

**IN THE COURT OF PRINCIPAL SENIOR CIVIL JUDGE
AT ANJAR-KACHCHH.**

REGULAR CIVIL SUIT NO. 60/2008.

ORDER BELOW APPLICATION EX: 5

1. That the present application has been filed by the plaintiff for obtaining interim injunction under O. 39, R. 1 & 2 r/w Section 151 of CPC with a prayer to restrain the defendant no. 1 and his heirs, servants, legal representatives to sale out, gift, exchange, transfer, create charge, lease, lien, create right over the suit land R. S. No. 203 situated at Moti Nagalpar, Taluka Anjar-Kachchh and to maintain status quo till then the final order of the suit. The plaintiff has also prayed to restrain the defendant no. 1 and his family members, agents or servants to take away possession of the plaintiff over the suit land till then the final order of the suit. The plaintiff has also come with a prayer to restrain the defendant no. 6 to change in the records of the revenue. The defendant no. 7 may be restrained to act in such a way that causes the right of the plaintiff till then the final order of the suit. Thus, an interim injunction may be passed against the defendant no. 1 to 7 till then the final order of the suit.

2. Summons and notices have been duly served upon the defendants. The defendant no. 2 is died but plaintiff has not filed a legal heirs of the defendant no. 2 then the suit is abated on the defendant no. 2. The defendant no. 3 to 7 are not file any written statement against the suit. The defendant no. 1 appeared before the Court and filed his written reply vide Ex: 40.

3. The plaintiff has produced the documentary evidence vide mark 3/1 to 3/10, mark 137/1. The defendant no. 1 has produced the documentary evidence vide mark 117/1 to 117/7, 129/1 to 129/2. The plaintiff has filed written argument vide Ex: 125. The defendant no. 1 has filed written argument vide Ex: 120.

4. The following points arise for the determination of the present application :

(1) Whether the plaintiff proves his prima facie case ?

(2) Whether the balance of convenience is in favour of the plaintiff ?

(3) Whether the plaintiff will suffer an irreparable loss in absence of interim injunction ?

(4) What order ?

5. The findings thereon are as under :

(1) In the negative.

(2) In the negative.

(3) In the negative.

- (4) As per final order.

REASONS

6. **Issues No. 1,2 & 3 :**

All issues are discussed together for the convenience of the Court. The plaintiff's Ld. Advocate argued that the plaintiff and defendant no. 1 both are brothers and resided at Nagalpar and both are the farmers. Bhacha Radha Ahir is a owner and possessor of the suit land. Deceased Bacha Radha Ahir is a elder father(Mota Bapa) of the plaintiff and defendant no. 1 to 5. The suit property entered into the revenue record on the name of defendant no. 1 and therefore the defendant no. 1 is not a only owner and possessor of the suit land but the defendant no.1 made a illegal entry on his name. The defendant no. 2 to 5 is a legal heirs of the deceased Bhacha Radha Ahir died on date 07/02/2008 and his wife Jiviben Bhachabhai and his only son Jakhu Bhacha Ahir was passed away from many years ago. Bhacha Radha Ahir was resided at Nagalpar with plaintiffs and defendant no.1's father. That the plaintiff and defendant no.1 both are taken a care of the Bhacha Radha Ahir after the plaintiff's father died. As per the para no. 3 of the suit the plaintiff is a legal heirs of the deceased Bhacha Radha Ahir. The defendant no. 1 was made a illegal entry no. 1830 on his name and plaintiff is unknown on that entry no. 1830. Plaintiff cultivated the land with defendant no.1 and they both are the co-owner an possessor of the suit land. Plaintiff file a appeal against entry no. 1830 in the revenue department under the Rules 108(5) for the

Revenue Act and they produce the appeal memo with his suit vide mark 3/10. The forged document in possession of the defendant no.1. I have request the Hon'ble Court to pass the order against the defendant no.1 to produce a forged document in the Court. Plaintiff given a notice to the defendant no.1 by the RPAD and UPC from his Advocates but defendant no. 1 is not given a reply of plaintiff's notice. Plaintiff produced a document vide mark 3/1 of the suit land, they entry no. 1830 made on the name of defendant no. 1 and this entry is promulgated by the Circle Officer on date 1/12/05 and defendant's name is entered into the revenue record in Village Form No. 8-A. This document produced by the plaintiff vide mark 3/2 and Village Form No. 7/12 vide mark 3/3 and Hak Patrak entry no. 1990 vide mark 3/4 produced by the plaintiff in his support. The plaintiff file a public notice vide mark 3/5. Rationing Card produced vide mark 3/6. A legal notice produced by the plaintiff vide mark 3/7 and the UPC and RPAD cover produced vide mark 3/8 and 3/9. In this circumstances the plaintiff's Ld. Advocate argued that plaintiff is a co-owner and possessor of the suit land. He is a legal heir of deceased Bhacha Radha Ahir. The defendant no. 1 is not legal heir of Bhacha Radha Ahir. The defendant no. 1 made a illegal entry in his name. Therefore, the plaintiff has a prima facie case and also balance of convenience in favour of the plaintiff. If the Court not given a interim injunction in favour of plaintiff the plaintiff will suffer an irreparable loss which cannot be compensated in terms of money. The LA of the plaintiff has argued that all the authorities of the Hon'ble Supreme Courts and Hon'ble High Courts are not helpful to the defendant no. 1 because the fact of this case and authorities are different. Plaintiff is in possession of the suit land and he sought declaration regarding ownership and possession. Plaintiff is in possession of the suit land and therefore all the authorities

are not helpful to the defendant no.1 and therefore interim injunction application will be granted in favour of the plaintiff.

7. The LA for the defendant no. 1 argued that the plaintiff is a owner and possessor of the suit land. The entry made by the revenue authority is a legal one therefore plaintiff file a suit against defendant no.1 on false fact. Deceased Bhacha Radha Ahir was resided with defendant no.1 and defendant no.1 is taken a care of Bhacha Radha Ahir. The entry no. 1830 made by the revenue authority is a legal one. Defendant no.1 not made any forged document with benefit of the oldness of Bhacha Radha Ahir. The appeal under the Revenue Rules 108(5) is pending before the Deputy Collector. Therefore, the suit is premature and not tenable. Hence, the application of the interim injunction is rejected. Plaintiff have no right to produce the said document by me. The notice given by the plaintiff on dated 14/08/2008 was not served to the defendant no. 1. Hence, I have no given a reply of said notice. Defendant no. 1 produce a general power of attorney vide mark 117/1. The will produce in mark 117/2 on dated 26/08/2008. Partition deed produced by the defendant no;. 1 vide mark 117/3 on dated 17/05/2005. Hak Patrak no. 6 entry no. 1803 – Village Form no. 7/12 and Village Form No. 8-A and receipt of the Tax is produced vide mark 117/4 to 117/7. The death certificate of Hamir Radha and Bhacha Radha vide mark 129/1 and 129/2. Plaintiff produced a registered will of Bhacha Radha Ahir on dated 21/1/1999 vide mark 137/1. The mark 117/2 is a will made by Bhacha Radha Ahir on dated 26th August, 2004 before the Notary Public Mr. I. U. Bayad at Anjar and mark 117/3 is partition deed made by the Bhacha Radha Ahir before Notary Public on dated 17th June, 2005 before Notary Public Advocate Mr. S. K. Rathod. The plaintiff is not a challenge both the documents in his plaint

and not given any prayer against vide mark 117/2 and 117/3. The entry no. 1830 made on the mark 117/2. The deceased Bhacha Radha Ahir was already given a suit land to the defendant no. 1 with his partition deed. The partition deed was produced before the revenue authority and revenue authority made entry no. 1830 vide mark 117/4 with due to legal work as per the law and promulgated said entry. This entry is not rejected by the revenue authority and therefore the revenue authority is not pass the order against this entry in the plaintiff's appeal. The plaintiff produce a will vide mark 137/1 of the deceased Bhacha Radha Ahir made on dated 22/1/1999 but plaintiff not file a suit on the will and no any single contention made in his plaint. Therefore, this will is not supported to the plaintiff. The defendant no. 1 is not go before the revenue authority made a entry no. 1830 with will of Bhacha Radha Ahir but defendant no. 1 go to with partition deed of Bhacha Radha Ahir. The deceased Bhacha Radha Ahir was a owner and possessor of the suit land. The suit land is a own property of the deceaed Bhacha Radha Ahir and Bhacha Radha Ahir is a entitle to give his property is anybody under the law of Succession Act. Therefore, Bhacha Radha Ahir on his live handed over the suit land with possession to the defendant no. 1 with the document vide mark 117/3 and the revenue authority was promulgated the said entry no. 1830 on the basis of partition deed of deceased Bhacha Radha Ahir. Therefore, defendant no. 1 is owner and possessor of the suit land with vide mark 117/3. The defendant no. 1 is relied upon the following citations :

(I) **1972 (0) GLHEL-SC 23283** in the case of **Ram Saran V/s. Ganga Devi** wherein the Hon'ble Supreme Court has held that SPECIFIC RELIEF ACT, 1877 – S. 42 - suit for declaration that the plaintiff was the owner of the suit premises – suit premises were in possession of the

defendant – no relief for possession was prayed for maintainability of suit – held, suit was not maintainable – the plaintiff sought declaration regarding ownership without seeking the relief of possession – the suit is hit by S. 42 of the Act – appeal dismissed.

(II) **1962 (0) GLHEL-HC 214001** in the case of **Zandaram Joitaram V/s. Prahladrao Vithalrao** wherein the Hon'ble Gujarat High Court has held that Code of Civil Procedure, 1908 – OR.39, R. 1 – proceedings for perpetual injunction – vacation of interim injunction after granting it – appeal – temporary injunction granted by the Appellate Court – when the suit is for a permanent injunction of a particular kind, an interim injunction of the same kind can be issued but not of different kind unless there is provision for such a thing in Order 39 C. P. C. - different kinds of injunctions – in the absence of a finding about the prima facie case, the Ld. Appellate Judge was wrong in interfering with the finding of the Trial Court vacating the injunction on the ground that the plaintiff did not make out a prima facie case – application allowed.

(III) **2004 (0) GLHEL-SC 31809** in the case of **Tej Narain V/s. Shanti Swaroop Bhore** wherein the Hon'ble Supreme Court has held that Limitation Act, 1963 – appellant filed suit for declaration and possession of ancestral house – predecessor of defendant took forcible possession in 1928 – suit was filed in 1955 alleging that defendant took forcible possession in year 1949 – documentary evidence showed that forcible possession was taken in year 1928 – consideration as to adverse possession – held, it was clearly established that defendants have been in continuous possession of house since 1928 – suit filed by appellant in year 1955 is clearly by limitation – respondents have perfected their title by

way of obverse possession – appeal dismissed.

(IV) **2004 (0) GLHEL -HC 209325** in the case of **Patel Rajnikant Dhulabhai V/s. Patel Chandrakant Dhulabhai** wherein the Hon'ble Gujarat High Court has held that Benami Transactions (Prohibition) Act, 1988 – S. 3, 4 – Code of Civil Procedure, 1908 – Or. 39 R. 1, 2 – original plaintiffs prayed interim relief restraining respondents for making constructive on the suit property – refused – challenged on the ground that the suit property was HUF property which was purchased by the deceased Dhulabhai in name of respondent no. 1 who was at that time studying in the college and had no source of income at all – revenue record showed the name of respondent no. 2 from 1991 onwards – under the Urban Land Act, the disputed property was shown in the name of the respondent no. 1 – held, on facts of this case it is not just and proper to draw an inference that the suit property was HUF property – order of Trial Court rejecting interim relief upheld – appeal disposed of.

8. I go through all the citations of the Hon'ble Supreme Court and the Hon'ble High Courts read with pleadings and documentary evidence the plaintiff is not in possession of the suit land or a not co-sharer or co-owner of the suit land. The suit premises were in possession of the defendant no.1. Plaintiff is not prepared a Panchanama to the suit land for the prove his possession. In this circumstances the above discussion I seems that the plaintiff have no prima facie case against the defendant no. 1. Balance of convenience is not also in favour of the plaintiff. The suit property is not HUF property. All the revenue records showed the name of defendant no. 1 from 23/08/2005 onward. The fact of this suit it is not just and proper to draw an inference that the plaintiff is

owner and possessor of the suit land. Therefore, the interim injunction is rejected under the law because the plaintiff have no prima facie case, no irreparable loss or no balance of convenience in favour of the plaintiff. Therefore, the essential three ingredients of grant interim injunction is not favour in plaintiff hence I given an answer of issues no. 1 to 3 in negative and the following order is passed in respect of issue no. 4 :

ORDER

(1) That the present application filed by the plaintiff under O. 39, R. 1 & 2 r/w Section 151 of CPC is hereby dismissed and the order under the Ex:5 on dated 15/04/08 is vacated.

(2) No order as to costs.

Pronounced today on 27th February, 2013 in the open Court.

Date: 27/02/2013.
Anjar-Kachchh.

(H. A. Brahmbhatt)
Principal Senior Civil Judge,
Anjar-Kachchh.