

**IN THE COURT OF ADDITIONAL CIVIL JUDGE,
AT ANAND
REGULAR CIVIL SUIT NO. 467 OF 2015**

ORDER BELOW EX. 5

1. Plaintiff has filed this suit against the defendants alongwith this interim injunction application.
2. The brief facts, giving rise to this present suit and application Ex. 5 are as under;

It is the say of the plaintiff that the defendants are in need of money and therefore they have contacted the plaintiff and decided to mortgage the disputed properties to the plaintiff after receiving the mortgage amount. Further, it is the say of the plaintiff that the disputed properties mortgaged by the defendants on dtd 06/09/2013 executing the mortgage deed for five years before the Notary public and defendants have received Rs. 5,00,000-00 and handed-over the possession of the suit land. Further, it is the say of the plaintiff that thereafter defendants are in need of more money and therefore they have again executed mortgage deed on dtd 16/09/2014 before

the Notary public and further received Rs. 10,00,000-00 from the plaintiff and also handed-over the possession of the suit lands and plaintiff is cultivating the said suit lands and at present plaintiff has yielded the crop of maize and tomato. Further, it is the say of the plaintiff that the defendants have not returned the mortgage amount to the plaintiff even-though they are trying to sale the disputed properties to the third party and threatening the plaintiff's person to vacate the suit properties who is residing in the room situated in the disputed properties. Hence plaintiff has filed the suit alongwith present interim injunction application against the defendants.

3. Defendants are duly served with the summons / notice of the suit as well as Ex. 5 application. Defendant Nos. 1 and 2 have appeared through their Id. Advocate and filed their written statement at Ex. 31 and denied all the averments made in Ex. 5 in toto. It is contended that they have not executed any agreement and plaintiff has fabricated the so called agreement. Further, it is contended that they have not received any amount from the plaintiff and plaintiff has not produce any evidence which shows that huge amount was paid to the defendants It is contended that the disputed properties are ancestral properties and defendant Nos. 1 to 3 are co-owner of the said properties and defendant No. 3 is cultivating the disputed properties. It is contended that the disputed properties are never partitioned and till date it is

undivided. It is contended that with mala fide intention plaintiff has prepared fabricated agreement with a intention to snatch away possession of the properties. Ultimately, it is contended to reject the suit and interim injunction application with costs.

4. Defendant No. 3 has also filed his written statement at Ex. 32 and denied all the averments made in Ex. 5 in toto. It is contended the disputed properties are ancestral properties and undivided and he is doing the administrative work and cultivating the suit lands. It is contended that the plaintiff has not shown any evidence to show that how he has paid huge amount of Rs. 15,00,000-00. Ultimately, it is contended to reject the interim injunction application with costs.
5. In support of his case plaintiff has produced following documentary evidence.

1. Mark 3/1 Village Form No. 7/12 for survey No. 489+490/1
2. Mark 3/2 Village Form No. 8-A
3. Mark 3/3 Village Form No. 7/12 for survey No.472
4. Mark 3/ 4 Village Form No. 7/12 for survey No. 484
5. Mark 3/5 Village Form No. 7/12 for survey No.483
6. Mark 3/6 Copy of death certificate of Hasmukhbhai `
7. Mark 3/7 Pedigree of Hasmukhbhai Somabhai
8. Mark 3/8 Copy of affidavit of Rakeshkumar Hasmukhbhai
9. Mark 3/9 Copy of Mortgage Deed dtd 06/09/2013

10. Mark 3/10 Copy of agreement
 11. Mark 3/11 Copy of Mortgage Deed dtd 15/09/2014
 12. Mark 3/12 Copy of notice given by the plaintiff to the defendants.
 13. Mark 3/13 & 14 RPAD Receipts
 14. Mark 3/15 Public notice given in the news paper
 15. Mark 3/16 & 17 Photographs
 16. Mark 3/19 Bill of photographs
6. Against this defendant have not produced any documentary evidence in present case on hand.
7. The following points arise for my determination of Ex. 5 application.
1. Whether the plaintiff has any prima-facie case ?
 2. Whether the balance of convenience is in favour of the plaintiff ?
 3. Whether the plaintiff will suffer irreparable loss / injury, if injunction is not granted ?
 4. What order ?
7. My findings to the above points are as follows.
1. Partly in the Affirmative
 2. Partly in the Affirmative
 3. Partly in the Affirmative
 4. As per final order

: R E A S O N S

8. **POINT NO. 1 TO 4 :-** The facts of the above points are similar and hence, I have decided the same together for the sake

of convenience and to avoid the repetition of facts.

9. First of all it transpires from the present application vide which the plaintiff has sought relief of temporary injunction against the defendants for not to transfer, alienate, sale, gift the disputed properties till final disposal of the suit. Further, plaintiff has also sought relief of defendants may not disturb the plaintiff's possession till final disposal of the suit.
10. It is the say of the plaintiff that he became possession holder of the disputed properties by mortgage deeds executed by the defendant Nos. 1 and 2 in his favour. The said mortgage deed was executed on dtd 06/09/2013 and plaintiff has paid Rs. 5,00,000-00 in cash to the defendant Nos. 1 and 2 being mortgage amount and the mortgage period was initially fixed for five years. Thenafter, again another mortgage deed was executed between plaintiff and defendant Nos. 1 and 2 for the share of defendant Nos. 1 and 2 in the disputed properties for a period of 99 years. Further, it transpires from the mortgage deed at mark 3/11 that the earlier mortgage deed at mark 3/9 has been treated as canceled. Further, it transpires that the plaintiff has paid mortgage amount of Rs. 10,00,000-00 in cash for executing the second mortgage deed and hence the plaintiff has paid total Rs. 15,00,000-00 to the defendant Nos. 1 and 2. If the village form No. 7/12 at mark 3/1 is considered, it is found that the defendants names are being reflected, meaning thereby the disputed properties still undivided properties amongst the defendants. Further, if the mortgage deed at mark 3/9 and 3/11

are considered vide these mortgage deeds the defendant Nos. 1 and 2 have handed-over the possession of their share of the disputed properties to the plaintiff. Further, court commissioner has filed panchnama at mark 10/2 and also submitted map of the disputed site at mark 10/3. The panchnama is good piece of evidence for ascertaining the possession. If the panchnama is minutely examined, the court has not come to the conclusion that whose possession is there of the disputed properties. Further, to the some extent it is helpful to the plaintiff about the crops standing in the disputed lands. The main contention taken by the defendants in their written statement that the mortgage deeds relied upon by the plaintiff are not registered, hence on the basis of these mortgage deeds the relief sought by the plaintiff cannot be entertained. This court is of the view that the prima-facie it is presumed that the said mortgage deeds are notarized and huge amount of Rs. 15,00,000-00 has been paid towards mortgage amount to the defendant Nos. 1 and 2. Further, it transpires that by bringing the present application, plaintiff has only prayed for protection of his possession. The question of entertaining the document in question can be considered by leading the evidence. Prima-facie this court is of the firm view that the possession is being handed-over by the defendant Nos. 1 and 2 to the plaintiff by executing the mortgage deeds and in lieu of that defendant Nos. 1 and 2 have accepted Rs. 15,00,000-00. Further, during the arguments Id. Advocate for the defendant Nos. 1 and 2 have vehemently argued that the plaintiff has not shown single

evidence from where he got Rs. 15,00,000-00 and the plaintiff has failed to give any explanation of source of this huge amount. Of course, this court is of the view that the plaintiff has not given any explanation for source of this income. At the same time it is presumed that the defendant Nos. 1 and 2 have accepted the said amount by executing the mortgage deeds unless contrarily proved. Therefore, to some extent it can be believed that transaction took place between the parties.

11. Further, it transpires from the clause No. 3 of the mortgage deed at mark 3/11 that if the defendant Nos. 1 and 2 want to sell the disputed properties in that case the defendant Nos. 1 and 2 require to take consent of the plaintiff. Further, this court is of the view that the defendants have not brought on record the affidavit of the witnesses who have identified the parties and were present at the time of execution of mortgage deeds before the Notary. Therefore, this court has reason for presumption that the say of the defendants cannot be believable at this juncture.

12. Ld. advocate for the defendant Nos. 1 and 2 have relied on the case of Harshadkumar Kantilal Bhalodwala & 1 v/s Ishwarbhai Chandubhai Patel & 2, reported in 2010 (2) GLR 1041. This court has respectfully considered the ratio laid down in the said case law. But, this court is of the view that the facts of the case relied upon by the defendants are quite different than the case on hand. The facts of the case relied upon by the defendants in which there is a fact of agreement to sale and payment of Rs. 4,50,000-00 in which concerned party has failed to give

explanation for payment of Rs. 4,50,000-00. While in the case on hand plaintiff has sought the relief of protection of his possession. Further, the defendants have not adduced cogent evidence regarding non-receipt of mortgage amount. The defendants denial is not suffice the defence.

13. Further, Id. Advocate for the defendant Nos. 1 and 2 has relied on the case of Raysing Hurji Bhil v/s Vaniben Manjibhai, reported in 2007 (1) GLR 562. The facts of the case law relied upon by the defendants is quite different than the case on hand. This court is of the view that the documents in question are to be entertained in evidence or not can be considered by leading the evidence. In the case on hand, possession has already been handed-over by the defendant Nos. 1 and 2 to the plaintiff.

14. Thus, in view of the above discussion this court is of the view that plaintiff has partly succeeded to prove his prima-facie case and if status-quo is not granted against the defendant, irreparable loss would occur to plaintiff and balance of convenience is also in favour of the plaintiff. Hence, I answer point No. 1 to 3 partly in the affirmative and in reply to point No. 4, I pass the following order in the interest of justice.

: O R D E R :

- ➔ Present injunction application Ex. 5 preferred by the plaintiff is hereby partly allowed.
- ➔ Both the parties are hereby directed to maintain status-quo of the suit properties in respect of the possession, right and title of the disputed properties till final disposal of the suit.

- ➔ Costs of this application shall be cause of the suit.
- ➔ Pronounced in the open court on 21st day of July, 2016.

Date : 21-07-2016

Place : ANAND

(Kiritkumar Babubhai Vaghela)

Additional Civil Judge,

Anand,

JUDGE CODE - GJ-01142