



**IN THE COURT OF 2ND ADDITIONAL CIVIL JUDGE,
BOTAD**

RCS/341/2020

PLAINTIFF:

BHUPATBHAI BHAVSANGBHAI SOLANKI

VERSUS

DEFENDANT:

MADHABHAI PUNABHAI BAVALIYA

APPEARANCES:-

- ❖ For Plaintiff:- Shri C. R. Mehta
- ❖ For Defendant:- Shri G. K. Gabu

Order Below Exhibit-5

1. The present application is preferred by the plaintiff for seeking Temporary Injunction against the defendant under Order 39 Rule 1 and 2 of the Civil Procedure Code and Section 151 of Civil Procedure Code for restricting defendants from mortgage, loan, lien or charge and not to transfer possession of the property until the registered document is made in favor of the plaintiff, and restricting defendants from doing masonry work or make any alteration in the suit property.

2. FACTUAL MATRIX:-

It is asserted that an open land of Plot No: 253 measuring 170-71 square meters was purchased by the defendant from Narshibhai Damjibhai Italiya by Registered Sale deed. The defendant has made three parts of the above plot out of which one Northern part has been sold to Bhavnaben Jagdishbhai Bavalia by registered sale deed in 2018 and Southern part to Dharjia Kinjalben Shamjibhai vide registered sale deed in 2018 and for the remaining open plot in between these two, measuring 56.75 Sq. Mtrs. (which is subject matter of the suit, Hereinafter referred as "Suit Property"), a registered agreement to sale has been made in favor of the plaintiff by the defendant on 17/05/2018 at the consideration of Rs. 2,50,000/-. Further asserted that the plaintiff paid a sum of Rs. 1,00,000/- in cash to the defendant and the remaining amount of Rs. 1,50,000/- is to be paid by the plaintiff to the defendant within twelve months. On 16/05/2019, the plaintiff has paid the defendant Rs.1,50,000/- and pursuant to this settlement, the defendant has made an agreement on Rs. 100 stamp paper for receiving the consideration amount. Thereafter despite asking the defendant several times to make a sale deed in favour of the plaintiff, the defendant has refused. Hence the plaintiff through his advocate sent a R.P.A.D. Notice on 22/07/2020 to make a sale deed in favor of the plaintiff and comply with the agreement. When the plaintiff came to know that the other person was trying to take the property, the plaintiff published in the daily newspaper. Hence suit has been filed for Hence this suit seeking the performance of the agreement and to declare and grant permanent injunction and the present application under Order 39 Rule 1 and 2 and Section 151 of Civil Procedure Code, 1908 is preferred.

3. Relief Claimed in Exhibit -5 application:-

The plaintiff has sought following reliefs in the injunction application at Exhibit -5:-

- A. *"To grant the relief of interim injunction to the plaintiff that the defendants shall neither themselves nor through attorney/ agent or servant, mortgage, loan, create lien or charge or not to transfer possession of the property until the registered document is made in favor of the plaintiff, and the property being an open plot defendant neither himself nor through Attorney/agent, servant, relatives shall do masonry work or make any alteration of the property mentioned in Para-5 of the application;*
- B. *To grant any other relief which the court deems fit in the interest of equity and justice and*
- C. *To grant the cost of the application from the defendants."*

4. Proceedings:-

- A. Summons were issued and served to the defendant and learned advocate for the defendant has filed vakalatnama.
- B. On 16/06/2022, The defendant has vide Exhibit-93 filed the written statement/ reply of the plaint and of the Exhibit-5 application.

5. Submission in written Statement:-

The Defendant has submitted that:-

- a. Defendant has denied the averments of the application and plaint and submitted that property has never transferred possession to the plaintiff;
- b. The nephew of the defendant used to take money from the plaintiff and against which as security, agreement to sale dated 17/05/2018 was made by the defendant in favor of the plaintiff;

- c. The defendant has never taken any amount from the plaintiff against the consideration of agreement to sale;
- d. The registered document dated 16/05/2019 is a forged document;
- e. Thereafter as against the payment taken by the Nephew of the defendant, defendant's nephew has transferred his Godown in the name of Son of the plaintiff by Registered Sale Deed. Plaintiff has also suggested to the defendant that now there is no need to make any document as the amount has been settled;
- f. Although after payment, the plaintiff demanded money from the defendant's nephew and because of which the father of the defendant's Nephew was forced to leave the house and against which a written complaint dated 05/10/2020 has been filed;
- g. To create pressure on the Nephew of the defendant, the plaintiff has published in Daily News paper dated 20/10/2020.
- h. Plaintiff is not entitled for the relief as the Agreement to sale has been made without consideration;

6. Oral Arguments for Exh.-5 Application:

From the Plaintiff Side:

Learned advocate for the plaintiff side has argued and submitted that:

- a. The defendant has admitted that the agreement to sale was made in favor of the plaintiff by the defendant;
- b. The plaintiff has also sent notice to comply but no reply has been given by the defendant;
- c. There is nothing on record which shows that the agreement to sale was made for the purpose of security only and no consideration has been given;

- d. The agreement to sale was a registered document and till today the defendant has not challenged or not made any proceeding against the registered agreement to sale;
- e. There is nothing on record which suggests that the registered agreement to sale was created for the purpose of settling the interest;
- f. Plaintiff has a prima facie case.
- g. Balance of convenience is in the favor of the plaintiff.
- h. If the plaintiff is not given the relief, then the plaintiff would suffer irreparable injury and which will not be compensated in terms of money.

From the Defendant's Side:

Ld. advocate for the defendant has submitted that:-

- a. The defendant is having the possession of the suit property and it has never been transferred to the plaintiff or any one else till date;
- b. The registered agreement to sale is for the security purpose only. The agreement to sale was made between the plaintiff and defendant for the purpose of security of the transactions between the plaintiff and defendant's nephew;
- c. Defendant has never taken any consideration amount against the agreement to sale;
- d. The suit property is kept by the defendant for constructing his residential house;
- e. The amount which has been taken by the nephew of the defendant has been settled by transferring the godown in favor the plaintiff's son;

- f. There is no prima facie case.
 - g. Balance of convenience is not in favor of the plaintiff.
 - h. The defendant will suffer irreparable injury if injunction is granted.
7. Considering the pleadings, documentary evidence and arguments advanced by the Learned Advocates for the parties for deciding this application, following issues i.e. points for the determination of the present application under Order 39 Rule 1 and 2 and Section 151 of the Civil Procedure Code, have been raised:-
- 1. Whether the plaintiff proves that the plaintiff is having a prima-facie case?
 - 2. Whether the plaintiff proves that the balance of convenience is weighing in his favor?
 - 3. Whether the plaintiff proves that if injunction as prayed is not granted then he will suffer an irreparable loss which cannot be compensated in the terms of money?
 - 4. What order?
8. My finding regarding the above issues are as follows :
- 1. In the Affirmative.
 - 2. In the Affirmative.
 - 3. In the Affirmative.
 - 4. As per final order.:-

-:: REASONS ::-

9. I have gone through the injunction application vide Exhibit-5, Reply of the Defendant and submissions advanced by the learned advocates appearing for the parties and also gone through the documents as submitted by the parties on record. While considering the settled principle of law at this

stage for adjudicating the present case, entire merit is not required to be discussed.

10. At this juncture, I would like to discuss the Judgment of the Hon'ble Supreme Court in which the Hon'ble Supreme Court has observed that:

"5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is "a prima facie case" in his favor which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in "irreparable injury" to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, 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. The third condition also is that "the balance of convenience" must be in favor of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that it is likely to be caused to the other side if the injunction is granted. If weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject-matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial

discretion in granting or refusing the relief of ad-interim injunction pending the suit.”¹

(Emphasis supplied)

11. For granting the relief of the temporary injunction under Order 39 of CPC, the party has to pass a triple test and satisfy these three ingredients by sufficient evidence. First is that the plaintiff has to prove his case prima facie by submitting sufficient evidence. Secondly, he must also prove that the balance of convenience is in favor of plaintiff and thirdly, if the interim injunction is not granted in favor of the plaintiff then he will have to suffer irreparable loss which cannot be compensated in terms of money. Further, it is also settled principle of law that all above ingredients are interconnected to each other and it is the duty of the plaintiff to prove all the three ingredients and if above three ingredients are proved by the plaintiff, then the plaintiff is entitled for interim injunction.

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(Emphasis supplied)

TRIPLE TEST

12. **POINT NO.1**

PRIMA FACIE CASE:

Prima facie case basically means “sufficient to establish a fact or raise a presumption”. Therefore, while considering the above ingredients and considering the facts as averred by the plaintiff in his plaint as well as in the present application for temporary injunction, it clearly and ostensibly transpires from the documentary evidence submitted by the plaintiff which is mark 4/1 to 4/9 that the above suit property was purchased by the defendant from one Narshibhai Damjibhai Italiya vide Registered Sale

¹ Dalpat Kumar Versus Prahlad Singh, AIR 1993 SC 276.

Deed Dated 22/03/2011. It is admitted by the defendant that three parts have been made of the Said property. Out of which the Northern and Southern part of the Said Property has been sold. The remaining portion Measuring 56.75 Sq. Mtrs is the Subject matter of the suit. It is admitted by the defendant that an agreement to sale was made by the defendant in favor of the plaintiff vide Registered Agreement to Sale Document No. 2294/2018 dated 17/05/2018 copy of which has been filed along with the suit vide Mark 4/4. As per the say of the plaintiff the amount of Rs. 1,00,000/- has been paid by the plaintiff to the defendant but the defendant has denied that the amount has been paid. As per the registered agreement to sale, the suit property is agreed to be sold to the plaintiff at the consideration of Rs. 2,50,000/- (Rupees Two lacs Fifty Thousand Only) and the defendant has accepted Rs. 100,000/- (Rupees One Lac Only) in cash and the remaining amount of Rs. 1,50,000 (Rupees One Lac Fifty Thousand Only) is to be paid within 12 months from the date of agreement to sale and the Sale agreement shall be made. Vide Mark 4/5 An agreement on the stamp paper of Rs. 100 dated 16/05/2019 is submitted. As per the agreement, the defendant has received the amount of Rs. 2,50,000/- (Rupees Two lacs Fifty Thousand Only) and upon bare perusal it appears that the said written agreement has not been challenged till date and no proceedings have been initiated. Thereafter the plaintiff has also sent a legal notice dated 22/07/2020 produced vide Mark 4/6 and urged to perform as per the terms of the agreement to sell. The defendant has not denied that the notice has not been sent to him. The defendant has also remained silent on the point that any reply has been filed by him pursuant to this legal notice. The defendant has raised point

that the Agreement to sale was made for the security purposes only but looking at the Agreement to sale and documents submitted by the plaintiff as well as defendant, there is no iota of evidence which suggests that the registered agreement to sale was made for the security purpose only. I am of the view that the plaintiff has succeeded to prove that he is having a prima facie case against the defendant. Hence I answer Issue no. 1 in Affirmative.

13. **POINT NO.2**

BALANCE OF CONVENIENCE:

The balance of convenience basically means “to determine the party who would suffer greater harm/loss and that party would be said to be having a balance of convenience”.

Looking at the facts, circumstance and case record it appears that the possession is with the defendant only and it has never been given to the plaintiff. The registered agreement to sale has never been challenged by the defendant and thereafter sending the legal notice also, the defendant has not replied and also not complies as per the terms of the agreement to sale. Therefore the comparative mischief or inconvenience likely to be caused to the plaintiff from withholding injunction will be greater than by allowing it. Therefore I am of the view that the balance of convenience is also in favor of the plaintiff. Hence I answer issue no.2 in Affirmative.

14. **POINT NO.3**

IRREPARABLE INJURY

Irreparable injury basically means “an injury which is impossible to rectify”. Further considering the facts and circumstance of the case in hand at this stage, it appears that the defendant is in possession and if the status of

the suit property is changed then it may lead to serious injury to the plaintiff and may also lead to multiplicity of proceedings. If the injunction is not granted then it will cause serious injury to the rights and interest of the plaintiff and it will cause irreparable injury to the plaintiff which could not be compensated in terms of money. Hence I answer issue no.3 in Affirmative.

Point No. 4

15. In the judgment of Gitaben Govindbhai patel Versus Rameshbhai Hirabhai Patel,² It was held by the Hon'ble High Court of Gujarat that,

"13. Now, it is well settled principle of law that so far as the suit based on agreement to sell for specific performance of contract, even if that agreement to sell is not registered, same can be considered for collateral purpose. Such agreement to sell can be considered for the purpose of Section 53A of the Transfer of Property Act. Even an unregistered document can be used as evidence for collateral purposes. If there is contract of agreement to sell and the same is not refused by the defendant and further when legal notice has been issued to the defendant for purpose of that contract, if no injunction is granted in favour of the plaintiff, then, there might be multiplicity of litigation in case defendant transfers the property during the pendency of the litigation. Since the right of property is involved in respect of agreement to sell, it is necessary that the nature of the property does not change its status during the pendency of the suit",

Hence, in the view of all the above circumstances and satisfaction of all the three ingredients and settled position as expressed above, for the issue no. 4, the following order has been passed :-

² C/AO 35/2021, Gujarat High Court.

-:: ORDER ::-

1. The present interim injunction application as filed vide Exh.-5 by the plaintiff is hereby ordered to be **Partly Allowed.**
2. The defendant shall neither himself nor through attorney/ agent or servant mortgage, loan, create lien or charge and not to transfer possession of the Suit Property i.e. Middle Portion of Plot No: 253 measuring 56.75 square meters till the final disposal of the suit;
3. The defendant shall neither himself nor through Attorney/agent, servant, relatives do masonry work or make any alteration of the Suit Property i.e. Middle Portion of Plot No: 253 measuring 56.75 square meters till the final disposal of the suit;
4. No order as to costs.

Pronounced and signed in open court today on this 23rd day of April, 2024
at Botad.

Date:-23/04/2024

Place:- Botad.

(RAVINDRA KUMAR)

2nd Additional Civil Judge,

Botad

(Code No. GJ01713)