

REGULAR CIVIL SUIT NO. 111 of 2016

ORDER BELOW EXH.5 :-

- (1) The plaintiff has preferred an ad-interim application under Order-39, Rule (1) and (2) and Section 151 of the Civil Procedure Code to obtain relief as prayed in para (5) of the present application supporting with affidavit along with the suit. The brief facts of the plaintiff's case are that the plaintiff and co-defendants no.1 and no.2 are brothers and sister. The plaintiff's ancestral land of R.S.no.327-4 acres and 15 gunthas, R.S.no. 328- 8 acres and 37 gunthas, R.S.no. 340- 8 acres and 27 gunthas and R.S.no. 341-10 acres and 37 gunthas which was in total 39 acres and 26 gunthas of land situated at village Zerda, Taluka Deesa. Out of which 29 acres and 26 gunthas (R.S.no.327- 4 acres and 15 gunthas, R.S.no.328- 5 acres and 37 gunthas, R.S.no. 340- 8 acres and 27 gunthas, R.S.no. 341- 10 acres and 37 gunthas) of land was sold to Panchal Babulal Keshavlal in 1988.
- (2) The plaintiff's father had sold 5 acres and 27 gunthas of land out of total 8 acres and 27 gunthas of R.S.no. 328 known as *Dana ni vat valu*. The remaining 3 acres and 0 gunthas of R.S.no. 328 was kept by plaintiff's father with him. Which is not transferred to anyone till date. Later on the defendants had purchased field of R.S.no.328 known as *Dana ni vat valu*. Panchal Babulal Keshavlal owned 5 acers and 27 gunthas which he sold to the defendants and the possession

was also transferred. The remaining 3 acres and 0 gunthas of land was entered in name of plaintiff and co-defendants vide Entry no.1458 after demise of plaintiff's father. The defendants approached the plaintiff to purchase the said land which the plaintiff denied. Since last one and half years the defendants have entered forcibly. Which an illegal act since beginning. The plaintiff had asked the defendants to vacate plaintiff's land of 3 acres and 0 gunthas but the defendants threatened the plaintiff and told him to go away.

- (3) The defendants have taken possession of the said land wrongfully. Therefore the plaintiff had issued a notice to the defendants on 1/3/2016 through his advocate by RPAD. Which was served to the defendants on 8/3/2016. But the defendants have not given possession of the said land to the plaintiff. Therefore the plaintiff has to file the present application for interim injunction against the defendants.
- (4) The plaintiff has prayed for temporary injunction in his favor as per para 5 of this application. The notices were issued to the defendants, which were duly served upon them. The defendants have appeared through their Ld. Advocate Mr.N.M.Chavda. He has filed written statement vide Exh. 13. The co-defendant no.1 was deleted as the plaintiff had declared vide pursis Exh.-17 that address of co-defendant no.1 is not available. The learned advocate for plaintiff Mr. B.B.Maidh has argued on behalf of the plaintiff. The learned advocate for the defendants Mr.N.M.Chavda has filed written arguments vide Exh.-23.
- (5) The defendants have denied all the averments of the suit as well as

the present application for interim injunction. They have contended that the plaintiff has not produced death certificate or Pedigree of late Brahman Sukhrambhai Hathibhai. The suit land of R.S.no. 328- 3 acres and 0 gunthas of land was of new tenure(navi sharat) which was sold by the plaintiff and co-defendant no.1 to Babulal Keshavlal Panchal on 6/6/1990 for Rs.20,000/- on stamp paper or Rs.50/-. The possession was also transferred to Babulal Keshavlal. He was in possession on 6/6/1990. On 15/5/1992 the possession was transferred to co-defendant no.1 Jamabhai Haribhai Rabari. The plaintiff and co-defendants are not in possession of the suit land since 1990. The plaintiff has not produced the four boundaries of the suit land. On 12/11/2013 Trivedi Babulal Sukhram had declared on stamp paper Rs.50/- that the said land is of new tenure therefore after converting it to old tenure he will execute the registered sale deed to defendant no.4. The plaintiff is not in possession since 1990 so has not given true cause of action to file the present suit therefore the suit is liable to be dismissed under Order-7, Rule-11. The plaintiff has not used proper stamp fees. The plaintiff is not in possession since 1990 so the suit is barred by law of limitation. The defendants have improved the land and are cultivating it.

(6) The defendants have relied upon the following citations:

(i) Madhukarbhai Trambaklal Shah through P.O.A. Jigneshbhai M. Shah & Ors. v. Sterling Bopal City Co-Op Housing society through Administrator & Ors. 2009(1) GLR 86

Wherein the Hon'ble Supreme Court had granted temporary injunction and restrained the purchaser from transferring the property

during pendency of the suit.

(ii) M/s. Prabha Construction(P.) Ltd. and others v. Smt. Shan Trilochan Singh and another AIR 1995 Delhi 79

Wherein the Hon'ble High Court has held that when plaintiff had filed the suit after three years or more after receipt of notice was time barred and liable to be rejected.

(iii) Rabindra Kumar Shaw(D) by L.rs. v. Manick Lal Shaw AIR 2008 SC 646

Wherein the Hon'ble Apex Court has held that the High Court had rejected the temporary injunction on technical ground of non impleadment of the three sons of the defendant.

(7) The following issues arise for the determination of the present application :

1. Whether the plaintiff has prima-facie case?
2. Whether the balance of convenience is in favor of plaintiff?
3. Whether the plaintiff proves that if the injunction is not granted in his favor then he will suffer irreparable loss which cannot be compensated in terms of money?
4. What order?

(8) My findings for the afore stated issues are as follows :

1. In negative.

2. In negative.
3. In negative.
4. As per final order.

REASONS

(9) Issue no. 1 to 3 :-

As the above mentioned issues are interlinked with each other, to avoid repetition and for the sake of convenience, I discuss them simultaneously. I have perused the documents on record, written statement and written arguments filed by the defendants and the citations. Heard learned advocate for both the parties to the suit.

The present plaintiff has produced documentary evidences to show his prima-facie case vide Mark 4/1 to 4/7. The defendants have produced documents vide Mark-14/1 to 14/3. It is not in dispute that plaintiff's father Brahman Sukhrambhai Hathibhai had sold 29 acres and 26 gunthas (R.S.no.327- 4 acres and 15 gunthas, R.S.no.328- 5 acres and 37 gunthas, R.S.no. 340- 8 acres and 27 gunthas, R.S.no. 341- 10 acres and 37 gunthas) of land to Panchal Babulal Keshavlal in 1988. Names of plaintiff and co-defendants were entered at revenue records as legal heirs of late Sukharam Hathiram vide Entry no.3417 on 25/7/2003. The co-defendant no.1 had sold the disputed land of R.S.no.328 paiki 2 ad measuring H-AR-PR 1-21-41 Sq. Mtr of land to the defendant no.4 on 12-11-2013. The said document is not a registered sale deed but it is mentioned in it that Rs.2,61,000/- was received and it was agreed to execute sale deed in short

period of time. It is also mentioned that there is no question of transferring possession as the defendant no.4 is already in possession. On the other hand the plaintiff has failed to produce any documentary evidence to show his possession over the suit land. The plaintiff is aware of the fact of defendant's possession over the suit land since 1990. But he has choose no to challenge it till filing of the present suit in the year 2013.

In SUMRA ABU HAJI vs. HIMATSINHJI JUVANSINHJI JADEJA 1985(2) GLR 741 It has been held as below:

5. (A) LIMITATION ACT, 1963 (XXXVI OF 1963) - Sec. 27 (Equivalent to Sec. 28 Limitation Act, 1908) - Art. 65 - Suit for possession of immovable property - On the expiry of the period of limitation, even the title of the true owner is,extinguished, and it vests in the person in adverse possession for the requisite period.

in the decision of *M/s. Bharat Barrel Drum Mfg. Co. v. Employees State Insurance Corporation*, 1971 (2) SCC 860, Hon'ble Supreme Court held as under :

"The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of evidence documentary as well as oral to enable the defendant to contest the claim against him; secondly to give effect to the principle that law does not assist a person who is inactive and sleeps over his rights by allowing them when challenged or disputed to remain

dormant without asserting them in a Court of law. The principle which forms the basis of this rule is expressed in the maxim *vigilantibus et non-dormientibus, jura subveniunt* (the laws give help to those who are watchful and not to those who sleep).

The interlocutory remedy is intended to preserve the rights of the parties, which may appear on a prima facie case. The court also should not be oblivious of the fact that in restraining one party from exercising what is considered its legal rights is a very serious matter and before grant of temporary injunction the comparative loss or injury likely to be caused to other side has also to be considered.

I am of the view that the plaintiff has failed to prove his prima facie case. He has not proved his possession over the suit land. Therefore, balance of convenience is also not in his favour and there is no question of irreparable loss as he is not in possession of the suit land since long time. For the above stated reasons my reply for Issue no. 1, 2 and 3 is in negative and for Issue no. 4 I order as follows in the interest of justice:

: O R D E R :

1. The plaintiffs' application Exh.-5 is rejected.
2. Cost shall follow the final judgment of the suit.

Pronounced in the open Court today the 29th day of January, 2018.

Date :29/01/2018.

Deesa.

(Sheetal Venkateson Mudaliar)

2nd Additional Civil Judge,Deesa.

Code no. GJ01217.