
REGULAR CIVIL SUIT NO. 08 of 2021
ORDER UNDER EXHIBIT NO. 5 (T.I.)

[1] The plaintiff has preferred an application for seeking temporary injunction against the defendants vide Exhibit No. 5 as per the provision of Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908.

[2] The present suit has been instituted by the plaintiff against the defendants for the declaration and permanent injunction. It is stated that the plaintiff and defendant No. 1 and 2 are the brothers and sisters and the defendant no. 3 is the purchaser of the suit property. It is stated that the property bearing survey no. 254, 255, 256, 257, and 298 were owned by her grandfather Deceased Sipai Anubhai Mahmadbhai vide Entry no. 132, 386. Her grandfather has three sons namely Hasubhai, Umarbhai and Sulemanbhai. The plaintiff and Defendant no. 1(1) to 1(4) and the Co-defendant are the children's of Sulemanbhai Anubhai.

2.1) It is stated that The three brothers have got the partition entry No. 711 for the respective part; wherein the Old Survey no. 298 was given to the Hasubhai Anubhai Sipai, and the same has been divided in three equal parts, where in old survey no. 298 paikee 5 akar, 07 guntha; was given to plaintiff and her brother and sisters and mother as a share of their father. The suit property has been described as-
[Old Survey no. 298/3, (New Survey No. 375)

Area-2H-25-63 Akar-2.28 known as Talavyu]. It is stated that the plaintiff has inquired about her property but her brother and sisters and not replied satisfactorily.

2.3) Thereafter she it is come to her knowledge around one month before that the property is enter in the name of the Defendant no. 3, and the same has been sold to the father of defendant no. 2 by the defendant no. 1(1) to 1(4) on 01-09-1989, during the minority of the plaintiff. It is further stated that the same has been entered vide no. 1387 at the village record and has not been signed by the plaintiff or the codefendant and sold without their consent. It is further stated that defendant no. 2 has sold the property to the defendant no. 3 vide entry no. 1469. It is stated that the sale transaction were done during the the minority of the plaintiff and without their consent therefore the same is not binding upon them. It is stated that the defendants have refused to part with their share, and threatened them. The property may be further transferred to the land grabbers therefore the present suit has been filed. They claimed the 1/6th share in the suit property; and stated that if the present application is not allowed, it will cause irreparable losses to the plaintiff and the property may be further transferred, Accordingly prayed for the allowing the present application as prayed for.

[3] The notice/process has been served upon the defendants. The Defendant no. 1 and no. 2 have not appeared and the suit has been ordered to be heard Ex-parte against them on Date: 21/07/2021, and the defendant no. 3 has filed the reply vide Ex. 24; wherein after denying the facts narrated in the plaintiff para wise, it is stated that the suit is barred by the law of limitation as the same has been filed after the lapse of 34 years. It is stated that when the property was owned and possessed by the defendant no. 1 the same has been transferred to the defendant no. 2 vide sale deed no. 956/1989 on Date: 01-09-1989, for the consideration of Rs. 27,500/- and the same has been entered vide 1387 and the same has been certified by the Deputy Mamlatdar on Dated: 06-01-1990. The same has been given to his daughter Madinaben vide Entry no. 1410, Dated: 21-05-1990 and the same has been certified by the deputy Mamlatdar on Dated: 12-07-1990.

3.1) It is stated that the property is transferred to the defendant no. 3 on Date: 17-09-1991 vide Entry no. 1122/1991 for the consideration of Rs. 40,000/- the same has been entered vide 1469 and the same has been certified by the Deputy Mamlatdar on Date: 14-11-1991. The plaintiff has not taken any objection, against all these transactions, till today. The plaintiff is not the daughter of the Sulemanbhai Anubhai, and due to the increase in the rate of the land due to the canal, the present suit has been filed in the collusion of the Defendant no. 1 and 2; accordingly prayed

for the rejection of the present suit and application with cost.

[4] The argument of the parties has been heard, Id. Advocate Mr. I. A. Shaikh on behalf of the plaintiff has submitted that- the defendant no. 3 is not farmer and therefore the agricultural land cannot be transferred to him, and the property was belongs to the Grandfather of the plaintiff, and the defendant has not given her share. It is argued that the consent of the plaintiff not taken in the year 1989/1991 during the said transaction of the suit property. The plaintiff has the right in the suit property and the sale transactions were void ab initio, therefore the application is to be allowed.

5.1) Wherein Learned Advocates for the defendant no. 3 has submitted that- the name of the plaintiff is not shown in the revenue record and property was sold to defendant no. 2 by the document of the mark 4/5 in year 1989 and to the defendant 3 in the year 1991. The suit is barred by the law of limitation and the section 5 of the Limitation Act is not applicable in the present suit, and no cogent reason has shown for the inordinate delay. The reason for non-inclusion of her name in the revenue record has not been explained, and the revenue record is also not challenged and the previous sale deeds has not been challenged by the plaintiff; and that no prima facie evidence has been produced to show that she has any right in the suit property or that she is the daughter of

Sulemanbhai and that the suit is filed in the collusion accordingly prayed for the rejection of the plaint with the present application.

- [6] The plaintiffs have submitted the documents Vide Mark-4/1 to Mark-4/10; where in the padhinama and revenue entries and the revenue record of the property has been produced, vide Mark-04/1 and 4/4 and 4/7 to 4/10 and sale deed of the suit property has been produced vide Mark-04/5 and 04/6.

The defendant has produced the documents in support of the written statement vide Mark-25/1; wherein the sale deed executed in his favour has been produced. I have perused the entire record of the suit.

- [7] Before discussing the factual aspects of the matter, the settled provisions of the law and the principles laid down by the Hon'ble superior courts with regard to Temporary Injunction are required to be taken into consideration. The Hon'ble Apex Court as well as different Hon'ble High Courts by catena of decisions lay down that, the grant of temporary injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the Court. While exercising the discretion the Court applies the following tests-(i) whether the plaintiff has a prima facie case; (ii) whether the balance of convenience is in favour of the plaintiff; and (iii) whether the plaintiff would suffer an irreparable injury if his prayer for

interlocutory injunction is disallowed. The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved, in the light of the said discussion following issues have come up before this court for determination of the present application.

:: ISSUES ::

1. Whether the plaintiff proves that it has prima facie case?
2. Whether the plaintiff proves that, the balance of convenience lies in its favour?
3. Whether the plaintiff proves that the refusal of the injunction will cause irreparable losses to it?
4. What will be the order?

[8] My answers to the above-mentioned issues are, as per the discussion and reasons herein after made, as follows: -

- 1 In the Partly Affirmative.
- 2 In the Negative.
- 3 In the Negative.
- 4 As per final order.

Issue No. 1: -

[9] The object of the interlocutory injunction, as held by the Hon'ble apex court, is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need to the defendants to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the balance of convenience lies, **[Gujarat Bottling Co. Ltd. vs. Coca Cola Company 1995(5) SCC 545.]**

9.1) In the light of the discussed principles, the factual positions of the present applications are to be examined. The plaintiff has stated that the plaintiff and defendant No. 1 and 2 are the brothers and sisters and the defendant no. 3 is the purchaser of the suit property where in old survey no. 298 paikee 5 akar, 07 guntha; was given to plaintiff and her brother and sisters and mother as a share of their father. The suit property has been described as- [Old Survey no. 298/3, (New Survey No. 375) Area-2H-25-63 Akar-2.28 known as Talavyu]. It is stated that the plaintiff has inquired about her property but her brother and sisters and not replied satisfactorily. The same

has been sold to the father of defendant no. 2 by the defendant no. 1(1) to 1(4) on 01-09-1989, during the minority of the plaintiff. It is further stated that the same has been entered vide no. 1387 at the village record and has not been signed by the plaintiff or the codefendant and sold without their consent. It is further stated that defendant no. 2 has sold the property to the defendant no. 3 vide entry no. 1469. It is stated that the sale transaction were done during the the minority of the plaintiff and without their consent therefore the same is not binding upon them.

9.2) In light of the pleadings and reply filed by the defendant no. 3 it is to be noted that the alleged transaction were taken since long back in the year 1989 and 1991 and the same has been remain unchallenged. The fact that she is minor at the time of alleged transaction is to be taken into consideration but the fact of the age of other brother and sisters raise the arrow of suspicion age their names were entered in the revenue record and the sale deed is also executed by them. The plaintiff has produced the only proof of her relation with the deceased Sulemanbhai is the Padhinama of Mark-4/1 which is appears to be created just before the 2 and half month of the filing of the present suit, and no other prima facie evidence has been produced. Therefore in light of the facts and circumstances and the pleadings of the parties, it is to be noted that the existence of the right in the properties as per pleadings are to

be discussed and decided during the trial it is not clear at this juncture the actual right of plaintiff in the suit property. Therefore prima facie at this juncture in the light of the facts and circumstances and the pleadings, without going into the merit of the document, taking into consideration the nature of the right claim by the plaintiff in the plaint; with respect to the suit property and the respective defence raised by the parties, at this juncture after carefully examine the whole record of the suit the Issue No. 1 decided in Partly Affirmative.

Issue No. 2 and 3: -

[10] In the light of the discussion and the averments made in the plaint and present application and reply filed by the defendant, along with the documents produced by the parties, the oral submission made by the Ld. Advocates for the parties and the relevant provisions of the law. For the purposes of avoiding unnecessary repetition of the facts and the circumstances of the application the two other elements viz. (1) balance of convenience and (2) The Question as to irreparable losses to the plaintiff is herein after discussed and decided together.

10.1) It is to be noted that, in light of the discussion made with respect to the issue no.1, the present suit is filed for the claiming the declaration as well as possession of the suit property being sold without the consent of the

plaintiff as she had the right in the suit property. The present two issues i.e. the balance of the convenience and irreparable losses are of the vital importance as to decide whether the present application is to be allowed or rejected. The plaintiff has challenged the sale transaction done in the year 1989 and 1991 by her alleged brother and sisters. It is interesting to note that the defendant no. 1 and 2 have not filed any reply in the present suit and they remain keep quiet; though the admitted sale transactions have been done by them.

It is further to be noticed that no pleadings or prima facie evidence has been produced as to show the date of death of their father and the birth of the plaintiff or her existence at the time of the sale transactions. On the contrary there are number of question arises which are remain unanswered from the pleadings and the documents. Like during the pleadings in the para-2 of the plaint it is stated that when she of seven years of age the share of her father was given to her and her brother and sisters and mother jointly. Now if her name was not entered but the name of defendant no.1/1 to 1/4 has been entered though as per pleadings the age of Lalkhan is shown as 52 and Jubedaben as 56 and and plaintiff as 48, suggest that all of them were minor and only name of present plaintiff was not entered, also raise the arrow suspicion as the no reason is mentioned for the not adding her name only.

10.2) Further it is to be noted that no other prima facie proof of her alleged age and minority has been produced; and as a proof of her relation with the Sulemanbhai only the Padhinama of Mark-04/1 is produced which is appears to be done just two and half month before the filing of the present suit. Further it is to be noted that the present suit has been filed after the lapse of almost 34 years and no reason for the same has been shown for the long inordinate delay. It is to be noted that the revenue record suggest that the these transaction of the transfer of the suit property has been registered and certified by the concerned authority therefore prima facie at this juncture it appears to be done after following the proper procedure.

10.3) Therefore in light of the rival contention of the parties and nature of the property and rights involved in the present suit and the application, it appears that the rights are involved in the present suit are required to be decided during the trial, as same are subject to the principle of law and other evidences. Therefore form the document on the record at this Juncture, without going to the merit of same, in light of the discussion here in above made, the plaintiff has failed to prove that the balance of convenience lies in her favour, as discussed here in above the suit has been filed after the lapse of almost 34 years of sale transaction and the plaintiff has not suggested single cogent reason as to the fact that why the

transaction remain unchallenged for the such a long period of time. The defendant is admittedly in peaceful possession of the suit property since 1991. Further with respect to irreparable losses it is to be noted that in light of the facts and circumstance, as here in above discussed the plaintiff have not shown a single fact or produced any cogent prima facie evidence that the transaction was done without her consent or she was in existence at that time or any reason for waiting till 34 years to get her right in the suit property. On the contrary if the present application is to be allowed it may cause irreparable losses to the defendant no.3 as restricting him from exercising lawful right over the suit property which has been purchased lawfully and the same has been entered in his name in the revenue record after completing the entire necessary requirement in the year 1991, and he is appeared to be bona fide purchaser.

10.4) The Ld. Advocate on behalf of the plaintiff has sent the Judgements of the Hon'ble Court on the date fixed for the order on present application, and the Ld. Advocate has not present and also have not explained the applicability to the same in the facts and circumstances of the present suit. The same are to be taken into consideration respectfully.

1) R/Special Civil Application No.10065 of 2020, Rosanben Hajibhai Deraiya w/o Ganibhai Sorathiya Versus State of Gujarat. On being respectfully perusal; it appears that the Hon'ble High Court has allowed the condonation

of delay of around 1 year before the revenue authority, as to challenge the Mutation entries. In the present suit the same is not under challenged and the present application is for injunction, therefore it is not be applicable to facts and circumstance. 2) Civil Application No. 12644 of 1999, Yuvraj Prithvirajsinhji s/o Maharao Madansinhji Versus Maharani Rajendrakunvarba Saheb & Ors. The Facts of the case are not similar as in the said suit the suit was filed for the partition and the number of proceedings were pending between the parties, therefore the order for status quo has been justified. But in the present suit it is to be noted that not single prima facie evidence has been produced as to show that the plaintiff has right as to cause her irreparable loss, as she has not challenged any mutation entry and the defendants who are the brother and sisters of her have not come before the court and the defendant no.3 is prima facie appears to be a bona fide purchaser in possession of property from 1991, as the here in above discussed. Therefore without going into the repetition as the plaintiff has failed to prove that the balance of convenience lies in her favour or that the rejection of the present application would cause her any irreparable losses, as the legal definition of the word 'irreparable losses' have to be taken into consideration as it has been provided that, Irreparable injury, does not mean that there must be no physical possibility of repairing the injury, but means

only that the injury must be a material one, namely, one that cannot be adequately compensated by way of damages." In the canvas of the facts of present suit no such facts and circumstance exist as show that compensation for damages may not be an adequate remedy.

10.5) It is well settled that the injunction is a discretionary remedy. The court is not bound to grant such relief merely because it is lawful to do so. But the discretion of the court is not arbitrary but sound and reasonable guided by judicial principles, (**Ganesh Daivajna Vs prakash 2000 (3) Mh. L.J. 347**). The exercise of discretion must be in a judicial manner depending on the circumstances of each case. No hard and fast rule can be laid down for the guidance of courts as regards the exercise of such discretion, (**Harcharanjit Vs Deeksha 2008 (3)Mh.L.J. 587 Bombay High Court**).

[11]In the light of the discussion herein above made, as the plaintiff has failed to prove that the balance of convenience lies in her favour as to grant her any relief in the present application, or that refusing the same may cause her irreparable losses i.e. the losses which cannot be compensated in terms of money. Accordingly, the issue no.2&3 is answered in Negative and following final order is passed in the larger interest of the justice with respect to the applications-

:: ORDER ::

1. The Applications are hereby Rejected.

2. The Cost of the Application shall follow the final decision of the suit.

**Pronounced and signed today on 01st Day of April,
2023.**

Date: 01/04/2023.

Place: Tharad.

[JITENDRA SINGH]
Additional Civil Judge,
Tharad. (UID-GJ01406).