**SPCS/28/2013 ORDER**

**IN THE COURT OF ADDITIONAL SENIOR CIVIL JUDGE**
**RAJKOT AT GONDAL**

**ORDER BELOW EX.5 - SPECIAL CIVIL SUIT NO. 28 OF 2013**

1. The plaintiff has filed the present application under O.XXXIX R.1-2 of C.P.C. restraining the defendant and his heir etc. from making any type of writing, transaction, dispossessing or making any obstruction or disturbance in the possession of the plaintiff till the final disposal of the suit.

2. The short facts of the present case are that the plaintiff is residing at Rajkot and defendant is her brother and residing at Junagadh. The plaintiff is also doing her business in the names of Leelaben and Lataben. It is further averred that the Plot No.G-1921/1 admeasuring 4770 sq.mts. situated at village Metoda GIDC, Rajkot District was obtained in the name of plaintiff and her family members. All the obtained three plots are situated adjacent to each other and out of these plots, the Plot No.1921/2 situated on the eastern side is in the name of the plaintiff, another plot situated on the western side No.1921/1 is obtained in the name of the defendant and the last one plot No.1921 was obtained in the name of Raniben, the wife of the son of the plaintiff. The gate of all the three plots is common and lying in the plot No.1921/2 which is in the name

of the plaintiff. Thereafter, agreement dated 17/10/2009 was executed to sell the plot of the defendant bearing No.1921/1 to plaintiff as per the family arrangement. So, the plaintiff has purchased the said plot from his brother i.e. the defendant in consideration of Rs.5 Lakh; at the time of agreement, the defendant has paid Rs.4 Lakh in cash and acknowledged the receipt of payment in the said agreement; the defendant had to transfer the said plot in the name of plaintiff in GIDC and after fulfilling all the due procedure, the plaintiff has to pay remaining amount of Rs.1 Lakh. The said agreement was carried out in presence of witnesses Chandubhai Patel, Sidabhai Ghoghabhai and Jasvantbhai Bhailalbhai Mehta and received consideration and handed over the possession to the plaintiff. But as the procedure of sale was not completed within stipulated period, in the year, 2012, the agreement was extended and further time was executed by paying Rs.50,000/- by the defendant to the plaintiff. It is further averred that in the year, December-2012, the plaintiff went to her native Maliya-Hatina by handing over possession of her house temporarily to Hamirbhai, the son of the defendant and when she returned home, she came to know that Hamirbhai has left the house by taking cash and other articles of the plaintiff including the agreement of property. Hence, the plaintiff filed complaint before Malaviya

Nagar Police, Rajkot on 22/02/2013. So, lastly it is averred that the plaintiff has purchased the said plot from defendant and also paid 90% consideration to the defendant. But the defendant has committed breach of contract and has not transferred the suit plot in the name of the plaintiff. Hence, the plaintiff has filed this application for ad-interim injunction.

3. The defendant has appeared before the court and filed his written statement cum written objections at Ex.12 and denied most of the averments made in the application. It is contended that he does not know that the plaintiff is known as Leelaben and Lataben and doing transaction in these names; it is contended that the plaintiff and the defendant are brother and sister, but as per mutual understanding, wall is constructed in the property; it is denied that the gate is common but the properties are different and hence, the plaintiff is in possession of the property and running factory; it is denied that as per the agreement dated 17/10/2009, the defendant has intended to sell Plot No.1921/1 to plaintiff in consideration of Rs.5,00,000/- and he has paid Rs.4,00,000/- in cash and after fulfilling the due procedure, the plaintiff has to pay remaining amount of Rs.1,00,000/- to the defendant; it is also denied that the plaintiff has extended time limit of

agreement by receiving Rs.50,000/-; it is also denied that Hamirbhai has taken away all the household kits, ornaments and cash amount from the house of the plaintiff. It is contended that actually, with a view to settle his son Hamirbhai, the defendant has kept his son at the house of the plaintiff and the defendant has purchased plot No.1921/1 in GIDC Metoda which was allotted to the defendant in consideration of Rs.8,58,750/- in the year, 1997 and thereafter, his son is carrying out business in the said plot. Moreover, with a view to make transaction and administration of the said plot, the defendant has also kept the file of plot with his son. At present, the suit property is approximately valued at Rs.6 to 7 Crore but with the malafide intention and to grab money from the defendant, the plaintiff was pressuring his son Hamirbhai to hand over the file of the plot. Hence, his son has taken the file of suit plot. So, the plaintiff has filed false complaint before Police. It is contended that the defendant has never signed the so called agreement and the agreement in dispute is false and fake. It is also contended that the defendant has purchased the suit plot in the year 1997 in Rs.8,58,750/- then how the defendant can sell suit plot in less amount of Rs.5 Lakh only. So, it clearly appears from the application and documents that the plaintiff has created fake and false story with a view to grab the suit plot. Hence, the plaintiff has no prima facie case and balance of convenience and if ad-interim injunction as prayed for is granted in that case, the defendant would suffer irreparable loss rather than the plaintiff. Hence, he has prayed to reject application with costs.

4. The plaintiff has produced following documentary evidences. viz. Agreement to sell at mark 3/1, copy of FIR at mark 3/2, copy of agreement extending time limit at mark 3/3, affidavit of Sidibhai at mark 24/1, affidavit of Jasvantbhai at mark 24/2, draft of undertaking at mark 24/3, supplementary agreement at mark 24/4, deed of assignment at mark 24/5, agreement to sell of shed at mark 38/1, payment receipt at mark 43/1 to 43/3, allotment of plot No.1921/2 to plaintiff at mark 43/3, plot allotted to the wife of son of plaintiff at mark 43/5, trust deed at mark 43/6, family arrangement of property at mark 43/7, death certificate of Naynaben at mark 43/8 and village form No.6 of agri.land purchased by plaintiff at mark 43/9 and sale deed No.1679 of 2009 at mark 43/10.

5. In support of his case, the defendant has also produced following documentary evidences. The defendant has produced various documentary evidences under D.E.List Ex.13 from mark 13/1 to 13/60,mark 18/1 to 18/3,copy of FIR filed by defendant against

the plaintiff dated 26/07/2013 at mark 20/1, pass book at mark 26/1, affidavit of Dayabhai Karshanbhai at mark 26/2, report of handwriting expert at mark 26/3, payment receipts at mark 37/1 and 37/2, extract of GIDC at mark 37/3.

6. Following points arise for the determination of application.

1. Whether the plaintiff proves prima facie case and balance of convenience in her favour?

2. Whether the plaintiff proves that if ad-interim injunction as prayed for is not granted, she would suffer irreparable loss?

3. What order?

7. My findings on the above points are as under:-

1. In the negative.
2. In the negative.
3. As per final order..

// **R E A S O N S** \\

8. **Points No.1 & 2**:-Read the application and objections of the defendant and also perused the documentary evidence produced by both the parties. I have also gone through the written arguments alongwith the legal citations submitted by the

learned advocate Mr.A.R.Shukla on behalf of the plaintiff as well as written arguments alongwith legal citations submitted by the learned advocate Mr.J.N.Rachh on behalf of the defendant.

9. Considering the documentary evidences produced by both the parties and written arguments of the learned advocates of both the sides, first of all, it appears from the record that the defendant and the plaintiff are the brother and sister. It is alleged by the plaintiff that the plots in the question are obtained in the name of the plaintiff and her family. Out of them, one of the plots No.1921/2 is in the name of the plaintiff, western side Plot No.1921/1 is in the name of the defendant and another Plot No.1921 is in the name of Raniben, the wife of the son of the plaintiff. Learned Advocate Mr.A.R.Shukla for the plaintiff has submitted that as per the agreement to sell mark 3/1 dated 17/10/2009, the defendant has intended to sell the plot No.1921 which was allotted to him by GIDC to the plaintiff in total consideration of Rs.5,00,000/-. Out of them, the plaintiff has paid the defendant Rs.4,00,000/- and the remaining amount of Rs.1,00,000/- was to be paid after fulfilling the due procedure of transfer of the plot by GIDC in the name of the plaintiff. It is further submitted that as the plot was not transferred within time, as per agreement mark 3/3

dated 17/08/2012, time was extended to fulfill the due procedure. But inspite of this fact, with a view to grab the plot and huge money, the defendant has failed to transfer the plot in the name of the plaintiff. It is also contended that Hamirbhai, the son of the defendant was being taken care and maintained by the plaintiff, he has taken away all the household articles, ornaments and cash amount. So, it is submitted that the defendant and his son have committed breach of trust and agreement to sell with a view to grab the property and money. It is submitted that the defendant has executed the agreement to sell mark 3/1 and each page of the said agreement contains the signature of the defendant and now, he cannot deny that he has not executed and signed the agreement. Therefore, the plaintiff is entitled to get ad-interim injunction as prayed for. On the other side, the learned advocate for the defendant has submitted that the plot has been allotted by GIDC to the defendant. The defendant has been allotted the plot in question and it appears from the copy of passbook produced at mark 26/1 that the defendant has been allotted the suit plot in consideration of Rs.8,58,750/- from GIDC. So, there is no question to sell the suit plot in less amount of Rs.5 Lakh because, at present the price of the property is approximately Rs.6 to 7 Crore. It is further contended that the agreement to sell mark 3/1 and extension contract mark 3/3 are bogus and got up because, as per the report of the handwriting expert mark 26/3, the signature of the defendant does not match with the signature of the agreement to sell mark 3/1. It is contended that in para-2 of agreement mark 3/1, it is mentioned that Rs.1 Lakh is to be paid after completing the due procedure of transfer and lastly, it is submitted that entire amount of consideration is received. So, the contents of the agreement are different from each other. Two different persons have purchased stamp papers of agreement. So, the genuineness of the agreement is doubtful. Moreover, the suit plot is just allotted and not sold by GIDC so, the defendant cannot sell the suit plot to any one. Moreover, the plaintiff has also failed to show that how she managed such a huge amount of Rs.4,50,000/- alleged to have been paid to the defendant. She has also not produced any documentary evidence like passbook etc. regarding arrangement of such money. So, the plaintiff has created all the bogus and fake story with a view to grab plot and money from the defendant. So, the application should be rejected.

10. Now, considering the facts and circumstances of this application as well as the arguments of both the sides, it appears from the copy of agreement to sell mark 3/1, wherein the word "Sale Deed" used.

Actually, the GIDC has allotted the disputed plot to the defendant. So, the defendant cannot be said to be the owner of the plot. Because, GIDC is the owner of the plot and such plot is just allotted to the defendant and therefore, the defendant can only transfer the name and cannot make the sale of the suit plot. Moreover, if we peruse the copy of the passbook produced at mark 26/1 and the document at mark 13/1, it appears that the defendant has obtained the suit plot in consideration of Rs.8,58,750/- from GIDC. While, the agreement to sell mark 3/1 seems to have been executed for consideration of Rs.5,00,000/-. So, this contention of the plaintiff is not believable that defendant wants to transfer the disputed plot in Rs.5,00,000/-. Because, the defendant has obtained this plot in the year, 1997 in consideration of Rs.8,58,750/- and now he wants to sell the same in less amount of Rs.5,00,000/-. One another thing is also not cleared by the plaintiff that how she managed to pay Rs.5,00,000/- to the defendant. Because, she has not produced any documentary evidence like the passbook or any other source to show how she managed and paid such a huge amount. On this point, the learned advocate for the defendant has relied upon the decision reported in **2010 (2) GLR 1041 IN THE CASE OF HARSHADKUMAR KANTILAL BHALODWALA AND ANR. VS. ISHWARBHAI CHANDUBHAI PATEL AND ORS.** Wherein, it is held that when agreement is disputed and receipt of part consideration made in cash is denied, plaintiff is required to produce some evidence to show that money was withdrawn from Bank account or borrowed from somewhere or at least show the source of money by documentary evidence such as Income Tax Return, Bank Passbook etc. This judgment is fully applicable to the present case, because, the defendant had denied the said transaction and the receipt of the money. So its the duty of the plaintiff to show the source of money how she paid by documentary evidence but the plaintiff has failed to show this court that how she managed and paid Rs.4,50,000/- to the defendant as mentioned in agreement mark 3/1 and 3/3. Moreover, it is the duty of the plaintiff to prima facie show that how and when she has made the payment in cash. The affidavits filed by the plaintiff of attesting witness is a question of recording evidence. There must be some documentary proof to prove cash payment like acknowledgment receipt, income tax return or bank passbook etc. But in the instant case, the plaintiff has not produced any documentary evidence to prove her cash payment of Rs.4,50,000/-. The plaintiff has also not produced Income Tax Return or Passbook to show her payment made for purchase of disputed plot from the defendant. On the other side, the defendant has produced pass book and bill under D.E.List Ex.26 to show that he has obtained disputed plot from GIDC in consideration of Rs.8,58,750/-. Further, the learned advocate for the defendant has relied upon the decision reported in **2007(1) GLR 79 IN THE CASE OF JAYANTIBHAI MAFATBHAI PATEL VS. DILIPBHAI BECHARBHAI PATEL.** Wherein, it is held that requirement of O.39 is that there has to be prima facie case and court is required to consider balance of convenience aspect- it is required to examine minutely merits of case and circumstances in existence before granting of injunction. In the instant case, the plaintiff has not shown this court that how she has managed the payment of Rs.4,50,000/- and what type of source of income she has with her. She has not produced any Income Tax Return, Bank passbook etc. to show her payment source. Moreover, it also appears from the record that the defendant has obtained the disputed plot from GIDC in Rs.8,58,750/- and as per the plaintiff, the defendant is giving this plot to her in Rs.5 Lakh only. So, this story is also not believable because as per the say of the defendant, the suit plot is at present bears value of more than Rs.6 to 7 Crore and therefore, it cannot be believed that the defendant can even sell this plot at the lowest price in the year, 2009 comparing his purchase price in the year, 1997. Moreover, it also appears from agreement mark 3/1 that it is written on stamp paper of Rs.100/- which is unregistered and another agreement extending time limit at mark 3/3 is executed on stamp paper of Rs.20/- which is also unregistered. Moreover, the plaintiff has produced affidavits of the witnesses of the agreement, but at this stage this court is deciding application for ad-interim injunction and validity and genuineness of the affidavits of attesting witnesses is a question of recording evidence and it can be decided at the time of final trial. One another thing creates doubt that it is written in both the agreements mark 3/1 and 3/3 that the original writing of the agreement on the stamp paper of Rs.100/- and Rs. 20/- will be retained by the seller and the copies and other original documents will be handed over to the purchaser. So, this contents of the agreement mark 3/1 and mark 3/3 creates doubt that why the plaintiff has not taken from the defendant and kept with himself the original agreements mark 3/1 and mark 3/3 after making a huge payment of Rs.4,50,000/-.

11. So, in the view of above discussion, it seems that GIDC has allotted the plot to the defendant and hence, he cannot be said to be the true owner of the property in the question. So, such plot can be only transferred and cannot be sold. Moreover, the plaintiff has prima facie failed to show this court that how and when she has made payment in cash to the defendant regarding the said transaction. Because, the plaintiff has not produced any receipt of

payment. Moreover, the plaintiff has also failed to show this court the source of income she has while making such a huge payment to the defendant. She has not produced any income tax return, passbook not even shown that how she has managed such amount. On the other side, the defendant has shown that vide documents of passbook and bills that he has obtained such plot by paying Rs.8,58,750/- to GIDC. Moreover, both the documents of agreement mark 3/1 and 3/3 are executed on the stamp papers of Rs.100/- and 20/- only and both the agreements are unregistered. So far as the affidavits of attesting witness is concerned, it is a question of recording of evidence. Moreover, consideration amount of Rs.5 Lakh is also not believable because, in the year, 1997, the defendant has obtained this plot in Rs.8,58,750/- and in the year, 2009, the defendant does the agreement to sell this plot in Rs.5,00,000/-. So, the story of less price comparing earlier purchase price is not believable. So, the genuineness of agreement mark 3/1 and 3/3 is the question of recording of evidence. So, considering all these facts and circumstances and documentary evidence and arguments of both the sides, the plaintiff has failed to prove prima facie case and balance of convenience in her favour and if ad-interim injunction as prayed for is granted in that case, the defendant would suffer irreparable loss rather than the plaintiff. So, points No.1 & 2 are replied in the negative and I pass the following order.

// **ORDER** \\

1. Present application Ex.5 is rejected.

2. Cost in cause.

Signed and pronounced in the open Court today on the **18th day of FEBRUARY, 2015** at Gondal.

**Date : 18/02/2015**

**Place : G O N D A L**

**(JASPREETSINGH G. BAGGA)**
Addl. Senior Civil Judge
**G O N D A L.**
**JUDGE CODE GJ00667**