

HIGH COURT OF GUJARAT**BIPINBHAI GOPALBHAI GADHAVI***Versus***MADINABIBI NAZAR ALI****Date of Decision:** 01 December 2006**Citation:** 2006 LawSuit(Guj) 219**Hon'ble Judges:** [P B Majmudar](#)**Case Type:** Appeal From Order**Case No:** 21 of 2006**Subject:** Civil**Acts Referred:**[Code Of Civil Procedure, 1908 Or 2R 2](#)**Final Decision:** Appeal allowed**Advocates:** [Jitendra M Patel](#), [Chetan Pandya](#), [R C Jani](#)

[1] The appellant herein is the original plaintiff of Special Civil Suit No. 29 of 2004 which is filed before learned Civil Judge, Senior Division, Ahmedabad Rural. The said suit is filed for getting decree for specific performance of suit agreement. The case of the plaintiff is that there is a property situated at village Geratpur, Taluka Daskroi, Dist. Ahmedabad. The property in question is described in paragraph 1 of the plaint. It is the case of the plaintiff that on 22.10.86 an agreement to sale was executed by Kadar Ali Nazar Ali Saiyed and his wife Lalbib The said agreement was executed in favour of Pramodrai Ambalal Raval and Nirupamaben. Thereafter on 30th August 1986, an irrevocable Power of Attorney was executed and therefore the original owners have no right, title or interest in the property. It is the case of the plaintiff that the said Pramod and Nirupama have transferred their rights by way of a Banakhat by taking full consideration on 06.01.96 and accordingly, the property is also transferred by them in favour of the plaintiff. According to the plaintiff, he is a bonafide purchaser. It is the case of the plaintiff that according to the banakhat, the price of 66 Vighas of land in connection with block No. 61 and 66 was fixed at Rs.20,000/- per vigha and the land was agreed to be sold to the plaintiff at Rs.13,20,000/- and the said amount has been paid in installments. It is the case of the plaintiff that accordingly, the plaintiff has

agreed to purchase the aforesaid land for a total amount of Rs.13,20,000/-. It is the case of the plaintiff that thereafter, the defendants have not executed any documents of sale. There is a reference of executing another banakhat on 08.11.99 re-affirming the agreement to sale dated 15.10.94, which, according to the plaintiff, is executed by the said Kadar Ali Nazar Ali Saiyed. It is the case of the plaintiff that the respondents are trying to sell away the property in question. There is also reference to a suit filed by deceased Kadar Ali Nazar Ali Saiyed which is in connection with cancellation of power of Attorney given to the plaintiff, which, according to the plaintiff was settled subsequently. The case of the plaintiff is that now since the price of the property has increased, the defendants are not ready to execute the sale deed. It is also the case of the plaintiff that he has also filed Regular Civil Suit No. 681 of 2001 for permanent injunction. In that suit an interim injunction application was pressed into service which was rejected, against which the plaintiff has also filed an appeal before the District Court and the same is pending. On this and other grounds, the plaintiff has filed this suit, being S.C.S. No. 29 of 2004, praying for a decree for specific performance. In the said suit, the plaintiff submitted an application for injunction at Exh.5 with a prayer that the defendants may be restrained from transferring or alienating or dealing with the suit property, i.e. block No. 61 and 66 situated in village Geratpur, Taluka Daskroi, Dist. Ahmedabad. The learned trial Judge initially granted ad-interim relief, but ultimately after hearing the parties, vacated the injunction by judgment and order dated 19.01.06 against which the original plaintiff has filed the present Appeal from Order.

[2] Learned advocate Mr. Patel has submitted that the trial Court has committed an error by holding that if any banakhat has taken place on 08.11.99 such banakhat is a nullity as permission of the Collector is not taken and that the plaintiff cannot get legal possession on the basis of such agreement to sale. The trial Court also found that before filing the present suit, the plaintiff had also instituted another suit being Regular Civil Suit No. 681 of 2001 in which injunction application was rejected by the trial Court. Mr. Patel further submitted that the trial Court has committed an error in coming to the conclusion that the prayer of the appellant plaintiff is barred by res-judicata. Mr. Patel further submitted that that the trial Court has not considered the merits of the case and has rejected the application on the ground of res judicata, as well as on the ground that the suit is not maintainable in law.

[3] Mr. Jani, learned advocate for the respondent, on the other hand, submitted that when in the earlier suit, the application for injunction was rejected, even though the bar of res judicata may not apply, yet on the basis of judicial parity and comity, in a subsequent suit, Court cannot grant injunction when such prayer is rejected by the Court in the previously instituted suit, and simply because some additional prayers are

made in the present suit, and even if specific performance is asked for, so far as interim injunction is concerned, identical injunction is prayed for in this suit. It is submitted that on the basis of judicial parity and comity, injunction could not have been granted by the learned Judge and therefore, it is rightly not granted.

[4] Learned advocate Mr. Patel submitted that his client is going to withdraw Civil Suit No. 681 of 2001 for which he has filed an undertaking before this Court.

[5] I have heard learned advocates for both the parties at length. I have also perused the available records.

[6] It is required to be noted that the learned trial Judge has rejected Exh. 5 application on the ground that the same is barred by res judicata as well as on the ground that so far as banakhat dated 08.11.99 is concerned, since permission of the Collector was not taken, such agreement to sale is void ab-initio. The learned trial Judge also found that the suit is barred under Order 2 Rule 2 of CPC.

[7] In this connection, it is required to be noted that while deciding interim application, the learned trial Judge should have also considered the merits of the case also, to find out whether the plaintiff has any prima facie case. It is pointed out by Mr. Patel that in a given case, final decree can always be passed subject to permission of the Collector. Mr. Patel relied on the judgment of the Supreme Court in the case of Govindbhai vs. Gulam Abbas reported in AIR 1977 SC 1019.

[8] Mr. Patel submitted that the question of res judicata cannot apply as the earlier suit is not disposed of on merits.

[9] So far as the question of resjudicata or maintainability of suit is concerned, it may be true that as earlier proceedings are not disposed of on merits and an appeal against the order below Exh. 5 is still pending before the District Court, and, therefore, the principles of res judicata may not apply in strict sense. However, I find substance in the submission of Mr. Jani that so far as the question of granting interim injunction at Exh. 5 stage is concerned, a similar prayer was made by the very plaintiff in the earlier suit, and, therefore, the trial Court was required to consider whether on the principle of judicial comity and parity, a different order could have been passed on Exh. 5 in a subsequently instituted suit even if it is held that the suit is not barred by res judicata. The learned trial Judge has not addressed himself on this point. The learned trial Judge has also not considered the merits of the case as to whether the plaintiff has any prima facie case worth the name. In the operative part of the order, it is stated that prayer for injunction is rejected on the ground that of res judicata as well as on the ground that without prior permission of the Collector, the banakhat is void. Considering the said aspect of the matter, the matter is required to be sent back to the trial Court for

deciding Exh. 5 denovo by considering the fact whether the plaintiff has any prima facie case or not, and whether in a subsequently instituted suit, injunction can be granted though the same prayer in Exh. 5 in another suit instituted by the same plaintiff has earlier been rejected by another Judge. The learned trial Judge shall also consider the applicability of the principle of judicial parity and comity. The learned trial Judge shall also consider whether the plaintiff has any prima facie case and whether the balance of convenience is in favour of the plaintiff or of the defendants? The learned Judge shall also consider whether injunction can be granted even if there is a prima facie in favour of the plaintiff when in another suit, on merits, exh. 5 application was rejected by another Judge, based on the principles of judicial parity and judicial comity.

[10] It is clarified that this Court has not expressed any opinion on the merits of the matter and the observations made by this Court in this order are tentative in nature and meant only for the purpose of deciding the present appeal; the trial Court shall hear and dispose of the application Exh. 5 on its own merits as per evidence on record without being influenced by the observations herein. It shall be open to the parties to raise all available points before the trial Court. At the request of the parties and on their assurance that their counter parts at the trial Court will co-operate and shall not ask for adjournment, the trial Court is directed to dispose of application Exh. 5 on or before 16.01.07.

[11] In the result, the appeal is partly allowed. The matter is remanded to the trial Court.

[12] In view of the above order passed in the Appeal from Order, the Civil Application does not survive, and it stands disposed of accordingly.