

MANSINGBHAI KALUBHAI BARIYA
VS.
VALSINGBHAI KALUBHAI BARIYA AND OTHER

ORDER BELOW EXH-5

1. Heard Ld. Ad. Mr. R B Bhavasar for the plaintiff and Ld. Ad. Mr. P M Padhiyar for the defendant no.1, Ld. Ad. Mr. M M Prajapati for defendant no.2. Perused the record of the case.
2. The instant application has been filed by the plaintiff seeking relief of interim injunction for restraining the defendants from obtaining any permission and from alienating the suit land situated at Sanjeli, bearing revenue survey no. 5 (old no. 225), admeasuring hectare 0-35-29 (in short referred to as “**suit land**” hereinafter).

Short Facts:-

3. Short facts of the grievance of the plaintiff raised in the present application may be summarized as under;
 - I. That the plaintiff and defendant nos. 1 and 2 are real brothers and legal heirs of the deceased Kalubhai Moghjihbai Bariya. It is the case of the plaintiff that the suit land was originally a government land which was cultivated by the late Kalubhai Moghjihbai, and after his death his sons i.e. plaintiff and defendants were cultivating the suit land. However, as per the customs of the parties of the suit, elder son-Valsingbhai Kalubhai, defendant no.1 claimed the suit land from the government, and as per the order passed in Ganot Case no. 20/84, dated 23/4/1984, the land was allotted in the name of defendant no.1 only, but the amount was paid out of the savings of late Kalubhai Moghjihbai. Thus, the suit land was

belonged to late Kalubhai Moghajibhai but it is mutated in the name of defendant no.2 alone. It is also submitted that even the defendant no.2 was residing in the joint family in 1984 and he had no independent source of income.

- II. Further, their father late Kalubhai had made partition of the suit land during his lifetime and as per the said partition all three brothers i.e. plaintiff and defendants have been cultivating their separate shares as per partition and defendant has also constructed a house in his share of land.
- III. It is further submitted that defendant no.2 filed a suit being RCS no. 3/2019 with respect to the suit land, however the same was withdrawn after amicable settlement through the *Panchas*.
- IV. The plaintiff also approached the deputy collector, Jhalod for entering his name as joint holder of the land on the basis of the Government Circular dated 15/03/1996. Further, the suit land is restricted tenure land under section 73AA and plaintiff came to know that the defendant no.1 has been trying to obtain permission to change its tenure and to transfer the same to third party.
- V. In such circumstances, plaintiff has submitted that the he has strong prima facie case, balance of convenience lies in the favour of the plaintiff and if interim injunction as prayed is not granted in favour of the plaintiff he shall suffer irreparable loss. Therefore, it is prayed that the present application be allowed.

Written Statement:-

4. On due service of the process of the court, defendants appeared before the court through their learned advocates and defendant no. 2 filed his Written Statement at Exh-23, wherein he has admitted

all the averments of the plaint without any exception and also stated that he has no objections if the present application is allowed by the court.

5. Whereas, defendant no.1 filed Written Statement at Exh-15 wherein he denied all the averments of the suit and submitted that basically he had purchased the suit land in 1983 but as the said transaction was barred by section 43 of the Tenancy Act, proceedings were initiated as tenancy case no. 13/83 by the Mamlatdar /Agriculture Tribunal, Jhalod, wherein the suit land was entered as waste land vide entry no. 714. Then after, defendant no. 1 claimed the said land which was granted in favour of defendant no.1 as permanent holder vide *T.H.no.Ganot/Case no.20/84*, dated 24/04/1984 with condition to pay rs. 424/- and other encumbrances on the same day. Therefore, the defendant no.1 owns the suit land as an independent owner. Further, it is also submitted that the neither late Kalubhai Moghjbhai nor plaintiff nor defendant no.2 raised any objections regarding ownership of the defendant no.1 till 2019. He has further submitted that the present suit is barred by the principle of Res Judicata for the reason that the plaintiff was a party to the earlier suit and the same was already disposed of.
6. Moreover, it is argued that the plaintiff has to demonstrate his legal right to make a strong prima facie case, however plaintiff has miserably failed to do so. In summing up, he urged this court to reject the present application being devoid of merit.
7. I have heard arguments of both the side and considering the facts case and submissions made before this court following issues

emerge for consideration in order to adjudicate the present application;

1. Whether the plaintiff proves that he has strong prima facie case in his favour ?
2. Whether the plaintiff proves that balance of inconvenience lies in his favour ?
3. Whether the plaintiff proves that he will suffer irreparable loss if interim injunction is not granted ?

Answers to issues and Reasons there for: -

8. For the sake of brevity all these issues are discussed hereinafter altogether as they are inter-connected with each other.
9. It is pertinent to note here that the relief as prayed for by way of this application is discretionary and equitable in nature and it can be granted only if the plaintiff successfully establishes all the above issues in his favour. Principles governing the aspect of interim injunction have been propounded by the Hon. Apex Court time and again, that the powers of court are discretionary in nature which can be exercised in appropriate cases where the court is of the prima facie opinion that all the necessary requirements have been established by the plaintiff.
10. Having heard both the side, and having perused the record, it appears that the plaintiff is before this court claiming to be joint holder of the suit land. It is admitted fact that the plaintiff and defendants are real brothers. It can be clearly seen from the perusal of the record that the whole controversy arisen when the name of defendant no. 1 was entered in revenue record as a holder of the suit land. On one hand plaintiff claims that he is co-sharer of the

suit land, and on the other hand defendant no.1 contests that the suit land is his independent property. It is also admitted fact that earlier a suit was filed and the same was withdrawn. But at this juncture, it is pertinent to note that the mere withdrawal of suit by plaintiff does not create a bar of Res Judicata. Therefore, the principle of Res Judicata does not apply to the case on hand for the simple reason that the earlier suit was not decided on merits but merely withdrawn.

11. The plaintiff claims to be in possession of the part of the suit land, but the revenue record suggests that the suit land was granted to the defendant no.1 only. Even the plaintiff has not placed on record any material which support his claim except the report of the Circle Officer at Mark-32/2 along with *Panchnama* and statements of *Panchas*. However, it is to be noted that the said documents cannot be relied upon as prima facie gospel truth, but the same is required to be undergone the test of the evidence at a proper stage. Further, plaintiff has not submitted any affidavit of the such third party to support his claim of possession.
12. Moreover, it appears that late Kalubhai Moghajibhai had never challenged the grant of the suit land in favour of defendant no.1. Even after death of Kalubhai Moghajibhai in 2004, the plaintiff has not asked for his right till the present suit.
13. It is also pertinent to note that the defendant no.2 who filed the earlier suit RCS no. 3/2019 has not made any statement with regard to the settlement arrived at in the said suit. It appears that the order passed in RCS no. 3/2019 clearly states that there was a written settlement on 10/03/2022 and both the parties agreed to abide by

the terms and conditions of the same. However, neither plaintiff nor defendant has placed such writing on record. Further, plaintiff has pleaded that the defendant has been trying to obtain necessary permission from government without consent of the plaintiff, but plaintiff has not produced any material showing such intention of the defendant to convert the tenure of the suit land or intention to sell it to third party.

14. What amounts to prima facie case is nowhere defined in the Code. Therefore, in common parlance of the term it can be said that the relief of the plaintiff is based on the foundational facts which are supported by material on record at present and also that the plaintiff has a good case to go for trial. Therefore, at this juncture, the prime consideration is not to decide the case on merits but to arrive at *prima-facie* opinion whether the plaintiff has in his favour all the issues viz. "prima facie", "balance of convenience" and "irreparable loss". As noted earlier, there is no dispute about relationship between the parties, but the rights of the parties *qua* the suit land can only be established and/or decided after affording opportunities to both the parties to lead their evidence. Therefore, at present, I am of the view that the plaintiff has not a prima-facie case against the defendant for grant of interim relief for the reason that he cannot be protected as against the person who is holder of the suit land as per the revenue records. Even otherwise, it is the case of the plaintiff that plaintiff and defendants are co-sharer / co-holder of the suit land. In such circumstances, it is settled law that the order of injunction cannot be passed against the true owner. Moreover, the factors of balance of convenience and irreparable loss do not appear to be in favour of the plaintiff as against the defendant considering the aforesaid facts and circumstances of the case.

15. Considering the aforesaid, I am not convinced that the plaintiff has a strong prima facie case in her favour. So in view of the aforesaid discussion and reasons, I answer all the issues in **NEGATIVE** and resultantly I am not inclined to exercise discretionary power in favour of plaintiff by way of any interim relief. Hence, following order in the interest of justice;

-- ORDER --

- A) The present application at Exh-5 preferred by the plaintiff is hereby rejected.
- B) Cost shall follow the event of the cause.

Order signed and pronounced today on 06TH February, 2026 in an open court.

Date : 06-02-2026
SANJELI

DR.T.R.GHONIYA
PRINCIPAL CIVIL JUDGE
SANJELI- GJ01561.