument is not admissible in evidence even for collateral purpose, until the same is impounded. Hence, if the Appellants/Defendants

want to mark these documents for collateral purpose it is open for them to pay the stamp duty together with penalty and get the document impounded

and the Trial Court is at liberty to mark Exhibits B- 21 and B-22 for collateral purpose subject to proof and relevance.

5.3 Mr. Marshall, learned senior advocate for the respondent has also relied on the decision of the Apex Court in the case of Maharwal Khewaji Trust

(Regd.), Faridkot Vs. Baldev Dass, reported in (2004) 8 SCC 488, especially, para-10 which reads as under:-

10. Be that as it may, Mr. Sachar is right in contending that unless and until a case of irreparable loss or damage is made out by a party to the suit, the

court should not permit the nature of the property being changed which also includes alienation or transfer of the property which may lead to loss or

damage being caused to the party who may ultimately succeed and may further lead to multiplicity of proceedings. In the instant case, no such case of

irreparable loss is made out except contending that the legal proceedings are likely to take a long time, therefore, the respondent should be permitted to

put the scheduled property to better use. We do not think in the facts and circumstances of this case, the power appellate court and the High Court

were C/AO/270/2019 JUDGMENT justified in permitting the respondent to change the nature of the property by putting up construction as also by

permitting the alienation of the property, whatever may be the conditions on which the same is done. In the event of the appellant's claim being found

baseless ultimately, it is always open to the respondent to claim damages or, in an appropriate case, the court may itself award damages for the loss

suffered, if any, in this regard. Since the facts of this case do not make out any extraordinary ground for permitting the respondent to put up

construction and alienate the same, we think both the courts below, namely, the lower appellate court and the High Court erred in making the

impugned orders. The said orders are set aside and the order of the trial court is restored.

6. In rejoinder, learned senior advocate for the appellants has submitted that the plaintiff has not joined necessary parties to the suit and there is

relinquishment of the share by the plaintiff which can be looked into by this Court. He has relied on the decision in the case of Digambar Adhar Patil

Vs. Devram Girdhar Patil (died) and another reported in AIR 1995 SC 1728 and in the case of Roshan Singh and others Vs. Zile Singh and others

reported in AIR 1988 SC 881. He has submitted that there is no pleadings by the plaintiff that she is residing in Delhi. While referring to the cause title,

he has submitted that as per the cause-title itself her residence has been shown near to the suit property. Mr. Kavina, learned senior advocate has also

submitted that equity demand that the defendants may not be restrained from dealing with entire property, as share of the plaintiff would be 11% and

ultimately, if the plaintiff C/AO/270/2019 JUDGMENT succeeds then she can be compensated in terms of money and, therefore, the impugned order

of the Trial Court is required to be interfered with by this Court.

7. Considering the contention raised by both the parties and considering the materials placed on record as well as paper book and the decisions relied

upon by both the sides, it appears that there are dispute regarding relinquishment right by the plaintiff in favour of her brother as well as passing of the

resolution by the Muslim Cooperative Society. There is also dispute regarding genuineness of the handwriting expert's report and there is also dispute

as to the residence of the plaintiff. According to the plaintiff, she was residing at Delhi and it is the contention of the defendants that as averred in the

plaint, residence has been shown is near to the suit property. It also appears from the record that the Corporation has also granted commencement

letter for construction of 21 flats on the suit land. It also appears from the arguments of learned counsel that the construction has been carried out

during the pendency of the suit.

8. Now, the suit of the plaintiff is based on the averments that she has 1/5th share in the suit property. Whereas, according to the defendants side,

even if her right of share in the suit property is considered then she has only 10% to 11% share thereof. It is an admitted fact, as referred from the

paper book at page 101, that the release deed is not registered one and it is only notarized. It also reveals from page No.107 of the paper book that the

resolution has been passed by the Muslim Cooperative Society Limited on 16.07.2017 approving the application by the possessor of plot No.17

submitting the application dated 16.12.1995 along with the statement of Smt. Habibunnisa S. Munshi, the name of the plaintiff has been removed.

Thus, the relinquishment document is of the year 1995 and the resolution has been passed in the year 2017 by the society.

9. It reveals from the record that there is dispute as to what portion of the suit property is in favour of the plaintiff. This fact can be decided by leading evidence by both the sides.

10. Now, so far as the contention of the plaintiff that she was in Delhi is concerned, it is pertinent to note that in the suit her residential address is

shown as C/201, Chirag Residency, Muslim Society, Navrangpura, Ahmedabad. The question in the present case is whether for right of 10% to 11%

share in the suit property, the order regarding the entire suit property could be passed or not? Considering the materials placed on record, it appears

that at the relevant time, the plaintiff may be resided in Delhi, but in her statement in the plaint, it is shown that she is residing in Ahmedabad. This fact

suggests that she has knowledge regarding putting up of the construction on the suit land as the construction cannot be completed within a short

period. The commencement letter of the Corporation is dated 07.06.2018. This fact suggests that during the pendency of the suit, the construction has

been carried out. Thereafter, the plaintiff has moved application at Exhibit 23 for restraining the defendants from carrying out the construction on the

suit land. It also appears from the record that the Notice of Motion i.e. filed at Exhibit 7 has been allowed vide order dated

17. 09.2019 by the Trial Court. In the order, the Trial Court has observed that the construction of the flats on the suit land in question, if those flats are

sold by the defendants, then, the right of the plaintiff would be affected and the plaintiff would also suffer an irreparable loss which cannot be

compensated in terms of money.

11. Now, considering the pleadings of the parties, it is clear that the plaintiff is seeking her share in the suit property which may either 10% to 11% or

20%. It also appears from the pleadings of the plaintiff that the so-called release deed is dated 31.10.1995 and the application of the society on the

letterhead is dated 25.12.1995 are C/AO/270/2019 JUDGMENT false and she does not accept the same. It appears from the pleadings that she has

filed declaration of relinquishment of her share in the suit property and to restrain the defendants from transferring or alienating the suit property as

she has undivided share of 1/5th share in the suit property. Now, considering the facts of the present case, it is clear that the contesting respondent

has clearly stated that out of 21 flats, 08 flats have to be given to the defendants. It means that other flats would be sold to somebody else. Under

these circumstances, to protect the share of the plaintiff, some sort of prohibitory order and direction is required to be passed. However, for small

portion of the share in the property, the entire suit property cannot be subject matter of injunction. The equity demands that there must be balance of

rights of the parties regarding the property. Under these circumstances, the impugned order of the Trial Court is required to be modified.

12. Under these facts and circumstances of the case, the defendants No.1, 1/2, 3 and 4/2 are hereby restrained from transferring, selling, assigning or

alienating 02 flats out of 08 flats which are to be allotted to them till the final disposal of the suit. The rest of the defendants are hereby restrained from

transferring, selling, assigning or alienating 01 (one) flat out of remaining 13 flats till the final disposal of the suit.

13. With the aforesaid observations, the impugned order of the Trial Court is modified and the present appeal from order stands disposed of.

14. Since the main appeal is disposed of, the Civil Application shall not survive. Hence, the Civil Application stands disposed of accordingly. Rule is

discharged.