

**RCS NO: - 292/2011**  
**ORDER BELOW Exh. -5**

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-185 old Survey No. 47/1 & 47/2 A/c No. 384 admeasuring 1-98-30 Hecter Arre-Sq.mts Akar Rs. 12.87/- of Moje Village Balwa Ta:- Kalol, District, Gandhinagar (hereinafter referred as suit property for the sake of convenience and brevity) It is submitted that suit property was owned by the grand father of the plaintiff Choudhary Dharmaji Dalaji and the same was mortgaged in the year 1963 and in the year 1984 the mortgaged of the suit land was redeemed and the possession was handed over to the plaintiffs and defendants have also promised to transfer their names in the revenue record after the redemption of the mortgaged but defendants had told that if their names were deleted from the revenue records then they were not e entitled to purchase new land as they were not remained as farmers. Further it is submitted that since 1984 possession of the suit land is with the plaintiffs and they are enjoying

possession without any interruption and on dt. 21/9/11 upon receiving revenue record village form No. 7/12 plaintiffs came to the knowledge that defendants have created charge over the suit land by taking loan of Rs. 2,00,000/- from the Gujarat State Co-op Bank and Loan Of Rs. 1,50,000/- from Dena Bank Ltd and other charges were created by the defendants and upon complaining defendants have replied that they are not going to delete their names in the revenue records and they will grab the suit land by any way and also sale away the suit land therefore to stop the defendants from doing illegal acts this suit is filed 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 land and not to take possession of the suit land by force 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.14 wherein, defendants have denied all the facts of the plaintiffs case and contended suit of the plaintiffs barred by delay and laches, jurisdiction and limitation. It is submitted that suit of the plaintiff is barred by the non joinder and

mis-joinder of the parties and all the heirs were not joined in the suit as plaintiffs and also submitted that suit is barred by the provision of the Contract Act. It is also submitted that suit property is not ancestral property and specifically denied that suit transaction regarding mortgage of the suit property and redemption of the same. Further it is submitted that owner of the suit property was Lavjibhai Laljibhai Choudhary and the entry of the promulgation of the old survey Nos was made and the same is entered in the revenue records vide entry No. 893 and as the suit land was ancestral to Lavjibhai Laljibhai and enjoyed by the members of the Laljibhai Veljibhai H.U.F. And upon the partition made between them the suit land comes to the heirs of the deceased Nathaji Lalaji and the same is entered into the revenue records vide entry no. 1960 on dt. 13.5.77 and thereafter another partition was made between the heirs of Nathaji Lalaji and suit property was comes to the defendant No. 1 and 2 and one Chhaganji Nathaji and the same is entered in the revenue record vide entr No. 2273 on Dt. 22.4.1979 and since then the suit property is in the occupation and possession of the defendants No. 1 and 2 and one Chhaganji Nathaji and on Dt. 6.12.11 Chhaganji Nathaji expired therefore on the date suit land is with defendants. Further it is

submitted that Block No. 185 was consist of total Five old survey Nos. i.e. 196/2, 196/3, 46, 47/1, 47/2 and the owner of the old survey No. 47/1 and 47/2 was the grand father of the plaintiff's Dharmaji Dalaji and the siad both survey Nos were sold to the Lavjibhai Laaljibhai by Dharmaji dalji grand father of the plaintiff's by registered sale deed vide registration No. 644 on 21.6.63 by taking consideration Of Rs. 2500/- and possession of the both survey Nos were also handed over to the Lavjibhai Laaljibhai and in the year 1968 appropriate authority has passed the order of promulgation of the Block No.185 after verifying all the documentary evidence and certificate was also given on 13.5.1968. further it is submitted at the no point of time suit property was received in the mortgage by the forefather of the defendants and therefore no question arise to redeem the same and therefore plaintiffs have suppressed the material facts of the sale deed. Further it is submitted that suit land is enjoyed by the defendants and running in their names since 1979 and also submitted that if the mortgaged was redeemed in the year 1984 then cause of action starts from the year 1984 but the suit is nt filed within limitation and to harass the defendants this suit is filed to grab the money therefore the present plaintiffs have full knowledge and therefore

this suit is not maintainable therefore, plaintiffs have no right to file such suit, so, interim application should be rejected with costs. Plaintiffs have filed rejoinder affidavit against the reply of the defendants wherein he has denied the facts stated in the reply and has repeated the facts of the suit and this application and has denied the facts of the sale deed as mentioned in the reply executed between Dharmaji Dalaji and Lavjibhai Laaljibhai in the year 1963.

4. In view of the rival pleadings of the parties following points arises for my determination:

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.

## **REASONS**

6.I have heard the arguments on both the sides. I have perused all the documents produced herein.

7.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 principle 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.

**8.** So far the facts of this case is concerned, the plaintiff has filed the present suit for declaration and injunction and has filed an injunction application. Now as per the case of the plaintiff that parties to the suit are heirs of the late Shri Choudhary Dharmaji Dalaji and the suit properties are belonged to the Dharmaji Dalaji and therefore they have right in the suit properties as heirs of the Dharmaji Dalalji as the he was grandfather of the plaintiffs and has stated that suit property was mortgaged with the defendants in the year 1963 and the same was redeemed in the year 1984 by paying Rs.2200/- to the defendants but the said facts is

denied by the defendants in their reply and has stated that suit property was not actually mortgaged but the in the year 1963 suit land was sold by the Dharmaji Dalalji grand father of the plaintiff's to the Lavjibhai Laaljibhai by taking consideration of Rs. 2500/- and the registered sale deed was also executed between the parties. The above facts was denied by the plaintiffs in their rejoinder affidavit. Now on perusing the documents produced by the defendants at list Exh- 16 and the mark 16/5 is the copy of the sale deed of survey no. 47/1 and 47/2 i.e. suit land is sold to the Lavjibhai Laaljibhai on 21.6.63 and the same was registered at the office of the Sub registrar vide registration no. 644 and it is also admitted by the plaintiffs that names of the defendants are running in the revenue records. Further on perusing the documents produced at mark- 16/5 it is clearly mention in that the possession of the suit property was handed over at the time of the sale deed and therefore there is no reason to believe that possession of the suit property is not with the defendant at this stage and revenue record also suggest the possession of the defendants and plaintiffs have also not produced any evidence to prove contrary. Further it is also noticeable that as per the case of the plaintiffs they had redeemed the mortgage in the year 1984 but they have not produced any documents to

support the plea of redemption therefore 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.

9. 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."

**10.** 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.

**11.** In view of the above discussion, plaintiffs 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 26<sup>th</sup> March, 2014.

**Kalol.**

**(MEHUL R PATEL)**

**GJ001194**

**26/03/2014**

**5<sup>th</sup> (Ad-hoc) Additional Civil Judge,  
Kalol.**