

RCS NO: - 98/2011
ORDER BELOW Exh. -5 & 42

1.The present application is given by the plaintiffs under the provisions of Order 39 Rules 1 and 2 read with section 151 of the code of Civil Procedure along with the suit filed against defendants for obtaining temporary injunction.

2.The short facts of this application and the suit are that, land bearing Block Number-1164 old Survey No. 961 a/c No:- 533 ad-measuring 1-64-10 Hector Arre-Sq.mts Akar Rs. 10.13/- of Moje Village Soja, Ta:- Kalol, District, Gandhinagar (hereinafter referred as suit property for the sake of convenience and brevity) It is submitted that suit properties was owned by the grand father of the plaintiffs and defendants Late Lalaji Vastaji as servitude land and after the death of the Lalaji Vastaji the suit land came to the Madhuji, Revaji and Maganaji as heirs of the deceased and after the death of them the suit land comes to the parties of the suit and to the heirs of Maganji Lalaji and they are all in the possession of the suit land and also cultivating the same and plaintiffs are cultivating in the land at eastern side of the suit property and there is 1/3 share of the plaintiffs and 1/3 share of the defendants and 1/3 share of the heirs of the Maganji Lalaji. Further it is submitted that

when the father of the defendants was alive at that time plaintiffs have requested to the father of the defendants to enter in the village form NO. 7/12 but at that time father of the defendants have told that there is right of the plaintiffs in the suit property and due to good relation with them plaintiffs' have relied upon them and defendants have entered their names as heirs in the revenue record and defendants have also given promise to enter the names of plaintiffs in the revenue record but before one week of filling of this suit defendants have refused to enter the names of plaintiff's in the revenue records and threatened plaintiffs to sale away the suit land to the third party and therefore the plaintiff has filed this suit for declaration, partition and has filed this application to restrict the defendants from transfer or alienating the suit land to third party by any mode of the transfer and not to create any charge over the suit lands and to obstruct the plaintiffs from cultivating land as prayed in para 8 of this application till the pending disposal of the suit.

3.An urgent show cause notice was issued to defendants and in response thereto, defendants appeared and filed reply vide Exh.16 wherein, defendants have denied all

the facts of the plaintiffs case and contended suit of the plaintiffs barred by delay and latches, jurisdiction and limitation and has suppressed the material facts. It is submitted that suit property was not of the forefather of parties Lalaji Vastaji and denied that the said land was not allotted by Govt. to the Lalaji vastaji and and also denied that said land was not come to the son of Lalaji Vastaji i.e. Madhuji, Revaji and Maganji as heirs and also denied that no 1/3 share was there in the suit land of plaintiffs and heirs of Maganji Lalaji. Further it is submitted that names of the plaintiff were not there on the record because there is no rights of the plaintiffs in the suit land they have never approached to defendants nor their father to enter their name in the revenue record. Further it is submitted that if the defendants have promised to enter their names in the revenue record after the names of the defendants were brought on record then names of the defendants were entered in the year 1991 and till filing of the suit plaintiffs have not done anything which fact itself proves the false case of the plaintiffs. Further it is submitted that plaintiffs have not mentioned that in which portion of the land they are in possession in the prayer clause of the suit and have also not mentioned the four boundaries of the

suit land have prayed for whole suit land therefore it is contradictory statement made by the plaintiffs in their suit. Further it is also submitted that the suit land was allotted to father of the defendants as per the consolidation Scheme and as per the scheme at that time defendants father was owner of the suit land and same was entered in the revenue record vide entry No. 402 which is produced by the plaintiffs and name of the defendants were entered in the year 1991 vide mutation entry no. 4242 on dt. 29/10/91 and plaintiffs have never challenged entry No. 402 till today but due hike of land price plaintiffs have created false story and filed this suit, therefore this suit is not maintainable therefore, plaintiffs have no right to file such suit, so, interim application should be rejected with costs. Plaintiff have filed the rejoinder affidavit against the reply of the defendants wherein he has denied that facts of the reply and has repeated the facts of the suit and injunction application. Further they have mentioned details of the court commissioners report and also stated that they have given public notice on 28/2/2011 in local news paper and has also given notice to Talati Cum Mantri, Mamlatdar, Kalol and Collector, Gandhinagar that defendants are trying to sale away the suit land.

4. Further during the pendency of the suit upon the application of defendants No. 5 and 6 at Exh-22 plaintiff's have joined defendants no. 5 and 6 in the suit by order of the court and in response thereto, defendants appeared and filed reply vide Exh.39 wherein, defendants have supported the claims of the plaintiff and stated that there is 1/3 share of them in the suit land and also submitted that they are not agreed to the reply filed by the defendants No. 1 to 4 and the same is not binding to them.

5. Further defendants No. 5 and 6 have also filed the counter claim against the defendants No. 1 to 4 at Exh- 41 wherein they have also claimed 1/3 share in the suit property and have also prayed for the injunction vide injunction application at Exh- 42 wherein they have prayed for to restrict the defendants No:- 1 to 4 from transfer or alienating the suit land to third party by any mode of the transfer and not to create any charge over the suit lands and to dispossess the defendants No 5 &6 from land as prayed in para 8 of this application till the pending disposal of the suit.

6. Defendants No. 1 to 4 has also filed their reply against the Exh- 41 and 42 wherein they repeated the facts of their reply filed at Exh-16.

7. In view of the rival pleadings of the parties following points arise for my determination:

For Exh-5

1. Whether the plaintiffs prove their prima facie case?
2. Whether the balance of convenience is in plaintiffs' favour?
3. Whether plaintiffs will suffer irreparable injury if the injunction as prayed for is refused?
4. What order?

5. My findings to the aforesaid points are as under for the following reasons:

1. In the negative.
2. In the negative.
3. In the negative.
4. As per Final Order.

**For Exh- 42 injunction application filed by
defendant No. 5 & 6**

1. Whether the defendant proves their prima facie case?
2. Whether the balance of convenience is in defendant's favour?

3. Whether defendant will suffer irreparable injury if the injunction as prayed for is refused?

4. What order?

6. My findings to the aforesaid points are as under for the following reasons:

1. In the negative.
2. In the negative.
3. In the negative.
4. As per Final Order.

REASONS

7. I have heard the arguments on both the sides. I have perused all the documents produced herein. Both the injunction applications filed for the dispute arising out of the same property and connected with each other therefore to avoid unnecessary repetition of reasons of both applications are given jointly.

8. At the outset, it may be mentioned that the issuance of injunction is governed by order 39 of the Code of Civil Procedure. Rule-1 of Order-39 of the Code of Civil Procedure envisages granting of temporary injunction

when there is a question of preservation for dispossession thereof. Rule-2 of Order-39 of the Code of Civil Procedure lays down the procedure for issuance of injunction for restraining breach of contract or other injury of any kind. Moreover the provisions of Rule-1 and 2 of Order-39 of the Code of Civil Procedure lay down the circumstances under which a temporary injunction can be granted and unless these circumstances exist a court has no jurisdiction to grant it. But the fact that these circumstances exist does not compel the court to grant it in all cases, in as much as the rule only shows that in the cases mentioned therein the court may grant an injunction. Thus, granting an injunction is purely within the discretion of the court. The grant of injunction is a serious matter and the court should always take good care to grant an injunction. The court should grant injunction in cases only where such an injunction is essential. It being an equitable relief, it would be refused to the person who himself failed to do equity. The principles which govern the exercise of the discretion are- firstly there should be a serious question to be tried in the suit and that on the facts before the court should be a probability of applicants being entitled to the relief asked for by him, secondly, that the court's interference is necessary to protect her from that species of injury which should be

irreparable before her legal right which can be established on trial and thirdly, that the comparative mischief or inconvenience which likely to issue from withholding the injunction will be greater than that which is likely to arise from granting. From the above conditions the first is generally termed as a "prima facie case" i.e. in other words prima facie existence of right and its infringement. But the existence of a prima facie case is not alone sufficient. The applicant should further satisfy the second condition by showing that irreparable injury will accrue to him if the injunction is not granted and that there is no other remedy open to him, by which he can protect himself from the consequence of apprehended injury. The term "irreparable injury" only means that the injury must be material one for which one cannot be adequately being compensated for damages. The third condition is called the principle of "balance of convenience". In applying this principle, the court should compare amount of substantial mischief likely to be done to the applicant if the injunction is refused and also compare it that which is likely to be caused to the other side if the injunction is granted. Even where all the above conditions are satisfied, a temporary injunction nevertheless is refused for the other reasons.

9. So far the facts of this case is concerned, the plaintiff has filed the present suit for declaration and permanent injunction and has filed an injunction application. Defendants No 5 and 6 have supported the case of the plaintiffs and they have also filed their counter claim for declaration and permanent injunction and have also applied for the temporary injunction against defendants No 1 to 4. Now as per the case of the plaintiff and defendants No 5 and 6 that they have 1/3 share in the suit property and as names of the defendants No. 1 to 4 are on the revenue record they are trying to sale away the suit property therefore to stop the illegal act of defendants No 1 to 4 both have applied for temporary injunction. Now from the pleadings and the documents produced by parties of the parties it is not disputed that names of the defendants No 1 to 4 are there in the revenue record of the suit land. Defendants No. 1 to 4 have denied all the facts of both applications and stated that said land was came to the father of the defendants No. 1 to 4 in the consolidation scheme and name of their father was entered vide mutation entry No.402 and after the death of their father their names were entered in the year 1991 and therefore there is no right of the plaintiff as well as defendants No 5 and 6 in the suit land. Now on perusing the documents produced by the plaintiffs at List exh- 3

and 33. It is clear that names of the defendants No 1 to 4 are there on the revenue record. Advocate of the defendants No. 1 to 4 has argued that that documents produced at mark 3/5 wherein entry was made in the year 1927 and plaintiffs have not challenged the same since 90 years. Further, it is also submitted that on perusing the Mark 3/5 the total area of the old survey No 961 is shown as 1 acre and 2 guntha is equal to about 4200 Sq. Mts but on looking to the area of the Block No. 1164 it is of total 16410 Sq. Mts therefore it is submitted that there are other land of the defendants which were exist at the time of the consolidation scheme including suit land and therefore plaintiff's and defendants No. 5 & 6 has no rights in the suit land. Further it is also submitted that as stated by the plaintiffs there is no possession of them but only defendants No.1 to 4 are in the possession and for to show that they produced the documents vide list exh- 17 and 51 wherein on perusing the mark- 17/4 a Khedut Pothi was produced of Account No. 533 and Mark 17/5 village form No. 7/12 was produced to show their names on record and further perusing the mark- 51/1 to 51/3 which village form no. 7/12 wherein names of the defendants No.1 to 4 are there and also shown as farmers in village form No. 12. Further the defendant No 1 to 4's Advocate has submitted that in the column No. 13 of village form No. 12 it is shown as type

of cultivation(Khed Ni Rit) wherein "1" is written which means if the owner himself is cultivating land then it is written "1" and therefore as the plaintiffs have stated that they are in the possession is not true and correct. Further Advocate of the plaintiff's has made submission that they have applied for the court commissioners report and in the court commissioners report possession of the plaintiffs is mentioned and they have also produced the photos at mark- 33/12 showing that they are in the possession of the suit land and they are cultivating the suit land but the same is opposed by the defendants therefore without evidence it cannot be taken in to consideration for prima facie establishing possession of the plaintiffs, further commissioners report also cannot be the independent evidence unless other documents supports that report but here no evidence is supporting the report of commissioner prima facie which proves the possession of the plaintiffs and according to the Sec- 135J of The Bombay Land Revenue Code that an entry made in the revenue record is presumed to be true and correct unless the contrary proved by adducing the documentary evidence therefore presumption can be made in favour of the defendants as the revenue records suggest the name of defendants and plaintiffs have not prima-facie rebutted the presumption. On perusing the record of the

case in view of the aforesaid submission made by the defendants Advocate in my opinion plaintiffs have failed to prove their prima facie case. The second condition for granting injunction that irreparable injury will accrue to plaintiffs if the injunction is not granted and that there is no other remedy open to him, by which he can protect himself from the consequence of apprehended injury. In the present case plaintiffs may also exercise for the protection provided by section 52 of the Transfer of Property Act.

10. M/s. Kacchi Properties v. Ganpatrao Shakarao & Others, Appeal From Order No.542 of 2010, decided on 03/08/2010 wherein, The Hon'ble Bombay High Court has while deciding the question about the necessity of granting temporary injunction to restrain a defendant from treating third party interests/alienating the property pending suit after referring various Hon'ble Supreme Court Judgments & Other High Courts Judgments held that "plaintiff need not at all to worry about transfers pendente lite and so, occasions for invoking power under order XXXIX, Rules 1 & 2 would arrive only in rare case where the plaintiff can demonstrate that rule of lis pendency is inadequate to permit plaintiff's interest." and further held that,

"Rule 1 of Order XXXIX of the Civil Procedure Code enabling court to grant temporary injunctions to restrain transfers pendente lite is only an enabling provision recognizing power of court to issue such injunction and does not imply that because there is a power, it may be exercised. The provision could be invoked only if protection provided by section 52 of the Transfer of Property Act is shown to be inadequate."

11. Looking to the ratio laid down by the Hon'ble Bombay High Court, the plaintiff has not shown as to how protection of section 52 of the Transfer of Property Act would be inadequate or why an injunction would additionally be necessary to prohibit the defendants from transferring the right, title and interest of the suit property.

12. In view of the above discussion, plaintiffs and defendants No 5 and 6 have prima facie failed to prove their case and when they have failed to prove prima facie case, then balance of convenience and irreparable loss also not tilt in their favour, they are not entitle to get the interim injunction as prayed for in this application and therefore there is no necessary of having court's interference for the protection of plaintiffs' right. Accordingly, I answer point Nos. 1,

2, and 3 in the negative, and hence, in the interest of justice, I pass the following order:

ORDER

- The present application of Exh.5 is hereby dismissed.
- The cost of this application to be cause in the suit.

Pronounced in the open court today on 31th March, 2014.

Kalol.

(MEHUL R PATEL)

GJ001194

31/03/2014

**5th (Ad-hoc) Additional Civil Judge,
Kalol.**