

**ORDER BELOW EXHIBIT - 5 IN R.C.S No.207/2021**

1. Facts of the present application Exh.5 of the plaintiff is that, the land of survey No.354, it's new survey No.90 and old survey No. 353, it's new survey No. 89 and old survey No.288/1 paiki it's old survey No.123 and old survey No.358, its' new survey No.145 at present continued on ledger Account NO.693 having old tenure agriculture lands situated moje Rangpurda, Taluka Kadi which are the parties ancestral undivided properties (**hereinafter referred it to as 'suit properties'**). Further, it is averred that names of ancestors of the parties was Patel Mohanbhai Gangaram and wife Patel Maniben Mohanbhai. The suit properties namely Survey No.353 and 354 were continued on the name of Patel Mohanbhai Gangaram and upon the death on 17/09/1976 names of Patel Gandabhai Mohandas, Patel Nagarbhai Mohandas, Patel Babubhai Mohandas and Patel Maniben widow of Mohanbhai Gangaram were mutated jointly through the right of heirship. Thenafter death of Patel Mohanbhai Gangaram and thenafter death of his wife Patel Maniben Mohanbhai on 09/11/1987, suit properties i.e. survey NO.s 353, 354 and 281/1 and 358 were mutated on the name of Patel Gandabhai Mohandas, Patel Nagarbhai Mohandas, Patel Babubhai Mohands and Patel Babuben Mohanbhai jointly through the

right of heirship. Further, it is averred that on 10/11/1998 Patel Gandabhai Mohandas was died, hence names of defendant Nos.3 to 5 namely Patel Madhuben widow of Gandabhai, Patel Girishbhai Gandbhai and Patel Rekhaben Gandabhai and name of plaintiff were jointly mutated as right of heirship in the revenue record on the suit properties. Further, it is averred that during the life of Patel Babuben Mohanlal had made a registered Will on 4/7/2015 to give her undivided 1/4th share from the undivided suit properties and said Will registered vide Sr. NO.3865/2015 in the office of Sub-Registrar, Kadi and on 02/09/2016 deceased Patel Babuben Mohanlal died, thus on the basis of Will, plaintiff became the owner of the undivided 1/4th suit property of the deceased. The plaintiff has 1/4th share from the undivided suit properties and no partition/distribution of the suit properties be made among the parties. Further, it is averred that plaintiff has asked for partition of the suit properties and to give him actual peaceful possession of his 1/4th share property from the undivided suit properties, but defendants denied to give, hence to get his legal share of the property from the suit properties, present suit is filed. Further, it is averred that it takes time to dispose off the suit and during the time, it might be

possibility that defendants permanently make changes in the actual condition of the suit property or suit properties give on mortgage, sale, transfer or change the situation then there may not be meaning of the present suit and in future he may face hardship. If changes may be occurred in the suit property, then his legal right may be extinct and he may be faced irreparable loss which cannot be compensated in terms of money, hence present injunction application is filed. Further, it is averred that plaintiff has prima facie case, balance of convenience is in his favour and if injunction order may not be granted in his favour then he may be loss huge which cannot be compensated in terms of money. It is urged that to restrain defendants that neither defendants nor through their persons, agents, servants or any other party not to change in the suit property or in the revenue record either directly or indirectly and as such pass temporary injunction order against defendants and in favour of plaintiff and cost of the application be awarded from defendants.

2. In support of the claim, plaintiff has filed documents vide mark 3/1 to 3/6.
3. This court has issued the notice to the defendants. Defendants No.1, 3, 4, 5 served, but remained absent and not filed any reply or

representation, this Court had made call out thrice, but defendants No.1, 3, 4, 5 are remained absent, hence right of reply of the defendants No.1, 3, 4, & 5 closed accordingly.

3.1 Defendant No.2 appeared through his Advocate and has filed written statement vide Exh.18 and denied the facts of the suit as well as to the injunction application of the plaintiff in toto. Further, he has submitted the true fact that the land of survey No.354, it's new survey No.90 and old survey No. 353, it's new survey No. 89 and old survey No.288/1 paiki it's old survey No.123 and old survey No.358, its' new survey No.145 at present continued on ledger Account NO.693 having old tenure agriculture lands situated moje Rangpurda, Taluka Kadi in which plaintiff and defendants are doing cultivation. Further, it is submitted that plaintiff and defendants ancestor was Mohanbhai Gangaram Patel and the above survey numbers were of ancestral properties and he has four heirs namely Mohanbhai Gangaram and his wife Maniben Mohanbhai and daughter Babuben, son Gandabhai, Nagarbhai, Babubhai. Out of which, one heir namely Patel Babuben Mohanbhai had filed R.C.S No.122/91, dated 26/7/91 in the Ld. Court at Kadi for partition and then after Babuben i.e. plaintiff has made family contract with the defendants Patel Gandabhai Mohandas, Patel Nagarbhai Mohandas, Patel Babubhai Mohandas and

her voluntarily waived the right from all the survey numbers i.e. old survey Nos.353, 354, 288/1 and 358 for which parties of the suit had filed Exh.25 before the Ld. Court Kadi. Thus, plaintiff Babuben Mohandas had waived her right from all the properties and said facts known by plaintiff and defendants and on the basis of that consent decree was drawn in that suit. Plaintiff has in collusion with other defendants arbitrarily and illegally out of knowledge of defendant NO.2, registered the Will of Patel Babuben Mohanlal on 4/7/2015 at Book No.3 at Sr. No.3865. The said Will prima facie is illegal and made out of knowledge of defenadnt No.2 and upon the death of Babuben plaintiff has made entry on his name which is contrary to R.O.R and signature of objectioner has not been taken in the notice under Sec.135 D, hence said Will is prima facie illegal and on the basis of Will Ld. Mamlatdar has certified the entry NO.2946, dated 24/7/2017 and to cancellation of the entry NO.2946, present defendant No.2 has filed R.C.S. NO.30/2022 against the plaintiff and other defendants. As such plaintiff has falsely demanded partition of the suit properties and at present plaintiff and defendants are doing agriculture activities in the suit properties and if equal partition of the suit properties be made then defendant No.2 has no objection or dispute.

4. This Court has kept the matter for argument. Id. Advocates for the parties have made oral arguments, which I have heard respectively.
5. For deciding this application, following issues arises for my determination:

**ISSUES**

1. Whether the plaintiff has a prima facie case in his favour?
  2. Whether the balance of convenience is in favour of the plaintiff ?
  3. Whether an irreparable injury will be caused to the plaintiff if temporary injunction is not granted ?
  4. What order ?
6. My findings to the above issues are as under:

- (1) Issue No.1 : In the negative
- (2) Issue No.2 : In the negative
- (3) Issue No.3 : In the negative
- (4) Issue No.4 : As per final order.

**REASONS**

7. As all the three issues are inter-connected with each other and in order to avoid repetition of the facts, all the three issues are dealt and discussed together.
  - 7.1 Here at this stage for deciding this

application of temporary injunction application very short issue is arise at this stage the plaintiff's mainly relies on the the will is made by the Babuben Mohanlal in the favour of plaintiff and for same the revenue entry is made vide entry no.2946 on date 14/07/2016 which is presented vide Mark 3/6 while coin side defendant's no.2 has confronted the suit and submitted that the fraud has committed by plaintiff by making false will and hiding many true facts which not pleaded by him in plaint Patel Babuben Mohanbhai had filed R.C.S No.122/91, dated 26/7/91 in the Ld. Court at Kadi for partition and then after Babuben i.e. plaintiff has made family contract with the defendants Patel Gandabhai Mohandas, Patel Nagarbhai Mohandas, Patel Babubhai Mohandas and her voluntarily waived the right from all the survey numbers i.e. old survey Nos.353, 354, 288/1 and 358 for which parties of the suit had filed Exh.25 before the Ld. Court Kadi. Thus, plaintiff Babuben Mohandas had waived her right from all the properties and said facts known by plaintiff and defendants and on the basis of that consent decree was drawn in that suit. Further stated that plaintiff has in collusion with other defendants arbitrarily and illegally out of knowledge of defendant NO.2, registered the Will of Patel Babuben Mohanlal on 4/7/2015 at Book No.3 at Sr. No.3865. The said Will prima

facie is illegal and made out of knowledge of defenadnt No.2 and upon the death of Babuben plaintiff has made entry on his name which is contrary to R.O.R and signature of objectioner has not been taken in the notice under Sec.135 D, hence said Will is prima facie illegal and on the basis of Will Ld. Mamlatdar has certified the entry NO.2946, dated 24/7/2017 and to cancellation of the entry NO.2946, present defendant No.2 has filed R.C.S. NO.30/2022 against the plaintiff and other defendants.Thus here in the suit main controversy is arise around the joint ancestral properties and in which the plaintiff has claimed his hare through the will while defendant's no.2 has confronted the will on which plaintiff relies thus it is on the record that the suit properties is in question are ancestral as well as joint properties and all the parties of the suit are co-owners of the suit properties.

8. Thus, looking to the facts of question if we see the settled principle of law than as per the settled principles of law in the case of **Sant Ram Nagina Ram V/s. Daya Ram Nagina Ram, AIR 1961 Pb. 528** Hon'ble P&H High Court laid down that injunction can not be granted against the co-owner or co-sharers thus also looking to facts and prayer of the case the injunction can not be granted thus plaintiff's fails to show prima

facie case in favours of them looking to the facts of this case thus plaintiff has fails to show his prima facie case in his favour. Further, as the if the suit property will alienate by the defendant, then the suit of the plaintiff will became a purpose less, but as per above discussion plaintiff having no prima facie case in his favour which shows that balance of convenience is also not in favour of the plaintiff. Further, the plaintiff is seeking relief of interim injunction. For that purpose, it is also necessary that the relief which is claimed through interim injunction must be such which cannot be compensated in money whereas in the present suit, the main relief of the plaintiff is to declare that the share in suit property which they get on the basis of will is their and for the establishment of their right but as already stated above that plaintiff fails to establish their prima facie case in their favour thus the irreparable loss is also not seen that will occurred to the plaintiff, and the genuineness of the will is not decided at this stage without adducing the evidence and that is a question of trial which is determine at the stage of trail with that whether the will maker Babuben has waived his right in the earlier suit vide R.C.S No.122/91 can not be determine at this stage and that all are question of evidence and question of trail therefore, all the essential ingredients of

order 39 are not satisfied. Hence, the interim injunction cannot be granted and answers for issues No.1 to 3 are in negative and for issue No.4, I pass the following order.

**:: ORDER ::**

1.The plaintiff seeking for temporary injunction application vide Exh. 5 is hereby rejected.

2.The cost of this application is decided as per the final order of this suit.

Signed and pronounced in the open court on 19<sup>th</sup> day of April, 2023 at Kadi.

Place: Kadi.

Date: 19-04-2023.

**(Rajvratcharan B. Gadhvi)**  
2<sup>nd</sup> Addl. Senior Civil Judge,  
Kadi, Dist. Mahesana  
[Code No.-GJ01067]